



## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

### LEVEL 3 UNIT 5 – LAW OF TORT

JUNE 2023

#### Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2023 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

### CHIEF EXAMINER COMMENTS

Overall the pass rate decreased by what would be a notable amount, except that it very much fell back into line with the pass rates for 2022 – January 2023's very high pass rate seems likely to be the exception. Candidate performance was varied across the paper, with certain areas of law and types of question strongly influencing the marks.

In terms of paper performance, section A was generally answered well. Candidates did particularly well on Questions 1, 2, 4 and 8. Performance was less strong on Q5, which was expected, but notably very weak on Q3, which was less so. Given the very small number of statutory provisions covered by the unit spec, it may be that these are occasionally overlooked, but conversely because there are few provisions to learn, Candidates are expected to have a robust knowledge of those that do apply.

Section B saw the scenarios matching paper order for popularity. More than half of the cohort answered scenario 1, about a quarter answered scenario 2, and a smaller proportion answered scenario 3:



In scenario 1, Candidates generally did well on psychiatric harm but struggled with question 3, which related to liability for rescuers.

In scenario 2, Candidates were generally strong on the various defences being examined. Given the weight of marks in this area, there may have been an element of self-selection here. Areas candidates could have performed better on were applying volenti/ contributory negligence to the facts and, surprisingly, heads of damages (especially general damages).

In scenario 3, Candidates were strong on setting out the law but struggled with applying it. This was notable on the standard/breach questions in particular.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Section A

#### Question 1

This was a very straightforward question and attracted a very high mean mark, with the vast majority of candidates able to gain both marks.

#### Question 2

As a one mark question, this was a relatively easy question to answer, with more than 80% of candidates gaining the mark. This has been asked as a question worth up to 4 marks and the extra level of detail in those versions definitely makes them more difficult.

#### Question 3

This should have been a relatively straightforward question – as long as candidates were aware of the statutory section. However, candidates seem to have weak knowledge of the (small number of) statutory provisions included in the unit spec and this led to a very low mean mark here. This was lower than expected, but balanced by stronger than expected performance elsewhere in section A.

#### Question 4

This was a question on a topic candidates tend to gravitate toward and so the relatively high mean mark was expected.

**Question 5**

This was a question which neatly differentiated levels of knowledge, with a good spread across the different marks available.

**Question 6**

The same could be said here as on Q5 – a good spread of marks, showing the question catered to different levels of ability/knowledge.

**Question 7**

This was a slightly more difficult version of the question which required knowledge of ‘recent’ (last two decades) law in order for both marks to be achieved. Performance was better than expected.

**Question 8**

Four-mark section A questions can be challenging but as this question was very much a straightforward test of specific knowledge (the provisions of the Limitation Act 1980) performance was strong, perhaps a little stronger than expected.

**Question 9**

This was a 50/50 question in the sense that it gave two possible answers. Given that this question has been asked a number of times, it was expected an even higher majority to have got it right.

**Section B****Scenario 1 – general**

Most candidates chose Scenario 1 (just over 60% overall) although not in numbers that made the other scenarios redundant. This possibly was due to the fact that the scenario focused on liability for psychiatric injury – this has historically always been a very popular scenario topic. It included some more challenging elements, especially those covered by Q3, and this worked well.

**Question 1**

This was a question which asked candidates to identify a key concept and set out the law relating to it. Performance was, as expected, strong in part (b) where candidates could list elements of a legal test, and solid if less strong in part (a) which required wider knowledge.

## **Question 2**

This was a well answered question with many candidates getting full, or close to full, marks on both parts. This was expected to be a question candidates found relatively easy to answer and so it proved.

## **Question 3**

This was another question which performed as predicted – the one area within psychiatric harm that candidates really struggle with is claims by rescuers, and this was the case when this question was first asked. It occurred again here, but this did provide a ‘balance’ to the easier first two questions and also an opportunity for a minority of candidates to really demonstrate their additional knowledge.

## **Question 4**

Performance was really diverse across this question – it tested a different learning outcome to the other questions and so acted as a good differential between candidates who were simply very strong on psychiatric harm and those who were strong across multiple topic areas.

## **Scenario 2 – general**

This was the second most popular scenario, with around 1 in 4 candidates answering it. The scenario mainly tested knowledge of defences. Again performance varied across questions and this was perhaps the best answered scenario overall. There is an element of self-selection here – candidates with a basic to average level of knowledge across the board are likely to be drawn to scenario 1, so those picking this scenario probably were those who felt they had specific knowledge on defences/damages that would make this preferable.

## **Question 1**

This was a straightforward first question which asked candidates to identify a defence (illegality) which candidates tend to grasp very easily, and set out the law relating to it. Performance was, as expected, very strong. Performance was better than expected, perhaps suggesting the self-selection mentioned above.

## **Question 2**

This question required candidates to have an understanding of contributory negligence and volenti. Candidates sometimes confuse these defences, so them coming within the same question could have led to issues with cross-crediting – these were dealt with by establishing a specific policy at standardisation as to what could, and could not, be cross-credited. Performance was as expected in parts (a)-(c), application was poor in (d). There did not seem any particular reason for this.

### **Question 3**

This question was intended to be a slightly more difficult version of a question candidates have come to expect, i.e. what damages a person can claim. By splitting the question, candidates were challenged to think about different heads of damages and this did lower the mark compared to some similar previous questions, making the scenario more balanced.

### **Scenario 3 – general**

This was the least popular scenario, which is probably unsurprising given that two of the areas it examined, the standard of duty and vicarious liability, are areas candidates tend to struggle with. It seems less ‘exam aware’ candidates tended to choose this scenario.

### **Question 1**

Performance on both parts of this question was very poor. –Performance was still below expectations and might have been partly due to some candidates confusing breach with existence of duty. With such small candidate numbers one or two low marks can make a huge impact on mean scores.

### **Question 2**

Candidates did well on (a) and less well on (b) – these were both very much the expected outcomes.

### **Question 3**

A slightly better performance was expected here.

### **Question 4**

Much like Q2, the intention here was for an easier (a) setting out the law and a harder (b) applying it.

**SUGGESTED POINTS FOR RESPONSE****LEVEL 3 UNIT 5 – LAW OF TORT****SECTION A**

Question Number	Suggested Points for Responses	Marks (Max)
1	<ul style="list-style-type: none"> <li>Negligence</li> <li>Nuisance</li> </ul>	2
Question Number	Suggested Points for Responses	Marks (Max)
2	<ul style="list-style-type: none"> <li>Relationship between the victim and the tortfeasor and/or physical closeness.</li> </ul>	1
Question Number	Suggested Points for Responses	Marks (Max)
3	<ul style="list-style-type: none"> <li>In a claim in negligence</li> <li>When determining standard of duty/ whether D should have taken particular steps, court may consider if this may</li> <li>prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or discourage persons from undertaking functions in connection with a desirable activity</li> </ul>	3
Question Number	Suggested Points for Responses	Marks (Max)
4	<ul style="list-style-type: none"> <li>In the zone of danger</li> <li>Some physical harm is foreseeable</li> <li>Recognised psychiatric disorder</li> </ul> <p>Relevant case e.g. Page v Smith</p>	2
Question Number	Suggested Points for Responses	Marks (Max)
5	<ul style="list-style-type: none"> <li>A skilled defendant will be required to carry out a task to the standard of a reasonable person with that skill.</li> </ul> <p>Relevant case law: E.g. Nettleship v Weston (1971), Bolam v Friern Hospital Management Committee (1957)</p>	2
Question Number	Suggested Points for Responses	Marks (Max)
6	<ul style="list-style-type: none"> <li>Defendant must take his victim as he finds him.</li> <li>If due to some personal idiosyncrasy a claimant suffers more than would be expected,</li> <li>the defendant will nevertheless be liable for the full extent of the injury;</li> <li>provided the type of injury was foreseeable.</li> <li>A relevant case: Smith v Leech Brain (1962).</li> </ul>	3

Question Number	Suggested Points for Responses	Marks (Max)
7	<ul style="list-style-type: none"> <li>Traditionally that of employer/employee</li> <li>But now a relationship “akin to employment”</li> </ul> Relevant case e.g. JGE v Trustees of the Portsmouth RC Diocesan Trust (2012)	2
Question Number	Suggested Points for Responses	Marks (Max)
8	<ul style="list-style-type: none"> <li>Limitation Act 1980 (S11)</li> <li>3 year period</li> <li>From date of cause of action</li> <li>Or knowledge of person injured</li> <li>Whichever is later</li> <li>If C dies, period may restart</li> <li>If C disabled, period may be suspended</li> <li>If C a child, period begins on 18th birthday</li> <li>After which claim will be statute barred</li> </ul> Unless court exercises its discretion	4
Question Number	Suggested Points for Responses	Marks (Max)
9	General damages	1
<b>Section A Total: Total marks:20</b>		

#### Section B - Scenario 1

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<ul style="list-style-type: none"> <li>Someone who witnesses a shocking event</li> </ul> But is not in the “zone of danger”/ to whom physical harm not foreseeable	2
1(b)	Relevant case e.g. Alcock v CC of S Yorkshire (1992) <ul style="list-style-type: none"> <li>Proximity of relationship</li> <li>Which requires close ties of love and affection</li> <li>Proximity to accident or immediate aftermath</li> <li>Witnessed with own unaided senses</li> <li>Sudden shock</li> <li>Recognised psychiatric disorder</li> <li>Foreseeable in a person of normal fortitude</li> </ul>	7
<b>Question 1 Total: 9 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
2(a)	<ul style="list-style-type: none"> <li>Mother of the children involved – close ties</li> <li>Was 100m away - proximity in time and space</li> <li>Witnessed with her own senses</li> <li>Appears to be sudden shock</li> <li>Or is there a question/her brooding upon it</li> </ul>	7



	<ul style="list-style-type: none"> <li>Recognised psychiatric disorder – PTSD</li> <li>In the circumstances PTSD would be reasonably foreseeable in a person of normal fortitude</li> <li>A duty is owed/ likely to be able to claim as secondary victim</li> </ul>	
2(b)	<ul style="list-style-type: none"> <li>Father of children – close ties</li> <li>At home – NOT proximate in time and space</li> <li>Heard the accident</li> <li>But senses were not “unaided” (credit any relevant argument on this)</li> <li>Appears to be sudden shock</li> <li>Not a recognised psychiatric disorder</li> <li>A duty is not owed/ unlikely to be able to claim as secondary victim</li> <li>Relevant case e.g. <i>Hinz v Berr</i></li> </ul>	7
<b>Question 2 Total: 14 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
3	<ul style="list-style-type: none"> <li>Modern position that rescuers must claim as primary or secondary</li> <li>Relevant case e.g. <i>Chadwick v BR Board/ White v CC of S Yorkshire</i></li> <li>Cannot claim as secondary victim</li> <li>As no close ties of love and affection</li> <li>Carried out rescue in spite of fire</li> <li>So entered the “zone of danger”</li> <li>Therefore will be a primary victim</li> <li>Will be owed a duty if physical harm foreseeable</li> <li>Relevant case e.g. <i>Page v Smith</i></li> <li>Therefore owed a duty/ should be able to claim as primary victim</li> <li>With a recognised psychiatric illness</li> </ul>	9
Question Number	Suggested Points for Responses	Marks (Max)
4	<ul style="list-style-type: none"> <li>Limitation Act 1980</li> <li>Limitation period for personal injury claims</li> <li>Of three years</li> <li>From accrual of cause of action</li> <li>If does not claim in time will be time-barred</li> <li>Will act as a complete defence</li> <li>Harpreet must claim within 3-4 months from now/by March 2024</li> <li>Otherwise he will be unable to claim</li> <li>Unless he can persuade the court to exercise its discretion</li> </ul>	8
<b>Scenario Total: 40 marks</b>		



## Section B - Scenario 2

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<ul style="list-style-type: none"> <li>• Identification of ex turpi causa</li> <li>• Explanation e.g: no claim for damages can arise from a blameworthy cause</li> <li>• Complete defence</li> </ul>	3
1(b)	<ul style="list-style-type: none"> <li>• Harry is involved in blameworthy activity</li> <li>• Buying stolen goods</li> <li>• Conclusion: Defence of ex turpi causa is likely to succeed</li> <li>• Relevant case law e.g: Clunis v Camden &amp; Islington HA (1998)</li> </ul>	4
<b>Question 1 Total: 7 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
2(a)	<ul style="list-style-type: none"> <li>• Identification of volenti (non fit injuria)/consent</li> <li>• Explanation e.g: no injury can be done to a willing person</li> <li>• Complete defence</li> <li>• Claimant must be aware of risks</li> <li>• Claimant must freely consent</li> </ul>	5
2(b)	<ul style="list-style-type: none"> <li>• Tent pole was insecure</li> <li>• Appropriate discussion of whether Harry was aware of risks</li> <li>• It was Harry's own decision to enter the tent</li> <li>• Harry therefore entered tent voluntarily</li> <li>• Conclusion: Defence of consent is likely to succeed</li> <li>• N.B: Credit reasoned contrary conclusion</li> <li>• Relevant case law e.g: Stermer v Lawson (1977)</li> <li>• N.B: Marks may be transferred between (a) and (b)</li> </ul>	6
2(c)	<ul style="list-style-type: none"> <li>• Identification of contributory negligence</li> <li>• Law Reform (Contributory Negligence) Act 1945</li> <li>• Partial defence only/appropriate reference to reduction in damages awarded.</li> <li>• Defendant must prove that claimant acted carelessly</li> <li>• NB: Credit appropriate case in lieu e.g: Sayers v Harlow UDC (1958)</li> </ul>	4
2(d)	<ul style="list-style-type: none"> <li>• Isla must establish that by entering the tent Harry acted carelessly</li> <li>• He put himself in a dangerous position</li> <li>• Isla must establish causation</li> <li>• Harry contributed to the damage he suffered by entering the tent</li> <li>• Conclusion: e.g the defence is likely to succeed</li> <li>• Harry's damages will be assessed and reduced</li> <li>• Relevant case law e.g: Davies v Swan Motor Co (Swansea) Ltd (1949)</li> </ul>	7
<b>Question 2 Total: 22 marks</b>		



Question Number	Suggested Points for Responses	Marks (Max)
3(a)	<ul style="list-style-type: none"> <li>• Special: Precisely quantified at date of trial</li> <li>• General: Not readily quantifiable at date of trial</li> </ul>	2
3(b)	<ul style="list-style-type: none"> <li>• Loss of earnings to date of trial</li> <li>• £15,000 from business and/or approx. £600 from website</li> <li>• Damage to suit</li> </ul>	3
3(c)	<ul style="list-style-type: none"> <li>• Pain and suffering</li> <li>• Crushed chest/broken arm</li> <li>• Loss of amenity</li> <li>• Inability to play cricket</li> <li>• Loss of future earnings</li> <li>• Income from the website</li> </ul>	6
<b>Question 3 Total: 11 marks</b>		
<b>Scenario Total: 40 marks</b>		

### Section B - Scenario 3

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<ul style="list-style-type: none"> <li>• court will apply the reasonable person test</li> <li>• William is expected to have the skills of a reasonably experienced farm worker</li> <li>• breach of duty of care occurs when the defendant did something that a reasonable person, in the same circumstances, would not have done</li> <li>• or omitted to do something that a reasonable person would have done</li> <li>• it is an objective test</li> <li>• Blyth v Birmingham Waterworks (1856)</li> </ul>	5
1(b)	<ul style="list-style-type: none"> <li>• The reasonably experienced farm worker would not have failed to secure the bull paddock</li> <li>• William ought to have foreseen that failure to secure a bull in the presence of 500 people camping on the farm was likely to lead to some damage</li> <li>• The magnitude of risk from the bull was high</li> <li>• And it would have been practicable to take precautions (lock the gate)</li> <li>• Therefore William's conduct has fallen below the standard of a reasonable farm worker</li> <li>• And he has breached his duty of care</li> </ul>	4
<b>Question 1 Total: 9 marks</b>		

Question Number	Suggested Points for Responses	Marks (Max)
2(a)	<ul style="list-style-type: none"> <li>But for the defendant's negligence</li> <li>the harm/loss/damage would not have occurred</li> <li>Relevant case law e.g.: Barnett v Chelsea and Kensington HMC (1969)</li> <li>But for William's failure to secure the paddock gate allowing the bull to escape</li> <li>Abbey would not have suffered any of the injuries</li> </ul>	5
2(b)	<ul style="list-style-type: none"> <li>The ambulance crew's negligence was sufficient to break the chain of causation</li> <li>between his negligence and the amputation</li> <li>and therefore he is only liable for the broken leg, not the amputation</li> <li>Relevant case Knightly v Johns (1982)</li> </ul>	4
<b>Question 2 Total: 9 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
3(a)	<ul style="list-style-type: none"> <li>court will look at all the circumstance in which the individual works</li> <li>is the employee in business on his own account or working for an agreed wage</li> <li>does he take any risk of loss/chance of profit</li> <li>does he provide his own equipment etc.</li> <li>does he wear own clothes or work's uniform</li> <li>is he able to delegate work</li> <li>Ready Mixed Concrete (South East) Ltd v MoP (1968)</li> </ul>	6
3(b)	<p>Employee status indicated by:</p> <ul style="list-style-type: none"> <li>provision of accommodation and meals</li> <li>and an overall to wear</li> <li>guaranteed 20 hours work</li> <li>stipulation of hours of work</li> <li>told where to work and what to do</li> <li>not allowed to delegate work</li> <li>he doesn't take any risk of loss</li> <li>doesn't provide any equipment</li> </ul> <p>Self-employed status suggested by:</p> <ul style="list-style-type: none"> <li>pays own tax and national insurance contributions</li> <li>On balance, William is likely to be employed</li> </ul>	8
<b>Question 3 Total: 14 marks</b>		

Question Number	Suggested Points for Responses	Marks (Max)
4(a)	<ul style="list-style-type: none"> <li>The doctrine of vicarious liability makes one person liable for the act of another/an employer liable for the wrongful acts of its employee.</li> <li>A tort has been committed</li> <li>By an employee/or a person in a relationship akin to employment</li> <li>The tort was committed by a person acting during the course of employment or involved in an activity closely connected with his/her role in the organisation or not on a 'frolic of his/her own'.</li> </ul>	4
4(b)	<ul style="list-style-type: none"> <li>William has committed a tortious act/ been negligent</li> <li>during course of employment / no evidence that he was on frolic of his own</li> <li>he was feeding the bull on Brent's instructions</li> <li>was possibly doing authorised act in unauthorised way</li> <li>Limpus v London General Omnibus Co Ltd (1862)</li> </ul>	4
<b>Question 4 Total: 8 marks</b>		
<b>Scenario Total: 40 marks</b>		