UNIT 13 - LEVEL 6 – LAW OF TORT
SUGGESTED ANSWERS – January 2010

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 2010 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

Question 1

Candidates are asked to analyse what a claimant must demonstrate in order to succeed in establishing a duty of care in cases of negligent misstatement.

Candidates should identify the particular place of negligent misstatement within the tort of negligence. It normally arises within the context of pure economic loss. In the case of Hedley Byrne & Co v Heller & Partners [1963] the House of Lords moved away from the position that pure economic loss should never be recoverable and accepted that, in principle, it was possible to establish liability in tort for negligent misstatement.

For policy reasons their Lordships rejected the test for duty that was based upon the neighbour principle (reasonable foreseeability) and, for the purposes of the action in question, established the requirement that a special relationship exist between defendant and claimant.

In order to establish that there was a special relationship it is necessary to show that:

1. The defendant possessed special skill in providing the kind of advice in question
2. The claimant reasonably relied upon the defendants advice
3. The defendant had some knowledge of the type of transaction for which the advice is required

When considering the requirement that the defendant possessed special skill, candidates should explain and analyse relevant case law: see, for example, Mutual Life & Citizens’ Assurance Co v Evans [1971] (the view taken by the minority as well as the majority of the Privy Council); ESSO Petroleum v Marden [1976]; and Midland Bank Trust v Hett, Stubbs & Kemp [1978].
When considering the requirement that the claimant must reasonably have relied upon the defendant’s advice they should explain and analyse relevant case law such as: *J.E.B. Fasteners v Marks Bloom & Co* [1981]; *Caparo Industries plc v Dickman* [1989]; *Morgan Crucible v Hill Samuel* [1991]; *Yianni v Edwin Evans & Co* [1981]; and *Smith V Bush; Harris v Wyre Forest District Council* [1989] etc.

When considering the requirements that the defendant must have some knowledge of the type of transaction for which the advice is required, candidates should explain and analyse relevant cases such as *J.E.B. Fasteners v Marks Bloom & Co* [1981] and *Caparo Industries plc v Dickman* [1989].

Better answers will assess the validity of the policy in relation to negligent misstatement. They will consider arguments specific to negligent misstatement and the court’s stance in relation to negligent misstatement: (eg) carelessness in expressing opinion with the spoken word, the potentially large numbers of people affected by misstatements and the possible long-lasting quality of information. They will assess the influence of the test(s) for establishing a duty of care. They will consider the burden thus placed upon the claimant and its possible influence upon the likelihood of success.

**Total 25 marks**

**Question 2(a)**

Candidates are asked to analyse a comment made by Lord Herschell in *Smith v Baker* (1891) and its relevance to the law of tort.

They should identify the comment as being upon the defence of consent (*volenti non fit injuria*). That is clear from the language of the comment; *Smith v Baker* is a notable case in the history of the defence in question.

Candidates should explain and analyse the nature of the defence. The defence of consent only arises when a tort has been committed. The issue then is: did the claimant consent to assume the risk that caused the damage.

Decided cases should be used to explain and illustrate the nature of the defence. See, for example: *Murray v Haringey Arena* [1951], *ICI v Shatwell* [1965], *Buckpit v Oates* [1968], *Dann v Hamilton* [1939], *Morris v Murray* [1990] and *Cleghorn v Oldham* [1962].

Candidates should identify the requirement that the consent is real as the essential limiting factor to the defence. The reality of consent has two elements: there must be sufficient knowledge possessed by the claimant for him to genuinely assume the risk; the assumption of risk should not be as a consequence, or in the context of, financial, social or moral pressure.

Cases relevant to this part of the analysis include: *ICI v Shatwell* [1965], *Smith v Baker* [1891], *Haynes v Harwood* [1935], *Baker v Hopkins* [1959], *Chadwick v British Transport Commission* [1967], and *Cutler v United Dairies (London) Ltd* [1935] etc.

**Question 2(b)**

Candidates are asked to analyse the defence of contributory negligence.
In doing so they should explain the meaning of contributory negligence: it exists within the context of damage suffered as a result of a tort committed by another; it is conduct by the Claimant which contributes to his own harm.

Candidates should explain the position at common law: contributory negligence is a complete defence.

They should explain and analyse the position under the Law Reform (Contributory Negligence) Act 1945. That analysis should include consideration of the powers of the court to apportion liability, the method used by the court, and illustration of that method by way of relevant case law: see (eg) Froom v Butcher [1976], O’Connell v Jackson [1972] and Jones v Livox Quarries Ltd [1952].

Better answers will analyse the court’s use of its powers, in particular, in relation to groups such as children, workmen, and rescuers: see Gough v Thorne [1966] Yachuk v Oliver Blaise & Co Ltd [1949] Caswell v Powell Duffryn Collieries [1940] Stapley v Gypsum Mines [1953] etc.

**Total 25 marks**

**Question 3(a)**

Candidates are asked to critically analyse the law of negligence in cases in which psychiatric harm to primary victims is caused as a result of a sudden shock.

They should explain that formerly (as a matter of public policy) it was not possible to recover damages in respect of psychiatric harm: Victorian Railway Commissioners v Coults (1888). They should explain that the position changed in the course of the 20th Century.

Candidates should analyse the development of the duty of care in relation to ‘nervous shock’ and consider elements such as: was the claimant within the zone of danger, did the claimant fear for his/her own personal safety, and was such fear reasonably foreseeable.

Candidates should explain and analyse attempts by the modern judiciary to formulate the position on this aspect of psychiatric harm: see Alcock v Chief Constable for South Yorkshire [1992], per Lord Oliver and Page v Smith [1996], per Lord Lloyd.

Better candidates will identify and analyse the discrepancy between the views expressed.

According to Lord Oliver the duty extended to those ‘involved either mediately or immediately as a participant’ and included those who feared for their own safety, rescuers, and involuntary participants. Lord Lloyd took view that the duty extended to those ‘directly involved...within the range of foreseeable physical injury.’

Better candidates will identify and analyse the influence of these views on subsequent cases such as (e.g.) Hunter v British Coal [1998] and White v Chief Constable for South Yorkshire [1999].
Question 3(b)

Candidates are asked to critically analyse the law of negligence in cases of psychiatric harm to secondary victims.

They should establish the nature of actions in the tort of negligence and earlier policy on recovery for psychiatric harm: see *Victorian Railway Commissioners v Coultas* (1888).

They should explain and analyse the development of the action based upon the perception of harm suffered by others.

Candidates should explain and analyse the position taken by the House of Lords in *Bourhill v Young* [1943]. They should explain and analyse subsequent piecemeal development of the law: see (eg) *Dooley v Cammell Laird* [1951], *Chadwick v British Transport Commission* [1967] and *Hinz v Berry* [1970].

They should explain and analyse more recent attempts by the senior judiciary to formulate the principles governing this area of the law: see the threefold proximity test(s) developed by the House of Lords in *McLoughlin v O’Brien* [1983] in relation to ‘aftermath’ cases. See the criteria employed by the House of Lords in *Alcock v Chief Constable for South Yorkshire* [1992], particularly Lord Oliver’s comments on the nature of the relationship and the requirements as to proximity in time and space.

Better candidates will consider subsequent case law (eg) *Palmer v Tees Health Authority* [1999] and *Walters v North Glamorgan NHS Trust* [2002].

Better candidates will consider the conceptual, cultural and practical problems associated with this area of the law.

**Total 25 marks**

Question 4

Candidates are asked to analyse the torts that make up trespass to the person, including the tort in *Wilkinson v Downton*.

Candidates should identify the torts that are traditionally regarded as trespasses to the person. They are: assault, battery and false imprisonment.

They should define/explain the tort of assault: assault is an act of the Defendant which causes the Claimant reasonable apprehension of the infliction of a battery on him by the Defendant.

Better candidates will analyse the elements of the tort. They are: the threat of immediate violence coupled with the ability to carry out the threat. They will analyse relevant case law: see (eg) *Stephens v Myers* (1830), *Turberville v Savage* (1669), and *Thomas v National Union of Mineworkers* [1985].

Candidates should define/explain the tort of battery: ’it is the intentional and direct application of force to another person.

Better answers will identify and analyse the elements of the tort. They will consider whether the least touch is sufficient or whether an element of hostility is required: see *Wilson v Pringle* [1987], *F v West Berkshire Health Authority*
Better candidates will analyse the law and the uncertainty produced by Wilson v Pringle and its inappropriateness to certain contexts. They will consider defences.

They should define/explain the tort of false imprisonment. It is the infliction of bodily restraint which is not impliedly or expressly authorised by law.

They should explain and analyse the elements of the tort. They should consider whether the tort requires incarceration: see (eg) Warner v Riddiford (1858), Bird v Jones (1845) etc. They should consider whether the tort may be committed without the knowledge of the victim: see Herring v Boyle (1834); Meering v Graham White Aviation [1919]; Murray v Ministry of Defence [1988].

Better answers will analyse the contexts in which the tort is likely to occur: (eg) contractual relationships: Herd v Weardale Steel Co (1915), Robinson v Balmain Ferry Co [1910]; and lawful/unlawful arrest: (eg) Christie v Leachinsky [1947], John Lewis v Tims [1952]; Hook v Cunard Steamship Co [1953]. They will consider defences.

Candidates should define/ explain the tort in Wilkinson v Downton: per Wright J it consists of an act by the Defendant that is done wilfully and is calculated to cause physical damage to the Plaintiff. Candidates should analyse the elements of the tort, for example the meaning of ‘wilfully’ and ‘calculated’ in this context; the meaning of ‘physical damage’ and how it might be brought about.

Candidates should analyse the torts in question and identify the common characteristics of trespasses. They are: they must be direct; they are actionable per se. They are fault based. Candidates should distinguish Wilkinson v Downton and explain how it differs from the traditional trespasses.

Better candidates will analyse the requirement as to the defendant’s state of mind and consider whether intention is required or whether negligence sufficient: see Fowler v Lanning [1959], Letang v Cooper [1964]; they will consider whether it is sufficient for battery that the act complained of is willed or whether there must be some hostile intent, as in Wilson v Pringle [1986]. Again, they will distinguish the tort in Wilkinson v Downton from traditional trespasses to the person.

**Total 25 marks**
SECTION B

Question 1 (a)

Candidates are asked to advise Siobhan on any claim that she may bring in respect of the damage done to her memory and mental capacity.

They should identify the appropriate cause of action for Siobhan as negligence. They should identify Dr Bakir as the appropriate defendant in the action.

They should set out the basic requirements for such an action: the claimant must establish that the defendant owed her a duty of care, that the defendant breached that duty, and that she (Siobhan) suffered damage as a consequence.

Siobhan must establish that, as a matter of law and fact she belongs to a class to which the defendant owes a duty of care. It is well established that in the doctor - patient relationship, medical practitioners owe a duty of care to patients. As a matter of fact Siobhan is a patient and Dr Bakir is a medical practitioner. He consequently owes her a duty of care.

Candidates should advise on the requirement of demonstrating breach of the duty of care owed. A defendant breaches his or her duty when s/he fails to act as reasonable person would or acts in a way in which a reasonable person would not: see Blyth v Birmingham Waterworks (1856), per Alderson B. The test is an objective one.

When deciding whether a medical practitioner (acting in the course of his profession) has discharged this duty or not, the test is: would a reasonably competent practitioner have behaved in such a way. See: Bolam v Friern Barnet Hospital Management Committee [1957], Sidaway v Board of Governors of the Bethlehem Royal & Maudsley Hospital [1985] etc.

On the facts of the problem, it is apparent that Dr Bakir failed to warn Siobhan of the risks inherent to the treatment. This may amount to a breach of duty.

If it does, it is necessary to demonstrate a causal link between Dr Bakir’s failure to warn Siobhan and the damage to Siobhan’s memory and cognitive functions.

In this case the appropriate test is that in Chester v Afshar [2004]: has the failure to warn of the inherent risks of ECT removed Siobhan’s ability to make an informed choice of whether to run the risk of such treatment and so caused the damage.

Credit is to be given to those who employ attempt to employ: the ‘but for’ test (see Barnett v Chelsea & Kensington Hospital Management Committee [1969]) and the ‘material increase of risk test’ (see McGee v NCB [1973]).

Siobhan will also find it necessary to show causation in law (that is, the damage suffered is not too remote in law). Applying the test in The Wagon Mound (no1) [1961] as interpreted in Hughes v Lord Advocate [1963], there are no obvious issues concerning remoteness of damage.
Better candidates will consider possible defences and arguments in favour of Dr Bakir.

Better answers will demonstrate knowledge and understanding of legal principle and decided 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 1(b)**

Candidates are asked to advise Siobhan on any claim that she may bring in respect of the injuries to her spine.

The appropriate defendant is Dr Williams. Dr Williams is a medical practitioner. As a matter of law her owes a duty of care to the class to which Siobhan, as a matter of fact belongs. That is, she is his patient.

When considering the issue of breach candidates should apply the objective test in *Blyth v Birmingham Waterworks* (1856) per Alderson B. They should place the issue in context and explain, analyse and apply the test for deciding whether the conduct of the defendant has met that objective standard. In this context the question used in determining this is whether the standard of the reasonably competent medical practitioner has been met: see *Bolam v Friern Barnet Hospital Management Committee* [1957], *Sidaway v Board of Governors of the Bethlehem Royal & Maudsley Hospital* [1985] etc.

Candidates should assess the magnitude of risk in failing to ascertain correct medical procedures and employ them.

There are particular factors to be considered. Dr Williams is an inexperienced practitioner. Candidates should consider whether this influences the question of breach. It is clear law that test in relation to experience is an objective one. Dr Williams is to be judged against those who are reasonably experienced: see *Nettleship v Weston* [1971].

It may be argued that Dr Williams is carrying out the function of someone more senior than he (Dr Williams) actually is. His conduct and competence is to be judged against what is expected of someone holding the post he occupied, not against what is expected of a person of his rank and experience: see *Wilsher v Essex AHA* [1987].

Siobhan must demonstrate that, as a matter of fact, Dr Williams’ breach of duty in failing to administer the muscle relaxant caused the harm suffered by her. In doing so the appropriate test for consideration are the ‘but for’ test (see *Barnett v Chelsea & Kensington Hospital Management Committee* [1969] etc) and/or the ‘material increase of risk test’ (see *McGee v NCB* [1973]).

It is necessary to show causation in law (that the damage suffered is not too remote). Employing the test in *The Wagon Mound* (no1) [1961] and in *Hughes v Lord Advocate* [1963], there are no obvious issues concerning remoteness.
Better candidates will consider defences/arguments in favour of Dr Williams. For example, is there a body of informed opinion that would support his conduct: see (e.g.) *Whitehouse v Jordan* [1981]; is it possible to argue that Siobhan has consented to the kind of risk that led to her injury etc.

Better answers will demonstrate knowledge and understanding of legal principle 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 1(c)**

Candidates are asked to advise Siobhan on the principles that will be employed by the court when assessing damages, should she prove successful in her claims.

They should explain that the purpose of damages in tort is to provide monetary compensation to the Claimant for the harm suffered as a result of the tort. In so far as it is possible, the monetary award is intended to carry the Claimant back to position she was in before the tort occurred. They should explain what may be taken into account when calculating damages: (e.g.) loss of income, pain and suffering, loss of amenity etc.

In advising Siobhan they should indicate that she may claim, by way of special damages, her loss of income from date of accident to date of trial etc; by way of general damages she should be compensated for loss of future income, pain and suffering, loss of amenity (including loss of hobbies), costs associated with treatment/injury from the date of trial, the cost of home help, equipment, possible alterations to house etc. They should include any additional costs of bringing up Siobhan’s child.

*(Total Marks for Question 1: 25 marks)*

**Question 2**

Candidates are asked to advise the parties on their rights and liabilities under the Occupiers’ Liability Acts 1957 and 1984.

**Claims Against the Occupier**

**Albert and Ted**
Candidates should identify Albert and Ted as lawful visitors to the Pig and Farrow. They should identify the damage suffered by them as being caused by the state of the premises. The appropriate cause of action is therefore breach of the duty imposed by the Occupiers Liability Act 1957: see *Ogwo v Taylor* [1987].

It is consequently necessary to identify the occupier. The test for doing so is the control test: *Wheat v Lacon* [1966]. Ron has control of the premises: he controls the property as owner and he has taken control of the overall management of the building work. The nature of his control determines the nature of his duty under the 1957 Act: see *Wheat v Lacon*.

The duty owed by an occupier is set out in s2(2) of the Occupiers Liability Act 1957. It is to take such care as is reasonable to keep visitors reasonably safe in using the premises for the purposes for which they were invited.
Candidates should assess whether there has been a breach of the common duty of care in s2 (2) of the 1957 Act: has the occupier done what is reasonable to keep visitor reasonably safe: see *Fisher v CHT* [1966].

**William and Chris**

Candidates should advise William and Chris on any claims that they may bring.

William and Chris are not lawful visitors. They are trespassers. Their claim will therefore arise under the Occupiers Liability Act 1984 and not the Occupiers Liability Act 1957.

Using the control test (see *Wheat v Lacon*), candidates should identify the occupier relevant to the problem in question.

Candidates should consider whether a ladder may constitute ‘premises’: see *Wheeler v Copas* [1981].

They should consider whether a ladder/building site may constitute an allurement: see *Glasgow Corporation v Taylor* [1922] etc.

They should assess whether a duty of care had arisen: see s 1(3) of the Occupiers Liability Act 1984.

Candidates should explain and analyse the nature of the duty to trespassers: see s 1(4) of the 1984 Act. It is a duty to protect from personal injury but liability does not extend to damage to property: see s1 (4) and s1 (8) of the 1984 Act. They should consider whether there has been a breach of the duty arising under the Occupiers Liability Act 1984.

Both William and Chris suffer personal injury and so may have a claim against the occupier. In addition William has suffered damage to property (his tracksuit); as is stated above, compensation for harm to property is not recoverable under the 1984 Act.

**Arguments in Favour of the Occupier**

**Albert**

Candidates should identify, explain and analyse possible defences to the claim by Albert, who was electrocuted as a result of a conjunction of exposed wire, wet plaster, and the turning on of electrical power.

Relevant defences include *volenti non injuria* and contributory negligence.

It is also arguable that the duty of the occupier was not breached: see s 2(3) (b) of the 1957 Act. For s 2(3)(b) to apply the risk in question should come within his knowledge as being a risk usually attendant on Albert’s trade.

**Ted**

Candidates should identify, explain and analyse possible defences to the claim by Ted, who was electrocuted as a result of a conjunction of exposed wire, wet plaster, and the turning on of electrical power.

Whether contributory negligence or *volenti non fit injuria* may be argued is a question of fact depending upon (among other things) Ted’s knowledge of the risk.
It may also be argued that the occupier’s duty to Ted was not breached: see s 2(3) (b) if the 1957 Act. This argument is, however, unlikely to succeed against Ted. For the s2(3)(b) argument to succeed the risk must come within his knowledge as being a risk usually attendant on his trade. This is unlikely in case of a thatcher: see (e.g.) Bird v King Line [1970].

William and Chris

William and Chris are both young children. Candidates should consider whether they are ‘of tender years’. They should explain and analyse what constitutes a child of tender years. They should consider the possible effect of a finding that the child is of tender years; there is a duty upon parents to supervise and protect from them from harm: see Phipps v Rochester Corp [1955]. It is therefore arguable that the occupier should not be liable for their injuries either wholly or at all.

The occupier might also argue that no duty had arisen under s1(3) of the 1984 Act

William

William will not be able to claim for the harm to his tracksuit: s 1(8) of the 1984 Act provides there is no liability under the Act for damage to property

It is arguable that the risk of climbing on to the thatched roof was obvious even to a young child: see Liddle v Yorkshire (North Riding) County Council [1934]. Volenti non fit injuria is therefore a possible defence.

Contributory negligence under the Law Reform (Contributory Negligence) Act 1945 is also an arguable defence. Candidates should assess the viability of such a defence in response to a claim by a child of William’s age: see Gough v Thorne [1966] etc.

Chris

It is arguable that Chris consented to the risk of climbing the ladder. Volenti non fit injuria is therefore an arguable defence. Candidates will need to assess whether Chris had sufficient knowledge to truly consent to the assumption of risk; this is unlikely to succeed unless the state of the ladder was obvious

Chris suffered brain damage has a result of an allergic reaction to treatment for the injury received when the rung of ladder gave way. It is therefore arguable that the brain damage suffered by Chris is too remote: see The Wagon Mound (no 1). However, the principle of ‘take your victim as you find him’ may defeat such an argument: see Robinson v The Post Office [1974].

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

(Total for Question 2: 25 Marks)
Scenario 3

Candidates are asked to advise LCC on possible claims against it resulting from the operation of its plant.

When advising candidates should, first, identify the possible nature of those claims. They are: private nuisance, public nuisance, and the tort in *Rylands v Fletcher* (1868). They should identify and advise on possible defences open to LCC.

When advising on private nuisance, candidates should give a definition of the tort. It is the unlawful interference with a person’s use or enjoyment of land, or some right over, or in connection with the land.

They should explain and analyse the factors the court will consider when determining interference is unlawful. Of relevance to the facts of the problem are:

- Whether there had been repetition or continuance of the activity complained of or whether it had existed as a state of affairs: see (eg) *Halsey v ESSO* [1961], *Miller v Jackson* [1977]
- The locality: see (eg) *St Helen’s Smelting v Tipping* (1865), *Halsey v ESSO* [1961], *Sturges v Bridgeman* (1879), *Adams v Ursell* [1913] etc
- The nature of the harm suffered: whether it is to use and enjoyment of the land or whether it consists of physical harm to the property: *St Helen’s Smelting v Tipping* (1865)
- The claimant’s interest in the land: see *Hunter v Canary Wharf* [1997]

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

Better answers will consider the status and culpability of the defendant: see (eg) *Page Motors v Epsom & Ewell BC* [1982], *Hussain v Lancaster CC* [1999], *Lippiatt v South Gloucestershire Council* [1999].

Candidates should then apply the law of private nuisance to the facts of the problem.

Better answers will give particular attention to Sally’s claim in private nuisance. Jake’s lack of interest in the land may preclude any action by him. They will consider the location of the property in question: see (eg) *Halsey v ESSO* etc; they will distinguish the rule relating to physical damage: *St Helen’s Smelting v Tipping*. They will discuss the status and culpability of LCC: see *Hussain v Lancaster CC; Lippiatt v South Gloucestershire Council* etc when considering the actions of employees on their way to and from work.

When advising on public nuisance candidates will define and state the law on the tort of 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.

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].
Candidates should apply the law of public nuisance to the facts of the problem. They should consider whether Sally, Jake, Maud and Norman are members of a class. They should consider whether they can show particular harm.

Better candidates will identify particular instances of damage: (eg) damage to Jake’s car; Maud and Norman’s emotional distress; Norman’s swearing and consider whether they are actionable.

When advising on the tort in *Rylands v Fletcher*, candidates should define the tort: ‘the person who for his own purpose brings on his lands and collects 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 liable for all the damage which is the natural consequence of its escape’ *Rylands v Fletcher* (1866), per Blackburn J. They should consider the introduction of the expression ‘non-natural user’ by Lord Cairns when the appeal was considered by the House of Lord in 1868.

Candidates should identify the elements of the tort as being: non-natural user and escape of some hazardous thing.

Better answers will include explanation and analysis of the requirements of non-natural user and of escape: see (e.g.) *Read v Lyons* [1947] *AG v Corke* [1933].

Candidates should apply the law to the facts of the case and advise LCC. Better answers will deal, in detail, with the issues of escape and non-natural user.

Candidates should identify and explain possible defences.

They should consider whether hypersensitivity may constitute a defence to part of Sally’s claim in private nuisance. She is pregnant; sleeping in the afternoon may constitute hypersensitivity: see *Robinson v Kilvert* (1889) etc.

In relation to private and public nuisance and the tort in *Rylands v Fletcher* they should consider the defences of

- prescription: see (eg) *Sturges v Bridgman* (1879);
- public utility;
- common benefit: see *Dunne v North Western Gas Board* [1964])
- statutory authority (see: (eg) *Dennis v MOD* [2003], *Allen v Gulf Oil* [1981], *Metropolitan Asylum District v Hill* (1881)).

Better answers will demonstrate knowledge and understanding of legal principles and cases. They will demonstrate the skill of applying the law to the fact.

They will give a reasoned view of probable or likely legal outcomes.

**(Total for Question 3: 25 Marks)**
Question 4 (a)

Candidates are asked to advise Howard Stetson on any action he may take in respect of the written article and spoken comments made about him and his acting.

In doing so they should, first, identify the problem as concerning defamation.

They should then define/explain the tort of defamation. It is 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.

Candidates should distinguish slander from libel. Libel is defamation in a permanent form. Slander is defamation in a transient form. There are exceptions, for example in the case of a spoken defamation that is broadcast. It is necessary show harm in slander. Again, there are exceptions to this requirement. In libel harm is assumed.

In order to succeed in a claim for defamation Mr Stetson 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, candidates should identify the following as possibly being capable of bearing a defamatory meaning:

1. The criticism of Mr Stetson’s acting skill
2. His lack of suitability for Shakespearian roles
3. Likening him to Bingo Blake

Better answers will include an assessment of whether the physical description of Mr Stetson may amount to defamation if it is meant to expose him to ridicule: see Berkoff v Burchill [1996].

Candidates should identify possible instances of publication. They are: Bob’s article being sent to the sub-editor; the printing and selling of the material in the Daily News; Bob’s comments at the award ceremony; and the broadcast of Bob’s comments.

The headline of ‘Just like Bingo Blake’ in ‘The Daily News’, without further comments as to Mr Stetson’s appearance may amount to an innuendo that he is unsuitable to play Henry V and, arguably, other roles that have a dramatic or tragic content. Such innuendo would depend on the existence of information extrinsic to the article as to the nature of Bingo Blake performances and appearance. Alternatively the headline may simply expose Mr Stetson to ridicule: see Berkoff v Burchill.

Candidates should identify instances of possible libel and slander and their possible implications for what Mr Stetson would need to demonstrate. Bob’s comments at the award ceremony are possibly slanderous. Mr Stetson would need to prove damage unless, as they do here, the defamation relates to his trade or profession.

Bob’s word-processed article (that was sent to the sub-editor), the article published in newspaper, and the television broadcast of Bob’s comments are possibly libellous. Damage to their subject is assumed, if the defamation is established.
Better answers will demonstrate knowledge and understanding of legal principle, 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.

(15 marks)

Question 4(b)

Candidates are asked to advise Howard Stetson on possible defences that may be used to defeat any claims he may make in respect of the article and spoken comments made about him and his acting.

In doing so they should identify the defences that are relevant to the claims by Mr Stetson. They are justification, fair comment, and qualified privilege.

Candidates should explain and analyse fair comment. The comment must be on matter of public interest: London Artists v Littler [1969]. It must be based on fact: see Campbell v Spottiswood (1862), Kemsley v Foot [1952].

The defence is destroyed by malice.

Candidates should explain and analyse the defence of justification. Justification means that the material complained of is true. The subject of the material is given the reputation that he deserves. The defence of justification is not defeated by malice. Substantial truth is sufficient to establish the defence: see Alexander v North East Rly Co (1865).

Justification is not defeated by malice.

Candidates should explain and analyse the common law defence of qualified privilege. The defence is that the person made the comment out of a legal, moral or social duty and the person receiving the information had an interest in receiving it.

Qualified privilege is defeated by malice.

Candidates should apply the law to the facts.

Better answers will assess whether Mr Stetson’s performance of Shakespeare in high school is sufficient to defeat a defence of justification for the comment that he had never performed in Shakespeare. They will assess whether the comment is substantially true.

They will consider whether the defence of fair comment may be defeated by malice that is evident in the article: see (eg) Thomas v Bradbury & Agnew [1906].

They will consider whether the arguably fair comment on Mr Stetson’s accent (that it is a Chicago accent) is defeated by its inaccuracy (apparently it is a New York accent).
Better answers will demonstrate knowledge and understanding of legal principle and decided 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.

(10 marks)

(Total Marks for Question 4: 25 marks)