CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

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 January 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

Overall the pass rate increased by a notable amount, albeit within the historical variance for this unit. Candidate performance was very consistent across the paper, with only a handful of questions attracting a particularly high or low average mark.

In terms of paper performance, Section A was generally answered well. Candidates performed particularly well in the 1 and 2 mark questions, while 3 mark questions tended (as intended) to act more as differentials between stronger and weaker scripts. Questions 3 (rescuers) and 5 (material increase in risk) were notable examples of this. Question 4 was the least well answered question, with many candidates not appreciating that the question was asking about foreseeability in the context of breach (as opposed to existence of duty or remoteness of damage).

Section B saw a relatively balanced split between scenarios, although scenario 3 was slightly more popular and scenario 2 slightly less. As is always the case, some topics definitely lead to stronger performance than others.

In scenario 1, candidates generally did well on psychiatric harm and damages. Understanding of the law relating to novel duties of care was definitely improved on 2022, with more candidates understanding the impact of decisions such as Robinson. The weakest performance was, by some way, on question 2 (public policy and liability of the police).

In scenario 2, candidates were generally strong on the various defences being examined. Given the weight of marks in this area, there may have been an element of self-selection here. Areas candidates could have performed better on were 2b (Road Traffic Act exclusion of volenti) and 3b (remoteness/ eggshell skull).

In scenario 3, candidates were strong on psychiatric harm but struggled with the question (1b) on novus actus and, to a lesser extent, the final question on illegality.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

This was a very straightforward question testing the very first line of the unit specification. Almost all candidates obtained the single mark available.

Question 2

This question reflected the time in which it was originally set, and the marking guide had to be expanded to take note of more recent authority. This probably made the question less challenging, in that there were more opportunities to gain marks and performance was very good.

Question 3

This was a more difficult question and this was shown in a wider dispersion of marks. Most candidates were able to provide an answer containing some credit, but just less than 10% received full marks.

Question 4

This was one of the most challenging Section A questions and performed as expected. Only just over 20% of candidates 'passed' this question.

Question 5

Candidates generally either had good knowledge or did not understand the area.

Question 6

This question was generally well answered. The majority of the candidates who obtained no marks appeared to have made the common mistake of confusing factual and legal causation.

Question 7

Like A1 this was a straightforward one-mark question which the vast majority of candidates obtained the mark for.

Question 8

Performance in section A was very much as expected but if there was a surprise it was that a pleasing majority of candidates showed good knowledge to answer this question fully.

Question 9

Again, a majority of candidates obtained both marks available. The question performed as expected.

Section B

Scenario 1 – General

Roughly a third of candidates answered Scenario 1. This was a higher proportion than expected given that a couple of difficult areas were included (novel duties of care, public policy and police negligence) but it may be explained by the fact these were balanced by two areas candidates have traditionally done particularly well in answering (psychiatric harm and damages). Performance broadly followed that balance, with candidates usually picking up their best marks in Q3 and Q4.

Question 1

This question required candidates to have knowledge of the law on establishing a duty of care for part (a) and to apply that law in part (b). Interestingly, candidates tended to perform better on part (b) than (a); candidates usually find it easier to learn and repeat the law than to actually analyse and apply it. Possibly this is mainly due to the fact that the law in the area has recently changed – knowledge of these changes was more important for part (a) than part (b).

Question 2

This was by far the weakest answered question in the scenario. Candidates have historically always struggled with the idea of public policy (generally) and police liability (specifically). A small minority of candidates knew the area well, a larger minority did not know anything about the

area, while most candidates had a vague understanding of the general principles but lacked the detailed knowledge required for more credit.

Question 3

This was a "classic" psychiatric harm question. Candidates know that the chances are high that such a question will be asked, because of the way the unit specification is written and the fact that there are only a very limited number of ways of asking a Section B question on this topic. As such, the high overall performance here was not surprising.

Question 4

Performance was also good here, showing a good range given that this question tested a different learning outcome to the rest of the scenario.

Scenario 2 – general

Scenario 2 was by some way the least popular scenario, with less than 20% of candidates selecting it. Possibly this was due to the learning outcomes examined, given it was the only scenario not to include psychiatric harm but did include two areas in causation and defences.

Question 1

This question tested candidates' knowledge of the use of limitation as a bar to a claim. This is not an area that is always examined, given that there is a lot of scope for different areas within the wider learning outcome, so the good performance here was to be commended.

Question 2

This question required candidates to have an understanding of contributory negligence and, in part (b), S147 Road Traffic Act. Performance was again good, perhaps slightly better than expected, especially on part (b).

Question 3

This question was intended to balance itself through a more straightforward part (a) and more difficult part (b). Very strong performance on part (a) and mixed, albeit still strong, performance on part (b) suggest that this has occurred.

Question 4

As has historically been the case, this question on damages for a deceased claimant tended to separate candidates between those (the majority) with a very strong grasp of the area, and the remainder who had little or no knowledge of the topic.

Question 5

This question was answered well, with a good portion of candidates receiving full marks

Scenario 3 – General

This was the most popular scenario, although this still meant that less than 50% of candidates selected it.

Question 1

As with similar questions in the other scenarios, this combined a more challenging topic (*novus actus*) with a more straightforward element (the usual test for factual causation). Again, the balance seemed to be struck well, with very strong performance on (a) but (b) showing a much broader range of marks and thus acting as a differentiator as intended.

Question 2

Both parts of this question were a test of knowledge and candidates performed extremely well on this. In many ways, the extremely high marks awarded here were balanced by question 3, where both parts required application.

Question 3: As above comment.

Question 4

This question was answered well, in common with the general theme through the paper of candidates being more capable of defences-based analysis than has historically been the case.

<table>
<tr><td colspan="3">**SUGGESTED POINTS FOR RESPONSE**

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LEVEL 3   UNIT 5 – TORT LAW</td></tr>
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SECTION A

Question Number	Suggested Points for Responses	Marks (Max)
1	Civil wrong	1
2	• Caparo v Dickman (1990) • Reasonable foreseeability • Proximity • Just and reasonable • Following Robinson v CC of S Yorkshire (2018) • An incremental approach • By analogy with existing cases	3
3	• Duty owed provided a reasonable person in the rescuer's situation would feel obliged to assist • A person who creates a dangerous situation is liable for all foreseeable consequences of his action • "Danger invites rescue"/ it is usually foreseeable a person will go to another's rescue • Relevant case law e.g: Baker v Hopkins (1959)	3
4	• Standard is that of reasonable man • With knowledge at the time the act/omission occurred • Cannot use hindsight • Relevant case e.g. Roe v Minister of Health	3
5	• Multiple causes/ "where it is hard to determine which D is to blame" or similar • Of a particular injury/harm • D will be liable if makes material contribution to risk of harm • Relevant case e.g. McGhee v NCB Reference to relevant example e.g. industrial disease cases	3
6	• Identification of remoteness test. • The type or kind of injury • must be a foreseeable result of the breach of duty. • Relevant example or case law e.g.: The Wagon Mound (No.1) (1961)	2
7	• Employer can be held liable for wrongful act of employee/ "one person is liable for the act of another" or similar	1
8	• Damages will be reduced by an appropriate percentage to reflect fault on the part of the claimant (or words to this effect).	2
9	• Dependants (of the deceased) • Any relevant example from S1(3) of FAA 1976	2
	Section A Total: 20 marks	

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Section B - Scenario 1

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	An explanation that makes reference to the following points; • Following the guidance of the Supreme Court • Relevant case e.g. Robinson v CC of W Yorkshire (2018) • Starting point is to look for an established duty • If not, an incremental approach • By analogy with existing authority • Using the principles from Caparo v Dickman (1990) • Foreseeability • Proximity • Fair just and reasonable to impose duty	8
1(b)	An explanation that makes reference to the following points; Application of neighbour "test": • Store should take reasonable care (security) to avoid harm to a customer • Cam, as a customer, is a neighbour Application of 3 part "test" • Reasonably foreseeable that if Don is allowed to enter store harm may be done to a customer • Foreseeability therefore exists • Relationship exists between store and customer • Proximity is established/therefore exists • Why it is just and reasonable to impose liability • Conclusion: Buyitbetta owes duty of care • Relevant case law e.g: Topp v London Country Bus Ltd (1993) or Smith v Littlewoods (1987)	6
	Question 1 Total: 14 marks	
2	An explanation that makes reference to the following points; • Statutory authorities are not generally held liable in negligence • Police are statutory authority/not likely to be held liable • Relevant case law e.g: Hill v CC of W Yorkshire (1988) • Police immunity is not absolute • Exemption from liability may be breach of ECHR • Relevant case law e.g: Osman v UK (1999) • Cases since Osman have suggested still extremely difficult to claim • Relevant case law e.g. Michaels v CC of S Wales (2015) Conclusion – Police may be held negligent to Cam	9

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3(a)	An explanation that makes reference to the following points; • Anita is directly involved • and within the range of foreseeable injury/danger zone • Anita fears for her safety – knife • Relevant case law e.g: Page v Smith (1995) • Conclusion: Anita meets the requirements for a primary victim	**4**
3(b)	An explanation that makes reference to the following points; As a secondary victim Frank must show: • Recognised psychiatric harm • Close tie of love and affection to the victim • Physical proximity to scene or its aftermath • Saw or heard the event or its aftermath with own senses • Sudden shock • Reasonably foreseeable in person of ordinary fortitude • Relevant case Alcock v CC of S Yorkshire (1992) Application: • Close tie of love and affection with Anita • No proximity • Did not see with own senses • No sudden shock Conclusion: Frank does **not** meet the requirements of a secondary victim	**9**
	Question 3 Total: 13 marks	
4	An explanation that makes reference to the following points; • Pain and suffering • Loss of future earnings • Loss of amenity • E.g: loss of enjoyment of holidays, inability to play with child • Objective assessment • Therefore irrelevant that Anita does not realise what she is missing	**4**

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Section B - Scenario 2

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	An explanation that makes reference to the following points; • Limitation Act 1980 • imposes a limitation period for personal injury claims • of three years • from the accrual of the cause of action • which was the date of the accident • Collette's claim must, therefore, be commenced on or before 2nd August 2023	**6**
1(b)	An explanation that makes reference to the following points; • the claim would become statute barred. • Harold would have a complete defence to the claim	**1**
	Question 1 Total: 7 marks	
2(a)	An explanation that makes reference to the following points; • Contributory negligence is a relevant defence • under s1 Law Reform (Contributory Negligence) Act 1945 • where the claimant's own negligent conduct • has contributed to the claimant's harm/damage • the court may reduce damages awarded • by an amount deemed just and equitable • Collette's failure to wear a seatbelt has increased the severity of injuries • and her damages may be reduced accordingly • Froom v Butcher (1976)	**8**
2(b)	An explanation that makes reference to the following points; Harold cannot bring the defence of volenti/consent against Collette's claim • as s149 Road Traffic Act 1988 • expressly prevents drivers using the defence against passenger claims	**2**
	Question 2 Total: 10 marks	
3(a)	An explanation that makes reference to the following points; u • To establish factual causation the 'But for' test is applicable. • The court asks would the claimant have been injured but for the defendant's action • Applying the test: Bella would not have been injured or subsequently died but for Harold crashing his car into Bella's car. • Barnett v Chelsea and Kensington Management Hospital Committee (1969)	**3**

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3(b)	An explanation that makes reference to the following points;	5
	- The type of damage suffered - must be a reasonably foreseeable result of the defendant's breach of duty of care. - Applying the test: A head injury is a type of injury that Harold should have been able to foresee from his negligent driving. - The thin-skull rule is also relevant: - Where some physical injury is foreseeable from the defendant's breach of duty, the defendant becomes liable for the whole extent of damage suffered even though it is not all foreseeable. - Therefore, Harold is responsible for Bella's death. - Relevant case: Smith v Leech Brain (1962)	
	Question 3 Total: 8 marks	
4(a)	An explanation that makes reference to the following points;	5
	- Under Law Reform (Miscellaneous Provisions) Act 1934 - PRs can claim everything Bella could have claimed, except future losses - Special damages - E.g. repair costs for her car - And loss of earnings to death - Funeral expenses (if paid by Bella's estate). - General damages - E.g. for pain and suffering	
4(b)	An explanation that makes reference to the following points; Bring loss of dependency claim under Fatal Accidents Act 1976	1
	Question 4 Total 6 marks	
5	An explanation that makes reference to the following points; - illegality / ex turpi causa - Aaron was engaged in an illegal activity of taking the plane without owner's knowledge or consent when he suffered his injuries - Harold can argue that Aaron's damages arise directly from an illegal activity /acting together in a criminal enterprise - it would be contrary to public policy to allow Aaron to recover damages/ no action can be based on an illegal cause - if successful, illegality is a complete defence - Relevant authority e.g. Pitts v Hunt (1991) - Harold can also argue the defence of volenti non fit injuria / consent - no injury can be done to a willing person - Harold must prove that Aaron knew of the risk of flying in the plane with an inebriated pilot - And voluntarily agreed to it - If successful volenti is a complete defence	9

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Question Number	Suggested Points for Responses	Marks (Max)
	• on the facts he appears to have known of and agreed to the risk. • Relevant case e.g. Poppleton v Trustees of the Portsmouth Youth Activities Committee (2008)/ Morris v Murray (1990) • Conclusion: Defences likely to succeed	
Scenario Total: 40 marks		

Section B - Scenario 3

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	An explanation that makes reference to the following points; • The "but for" test • But for the defendant's actions, would harm have occurred? • Relevant case e.g. Barnett v Chelsea	**3**
1(b)	An explanation that makes reference to the following points; • Doctrine of novus actus interveniens/new intervening act • Creates a break in the chain of causation • Effect is to prohibit recovery of damages past this point • Can be act of claimant • Relevant case e.g. McKew v Holland • I caused the original injury to G • But G has acted against doctor's orders/unreasonably • By going outside without her crutch • May have broken chain as ankle injured further and worse prognosis • I may be able to rely on the defence of contributory negligence	**8**
Question 1 Total:11 marks		
2(a)	An explanation that makes reference to the following points; • A primary victim is someone who suffers recognised psychiatric harm • And to whom physical harm is caused, or • Such harm is reasonably foreseeable/ "in the zone of danger" • Only some harm foreseeable/ no need to show psychiatric harm foreseeable • Relevant case e.g. Page v Smith	**4**
2(b)	An explanation that makes reference to the following points; • Secondary victim is someone who suffers recognised psychiatric harm • And meets the "control mechanisms" • Established in Alcock v CC of S Yorkshire • Proximity in space and time to the event • Or the immediate aftermath • Proximity of relationship/ close ties of love and affection	**7**

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		• Witnesses the accident with own unaided senses • Suffers sudden shock • Reasonably foreseeable in person of ordinary fortitude	
			Question 2 Total: 11 marks
3(a)		An explanation that makes reference to the following points; • Jennifer was nearly involved in the accident • So physical harm was foreseeable • She was in the zone of danger • Therefore she is a primary victim • Suffered recognised psychiatric injury Iqbal owes her a duty of care	4
3(b)		An explanation that makes reference to the following points; • Kelvin drove past 10 minutes later • So no risk of physical harm • Is not primary victim/ can only claim as secondary victim • Kelvin saw the car and the medical treatment • So witnessed the immediate aftermath • Kelvin must prove his relationship to Henry was one of love and affection • Kelvin saw the aftermath with his own senses • Kelvin appears to have suffered a sudden shock • Suffered recognised psychiatric injury • Kelvin is likely to be able to claim/ any other reasoned conclusion	7
			Question 3 Total: 11 marks
4		An explanation that makes reference to the following points up; • no remedy from improper cause • As a matter of public policy • Unclear exactly how defence operates/ very fact-sensitive • if successful, illegality is a complete defence • Relevant factor: is the harm a consequence of the illegal act • Relevant factor: would allowing recovery undermine the purpose of the rule broken • Relevant factor: gravity of the conduct • Henry is in possession of illegal drugs • Which is a crime/ evidence of illegality • Harm is not a consequence of the illegal act • Recovery by H for I's negligence would not undermine the criminal law • Credit any other relevant point • Credit any reasoned conclusion Relevant case e.g. Gray v Thames Trains, Patel v Mirza etc.	7
		Scenario Total: 40 marks	