INSTITUTE OF LEGAL EXECUTIVES
LEVEL 6 - LAW OF TORT
EXAMINER’S REPORT – AUTUMN 2008

SECTION A

Question 1

GENERAL ADVICE TO CANDIDATES

Overall, there were far too many answers which presented at length the general principles applicable to duty, breach and damage with very little attempt to apply the materials to the facts of the particular question.

Most candidates dealt competently with the law in relation to psychiatric harm and the general defence of contributory negligence.

Most candidates stated the law generally on duty of care, often at far too much length, but failed entirely to consider whether there was a duty of affirmative action in this particular case in relation to the publican.

A significant number of candidates failed to realise that the defence of volenti is excluded by the Road Traffic Act. Very few candidates identified the potential application of ex turpi causa against the passenger in the car.

Some candidates treated the rescuer as a bystander and did not consider whether rescuers are in a special category.

SUGGESTED ANSWER

The potential defendants are Dick (D) and George (G) and the potential claimants are Pat (P), Ivy, Betty (B) and Ronnie (R).

D unquestionably owes a duty of care under the neighbour principle to other road users in the area of harm – this is a well established duty situation.

It is not so clear whether G owes a duty under the neighbour principle either to his customers or to third parties who are injured as a result of inebriation. Dealing firstly with P, does G owe a duty to refuse to serve alcohol to customers he knows to be over the drink drive limit? The courts would have to decide whether it was fair just and reasonable to impose a duty of affirmative action on G as a publican. There may be a duty to take affirmative action where there is a relationship between the parties and the defendant gains some benefit from his relationship with the claimant. Arguably, a publican gains a financial benefit from selling alcohol to customers. If a duty is owed then it is a question of fact whether G acted as a reasonable publican and this would depend on his actual or constructive state of knowledge of the state of inebriation of D and P.

The issue of how far a defendant who provides alcohol is under a duty to protect a claimant of full age and understanding against his own weakness was
considered in Barrett v MoD where CA said it was not fair just and reasonable to impose a duty thereby blaming one adult for another’s lack of self control. In Jebson v MoD there was liability on the part of the defendants for their failure to supervise the claimant on a particular occasion. Neither of these cases is directly relevant and the case could go either way. G would argue that he should not be expected to supervise D’s drinking habits and P would argue that because of the relationship between publican and customer the publican has a duty to oversee the general state of his customers.

If G was liable to P then undoubtedly G would argue contributory negligence on P’s part possibly up to 75% as in the 2 cases cited.

**G’s liability to Ivy**
Winfield opines that the above reasoning does not necessarily apply to an innocent third party who is injured as a result of a road traffic accident caused by drunken driving to whom a duty may more readily be established. The Supreme Court of Canada said that commercial vendors of alcohol owe a general duty of care to persons who can be expected to use the highways. However, there appears to be no English authority on this. Clearly, if a duty is owed to P then a fortiori, a duty will be owed to Ivy and D and G will be joint tortfeasors. In this case, Ivy can sue either or both and each is wholly liable for the full extent of the harm. The Civil Liability (Contribution) Act 1978 provides for contribution between joint tortfeasors on a just and equitable basis by reference to respective responsibility for the tort.

**Ivy**
D owes a duty of care to Ivy because she is a person in the area of foreseeable harm – Dulieu v White. Ivy is a primary victim and the thin-skull applies – Page v Smith. She can recover for the full extent of her injuries even though a person of reasonable fortitude may not have suffered in this way. Psychiatric harm is no different from personal injury in this respect. The tortfeasor must take his victim as he finds him and this can extend to the recurrence of a condition from which the claimant suffered for 20 years prior to the accident. The test is that of reasonable foreseeability of exposure to the risk of physical or psychiatric harm. This also applies to G if a duty of affirmative action is established.

**Pat**
D owes P a duty of care but could raise a number of defences to avoid or reduce liability:-

Volenti – this is a complete defence and in relation to the tort of negligence takes the form of assumption of risk. In Pitts v Hunt where the claimant was a pillion passenger who encouraged the driver to ride in a reckless fashion after both had been drinking heavily, CA was satisfied that the claimant was volens. However, the statutory provision under the RTA precluded the defence being used. Instead, ex turpi causa non oritur action was used successfully. The leading case is Ashton v Turner where the claimant and defendant made a getaway from a robbery in a car driven by the defendant. The car crashed and the claimant was injured. It was held that no duty was owed. This principle applies to P who was engaged in a criminal activity with D, i.e. driving recklessly while drunk.

Contributory negligence is a partial defence leading to a reduction of damages – S1(1) LR(CN)A 1945 – where a person suffers damage as the result partly of his own fault and partly because of the fault of another person ... the damages
recoverable shall be reduced to the extent to which the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage. D must prove that P was at fault and that his fault was a cause of the injuries suffered. By not wearing a seatbelt, P has more serious injuries than would otherwise have been the case. In Froom v Butcher, Lord Denning noted that the car accident had been caused by bad driving but the damage is caused partly by the bad driving and partly by failure to wear a seat-belt. Following this case, P will have his damages reduced by around 25% for failure to wear a belt. In addition, P contributed to the bad driving by placing himself in a dangerous position and exposing himself to risk of involvement in an accident – Davis v Swan Motor. The bad driving caused the accident and on this basis could have damages reduced by around 50% having taken into account causative potency and comparative blameworthiness. This makes a reduction of 75% in total.

Betty
She was 100 yards from the incident and not in the ‘zone of danger’ as per Bourhill v Young so no duty is owed to her unless she acted under any compulsion to assist. There is no evidence of this and she appears to have acted out of idle curiosity. The harm she suffers is nervous shock and as a secondary victim she is unable to establish the necessary ties of closeness of relationship even if she maintains she is helping the victims – Frost. Rescuers are required to show sufficient proximity by demonstrating that their own safety was under actual or apprehended threat.

Ronnie
If R has acted as a rescuer who has suffered personal injury, then the defences applicable to P will not apply and a duty will be owed on the basis that a dangerous situation invites rescue. Consent does not apply where the claimant takes a deliberate risk to rescue another from imminent danger where he acts under an exigency caused by D’s wrongful misconduct. Dr Goodhart’s analysis was accepted by CA in Haynes v Harwood where a rescue attempt was said to be foreseeable. The rescuer acts under an impulse of duty, social, moral or legal so there is no choice as such. Also, the negligent act precedes the act of rescue so there can be no consent.

R’s act will not amount to a novus actus because a rescue attempt is a natural and probable consequence of the defendant’s act – Haynes v Harwood. R’s rescue was a reasonable act unlike the meddlesome act in Cutler v United Dairies. The fact that R is part of the rescue services albeit not on call will not affect her chances of success. HL rejected the so-called ‘fireman’s rule’ in Ogwo v Taylor.

Contributory negligence is not relevant – Baker v Hopkins – danger invites rescue and the court should not be astute to accept criticism of the rescuer’s conduct from the wrongdoer who created the danger.

Question 2

GENERAL ADVICE TO CANDIDATES

Candidates appreciated that this question concerned causation and remoteness of damage. However, due to a lack of knowledge of the principles of causation and remoteness, most candidates were unable to answer the issues raised by the
question. As a result, most answers received low marks. It is vital for candidates in future to study this area of the tort of negligence in more detail.

The main points which candidates did not consider were:

- It is the kind or type of damage which must be foreseeable rather than its extent or the way in which it occurs.
- The “but for” test was usually stated in general terms but not applied specifically to the destruction of the car.
- The defendant whose negligence causes the explosion and fire is, in principle, also liable for the death of the fireman. However, candidates should then have considered whether either or both of the wind changing direction and the inaccurate information given to the fireman broke the chain of causation.

**SUGGESTED ANSWER**

Larry (L) has been negligent in overtaking the lorry and as the defendant he is liable to compensate those to whom a duty is owed as long as the damage is caused by his careless act and is not too remote.

**Explosion and fire**

This is causally connected to L’s wrongful act because it satisfies the ‘but-for’ test. However, even where the defendant’s breach of duty is a cause in fact of the claimant’s damage, damages may be denied on the grounds that the breach of duty is not the legal cause of some of the damage suffered because it is said to be too remote. The courts have to draw a line so that the defendant is not liable for every consequence of his wrongful act. Under Re Polemis the test was that the defendant was liable the physical damage was a direct consequence of the defendant’s breach of duty. Under this test, L may be liable for the damage to the lorry and petrol station.

The direct consequence test was considered and rejected by PC in the Wagon Mound No 1 where fire damage was not a reasonably foreseeable consequence of the defendant’s breach of duty as it was not foreseeable that oil on water would catch fire. Under this rule L would probably be liable because fire and explosion are kinds of damage that is reasonably foreseeable when vehicles collide.

Providing this kind of damage is reasonably foreseeable, it does not matter that it came about in an unforeseeable way. In Hughes v Lord Advocate burning was a foreseeable type of damage even though the precise manner of the burning might not have been foreseen. It is sufficient if the accident which occurred is of a type which should have been foreseeable by a reasonably careful person.

**Application**

Explosion and fire are reasonably foreseeable kinds of damage resulting from road traffic accidents even though the precise sequence of events is not foreseeable. L is liable for the damage to the lorry and petrol station.

**Destruction of L’s car**

The issue is what is the cause of the damage to L’s car and his death? Dee owes L a duty of care, is in breach of this duty but the damage suffered by L would have happened anyway. The but-for test is not satisfied – Barnett v Chelsea and
Kensington HMC. In this case the defendant’s breach of duty did not as a matter of fact, cause the claimant’s death.

Application
Similarly in the instant case, there is no causa sine qua non, i.e. the event of Dee ploughing into L’s car is not a cause of the destruction of L and his car.

**Death of Frank**
F’s estate can bring an action in negligence against whoever owed him a duty of care, was in breach of that duty and where there is a causal link and the damage is not too remote.

L is liable for the initial conflagration. Whether L is legally responsible for F’s death depends on the relationship between the scope of his liability - a duty question; and the limit to be set on his liability – a remoteness issue.

There is a causal link between L’s carelessness and F’s death because ‘but-for’ the initial accident there would have been no fire and explosion and the building would not have caught fire when the wind changed direction.

Although the death of a fireman during a rescue operation is a reasonably foreseeable consequence of a serious accident, the courts have to ask whether F’s death was within the risk created by L’s negligence. This involves policy, i.e. setting limits to the responsibility which L bears for his negligence.

Intervening acts or events
A consequence is said to be too remote if it follows a ‘break in the chain of causation’, i.e. a nova causa interveniens. This means that although L’s breach of duty is a cause of F’s damage in the sense that it satisfies the ‘but-for’ test of causation in fact, in the eyes of the law, another intervening event is regarded as the sole effective cause of that damage.

In the Oropesa, a new act had to be unreasonable, extraneous or extrinsic. The act of the ship’s master in crossing from the Manchester Regiment to the Oropesa after both ships had collided was not a new act and the death of the men on board was caused by and flowed from the collision rather than from the act of the ship’s master. The ship’s master was not tortious and he was not guilty of a breach of duty to the deceased in ordering him into the boat. This can be distinguished from the instant case where the act of the commander probably constitutes a breach of duty to his fireman.

In Knightly v Johns, D1’s negligent driving caused the blocking of a busy tunnel. D2, a police inspector, took charge but did not close the tunnel as he should have done. He ordered the claimant to drive back against the traffic to close the tunnel and the claimant was struck by D3 who was driving negligently. CA held that D1 was not liable for the claimant’s injury because the subsequent collision was too remote a consequence of D1’s original negligence. This was because while the police action was natural, probable and foreseeable and there might be risk-taking, the number of errors made D2’s action unreasonable.

Application
This is an area where the courts refer to ‘common sense rather than logic’ – Knightly v Johns; and ‘a robust and sensible approach’ – Lamb v Camden LBC
and precedents can only give a feel for how a particular case would be decided. However, in view of the 2 cases cited, it is suggested that there is a break in the chain of causation between L’s careless driving and F’s death. The commander’s act is unreasonable as in Knightly v Johns and does not flow from the initial accident as in the Oropesa. This means that F’s estate is advised to sue his employer for breach of their duty of care in the employer/employee relationship.

There may also be a claim against Dee who arguably has placed herself in a dangerous position inviting rescue. However, the mode of rescue could be said to be unreasonable because a window could have been used.

**Question 3**

**GENERAL ADVICE TO CANDIDATES**

A significant proportion of the candidates who answered this question wrongly treated it as a question about defamation. Neither a threat to disclose information nor a photograph of the type in this question can be the basis of an action in defamation.

The question concerns privacy, the law of confidence and the misuse of private information. Those candidates who appreciated that this was the area of law in issue, generally scored weak marks because of lack of detailed knowledge of the law in this area.

**SUGGESTED ANSWER**

**Introduction**

Tom and Dale are advised that in order to prevent Ron from disclosing information concerning his former life and the photograph being published, they will have to seek an injunction from the court. An injunction is an equitable remedy and presupposes a cause of action on the part of the claimants. An injunction is granted where damages would be inadequate and generally the claimant must come to the court with ‘clean hands’.

**Dale and the photograph**

If there is a right to privacy then Dale would be able to show that such a right has been contravened. However, it is doubtful that any such right exists.

Art 8 confers on individuals the right to respect for privacy HRA 1998.

Law before HRA:-

In Kaye v Robertson 1991 an actor in hospital sought an injunction to prevent a newspaper from publishing pictures taken without consent. The court could not at the time identify a clear cause of action to enable it to grant the appropriate remedy. Eventually, an interim injunction was granted on the basis that the actor had legal rights in his own wish to tell his story at some future date and the publication of photos would lower the economic value of this right.

Although the facts are similar and Dale could rely on this case to obtain an injunction, Dale can also refer to Art 8.

The leading case in this area is Douglas v Hello where the judge held that the publication of unauthorised wedding photographs constituted an actionable
breach of confidence giving a number of reasons to support his ruling that no such law was recognised in English law. HL in Wainwright also rejected the argument that there is a right to privacy. They opined that the action for breach of confidence provided sufficient protection to comply with Art 8.

CA noted in the 2005 hearing of Douglas v Hello that judges would be expected to develop the law having regard to ECHR. It was recognised that the courts had a duty to protect privacy rights. CA held that the photographs fell within the protection of the law of confidentiality as it had been extended to protect private information. The court found that a claim for breach of confidence was not to be categorised as a tort but as a claim for unjust enrichment. The test for whether the matter fell within the requirements for privacy within English law was whether Hello knew or ought to have known that the defendants had a reasonable expectation that the information would remain private.

In HRH v ANL the Prince of Wales successfully argued that his handwritten journal was private and confidential in circumstances where the defendant newspaper had not obtained the journal legitimately.

Applying the modern law of breach of confidence extended to protect private information and the court’s duty to comply with Art 8 it is clear that the court would grant the injunction asked for.

**Tom**

Disclosure of the information would be bad for Tom’s career and an injunction is obviously more suitable as a remedy than damages.

Tom must show a cause of action and the law of confidence was conceived of in terms of having been imparted in circumstances which expressly or impliedly created an obligation of confidence. The law of breach of confidence protects against the misuse of private information. Tom is advised to base his claim on the cause of action described as ‘misuse of private information’.

Dame Butler-Sloss in Venables v News Group Newspapers said that the onus of proving the case that freedom of expression must be restricted is on the applicant seeking relief. The onus is on Tom to prove that the information should not be disclosed.

The older cases suggest that the public interest in disclosure may outweigh the private interest in protecting personal information under the principle of ‘no confidence in iniquity’.

This appears not to apply in cases of personal information where the fact of the claimant’s misuse of drugs contrary to drugs legislation did not attract the iniquity principle – Campbell v MGN. This was held to be a personal matter and could be kept private. The fact that being a ‘rent-boy’ involves immoral if not criminal behaviour, this will be regarded as a private matter applying the above principles.

As well as the developing law of confidence there is also the Human Rights Act 1998 which creates a free-standing right of privacy per Art 8: everyone has the right to respect for his private and family life, his home and his correspondence. The ECtHR in Hannover declared that the German court, by denying a remedy to the daughter of the Prince of Monaco, amounted to a breach of Art 8. It would
appear that if Tom is not successful under the law of confidence then he will succeed by appealing directly to Art 8.

**Personal/private information**

This covers information about a person’s sexual life – Stephens v Avery.

Sexual behaviour during the course of a marriage could not be disclosed on divorce – Argyll v A.

In A v B the claimant sought an injunction to prevent disclosure of his extra-marital affairs in the Press.

The trial court drew an analogy between the confidential relationship which English law recognises between a married couple and other sexual relationships which are accepted in current society. Even a person who willingly lives much of his life in the public eye, such as a footballer or actor, could claim the protection of the law for certain activities which are private in nature. However, CA would not give a blanket protection to all sexual relationships and drew a distinction between short-term, transient relationships on the one hand and marriage or other demonstrably stable relationships on the other. In the former type of relationship, it would always be more difficult to justify the restriction on a free press which a successful claim for breach of confidence would entail.

If Tom and Ron were in a Civil Partnership then this is equivalent to marriage and restriction on disclosure would be easier to justify than if they were in a casual relationship.

**Question 4**

**GENERAL ADVICE TO CANDIDATES**

Most candidates answered this question reasonably well and some good marks were scored.

Some candidates failed to appreciate that, in public nuisance, economic loss can be claimed by a person who has suffered special damage. In relation to private nuisance, a significant number of candidates did not appreciate that a tenant has an interest in land. There is also confusion about the status of planning permission – which is not, in itself, statutory authority.

Most candidates commented that an injunction could be applied for; but very few candidates gave any detailed consideration to the law applicable to when an injunction will be granted and the application of that law to the facts of the problem.

**SUGGESTED ANSWER**

**Public Nuisance**

The residents Smells from S factory affects residents over a large area. This may be enough to constitute a public nuisance defined as an act or omission which affects the reasonable comfort or convenience of a class or group of Her Majesty’s subjects – PYA Quarries. This is essentially a common law crime and proceedings are
brought by the Attorney General by way of a ‘relator’ action on behalf of those affected. There is no need to have a proprietary interest in the land affected.

Jane
If an individual suffers damage over and above that suffered by the class of persons affected by a public nuisance then a person who suffers special damage may bring a civil action for damages in tort. The damage must be substantial and direct and not consequential. In Castle v St Augustine’s Links the claimant who was hit by a golf ball driven onto the highway could claim special damage. In Jane’s case, she has suffered economic loss because the smell has deterred campers from the camp-site. Special damage was held to occur where a business suffers economic loss because of obstruction of the highway in Benjamin v Storr where the claimant complained of damage to his trade caused by horses and vehicles waiting outside his shop.

Therefore, if the court accepts that this is a public nuisance then J can claim for her economic loss. If not, she will have to claim for private nuisance – see below.

**Private nuisance**
This is relevant to Jane, Kumar and the Martial Arts Club

Private nuisance is defined as an unlawful interference with a person’s use or enjoyment of land or some right over it. In order to sue, a person must have an interest in the land affected – Malone v Laskey. This includes owners and tenants and Jane, Kumar and MAC therefore qualify to bring a claim. HL in Canary Wharf confirmed Malone v Laskey reinforcing the traditional view that entitlement to the use and enjoyment of land remains a necessary characteristic of a claimant in a private nuisance action.

S is the defendant as the occupier of the land from which the nuisance emanates and creator of the nuisance. The basis of the claim is that the defendant has caused an unreasonable and substantial interference with the claimant’s use or enjoyment of land or damage to the land itself. The interference may take the form of a smell but no account is taken of trivialities.

Jane
Where the nuisance complained of is personal discomfort the nature of the locality is relevant – St Helens Smelting v Tipping. The area is described as Greenfield and is therefore not industrial.

A grant of planning permission does not amount to statutory authority and therefore does not directly legalise an activity which amounts to a nuisance, even if it is the inevitable consequence of the activity – Wheeler v Saunders. However, in Gillingham BC v Medway planning permission could have the effect of changing the nature of the neighbourhood and the question of nuisance would have to be decided by reference to the changed character. Assuming the smell is unreasonable in the locality Jane will have a successful claim.

The duration of the nuisance is that there is only a problem when the wind is in a certain direction. This will probably satisfy the requirement of repetition and recurrence. The longer a nuisance continues the more likely it is to be an actionable nuisance. In the present situation, the smell will always be a problem at certain times.
Kumar
Although K is very sensitive this does not necessarily mean he cannot claim. Where damage is due more to the claimant’s sensitivity than to the defendant’s activity no nuisance is committed – Robinson v Kilvert. However, if D’s activity would have caused damage to non sensitive property, C can recover for the full extent of his loss including sensitive property – McKinnon Industries v Walker. K can establish that the smell from the factory is unreasonable because he is not alone in being affected (unlike the C in Heath v Mayor of Brighton where the incumbent was the only person affected by the noise of the power station.) Once a nuisance is established, remedies will extend to K’s delicate constitution.

Martial Arts Club
The club does not appear to be affected at the moment; the damage is the threat to their promotion programme. Where no damage has yet occurred but is imminent, a quia timet injunction may be granted. Although no present damage need be proved, probability that substantial damage will ensue must be shown otherwise the law would be redressing fanciful claims.

The principal remedy is injunction and the court’s discretion not to award an injunction is only exercised in exceptional circumstances. In this case, the court may take the view that an injunction would be oppressive and award damages instead. In Goode v Owen 2002, CA held that an injunction was not justified on the facts and damages would be more appropriate. The principle is that D should not be able to buy the right to commit a nuisance.

The rule in Rylands v Fletcher
Clear Water Processing Plant
The rule in Rylands v Fletcher is relevant here. A person who for his own purposes brings on his land anything likely to do mischief if it escapes is answerable for all the damage which is the natural consequence of its escape. S have control over the contents of their factory which have been accumulated by S and are not naturally there.

The claimant has to show that the use of the land for a factory is non-natural. In Rickards v Lothian this was described as, ‘some special use bringing with it increased danger to others and not merely the ordinary use of land.’ This is a flexible concept and use of land as a munitions factory in war-time was held to be a natural user in Read v Lyons. Negligence considerations come into play here and the way the materials are stored is relevant as in Mason v Levy Autoparts.

In Cambridge Water v Eastern Counties Leather HL decided that foreseeability of harm of the relevant type was an essential element of liability. A reasonably prudent person would not have foreseen contamination of ground water and ECL were not liable for CWEC’s losses. Therefore, harm of the type that has occurred here was be reasonably foreseeable for a successful claim.

In Transco v Stockport HL said that to succeed in R v F it had to be shown that D had done something that he recognised as giving rise to an exceptionally high risk of danger if there was an escape. The rule would only apply if the use of D’s land was extraordinary and unusual judged by contemporary standards. An example was the storing of polystyrene blocks in such a way as there was a likelihood of catching fire which escaped to neighbouring premises.
CWPP can recover for their loss if they prove that S’s factory constituted a high risk of danger and that the damage was foreseeable, i.e. contamination of the well.

**Question 5**

**GENERAL ADVICE TO CANDIDATES**

There were some good answers by those candidates who appreciated that the question was mainly about the imposition of a duty of care in negligence where the loss is purely economic. Weak candidates, who failed to appreciate this, wrote generally about negligence and scored poor marks.

**SUGGESTED ANSWER**

In the context of duty of care, the courts sometimes make reference to the principle of assumption of responsibility to justify the imposition of a duty of care in a particular situation. This usually arises in cases where the loss is purely economic. In Hedley Byrne, HL held that there might be liability in tort for merely financial loss caused by negligent misstatement and the court spoke in terms of the maker of the statement having assumed responsibility towards the other and that other having relied on it.

It is now evident that the principle extends beyond liability for statements to the situation where D undertakes to perform a task or service for C. This concept is very close to contract but instead of consideration there is the requirement of reliance. The concept was used in the case of Henderson v Merrett where claims were brought by Lloyd’s Names who incurred liabilities arising out of alleged negligent underwriting by managing agents of syndicates of which they were members. Lord Goff held that a duty of care arose in tort on the basis that the managing agents had assumed responsibility towards the Names. They held themselves out as possessing a special expertise. Since the duty was said to rest on the principle in Hedley Byrne, there was no problem with the loss being purely economic.

Where the loss is purely economic:
Assumption of responsibility can be seen as an indicator of proximity in economic loss cases.

In White v Jones – HL found that by agreeing to prepare a will the solicitor had voluntarily assumed responsibility to the beneficiaries to carry out the preparation of the will with due care and skill.

Various cases involving solicitors illustrate the application of the test and care must be taken to limit the scope of the duty to that for which D has actually undertaken responsibility. In Cancer Research, solicitors had not assumed responsibility on the issue of inheritance tax vis a vis the charity.

Outside the context of solicitors examples include:-
Welton v North Cornwall DC – an environmental health officer to the owner of a guest house on necessary alterations;
Williams v Natural Life Health Food – a director of a small company did not assume personal responsibility because any responsibility assumed was in his capacity as a company director;
In West Bromich Albion, a doctor had not assumed responsibility to protect the economic interests of the club when treating one of their professional players. Precis v William Mercer – the courts applying the assumption of responsibility approach had regard to factors such as the purpose for which the information was communicated to D. CA held that precise limits of the concept were in a state of development and the court had to look at all the relevant circumstances to see whether they fell within previous similar situations where responsibility had been assumed.

Where the loss is purely economic this can be a bar to recovery unless brought within Hedley Byrne principles. Under HB, statements will rarely give rise to any other type of loss. The assumption of responsibility appears to be creating a parallel liability in respect of services.

Since Henderson, assumption of responsibility has been the basis of recovery in a wide range of situations and can be seen as a rival to the Caparo test as a general approach to the duty of care question.

Cases to illustrate the concept justifying imposition of a duty where loss is not purely economic:-
Phelps – on an educational psychologist called in by LA to advise of a child;
Watson – on the adequacy of medical arrangements at fights organised by British Boxing Board;
Vowles v Evans – on a referee of an amateur rugby match;

The assumption of responsibility is one which is based on the law’s objective assessment of the situation – Smith v Eric Bush.

In Customs & Excise Commissioners v Barclays Bank, the Bank obtained a freezing order against the assets of companies in respect of outstanding VAT. CA held that the Bank owed a duty of care to the claimants as soon as it was served with the order and that this was justified on the basis of assumption of responsibility as well as the Caparo tri-partite approach.

On the above approach, the test is little more than a label applied once the conclusion has been reached, i.e. that a duty ought or ought not to be owed. However, the test arguably has value where a D who has expressly or impliedly agreed to undertake or perform a service should be under a duty. This is not to impose a duty where D has not assumed any responsibility as this would be tantamount to outflanking the basic principle that one is not required to take positive action to assist others.

**Question 6**

**GENERAL ADVICE TO CANDIDATES**

Most candidates answered this question quite well and some good marks were scored. The weaker candidates did not understand the materials well enough.

Some candidates confined their answer to consent in medical cases, which is primarily trespass to the person rather than negligence.
SUGGESTED ANSWER

Where C voluntarily assumes the risk of D’s negligence then D has a complete defence – Smith v Baker.

There has to be an initial negligent act on D’s part before C can be said to assume the risk – Wooldridge v Sumner.

The content of the duty has to encompass the risk assumed by C. In Reeves v MPC, the deceased committed suicide in police custody. It was held that because the police owed him a duty of care to protect him from suicide then volenti could not apply because this would have deprived the duty of any content.

Agreement
This may be express or implied. In ICI v Shatwell C deliberately defied safety instructions and it was held that he had consented to the very conduct which had caused the injury and had fully appreciated the risk of injury to himself.

The court rejected the defence in Dann v Hamilton where C took a lift with a driver known to be drunk.

Note Section 149 RTA 1988 – consent is no defence in case of motor vehicles. This section applies to express and implied agreements – Pitts v Hunt. The Act does not apply to aircraft or boats etc. In Morrison v Murray CA held that the defence was made out, distinguishing Dann v Hamilton on the basis that the activity was so inherently dangerous that it was like meddling with a bomb.

Knowledge
Awareness of D’s activity does not equate with consent – Slater v Clay Cross. C consented to the ordinary running of the railway but not to the negligence of the driver. In Smith v Baker there was no consent to the negligence of employers in failing to warn C of a recurring danger.

Consent freely given
In ICI v Shatwell there was no pressure from the employers who had prohibited such behaviour.

Consent and standard of care
C may consent to a degree of disregard for his own safety, e.g. in sporting situations, but D does not have carte blanche. A spectator does not consent to D’s negligence but consents only to the consequences of the game or competition being performed within the rules of the game or competition – Wooldridge v Sumner. It was held that D had only committed an error of judgement in trying to win.
In Condon v Basi there was no consent to a recklessly dangerous tackle in a game of football.

The above approach was applied in Blake v Galloway where the parties engaged in horseplay with tacit conventions. C had consented to inherent risks but the situation would have been different if D had used a stone instead of bark.

Rescue cases
Dr Goodhart’s exposition of the American position was accepted as an accurate representation of English law in Haynes v Harwood. CA found for C who
deliberately or instinctively encounters peril in response to a dangerous situation created by D which invites rescue.

There are 3 reasons for this:-

1. D owes a duty directly to the rescuer and C’s claim is not derived from a duty owed to the person in danger – Videan v BTC. If a duty is owed there can be no consent – Reeves v MPC.

2. The rescuer acts under an impulse of duty, legal, moral or social and therefore cannot exercise freedom of choice – Frost.

3. D’s negligence precedes C’s act of running the risk and therefore C does not consent to D’s negligence – Baker v Hopkins

**Question 7**

**GENERAL ADVICE TO CANDIDATES**

This question was generally well done, with good knowledge shown of the relevant legal principles and the conceptual differences between trespass to the person and negligence. In particular, most candidates considered Blake v Galloway in relation to the intention and recklessness requirements in the trespass to the person; there was also good presentation of the material on Wilkinson v Downton

**SUGGESTED ANSWER**

**Trespass to the person and negligence**

Trespass to the person involves direct interference with a person’s body or liberty. Today, intention to do the act is necessary. There are 3 forms of trespass to the person, i.e. assault, battery and false imprisonment and in each case the wrong must have been committed directly. This may be by the express or implied threat of force.

Assault is defined as act of D which causes C reasonable apprehension of infliction of a battery on him by D, e.g. poisoning;

Battery is defined as an intentional and direct application of force to another person, e.g. acid in a hand-dryer, stabbing;

False imprisonment is defined as the infliction of bodily restraint which is not expressly or impliedly authorized by law.

The act need only be intentional as regards contact in battery and there is no requirement to intend the consequences – Wilson v Pringle. The intention requirement was considered in Blake v Galloway where CA found no intention to injure and that the degree of recklessness was insufficient to constitute battery. Therefore any claim for damages would need to be framed in negligence.

Where harm has been caused negligently, this is covered by the tort of negligence where C has to prove a duty was owed (no problem where there is personal injury), breach of duty and consequential harm that is not too remote.

The limitation period in relation to actions brought in intentional torts is 6 years from the date on which the action accrued. Section 11 Limitation Act 1980 provides a 3 year limitation period from the date on which the accident accrued or from the date of knowledge of C for claims for damages for personal injuries.
This might appear to advantage the wrongdoer who committed intentional acts over one who committed negligent acts.

Historically, fault was not a requisite element in trespass. A Defendant who inflicted a direct injury on C was liable in trespass unless he could establish a defence. Particulars of claim alleging that D struck C would suffice and D would have to prove the incident was an accident. This was contrasted with indirect harm where the cause of action was ‘case’ and where C had to show that D’s act failed to come up to the standard required by law.

Today, an action for unintentional trespass to the person no longer exists in practice. In Fowler v Lanning, the burden of proving negligence in actions for unintentional trespass to the person is on C and therefore a statement of claim stating, ‘D shot C’ disclosed no cause of action.

In Letang v Cooper it was said that where an injury is not inflicted intentionally but negligently, the only cause of action is in negligence and not in trespass.

Once C can establish trespass, he need not show that the injury was foreseeable – see Wilson v Pringle above. The approach to remoteness is not foreseeable of type of damage but the old Re Polemis rule that D is liable for all the direct consequences of his intentional act – Allan v New Mt Sinai Hospital. This can be compared with negligence where the remoteness rule is that of reasonable foreseeability of harm – Wagon Mound. The precise nature or amount of injury need not be foreseeable – Hughes v Lord Advocate. If any injury is foreseeable, D is liable even if, because of C’s susceptibility, it is greater than would have been suffered by a normal person – Paris v Stepney BC and the thin-skull rule.

In negligence, C must show that D owed him a duty of care, a function which eliminates or restricts claims for ‘policy’ reasons and of limiting the range of D’s liability. However, the restrictive function is not necessary in cases of personal injury where a duty of care will always be held to exist. As regards the second function, the test is whether C was a reasonably foreseeable victim of D’s act. In trespass cases, no such control device is necessary because of the requirement of directness.

Trespass is actionable per se. This means that C does not have to prove actual damage to himself. C’s interest in his personal security is regarded as being sufficiently important to warrant protection even in the absence of actual damage.

C may recover substantial damages for distress and humiliation particularly in false imprisonment cases, even though he suffers no physical injury – see Lord Atkin in Meering v Grahame-White Aviation.

Such losses are not recoverable in negligence and if D uses indirect means to inflict humiliation or distress there is no action in English common law in the absence of physical harm, (including recognized mental illness). C would have to show harassment under PHA where anxiety is a head of damage.

**Wilkinson v Downton**

Under the rule of Wilkinson v Downton, where D intentionally and without justification causes physical harm to C he is liable whether or not his action can be classed as trespass. This principle was applied in Janvier v Sweeney.
The above principle falls neither within trespass to the person because the element of directness is missing, nor within the tort of negligence because intention is not the same as carelessness – it is more serious.

In Wainwright v HO it was said the W v D has no leading role in the modern law because the tort of negligence will do just as well. This view can be criticized on the basis that intentional harm is far worse than careless harm. Also, the law of damages differs: exemplary and aggravated damages are never available for negligence, but may be available where D acts intentionally.

If W v D is subsumed within the tort of negligence then C would not be able to recover for harm which amounts to distress or humiliation but which falls short of psychiatric illness. Such harm is recoverable as part of damages for trespass because the tort is actionable per se. Such harm does not amount to sufficient damage to found an action in negligence – Wainwright v HO. However, if C can prove harassment under PHA 1997 then this Act allows recovery of damages for anxiety.

**Question 8**

**GENERAL GUIDANCE TO CANDIDATES**

The question specifically states that it is only on the Occupiers Liability Act 1984. Despite this, a number of candidates produced a general answer which included material on the 1957 Act and such answers did not score pass marks.

There have been a number of important recent cases in this area, which were considered in an excellent article by Professor Mark Pawlowski in the August 2007 edition of the *Legal Executive Journal*. As a general point, candidates should ensure that they read all issues of the Journal.

The cases deal with the issue of the “state of the premises” compared to the “dangerous activity of the claimant.” The better answers covered this, but there were a significant number of answers which did not and showed a general lack of knowledge of the main legal principles.

**SUGGESTED ANSWER**

Section 1(1)(a) of the Occupiers’ Liability Act 1984 makes clear that the relevant duty of care owed by the occupier to trespassers is confined to any risk of suffering personal injury on the premises ‘by reason of any danger due to the state of the premises or to things done or omitted to be done on them. Section 1(3) provides that a duty is owed to the trespasser if the occupier:

- Is aware of the danger or has reasonable grounds to believe that it exists (s.1(3)(a));
- Knows or has reasonable grounds to believe that the trespasser is in the vicinity of the danger (s.1(3)(b), and
- The risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection (s.1(3)(c).

The duty is to take such care as is reasonable in all the circumstances to see that the trespasser does not suffer injury on the premises by reason of the danger concerned. The obligation to take reasonable care may, in appropriate
circumstances, be discharged by taking such steps as are reasonable to give warning of the danger or to discourage persons from incurring the risk.

Cases:
Siddorn v Patel 2007 – court rejected C’s argument that the skylight was unsafe and that no adequate warning had been given. The duty of care under the 1984 Act could only arise if the danger referred to in s.1(a) was due to the state of the premises and not to C’s activity. C had danced on D’s garage roof during a party at her flat. There was nothing to suggest that the cover was unsuitable or in a state of disrepair. The decision accords with the proposition established in a number of earlier cases that the 1984 Act is not engaged where the injury is sustained because C chooses to engage in an activity with inherent dangers and not because the premises are in a dangerous state.

In Donoghue v Folkstone Properties where a young adult dived into a harbour and struck his head on an underwater pile; C could not ascribe an injury so sustained to the state of the premises.

Similarly, in Tomlinson v Congleton BC a young person sustained injuries by diving into a stretch of shallow water and the court held that the injury was attributable to the activity which was inherently risky rather than to the state of the premises.

In Maloney v Torfaen CBC C fell down a bank while drunk. CA said the accident had occurred as a result of a danger due to the state of the premises. C’s foolhardiness was treated as being relevant to the issue of contributory negligence. D was not liable because s.1(3)(b) was not satisfied.

Child trespassers - In Keown v Coventry Healthcare NHS Trust 2006 CA held that premises that would not be dangerous for an adult could be dangerous for a child. The question was one of fact and degree and much would depend on the age of the child and his ability to recognize danger. In the instant case, the boy was 11 years old and was aware of the risk of falling from the fire escape and knew that what he was doing was dangerous. The danger did not arise from the state of the premises, there was nothing wrong with the fire escape. The danger was the result of what the boy had deliberately chosen to do.

Keown can be contrasted with Young v Kent CC 2005 where a 12 year old boy climbed on to the roof of a school building using the flue of an extractor fan. He deliberately jumped up and down on the skylight and fell through it. The skylight was brittle and inherently dangerous for a young child. The danger was said to be attributable to the state of the premises rather than C’s activity. The council knew that children climbed the flue on to the roof and could have fenced off the area. There had been a clear breach of duty under the 1984 Act. C’s act went to the issue of blame in assessing his contributory negligence and damages were reduced by 50% to reflect his responsibility for the accident.

Different considerations will apply depending on whether the trespasser is an adult or a child. In the case of an adult, the court is unlikely to be sympathetic where the injury has been caused because C has chosen to indulge in an activity involving inherent dangers. Child trespassers may court the risk of injury associated with premises which pose a danger to them but not adults. The age of the trespasser is relevant in determining whether the danger is attributable to the state of the premises. It does not follow that the premises must always be
made safe for very small children. In accordance with this principle, it has been held that a person who owns a mountain in the vicinity of a town is not required to fence it off in case small children frequent it – Simkiss v Rhhonda BC 1983.

Also, the relevance of C’s choice to indulge in a dangerous activity cannot be ignored. In Keown, the court will find little sympathy for the child who has sufficient capacity to recognize both the danger of what he is doing and the risk of injuring himself. C had the attributes of an adult in making a genuine choice to engage in a dangerous activity.

In Siddorn and Keown C’s blame precluded him from satisfying the threshold requirement contained in s.1(1)(a). This meant that the claim in both cases failed. In Young and Maloney the issue of C’s behaviour was treated as a matter relevant only to the issue of contributory negligence.

**EXAMINATION STATISTICS**

Candidates Sitting: 123  
Percentage Passing: 54%  
Distinctions Achieved: 5