CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

LEVEL 6 – UNIT 13 – LAW OF TORT

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

In this session, the changes to the case law for negligence was well-represented and used well in both essay and problem questions.

Centres should continue to encourage candidates to explain that it is the 'incremental approach' that should be followed in novel circumstances and that an analysis of the existence of a duty of care by reference to foreseeability, proximity and fairness/justice/reasonableness is no longer good law.

There continued to be errors made in terms of providing irrelevant information that could not be awarded marks or for inserting information in one section of a question when it should be in another. For example, in a question requires only an outline in the first part, should not contain a discussion of issues, and conversely, a question requiring a discussion will not acquire many points for general information on generalised information such as rules and case names. However, for the most part this only happened in around a third of those papers sat.

Essay questions, particularly at Level 6, will ask for candidates to focus on a particular issue within an area of law, however, many candidates spent sometimes as much as the first half of their answer laying out only generalised information. Candidates should be advised to make any such

explanation, of the topic at hand, brief and focus should be concentrated on answering the specific focus of the question. At Level 6, examiners are not looking for a candidates' knowledge of basic rules of the duty of care but their increased ability to engage in debates surrounding these rules and laws. Candidates are advised to understand the general elements, be able to discuss a minimum of 3-4 issues relating to an area of law and be ready to discuss those concerns, criticisms, reforms etc, whilst directly addressing the wording of the specific question posed on the day of the examination.

When candidates use case law in essays, it is important that the reasoning for the inclusion of the case is included, for example, how does the case support the candidate answer or illustrate a question/point? Many candidates simply inserted case names. Whilst this shows knowledge it does nothing to indicate understanding of the role of the case in meeting the requirements of the specific question that has been asked. Developing an answer to show why a particular case has been used is vital.

Conclusions that merely repeat information that has already been credited earlier in the answer will also not gain any credit. A better idea for conclusions is to save some information relating to the points that have been raised to conclude and directly answer the question whilst gaining points for 'fresh' facts/arguments, such as recommendations for any reforms.

In scenario's where there are any 'grey areas', in which it is not clear whether an element has been established, it is perfectly acceptable to include in an answer the reasons as to why an element may be satisfied and then to raise alternative arguments to the contrary. In fact, this is advised for the candidate to show greater understanding of the application of the law in these types of cases, in which discretion is a necessity and to avoid an incorrect answer.

In this series, there was a particular use of this technique for a problem question, and this enabled the maximum marks to be awarded. In general, if there is doubt within a problem question, assume that the facts are that way deliberately to assess whether a candidate can analyse the varying impact legal principles and rules can have.

A striking problem that arises in problem question answers is that of the retelling of the facts of the scenario. This practice attracts no credit as there can be no marks awarded for the retelling of facts given within the examination. The use of the particular words and 'actions' should be used to illustrate the reasoning for any argument presented by the candidate but the simple re-writing of many actions and sentences from the text will gain no marks and waste valuable time.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1 (remoteness of damages)

This was one of the most popular questions. This question was generally answered well with a range of issues being discussed. Cases such as Re Polemis and Wagon Mound were used to illustrate the primary principles in this area of law. Better answers provided a discussion of the changes that took place and the reasoning behind the changes. Whilst many candidates exhibited extensive knowledge of the case law, essays at level 6 require that knowledge to be presented in such a way as to analyse the legal principles at play, rather than merely stating them.

Question 2 (interests protected by tort)

This was an extremely popular question. Whilst this question was generally answered well, there was a distinct lack of a range of interests that were discussed. This was the primary source of the loss of any credit. All the overarching heads of interests should be raised, with a minimum of 2-3 interests being discussed in detail. When attempting these types of questions, the better answers will not only explain the interest that is being protected but give case examples to illustrate the protection in action. In addition, a good way to gain marks is to explain the reasons as to why that impact may be a negative one as well as positive.

Question 3 (defences)

This was a popular question. Quite a few answers provided more information than was required in the first part of the question. This part only needed an outline of the requirements for each of the defences. A minor number of candidates repeated the information relating to the requirements in the second part of the question. Candidates should be aware that when questions are divided in this way, they must take care to plan the information that will be provided in each part of the question. Candidates showed a great understanding of the case law that runs through this area of law and many candidates were able to give case examples. However, it is imperative that when using a case as an example, that the candidate is clear in their answer why they are raising the case. Simply stating a case name cannot gain credit. The use of a case should be discussed in such a way as to show how the legal rule in play will impact the set of circumstances in that case. It is far more important to discuss the judicial reasoning behind the ratio of a case, than it is to merely state its name or only declare the facts of the case.

Question 4 (psychiatric harm)

This was also a popular question, however, answers to this predominantly contained general information on the rules in place for these types of cases. These questions require a candidate to be able to illustrate their understanding of the reasoning behind judicial decisions and changes and for the impact they have on the varying circumstances that come before the courts. Candidates showed extensive knowledge of the case law, however, to simply state the rules laid out in leading cases such as Alcock is not sufficient to gain credit. Essays at this level require a discussion of the reasoning behind these rules and the criticisms based on their impact in particular circumstances. Better

answers raised the suggested reforms made by the Law Commission and were able to integrate those recommendations into an explanation as to the reasoning behind boundaries on these types of claims.

Section B

Question 1 (emergency services and duty of care)

This was an extremely popular choice. Most candidates identified the similarity between the facts of the question and those in the case of Robinson. Better answers provided a detailed analysis of the comparison of the cases in which it was shown how a duty was also owed in the problem question. Knowledge on the liability of the ambulance service was less evident and was not applied in such a comprehensive way as the liability of the police. The ambulance service may owe a duty to a patient once it has accepted a call (having been given the patient's name and address and the nature of the emergency), knowing that the patient is relying on the service to respond within a reasonable period e.g., Kent v Griffiths (2000) but confirmation would be needed relating to whether the service accepted the emergency call given the high demands that night.

Answers relating to the liability of the fire service were also mostly of low quality, with most candidates not analysing the problem question in line with any legal authority. The fire brigade will only be liable if they respond to an emergency call and, through a positive act of carelessness, make the claimant's position worse than if they fail to attend at all e.g., Capital & Counties Bank plc v Hampshire CC (1997).

Question 2 (occupiers' liability)

As always this was an extremely popular problem question. The statutory provisions and their subsections were, for the most part, well revised and presented.

The incident involving Gary was handled well by most candidates including the element based on the transfer of liability to an independent contractor.

The incident involving the visitor invited by the occupiers' raised many issues for candidates to contend with. Many debated whether Fiona was a lawful or non-lawful visitor and discussed the potential outcome based on either scenario. This is the correct approach to take and gained the greatest number of marks that could be awarded. Many candidates also debated whether this claimant could have been a child due to being invited by the occupiers' parents. Again, to debate a 'grey area' is the best route to gain the most marks as assumptions should not be made based on facts that have not been provided. Candidates should identify the information that they do have and apply accordingly and then confirm the information that they have not been provided with so they can prepare to advise the claimant on the various potential outcomes.

The incident involving the non-lawful visitor (that had previously been lawful) was handled well.

Question 3 (vicarious liability)

This was a popular choice. However, many candidates mistook the question for one based on employers' liability. Candidates are advised to work their way through all the facts taking the time to decide what area of law is being discussed. This can be checked by briefly checking that the elements of the chosen area of law fit with all the incidents that occur.

Most candidates showed a good understanding of the test to be applied regarding whether the person committing the tort is an employee. However, the test to be applied for whether the tortfeasor was 'in the course of employment' were less well applied. Whilst Cox v Ministry of Justice [2016] widened the scope of the type of circumstances that could give rise to vicarious liability, the court in Morrisons v Various Claimants [2020] confirmed that an employer would not be held liable if an employee acted for the purpose of a 'personal vendetta'. In the recent case of Isma Ali v Luton Borough Council [2022] the court highlighted that the fact that the employment role presents an opportunity for a crime to be committed, does not automatically render the employer liable. Lastly, the court in Chell v Tarmac Cement & Lime Ltd [2022] discussed how malice on the part of an employee is not and should not be an expected element of any employers' risk assessment. The incident involving the bouncer that committed a crime on the work premises should have involved these types of recent cases being raised and applied to the question.

Question 4 (trespass to land)

This was only attempted by a small number of candidates. Unfortunately, it was not answered well highlighting that this is an area that requires more attention for the application to problem questions. Most candidates showed a good understanding that these types of incidents required intentional behaviour, however, the other aspects of these claims were not analysed or developed to a sufficient degree. This area of law requires a good understanding of the rules in place for this type of tortious protection and an ability to discuss those elements along with legal authority to illustrate the impact of legal principles on the circumstances in the problem posed. The use of past examination papers involving this area of law would be a good way to practise the application of these rules.

SUGGESTED POINTS FOR RESPONSE LEVEL 6 – UNIT 13 – LAW OF TORT		
Question Number	**Suggested Points for Responses**	**Marks (Max)**
1	- In the 1920's the case Re Polemis stated that claimants could claim for all damages that was a direct consequence of the harm caused by the defendant **Current modern approach** - In the 1960's, in the case of Wagon Mound, the test was re-defined to be based on reasonable foreseeability - Also, in the 1960's, in Smith v Leech Brain, remoteness was extended to include the thin skull rule applies; it will not be too remote to consider harm sustained due to a pre-existing condition - The type of harm is generally broadly defined, e.g, personal injury and the precise concatenation of circumstances need not be foreseeable, e.g., Bradford v Robinson Rentals, but with some exceptions e.g., Tremain v Pike - In the 1990's, the case of Page v Smith expanded the scope of liability to include psychiatric harm; it will not be too remote to consider psychiatric harm so long as 'some' harm was foreseeable - Discussion in Spencer v Wincanton relating to whether injuries from subsequent incidents are too remote (i.e., Whether causative potency remains regardless of the presence of contributory negligence); so, case sensitive that is described as "almost impossible to generalise." Results in the degree of unreasonable behaviour by a claimant needs to be "very high" (Emeh Kensington) - Discussion relating to whether subsequent injuries, albeit not due to a potential defendant's actual negligence or a *novus actus interveniens*, can still be regarded as not too remote, such as in Webb v Barclays Bank - Impecunious claimant was an issue that resulted in changes to the rules in 2004 in Lagden v O'Connor. This case overruled Liesbosch Dredgar v SS Edison from 1933 and so now the thin	**25**

	skull rule applies even if loss is caused by the claimant's own financial situation - The presence of inconsistent rulings or decisions is based on the courts being forced to not only apply the tests applicable at the time but also to ensure they are applicable and justifiable at the time of judgment	
	Question 1 Total:25 marks	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
2	**Personal security** - Fear of being hit – tort of assault protection - Actual contact – tort of battery protection - Restriction of freedom of movement – false imprisonment protection - Scope of protection expanded as society expanded - Medical advancements resulted in expansion to protection for psychiatric harm - Courts increasingly involved in medical treatment cases, for example, involving consent or the right to life **Property interests** - Land protected by the torts of nuisance, Rylands v Fletcher and trespass to land - Personal property can be protected by trespass and the tort of negligence **Economic interests** - Courts reluctant to get involved as they do not want to get involved in business practices - this type of protection historically protected within contract law and predominantly protected by legislation - Law distinguishes, and issues arise, between economic harm that is consequential to physical harm and that which is pure economic harm providing limited protection in tort law **Reputation and privacy** - This can be protected by the tort of defamation - Can claim if reputation is damaged by untrue speech and writing	**25**
	Question 2 Total:25 marks	

Question Number	Suggested Points for Responses	Marks (Max)
3(a)	**Contributory negligence** - Partial defence - S1(1) Law Reform (Contributory Negligence) Act 1945 – reduce damages to deliver just and equitable outcome - Claimant partly at fault for harm caused - Not usually applicable re: rescuers unless they are foolhardy and have unreasonable disregard for their own safety - Child claimants should be held against standard of reasonable child of the same age (Gough v Thorne 1966) - Court can make allowance for workers sense of danger if it is impaired by noisy or repetitive tasks, fatigue or confusion (Caswell v Powell Duffryn Associated Collieries (1939)) - Can apportion liability between parties on a percentage basis – share responsibility and damages are reduced accordingly - Percentage reduction depends on causative potency of each party's conduct (e.g., vehicle operator and pedestrian) - Common example is claimant not wearing seatbelt (Froom v Butcher (1975)) **Consent** - Complete defence - Must prove claimant had full knowledge of the nature and extent of the risk and that consent was freely given - Can be express or implied - Exceptions relating to sporting events and medical procedures - Issues relating to workers who are forced to accept the risks due to financial pressures (e.g., Smith v Baker (1891)) - Availability within cases involving Occupiers' Liability **Illegality** - Claimant is the victim of a tort whilst involved in serious wrongdoing - There must be a close connection between the tort and the wrongdoing, e.g., Delany v Pickett; Joyce v O'Brien - Defence based on public policy	**12**

Question Number	Suggested Points for Responses	Marks (Max)
3(b)	**Discussion of issues addressing essay question** - Contributory negligence achieves balance as results in relative culpability - Contributory negligence most frequently invoked as best promotes fairness as takes account of mutual culpability - Courts reluctant to allow defence of consent, especially in light of the possibility of alternative remedies via contributory negligence - Consent difficult to establish and rarely successful - Consent only likely in cases where claimant willingly accepts risks without any inducement or pressure (e.g., ICI v Shatwell 1965) - Illegality highly circumscribed and rarely successful	**13**
		Question 3 Total:25 marks
Question Number	**Suggested Points for Responses**	**Marks (Max)**
4	**Framework of case law:** – Alcock (1991), Page v Smith (1995) and White (1999) – Framework of rules that are control mechanisms – **Discussion of the distinctions created** – Physical and psychiatric harm – From medical perspective no qualitative difference – If claimants' symptoms fall just short of criteria, they may still suffer just as much as those who met the requirements – Distinguishes between primary and secondary victims – Primary is personally endangered or reasonably believes themselves to be – Secondary is neither personally endangered nor reasonably believe themselves to be – Primary victims need only prove physical harm was foreseeable (Page) – Secondary victim must meet the criteria set out in Alcock – Must hear or see the incident with their own senses – Must have close tie of love and affection with a victim – Must have been at the incident or the immediate aftermath – Must have suffered psychiatric harm due to a sudden shock; limits of this, e.g., North Glamorgan v Walters – Progressive deterioration is excluded (Sion; Ronayne) – 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 Taylor/Taylorson.	**25**

	Further discussion of issues related to distinctions, for example – Presumptions - Law Commission recommended fixed list of relationships in which love, and affection would be presumed – timing of immediate aftermath developed in McLoughlin v O'Brian (1983) – rules are arbitrary and unfair – Requirement that claimant be present at the incident, or its aftermath does not match any medical tests/criteria – requirement of sudden shock – 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 – exclusion of cases where the shocking event witnessed by the claimant is different from the original harm into the primary victim, e.g., Taylor v A Novo – policy fears relating to floodgate concerns – legal tests contradicting with medical tests – vulnerable victims exposed to cross-examination due to requirement of close tie of love and affection – inconsistent application of sudden shock and aftermath in borderline cases **Reforms suggested by the Law Commission** – Recommended removing unnecessary constraints on claims – Recommended removal of sudden shock requirement – Recommended removal of close tie of love and affection requirement – Reforms were not adopted	
		Question 4 Total:25 marks

SECTION B

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	**Belinda v The Police Service** – Chief Constable for relevant area would be vicariously liable for actions of officers under their instruction/control as per s88(1) Police Act 1996 – Police subject to the same liability in negligence as private individuals and bodies (Robinson v CC West Yorkshire Police (2018)) and so have no specific 'immunity' – Distinction between positive acts of carelessness creating foreseeable risk of personal injury and pure omissions	**17**

	– Foreseeability due to the suspect, Andrew, being known to the police for resisting arrest with violence (Wagon Mound No.1 1961) – Positive act when officers decided to chase Andrew in a crowded town centre – But for the actions of the officers, Belinda would not have suffered harm (Barnet v Chelsea and Kensington Hospital Trust (1968)) – Liable for injuries to Belinda **Belinda v The Ambulance Service** • Ambulance service may owe a duty to a patient once it has accepted a call (having been given the patient's name and address and the nature of the emergency), knowing that the patient is relying on the service to respond within a reasonable period of time e.g., Kent v Griffiths (2000) • Would need confirmation of whether the service accepted the emergency call given the high demands that night.	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
1(b)	**Chris v The Fire Service** • Same act/pure omission distinction applies as per the police service • Fire brigade only liable if they respond to an emergency call and, through a positive act of carelessness, make the claimant's position worse than if they fail to attend at all e.g., Capital & Counties Bank plc v Hampshire CC (1997)	**8**
		Question 1 Total:25 marks
Question Number	**Suggested Points for Responses**	**Marks (Max)**
2	**Gary v Diya & John (DJ)** - DJ are the occupiers and the only potential defendant as per Wheat v Lacon - Gary is a lawful visitor as invited onto premises - Discussion relating to the premises being private and the use of it during the incident - OLA 1957 applies - Personal injury and damage to/loss of property can be claimed for - Potential for transferring duty to the independent contractor HiWire - S2(4)(b) applies if DJ can show they were reasonable in hiring HiWire (unlikely that DJ would be expected to have supervised the independent contractor due to the specialist nature of electrics)	**25**

	Fiona v DJ: - DJ will be considered the occupier - Debateable whether Fiona is a lawful visitor due to the 'invite' the occupiers' daughter - If considered a lawful visitor, the OLA 1957 applies - Personal injury and damage to/loss of property can be claimed for - If considered an unlawful visitor, the OLA 1984 applies - Personal injury only may be possibly claimed if certain criteria met as per s3(a)-(c) OLA 1984 - Liability for negligence in relation to the spilled drink **Kulvant v DJ** - DJ will be considered the occupier - Kulvant was initially a lawful visitor as she was an invitee but when she entered the room marked for private, she probably became an unlawful visitor - OLA 1984 applies - Facts state that the occupier aware of the danger, aware of potential of unlawful visitors and it would be reasonable to expect the centre to take precautions, for example, locking the door - Even as unlawful visitor, if all requirements are satisfied, a claimant can be awarded damages for personal injury. Risk is not obvious, and no evidence of willing assumption - Discussion relating to the possibility of fulfilling duty with the use of warnings, i.e., warning sign on the door	
	Question 2 Total:25 marks	

Question Number	Suggested Points for Responses	Marks (Max)
3	**Case law framework of tests re: whether claimant is an employee** – Tort committed – Tortfeasor is an employee – Tortfeasor was in the course of employment when the tort was committed – Control test (Mersey Docks 1946) – Integration test (Stevenson 1952) – Economic reality test (Ready Mixed Concrete 1968) – All factors considered/combination of tests (Cable and Wireless 2006) – Authorised act but in unauthorised/careless manner (Century Insurance 1942) – Not in scope of employer, for example, conductor not paid to drive the bus (Beard 1900)	**25**

	– If in employer's benefit, can be in the course of employment (Rose 1976) – If not in course of employment, will be considered a frolic of their own (Rose; Limpus 1982)) – Discussion of modern approach, including close connexion and akin to employment relationships, such as Lister v Hesley (2001); Dubai Aluminium v Saleem (2003); JGE v Trustees of Portsmouth Roman Catholic Diocesan Trust (2012), Various Claimants v Catholic Child Welfare Society (2012); Mohamud v Morrison (2016); Cox v MoJ (2016); Barclays v Various Claimants (2020); Morrison v Various Claimants (2020) **Apply the rules of vicarious liability to the facts relating to whether the claimants are employees and in the course of employment:** **Leroy** – potential of not being considered an employee based on a zero-hour contract and paying his own tax and NI compared with factors indicating the opposite such as the wearing of a uniform and being subject to instruction - see, for example, Uber v Aslam (2018) – authorised to serve drinks but not authorised to serve cocktails in this manner – authorised actions in an unauthorised way are still considered to be within the course of employment **Max** – facts state that he is an employee so will need to be determined if in the course of employment – personal issue with customer and he is on his break when encounters Owen – Discussion of case law relating to closeness of connection between activities and incident, such as Mohamud v Morrison (2016) and Mattis v Pollock (2003) **Neil** – Facts state that he is an employee so will need to be determined if in the course of employment – Not authorised to work on electrical equipment but activities related to those authorised – Discussion of case relating to closeness of connection between activities and incident	
	Question 3 Total:25 marks	

Question Number	Suggested Points for Responses	Marks (Max)
4	**Boundary of driveway dispute** – Considered land – Deliberate and voluntary interference – Historic records of boundary lines to be examined to confirm boundary lines – Objective assessment for any award of damages (Pennock v Hodgson (2010)) – Deliberate interference could involve award of aggravated damages, e.g., Owers v Bailey (2006) – Alternative discussion relating to the discouragement of litigation and the lack of damage suffered by the claimant, e.g., Rashid v Sharif (2014) **Fence panel and flower bed** – Both considered land – Quentin had the intention and voluntarily entered Raymond's land by walking on the flower beds – Raymond did give express consent for the removal of the fence panel – There would be implied consent for the walking on the flower beds in order to access the area – Whilst this, at first, may not be considered to be trespass, the events involving the removal of the flower beds may invalidate any consent given or implied **Moving of the plants** – The plants will be considered as land – Quentin intentionally and voluntarily removed/replanted them – Likely to be trespass as he exceeded the permission given by Raymond – Motive irrelevant as per Mohamud v Morrisons (2016)	**25**
		Question 4 Total:25 marks