LEVEL 6 - UNIT 13 – Law of Tort
SUGGESTED ANSWERS – June 2014

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 2015 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners’ reports which provide feedback on student performance in the examination.

SECTION A

Question 1(a)
In the tort of negligence ‘duty of care’ is a legal duty to take reasonable care not to harm another. It is an essential element in establishing an action in negligence. Whilst it may be possible to demonstrate that harm has been suffered as the result of carelessness, it is not possible to establish liability unless the claimant can show he was owed a duty of care. ‘A man is not liable for negligence in the air. The liability only arises where there is a duty to take care and where failure in that duty has caused damage’ per Lord Russell, Bourhill v Young (1943).

The role of this requirement is to limit potential claims. Its purpose is to draw a line between those kinds of carelessness and injury for which the court considers compensation should be awarded and those for which it should not. Per Lord Denning MR, Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd (1972) ‘...At bottom I think the question ...is one of policy. Whenever the courts draw a line to mark out the bounds of duty, they do it as a matter of policy so as to limit the responsibility of the defendant...’

Whether or not a duty of care is owed is consequently based not only upon justice to individual claimants but upon judicial ideas of public policy.

Question 1(b)
Negligence as a separate tort may be traced back to the 18th Century. The requirement of a duty to another may be traced back to the early 19th Century: see (e.g.) Ansell v Waterhouse (1817).
Duties were developed throughout the 19th Century with regard to specific situations and relationships. Examples include those between road users, employers and employees, and doctors and patients.

Brett MR, in Heaven v Pender (1883), made the first attempt to establish a general principle for determining the existence of duty of care: A duty would arise ‘...Whenever one person is ...in such a position with regard to another that everyone of ordinary sense...would at once recognise that if he did not exercise ordinary skill and care... he would cause danger or injury to person or property of the other, a duty arises...’. Later (now as Lord Esher) he (obiter) reasserted this principle in Le Lievre v Gould (1893), apparently saying that a duty should arise where there was physical proximity. These attempts to establish a general principle were unsuccessful.

Lord Atkin, in Donoghue v Stevenson (1932), having criticised Brett MR’s test in Heaven v Pender for being too broad in its effect, then drew upon it, affirming that there was a duty to neighbours (to those who are proximate). He went on to define neighbours in law: they are ‘... persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation...’ Lord Atkin thus produced a mental rather than a physical test that was far broader in its effect and more extensive in its influence than Brett MR’s. Lord Atkin’s obiter statement was opposed by a minority of the House of Lords. More than 30 years later it formed the basis of a significant of expansion in liability.

In Home Office v Dorset Yacht Co (1969) Lord Reid stated: 'Donoghue v Stevenson may be regarded as a milestone... I think the time has come when we can and should say that it ought to apply unless there is some justification and valid explanation for its exclusion.’

In Anns v Merton LBC (1978), Lord Wilberforce put forward a two-part test for considering whether a duty of care should exist: (1) Using Lord Atkin’s formulation the court should decide whether there was sufficient proximity between the parties. If the answer is ‘yes’ the court should go on to consider: (2) Are there considerations which ought to negate, or reduce or limit that duty? Those considerations are generally taken to be considerations of public policy.

There followed decisions, based upon Lord Wilberforce’s test, largely in the area of pure economic loss, which later gave rise to judicial and academic concern. Perhaps most contentious was Junior Books v Veitchi Co Ltd (1983), which came to be regarded as the ‘high water mark’ of this expansion. It was followed by a judicial retreat from Anns, limiting the case to its facts ((e.g.) Curran v Northern Ireland Housing Association (1987)), questioning the principles upon which it was decided ((e.g.) The Aliakmon (1986)), and doubting its status (e.g.) Peabody Donation Fund v Parkinson (1984), Yuen Kun-Yen v A-G- for Hong Kong (1987)).

In Murphy v Brentwood District Council (1990) the House of Lords overruled the narrow ratio in Anns. In Caparo v Dickman (1990) it laid down a three-part test for the recognition of duty of care:

(i) the damage to the claimant must be reasonably foreseeable;
(ii) there must be sufficient proximity between the parties; and
(iii) it must be fair, just and reasonable that the law should impose a duty of care.

Whereas Lords Atkin and Wilberforce appear to have regarded foreseeability as a test for proximity, in this context it operates as a separate criterion. Proximity here refers to legal proximity, referring to a sufficiently close legal relationship between claimant and defendant. Practically, it may be thought of as a requirement that the harm suffered does not fall into certain well established classifications, such as psychiatric damage and pure economic loss which preclude a duty or permit one to arise only in certain restricted situations.

This use of ‘proximity’ has been criticised. Lord Nicholls’ in Stovin v Wise (1996), described it as ‘a slippery word’ and seemed to regard it as meaning that it must be ‘fair just and reasonable’ to find a duty of care existed.

The criterion ‘fair just and reasonable’ relates to general policy considerations such as the opening of ‘the floodgates’ or the wider harmful effects of a finding of liability in relation to providers of emergency services, publically funded bodies etc.

Per Lord Bridge, in Caparo, the attempt at a single practical test for determining a duty of care has been abandoned and the law had moved in the direction of attaching greater significance to traditional categories.

It may be that the clearer and simpler tests in Anns and Donoghue led to the expansion of liability. Lord Atkin makes no reference to policy but he spoke in a context in which the policy categories established in the 19th Century (see (e.g.) Victorian Railway Commissioners v Coultas (1888) and Cattle v Stockton Waterworks Co (1875)) clearly held sway. Those categories continued to be observed during the period of expansion: see (e.g.) Spartan Steel v Martin & Co (1972). Where policy required a higher level of proximity the law employed other criteria than Lord Atkin’s test: see (e.g.) Hedley Byrne v Heller (1962).

If the underlying purpose of Caparo was to put an end to the expansion of liability of the kind seen in Junior Books, it succeeded. The cost has been an increase in complexity and, some argue, in loss of what clarity and precision that had been achieved.

**Question 2**
The objective standard of care employed in the tort of negligence was expressed most influentially by Alderson B in Blyth v Birmingham Waterworks Co (1856):

‘Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.’

The reasonable man (or person) is a judicial construct. Gauging the conduct of the defendant by reference to that construct is to apply an objective test. Some observations can be deduced from Alderson B’s statement as to the characteristics of the reasonable man: he is reasonable, prudent, and guided by
the standards of ordinary society. Further Judicial attempts to characterise him have emphasised his ordinariness and reasonableness.

The reasonable person does not take unreasonable risks. A number of factors inform what may make a risk unreasonable. The first of those is the magnitude of the risk. Two considerations are engaged here: the likelihood of harm and the seriousness of the potential harm. Where harm is extremely unlikely to happen a failure to guard against it is unlikely to be regarded as a breach of duty: see (e.g.) Bolton v Stone (1951). As likelihood increases so does the magnitude of risk: see (e.g.) Hilder v Associated Portland Cement (1961).

The magnitude of risk also increases with potential seriousness: the greater the potential harm the less reasonable is it to accept any risk. The claimant’s known characteristics may make a breach of what would otherwise not have been a risk of high magnitude. In Paris v Stepney LBC (1951) an employee, who was blind in one eye, injured his good eye whilst working on one of his employer’s vehicles. The House of Lords held that the employer was negligent in failing to supply protective goggles to Paris because the seriousness of harm resulting from the injury to his single good eye was far greater than to a man with two good eyes.

Breach may also arise when serious harm to someone with the claimant’s foreseeable, rather than known, characteristics occurs: see (e.g.) Haley v London Electricity Board (1965). When assessing foreseeability the defendant is not to be given the attribute of hindsight and must be judged by the state of knowledge at the time of the act complained of: Roe v Ministry of Health (1954).

The test therefore allows practicality and flexibility in assessing the magnitude of risk.

Where questions of skill and judgment are in issue the standard becomes that of the ordinary reasonable person who professes or holds himself out as possessing that skill. Learner drivers are judged by the same standard as reasonably qualified and experienced drivers: Nettleship v Weston (1971). In Bolam v Friern Hospital (1957) McNair J held that a doctor should not be liable in negligence if he acted ‘...in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.’ This test was later approved by the House of Lords in Whitehouse v Jordan (1981) and in Sidaway v Bethlem Royal Hospital (1985). This does not, however, mean that medical opinion is conclusive of the issue. Where the court finds that medical opinion on the question is illogical it is free to find a doctor negligent despite such opinion: Bolitho v City & Hackney Health Authority (1997).

The duty imposed by the law of negligence is to act reasonably, not to eliminate all risk. Where the social or financial cost of eliminating such a risk is disproportionate the defendant will not be liable in negligence, provided the defendant has acted reasonably: Latimer v AEC (1953).

Similarly, the importance of the object to be attained should also be taken into account when assessing breach of duty. Conduct that in ordinary commercial situations would amount to a breach of duty may not be held to be so when, for
example, the life of a member of the public is at risk: Watt v Hertfordshire County Council (1954).

The position is more complex where the defendant acts under a disability. The objective standard, as a general principle, does not take into account the idiosyncrasies of the defendant. Just as lack of experience is not to be taken into account so neither is infirmity. In Roberts v Ramsbottom (1980) the defendant suffered a cerebral haemorrhage whilst driving. He remained conscious and was aware that he was unwell. He nevertheless continued to drive on, causing both personal injury and damage to property. Nair J was prepared to accept automatism as a defence but on the facts the defendant’s state fell short of automatism. The defendant was consequently held liable.

In Mansfield v Weetabix (1998) the Court of Appeal held that liability did not arise when a driver suffered a sudden and unexpected hypoglycaemic episode which lead to damage to the defendant. Whilst approving the decision in Roberts, the court went on to say that it was wrong to use the criminal law test of automatism.

Where the defendant is a child that too may be taken into account when considering issues of foreseeability and judgment. In Mullins v Richards (1998) the Court of Appeal held a 15 year old girl not liable on the basis that someone of her age would not have foreseen the risk in question.

The application of an objective test permits, among other things, enables the law of tort to ensure a degree of certainty of outcome and to reinforce normative rules of behaviour. It is sufficiently flexible to take into account the need to avoid inhibiting socially and economically desirable activities. In this regard, it is now supported by s1 Compensation Act 2006.

The concept of the reasonable person is such that allowance can be made for those acting under a disability.

**Question 3(a)**

Private nuisance is ‘unlawful interference with a person’s use or enjoyment of land, or some right over, or in connection with it.’ It may take the form of encroachment on land, direct physical injury to land, or interference with the enjoyment of land: Hunter v Canary Wharf (1997), per Lord Lloyd.

When assessing whether a private nuisance has been committed the court seeks to balance the competing rights of claimant and defendant. Neighbours are required to use of their own land reasonably and be reasonably tolerant of the way in which others use their land.

Single acts of short duration are unlikely to amount to private nuisance. The longer the activity continues or the more often it is repeated the more likely it is to do so. An exception to this is where a state of affairs exists on the defendant’s land, which it is reasonably foreseeable will lead to a nuisance: see (e.g.) Spicer v Smee (1946), British Celanese v Hunt (1969), Miller v Jackson (1977).
Where the claimant’s use of the land is abnormally sensitive, activity that is detrimental to that use may not amount to a nuisance: *Robinson v Kilvert* (1899). Where, however, the defendant’s actions would have had a negatively affected a non-sensitive use of the claimant’s land then the claimant’s sensitive use will not act as a barrier to a successful claim: *McKinnon Industries v Walker* (1951).

To act from malice is to act unreasonably. The court has shown itself ready to find private nuisance where malice is present: see *Christie v Davie* (1893); *Hollywood Silver Fox v Emmett* (1936). These cases seem to be inconsistent with the House of Lords’ decision in *Bradford v Pickles* (1895), where Lord Halsbury LC said that provided the defendant’s act was lawful motive is irrelevant. The cases may be reconciled. They are attempts to balance the interests of neighbours in quite different situations. Whilst there is no absolute right to be free from all interference there is a right to be free from unreasonable interference and motive is relevant factor in deciding upon reasonableness.

Location is a relevant factor in assessing reasonableness. ‘What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey’ *Sturges v Bridgeman* (1879) per Thesiger LJ. The granting of planning permission may influence the nature of the locality: see (e.g.) *Gillingham Borough Council v Medway (Chatham Dock) Co* (1992).

Where there is physical damage to the claimant’s property the criterion of locality is not regarded as a factor. Physical damage to the property of another must not be inflicted whatever the location: *St Helen’s Smelting v Tipping* (1865); *Halsey v ESSO Petroleum* (1961). The justification for such a distinction is questioned by Winfield & Jolowicz.

In appropriate circumstances the court will consider the natural condition of land: (e.g.) *Leakey v National Trust* (1980). The individual defendant, its resources, and what could reasonably be expected of it were said to be relevant considerations.

The court will also consider the social utility of the activity complained of. Activities with significant social utility are less likely to be regarded as a private nuisance.

**Question 3(b)**

Blackburn J defined the tort in *Rylands v Fletcher* (1866): ‘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’. When appealed to the House of Lords, Lord Cairn’s added the requirement that the thing brought and stored on the land must be a ‘non-natural user’ of the land.

The essential requirements for establishing liability are therefore:

1. The defendant brought and collected something on his land
(ii) That thing was likely to cause harm if it escaped
(iii) The thing’s presence on the defendant’s land amounted to a non-natural user of the land
(iv) The thing did escape and caused damage to the claimant.

To the above should be added the requirement that the kind of harm suffered should be reasonably foreseeable: Cambridge Water Co v Eastern Counties Leather plc (1994)

Things which occur naturally on the land may not provide the basis for a claim in this tort: therefore (e.g.) pernicious weeds that escape from the defendant’s land onto the claimant’s do not sound in Rylands v Fletcher. The requirement is one of bringing and/or collecting.

‘Things’ held likely to cause mischief have been divers in nature. For example, in AG v Corke (1933) human beings were held to fall into this category; so in Crowhurst v Amersham Burial Ground (1878) were yew trees planted along the boundary of the burial ground which grew through the fence and into a neighbouring field. In Hale v Jennings Bros (1938) part of ‘chair-o’-plane’ which broke away from a fair ground ride and injured the owner of a neighbouring attraction gave rise to liability in Rylands v Fletcher. (Following dicta in Hunter v Canary Wharf (1996) Cambridge Water Co v Eastern Counties Leather plc, and Transco v Stockport (2003) to the effect that Rylands v Fletcher is a variety of nuisance, considerable doubt has been cast upon the personal injury aspect of this and other cases.)

What is regarded as non-natural user varies with circumstances and time, per Lord Porter, Read v Lyons (1947). Thus in Musgrove v Pandelis (1919) storing a car with petrol in its tank in garage was held to be a non-natural user. In Rainham Chemical Works v Belvedere Fish Guano (1921) the use of land for the manufacture of explosives was held to be a non-natural user whilst in Read v Lyons members of the House of Lords took the view that, in time of war, such activity could amount to a natural user of land. The latter view is inconsistent with modern views. In Cambridge Water Co the House of Lords described the storage of chemicals as a classic case of non-natural user. The fact that an activity was socially useful did not prevent it being a non-natural user. Dicta in Transco v Stockport indicates that only the unusual or exceptionally hazardous should be regarded as non-natural users.

In order for a claim to succeed in Rylands it is essential that the claimant establishes that there has been an escape from the defendant’s land: Read v Lyons. This was affirmed in Transco v Stockport.

**Question 4**
According to the Faulks Committee the tort of defamation seeks to preserve the balance between the individual’s right to protect his reputation and the general right to free speech.

Defamation is: ‘The publication 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’ (Winfield & Jolowicz ‘On Tort’).

Such a cause of action, protects the individual’s interest in his reputation, which has implications for both personal and financial safety. It is also likely to inhibit free speech.

There are situations in which it is in the public interest for freedom of speech to override the individual’s interest in reputation. Publications can therefore benefit from the protection of either absolute or qualified privilege.

Absolute privilege provides an absolute bar to actions in defamation. It is not destroyed by malice. Qualified privilege protects publications only to the extent that they are made without malice. Malice in this context includes being aware of or reckless to the untruth of a statement or having a dominant and improper motive when making a statement believed to be true.

Absolute privilege gives protection to statements made on occasions where freedom of speech is essential. For example statements made in the chamber of either House of Parliament attract absolute privilege, as do statements made, either orally or in writing as part judicial proceedings. Fair and accurate reports of Parliamentary and judicial proceedings are similarly protected.

Qualified privilege serves to protect those who act under a legal, moral, or social duty to pass information: see (e.g.) Watt v Longsdon (1930); Horrocks v Lowe (1975). Whilst there do not seem to be any specific judicial definitions or limits set on the precise nature of those duties, it is clear that they must be genuine. The satisfaction of the idle curiosity of others will not suffice.

Its protection extends to the publication in the media of matters in which the public has an interest. This is sometimes described as ‘the responsible journalism defence.’ In order to ensure that it is limited to responsible journalism it is necessary for the defendant to demonstrate that the status and nature of the information was such that the public had a legitimate interest in knowing it. In Reynolds v Times Newspapers (2001) Lord Nicholls put forward an illustrative list of what should be considered when assessing whether the defence had been in established. That list includes criteria going to the nature, source and status of the information as well as to the manner of its gathering.

The defence of justification amounts to a claim that the defendant’s statement was true. Substantial truth is sufficient, it is not necessary that the statement is true in every respect: Alexander v North Eastern Rly (1856). The defence is absolute: i.e. is not destroyed by malice. It may be argued that the fact that the statement is true means that the claimant is not lowered in the eyes of right thinking people by the published statement: rather he is lowered by his own actions and receives the reputation that he deserves.

More significantly the defence protects those who are prepared to speak out. The right to speak the truth may be seen as the central plank to any meaningful right to free speech.
The defence of fair comment protects the right to the honest expression of opinion. It is not concerned with factual statements. Opinion cannot be proved, by its very nature, to be either true or false. The defence does not, however, constitute a licence for the expression of gratuitous, irresponsible, outrageous or dishonestly held views. It is therefore limited by a number of requirements.

The comment in question must be on a matter of public interest. In London Artists v Littler (1969) ‘matters’ of public interest were defined as either of general public interest (e.g. comment on public institutions) or matters expressly or impliedly subject to public criticism or attention (e.g. comment on books or theatre productions).

The opinion expressed must be based on fact. Mere honest belief is insufficient: Campbell v Spottiswoode (1863). The facts supporting the comment need not be expressed in the material complained of: (e.g.) Kemsley v Foot (1952).

To be regarded as ‘fair’ the comment must be objective. In Turner v Metro-Goldwyn-Mayer (1950) the test for this was formulated by Lord Porter as: "..."would any honest man, however prejudiced...exaggerated or obstinate his views, have written this criticism?" The defence is destroyed by malice: see (e.g.) Thomas v Bradbury, Agnew & Co (1906).

Whilst the tort of defamation and its common law defences may give the formal appearance of striking a balance between the interest in reputation and freedom of speech in practice it has been subject to lengthy and severe criticism. The defences are complex and, in places, uncertain. The position was exacerbated by the strict liability rule, in cases of unintentional defamation, as well as by the presumption of damage in cases of libel and some forms of slander.

Attempts have been made to mitigate this harshness. For example, although not a ‘defence’ the Defamation Act 1996 (ss 2–4) set up formal procedure to enable defamation disputes to be resolved at an early stage.

Section 1 Defamation Act 2013 requires that, in order to bring an action, a claimant must now demonstrate actual or potential harm.

Section 2 (1) Defamation Act 2013 provides a statutory defence of truth (replacing the common law defence of justification); D does not have to prove the literal truth of every word provided if he can ‘justify the sting’ in the libel as in Alexander v North Eastern Railway Co (1865).

Section 3 Defamation Act 2013 provides for new defence of honest opinion which replaces the common law defence of fair comment. Honest opinion is a complete defence to an action in defamation. It protects opinions honestly held, however obstinate, prejudiced, or exaggerated. It is judged on the basis of how the ordinary person would understand it. This reflects the test and the terminology approved by the Supreme Court in Joseph v Spiller (2009).

Section 4 of the Defamation Act 2013 provides the defence of publication on a matter of public interest. It abolishes ‘Reynolds privilege’. The defence may be relied on irrespective of whether the statement complained of is one of fact or opinion.
The Defamation Act 2013’s purpose is to strike a fair balance between reputation and free speech. Whether it will succeed in this remains to be seen.

SECTION B

Question 1

In order to advise Bruno it is necessary to consider any claims he may have against Alice and against Tradex. It is also necessary to consider any claim Alice may have against Bruno.

The acts in issue by of each of the parties appear to be intended. The appropriate cause of action is therefore in trespass rather than negligence: Letang v Cooper (1964).

Each act appears to involve trespass to the person. Three distinct torts fall within this category: assault, battery, and false imprisonment.

These torts have a number of characteristics in common. They are all actionable per se (i.e. it is not necessary for the claimant to demonstrate damage). They must each be willed (i.e. the act, but not the consequence, complained of must have been intended). They must be direct.

Bruno’s Claim against Alice in Assault

Assault is an act of the defendant which causes the plaintiff reasonable apprehension of the infliction of a battery on him by the defendant.

The claimant must have reason to apprehend the defendant’s capacity to carry out the threat immediately. Where this is absent a claim for assault is unlikely to succeed: see (e.g.) Mbasogo v Logo (2005). It was long thought that some aggressive movement or gesture was required and that words were insufficient. The House of Lords rejected this view in R v Ireland (1998). The degree of ‘violence’ threatened does not necessarily have to be extreme: (e.g.) holding out a police batten to indicate an intention to prevent escape has been held to be an assault: Hepburn v Chief Constable for Thames Valley (2002).

The facts of the question identify aspects of Alice’s conduct which may amount to an assault. They are: Alice raising her fist and using (in this context) her possibly threatening words.

Two facts may weaken Bruno’s chances of establishing a claim. They are: Alice’s distance from him when she shouted and raised her fist, and her age. It is not necessary that battery may be carried out instantaneously. In Stephens v Myers (1830) the defendant was some yards from the plaintiff when he made threats to drag him from his chair. This was held to be an assault. The issue of distance is therefore one of degree. The facts of the question are insufficiently precise to advise on the issue.

In order to succeed the claimant’s apprehension of battery must be reasonable. Alice is described as ‘elderly’. This might prevent her inflicting serious harm on
Bruno but it need not prevent her touching him, which may be sufficient to establish a claim.

Bruno therefore has an arguable but somewhat uncertain claim in assault.

**Alice’s Claim against Bruno in Battery**

Battery is the intentional and direct application of force to another person. It has been debated whether this requires hostility (Wilson v Pringle (1987)) or mere absence of consent (T v T. (1988); Re F (1989)). On the facts, such discussion is academic: both hostility and lack of consent were present: Bruno struck Alice to the ground because he was furious at being called a thief.

A defence which might be argued in Bruno’s favour is self-defence. The defendant must establish that it was reasonable to defend himself and that the force used was proportionate: Lane v Holloway (1967).

This defence is very unlikely to succeed. From the facts of the question Bruno appears to have acted from anger or a desire for revenge at being called a thief. He waited until Alice reached him, which suggests that that there was no need for him to defend himself; he could simply have driven away before she reached him. His attack on Alice was disproportionate to any perceived threat.

**Bruno’s Claim against Tradex in False Imprisonment**

False Imprisonment is the infliction of bodily restraint which is not impliedly or expressly authorised by law. Whilst the restraint must be total (Bird v Jones (1845)), the action does not require incarceration (Warner v Riddiford (1858)). In Meering v Graham White Aviation (1919) the Court of Appeal found the plaintiff to have been imprisoned from the time he came under the influence of the security guards who asked him to accompany them. Modern decisions indicate that claimant need not have been aware that he was imprisoned in order for the tort to be established: Meering v Graham White Aviation (1919); Murray v Ministry of Defence (1988).

Bruno therefore has an arguable case that he was falsely imprisoned from the moment he came under the influence of Tradex’s security guard whether or not he knew that the guard remained outside the room in which he was detained to prevent his leaving.

The burden of proof is then on Tradex to demonstrate that the imprisonment was not unlawful. Under s 24A Police and Criminal Evidence Act 1984 Tradex must establish the arrest was lawful by showing: (i) reasonable grounds for arrest; (ii) the crime in question was an indictable offence; (iii) the arrest was necessary because the act in question was causing loss of or damage to property; or the perpetrator was making off before a constable could assume responsibility for him.

The crime suspected is theft ((e.g.) R v Morris (1983)), which is an indictable offence. Tradex may argue that its actions were necessary because it was likely that Bruno’s act would lead to a loss of property or that he would make off before a constable could take responsibility for him. In the absence of a conviction Tradex must demonstrate that it had reasonable, objective grounds...
for suspecting Bruno. Suspicion falls short of a *prima facie* case. The fact that Bruno was found not guilty by a court is therefore not conclusive that the suspicion was not reasonable.

At common law if an arresting police officer does not state the reason for the arrest then it is unlawful: *Christie v Leachinsky* (1947). This requirement does not apply to arrests by private individuals. Provided a person arrested by a citizen is brought before a police officer or magistrate as soon as reasonably possible such a detention may not amount to false imprisonment: *John Lewis v Tims* (1952).

Bruno therefore has an arguable claim. His likelihood of success turns on whether or not Tradex can show reasonable grounds for suspicion.

**Question 2**
To advise Charles, Nabila and Harold it is necessary to consider claims in negligence against Olaf and relevant defences.

**Establishing the Claims against Olaf**
To succeed in negligence it is necessary to establish that the defendant owed the claimant a duty of care, that the duty was breached, and the claimant consequently suffered harm that was not too remote in law.

The duty of care owed by road users to other road users is an established duty. As a driver, Olaf is clearly a road user, as are the potential claimants. Olaf owes them a duty of care.

That duty is breached by failing to do something a reasonable person would or doing something a reasonable person would not do: *Alderson B, Blyth v Birmingham Waterworks Co* (1856). The test for breach is objective. The level of skill and judgment required is that of a reasonably competent and experienced driver: *Nettleship v Weston* (1971).

Driving ‘recklessly, zooming in and out of the town traffic’ is doing something which a reasonable person would not do. It is conduct involving risk of a high magnitude: it is likely to cause injury to others and such injuries are likely to be serious. Consequently it amounts to a breach of duty.

Providing he was aware that he had been drinking he may not argue that this ‘disability’ should lower the standard of care by which he should be judged: *Roberts v Ramsbottom* (1980).

The dominant test for establishing causation is the ‘but for’ test - but for the defendant’s breach of duty the damage would not have been sustained: *Barnett v Kensington and Chelsea Hospital* (1963). It is quite clear that but for Olaf’s breach neither Charles nor Harold would have been injured.

Nabila was not injured directly by the collision caused by Olaf’s breach. The ‘but for’ test is unlikely to establish causation. She might however argue that the collision caused her injury by materially increasing her risk of harm: *McGhee v NCB* (1973).
The test for remoteness in negligence is that the kind of damage suffered should be reasonably foreseeable: The Wagon Mound (No 1) (1961). Each of the possible claimants suffered physical personal injury, which in this context is clearly foreseeable.

Arguments which may be used to resist the Claims.

Charles

The failure to wear a seat belt is generally regarded as contributory negligence. Section 1 Law Reform (Contributory Negligence) Act 1945 empowers the court to reduce the damages awarded to the extent that it is just and equitable to do so. Lord Denning MR suggested (obiter) in Froom v Butcher (1976) that damages should be reduced by 25%, where harm would have been avoided altogether, had a seat belt been worn, and by 15% where the harm suffered would have been less.

If the defence is successful Charles’ damages are likely to be reduced by 15%.

Charles’ may argue that his pre-existing seat belt phobia rendered him unable to use a seat belt. He was consequently not negligent. The principle of ‘take your victim as you find him’ means that Olaf should be responsible for all the damage suffered.

In Condon v Condon (1978) the Claimant was held not to be contributarily negligent when she failed to wear a seat belt because she suffered from seat belt phobia. As in Condon, success in this argument would depend upon adequate medical evidence to establish the existence of the phobia.

Nabila

Nabila’s claim is likely to be met with the argument that that her own act caused of her injuries (novus actus interveniens).

Per Lord Bingham in Corr v IBC Vehicles (2008): “The rationale of the principle that a novus actus interveniens breaks the chain of causation is fairness. It is not fair to hold a tortfeasor liable ... for damage caused ... by some independent, supervening cause ...’

Sedley LJ in Spencer v Wincanton Holdings Ltd (2009) said that the chain was broken when ‘...the claimant suffers a further injury which, while it would not have happened without the initial injury has been in substance brought about by the claimant and not the tortfeasor’.

In Dalling v Heale (2011) the Court of Appeal posited a test based on (i) the ‘but for’ test and (ii) whether it is unfair to hold the defendant liable.

To establish a nova causa it is necessary to show that (i) but for Nabila’s act she would not have suffered damage and (ii) her actions were in some sense ‘unreasonable’ thus making it unfair to hold Olaf responsible for the consequences. Where the act is ‘blameworthy’, not necessary, or not in the
usual course of things it is likely to be ‘unreasonable’: McKew v Holland, Hannen & Cubitts (1969). It is clear that but for Nabila’s stepping from the back of the bus she would not have suffered injury. There is nothing to suggest that this act was necessary. She acted against the paramedics’ advice, suggesting that her act was ‘blameworthy’ in that it amounted to carelessness of her own safety.

It is therefore likely that the chain of causation was severed and her claim will fail.

**Harold**

*Ex turpi causa non oritur actio* is a complete defence to an action in negligence. In order for this defence to succeed it is necessary to be able to make a connection between the illegal act and the damage to the claimant.

On the present facts there are two possible connections between Harold’s criminal acts and the damage he suffered. He purchased a quantity of cannabis and was being driven to a club when the accident happened. Whilst driving, Harold encouraged Olaf to drive recklessly and ‘zoom in and out of the traffic’.

In Delaney v Pickett (2011) the claimant was seriously injured in a car collision. Both he and the driver were found by the police to be in possession of substantial quantities of cannabis. The judge inferred that their purpose was to traffic cannabis. The claim failed at first instance on the ground of *ex turpi causa*. The Court of Appeal held overturned the decision, finding insufficient connection between damage suffered and criminal act.

In Pitts v Hunt (1990), however, the claimant, a pillion passenger on a motorcycle, encouraged the rider to ride recklessly, frightening members of the public. The rider was killed and the claimant seriously injured when they collided with a car. The Court of Appeal held the claim to be barred under the principle of *ex turpi causa*.

In Joyce v O’Brien (2013) the Court of Appeal held that where the criminal enterprise meant that unusual or increased risks were foreseeable then the harm could be said to be caused by the criminal enterprise. That is, there is sufficient connection for *ex turpi causa* to be invoked.

Therefore Harold’s claim is likely to be defeated by *ex turpi causa* because of his encouraging Olaf to drive recklessly, rather than because of his possession of cannabis.

Should that defence fail Olaf could argue contributory negligence. In Owens v Brimmell (1977) the plaintive and defendant drank together approximately eight or nine pints of beer each. The plaintiff was injured when driving home because the defendant lost control of the car. The Plaintiff was found to be contributarily negligent and damages were reduced by 20%.

Harold is therefore likely to be found contributarily negligent and his damages reduced accordingly.
Question 3(a)

Neil v Hibernia

In order to advise Hibernia Motors (‘Hibernia’) on its possible liability to Neil it is first, necessary to determine its relationship with Neil and Ben.

If both are employees of the company then it is possible that Hibernia may be liable to Neil both for its possible breach of its employer’s personal duty to Neil and vicariously for the tort of Ben. There are insufficient facts in the question to determine Neil’s status. This answer will therefore be on Hibernia’s possible vicarious liability. In which case Neil must establish that Ben was an employee of Hibernia who committed the tort in question whilst in the course of employment.

In Ready Mixed Concrete (South East) v Ministry of Pensions (1968) McKenna J set out the ‘multiple test’ for deciding employment relationships:

1. the ‘employee’ agrees that in return for a wage or other remuneration s/he will provide work and skill for the employer
2. the ‘employee’ agrees, either expressly or impliedly, to be subject to the control of the ‘employer’
3. the other terms and conditions of the contract should not be inconsistent with there being a contract of employment.

Ben appears to be an employee: he provides work and skill (presumably) in return for a wage or other remuneration (he drives a company car, which may be taken as a form of partial remuneration); he appears to be under the control of Hibernia (he delivers Hibernia’s goods to its customers and is apparently subject to its policy on giving lifts); nothing suggests that other terms and conditions are inconsistent with a contract of employment.

As a driver Ben owed a duty of care to his passenger as a fellow road user. Driving at high speed may be an indicator of negligence, though it is not conclusive.
Hibernia will be liable for Ben’s torts providing they are committed whilst in the course of employment. The long established test for determining this is: (a) was it a wrongful act that was authorised by the employer; or (b) was it a wrongful and unauthorised way of doing an authorised act. In either case the employer will be liable for the acts of the employee (Salmond). In Lister v Hesley Hall Ltd (2001) (a case involving wilful wrong rather than negligence) the House of Lords restated the test saying it was important to look at the closeness of the connection between the nature of the employment and the particular tort. Other factors to be considered were whether tort took place on the employer’s premises and during working hours. However, in Dubai Aluminium v Salaam (2002) the same court emphasised shortly afterwards the importance of earlier authority.

Ben disobeyed Hibernia’s express prohibition on carrying passengers. Whether or not this placed him outside the course of his employment depends upon whether the prohibition relates to the sphere of employment or the way in which employment is performed. In Twine v Bean’s Express (1946) giving a lift to a passenger, contrary to express employer instruction, was held to place the tort outside the scope of employment. In Rose v Plenty (1976), however, the Court of Appeal held that a milkman who (contrary to express instruction) employed a boy to help deliver milk, was in the course of employment when the boy was injured on the milk round. The court distinguished Twine on the ground that in Rose the boy was engaged to further the employer’s business. This is arguably consistent with Ben’s situation: Neil assisted in the delivery of Hibernia’s parts, thus furthering the employer’s business.

Employees travelling between work and home are usually not regarded as being in the course of employment. An exception to this is where a certain mode of transport is required. In the case of travelling salesmen journeys from place to place are within the course of employment. In Smith v Stages (1989) it was said that the issue depends on what the employee was employed to do. In this instance Ben is employed as ‘a parts delivery salesman’ and his vehicle is supplied for ‘driving to various garages in his sales area’. It would be impractical for him to leave the car at the place of his last delivery. He is therefore likely to be considered within the course of employment.

Hibernia is likely to be held liable for any tort he committed.

The Boys v Hibernia
Whether Ed is an employee will be decided upon the criteria in Ready Mixed Concrete. There are insufficient facts in the question to determine whether he is. The wording, however, implies that he is.

The tests in Salmond and in Lister v Hesley Hall Ltd both indicate that Ed is not in course of employment: as a mechanic he is unlikely to be required to demonstrate vehicles, particularly to school children.

Lister indicates that factors to be taken into account include the premises and time in which the tort took place. The assaults may have taken place in the employer’s vehicle and within working hours. It is however submitted that, short of express instructions to demonstrate the vehicle, such is the disconnection
between Ed’s employment and the tort that these are not significant. There is no connection between his employment and school boys.

Hibernia is unlikely to be found liable.

**Question 3(b)**

Wanda is described as an employee in the question.

It is an implied term of the contract of employment that the employer owes a personal (non-delegable) duty of care to employees. In Wilson & Clyde Coal v English (1938) Lord Wright said that the duty took the form of providing competent staff, safe tools and equipment, and safe systems of work.

Damages have been claimed successfully for psychiatric damage resulting from a breach of the duty to provide a safe work method. In Walker v Northumberland County Council (1995), Walker suffered a nervous breakdown as a result of the stress brought about by an increased workload. His employer was, however, aware of his illness and he was dismissed when he broke down for a second time.

Per Coleman J there is no reason why psychiatric harm should be treated as falling outside the scope of the employer’s personal duty of care to employees.

In Sutherland v Hatton (2002) the Court of Appeal produced guidelines for deciding such cases, requiring the consideration of sixteen criteria. The main points appear to be as follows. There are no special rules applying to harm suffered as a result of stress at work. ‘The threshold question’ is: ‘Was the kind of harm being suffered by the particular employee reasonably foreseeable?’ Factors such as the nature and extent of the work, whether the workload was much greater than normal and whether unreasonable demands were being made of the employee should be taken into account. Sutherland makes it clear that it is important that employees who feel that they are suffering psychological harm as a result of stress communicate the fact to the employer.

Judged on these criteria, Wanda has an arguable case: her workload increased markedly and, as she was required to do the work of three persons, it would appear that it was abnormally high and unreasonable demands were being made on her.

The greatest weakness in Wanda’s case is that she failed to inform her line manager of her problem. Against this should be weighed the fact that her distress was obvious to colleagues and, arguably, should have been obvious to an employer which had proper systems in place.

Hibernia should consider settling Wanda’s claim.

**Question 4**

I am asked to advise on possible claims under the Occupier’s Liability Acts. They regulate liability for harm suffered as a result of the state of premises.

Under both Acts the person owing a duty of care is the occupier of the premises. ‘Occupier’ is defined in neither Act. The common law test for occupier is set out in Wheat v Lacon (1966): ‘Wherever a person has a sufficient degree of control
over premises that he ought to realise that any failure on his part to use care may result in injury... then he is an occupier.’ per Lord Denning MR. There can be more than one occupier and the nature of the occupancy determines the nature of the duty: Wheat v Lacon; Fisher v CHT (1966).

Both Global Breweries and Rhino may be occupiers. The appropriate occupier (and, for practical purposes, defendant) is Rhino which, acting through its servant, George, has day to day control of the premises.

**Izaak v Rhino**

Izaak is a lawful visitor. Section 2(1) Occupier’s Liability Act 1957 (‘OLA 57’) provides that the occupier owes a common duty of care to such visitors.

Section 2(2) OLA 57 provides that the duty is to ‘... take such care as in all the circumstances of the case are reasonable to see that the visitor will be reasonably safe in using the premises for which he is invited or permitted to be there’.

Izaak is a plasterer. He is permitted on the premises to practise his trade or common calling. Rhino’s duty is to take care as to ensure that he is reasonably safe when doing so. Izaak was electrocuted because live electrical wires were exposed and came into contact with the wet plaster he was applying to the wall. Rhino are therefore, *prima facie*, in breach of duty.

Section 2(3)(b) of the 1957 Act provides that an occupier may expect a person in the exercise of his calling ‘will appreciate and guard against any special risks ordinarily incident to it, in so far as he is free to do so’. This section serves to lower the standard of care owed and consequently may be argued in Rhino’s defence.

It is, however, unclear whether electrocution is a special risk ordinarily incident to the trade of plasterer. The extent to which Izaak was ‘free’ to guard against those risks is also unclear. The facts of the question may imply that he was under some pressure from George to work despite the risk.

Given that George had actual knowledge that an electrician and plasterer were working at the same time, there was a breach of the duty to keep the premises reasonably safe. Arguments based on s2(3)(b) may not succeed.

Izaak has an arguable case.

**Josh v Rhino**

Like Izaak Josh was a lawful visitor and so falls to be considered under OLA 57. He was permitted on to the premises was to carry out a building inspection. This implies he would move about the building. Josh was electrocuted by merely brushing against a recently plastered wall. Rhino appears to have failed to keep Josh safe and so is in breach of its duty of care under s2(2) of the 1957 Act.

Rhino might argue s2(4)(b) in its defence: it acted reasonably in entrusting the work to a properly appointed contractor. Given George’s actual knowledge that a plasterer and electrician worked at the same time in the building, and the obvious dangers of leaving live wires in contact with wet plaster, Rhino failed to
take appropriate steps to see that the work had been done properly. A defence under s2(4)(b) is unlikely to succeed.

Josh has a strong arguable case.

Tim v Rhino

The 10 feet high fence around the site indicates the absence of licence to enter the premises. Tim is therefore not a lawful visitor. His claim falls to be considered under the Occupier’s Liability Act 1984 (‘OLA 84’).

Under s 1(3) OLA 84 the occupier owes a duty to a non-visitor if: (a) he is aware of the danger or has reasonable grounds to believe that it exists; (b) knows or has reasonable grounds to believe that the other is in the vicinity of the danger; and (c) the risk is one against which, in all the circumstances, he may reasonably be expected to offer some protection.

The knowledge required to satisfy s1(3)(a) is actual knowledge (i.e. subjective) and that for s1(3)(b) is objective (that is, what would a reasonable person have concluded.) When considering s1(3)(c) the court should have regard to factors including the nature of the trespass and the trespasser, with e.g. a greater duty to a young child than to a burglar.

Tim’s parents must show that Rhino had sufficient control of the premises to constitute it an occupier and that the section 1(3) criteria were satisfied. The issues concerning control were dealt with above. There is nothing in the facts to indicate that the occupier had actual knowledge of the danger represented by the ditch. The hole in the fence and worn grass might indicate to a reasonable person that trespassers were often in the vicinity of the ‘danger’.

Section 1(1) (a) provides for liability arising ‘… by reason of any danger due to the state of the premises or to things done or omitted to be done on them.’ Section 1(4) provides that the occupier’s duty is to ‘…take such care as is reasonable in all the circumstances of the case to see that (the non-visitor) does not suffer injury by reason of the danger concerned.’

Assuming that the ditch is necessary to the construction project it is at least arguable that the ditch does not constitute something from which the occupier should protect this trespasser. Whilst Tim is a child of tender years, his attempt not to be seen suggests that he was aware that he was a trespasser and may indicate some undesirable intention on his part.

It is also arguable that the ditch is not a danger ‘due to the state of the premises’: see (e.g.) Tomlinson v Congleton Borough Council (2003). However, the failure to repair the hole in the fence may be seen as a failure to take reasonable care.

Further arguments that Rhino might bring in its defence is parental failure to take reasonable care to protect a child of tender years: Phipps v Rochester Corporation (1955). Both volenti non fit injuria and contributory negligence are available but unlikely to succeed, given Tim’s age. Tim may claim for his broken ankle but not the damage to his jeans (s1(8) of the 1984 Act). The strength of his case is uncertain.