**CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES**

# LEVEL 6 UNIT 13 – 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

Whilst the new case law on negligence has become increasingly prevalent in the last couple of sessions, there is a continuing need for centres and candidates to stay abreast of developing principles within new case law across all of the areas covered. As society modernises so do, for example, the situations considered to be employment. In addition, cases relating to the circumstances that would constitute the 'immediate aftermath' in claims relating to psychiatric harm. Whilst traditional and stereotypical case law remains relevant, it is imperative that candidates remain as up to date as possible. This may lead to candidates not being able to correctly identify current issues expected within essays and facts that relate to recent case law developments reflected within problem questions.

There was an improvement in candidates addressing the specific wording of essay questions as opposed to merely citing legal knowledge on the topic the essay question covers. This is encouraging. Candidate must always be prepared to discuss issues of concern within individual legal areas. Simply reciting legislation and case law will not suffice as marks for legal knowledge are capped and so without analysis of the principles that are addressed within the question, candidates will be unable to gain more than approximately half of the marks awarded.

The use of case law still requires some additional work by most candidates. Those that achieved a merit or distinction grade will have approached their use of case law in such a way that the judicial

mindset and reasoning for the outcome of cases is explained and used to address the question. Alternatively, the impact of the outcome of cases on those involved has been used to illustrate concerns within areas of law. This is how candidates can gain full marks, as simply citing case law and knowing the outcomes will only gain marks for knowledge and lose out on marks for analysis.

There was a distinct lack of 'repetitive' conclusions. This is, once again, very encouraging. Conclusions should attempt to conclude the debate with information such as progress on any reviews or recommendations or developments in case law principles. A summary of previously stated facts and authority cannot be credited. Those candidates with good answers refrained from summarising and focused on bringing the discussion to an end.

There continues to be a common issue when answering problem questions. A candidate's approach to these is vital and this must include an approach that covers the relevant legislation and case law, along with a clear and logical application of those laws and principles to the facts given.

As with repetitive conclusions, marks will not be awarded for the same issue twice. For example, within the trespass to person question there appeared to be two assaults. When candidates find themselves faced with this in a question, they should be aware that there must a distinguishing feature or reason as to the apparent inclusion of an issue twice. In this situation, it would more than likely mean that one would be an assault whilst the other would be negated. This is done for candidates to show their legal understanding of the types of questions courts have been faced with, such as when words given may or may not constitute 'immediate.'

Candidates must avoid repeating the facts given in a problem question within their answer as if they are explaining what happened. They are advising the clients involved and so can assume that the 'reader' knows what happened. The inclusion of the wording within a problem question should only be incorporated into an answer when used to illustrate a candidates reasoning. No credit can be given for reciting facts provided in the question.

Candidates should refrain from definitively deciding whether a defendant is or is not liable. Candidates are only asked to advise clients and therefore should not answer as if the case has been decided. Candidates should illustrate their legal understanding by discussing the different legal tests and principles defendants and claimants will face during their case and the potential impact these may have on the outcome.

Each question, whether it is an essay or problem question, will generally only cover one area of law. So, for example, information regarding employers' liability in the workplace would not be required for an essay relating to vicarious liability. If more than one area of law is required within a question, such as defences combined with defences, this will be made very clear in the wording of the question. Candidates should be careful to note the area of law requested from them in the question and take care not to divert to different areas of law as there will be no marks allocated for this information within the mark scheme.

Timing was less of an issue this year, which is again, encouraging. It is important that candidates survey the exam as a whole and allocate time accordingly to ensure they can complete the number of questions required in the time given.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Section A

**Question 1 (psychiatric harm)**

This was an extremely popular question. For the most part it was answered well with candidates showing good knowledge of the principles and the case law they derive from. However, whilst it is important that those historic and leading cases (e.g., Alcock, Page, White) are known and used, it is also important that candidates stay abreast of new case law and developing principles, particularly those covering more novel situations.

Principles to apply when the courts are debating whether a claimant was at the 'immediate aftermath' typically originate from the case of McLoughlin [1983] and this is a vital case to be aware of. However, candidates are advised to maintain knowledge of more recent case law development. In 2003, in Galli-Atkinson v Seghal the courts debated their approach when a claimant stated they were in an immediate aftermath that whilst being sometime after the shocking event, was a scene which had not yet been cleaned. The claimant had seen their daughter's body in the morgue, and this was deemed to be within the meaning of the immediate aftermath, which stood in direct contradiction to the ruling in Alcock in which claimants had searched for their loved ones in the temporary, makeshift morgue at the site of the disaster and were denied compensation. 'Grey areas' such as these are required for candidates to fully illustrate to potential claimants' the potential impact of these rulings.

One of the more modern, and important cases is that of Taylor v A Novo [2013]. The court not only stated that it should be considered whether subsequent harm caused is different to the original harm but also considered the proximity issue when cases relate to a deterioration in a primary victim's condition. The claim failed based on the court's interpretation of a lack of proximity. The court's approach has always been to restrict claims to the 'immediate aftermath' and considered this to be as close to the shocking event as possible to maintain the scope of liability.

Confusion and criticisms led to the introduction of the Negligence and Damages Bill 2015/16 in which many reforms that had been recommended were proposed. These would have extended the scope of liability to include those that were not considered under a strict interpretation of proximity. This would include those that suffered a psychiatric injury some time following the original event and those not present but suffer psychiatric harm when they are notified of the incident. However, the Bill has not yet progressed beyond the First Reading as it came about in the shadow of the outcome of the inquest into the Hillsborough disaster in which the deaths were ruled unlawful. This led to multiple claims for compensation against the police and the progression of the Bill is unlikely to continue whilst the courts are dealing with these claims.

Issues and developments such as these were not comprehensively used by many candidates. Knowledge of the cases involved will only gain credit for analysis when the reasoning for the outcomes and/or the impact of these rulings have also been discussed.

This judicial mindset continued until the conjoined cases of Paul, Polmear and Purchase reached the Supreme Court in May 2023. All 3 cases involved the deterioration and eventual death of a primary

victim. The case of Taylor rendered the Court of First Instance and the Court of Appeal bound to dismiss the claim due to the lack of proximity. Each claimant had developed their 'injury' over time following the original event/negligence. The lower courts had considered the subsequent outcome, such as the primary victim's death, as a 'separate event removed in time from the original negligence' and therefore excluded it from the scope of liability. However, the court, whilst ultimately bound to come to this decision, expressed discontent. Vos MR stated that he would be willing to allow claims such as these if he had been able to deal with the case with a "clean sheet" and not bound by Taylor. It was the courts' belief that allowing these types of claims would not go against the "thus far and no further" approach and was instead a different factual situation. The Supreme Court's ruling has not yet been delivered but considering the changes proposed within statute and changes to the courts attitude to these claimants, a fundamental change to this area of law may occur.

Another area of contention that was not fully utilised by candidates is that of the requirement of having a close tie of love and affection with the primary victim for a claimant to be considered a secondary victim.

Relationships such as those between work colleagues have been subject to a long-standing exclusion but conflicting case law resulted in unjust and confusing outcomes. Earlier case law such as Dooley v Cammell Laird in 1951 and Wigg v BRB in 1986 had allowed workplace claims for those that had suffered psychological injury due to feeling responsible for someone else being injured or killed. However, in Hunter v British Coal in 1999 the court did not allow the claim even though the claimant had been only yards from the incident and heard the explosion. The defendant was a driver that crashed into a hydrant. As he left for help, a colleague at the scene was killed when the hydrant exploded. However, the court ultimately denied this claim based on the lack of foreseeability in that the claimant would have suffered psychological harm when he was notified that the explosion had caused a death.

The Private Members' Bill in 2015/16 had also proposed to extend the category of those deemed to potentially have a close tie of love and affection with primary victims. This would have included siblings, aunts and uncles and colleagues and friends. This could alleviate much of the harshness attached to these cases that have raised so many concerns.

Candidates must remember that the total marks awarded per question will be split between knowledge and analysis and therefore, only answers that can discuss the developments and mindsets involved will be able to gain full marks.

**Question 2 (causation)**

Very few candidates answered this question and those that did primarily provided the stereotypical causation cases and those that address multiple tortfeasors. There was a lack of development of the issues that these divisions can create and explanations of, not only the outcome of cases, but the impact they have. However, those that did attempt it did show a good understanding of these issues.

Leading cases such as Performance Cars v Abraham [1962]; Baker v Willoughby [1970] and McGhee v National Coal Board [1973] clarifying the scope of liability should be discussed alongside traditional cases involving simultaneous culpability (e.g., Fitzgerald v Lane [1989]).

However, more recent cases should also be addressed. More clarification on the scope of liability has been provided in cases such as Rahman v Arearose [2001] and much discussion has arisen since the cases such as Webb v Barclays Bank [2002] and Reaney v University Hospital of North Staffordshire NHS Trust [2015] relating to issues involving medical treatment and differing types of harm suffered from subsequent incidents.

Cases such as those above show the courts approach has been flexible and subjective. They have been willing to extend the scope of liability and have laid out clear principles for the application of principles to determine the apportionment of blame. As always it is imperative that candidates do not only discuss the facts within a case but discuss the *ratio decidendi* behind the ruling and use that, along with the impact, to directly answer the essay question. Too often answers are a mere overview of case outcomes with no direct reference to the requirements of the question.

**Question 3 (nuisance)**

This was a popular question. The question was divided into two parts. The first required candidates to outline the principles underlying the tort of nuisance. The second part required candidates to discuss the courts approach when applying those principles to the different types of cases that come before the courts. Candidates showed good knowledge but provided a lack of discussion beyond the outcomes of cases as opposed to the decision-making process the courts used when applying principles.

Traditional and historic cases such as Miller [1975] (public interest) and Robinson (1889) (sensitivity) were given, however, candidates must have a more up to date understanding of the different balances the courts must consider. For example, more recent cases such as Grange Wind Farm v North Lincolnshire County Council in 2010 show the courts having to consider the element of locality faced with a novel claim involving an impact on children with autism.

One of the latest cases under the spotlight is that involving the right to not be overlooked in the Fearn v Tate Gallery case. At first instance and in the Court of Appeal the claim for an injunction against the walkway that allowed visitors to see into residents' homes was dismissed. However, early in 2023 the Supreme Court ruled that the walkway did in fact allow visitors to cause a nuisance as they were able to cause a substantial interference most of the day every day. The court highlighted how there is no limit to what can constitute a nuisance. The constant observation the residents in this case were subjected to, according to the court, was a level of intrusion beyond what an ordinary person would consider reasonable. The use of the land by the Tate Gallery also did not constitute an ordinary use of land as their purpose was not to invite people to admire the view from the gallery from a platform.

As a sideline the court also noted in this case that public utility is not a defence in these claims and is predominantly considered in relation to the justification of damages as opposed to an injunction but that it should not completely deny a claimant a remedy.

Additional issues such as the ability of the tort of nuisance to deal with situations that arise in modern cases, such as the requirement of a proprietary interest does not match with the modern conditions surrounding land ownership and occupation. This requirement confirmed in the case of Hunter v Canary Wharf in 1997 results in certain groups of people that are suffering from a nuisance being unable to claim for a remedy.

The law on nuisance has also created problems involving planning permission decisions. Those making decisions relating to planning are not able to consider the impact on individuals but only the local area in its entirety. Damages as a preferred remedy leaves unanswered questions such as how this will impact subsequent owners and if changes made in a case alter the perception of a locality i.e., considered more industrial than previously believed to be, this will make it harder for others in the area to bring claims.

Key ideas and changes such as these are vital if candidates wish to gain the marks allocated for analysis.

**Question 4 (vicarious liability)**

This was an extremely popular question and candidates showed a good understanding of the principles and case law that underpin this area of law. However, as mentioned above with the other essay topics, a more modern understanding of rulings and developments must be illustrated in a candidate's analysis.

Lady Hale, in Various Claimants v Barclays Bank in 2020, outlined the case law history in which the scope of vicarious liability had developed with it origins being in the House of Lords in Lister v Hesley Hall in 2001. Lady Hale discussed how leading cases such as E's Case [2013], Various Claimants v Catholic Child Welfare Society [2013], Woodland v Swimming Teachers Association [2013], Cox v Ministry of Justice [2016] and Armes v Nottinghamshire Country Council [2018] had involved debate and clarification of who exactly could be seen as an employee to give rise to vicarious liability.

Lady Hale highlighted how different judges had differed in their approaches. Some had applied a policy-based approach, considering, for example, how employers are more able to afford compensation, whilst others based their rulings on a comparison of those 'employed' and those that worked under conditions that constituted a 'relationship akin to employment.' She noted how, in relation to Cox, these cases can often have the same outcome regardless of the test that is applied. Candidates must be willing to address these contentious areas with an understanding of the court's methodology.

Courts have traditionally assumed that a person would be an employee for all purposes such as the payment of taxes, however, Lady Hale stated that "recent developments have broken that link" and spoke of how it would be tempting for the law to align itself with the distinction provided for 'workers' within the Employment Rights Act 1996 (specifically under s230(3)). Despite this appearing to be simpler, Lady Hale distinguished the divisions given by statute and the court by explaining they are both based on a "different set of rules." Cases such as these have resulted in the courts finding themselves trying to provide justice for victims injured by those not traditionally considered an employee, particularly those working within the 'gig economy.' Discussions such as these by Lady Hale in the trial transcripts can aid candidates to understand and include within their answers many of the reasons behind the decisions that determine the principles to be applied. Understanding Lady Hale's reasoning in which she claims that "it would be going too far down the road to tidiness for this court to align the common law concept……..developed for one set of reasons, with the statutory concept….developed for quite a different set of reasons" can be key in developing answers that require a discussion of, for example, a courts approach.

The continued development of this area of law has received much public attention in recent years due to, for example, the case of Uber v Aslam. In 2021 the Supreme Court confirmed that the courts modern approach when determining the nature of an employment relationship, involved a disregard for documentation or contractual terms. Instead, the courts use a statutory interpretation and focus on the conditions of employment that "reflect the reality of what is occurring on the ground."

Other prominent cases within this area include those involving an employee that has committed a criminal act. Cases such as Mohamud v Morrisons [2016], Various Claimants v Morrisons [2020], Isma Ali v Luton Borough Council [2022], Chell v Tarmac Cement & Lime [2022] and Schokman v CCIG Investments [2022] were raised by many candidates, along with cases involving independent contractors, such as Hughes v Rattan [2022]. As within the case of Barclays, the courts provide a modern outline of their reasoning for the limitations on the scope of liability and clarification for the modern employment-type circumstances brought before the courts. Lady Hale provided a comprehensive overview of the court's mindset, highlighting that much emphasis had been placed on the lack of compensation for victims if the scope of liability was extensively restricted. Comparisons given of the judicial mindset of other jurisdictions such as Scotland and Canada also provide an insight as to the reasoning behind changes in the courts current view and application of principles to those deemed to be 'employed' and 'within the course of employment.' The understanding and inclusion of these developments are vital for candidates to be able to gain full marks.

**Section B**

**Question 1 (occupiers' liability)**

This was an extremely popular problem question.

Many missed the opportunity to develop discussions relating to the system of checks and risk assessments undertaken by occupiers. As far back as 1976 the courts highlighted how occupiers should have a good system of checks in place and cases such as Allison v London Underground [2008]; Hufton v Somerset County Council [2011]; White Lion Hotel v James [2012]; Lougheed v On The Beach [2014]; and, Kennedy v Cordia Services [2016] reiterated the ability of occupiers to escape liability if they could show they had undertaken a risk assessment and acted as a reasonably prudent occupier in taking steps for identified risks.

The Occupiers Liability Act 1984(s1(3)(a) and cases such as Buckett v Staffordshire County Council [2015] discuss how if the occupier has been aware of previous incidents and have not taken reasonable steps, they will be liable. Contradictions between cases such as Buckett in which the claim failed with earlier cases such as Young v Kent [2005] could have been used to debate the correct application. For example, in Young the youth club had previously identified risks associated with a skylight, precautions could have been taken at a low cost to the occupier and therefore the defendant was found liable (although there was a 50% deduction made based on contributory negligence). In Buckett, the skylight had been deemed to be an obvious risk which the occupier did not need to warn against, and the claim was dismissed. Care should be taken by candidates to not decide liability but to merely use cases such as these to advise the client as to potential outcomes and reasons why.

A case that directly relates to one of the claims within the problem question is that of Hollywood v English Heritage in 2021 in which the occupiers' escaped liability as they had undertaken a risk assessment, taken reasonable precautions, and concluded that a handrail would not have prevented the incident that gave rise to this claim.

Good answers included a discussion of cases such as Dawkins v Carnival plc in 2012 that contained consideration of the number of staff present/involved in an incident causing harm. One of the most recent cases, Murphy v Milton Keynes Parks Trust in 2021 reiterated and clarified that occupiers were not expected to prevent all harm but to take reasonable precautions only with an emphasis on ***reasonably safe***. Good answers rightly discussed the issue of allurements such as the one contained within the problem question and the relevant case law that guide the courts.

Some candidates did not take note that the child had been left in a creche and therefore the question of the responsibility of the parents or guardians should not have been lengthy considering those leaving children in this type of establishment typically do not remain with their child and expect those responsible for the childcare to have fully considered the risks associated with children.

Candidates are advised to elaborate on an occupier being able to transfer their duty to an independent contractor. There are conditions imposed before an occupier is able to do this, such as the level of care taken in hiring the contractor and the ability and level of supervision required by occupiers in each case.

**Question 2 (trespass to the person)**

This was also an extremely popular question. Most candidates provided a good overview of the elements of each of the torts in this area of law. However, answers relating to the false imprisonment by both the department store and the police were weaker.

Good answers debated the issue of horseplay for the introductory incidents within the problem question. The courts have been willing to treat children as an adult if it can be shown that the tort committed was deliberate, for example pushing someone into a pool (Williams v Humphreys [1975]. The court in Wilson v Pringle in 1986, confirmed that it is not the harm that is to be intentional but the act itself. One of the most cited cases is that of Blake v Galloway [2004] in which the court decided that the claimant's knowledge of the 'rules of the game' resulted in their claim failing. One of the most recent rulings is that of Orchard v Lee in 2009 in which the court confirmed that a child would have to act carelessly to a high degree for liability to arise.

Some candidates debated whether the claimants were in fact imprisoned and the impact of whether they were aware of such. Previous case law in Herring v Boyle in 1834 had stated that knowledge of restraint was essential, however, the subsequent case of Meering v Grahame-White Aviation in 1920 ruled that a claimant can in fact be asleep, unconscious, or merely unaware they are unable to leave. The fact that the security guards from the department store in the problem question were outside the room did result in the two boys being restrained and therefore did constitute false imprisonment. Cases such as Jalloh v Secretary of State for Home Department in 2020 confirmed that a physical barrier is not necessary, for example, the perceived or threatened consequences of attempting to leave may render the claimant restrained sufficiently to constitute false imprisonment.

When cases involve claims against the police, the powers given under the Police and Criminal Evidence Act (PACE) 1984 apply. Provisions within PACE state that the reviewing of a person's detention must take place within the period time periods for the detention to remain lawful. Cases such as Roberts v Chief Constable of Cheshire [1999] confirm that this duty is absolute and can result in a lawful detention becoming unlawful. One of the claimants were held for 3 hours longer than the permitted 24 hours and this occurred without officers seeking authorisation from a superior officer, resulting in the final 3 hours of detention being unlawful, therefore constituting false imprisonment.

**Question 3 (causation and damages)**

Despite the instructions that accompanied the question stating that elements relating to a duty of care had already been established, some candidates proceeded to analyse these elements. No marks had been allocated to elements such as breach and therefore candidates must take care to only provide answers containing the information requested by paying particular attention to any instructions given alongside the question itself.

This problem question required a focus on the courts approach to apportioning culpability and damages when cases involve poor medical treatment. Many candidates were easily able to raise and apply the leading cases for causation. However, weaker answers failed to address the issues using more recent case law, particularly that of Webb v Barclays Bank & Portsmouth Hospital [2002], and fully developing a discussion relating to bad medical advice and/or treatment and its ability to break a chain of causation.

The coverage of damages was comprehensive, candidates showed a good understanding of the heads of damages and addressed losses such as earnings and the requirement of adaptations to her home. An area of concern was exhibited within discussions relating to the claimant's loss of being signed as a professional footballer. Cases that can be applied include Allied Maples Group v Simmons & Simmons [1995] in which the court described how the claimant must have had a 'real and substantial chance' at the 'lost career' to be able to claim under this head. Courts are willing and able to consider multiple potential outcomes and apply discounts to account for contingencies (see e.g., Langford v Hebran [2001]). In Herring v MoD [2003] the court used a base line career model to 'follow' potential paths and earning capacity. Candidates should ensure that they can cover not only the key and stereotypical heads of damage but also those giving rise to 'grey, speculative areas' such as these.

**Question 4 (defences)**

Despite the wording of the question confirming that the elements relating to a duty of care had been established, some candidates worked through those elements. There are no marks allocated for this information in this type of question and therefore, candidates should be careful to only focus on and provide the information they are asked for.

Another technique of concern is candidates running through all three defences on all the claimants. The defences will be separately attributed to each claimant as points cannot be allocated for running through the same type of information twice. Examiners wish to see evidence of a range of issues being applied and therefore, candidates should take time to identify the correct defence for each claimant and only provide the legal rules and reasoning for this per claimant. This will save a lot of time. If there appears to be two claimants with the same potential defence – as with this year's

question on defences in terms of contributory negligence – bear in mind that there must be a significant difference between the circumstances for each of the claimants. This year one of the claimants could be held as contributorily negligent due to being in the road when she was injured. This should have led to candidates discussing the balance the courts have to find when dealing with passengers and drivers and the additional element of one or both being intoxicated. Another of the claimants could potentially be held as contributing to their injuries due to a medical condition preventing or deterring them from wearing a seatbelt. This gave candidates the opportunity to discuss leading cases such as Froom v Butcher [1976] but to also address when these cases are not as straightforward such as in McKay v Borthwick [1982]. Candidates should take care to note facts that will need to be distinct and addressed to show how courts modify their approaches when necessary.

There were still several candidates that discussed consent as defence for Peter against his passengers. Section 149 of the Road Traffic Act 1988 prohibits this as a defence in these situations. Simply because a passenger accepts the risk of negligence on the part of the driver does not mean that the driver can escape liability for any such negligence. This is not the same as the passenger 'consenting'. Instead, in these cases, drivers can alternatively try to use the defence of contributory negligence, for example, if they were aware of the level of intoxication of the driver.

If both the claimant and the defendant were intoxicated, this can give rise to contributory negligence on the part of the claimant (Owens v Brimmell [1977]), however, if the passenger did not know of the intoxication of the driver, this defence will clearly fail (see Malone v Rowan [1984 and Traynor v Donovan [1987]). The courts have also confirmed that this defence will not apply against claimants that have not enquired into the driver's intoxicated state (Brignall v Kelly [1994] and Booth v White [2003].

Cases involving intoxicated pedestrians stepping out into the path of vehicles are numerous (for example, see Barlow v Entwhistle [2000], Maranowska v Richardson [2007] and Stewart v Blaze [2009]). The guiding principle is that drivers are not expected to foresee all risks such as those involving intoxicated or juvenile pedestrians unexpectedly stepping out into the road (Boardman 2010). The courts have stated that the test when dealing with intoxicated claimants, whether they are pedestrians or passengers, is an objective one in which it is the claimants' actions are focused on rather than the intoxication. The courts will assess what the claimant was and was not able to do, for example, being able to make decisions such as move positions in the vehicle (Lightfoot v Go Ahead Northen [2011]; recently confirmed in Campbell v Advantage Insurance [2021]).

In relation to the age of the claimant that was dancing in the road, the court will assess their liability as they do with both children and adults – at 17, whilst this is somewhat of a grey area in terms of whether the claimant is a child or not, she will be assessed against a reasonable person of her age.

The final claimant in this question involved the defence of illegality. This can be somewhat of a confusing defence. Very few answers contained a good application of this defence. The leading case is that of Patel v Mirza [2016] and there are three primary principles that the court consider. These are the purpose of the prohibition in place (for example, laws in place to prevent insider trading and mortgage fraud), any relevant and current policy issues and proportionality (whether it would be a proportionate response to allow or deny the defence).

The courts are primarily concerned with whether a party is attempting to profit from their own wrongdoing and whether to allow a particular claim would bring the law into disrepute. The courts question the impact of allowing the defence, for example, its ability to facilitate further incidents of mortgage fraud. For example, in Grondona v Stoffel & Co. [2020] the claimant was seeking compensation for their losses and not for the profit they would have made from the illegality. The courts considered that the negligence of the solicitor was a separate event from that which was illegal.

The court in Tinsley v Milligan in 1994 confirmed that the underlying rationale is that a defendant can only use the defence if they can show that the claimant must rely on their illegality.

In this case Richard was fully aware of Peter's intoxication and encouraged the illegality. Whilst contributory negligence would be a potential defence considering that Richard did not wear his seatbelt and sat forward into the front of the car, illegality would be a more appropriate defence for Peter in this case. Richard had been fully aware of the intoxicated state of the driver and was actively encouraging the illegal behaviour, therefore any claim would be closely connected to the prohibited behaviour and therefore, unlikely to succeed.

**SUGGESTED POINTS FOR RESPONSE**

**LEVEL 6 UNIT 13 – LAW OF TORT**

| Question Number | Suggested Points for Responses | Marks (Max) |
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| 1 | **Distinction:**<br>- Distinction between primary and secondary victims and the criteria for secondary victims to claim were laid out in Alcock v CC of South Yorkshire [1992]; Page v Smith [1995] and White v CC of South Yorkshire [1998]<br>- Primary victims are either exposed to danger or have a reasonable belief that they are in danger<br>- Secondary victims are not in personal danger, or believe that they are but perceive the death, injury, or endangerment of a primary victim<br>- Primary victims only need to show that harm, not specifically psychiatric harm, was a foreseeable consequence of the defendants' actions (Page)<br>- Can recover for psychiatric harm even as primary victim if illness was induced by perception of what happened to others rather than through fear for their own personal safety (e.g., Young v Charles Church (Southern) Ltd [1997]))<br>- Fine line between inside and outside the zone of danger (e.g., Young) leading to arbitrary results | 25 |

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| | **Requirements and Issues for Secondary Victims:**<br>- Must hear or see the incident with their own senses (Alcock)<br>- Will still be considered the immediate aftermath so long as the scene has not been cleaned up (Galli-Atkinson v Seghal [2003]); limits of this e.g., Taylorson v Shieldness Produce [1994]<br>- Timing of immediate aftermath developed in McLoughlin v O'Brian [1983]<br>- Requirement that claimant be present at the incident, or its aftermath does not match any medical tests/criteria<br>- Delayed reaction and consideration of delayed impact must be considered<br>- Inconsistent application of sudden shock and aftermath in borderline cases<br>- Close tie of love and affection (Alcock)<br>- Vulnerable victims exposed to cross-examination due to requirement of close tie of love and affection<br>- Unmarried cohabiting couples would go through ordeal to prove close tie<br>- Must have suffered psychiatric harm due to a sudden shock (Alcock); limits of this, e.g., North Glamorgan v Walters [2002]<br>- Progressive deterioration is excluded (Sion [1994]; Ronayne v Liverpool's Woman's Hospital NHS Trust [2015])<br>- Legal tests contradict medical tests<br>- Requirement of sudden shock means that claimants, for example, that have to care for a victim of an incident for the rest of their life may develop depression over time but would not meet the criteria<br>- Exclusion of cases where the shocking event witnessed by the claimant is different from the original harm to the primary victim, e.g., Taylor v A Novo [2013]<br>- Policy fears relate to floodgate concerns<br>- Law Commission criticised rules for secondary victims as being artificial and resulting in unfair outcomes (Liability for Psychiatric Illness, 1998)<br><br>**Changes and Reforms:**<br>- Law Commission recommended the removal of unnecessary constraints on claims including the removal of the sudden shock requirement and direct perception, but retaining a modified version of the close tie of love and affection requirement, but the reforms were not adopted<br>- Psychiatric can be as debilitating as physical so changes are needed<br>- Hillsborough was 32 years ago, and the law has not changed<br>- Negligence and Damages Bill 2015/6 – a private members Bill which aimed to achieve the broad objective of the Law Commission Report by establishing secondary liability purely on the basis of an expanded category of relationship establishing a close tie, but which did not progress beyond first reading.<br>- Conjoined appeals in the Court of Appeal in 2022: | |

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| | - Paul v Royal Wolverhampton NHS Trust – daughters saw their dad die due to not receiving medical treatment after a diagnosis over a year beforehand<br>- Polmear v Royal Cornwall NHS Trust – a 7-month-old died in front of their parents due to being misdiagnosed<br>- Purchase v Ahmed – a mother found her daughter dead after being misdiagnosed<br>- Lord Dyson said it was for Parliament to change law<br>- Case has the potential to extend class of potential claims so court must be cautious<br>- Leave to appeal to the Supreme Court granted and should clarify secondary victim requirements. | |
| | | **Question 1 Total:25 marks** |

| Question Number | Suggested Points for Responses | Marks (Max) |
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| 2 | **General approach:**<br>- Liability is based on the difference between the original position and the post-tort position, using the 'but for' test, e.g., Barnett v Kensington & Chelsea HA (1969), Hotson v East Berkshire AHA [1987]<br>- When the 'but for' test is not sufficient or unworkable, the courts have stated that causation is established when the defendant has materially contributed, e.g., Bonnington Castings v Wardlaw [1956]<br>- It is not necessary for the claimant to prove that the defendant is the sole cause<br>- A defendant does not escape liability just because other factors could have contributed, if the tortious cause is the probable one on the balance of probabilities: Wilsher v Essex AHA [1987]<br>- The courts approach is based on discretionary apportionment as opposed to fixed apportionment to deliver tailored and just outcomes<br>- All elements required for establishing liability are flexible concepts so that the court does not have to allow a defendant to escape liability due to technicalities of causation requirements<br><br>**Multiple tortfeasors:**<br>- Case law has laid out many principles to enable the courts to assess the division of damages in cases involving multiple tortfeasors<br>- Widely varying circumstances involved have demanded a flexible and subjective approach to the assessment process<br>- Case law has had to determine the scope of liability, e.g., Performance Cars v Abraham [1962]<br>- Courts are willing to 'extend' the scope of liability, e.g., Baker v Willoughby [1970], where a subsequent incident involving amputation of an already injured leg did not terminate liability to compensate for the consequences of the original injury<br>- Courts have required claimants to prove the scope should be 'extended', e.g., McGhee v National Coal Board [1973], where it | 25 |

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| | was sufficient to show that the tort increased the risk of the harm, even though it could not be shown to have caused or materially increased the harm<br>- Courts can apportion damages whilst holding a claimant simultaneously culpable, in a single complex incident, e.g., Fitzgerald v Lane [1989]<br>- Scope of liability can be extended into damages resulting from a second incident, e.g., Rahman v Arearose Ltd [2001]<br>- Liability of first defendant deemed to include liability for some of the damages resulting from subsequent bad medical advice based on injuries suffered from the original incident, e.g., Webb v Barclays Bank [2002]<br>- Scope of liability will be determined based on the types of needs and connection to different actions of different defendants, e.g., Reaney v University Hospital of North Staffordshire NHS Trust [2015]<br>- Illegality does not determine liability; apportionment of damages should reflect culpability, e.g., Widdowson's Executrix v Liberty Insurance [2021], a Scots case where a very negligent driver who seriously injured the deceased was held substantially responsible, as against medical personnel who had failed to provide adequate treatment subsequently. | |
| | | **Question 2 Total:25 marks** |

| Question Number | Suggested Points for Responses | Marks (Max) |
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| 3(a) | **Outline:**<br>- Tort of private nuisance protects against unreasonable interference with any enjoyment of land<br>- St Helen's Smelting Co v Tipping (1865) - requirement of 'real interference'<br>- Cambridge Water v Eastern Counties Leather [1994] - requirement of 'material interference' to limit scope of liability<br>- What is unreasonable – frequency, duration, time of day/night, intensity. Goes beyond reasonable give and take/legitimate pursuit of own interests<br>- Locality of the neighbourhood integral part of decisions (e.g., Sturges v Bridgman (1879))<br>- No liability if claimant is particularly sensitive (e.g., Robinson v Kilvert (1889)<br>- Planning permission does not in itself authorise a nuisance, e.g., Forster v Secretary of State for Communities and Local Government [2016]<br>- Public interest potentially important factor, e.g., Miller v Jackson [1975], Dennis v MoD [2003]; Barr v Biffa Waste Services [2012]. | 10 |

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| 3(b) | **Balance of competing interests:**<br>- Whilst sensitivity will normally defeat a claim, there are exceptions depending on the circumstances (e.g., Grange Wind Farm v North Lincolnshire Council [2010])<br>- Principles are primarily based on reasonableness<br>- Balancing the interests of claimant and defendant having regard to the characteristics of the activity complained of e.g., intensity, duration, frequency and purpose<br>- Malice usually makes what would normally be considered reasonable unreasonable (Christie v Davey (1893))<br>- Locality has fundamental influence on rulings:<br>- Characteristic of the neighbourhood has always been an integral part of the court's decisions (e.g., *Sturges v Bridgman* (1879))<br>- If the noise is more than any reasonable resident should endure it, it is no answer to say the neighbourhood is noisy (Rushmer v Polsue & Alfieri [1906])<br>- In Hunter v Canary Wharf [1997] the court discussed how the Isle of Dogs had been designated and developed as an enterprise zone and so development should continue to be encouraged<br>- In Hirose Electrical UK Ltd v Peak Ingredients [2011] the claimant complained of the smell of food, but the court ruled against them based on the area being an industrial one<br>- In Coventry v Lawrence [2012] a car racing circuit had become part of the nature of locality and so was not deemed a nuisance<br>- For certain rights there is no protection offered, e.g., right to a view and light:<br>- No protection for the right to a view as not seen as a necessity (Bland v Moseley (1587); Aldred's Case (1610); AG v Doughty (1752); re-asserted in Hunter)<br>- A right to light should be protected by easements or use of the Prescription Act 1832<br>- However, the court has been willing to accept that in certain circumstances the view from a property may be a valid deciding factor, for example, if it was the reason the property was purchased (Dalton v Angus (1880)<br>- The right to not be overlooked is not protected (e.g., Fearn v Tate Gallery Board of Trustees [2020])<br>- Access to electronic signals (e.g., terrestrial/satellite TV) was seen as important in Hunter indeed, the court as far back as 1965 in Bridlington Relay noted that the day may come when the population need signals such as those for the TV and internet. The claim in Hunter failed because the interference was caused by the presence of a building by analogy with there being no right to a view. Three of the Law Lords considered that other forms of interference could amount to an actionable nuisance. | 15 |
| | | **Question 3 Total:25 marks** |

| Question Number | Suggested Points for Responses | Marks (Max) |
|---|---|---|
| 4 | **General discussion of rules, for example:**<br><br>- Principle results in an employer being liable for torts committed by employees if committed during the course of employment<br>- Requires relationship of employment rather than employer-contractor relationship<br>- Requires a close connection between the relationship of employment and the tort committed<br>- Tort must be committed in the course of employment<br>- Organisations better resourced to meet claims<br>- Organisations can spread the losses by raising the prices of goods and/or services and taking out insurance<br>- Unrealistic and unworkable to expect individual employees to insure themselves<br><br>**Provides protection by:**<br>- being a deterrent<br>- promoting the recovery of damages<br>- offering compensation<br>- protecting against enterprise risk – a risk arising from the delegation of tasks to staff as part of the activities of the enterprise, that would not exist otherwise<br>- rendering organisations strictly liable even though they may have made every effort to recruit, train and supervise their employees<br>- encourages organisations to raise operational standards, for example, the proper training and supervision of staff<br>- widening of concept of course of employment to cover intentional acts closely connected with work duties<br>- modifying modern extension re: relationships akin to employment - refined in Cox v MoJ [2016] – three-part test<br>- widening liability to cover situations involving dual liability – when an employer is lent to another employer (Viasystems v Thermal Transfer [2005]; Various Claimants v Catholic Child Welfare Society [2015] (Christian Brothers Case)<br>- recognising modern business practices and relationships by assessing levels of integration of an employee in an organisation<br>- extending liability to relationships akin to employment, for example, agency workers and those on zero-hour contracts (Christian Brothers)<br>- widening scope in cases involving serious wrongdoing by an employee in Mohamud v Morrisons [2016]; Morrisons v Various Claimants [2020]; Isma Ali v Luton [2022]; Chell v Tarmac Cement & Lime [2022]; Schokman v CCIG Investments [2022]<br>- extending liability to public body/local authority for sexual abuse committed by foster parents (Armes v Nottinghamshire CC [2018]) | 25 |

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| | - providing clarification in e.g., Various Claimants v Barclays Bank [2020] and Hughes v Rattan [2022] on the status of independent contractors<br>- providing the flexibility needed due to the wide variety of factual circumstances<br>- developed to enhance the ability of victims to recover compensation following incidents arising from modern business activities . | |
| | | **Question 4 Total:25 marks** |

**SECTION B**

| Question Number | Suggested Points for Responses | Marks (Max) |
|---|---|---|
| 1 | Alan:<br>- As in all claims KLC will be considered as the occupier (Wheat v Lacon [1966]<br>- Alan is a visitor<br>- Ward v Tesco [1976] – evidential burden on the defendant to show system of checks in place whereas normally burden on claimant throughout<br>- a defendant can escape liability by showing an accident would have happened even with a good system in place (e.g., Hufton v Somerset County Council [2011]; Lougheed v On the Beach [2014])<br>- Dawkins v Carnival plc [2012] – court will consider number of staff present<br>- Court will consider that Bella was the only member of staff and the incident had only happened a few minutes before<br><br>Carl:<br>- Carl is initially a visitor<br>- Carl becomes a non-visitor when he enters the roof area<br>- Court will consider knowledge of defendant of any previous incidents (e.g., section 1(3)(a) OLA 1984; Young v Kent County Council [2005]; Bucket v Staffordshire CC [2015])<br>- Courts usually question location of guardian; however, Carl's mother will not be liable as is a lawful visitor using the creche facilities rendering the staff at the creche responsible<br>- Carl is 8-years old so could he 'appreciate that he was trespassing'? If so, potential contributory negligence will be available<br>- Could there have been a more suitable sign and/or a locked door?<br>- Any risk assessment undertaken will be considered (e.g., Allison v London Underground [2008]; Kennedy v Cordia Services [2016]) | 25 |

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| | Edwina:<br>- Edwina is a visitor<br>- Court will include considerations due to context and location (e.g., Taylor v English Heritage [2016]<br>- In Hollywood v English Heritage [2021] English Heritage successfully defended a claim relating to a claimant tripping on a mobility ramp; court said a handrail would not have prevented the accident<br>- The reporting of previous incidents persuasive but not conclusive<br>- The risk assessment will be considered (e.g., Allison v London Underground [2008]; Kennedy v Cordia Services [2016])<br><br>Frances:<br>- originally a visitor<br>- became a non-visitor when chose to enter the works area<br>- would need to establish a duty by satisfying the three preconditions in s 1 (3) OLA 84. Has she willingly accepted the risk, if so no duty: s 1 (6). Is it an obvious risk? If so no liability: Staples v West Dorset [1995]<br>- KLC hired KC and so can transfer liability if they show they were reasonable in hiring KC and in supervising them<br>- Reasonableness in hiring may be found due to previous dealings<br>- Not reasonable to check the technical issue of the state of the equipment. Arguably could have been expected to check that security was being maintained – but is this a one-off lapse<br>- Due to being a non-visitor Francis will only be able to claim for personal injury and not for the damage to her phone<br>- Contributory negligence in ignoring the exclusion notice<br>- Defendant potentially not liable as do not have to warn adults of an obvious risk (e.g., Tomlinson v Congleton BC [2003]; Buckett v Staffordshire CC [2015]; Edwards v Sutton BC [2016]; and Taylor v English Heritage [2016]). | |

**Question 1 Total: 25 marks**

| Question Number | Suggested Points for Responses | Marks (Max) |
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| 2 | Gavin:<br>- Liable for battery for pushing Harry<br>- There has been an application of force<br>- Unlawful element in question due to horseplay considerations<br>- Can be mere touch<br>- Sufficient if act is intentional even if harm was not intended<br>- Children must be careless to high degree for liability to be imposed<br>- If child commits a tort on purpose, they can be treated as an adult in court<br>- Unlikely that Gavin will be liable due to approach taken by courts regarding horseplay<br>- Consent likely defence for Gavin<br><br>- Liable for battery for pushing Harry to the ground | 25 |

- There has been an application of force
- Unlawful element likely satisfied as it cannot be argued that the conduct was horseplay
- Act was intentional
- Likely to be liable as does not appear that Harry consented as part of the 'game'
- Self-defence could be potential defence based on the facts if deemed to be reasonable force
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Harry:

- Liable for assault for waving fist and shouting at Gavin
- Apprehension present as Gavin believes he will be struck
- Unlawful element likely satisfied as it appears the horseplay has stopped at this point
- Despite Gavin being fearful, this is not required for an assault to be committed
- Gestures such as waving a fist in the air can amount to an assault
- However, due to wording used, the threat is conditional, negated and not immediate

- Liable for assault after being knocked to the ground
- Apprehension present
- Immediacy satisfied
- Unlawful as unlikely to be considered horseplay
- Court would consider if it was reasonable for Gavin to believe that Harry would carry out the threat
- Fear not necessary
- Consent unlikely possible as horseplay has ceased
- Contributory negligence cannot be used in cases involving assault and battery despite the provocation

Department store:

- Liable for false imprisonment - this is vicarious liability for the actions of Ian and Ivana. There is no doubt that apprehending troublemakers is part and parcel of their duties and would therefore satisfy the original Salmond test as to course of employment, let alone the current close connexion test. There is nothing to suggest that they are not employees in the strict sense of the word
- A complete restriction is required – the window is locked, and the door is open, however, the guards are outside the door
- Intention is present
- Lawfulness is based on the guard(s) exercising a right to detain the arrival of the police if they have reasonable suspicion
- Both Gavin and Harry were aware/believed they were unable to leave, but this is not a requirement
- The length of time is irrelevant as it could be seconds (Walker v Commission of the Police of the Metropolis [2014])

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| | Police service:<br>- Liability for false imprisonment is based on lawfulness of actions<br>- Police can exercise right of arrest under Police and Criminal Evidence Act 1984 (PACE) (s24)<br>- If detention is permitted, a claim for false imprisonment would fail<br>- The initial 24 hours of Harry's detention is lawful, provided that the custody officer has determined that there are legitimate grounds to detain, e.g., for questioning, that the police act expeditiously and the grounds continue to exist at the required periodic reviews (s41 PACE)<br>- The extension of Harry's detention was not authorised by an officer of the rank of Superintendent or above and therefore was unlawful, giving rise to a claim for false imprisonment<br>- No liability for Gavin as it appears the police dealt with him expeditiously within permissible time limits. | |
| | | **Question 2 Total:25 marks** |

| Question Number | Suggested Points for Responses | Marks (Max) |
|---|---|---|
| 3(a) | Mustafa/Insurer:<br>- Mustafa breached standard of duty owed by speeding<br>- But for Mustafa's breach, Natasha would not have been injured<br>- Legal causation requires a consideration of whether the defendant made at the very least a material contribution<br>- Original injury caused by Mustafa was merely the cut<br>- Poor medical treatment is the cause of the amputation.<br>- The hospital will be vicariously liable for the negligent doctor, but only for the exacerbation resulting from his negligence<br>- The next question is whether the medical negligence breaks the chain of causation such that Mustafa bears no responsibility for anything other than the original cut.<br>- Originally medical negligence broke the chain of causation, e.g., Hogan v Bentinck West Hartley Colliery [1949]<br>- More recently it has become more difficult for a defendant to successfully argue but that the causative potency of his breach of duty has been completely illuminated, even by subsequent negligence<br>- In Rahman v Arearose [2001] the defendant from the first accident was liable for a portion of the harm caused by a second incident, although this was a case where the claimant ended up suffering from complex psychiatric consequences following the combined effects of physical injuries for which the two defendants were separately liable. One reason for holding the first defendant liable for matters which went beyond its primary liability was the difficulty of disentangling the various elements of the psychiatric injury<br>- In Webb v Barclays Bank [2002] the bad advice and treatment given by the hospital did not break the chain of causation from the initial tort, as it was not seen as egregiously bad and the original defendant was liable for the additional harm caused, | 12 |

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| | although when its contribution was assessed, it was only a relatively small one<br>- Remoteness of damages would consider whether the additional harm caused by the second defendant was of the same nature or significantly different (Reaney [2015]); the type of losses has merely increased as opposed to a changing of nature<br>- In Widdowson's Executrix v Liberty Insurance [2021] the medical team could have prevented the eventual outcome (in that case, death); the first defendant driver who seriously injured the deceased by very bad driving was considered primarily responsible and held liable for 70%, with the remainder being divided amongst the other two medical defendants. the causative potency of the negligent driving was not significantly diminished and by the subsequent poor treatment which was not seen as particularly serious negligence<br>- In line with case law, likely that the Hospital Trust will be liable for the larger proportion of the damages available. | |
| 3(b) | Damages:<br>- Non-pecuniary losses:<br>  - Includes pain and suffering, loss of amenity and recognition of injury<br>  - section 1(1) Administration of Justice 1982 allows for recognition of pain and suffering<br>  - loss of amenity can include loss of dignity, e.g., Richardson v Howie [2004]<br>  - Natasha can claim for the pain she will suffer and the loss of her enjoyment of football<br>- Loss of earnings:<br>  - Loss calculated using the multiplicand and multiplier<br>  - The aim is to place the claimant in the position they would have been if they had earned the money<br>  - The aim is to also prevent a claimant being unjustly enriched by being compensated twice<br>  - Court then reduces this amount by considering contingencies of life and the benefits gained from receiving a lump sum of money<br>  - Natasha will be able to claim for the loss of income<br>  - Future loss of earnings can be claimed for, including losses incurred/risk associated in the labour market due to her disability (Smith v Manchester [1974])<br>- Loss of chance:<br>  - Allied Maples Group v Simmons & Simmons [1995] – chance must be 'real and substantial'<br>  - Doyle v Wallace [1998] – courts used midpoint between two salaries to assess loss of earnings<br>  - Langford v Hebran [2001] – court can calculate using multiple potential outcomes and apply discount to account for contingencies<br>  - Herring v MoD [2003] – court uses a base line career model to 'follow' potential paths and earning capacity | 15 |

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| | - Dixon v Were [2004] – claimant did not have the aptitude required to prove potential high earnings above the baseline<br>- Smith v Collett [2009] – industry experience and evidence cannot be underestimated<br>- Likely Natasha will be able to claim for the loss of the opportunity to become a professional footballer; medical evidence shows on the balance of probabilities that Natasha could have benefitted from this outcome (e.g., Smith)<br>- As per Allied, there appears to be a real and substantial chance of this opportunity<br>- Court can use baseline career model as in Herring<br>- Court can accommodate for multiple potential outcomes and apply contingencies<br>- Court could use the midpoint between the two relevant careers to assess potential earnings as in Doyle<br><br>- Future medical care and attention:<br>- This head covers reasonably incurred expenses<br>- Claimant has a choice between using the NHS or choosing private medical care<br>- If claimant is cared for within medical institution and therefore does not incur household expenses, these can be deducted<br>- If a third party incurs pecuniary loss due to caring for the claimant, this can be paid to the claimant, who can then pay the carer for their services.<br>- Professional care can also be claimed for as required, including for activities such as home decoration and gardening which Natasha is now unable to undertake.<br>- Natasha will be able to claim for any medical expenses incurred, the adaptations made to her home and any travel expenses related to the post-operation care. | |
| | | **Question 3 Total:25 marks** |

| Question Number | Suggested Points for Responses | Marks (Max) |
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| 4 | Stephanie:<br>- The relevant potential defence is contributory negligence. This is a partial defence and arises when damage occurs partly as the result of the fault of the Claimant and partly as the of the fault of another: s 1 (1) Law Reform (Contributory Negligence) Act 1945. The damages payable to the Claimant will be reduced by the extent considered just and reasonable by the court<br>- In a collision between a vehicle and a pedestrian the driver's actions are likely to be deemed more culpable than the pedestrian's, e.g., Eagle v Chambers [2003], which establishes that in normal circumstances the driver's responsibility is likely to be greater than that of the pedestrian, because he is in charge of a lethal machine<br>- Peter is clearly at fault. He is driving at excessive speed and heavily under the influence of alcohol. His culpability is high | 25 |

- Stephanie is also at fault. Standing, or in this case dancing, in the road is an obviously dangerous thing to do. While intoxication may have led her to behave in this way, the court is likely to consider the nature of her action rather than her intoxication: e.g., Lightfoot v Go Ahead Northern Ltd [2011]
- Likely that claim will be successful with assessed reduction for contributory negligence

Quentin:

- The relevant defence is contributory negligence as previously.
- Failure to wear a seatbelt, although irrelevant inrelation to causation of the accident, may result in greater damage being sustained. It can therefore result in damages being reduced due to contributory negligence (Froom v Butcher [1976]; Hazlett v Robinson [2014])
- Failure to wear a seatbelt due to a medical condition may result in contributory negligence failing as a defence (e.g., McKay v Borthwick [1982]). This is likely to apply here, as there is clearly a medical condition and an application for medical exemption is being pursued. The medical exemption is directly relevant to criminal liability for failing to wear a seat belt but would obviously be relevant evidence to support a case that the claimant could not be expected to wear a seat belt.
- Getting a lift with a driver known to be under the influence of alcohol is likely to be contributory negligence: Dann v Hamilton (1939), but this will not apply
- if the claimant did not know the driver was intoxicated, (e.g., Traynor v Donovan [1987]; Malone v Rowan [1984])
- Passengers are not under a duty to enquire as to the level of intoxication of the driver (Booth v White [2003])
- Likely claim will be successful

Richard:

- Consent is unavailable in these circumstances (s149 Road Traffic Act 1988)
- The primary defence will be illegality, which is a complete defence. A claim may be defeated if it involves the claimant's own criminal conduct
- Before 2016 a defendant could use the defence if the claimant had to rely on their own illegality
- Reliance principle replaced with three-part test Patel v Mirza [2016]
- Court considers whether the objectives of the law would be advanced if the claim was denied, if any public policy would be less effective if the claim was denied and if denying the claim was a proportionate response to the illegality. The illegality must therefore be significant and closely connected to the activity
- Pitts v Hunt [1991] – the claim was denied as both the defendant and claimant were intoxicated together on a motorbike; the claimant had known about the driver's

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| | intoxication, unlicensed and uninsured status and encouraged the illegal behaviour<br>- If illegality fails as a defence, the defendant can still assert contributory negligence.<br>- If illegality fails as a defence, the defendant is likely to they seek to rely on contributory negligence.<br>- Campbell v Advantage Insurance Co [2021] – a drunk claimant/passenger is subjected to the ordinary objective test – would a reasonable person had realised the driver was intoxicated/unable to drive?<br>- In the Campbell case the claimant was extremely drunk and largely comatose but had voluntarily moved from the front to the rear of the car, and this was enough for the court to conclude that he was aware of the circumstances and contributorily negligent to a limited extent. Here Richard, while drunk, is clearly aware of the situation, and has agreed to travel in the car. This is likely to amount to significant contributory negligence<br>- Claim is unlikely to be wholly successful. | |
| | | **Question 4 Total: 25 marks** |