UNIT 5 – LAW OF TORT

Suggested Answers – June 2009

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 2009 examinations. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

ILEX is currently working with the Level 3 Chief Examiners to standardise the format and content of suggested answers and welcomes feedback from students and tutors with regard to the ‘helpfulness’ of the June 09 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. There are a number of different torts including nuisance and trespass to land. Nuisance could be described as the unlawful interference with another’s use or enjoyment of his land or indirect damage to his land or things on it whereas trespass involves intentionally or negligently entering or remaining on or directly causing any physical matter to come into contact with the land of another.

2. In Donoghue v Stevenson [1932] Lord Atkins established the neighbour principle which stated that a person owed a duty of care to anyone they could foresee might be affected by their actions. In Caparo v Dickman the House of Lords established a three part test for imposing liability, namely, first, that the consequences of the Defendant’s actions should be reasonably foreseeable, secondly, that there was sufficient proximity, a closeness in time or space, for a duty of care to be imposed and, thirdly, that it should be fair, just and reasonable in all the circumstances for such a duty to be imposed.

3. Courts are generally unwilling to impose liability in negligence upon public bodies, including the police, as they feel that public bodies should be free to decide how their resources should be best used without interference from the courts. In Hill v Chief Constable of West Yorkshire [1998], Mrs Hill failed in her action to hold the police negligent for releasing the Yorkshire Ripper after they had had him in custody.
4. The standard of care generally owed in negligence cases is that of the reasonable man as stated in the case of *Blyth v Birmingham Waterworks Company* (1856). The defendant should do what a reasonable man would do and should not do what a reasonable man would not do.

In the case of a professional person such as a doctor, the defendant is expected to show the skill and care which would be expected of a reasonable professional as in the case of *Bolam v Friern Hospital Management Committee* [1957].

5. To succeed in a negligence action the Claimant must show not only that a duty of care is owed and is broken but also causation, that is that damage has arisen as a result of the breach. Causation has to be shown in both fact and law. The test for causation in fact is whether the damage would have arisen “but for” the actions of the Defendant as set out in the case of *Barnett v Chelsea & Kensington Hospital Management Committee* [1968]. An alternative test which could have been referred to instead of the “but for” test is the “material contribution” test as referred to in *McGhee v National Coal Board* [1973].

6. The chain of causation can be broken by a new intervening act such as the act of a third party. In the case of *Knightly v Johns* [1982], for example, the defendant had driven negligently and had blocked a tunnel. The police then drove the wrong way down the tunnel to block the other end of the tunnel as a result of which another accident occurred in which the police officer was injured. The defendant was held not liable for those injuries.

7. An employer can be vicariously liable for the tortious acts of an employee but not generally of an independent contractor. There are three standard tests used to decide whether or not someone is an employee.

The first such test is known as the control test when the court looks at the degree of control the “employer” has over the worker.

Secondly, the organisation test considers whether or not the worker is an essential part of the organisation.

Thirdly, the multiple test or economic reality test looks at all the circumstances in which the person concerned works.

Alternatively, the answer could have referred to factors which are taken into account in applying these tasks, such as what is stated in the employment contract, who pays tax and National Health Insurance and whether and to what extent the worker can delegate.

8. “Ex turpi causa” or illegality is a defence which can be used in a negligence action where it is alleged that the claimant was involved
in an illegal act. In the case of *Clunis v Camden and Islington Area Health Authority* [1998] Clunis, who had been convicted of manslaughter on the ground of diminished responsibility, sued the Health Authority for releasing him from a psychiatric hospital without making a proper assessment of his mental condition. He failed in his action as the Health Authority was able to show that the claim was based on Clunis’ illegal act and that he knew what he was doing when he killed his victim.

9. Special damages consist of the actual pecuniary loss suffered by the claimant up to the date of trial. This could include, for example, loss of earnings to the date of trial, the cost of obtaining medical treatment or the value of items damaged in an accident.
Section B

Scenario 1

1. It is a well established principle that road users owe a duty of care to other road users under the neighbour principle outlined in the case of Donoghue v Stevenson [1932]. In order to bring an action in negligence, Ali must be able to show that he was owed a duty of care, that the duty was broken and that damage arose as a result of that breach of duty. A duty of care is broken if the Defendant failed to show the standard of care expected of a reasonable man as spelt out in the case of Blyth v Birmingham Waterworks Company (1856).

   Brian, as driver, owed a duty of care to other road users and appears to have broken that duty. To establish whether damage has arisen, the “but for test” used in Barnett v Chelsea & Kensington Hospital Management Committee [1968] will be used. Under that test it can be seen that the damage would not have occurred but for the negligence of Brian.

   Don, as a driver, also owed a duty of care and appears to have broken that duty by driving into the rear of Ali’s car. Again, damage has been caused by his negligence.

   It appears that Don, at the time of the accident was driving his van in the course of his employment and as he has committed a tort, his employers, Cakes of Quality, could also be liable under the principle of vicarious liability as the bus company was liable for the negligent act of its driver in the case of Limpus v London General Omnibus Co (1862).

   Ali could therefore bring his case against Brian, Don and Cakes of Quality, although Cakes of Quality are most likely to pick up the liability for Don’s actions under the principle of vicarious liability.

2. Although Brian is a learner driver, he owes the same standard of care to other road users as any reasonable man under the test laid down in Blyth v Birmingham Waterworks (1856). It was held in the case of Nettleship v Weston [1971] that a learner driver owed the same standard of care as any reasonable driver.

3. Ali was not wearing a seat belt at the time of the accident and his injuries were partly caused by this failure. Had he been wearing a seatbelt he may have avoided hitting his head on the windscreen. It might therefore be considered unreasonable for the defendants to be held fully liable for all his injuries. Under the principle of contributory negligence, where a claimant has suffered injury partly through his own negligence as well as through the negligence of the defendant, his damages will be reduced by the extent to which he was liable for his own injuries under the Law Reform (Contributory Negligence) Act 1945. In the case of Froom v Butcher [1976] it
was held that where the claimant’s injuries were due in part to his failure to wear a seatbelt his damages should be reduced accordingly.

Here, therefore, the court would assess the total amount of damages appropriate for Ali in the light of the injuries he has suffered and would then reduce the damages he would actually receive because of his failure to wear a seatbelt.

The answer could also have referred to the defence of ex turpi causa; that no compensation should be due to someone whose actions were blameworthy.

4. To determine what must be shown to bring an action for psychiatric damage, it must first be ascertained whether the claimant is a primary or a secondary victim. A primary victim is someone who is present at the scene of the incident and who either may suffer physical injury or whose safety is threatened. As held in Page v Smith [1996], there is no need for the claimant to suffer physical injury and it is irrelevant whether or not the primary victim is of a nervous disposition. In this case, Emma is present at the scene and her safety was threatened so could be a primary victim and Ali must take his victim as he finds her. She can therefore claim against Ali, although he may be entitled to claim in turn against Brian, Don or Cakes of Quality.

5. Special damages are pecuniary loss to the date of trial such as loss of earnings or damage to Ali’s vehicle. They would also include any other damage suffered in the accident and costs connected with medical treatment since.

General damages are those damages which are not similarly quantifiable, such as damages for pain and suffering or loss of amenity. They would also include future loss of earnings.

Ali would be entitled to claim both general and special damages. His special damages might include loss of earnings to the date of trial and damage to his vehicle. His general damages would include the pain and suffering caused by his injuries.
Section B

Scenario 2

1. For reasons of public policy courts generally consider it not to be just and reasonable to impose liability in negligence upon public bodies, including the police, as they feel that public bodies should be free to decide how their resources should be best used without interference from the courts. In *Hill v Chief Constable of West Yorkshire* [1998], Mrs Hill failed in her action to hold the police negligent for releasing the Yorkshire Ripper after they had had him in custody.

However, in *Osman v UK* [2000], a decision on public policy grounds not to impose liability on the police in the case of a schoolteacher who had killed his student was challenged before the European Court of Human Rights. The police had been warned that the schoolteacher might do something but had not acted on the warning. The ECtHR recognised that the public policy constraints were in place to ensure the efficacy of the police but felt that in this case they had not been correctly balanced against the rights of the individual and that Article 6 ECHR had been contravened.

In this case it would seem possible that as PC Fred had been warned of a likely attack, he might owe a duty of care to Harjit and that this duty could have overridden public policy issues.

2. (a) It is a well established principle that road users owe a duty of care to other road users under the neighbour principle outlined in the case of *Donoghue v Stevenson* [1932]. In order to bring an action in negligence, George and Harjit must be able to show that they were owed a duty of care, that the duty was broken and that damage arose as a result of that breach of duty. A duty of care is owed if foreseeability, proximity and just and reasonableness can be shown in accordance with *Caparo v Dickman* [1990]. Ish, as driver, should be able to foresee the risk of harm to other road users, there is an obvious relationship in both time and space so the test of proximity is satisfied and it is certainly fair just and reasonable that as a matter of policy one road user should be held liable in negligence for his negligent driving.

(b) If Ish is to be held to have broken the duty of care, it must be established that he has failed to do what a reasonable man would have done or has done what a reasonable man would not have done, thereby satisfying the reasonable man test first set out in *Blyth v Birmingham Waterworks Co* (1856). The facts that he was driving too close to George and Harjit’s car and collides with the rear of it would mean that he has done so.
3. A new intervening act can break the chain of causation and can therefore amount to a defence for the defendant. The act can be an act of the claimant, an act of nature or more likely the act of a third party as in the case of *Knightley v Johns* [1982].

Here, Dr Jem gave Harjit the wrong medication. This could be considered a new intervening act by the doctor and if the court decided this to be the case then it would absolve Ish from liability for her death although not of course from liability for the original accident and its consequences.

4. The standard of care generally expected of a defendant is that of the reasonable man. As laid down in *Blyth v Birmingham Waterworks Co* (1856) the defendant must do what a reasonable man would do and must not do what the reasonable man would not do. However, when the defendant is a professional person or someone with special skill or experience he is expected to show the standard of care expected of someone with that skill, judgement or experience in accordance with the test in *Bolam v Friern Hospital Management Committee* [1957].

Here Dr Jem being a doctor would be expected to show the skill and judgment of a reasonable qualified doctor. The fact that he is newly qualified is not relevant. The court would have to consider whether any reasonably competent doctor would have given the wrong medication in the circumstances.

5. (a) General damages are damages for pain and suffering and other non-pecuniary loss as well as for future pecuniary loss. George would be able to claim general damages here for any pain and suffering he had undergone as well as for any future pecuniary loss.

(b) If George has died, his estate may be able to pursue the claim (except for any ‘lost years’ under the Law Reform (Miscellaneous Provisions) Act 1934.

(c) Her estate may also be able to make a claim on behalf of certain relatives such as her parents, brothers, sisters, uncles or aunts under the Fatal Accidents Act 1976, to the extent to which such relative may have been dependant upon the deceased. This is unlikely to be so here.
Scenario 3

1.(a) For Kev to bring a successful negligence action against his employers he must show a breach of the neighbour principle set out in *Donoghue v Stevenson* [1932]. In *Caparo v Dickman* [1990] it was held that this meant that the defendant must be able to reasonably foresee the consequences of his actions, that there must be proximity between the parties and that it must be fair just and reasonable for a duty to be imposed. It is a well established principle that an employer owes a duty of care; the risk of harm is obviously foreseeable, there is a relationship of proximity between the employer and employee and it is eminently fair just and reasonable that the employer should be liable to the employee for any injuries caused by the employer’s negligence.

(b) If Kev’s employers are to be held to have broken the duty of care, it must be established that they have failed to do what a reasonable employer would have done or has done what a reasonable employer would not have done, thereby satisfying the reasonable man test first set out in *Blyth v Birmingham Waterworks Co* (1856). The facts that Mez sent Kev into the factory and that there was grease on the floor would tend to indicate a breach of duty. However, the fact that Ken had ignored the notice on the door and entered the factory wearing ordinary shoes might be used to try to show that he had consented to running the risk, although employees are unlikely to be held to have consented.

2. If Lovely Birds are to be liable for the full extent of Kev’s injuries there must be no break in the chain of causation. Here, Dr Nell has given Kev an injection without asking whether or not he is allergic. This might be considered a new intervening act of a third party, as in *Knightley v Johns* [1982], sufficient to break the chain of causation but as Kev would be expected to undergo medical treatment following the accident, this might be considered a normal part of such treatment and although perhaps administered negligently that negligence may be insufficient to break the chain of causation.

3.(a) Lovely Birds may be able to raise the defence of Volenti non fit injuria (or consent). For this defence to be pleaded successfully Lovely Birds would have to show knowledge of the risk, the exercise of free choice by the Claimant and the voluntary acceptance of the risk. In *Stermer v Lawson* [1977], the defence of volenti failed as, although the Claimant had borrowed the Defendant’s motorbike voluntarily, he had not been shown how to use it and he was not therefore aware of the precise risk. In the case of *Smith v Baker* (1891) a workman who was working underneath a crane which was moving rock had no real choice about working where he was and he had not voluntarily accepted the risk even though he had continued to work underneath the crane.
Alternatively, an answer could have been based on the partial defence of contributory negligence. If so, an explanation of contributory negligence could refer to fault having to be shown on the part of the Claimant, contributing to the damage and to the fact that damages are then reduced. Relevant case law which could have been mentioned includes Sayers v Harlow UDC [1958] in which a lady who was trapped in a public toilet stepped on a revolving toilet roll holder when trying to climb out from the cubicle. The toilet roll holder revolved and she fell.

(b) Here, it would seem likely that Kev knew of the risk. However, he had been told by his supervisor, Mez to take a message and as in Smith v Baker, he may neither have been exercising free choice nor voluntarily accepting the risk. On the other hand it could be argued that by going into the factory despite the warning notice without the appropriate footwear he was both exercising free choice and voluntarily accepting the risk. The courts are generally reluctant to find volenti against an employee. Similarly, although it might be felt that Kev had contributed towards his injuries, except in extreme circumstances, the courts are reluctant to find that an employee has contributed to his injury.

4.(a) In addition to establishing the existence of a duty of care and its breach, for a negligence claim to succeed causation has to be proved both in fact and in law. To establish causation in fact it must be shown that the damage would not have arisen but for the acts of the Defendant as in Barnett v Chelsea & Kensington Hospital Management Committee [1969]. To establish causation in law the extent of the damages must be reasonably foreseeable as in the case of the Wagon Mound (No 1) [1961].

(b) Here, although Kev may be able to claim for loss of amenity (his ability to pursue his hobby) it is debateable whether his employers ought reasonably to have foreseen his extra income from the sale of model warships and it may be considered that this head of damage is too remote.

5. Kev may be able to claim special damages. Special damages are specifically quantifiable damages, such as pecuniary loss to the date of trial, other losses for damaged items of clothing and the expenses associated with any medical treatment received. Here, therefore, Kev may be able to claim for loss of earnings to the date of trial and for his damaged shirt and sweater.

Kev may also be able to claim general damages. These are not specifically quantifiable and include damages for such matters as future loss of earnings, pain and suffering and loss of amenity. Kev may therefore be able to claim for his future loss of earnings, pain and suffering for the injuries received and, perhaps, loss of amenity for his inability to pursue his hobby.