CHIEF EXAMINER REPORT

JANUARY 2024

LEVEL 6 UNIT 13 – Law of Tort

The purpose of the suggested points for responses is to provide candidates and Training Providers with guidance as to the key points candidates should have included in their answers to the January 2024 examinations.

The suggested points for responses sets out points that a good (merit/distinction) candidate would have made.

Candidates will have received credit, where applicable, for other points not addressed in the suggested points for responses or alternative valid responses.

Chief Examiner Overview
The use of case law still requires some additional work. Those that achieved a good 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. 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. 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. 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.

Candidate Performance and Suggested Points for Responses

It is noted that the low numbers of candidates taking the Level 6 exams limits the scope for constructive feedback to be given and for firm conclusions to be reached. Therefore, feedback on candidate performance is limited.

Section A

Question 1	25 marks
Most candidates showed, and rightly so at Level 6, good knowledge on causation tests, the relevant cases, and the purposes of the tests. However, responses often did not address the actual question asked. It is imperative that a candidate does not just exhibit knowledge of these tests, but that they also illustrate the ability to discuss them in terms of reasoning behind leading cases, limitations on the scope of liability and the impact this could have on the outcome of cases.	
Suggested Points for Response:	
General outline: - Only succeed if prove on the balance of probabilities that a loss is the result of the defendant's breach - Breach must have caused or materially contributed - Courts use 'but for' test (Barnett v Chelsea & Kensington Hosp Mgmt. Comm. (1968) - When there is a single cause, but for test can be applied without difficulty **Possible issues for discussion:** - Material contribution approach introduced in Bonnington Castings v Wardlaw (1956) - Wide approach and more claimant friendly - Court in McGhee (1973) stated a defendant is liable if they were a material contribution to the risk of damage - Court in Wilsher (1988) overruled that approach and returned to stricter test in Bonnington - Court in Fairchild (2002) resurrected McGhee approach in limited circumstances - Court in Barker v Corus (2006) re-stated that the Fairchild principle only to be used in certain circumstances - Claimant must show contribution exceeds 50% (Hotson v East Berkshire Health Authority (1987)) - Wilsher – claimant could not show that the operative cause was negligence - courts modified principle of causation to allow claim to succeed even though causation not established to empower autonomy (see Chester v Ashfar (2004)) - Courts discuss test of materiality (Montgomery v Lanarkshire Health Authority (2015)) - Rescuers are not an intervening event as someone foreseeably intervene when a defendant is negligent (Chadwick v British Rail (1967)) - Courts require medical negligence to be a grossly negligent and inappropriate response and must eclipse the original injury (Webb v Barclays Bank and Portsmouth Hospital (2002)) - Regarding medical negligence being an intervening event, the act must extinguish causative potency of original harm and important that the elusive concept of causation is not constricted (Rahman v Arearose (2001)) - Divisible injury cases such as Bonnington and Holtby v Brigham & Cowan (2000) - Acts of third parties must be tied to the original harm (e.g., Scott v Shepherd (1773); The Oropesa (1943)) - Act of a third party must be unreasonable in order to break the chain of causation (e.g., Knightley v Johns (1982)) - Courts ask whether the subsequent act has overtaken the original injury (Baker v Willoughby (1970)) - When disease-related courts apply principles from Jobling v Associated Dairies (1982) in which damages only awarded for period covering original injury and subsequent disease	

- Claimants own act can break the chain of causation (see McKew v Holland & Hannen & Cubitts (1969))
- Acts of nature able to break the chain of causation (e.g., Carslogie Steamship Co. Ltd v Norwegian Government (1952))
- Indivisible injury cases such as Bailey v MoD (2009) and Williams v Bermuda Hospital Board (2016)
- Requirement for proof of material contribution is NOT departure from but for – because evidence must indicate that claimant probably would not have been injured or so badly injured
- Liability apportioned where claimant suffered divisible injury but not where harm is indivisible

Question 2	25 marks

This was the most popular essay question. Most candidates showed a great understanding of the law in this area. Many cases were used in connection with the multiple common law principles. Again, however, there was often an absence of a focus on the question and more of a discussion relating to the principles and cases that clarify and enforce the limitations of the scope of this type of liability was occasionally missing. Examples of this could include the restrictions placed on claims by non-lawful visitors to limit the scope of the duty imposed for occupiers.

Suggested Points for Response:

Outline of Occupiers' Liability Act 1957:

- Common duty owed by occupiers to keep visitors to their premises safe (s2(2))
- Covers lawful visitors – those with express or implied permission
- Definition of occupier left to common law (s1(2))
- Occupational control test used in Wheat v Lacon 1966
- Covers claims for personal injury and property damage (s1(3)(b))
- Does not cover liability for dangerous activities voluntarily undertaken by the claimant, for example, Tomlinson
- Breach tested objectively under ordinary common law principles – likelihood someone could be injured, seriousness of any injury that might occur (Wagon Mound 1967), any social value of the activity (Watt) and any preventative measures that were taken (Latimer v AEG 1953)
- Higher standard expected if visitor is a child – they are to be expected to be less careful than adults (s2(3))
- Specialists and contractors are expected to understand and guard against any risks associated with their common calling (S2(3))
- Warnings given by an occupier may result in the duty being discharged (S2(4); Roles v Nathan 1963))
- An occupier does not have to guard against obvious risks, for example, Tomlinson

Outline of Occupiers' Liability Act 1984:

- Covers non-visitors
- Requirements to be satisfied before occupier will owe a non-visitor a duty of care – aware of the danger, aware of the possibility of a non-visitor and a reasonable expectation that precautions should have been taken
- Only covers claims for personal injury and not for property damage (s1(8))

Discussion of elements governing claims against occupiers:

- Case law's role in limiting scope of statutory rules to protect occupiers from unfair claims
- Both Acts cover dangers due to defective state of the occupier's premises, and also dangers arising due to things (e.g., activities) the occupier permits to take place on his premises
- Further application of principle resulting in prevention of unjust claims seen in line of other cases e.g., Keown v Coventry Healthcare NHS Trust (2006) and Poppleton v Portsmouth Youth Activities (2008)
- In assessing breach of duty, ordinary common law principles apply such as likelihood, seriousness, social utility and cost of preventative measures e.g., Latimer v AEC 1953

- Both statutes contain specific provisions relevant in assessing standard of care and whether it has been discharged, e.g., s2(3)(a) OLA 1957 requires higher standards of care re: child visitors
- Principle limited in Phipps v Rochester Corporation (1955) to prevent transfer of parental responsibility; occupiers entitled to assume that young children are accompanied by a responsible adult when visiting their premises
- S2(3)(b) OLA 1957 also allows occupiers to assume that specialists, such as contractors, will recognise and guard against risks commonly associated with their jobs whilst visiting premises (e.g., Roles v Nathan (1963))
- Similarly, s.2(4)(a) of the 1957 Act acknowledges that a warning provided by or on behalf of the occupier may discharge the duty of care, provided the warning is enough to enable the visitor to avoid the risk (see also s.1(5) OLA 1984)
- Courts confirm that the need to provide a warning does not apply in relation to risks which ought to be obvious to the visitor (Tomlinson)
- For example, in Darby v National Trust (2001) the Trust were not in breach of any duty for failing to provide warning signs discouraging persons from swimming in a pond
- Statutory provisions relating to risks voluntarily undertaken (s2(5) OLA 1957 & S1(6) OLA 1984)
- Case law relating to accidents resulting from dangerous activities voluntarily carried out by persons of full capacity not covered e.g., Tomlinson v Congleton Borough Council (2003); Evans v Kosmar Villa Holidays (2007); Edwards v Sutton (2016); Taylor v English Heritage (2016)
- Recent case law confirming that only premises are not expected to be completely safe, only reasonably safe (Murphy v Milton Keynes Parks Trust (2021); Hollywood v English Heritage Trust (2021)
- Therefore, whilst the Acts apply to a wide range of accident situations occurring on another person's premises, legislation is reasonably circumscribed, and courts interpret provisions sensibly so as to prevent unfair claims against occupiers

Question 3	25 marks

Many candidates approached this question with information on employer's duties to employees. This information was decided to be of worth and did receive credit. However, the question addressed an issue that specified 'whether' a duty would be imposed. Considering the importance and continuousness of employer's duties to their employees, this framing of the question should have indicated that there was an option as to whether a duty would be imposed. This should have highlighted that the area was that of vicarious liability.

Suggested Points for Response:

General discussion of rules:

- Principle results in an employer being liable for torts committed by employees if committed during the course of employment
- Requires relationship of employment rather than employer-contractor relationship
- Requires a close connection between the relationship of employment and the tort committed
- Tort must be committed in the course of employment
- Relevant test originated from Salmond (1907) and included consideration as to whether wrongful act was unauthorised mode of doing something authorised by the employer
- For cases involving intentional serious wrongdoing by an employer, test formulated in Lister v Hesley Hall [2001]

Discussion relating to adapting to modern circumstances:

- Further case law developments include clarification of incidents which justify the imposition of a duty onto employers (Catholic Child Welfare Society v Various Claimants (2012))
- Recent case law has considered the status of 'hybrid' workers/employees such as in Hawley v Luminar Leisure (2006); Woodland v Swimming Teachers Association (2014)
- Cases have considered circumstances involving the status of those considered self-employed e.g., Barclays v Various Claimants (2020); Uber v Aslam (2021)

- Cases have considered the close connection to tasks and motives e.g., Various Claimants v Morrison [2020]
- Cases have considered the conduct of an employee being divisible from that which is constituted by employment and that which constitutes a tort e.g., Mohamud v Morrisons (2016); London Borough of Haringey v FZO (2020)
- Organisations are strictly liable even though they may have made every effort to recruit, train and supervise their employees (e.g., MXX v A Secondary School (2022)
- Cases that have considered 'unusual' circumstances such as prisoners and foster parents (Cox v Ministry of Justice (2016); Armes v Nottinghamshire County Council (2017))
- Case law has seen the doctrine described as one that did not develop logically but on factors based on social convenience (ICI v Shatwell (1965) but more recently described as one "on the move" (Mohamud)
- Lady Hale in Barclays described the assumption of one status for employees in modern circumstances as "broken"; all factors and circumstances are to be considered

Question 4a	10 marks
Most candidates that chose to answer this showed good knowledge of the Defamation Act 2013, its sections, and the impact of the sections. Many responses showed good knowledge of the ways in which this law can be applied.	
Suggested Points for Response:	

Discussion of changes introduced by the Defamation Act 2013:

- Section 1 – introduced the serious harm test.
- Section 1 - Right of businesses ability to sue restricted.
- Section 2 – replaced common law defence of justification with the defence of truth.
- Section 3 – replaced common law defence of fair comment with the defence of honest opinion.
- Section 4 – abolished Reynolds defence and introduced public interest defence.
- Section 5 – introduced defence for operators of websites.
- Section 6 & 7 – expanded privilege categories.
- Section 8 – introduced the single publication rule and statutory limitation shortened to one year from first publication.
- Section 9 – jurisdiction issues.
- Section 10 – clarified rules in relation to secondary publishers.
- Section 11 - reversal of the presumption of trial by jury.
- Section 12(4) - court to pay regard to the freedom of expression when awarding damages.
- Section 13 – remedies, for example, the removal of defamatory content online.

Question 4b	15 marks

Part (b) required an in-depth discussion of the courts approach when they are faced with cases that involve a balance of competing interests. The DA 2013 is the most recent attempt by the government to comprehensively assess the impact of defamatory statements and the interference with the rights of others. For each area that is taught it is important for candidates to identify reasons for any changes and any criticisms or successes that those changes may give rise to. Research into previous, current, or future planned reforms are always extremely useful for these types of questions.

Suggested Points for Response:

Discussion relating to impact of changes:

- Pre-Defamation Act 2013, the law in this area was claimant-friendly and favoured the protection of reputation
- Fact that claims can be established on an actionable per se basis shows the value bestowed upon the protection of reputation
- Clarification provided in Lachaux v Independent Print Ltd relating to, for example, the interpretation of s1(1)
- Articles 8 and 10 have equal weighting
- Jury's ability to award damages impacted the freedom of expression until DA reversed the mode of trial presumption, with cases being heard by a judge unless the court specifically order a jury trial (see Yeo v Times News (2014)
- S1(1) 's interpretation is determined by the facts of the case and the impact of any statement(s) (Lachaux)
- Inferences can be drawn as to the level of harm suffered based on, for example, scale of publication and gravity of any statement(s) (Lachaux)
- Serious harm test discourages claims for cases involving a minor reputational impact
- Serious harm test raises threshold however, cases are determined by any impact on a claimant's reputation
- Burden of proof is on the defendant to provide evidence of truth
- Honest opinion under s3 no longer requires the presence of public interest as a justification (see Koutsogiannis v The Random House Group (2019)
- S4 and the public interest defence helps protect the freedom of expression; interpreted broadly (see Economou v de Freitas (2016); should consider context, timing, tone, seriousness (Serafin v Malkiewicz (2019)
- S5 can provide operator with immunity if they follow the correct process
- Ss 6 & 7 have aimed to prevent the stifling of scientific and academic debate
- S8 ended indefinite liability and brought stability to the claims presented before the courts (see Richardson v Facebook, Google (2015); Denman v Associated Newspapers (2016)
- S9 has restricted 'libel tourism' e.g., Ahuja v Politika Novine I Magazini (2015)
- S10 protects those that are not the authors, editors or publishers and would aid those involved in social media platforms issues arise when it is not reasonably practicable for the claimant to sue those 'responsible' for the comment
- S12(4) requires the court to have special regard to the freedom of expression when awarding damages to redress the balance away from the protection of reputation
- Access to justice denied due to no legal aid being available, however, ss2-4 Defamation Act 1996, an offer of amends, for example, can provide a means to avoid liability
- Companies' rights to sue have been restricted by the harm required.
- Limitation period changed to being from one year from first publication as opposed to first view or download
- Expanded ability to plead privilege and, therefore, less potential defendants available
- Strategic litigation prevents publication
- Risky for claimants that wish to bring a claim based on principle or to merely punish a defendant where there has not been serious harm

Section B

Question 1a	15 marks

Most responses contained good knowledge of medical negligence, however, there was a lack of knowledge on the principles and cases relating to the information provided to patients and the impact this has on the assessment of the validity of consent to medical procedures.

Suggested Points for Response:

Hospitals liability:

- Incorrect waiting time given to Alan could give rise to liability (e.g., Darnley v Croydon Health Services NHS Trust (2015))
- Bad advice given by Doctor Brown could give rise to liability (e.g., Webb v Barclays Bank and Portsmouth Hospital (2002))
- Issues relating to the disclosure of risks and informed consent could give rise to liability (see Chester v Ashfar (2004), Montgomery v Lanarkshire Health Board (2015))
- Montgomery – test of materiality – whether material will depend on significant a particular patient would attach
- Duce v Worcestershire Acute Hospitals (2018) – what is material is medical question – whether the patient should have been told is a legal question
- Liability can arise if patient is not told of reasonable alternatives (e.g., Thefaut v Johnston (2017) Plant v El Amir (2020)
- Alternative treatment should be disclosed depending on the patient; however, alternative must be an accepted practice and be appropriate rather than just possible (see Bailey v George Elliott Hospital 2017)
- Negus v Guys and St Thomas' NHS Trust 2021 – choice of procedure will not be deemed as negligence but a reasonable exercise of judgement if in accordance with practice accepted by responsible body of medical opinion
- Court must consider type and level of information to be provided to the patient (e.g., Webster v Burton Hospitals Trust (2017); Spencer v Hillingdon Hospital NHS Trust (2015)
- Characteristics of a patient, for example medical knowledge, will impact the disclosure decisions made (e.g., Webster)
- Therapeutic exception may be applied (Montgomery)
- Valid consent requires an assessment of the patient's capacity and competence
- Consent is a process and not merely a signature on a form (Medical Protection Society)

Contributory negligence:

- Possible defence of contributory negligence by the hospital for Alan not seeking medical assistance
- concept of reasonable care is objective
- Tompkins v Royal Mail Group (2005) correct approach is to determine causative contributions and decide just and equitable apportionment
- What is considered reasonable will depend on the circumstances (Harrison v MoD (1993)
- broad approach taken by the courts
- consideration given to fact that Alan believed the pain was to be expected (e.g., Spencer v Hillingdon Hospital NHS Trust (2015))

Question 1b	10 marks

Responses on part (b) occasionally lacked authoritative legislation or case law but candidates did show a good general knowledge of the heads of damage and the types of damages that could be claimed for. Issues of remoteness of damages should have been raised and the need for the harm to be reasonably foreseeable. Candidates must ensure they explain the heads of damages and the types of harm/loss that each cover. As importantly, they must use the facts provided in the problem question and address each one of them individually by advising the claimant as to whether each loss/harm could be covered.

Suggested Points for Response:

Potential claim for damages:

- Remoteness rules apply
- As per Wagon Mound, remoteness of damages will be based on reasonable foresight
- Non-pecuniary loss:
- Includes pain and suffering, loss of amenity and recognition of injury
- section 1(1) Administration of Justice 1982 allows for recognition of pain and suffering
- strict interpretation, e.g., Hicks v Chief Constable of South Yorkshire Police [1992]
- loss of amenity can include loss of dignity, e.g., Richardson v Howie [2004]
- Judicial Studies Board responsible for tariffs and awards
- court in Heil v Rankin [2000] highlighted how awards are assessed by the judiciary and are a value judgment
- courts should not aim for consistency of awards but for reasonable award in each circumstance (Heil)
- Pecuniary loss:
- Can claim for future medical care and attention
- This head covers reasonably incurred expenses
- Damages in relation to medical treatment, for example, able to choose private healthcare. No NHS costs are recoverable. Any savings made whilst using the NHS are deductible (s5 Administration of Justice Act 1982)
- Damages for expenses associated with hospital visits (Donelly v Joyce; Hunt v Severs)
- Future loss of earnings:
- Three ways to calculate future loss of earnings:
- Multiplier and multiplicand the usual method of calculation
- Blamire award possible (Blamire v South Cumbria HA [1992])
- Smith award possible (Smith v Manchester Corporation [1974])
- Court gave guidance in Khuzan Irani v Oscar Duchon [2019] on when the above methods should be used to assess the damages for future loss of earnings
- Interplay between traditional and Smith v Manchester award possible (e.g., Palmer v Seferif Mantas & Liverpool Victoria Insurance (2022))
- Ward v Allies and Morrison Architects (2012) is example of when court driven to conclude no alternative due to there being too many imponderables when determining a claimant's likely career path and earning capacity
- Blamire and/or Smith v Manchester award rather than multiplier and multiplicand a potential method for the court to use

Question 2a and 2b	19 marks

This was a very popular question. Candidates showed good knowledge of the definitions of these torts. Discussions were, however, very general. Whilst hostility is not required, the use of a vehicle by the defendant should have been discussed as this is an aggravating factor. General knowledge on all offences were provided but a comprehensive analysis is required which address potential outcomes rather than the candidate provided one definitive conclusion. Remember, candidates are required to advise the client, not to decide the case.

Suggested Points for Response:

2a (12 marks)

Assault:

- An assault causes the claimant to apprehend the infliction of battery on them (Collins v Wilcock (1984))
- Act must be intentional or negligent as to causing the apprehension
- Claimant must have reasonably apprehended the infliction
- Can be no assault if the claimant did not reasonably expect the defendant to carry out the threat (Thomas v NUM (1986))
- A conditional threat does not amount to an assault (Tuberville v Savage (1669))
- Claimant does not need to be in fear (Stephen v Myers (1830); Read v Coker (1853))
- Gestures can be sufficient (Stephen)
- Words alone can constitute an assault (R v Ireland (1998))
- Intended to cause apprehension with initial threat
- However, wording of threat shouted from the car was a conditional threat and means the assault is negated (Tubervile; Thomas)
- Intended to cause apprehension with the use of his vehicle when he drove it at Donald
- Immediacy and unlawful elements obviously satisfied

Battery:

- Battery is the direct application of unlawful force to an individual
- Application can be a mere touch (Cole v Turner (1704))
- Act must be intentional or negligent (Blake v Galloway [2004])
- Intention can be inferred (Wong v Parkside Health NHS Trust (2003))
- A defendant can be liable for all harm suffered even if they did not intend the harm (Williams v Humphrey [1975])
- Immediacy is a requirement of this tort
- The application of force must be unwanted and therefore unlawful
- Hostility is not required, and each case is considered on its merits (Faulkner v Talbot [1981])
- Everyday touching does not constitute a battery
- Use of vehicle (Flint v Tittenso 2015)
- Intentional can be shown by him being enraged (Blake)
- Court can impute intent as per Wong
- Can be liable for all harm suffered even if did not intend harm (Williams v Humphrey [1975])
- Hostility is present although it is not required (Faulkner v Talbot [1981])

2b (7 marks)

False imprisonment:

- False imprisonment is the infliction of bodily restraint which is not expressly or impliedly authorised by law
- All three are actionable per se i.e., without need to prove the claimant suffered any harm
- Claimant does not have to be aware that they have been restrained, e.g., Meering v Grahame-White Aviation [1920]
- Damages reduced if claimant unaware of restriction
- Act must be intentional or negligent
- Restriction must be complete (Bird v Jones (1845))

- If there is an alternative and/or reasonable 'escape' route, there is no liability
- Restriction must be unlawful, e.g., Jalloh v Secretary of State for the Home Department [2020], in which the claimant was unlawfully subjected to a curfew
- There does not need to be a physical barrier but could be due to a fear of the consequences of leaving, e.g., Jalloh
- The length of time involved is irrelevant, e.g., Walker v Commission of the Police of the Metropolis [2014] – claimant was restricted for a few seconds in a narrow doorway, however, only award minimal damages
- If the conduct is negligent rather than intentional, there is no tort, e.g., Sayers v Harlow Urban District Council [1958] – claimant was locked inside a public toilet as the lock was stuck
- Words such as a threat can amount to false imprisonment, e.g., Davidson v Chief Constable of North Wales [1994] – a store detective told the police the claimant had stolen an item, it was for the police to choose what to do with the information
- Carl was aware he was being restricted (Meering)
- Act by security guards was intentional (Sayers)
- Queries regarding whether the restriction was complete as Carl could have tried to leave on foot (Bird)
- Consideration of whether restriction was lawful action by guards under circumstances
- Length of time is irrelevant as seconds can constitute false imprisonment (Walker)

Question 2c	6 marks

Part (c) of this question required a discussion of Wilkinson v Downton. Most candidates showed an awareness of this version of trespass and a general knowledge of its requirements. Only responses that directly addressed each of its requirements and related them to the facts provided in the question received full marks.

Suggested Points for Response:

Wilkinson v Downton:

- Act done wilfully and calculated to cause harm and infringe a person's right to personal safety
- 3 elements to be considered: mental, conduct and consequence
- Requires intention to cause harm
- Requires an act serious enough to inflict harm on a reasonably firm person
- Recklessness can be sufficient
- Debates surrounding whether Eric wilfully acted in order to cause harm to Fiona
- Mental, conduct and consequent elements to be considered
- Was harm premeditated and deliberate?
- Recklessness is sufficient
- Could be physical or psychological harm (Wong)
- No justifiable reason for inflicting harm (e.g., OPO v MLA (2014))

Question 3	25 marks

Good responses addressed issues relating to the right to not be overlooked. Traditional cases have repeatedly confirmed this to be a right that does not receive protection. Since the ruling of the Supreme Court in the Tate Gallery case, this area of law has been modified. Due to number of visitors that were overlooking the residents in this case, the courts decided this was an exceptional case and did constitute a nuisance. It is unlikely that most claimants would suffer this type of interference based on the number of visitors and so is not likely to have a widespread impact. However, it is to be noted that this is a change in the historical approach to claims relating to this type of enjoyment of land. Public nuisance has undergone changes since the enactment of the Police, Crime, Sentencing and Courts Act 2022. Despite this type of nuisance becoming a criminal offence, there is nothing to prevent an individual bringing a claim in public nuisance. This was often missing from responses. Candidates must be careful to ensure they have covered all of the requirements of the question.

Suggested Points for Response:

Private Nuisance:

- Tort of private nuisance protects against unreasonable interference with any enjoyment of land
- St Helen's Smelting Co v Tipping (1865) - requirement of 'real interference'
- Cambridge Water v Eastern Counties Leather [1994] - requirement of 'material interference' and 'reasonable user' to limit scope of liability
- What is unreasonable – frequency, duration, time of day/night, intensity. Goes beyond reasonable give and take/legitimate pursuit of own interests
- Locality of the neighbourhood integral part of decisions (e.g., Sturges v Bridgman (1879))
- No liability if claimant is particularly sensitive (e.g., Robinson v Kilvert (1889)
- Planning permission does not in itself authorise a nuisance, e.g., Forster v Secretary of State for Communities and Local Government [2016]
- Public interest potentially important factor, e.g., Miller v Jackson [1975], Dennis v MoD [2003]; Barr v Biffa Waste Services [2012]
- Malice usually makes what would normally be considered reasonable unreasonable (Christie v Davey (1893))
- Gavin must have a proprietary interest to have standing for a claim in nuisance
- The landlord or charity (licensor) can be liable if in control of the licensees if they have the right to immediate possession and therefore in a position to control the land if not the residents (e.g., Cocking v Eacott (2016))
- Planning permission for the charity does not authorise a nuisance and court can consider whether the purpose can be fulfilled without a nuisance being caused
- Court will weigh competing interests (Lawrence v Fen Tigers Ltd (2013))
- Court will have to determine if the interference constitutes a material interference, lasts for more than a trivial duration
- Whilst locality is not determinative the fact that the area is well-known for being quiet the court may consider this and the impact the nuisance is having on other residents in the area
- If defendant claims their purpose has social utility, the courts have described individuals being burdened for a public interest as being a 'bad law' (Bamford v Turnley (1862); Marcic v Thames Water (2004))
- When determining whether to award an injunction or damages the court will assess whether the harm caused can be compensated with money and the impact of an injunction on the charity and students

Right to not be overlooked:

- Aldred's case (1610) states that there is no action based on delight and historic case law has continued to deny protection of such a right (e.g., Chandler v Thompson (1811) and Turner v Spencer (1861))
- Reasserted in modern case law (see Hunter v Canary Wharf (1997))
- Court in Fearn v Trustees of Tate Gallery (2023) ruled that certain structures are capable of constituting a nuisance

- Case involving Tate Gallery affected a substantial number of people and particularly large structure – the facts in Gavin's claim may well not compare sufficiently to overrule the general principle that the law of tort does not protect the right not to be overlooked
- If court are prepared to entertain these facts as a nuisance, an injunction against the construction of the extension would be potential remedy

Public Nuisance:

- Public nuisance has now been impacted by new legislation (Police, Crime, Sentencing and Courts Act 2022) but this does not prevent the bringing of a civil action for special damage caused to a private individual
- definition approved in Rimmington [2005] as '*A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects*.'
- substantial and unreasonable interference
- public nuisance is a nuisance which is so widespread in its range or indiscriminate in its effect (Attorney-General v PYA Quarries Ltd [1957])
- liability arises as soon as owner or occupier knows of the existence of the nuisance; has means to prevent or abate; & fails to do in reasonable time
- public nuisance is one which "materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects" (PYA Quarries)
- 'sphere' of the nuisance is generally described as the 'neighbourhood'
- act or omission must have been "likely to inflict significant injury on a substantial section of the public"
- questions relating to sufficient numbers to constitute class is a question of fact in every case
- does not need to be shown that every member has been affected; representative cross-section is sufficient
- Private individual(s) can apply for injunction or damages if they can show special damage over and above that suffered by the rest of the public involved; harm was not consequential; and, harm is substantial – not temporary or trivial (Benjamin 1874)
- if pollution has affected all members of the public equally, only the AG has a right to sue (Hickey 1970)
- highway authority has the right to sue (s130 Highways Act 1980)
- local authorities can bring a claim in its own name for the protection of interests of inhabitants of the area (s222 Local Government Act 1972)

Question 4	25 marks
Candidates consistently show knowledge of the traditional leading cases and the requirements for secondary victims. Cases such as Sion, Taylor, Ronayne and Young all raise discussion relating to what is referred to as a 'slow burn' involving the death of primary victims sometime after the shocking event. Whilst most candidates dealt with Jarred as a secondary victim quite easily and clearly, candidates must have addressed the timing of the death. The court would have to have considered the connection between the incident, the death of the victim and the illness/claim made by the claimant.	
Suggested Points for Response:	

Discussion of relevant rules:

- Alcock (1991), Page v Smith (1995) and White v Chief Constable of South Yorkshire (1999)
- Distinction between physical and psychiatric harm
- Distinction 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)
- Must be foreseeable in person of reasonable fortitude (White)
- 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
- Denning in Hinz v Berry (1970) - cannot be mere feelings of grief, sorrow, worry, financial strain etc – must be recognisable form of psychiatric harm (nervous shock)
- Will still be considered the immediate aftermath so long as the scene has not been cleaned up (Galli-Atkinson v Seghal 2003)
- Recent case law developments concerning 'slow burn' (e.g., Sion v Hampstead Health Authority (1994); Taylor v A Novo (2014); Ronayne v Liverpool Woman's Hospital NHS Trust (2015); Young v Downey (2021)); in which claimants have witnessed the deterioration of primary victims sometime after the shocking incident

Jarred:

- Potential claim as secondary victim
- Close tie of love and affection likely satisfied due to the relationship
- Was at the incident and witnessed the incident with his own senses
- Developed psychiatric harm due to shocking event
- Debate as to when the psychiatric harm developed; whether due to the incident or his mother's death
- In regard to his mother subsequent death, recent case law indicates that such a claim is likely to be unsuccessful as it is the incident that must give rise to harm caused and not a subsequent death (Taylor; Young)

Lewis:

- No special status
- Act if rescue is induced by the incident (Alcock 1991)
- Rescuers are not at an advantage but must not be at a disadvantage
- If due to negligence it will be foreseeable an individual will intervene (Chadwick 1967)
- Must distinguish between lay and professional rescuers
- Prior training may result in a higher tolerance to shocking events being expected
- American fireman's rule that states an employee cannot claim if on a call-out is not present in English law and they can claim as any other rescuer (Ogwo v Taylor 1987)
- As per Greatorex v Greatorex 2000 Kevin remains a rescuer despite satisfying elements of being a secondary victim in his own right

- Social Action Responsibility and Heroism Act 2015 not relevant as Kevin is a professional rescuer

Mitchell:

- Potential claim as secondary victim
- Close tie of love and affection likely to be established due to the relationship
- Was not at the incident and did not witness it with his own senses
- Phone calls informing the claimant of the incident do not come under the ambit of psychiatric harm
- Suffered psychiatric harm when received the phone call
- Recent case law indicates that such a claim is likely to be unsuccessful as it is the incident that must give rise to harm caused and not a subsequent death (Sion; Taylor; Ronayne; Young)
- Medical condition that developed after