

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

LEVEL 3 - UNIT 5 - TORT LAW

JUNE 2022

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 2022 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 dipped slightly after rising in recent examination sessions. Performance was, across the board, a little less strong than in those sessions, although it should be noted that January 2022 saw a particularly strong cohort. As always, certain truisms remain:

- Candidates perform better in section A (knowledge) than section B (knowledge and application)
- Candidates find certain topics (notably duty of care, parts of vicarious liability and damages) easier than others (notably standard/breach and causation)
- Candidates seem to be much more comfortable with long-established legal principles than with law from the last decade or two.

In terms of paper performance, Section A was generally answered well, with the notable exception of question 5 (doctor's duty to warn of risks). Very few candidates seemed aware of the Montgomery case, or of the crucial distinction between "material" and non-material risks.

Section B saw a more balanced split than usual between scenarios – this was most likely due to the fact that psychiatric harm was not examined in section B which is normally a strong attraction to the majority of the cohort. As already noted, some topics definitely lead to stronger performance than others:

In scenario 1, candidates generally did well on duty of care but struggled on the arguably more recondite areas such as 'hindsight' and the Bolam/Bolitho line of cases.

In scenario 2, candidates were strong on the multiple test and its application, but few considered the idea of relationships 'akin to employment'. Candidates were strong on 'but for' causation but very weak on causation in multiple causes situations.

In scenario 3, candidates were strong on *volenti* and, especially, damages; but very few candidates were able to provide a good answer on exclusion clauses.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

This was a very straightforward question, variations of which have been asked before. Three quarters of candidates obtained the mark for this question – the quarter who did not tended to provide an incorrect statute (often mixing up names/years), with a small minority citing a common law tort instead.

Question 2

Performance was, as expected, strong on this question. The case being asked about is probably the most famous in Tort Law as a whole and is usually the first case candidates learn on tort modules.

Question 3

This question was answered well by most candidates, although there was a real spread across the four possible marks. This reflected that the question had a straightforward element (the idea of floodgates meaning many cases) and a more complex element (why that is a problem).

Question 4

The vast majority of candidates obtained at least 50% (i.e. 1 mark) on this question. Strong performance was to be expected given it was a straightforward definition in an area that is historically popular with candidates.

Question 5

This question was answered very poorly. It was the most challenging section A question, given the topic (clinical negligence) and the fact that it involved relatively recent law (albeit from 2015). However, performance was considerably worse than expected with the vast majority of candidates failing to provide an answer attracting any marks at all. Possibly that this is something which tutors are not covering, despite being explicitly mentioned on the unit specification.

Question 6

This was straightforward recall and so unsurprisingly led to good performance

Question 7

The vast majority of the cohort obtained at least one mark – this question worked well as a distinguishing question between pass and higher grades, with some candidates limited to one mark (usually because they considered vicarious liability as synonymous with employer/employee relationships) while stronger candidates obtained both marks by providing a wider definition.

Question 8

Performance was probably better than predicted here, given that the defence of *ex turpi* is not traditionally answered particularly well. That is mainly based on using the defence in the more challenging section B – possibly the removal of the need to apply the law probably made this an easier way in which to encounter the topic.

Question 9

The vast majority of candidates were able to both define the concept of special damages and provide an example. A small number could only do one of the two tasks, and a similarly small number did not gain any marks (usually because of confusion with general damages)

Section B

Scenario 1 – general

Scenario 1 was the most popular scenario, although there was a more balanced split than usual between scenarios – this is most likely due to the fact that psychiatric harm was not examined in section B which is normally a strong attraction to the majority of the cohort. Performance on this scenario usually started strong, with the relatively simple duty of care questions (the fact that these questions began the scenario may have made it a little more attractive, explaining its relative popularity) but weaker candidates tended to struggle with the later questions which focused on standards of care and breach.

Question 1

This two-part question tested knowledge of existing duties of care. It was generally answered well, with a pleasingly small minority of candidates relying on the now discredited idea of a “three stage test” for duty of care.

Question 2

Performance on this question was average. This was as expected – the question was on a difficult topic (the standard of care) but was about as straightforward a question as is possible on that topic. There was a really wide range of all marks given here which was pleasing – the question worked as intended to act as a “benchmark” for papers as a whole.



Question 3

Performance on this question tended to cluster around the pass standard, with most answers either at, just above or just below. This reflected that, anecdotally, the vast majority of candidates had the basic knowledge that professionals are held to a particular standard. Stronger candidates knew case law to support this (and very strong candidates also brought in other relevant factors) while weaker candidates did not get beyond the basic principle.

Question 4

This was intended to be the most challenging question in scenario 1, as it required detailed knowledge of two specific issues in clinical negligence (across two parts). Again, the spread of marks was what one would expect – small numbers doing very well or very poorly, with most candidates displaying some knowledge but not the depth required to go much beyond the pass mark.

Scenario 2 – general

Scenario 2 was the least popular scenario, although only one less candidate attempted this scenario than scenario 3. Performance on the first two questions in the scenario was good.

Question 1

This question was a “classic” question on whether an individual will be in a relationship with an organisation which gives rise to vicarious liability. The field of vicarious liability (and employment law) has been ever changing in recent years and examiners tried to balance keeping the unit up to date with the fact that candidates tend to be slow to react to changes in the law. The good performance on this question suggested candidates are increasingly comfortable with the more modern approach, although as noted in advice to centres, more could still be done on ‘akin to employment’ relationships.

Question 2

This question was a very straightforward question on factual causation, intended to balance the much more challenging question 3. It was answered well on the whole.

Question 3

This was perhaps the most difficult question on the paper and the performance reflected this. The main reason for this was simply the topic being examined – complex issues of causation raised by multiple potential causes of harm are one of the most difficult areas of tort law (indeed, many candidates at undergraduate level find this a very difficult area).

Scenario 3 – general

Given that this scenario focuses on defences and damages, it was expected to be more popular., Performance was generally good, with the notable exception of question 2(a) which functioned exactly as intended to balance the scenario with the other two scenarios.

Question 1 and Question 2

Considering all four-part questions together, all four examined different potential defences. Performance was good on *volenti*, very weak on exclusion clauses and generally quite good on contributory negligence. This is in line with previous papers and was very much expected.

Question 3

This question was a little more polarising, with a cluster of answers achieving top marks and similar proportion at the low end of the marking scale. Anecdotally it could be suggested this was because some candidates chose the scenario in spite of this question – i.e., they knew defences and/or damages, but not breach of duty; while others had revised all three topics and thus were able to provide a good answer to what was, in essence, quite an accessible question.

Question 4

As always, performance on the damages question was excellent.

SUGGESTED POINTS FOR RESPONSE

LEVEL 3 - UNIT 5 - TORT LAW

SECTION A

Question Number	Suggested Points for Responses	Marks (Max)
1	Any of the following: <ul style="list-style-type: none"> • Occupier’s Liability Act 1957 • Animals Act 1971 • Occupier’s Liability Act 1984 • Consumer Protection Act 1987 Any other relevant example.	1
Question Number	Suggested Points for Responses	Marks (Max)
2	<ul style="list-style-type: none"> • Sometimes known as the “neighbour test” • Elucidated by Lord Atkin • Of use in new/novel duty situations, where no established duty of care • D owes a duty to/ not to harm D’s “neighbour” • Being persons so closely and directly affected by my act/ proximity • I ought reasonably to have them in my contemplation/ foreseeability 	3
Question Number	Suggested Points for Responses	Marks (Max)
3	<ul style="list-style-type: none"> • As a matter of policy • If the law makes bringing a successful claim easier • There may be a major increase in claimants/damages paid out • Which might overwhelm the court system And overwhelm defendants/insurers.	3
Question Number	Suggested Points for Responses	Marks (Max)
4	<ul style="list-style-type: none"> • A “primary” victim is one to whom physical injury is foreseeable/ is in the “zone of danger” • Relevant case e.g. <u>Page v Smith</u> 	2
Question Number	Suggested Points for Responses	Marks (Max)
5	<ul style="list-style-type: none"> • Under <u>Montgomery v Lanarkshire Health Board</u> [2015] • A doctor is under a duty to warn of material risks • Test of materiality is whether a reasonable person in the patient’s position • Would attach significance to the risk Or doctor aware that patient likely to attach such significance	3

Question Number	Suggested Points for Responses	Marks (Max)
6	Any of the following: <ul style="list-style-type: none"> • Act of the claimant • Act of a third party • Act of God/nature 	1
Question Number	Suggested Points for Responses	Marks (Max)
7	<ul style="list-style-type: none"> • Where one party is liable • For the acts/wrongdoing of another 	2
Question Number	Suggested Points for Responses	Marks (Max)
8	<ul style="list-style-type: none"> • no action may arise from a base cause • cannot claim if harmed while doing a criminal act • Complete defence • Operation of test: is illegality inextricably linked? • Relevant case e.g. <u>Ashton v Turner</u> (1981) 	3
Question Number	Suggested Points for Responses	Marks (Max)
9	<ul style="list-style-type: none"> • An explanation that highlights special damages can be precisely calculated at the time of trial (or words to that effect) • A relevant example such as: medical expenses to date; time off work; cost of travel to/from medical appointments; repair to property damaged etc. 	2
Section A Total: 20 marks		

Section B - Scenario 1

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<ul style="list-style-type: none"> • There is an established duty of care • Owed by one driver/road user • To another driver/road user • Therefore B owes A, a duty of care 	3
Question Number	Suggested Points for Responses	Marks (Max)
1(b)	<ul style="list-style-type: none"> • There is an established duty of care • Owed by a paramedic/medical professional • To a patient • Therefore C owes B a duty of care 	3
Question Number	Suggested Points for Responses	Marks (Max)
2(a)	<ul style="list-style-type: none"> • The usual standard of care is the reasonable person carrying out the act in question • So the standard is that of the reasonable driver • As an objective test 	7



	<ul style="list-style-type: none"> • This will take no account of experience • So a learner driver would be treated the same as a driver of many years • It is irrelevant that Bode only passed his test last week • Relevant case e.g. <u>Nettleship v Weston</u> (1971) 	
Question Number	Suggested Points for Responses	Marks (Max)
2(b)	<ul style="list-style-type: none"> • Given that visibility was poor • Especially as it was late in the day during winter • Bode was pulling out of a side road onto a main road • It would appear that Bode has not taken sufficient care/ has not acted as the reasonable driver would • Especially as despite driving below the speed limit Agathe was unable to stop in time • Bode is likely to have breached his duty of care 	5
Question Number	Suggested Points for Responses	Marks (Max)
3	<ul style="list-style-type: none"> • Where D is a professional/ exercising a special skill • Then the standard of care is higher • Because D is judged by the standard of the reasonably competent professional/ skilled person • Relevant case e.g. <u>Bolam v Friern Hospital Management Committee</u> (1957). • So basic standard will be that of the reasonable medical professional. • Relevant factor: magnitude of the risk. • Relevant case to support e.g. <u>Bolton v Stone</u> (1951). • Relevant factor: Utility of D's conduct • Relevant case to support: e.g. <u>Watt v Herts CC</u> (1954) • Relevant factor: D acting in an emergency • Relevant case to support: e.g. <u>Ng Chun Pui v Lee Chuen Tat</u> (1988) • Relevant factor: Common practice • Relevant case to support: • Reasoned conclusion as to standard 	8
Question Number	Suggested Points for Responses	Marks (Max)
4(a)	<ul style="list-style-type: none"> • Under the "second limb" • Of the test established in Bolam • D will not be liable if he has acted in accordance with a practice accepted as proper by a responsible body of men skilled in that particular art (or words to that effect) • <u>Bolitho v City and Hackney HA</u> (1998) • The opinion must be reasonable and logical • But does not need to be held by the majority • The court will not choose between two reasonable and logical schools of thought • Here, "a small minority" of doctors in C's favour 	6

	<ul style="list-style-type: none"> • As long as their opinion is logically supportable • C is unlikely to be in breach of her duty 	
Question Number	Suggested Points for Responses	Marks (Max)
4(b)	<ul style="list-style-type: none"> • When judging whether the standard of care has been breached • The court should use the state of knowledge at the time of the alleged wrongdoing • Not at the time of trial • It is a test of foresight, not hindsight • “We must not look at the [past] accident with [current] spectacles” • Relevant case e.g. <u>Roe v Ministry of Health</u> • At the time C treated B there was no reason not to use Exampleoprine • Indeed it was a commonly used treatment • Therefore C acted as the reasonable paramedic at the time • She is unlikely to have breached her duty of care by injecting B 	8
Scenario Total: 40 marks		

Section B - Scenario 2

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<ul style="list-style-type: none"> • Reference to older tests used for employment relationship e.g. control and/or organisation tests • Recognition that multiple test is test used today • Explanation of multiple test • Relevant case e.g. Ready Mixed Concrete • May also be liable where relationship is “akin to employment” • Relevant case e.g. Christian Brothers case 	5
Question Number	Suggested Points for Responses	Marks (Max)
1(b)	<p>Application – in favour:</p> <ul style="list-style-type: none"> • Must wear uniform • Truck painted in corporate livery • Some form of remuneration • Element of control over G • Including reserving a large portion of his working week <p>Application – against:</p> <ul style="list-style-type: none"> • Not paid a salary • Must pay own taxes/NI • Purchased own vehicle • May work for others • Described as “independent contractor” • Insufficient mutuality of obligation • Does not appear to be integrated into organisation <p>Akin to employment</p> <ul style="list-style-type: none"> • No need for employment contract for liability 	10



	<ul style="list-style-type: none"> • Policy factor: LLL has more means to compensate • Policy factor: LLL carrying out a business activity • Policy factor: G to some extent under control of LLL • Relevant case e.g. Cox v Ministry of Justice • However Supreme Court decision in Various Claimants v Barclays • May mean that liability is contracting/ less likely <p>Conclusion</p> <ul style="list-style-type: none"> • Reasoned conclusion either way 	
Question Number	Suggested Points for Responses	Marks (Max)
2(a)	<ul style="list-style-type: none"> • D must be shown to be the factual cause of the harm to C • Which asks “but for” the actions of D would C have suffered the harm? • Relevant case e.g. <u>Barnett v Chelsea and Kensington (1969)</u> 	3
Question Number	Suggested Points for Responses	Marks (Max)
2(b)	<ul style="list-style-type: none"> • There are multiple potential causes of G’s lung condition • It may have been due to the negligence of HH • It may have been due to the negligence of JA • It may have been due to another cause • It cannot be said that “but for” HH/JA’s negligence G would not have the lung condition 	4
Question Number	Suggested Points for Responses	Marks (Max)
3(a)	<ul style="list-style-type: none"> • In <u>Wilsher v Essex AHA</u> • Held that under “but for” principles • The tortfeasor’s act must, on the balance of probabilities, be the factual cause • But for policy reasons • Cases involving employment are treated more generously/ cases involving the NHS are treated less generously • In <u>Bonnington Castings v Wardlaw</u> • An alternative test of “material contribution to the harm” was created • C must show D’s negligence made a more than negligible contribution • In <u>McGhee v National Coal Board</u> • It was held that all that is required is material contribution to the <i>risk</i> of harm • In <u>Fairchild v Glenhaven Funeral Services</u> • The court held that multiple tortfeasors were jointly and severally liable • But subsequent cases have held that employers are only proportionately liable • According to their contribution 	10

	<ul style="list-style-type: none"> • Relevant example e.g. <u>Barker v Corus</u> (2006) • Calculated by the period of time they employed the claimant • There is an exception under Compensation Act 2006 • But this only applies to asbestos claims 	
Question Number	Suggested Points for Responses	Marks (Max)
3(b)	<ul style="list-style-type: none"> • G was exposed to engine fumes for 10 years while working for HH • If the test in Wilsher is used it is unlikely HH will be liable • Because G worked for them for less time than II • However, if the material increase test is used, it is likely HH will be liable • This is clearly a more than negligible contribution to the risk • It is more likely that this test will be used in the employment context • However, HH will only be proportionately liable • 10 of 30 years of exposure was while working for HH • So HH are likely to be liable for 1/3 of G's total loss • The Compensation Act does not apply because this is not an asbestos claim 	8
Scenario Total: 40 marks		

Section B - Scenario 3

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<ul style="list-style-type: none"> • A complete defence • Where C has full knowledge of the risk • And freely consents to it • Relevant case e.g. <u>ICI v Shatwell</u> (1965) 	4
Question Number	Suggested Points for Responses	Marks (Max)
1(b)	<ul style="list-style-type: none"> • Nina will know that there is a risk of injury playing sport • And consents to the ordinary risks of the game • But slide tackles are banned/ outside the ordinary risk • So Nina does not know that such tackles are a risk she is taking • Nor does she consent to it • The <i>volenti</i> defence is unlikely to be successful 	5
Question Number	Suggested Points for Responses	Marks (Max)
2(a)	<ul style="list-style-type: none"> • 2015 Act because Manoj is dealing as a consumer • Liability for property damage is not prevented by the Act • But under section 62 • A term must not be unfair • Unfair = contrary to the requirement of good faith... 	8

	<ul style="list-style-type: none"> • ...it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. • Reasoned argument that fair, e.g. reasonable to exclude liability outside of lockers • Reasoned argument that unfair, e.g. removes obligation of PP to control own property 	
Question Number	Suggested Points for Responses	Marks (Max)
2(b)	<ul style="list-style-type: none"> • Where C contributes to their own injury • Under the Law Reform (Contributory Negligence) Act 1945 • Con neg is a partial defence • Which reduces damages awarded • By a proportionate amount • M has left an extremely valuable item in the changing room • He has not used the lockers provided • Despite being warned to do so • However he did believe the room would be locked • Reasoned conclusion as to likelihood of defence 	8
Question Number	Suggested Points for Responses	Marks (Max)
3	<ul style="list-style-type: none"> • In addition to the general standard of reasonableness • The court will use the magnitude of risk test • The greater the risk, the higher the standard expected • Relevant case e.g. <u>Bolton v Stone</u> (1951) • In this case the risk is common • As five walkers have been struck in the past six months • The existing fence is clearly not sufficient • The reasonable person would guard against such a risk/ improve the fencing • Relevant factor: Social utility of D's conduct • Relevant case to support: e.g. <u>Watt v Herts CC</u> (1954) • Relevant factor: Cost of avoiding harm • Relevant case to support: e.g. <u>Latimer v AEC</u> (1953) • So PP are likely in breach of duty 	7
Question Number	Suggested Points for Responses	Marks (Max)
4	<ul style="list-style-type: none"> • "Special damages" used either as an accurate heading of such or accompanied by an accurate definition • Any cost of medical treatment/prescriptions etc. • Cost of physiotherapy • Transport costs to/from hospital/physio etc. • Lost earnings for time off work • Property damage for anything damaged by fall • "General damages" used either as an accurate heading of such or accompanied by an accurate definition 	8

	<ul style="list-style-type: none">• Pain and suffering• Loss of amenity• Including inability to go on long walks• Any other valid response	
Scenario Total: 40 marks		

