



CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

NOVEMBER 2023

LEVEL 3 UNIT 5 – TORT LAW

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 November 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

In this final sitting of the L3 Tort paper, a much smaller pool of candidates sat the paper than in previous examinations. Despite the small sample size, the pass rate remained very consistent with the previous paper, dropping only slightly from 74% to 71%.

As was perhaps inevitable with a final sitting of a paper, there was quite a disparity between candidates. Some candidates appeared to have an excellent knowledge and understanding of the area, but a minority did seem to perhaps be sitting the paper simply because it was a last opportunity, rather than because they were ready to do so.

As has been very common throughout the life of the level 3 qualification, candidates tended to be more able to show knowledge of the law than to apply that law to the facts. Performance was generally better in Section A as a result, although some papers did show a real ability to apply the law and these papers tended to achieve the Merit or Distinction bands.



Regarding knowledge, candidates showed particularly good knowledge of the law relating to psychiatric harm, basic but for causation, tests for who constitutes an employee and remedies. Less knowledge was particularly apparent in relation to more complex law on causation and on vicarious liability, as well as on standards of duty.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

This was a straightforward test of knowledge, answered correctly by around two thirds of candidates.

Question 2

Most candidates were able to achieve at least one mark on this answer – this was predominantly the mark for explaining the concept of the reasonable person. Fewer candidates appreciated that this made the test objective in nature, and very few cited a case.

Question 3

All but two candidates were able to give one reason, and most gave two. This question was answered well.

Question

This was perhaps the most disappointing section A question. Candidates would occasionally confuse the factors indicating the existence of a duty of care with what the question was actually asking, the factors which might affect the standard of any duty owed.

Question 5

This question asked about a very important but very simple test, and was answered very strongly as a result.

Question 6

This question was answered well – while it was asked in a straightforward manner, the topic area is often one candidates struggle with.

Question 7: This was a very straightforward question and performed strongly as expected.

Question 8

This question required knowledge of two distinct elements of a test – as such, the mark distribution is similar to previous similar questions, with stronger candidates naming both elements, a smaller proportion able to name one and a similar amount unable to name either.

Question 9

This was a practical question asking candidates about specific heads of damages. As a 3-mark question it was intended to act as a differential and there was a good spread of marks.

Section B

Scenario 1

Question 1

This was a question which required legal knowledge and an ability to spot how the law applied to a list of factors. Most answers obtained at least a pass mark, which was expected as this was an easier question intended to bring candidates into the scenario.

Question

This was a more difficult question and would have been considered the most difficult on the paper. There were still some relatively strong answers and had there been a larger cohort there may have been marks at the very top end of the scale.

Question 3

This was a three-part question which had easier (part a) and harder (part b) elements. Based on the data, it did function in the way with most candidates able to pick up the easier marks but only the stronger candidates obtaining the more complex marks available for discussion of policy.

Question 4

This was a question on what is often a very straightforward area (limitation), but because it did not relate, as such questions usually do, to personal injury, it was made more difficult. Performance was generally quite good here.

Scenario 2

Question 1

This was a question with three marks almost all candidates were able to obtain, setting out the basic law. The remaining marks required application, which tended to be shown only in stronger papers.

Question 2

Much like in scenario 1, this question was intentionally difficult to balance the fact that the other questions in this scenario were on topics candidates tend to perform particularly well on. It acted exactly as intended.

Question 3

Questions 3 and 4 related to psychiatric harm. Strong performance in these questions was expected, and this came to pass.

Question 4: The same comments apply as for Q3.

Scenario 3**Question 1**

These questions were for large amounts of marks but allowed candidates to obtain these in a considerable variety of ways.

Question 2

This was intended to act as the most difficult part of the scenario and one candidate did not perform well on this section, showing a limited understanding of the key concept (causation).

Question 3

Based on larger cohorts, this would generally be considered a more approachable part of the scenario, testing knowledge of two defences candidates tend to have good knowledge of. However, a candidate answering the question did not appear to understand either defence.

SUGGESTED POINTS FOR RESPONSE**NOVEMBER 2023****LEVEL 3 UNIT 5 – TORT LAW****SECTION A**

Question Number	Suggested Points for Responses	Marks (Max)
1	<ul style="list-style-type: none"> • Consumer Protection Act 1987; • Occupiers' Liability Act 1957 or 1984; • Animals Act 1971. Credit alternative statutory torts.	1
2	<ul style="list-style-type: none"> • Objective test • to determine what ought to have been known by a reasonable person in the defendant's position. • Relevant case: e.g. <i>Haley v London Electricity Board (1965)</i> 	2
3	<ul style="list-style-type: none"> • The fear of fraudulent claims; • The difficulty in proving a causal connection between the negligent act and the harm; • The danger of "opening the floodgates". Any other relevant consideration" e.g. the argument that such claims can discourage recovery; or competing medical experts etc.	2
4	<ul style="list-style-type: none"> • The claimant's age. • The vulnerability of the claimant (not the vulnerability of the defendant) • Special characteristics of defendant. • The importance of the defendant's objective. • The cost of avoiding harm. • Magnitude of risk 	3
5	<ul style="list-style-type: none"> • But for the defendant's action • would the harm have occurred? Relevant case law: <i>Barnett v Chelsea & Kensington HMC (1969)</i>	2
6	<ul style="list-style-type: none"> • Actions by the claimant • Actions by a third party • Natural event 	3
7	<ul style="list-style-type: none"> • The employee • Their employer 	2
8	<ul style="list-style-type: none"> • The defendant must show that the claimant knew of the risks attached to his or her conduct and that consent to such risks was freely given 	2

9	<ul style="list-style-type: none"> • Future financial loss • (loss of earnings) • Past & future non-financial loss • (pain & suffering • loss of amenity • mental distress 	3
Section A Total: 20 marks		

Section B - Scenario 1

Question Number	Suggested Points for Responses	Marks (Max)
1	<p>An explanation that makes reference to the following points;</p> <ul style="list-style-type: none"> • Explanation of Control Test • Application: She has to obey reasonable orders • Explanation of Multiple Test <p>Application:</p> <ul style="list-style-type: none"> • She has to wear a uniform • Choose number of hours per week • Any other relevant factor e.g. Tax and NI • Relevant case e.g. Ready-Mix Concrete (1968) • May also be liable where relationship is “akin to employment” • Relevant case e.g. Christian Brothers case • Policy factor for e.g. Midshire Police has more means to compensate • Policy factor against e.g. reluctance to hold police liable • Conclusion: Any reasoned conclusion 	8
2(a)	<p>An explanation that makes reference to the following points;</p> <ul style="list-style-type: none"> • Where a wrongful act is authorised by employer • Or a lawful act is authorised by employer but carried out in an unlawful/unauthorised way • Employee must not be on a frolic of his own • Relevant case law e.g Hilton v Thomas Burton (Rhodes) Ltd (1961) or Gravil v Carroll & Another (2008) • Modern test – close connection • Relevant case on this test e.g. Mohamud v Morrison or Bellman v Northampton Recruitment • Supreme Court decision in Various Claimants v Morrison • May mean that liability is contracting/ less likely 	5

Question Number	Suggested Points for Responses	Marks (Max)
2(b)	<p>An explanation that makes reference to the following points;</p> <ul style="list-style-type: none"> • Mary is performing an authorised act in an unauthorised way • Collection of stationery is authorised • She is collecting stationery (her job) • She is feeding the dog (not job) • Is she on a frolic of her own? • Argument for close connection e.g. on way to collect stationery which is one of her duties • Argument against close connection e.g. visiting her house not connected at all to duties • Reasoned conclusion as to whether she is in the course of employment (Credit any reasoned conclusion) 	6
Question 2 Total:11 marks		
3(a)	<p>An explanation that makes reference to the following points;</p> <ul style="list-style-type: none"> • Tort must have been committed • There must be an employer/employee relationship • Or relationship akin to employment • In the course of employment • Or involved in an activity closely connected with his role in the organisation 	3
3(b)	<p>An explanation that makes reference to the following points;</p> <ul style="list-style-type: none"> • Courts are reluctant to impose duty of care on public authorities • As police are a public authority, courts will be reluctant to impose duty here • Relevant case law e.g: Hill CC of W Yorkshire (1988) • Investigations might be restricted if officers had to be aware of negligence claims • Floodgates argument • However, police immunity is not absolute • Relevant case law e.g: Z and Ors v UK (2001) • Still very difficult to establish liability • Especially where omission rather than act • Relevant recent case law e.g. Michaels v CC of S Wales 	9

3(c)	An explanation that makes reference to the following points; <ul style="list-style-type: none"> • The tort has been committed –failure to log Liam’s call is a breach of her duty of care • Jan’s failure is in course of employment (or activity closely connected with her role) • Relevant case e.g: Century Insurance v NIRTB (1942), Lister v Hesley Hall (2001) • Conclusion: Midshires Police will not be liable, because of public policy. 	4
Question 3 Total: 16 marks		
4	An explanation that makes reference to the following points ; <ul style="list-style-type: none"> • Reference to Limitation periods/Limitation Act 1980 • NOTE 6 years • Because not personal injury • from 1 June 2018 / before 1 June 2024 • Otherwise action is statute-barred 	4
Scenario 1: 40 marks		

Section B - Scenario 2

Question Number	Suggested Points for Responses	Marks (Max)
1	An explanation that makes reference to the following points; <ul style="list-style-type: none"> • Identification: Duty of care • Established duty • Identification: Breach of duty • Harjit has driven negligently. • Identification: Causation • But for negligent driving John would not have been injured • Injury is not too remote • Credit other relevant points and cases 	7
2(a)	An explanation that makes reference to the following points; <ul style="list-style-type: none"> • Identification of reasonable man test • Explanation e.g.: omission to do what reasonable man would do/doing what he would not do • Reasonable man judged objectively. • Relevant case law e.g.: Blyth v Birmingham Waterworks Co (1856) 	4

Question Number	Suggested Points for Responses	Marks (Max)
2(b)	<p>An explanation that makes reference to the following points;</p> <ul style="list-style-type: none"> • Harjit is performing a skill – driving ambulance • Harjit should therefore demonstrate the standard of the ordinary skilled man exercising and professing to have the skill expected of an ambulance driver • Relevant case law e.g.: Bolam v Friern HMC (1957) • Harjit appears to have fallen below that standard • However her act may be justified by the importance of her objective • Application: Harjit was driving an ambulance to the scene of the accident • Harjit’s objective was therefore important • Relevant case law e.g.: Watt v Herts CC (1954) • Also Harjit is acting in an emergency • The court will take a more generous approach to what is reasonable in an emergency situation • N.B. Credit other factors if correctly related to the incident and breach of duty • Reasoned conclusion as to whether or not she has fallen below the expected standard 	10
Question 2 Total: 14 marks		
3(a)	<p>An explanation that makes reference to the following points;</p> <ul style="list-style-type: none"> • Someone not directly involved in the incident • But suffers psychiatric harm as a result of seeing/hearing what happens to others 	2
3(b)	<p>An explanation that makes reference to the following points;</p> <ul style="list-style-type: none"> • Physical proximity exists • Saw and heard events with own senses • Probably sudden shock • Discussion as to whether depression amounts to a recognised psychiatric illness • Foreseeability of psychiatric harm in a person of normal fortitude • No close relationship of love and affection between Fatima and victims of accident • Reasoned conclusion that Fatima cannot therefore claim • Relevant case law 	6
Question 3 Total: 8 marks		

Question Number	Suggested Points for Responses	Marks (Max)
4(a)	An explanation that makes reference to the following points; <ul style="list-style-type: none"> • Someone directly involved in the accident • Or within ‘the zone of physical danger’ • Or fears for his own life 	2
4(b)	An explanation that makes reference to the following points; <p>PV must be able to establish:</p> <ul style="list-style-type: none"> • The existence of a duty of care, breach of that duty and damage arising from the breach • That some harm is foreseeable • A clinically recognised psychiatric illness • Relevant case law e.g.: Hinz v Berry (1970) • Worthy of compensation • Caused by the defendant (1) • If so, primary victim can be compensated for psychiatric harm • Relevant case law e.g.: Page v Smith (1995) • appropriate discussion of the ambulance service being a public authority 	5
4(c)	An explanation that makes reference to the following points ; <ul style="list-style-type: none"> • Discussion as to whether severe depression/PTSD amounts to a recognised psychiatric illness • Izzy was in the zone of physical danger caused by Harjit’s driving • Izzy is therefore a primary victim • Conclusion Izzy could be compensated 	4
Question 4 Total: 11 marks		
Scenario Total: 40 marks		

Section B - Scenario 3

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p>An explanation that makes reference to the following points;</p> <ul style="list-style-type: none"> • Duty of care owed as employer to employee • Usual standard that of a reasonable employer • Relevant case e.g. Blyth v Birmingham Waterworks (1856) • Court will look at knowledge at the time of alleged breach (• Hindsight cannot be used • Relevant case e.g. Roe v Minister of Health (1954) • Up to 1997 dangers of RG not known • So reasonable employer would not have protected • Thus no breach of duty 	7
1(b)	<p>An explanation that makes reference to the following points;</p> <ul style="list-style-type: none"> • Danger of Radiant Green known since 1998 • Which was before A started working for CC • Standard will be that of the reasonable employer • Cost of taking precautions is a relevant consideration • Relevant case e.g. Latimer v AEC (1953) • Cost is low (£50 a year) • Compared to potential harm (serious health condition) • Reasonable employer would have provided a mask • Magnitude of risk test • Relevant case e.g. Bolton v Stone • Risk appears to be high • So high standard of precautions needed • So CC is in breach of duty 	8
Question 1 Total:15 marks		
2(a)	<p>An explanation that makes reference to the following points;</p> <ul style="list-style-type: none"> • Gary is aware that A is not using the mask • Reasonable man would enforce use of the mask • Or provide a suitable alternative • GG is in breach of duty 	4

Question Number	Suggested Points for Responses	Marks (Max)
2(b)	<p>An explanation that makes reference to the following points;</p> <ul style="list-style-type: none"> • There must be a causal link from breach to loss/ breach must cause the loss • Usual test is the “but for” test • Relevant case e.g. Barnett v Chelsea & Kensington HMC (1969) • But for the actions of D, would C have suffered the loss? • Problem with multiple tortfeasors • C could have suffered the damage from exposure by another employer • But for test cannot be satisfied • Alternate approach: material increase in risk test • Relevant case e.g. Fairchild v Glenhaven (2003) • Can apportion between defendants • Relevant case e.g. Barker v Corus (2006) • Note s3 Compensation Act does not apply • GG account for roughly 1/12 of her exposure at best • So will only be able to claim for that proportion 	7

Question 2 Total:11 marks

Question Number	Suggested Points for Responses	Marks (Max)
3(a)	<p>An explanation that makes reference to the following points;</p> <ul style="list-style-type: none"> • Consent/ no harm to a willing person • A complete defence • Requires freely given consent • With full knowledge of risks • A may have full knowledge of risks • Does A know of risk? Unclear • Free consent difficult in employment cases • But it is her choice not to wear the mask despite being provided • Relevant case e.g. ICI v Shatwell (1965) • Reasoned conclusion 	7
3(b)	<p>An explanation that makes reference to the following points</p> <ul style="list-style-type: none"> • Law Reform (Contributory Negligence) Act 1945 • A partial defence • Where C contributes toward injuries/harm suffered • A proportionate reduction in damages • So e.g. where C places himself in position where likely to suffer harm • Relevant case e.g. Fitzgerald v Lane (1988) • Here A has placed herself in harm’s way • By failing to wear the mask provided 	7



	<ul style="list-style-type: none"> • Likely to be contributorily negligent • And have damages reduced 	
		Question 3 Total: 14 marks
		Scenario Total: 40 marks

