LEVEL 3 – UNIT 5 – LAW OF TORT
SUGGESTED ANSWERS - JANUARY 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 January 2011 examinations. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review 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

1. In addition to duty of care and breach of duty, a claimant will have to establish damage arising from the breach.

2. (a) Reasonable foreseeability is one of the three elements of a duty of care. It has to be reasonably foreseeable that that the Defendant’s negligent act might cause harm to the Claimant.

(b) Candidates could have referred to a suitable case such as Bourhill v Young [1942] or given a suitable example such as the fact that a driver should foresee possible harm to other road users if he or she drives negligently.

3. Courts are reluctant to find public authorities negligent. The police are public authorities and the courts are therefore reluctant to find liability to avoid this interfering with the police’s freedom of investigation. This is as shown by cases such as Hill v Chief Constable of West Yorkshire [1988]. Candidates could have gone on to discuss the fact that the police’s immunity from liability is no longer absolute as shown by cases such as Osman v UK [1999] where the European Court of Human Rights held such immunity to be in breach of a potential claimant’s rights under Art. 6. The police’s effectiveness due to such immunity has to be balanced with the rights of the public.

4. The standard of care expected of a doctor is higher than the ‘reasonable man’ test of Baron Alderson in Blyth v Birmingham Waterworks (1856). A doctor will not be compared with the “man on the Clapham omnibus” but against the accepted standards of members of his own profession, people exercising the same skill and with the same expertise. Reference could be made to a case such as Bolam v Friern HMC [1957].

5. This test can be used as an alternative to the “but for” test where the defendant has made a material contribution to the claimant’s loss rather
than actually caused it. Reference could have been made to a case such as *McGhee v National Coal Board* [1972].

6. The two requirements for the existence of vicarious liability could be any two of the following:

- An appropriate relationship e.g employer-employee
- must be a tort
- must be committed in the course of employment or there is a close association between the tortious act and the nature of the relationship.

7. Candidates could have chosen any two of the three following examples:

- The claimant is partly to blame for the accident as in *Fitzgerald v Lane* [1989]; or
- The claimant has put himself in a dangerous position which exposes him to the risk of harm such as in *Davies v Swan Motor Co (Swansea) Ltd* [1949]; or
- The claimant has, by failing to take reasonable care for his own safety, increased the extent of the injury suffered. This could happen, for example, by the claimant's failure to wear a seatbelt or crash helmet. A relevant case could be *Froom v Butcher* [1976].

Instead of using cases, candidates could have used examples of appropriate situations.

8. s2(1) Unfair Contract Terms Act 1977 prevents a defendant from excluding liability for personal injury or death caused by his negligence in the course of business.

9. (a) Under the Law Reform (Miscellaneous Provisions) Act 1934, the action could be commenced by the personal representative of the deceased claimant; and

(b) Under the Fatal Accidents Act 1976, the action could be commenced by the dependants of the deceased claimant. Alternatively, candidates could have said that the spouse, civil partner or parents could have commenced an action for bereavement damages under this Act.

**SECTION B**

**Scenario 1 Questions**

1. (a) To establish that the defendant owed a duty of care, a claimant would need to show that:
   - The risk of injury was foreseeable to the defendant;
   - That there was a sufficient relationship of proximity between the parties; and
   - That it is fair just and reasonable to impose a duty of care.

(b) In view of the instruction to staff to keep classroom doors locked to avoid items being thrown from windows, Baljit should have been able to foresee, at least, the risk of some injury to Ahmed. As there is a tutor/student relationship there is sufficient proximity between the parties and it is clearly fair, just and reasonable that liability should be imposed. Relevant case law that could have been referred to includes...
2. (a) A claimant would have to show both causation in fact and causation in law. To establish the former, he would have to show either that the injury would not have happened but for defendant's negligence as in *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] or that defendant made a material contribution to claimant's injury as in the case of *McGhee v National Coal Board* [1972]. To establish causation in law, he would need to show that the type of injury was foreseeable and was not too remote as in “The Wagon Mound” (No. 1) [1961].

(b) It is clear that causation in fact is established. Either the 'but for' test or the 'material increase in risk' test would be satisfied. A court would probably hold that the injuries would not have occurred but for Baljit’s negligence but, if not, it is likely to accept that Baljit's action in leaving the classroom door unlocked contributed to Ahmed’s injuries. In view of the e-mail that had been circulated by the college to all staff, including Baljit, Baljit should have been able to foresee the likelihood of injury from a chair being thrown from a classroom window if she left the classroom unlocked and the damage is not therefore too remote. Whether Baljit should have been able to foresee the injury in the classroom is debateable and, although the issue should have been discussed, credit would have been given for this, whichever conclusion was reached. Finally, a good candidate should have identified that Ahmed suffered from brittle bones and therefore a discussion of the "thin skull rule" and its application here would be expected. A relevant case could be *Smith v Leech Brain* [1962].

3. Kempston College could be liable under the doctrine of vicarious liability, the liability of one person for the wrongful act of another. Ahmed would need to show first that Baljit is an employee of the college. It is known that Baljit is an agency worker and therefore there is an element of doubt as to whether she is an employee of the college. A good answer would have identified cases such as *Motorola v Davidson* [2001] in which it was held that an agency worker such as Baljit was likely to be an employee as she would have been under the day to day control of the college and *James v London Borough of Greenwich* [2008] in which the Court of Appeal held that a contractual relationship between an agency worker and the end user should only be held to exist when it was necessary. Candidates would not have been expected to reach any particular conclusion as to whether or not Baljit was an employee of the college as long as the issue was properly addressed.

Ahmed would also need to show that Baljit’s negligence was in the course of her employment. As Baljit had been instructed to lock classroom doors by the college, her failure to do so would almost certainly have been within the course of her employment, if she was an employee of the college.

4. (a) Under s2(1) Unfair Contract Terms Act 1977 the notice would be ineffective regarding Ahmed's personal injury as liability for personal injury or death cannot be excluded or limited as the college would be considered a business.

(b) Under s2(2) Unfair Contract Terms Act 1977 the notice would only be effective it was deemed to be reasonable. As the college was aware of
items being thrown from classroom windows, the matter was under its control and the clause might therefore be deemed to be unreasonable and therefore ineffective. Alternatively, as Dianne could insure her car against damage, whereas the college could not, the clause might be deemed to be reasonable and therefore effective. Either reasoned argument would have been given credit.

5. The normal limitation period for personal injury matters is 3 years from the date on which the cause of action arises. Here, this would mean 14 November 2011. However, at the time of the incident Ahmed was a minor who was celebrating his 17th birthday; time would not therefore start to run until he achieved 18 years of age and the limitation period would therefore expire on 14 December 2012. Credit would also have been given for any appropriate references to s14 Limitation Act 1980 and time starting to run from the date of knowledge (Ahmed’s memory loss may not have been immediately apparent) or the court’s rarely used power to extend the period under s33.

**Scenario 2 Questions**

1. (a) To establish that the defendant owed a duty of care, a claimant would need to show that:
   - The risk of injury was foreseeable to the defendant;
   - That there was a sufficient relationship of proximity between the parties; and
   - That it is fair just and reasonable to impose a duty of care.

   (b) In view of the fact that Edward was moving heavy items alone, Fawcett’s should have been able to foresee the risk of injury. As there is an employer/employee relationship there is sufficient proximity between the parties and it is clearly fair, just and reasonable that liability should be imposed.

   Relevant case law that could have been referred to includes *Caparo Industries v Dickman* [1990], *Smith v Littlewoods* [1987] and *Bourhill v Young* [1942]. Alternatively, suitable examples could have been given.

2. (a) The only two defences which it would appear from the facts could be available to Fawcett’s are the complete defence of consent (or Volenti non fit injuria) and the partial defence of contributory negligence. The former defence requires the defendant who is pleading it to show that the claimant had consented to the risk, that he had done so freely. It is not enough to show that he was aware of the risk but it must be shown that he had consented to it.

   With regard to contributory negligence, the defendant has to show that the claimant acted carelessly. This can be done by showing that he was partly to blame, that he put himself in a dangerous position or that he increased the extent of his injuries. The defendant would also have to establish causation.

   (b) Edward had obviously consented to the risk of injury by attempting to unload the heavy boiler on his own. However, he was put under pressure by Fawcett’s to work alone and, as in *Smith v Baker* (1891), the defence may therefore fail as consent may not have been freely given.
With regard to contributory negligence, Edward appears to have put himself in a dangerous position and therefore to have acted carelessly. However, there is no evidence to show whether or not Edward caused his injury, although the fact that he was working alone would indicate that he did. However, he was an employee and the courts are reluctant to find contributory negligence proved against an employee.

Relevant case law could have included *Dann v Hamilton* [1939] or *Davies v Swan Motor Co (Swansea) Ltd* [1949].

3. Julie would have to establish that Edward’s standard of care had fallen below that of a reasonable man. The test for this is objective and in *Blyth v Birmingham Waterworks Co* (1856) it was held that negligence was doing something that a prudent and reasonable man would not do or failing to do something which such a person would do. Various factors such as the foreseeability of risk and magnitude of risk will be taken into account in calculating whether the appropriate standard of care has been met. Relevant case law could include *Bolton v Stone* [1951].

Here the risk because of the weather conditions is obvious and Edward should have shown the standard of care expected of the reasonable driver. He manifestly has not and therefore has clearly breached his duty of care.

4. Fawcetts could be held liable for Edward’s negligence under the doctrine of vicarious liability, the liability of one person for the wrongful act of another. To establish vicarious liability Julie will have to show that Edward was an employee of the company and that his negligent act was in the course of his employment. Here, the accident occurred whilst Edward was on his way home. The question needed to be considered whether Edward was performing an unauthorised act in which case vicarious liability would not apply or whether he was performing an authorised act in an unauthorised way in which case it would. Either argument, if properly made would have achieved credit. A relevant case could have been *Hilton v Thomas Burton (Rhodes) Ltd* [1961].

**Scenario 3 Questions**

1. (a) Candidates should have identified and explained the two elements of the neighbour test from *Donoghue v Stevenson* [1932], namely the facts that you should take reasonable care to avoid acts or omissions which you can reasonably foresee might injure your neighbour and that your neighbour is anyone so closely and directly affected by your act that you should have them in your contemplation when directing your mind to the act or omission in question. It was not necessary to quote directly from Lord Atkin’s dictum.

   (b) Candidates should have gone on to consider and explain the three-stage test from *Caparo Industries v Dickman* [1990], and explained:
   - The risk of injury was foreseeable to the defendant;
   - That there was a sufficient relationship of proximity between the parties; and
   - That it is fair just and reasonable to impose a duty of care.

   (c) A reasonable person in Lakshmi’s position should have been able to foresee that her act might cause injury to another competitor. Proximity exists as both Karen and Lakshmi are competitors in the
same race and there is no policy reason why there should be no duty of care owed.

Relevant case law could have included Smith v Littlewoods [1987] and Bourhill v Young [1942] or Home Office v Dorset Yacht Co [1970]. Alternatively suitable examples could have been given.

2. The Claimant has to show that each of the Defendants has made a material contribution to the damage caused. A relevant case could be Fitzgerald v Lane [1989]. Alternatively, an example could have been used. Here, both Lakshmi and Matt would appear to have been negligent and to have made a material contribution to the injury suffered by Karen. Lakshmi knocked her off her bicycle and Matt ran over her hand. It is likely therefore that they will both be held liable and damages would be apportioned between them.

3. (a) The standard of care owed by a medical doctor would be the standard of an ordinary skilled man exercising the skill of a reasonable doctor. Candidates could have gone on to explain that the test is based on knowledge available at the time and, also, where the doctor’s actions are based on one of alternative opinions, logical support exists for the opinion being relied on. Relevant case law could have included Bolam v Friern Hospital Management Committee [1957], Roe v Minister of Health [1954] or Bolitho v City & Hackney HA [1997].

(b) Here the Defendant has a particular professional skill or expertise, he is expected to show the level of skill and judgement to be expected of a reasonably competent professional with that expertise. The fact that Dr Neale is newly qualified is therefore irrelevant; he should show the level of expertise to be expected of a reasonable doctor. Failure to read an x-ray properly is probably negligent for any doctor, although if a reasonably competent doctor would not have been expected to see the fracture then Dr Neale would not have been negligent. The fact that he is working when tired may also be evidence of negligence on the part of a professional person. A case such as Nettleship v Weston [1971] could have been cited.

(c) Candidates should have identified here a possible break in the chain of causation in the new intervening act of a third party, Dr Neale, namely the failure to read the X-ray correctly. However, negligent medical treatment is unlikely to break the chain of causation; it is more likely merely to reduce the original defendant’s liability. Relevant case law might have included Knightly v Johns [1982] or an example could have been given.

4. (a) The defence of consent requires the defendant to show that the claimant had voluntarily consented to the risk of injury and not merely that the claimant knew of the risk. It also has to be shown that such consent was freely given.

(b) Lakshmi and Matt might be able to use the defence of consent successfully as it would appear that Karen has voluntarily consented to the injury or the risk of injury. Competitors in sports are generally deemed to accept the inherent and obvious risks of their activity. Relevant case law could have included Murray v Harringay Arena [1951].
5. (a) The statute which regulates the question of damages in cases of contributory negligence is the Law Reform (Contributory Negligence) Act 1945.

(b) It provides that damages may be apportioned between the Claimant and the Defendant where contributory negligence is established. The court should assess the total damages and then reduce them accordingly.