CILEX

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2023

LEVEL 6 UNIT 13 – LAW OF TORT

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

In this series there were a range of questions approached. Candidates that do not take the time to explain what they raise in their answers, will lose credit due to information they have omitted or under-explained. They will miss opportunities to gain credit by developing points and/or explaining the use and impact of case law.

There appeared to be a common problem with the use of time during the examination. Candidates should ensure that they have taken the time at the beginning of the examination to read all the questions and to plan accordingly those that will be chosen and the information that is to go into each answer. Whilst this can feel time consuming, this will in fact save lots of time by ensuring comprehensive coverage of all the question requirements.

When choosing which information to include within an answer to an essay question, it is vital that candidates do not simply recite the rules relating to that area of law. It is imperative that candidates can raise several issues that arise when an area of law is critiqued. Marks are only awarded for discussions of issues and not a simple disclosure of the relevant rules. The type of discussion that is required covers, for example, the problems that legal rules can cause for defendants or claimants or the reasoning behind their place within the law of tort that is required.

Most candidates completed their essays by summarising all the information they had raised during their discussion. However, this information would already have been credited earlier during the answer, for example, a candidate cannot be credited for the use of the same case twice.

Additional credits can be gained during a conclusion by using information that has not been used before. To that end, it is more useful to consider a conclusion as an ending to the information provided such as the development of an area of law. Retain information, such as reforms that have been recommended and a direct addressing of the essay question for the conclusion and in this way, candidates continue to gain more credits and ensure that they have directly answered the question.

If candidates can be confident in discussing issues with each area of law, such as duty of care and psychiatric harm, this will enable them to identify and apply these issues when identified in problem questions. For example, in the psychiatric harm problem question, the issue of the timing of the aftermath that has undergone intense scrutiny within the courtroom should have alerted candidates to discuss this issue from the perspective of a potential claim and the impact this may have on claimants and defendants.

Candidates must not waste valuable time or lose credits by including within their answers the facts from the problem question. Assume that the reader is fully aware of the facts of the case and considering the candidate should be advising either a claimant or defendant, there would be no need for a candidate to repeat the facts to the client.

Candidates are strongly advised to plan their answers to problem questions. There appeared to be a common problem across many of the candidates' submissions that illustrated a lack of clarity dealing with the different claims that were possible and the differing parties involved. A few minutes spent planning the different parties and the issues that will be involved will greatly help prevent this issue.

Candidates should explain to the client the rules that apply in these types of cases and then of how those rules will be applied to the facts of the client's case. Candidates can only advise as to the possible outcomes that may occur within the courtroom. Advice is being provided pre-trial and so the candidate cannot predict the outcome but only advise on the different potential outcomes and give reasons as to why a particular ruling may be made or vice versa.
Candidates should address each claimant, defendant, and issue separately and avoid grouping together the outcomes or rules for multiple parties in sweeping summaries. Firstly, the information for each should be addressed separately as each are separate clients and secondly, this information merely summarised cannot be re-credited.

Care should be taken when planning the different parts of the answer when a question is separated into two parts. Candidates included a discussion in the first part and then found themselves struggling to find information for the second half of the question and many simply spent time repeating information from part (a).

The use of cases was, again, a particular problem this year. Credit cannot be gained by simply stating the name of a case. Before choosing to use a case, a candidate must be clear on the reasons for the inclusion of the case. Decisions such as, whether the case is a ruling case that contains primary tests

that must be applied, or whether the case is an example of a legal rule in action and can illustrate the impact of the rule for those involved.

In addition, providing a rule with a case name can be developed and gain valuable credit by explaining the reasoning behind the ruling. For example, why is a rule in place; if it is harsh upon certain parties, explain why the court continue to apply the rule. Finally, ensure that the case chosen is used for the correct issue, for example, the use of the case of Rose v Plenty for unauthorised act in an authorised way as opposed to its correct usage – when discussing a 'frolic of their own'.

Lastly, a general point on problem questions is to ensure that candidates make their answers clear and consistent. There were answers that would state a point such as a party was confirmed as an employee, but the answer would then continue by debating that party's employment status. Alternatively, candidates were determinative at one point but then later contradicted their statement further on in the answer. This again can be avoided using a clear plan before answering the question to ensure the candidate is clear on what information must be addressed and the arguments and reasoning they are going to provide.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1 – Interests

This was an extremely popular question. Many candidates raised valid points to illustrate the law of tort's aim of protecting the interests of citizens. Interests to be covered were included within the question, however, the way in which those interests were discussed was wide-ranging. Stereotypically this includes the torts of trespass to the person (assault, battery and false imprisonment), nuisance torts, trespass to goods, and economic loss. However, many candidates choose a wide range of areas to show how the courts achieve this aim and this is acceptable if the candidate can show how an interest listed within the question is protected.

At times, a candidate's opinion was expressly stated and whilst this may be valid, this must be accompanied with a legal basis and reasoning. Firstly, the relevant legal principles and tests in a particular area must be raised, possibly an example to illustrate the point you wish to discuss and a discussion of, for example, legal reasoning behind the rule, before an opinion can be offered which will be sufficient to gain marks being awarded.

A comparison of approaches and the relative fairness between the law's ability to protect citizen's interests e.g., the law may seem fairer when dealing with a duty of care than it may appear when dealing with a case involving nuisance – for a case involving negligence, a substantial award of damages can be granted whereas within nuisance cases, the most commonplace remedy is that of an injunction which may not serve to make the claimant feel as if they have been fully compensated for the issues they have experienced. This is an appropriate method which a candidate may use to address the interests.

Question 2 – Nuisance

This question was popular. Unfortunately, many candidates were only able to discuss the various rules and tests used in these cases. Whilst legal knowledge of the principles and approaches used are essential, the question requires a discussion rather than an account of the law.

The question focused on whether the tort of nuisance imposed strict liability and not a generalised review of the relevant factors considered by the courts.

A wide range of case law was used which is an excellent way in which to illustrate the impact of the law, however, without the legal reasoning and judicial mindset behind these questions, the impact of the duty imposed will not be fully explained.

Candidates were required to show, by using the various tests and case law examples, whether the tort did in fact impose strict liability. Some candidates provided an excellent analysis of how, due to certain factors considered by the courts when deciding these cases, the tort may in fact not be one of strict liability – most certainly not one of absolute liability.

Lastly, in relation to public nuisance, statutory changes have taken place due to the passing of the Police, Crime, Sentencing and Courts Act 2022. Candidates must be aware of the changes that have taken place and the impact this will have on the civil side of this area of law.

Question 3 – Damages

This was a fairly popular question. Candidates were required to discuss the various ways in which the courts are able to compensate claimants. Many answers covered a wide range of these, including all the many ways that the courts can help a claimant, for example, recover the appropriate award of damages to cover their needs for the future. Many candidates showed knowledge of these various methods at the court's disposal however they lacked the necessary discussion relating to the specific requirements of the question. Candidates were required to discuss the ability of the courts to meet the needs of claimants in these cases with the various options available such as periodical payments and damages for future care and assistance that may be required. Good answers discussed the difficulties associated with attaching a monetary figure that can appropriately meet the needs of some of the claimants involved. These cases involve life-changing events and can often impact not only the claimant but their dependents. Candidates require an understanding of how the courts overcome these issues and be able to discuss, for example, any shortcomings.

Question 4 – Economic loss

This was the least popular question and unfortunately only answered well by a small number of candidates. The problem appeared to be twofold. Firstly, the information must be carefully allocated between (a) and (b) in these types of questions. Part (a) requires a more factual discussion of the relevant rules, principles and leading cases. Part (b) requires a discussion that provides an explanation of the judicial mindset and reasoning for the creation of the rules and tests in place and also for any changes that have taken place. For example, were any changes created via case law made to provide fairer outcomes or to limit the remit due to floodgate concerns and the scope of liability for defendants.

Many of the answers gave case names and some information on the facts of the case, however, unless this is provided in terms of illustrating the reason or the impact of the rule, this will not attract the required marks. Many inclusions of case law merely stated the outcome but gave no reasoning for that outcome in relation to the requirements of the question.

Section B

Question 1 – Occupiers' liability

This was the most popular problem question. Candidates showed vast knowledge of the legislation and cases involved in this area of law.

Issues arose when there was a requirement for candidates to deliberate on the various incidents. Candidates must avoid determinative answers in which they decide the outcome. The question requires that you merely advise the clients on the relevant rules in place and the possible impact they may have on the facts of the case.

On this point, there is no need within a problem question to discuss the area of law in general terms, but to be specific to the client's circumstances and the discussion of the rules being applied to the facts.

Candidates should also be careful when using terminology such as discharging and transferring a duty of care. A duty can be discharged by an occupier by the use of warning signs. The transferring of a duty occurs when an occupier relies on the use of an independent contractor that they were reasonable in hiring and supervising. If this is accepted by the courts, it will be the independent contractor that will owe the duty of care and it will be for them to show they discharged that duty.

When there is doubt as to the status of a particular claimant, it is a good idea to review the problem question as a whole and highlight which parts of this area of law have been covered when discussing other claimants. Within an examination question, information will not be required to be duplicated as marks for this information would already have been allocated. This does not mean, that if a candidate has identified and discussed a claimant as a lawful visitor, that all other claimants will not be lawful. However, this is a good indication in order to provide a comprehensive occupiers' liability answer.

Candidates are advised not to be so determinative if there is doubt as to a claimant's status, but instead provide a debate as to the reasons they may be lawful and alternative reasons as to why they may not be. Often within examination questions it is precisely this debate that is required in order for a candidate to exhibit their ability to apply the law whilst analysing the impact of relevant rules and principles. Whilst applying candidates must ensure they merely advise the clients as to the potential outcomes that are possible as opposed to determining the case.

Question 2 – Psychiatric harm

This was an extremely popular question and candidates show wide ranging knowledge of the case law involved. Many discussed the impact of these rules, and this is not required, nor worthy of credit, within problem questions. Candidates are to remain focused on the law to be applied and how the

facts relate to these rules. Problem questions do not require a discussion of the unfairness of a rule nor any reforms that have been proposed.

The facts relating to Iris were answered well with most candidates identifying that the main issue for discussion was the potential for the rebuttable of the presumption of close ties of love affection. Candidates are reminded that it is not their role to determine whether this presumption is rebutted but merely to advise the client (Iris) that this is a possibility open to the defendant. This decision will be made when the trial takes place, not during the advice given beforehand. Candidates should pose their answers from the point of view of legal advice given to a client that requires information on what rules and principles will be applied when their case is heard, and not to write an answer that determines the outcome (this is the role of the judge/jury and not a legal advisor).

If facts lead a candidate to reach a firm conclusion, sound legal reasoning must accompany this in order to be awarded the appropriate number of marks.

Candidates are not required to have any medical knowledge nor to debate within an answer the medical implications of any medical condition included. Candidates need only explain to a client that it must be shown to the court that they do in fact have a medically recognised condition and this will involve the use of medical experts as opposed to the 'advising' candidate.

If a candidate feels that they know the outcome of a particular claim due to one element that is required failing, they are still required to explain to the client what those elements are, how they relate to the facts of the client's case and the reasons for why each element is either satisfied or not. It is not sufficient for a candidate to, firstly, decide the case, and secondly to merely advise that a client's claim fails.

Only a minority of candidates raised the statutory protection offered to those involved in a rescue situation. The Social Action, Responsibility and Heroism Act (SARAH) 2015 is relevant in these circumstances. Whilst the Act has been described as merely rewriting the common law, it does clarify that the courts are to take into consideration whether the rescuer claimant was acting for the benefit of society, adopted a 'predominantly responsible approach' and 'acting heroically.' Cases continue to be highly fact-sensitive and require the magnitude of risk to be balanced against social values/utility. Jon became a primary victim when he was exposed to danger as he attempted to extinguish the flames on the victim. This was due to his attempts to rescue Hannah and therefore, the civil law must reflect a consideration of the legislation in place to ensure claimants such as Jon are treated in an appropriate way based on their actions. This legislation along with common law attempts to promote the involvement of citizens in order to encourage social action and responsibility and the heroic actions that rescuers perform must be considered in this light when their claims are brought to court.

Many answers provided excellent knowledge and discussion on the claim involving the victim's husband and the court's approach when considering the scope of 'immediate aftermath'. Again, candidates are not required to determine whether the facts will be considered within the 'immediate aftermath' but merely to advise the client that is scope for discretion and to highlight a case in which this has taken place. Facts showing what was considered to be the 'immediate aftermath' must be provided as opposed to merely stating a case or to simply say it was 'allowed' in that case. Candidates should be aiming to advise the client that there is the possibility of different

circumstances being considered by the court and to illustrate how the courts dealt with a case with similar facts.

It is not necessary to discuss the damages that any claimant can be awarded in these type of problem questions. Candidates should focus on the facts of the tort., Damages would only be required if they are expressly requested within the wording of the question.

Question 3 – Vicarious liability

As always this is a very popular question and candidates showed wide ranging knowledge and understanding. Many candidates included current case law that has impacted the consideration of facts in these cases, such as those involving whether an employer can be held liable when an employee commits a crime at work.

However, many candidates focused far too much time and effort on discussing whether there was a duty owed and whether the elements of a tort had been fulfilled. In these type of questions, the candidate must focus on the primary elements of vicarious liability – whether the person involved is an employee and whether they are to be considered as within the course of their employment at the time of the incident. This should focus on, for example, whether they were doing an authorised or unauthorised act and to whether the work related to the terms of their employment.

Many candidates confused this with a question on employers' liability or provided an answer that covered both areas of law. To distinguish between the two, candidates should decide whether the harm caused was to an employee due to an employers' act or omission or whether the harm caused was to a third party by someone's employee when they were in the course of their employment.

The first claimant was expressly stated as being an employee, however, some candidates ran through the elements involved in making this decision. Candidates should take great care with the wording provided within problem questions and plan how the information within this area of law is to be allocated amongst the claimants to be advised.

Issues relating to the agency worker also highlighted a common error candidates made. Cases such as Hawley v Luminar Leisure, Uber v Aslam and Barclays v Various Claimants show that the courts are willing to consider multiple circumstances, including implied as well as express arrangements and clarify the definition of workers as a hybrid of those employed and those self-employed. Candidates must be able to use these cases to illustrate the likely assessment of a claimant's status when providing advice.

A number of candidates missed the opportunity for marks by not discussing in sufficient detail or by using up-to-date case law principles in relation to the closeness of the connection test used to establish whether an individual can be considered to be an employee for the purpose of vicarious liability. Recent cases such as Mohamud v Morrison in 2016 compared with that of Morrisons v Various Claimants in 2020 clarify debates involving those employees that commit a crime in situations that do not clearly lie within the remit of the 'course of employment.' The court, in Isma v Luton BC [2022], highlighted that simply because an opportunity to commit a crime arises during the course of employment does not automatically render an employer liable for the harm caused. Candidates must be aware of the different circumstances these types of cases deal with and be prepared to compare them and discuss them in line with the facts of the problem question.

There should be no inclusion of policy, reasoning or discussions of unfairness within a problem question. Candidates must focus on advising a client of the relevant rules that will be applied to the facts of their particular claim.

Question 4 – Defamation

This was a popular question. Sections of the legislation were known well, and the various elements required to be established were covered well. However, not all the potential claims were identified. An example of this is in relation to the television company which broadcast the alleged defamatory words spoken by the MP. Regardless of whether a candidate considered a claim to be not possible, reasons must be given as to the potential success of every individual/company involved, if they are specifically excluded within the question. For example, a question may require to only advise certain claimants and these instructions must be adhered to closely. Alternatively, if the question asks for the potential liability, a candidate must ensure they discuss all parties involved, even if it is by providing legal reasoning as to why a claim will not be possible.

A high number of responses confused the potential claims in relation to the ISP and the website operator. Section 1 of the Defamation Act 1996 covers claims against ISP's (Internet Service Providers). A defence is possible if the ISP can show that they were not the author, editor or publisher and were not aware of the statement complained of.

Later legislation deals with claims against website operators. These are not the companies that provide the internet service but host a website. Section 5 of the Defamation Act 2013 provides a defence for these operators if they can show they did not post the statement complained of. This defence can be defeated if the claimant can show that they cannot identify the party that posted the statement, the website operator was notified and did not take any action within ten days. A case example that could be used here is that of Godfrey v Demon Internet [1999] in which a successful claim was made due to the inaction of the website host.

Around half of the candidates discussed the comments made by the MP incorrectly. They either incorrectly identified whether the comments could be defamatory whilst spoken in Parliament or whether they were a second publication when spoken live on TV. Candidates must be clear on the scope of parliamentary privilege and the impact of this when a defendant is elsewhere. Statements within Parliament are protected, those outside of Parliament are not. Broadcasts made on live TV are covered by the defence of innocent dissemination so long as the defendant took reasonable care (s1(1)(b) DA 1996).

Candidates must take care with the terminology used. Some responses debated the difference between a statement being published with being communicated. For the purposes of defamation, the term 'published' refers to the communication of the statement to a third party. For libel this can be in written and permanent form and for slander this would be committed verbally. It may be useful for candidates to use the term published when discussing libel and communicated when discussing slander.

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SUGGESTED POINTS FOR RESPONSE

JANUARY 2023

LEVEL 6 UNIT 13 – LAW OF TORT

<table>
<tr><th>Question Number</th><th>Suggested Points for Responses</th><th>Marks (Max)</th></tr>
<tr><td>1</td><td>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
- Reputation and privacy; protected by the tort of defamation and can claim if reputation is damaged by untrue speech and writing

Property interests:

- Land protected by the torts of nuisance, <u>Rylands v Fletcher</u> and trespass to land
- Personal property can be protected by trespass to goods
- Personal property such as clothing can be protected by 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 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

Better answers will:

Provide an answer which directly addresses the focus of the question; contain excellent use of statute and/or common law throughout; and, be presented in a coherent and logical structure.</td><td>25</td></tr>
<tr><td></td><td colspan="2" align="right">Question 1 total:25 marks</td></tr>
<tr><td>2</td><td>Evaluation of private nuisance:

- if there is an unreasonable interference it is no excuse for the defendant to say that s/he took all reasonable steps to prevent it.</td><td>25</td></tr>
</table>

	- however, unreasonable interference involves a level of disturbance that goes beyond the 'give and take' therefore likely to involve element of fault on the part of the defendant; - remoteness of damage rule requires some element of foreseeability - Nuisance created by an act of nature or a third party not created by the defendant there is a requirement of fault (Goldman v Hargrave [1967]; Leaky v National Trust [1980]; Sedleigh-Denfield v O'Callaghan [1940]) Evaluation of Rylands v Fletcher: - tort imposes strict liability, without any requirement to prove unreasonable interference where physical damage is caused to the claimant's land by an isolated escape of a dangerous thing from the defendant's land; - must be some special type of use that brings with it an increase in danger - however, difficulties establishing 'dangerous thing' may negate the benefit of strict liability; - requirement that damage must not be too remote may involve some fault; - where the defendant alleges that the escape resulted from the act of a trespasser/act of nature, liability will be based on negligence. Evaluation of public nuisance: - define and explain elements of public nuisance - evaluation as to whether public nuisance imposes strict liability - public nuisance is a fault-based tort requiring proof of negligence e.g., Wandsworth London Borough Council v Railtrack plc (2002)). - thus, public nuisance is not a strict liability tort. Better answers will: Provide an answer which directly addresses the focus of the question; contain excellent use of statute and/or common law throughout; and, be presented in a coherent and logical structure.	
	Question 2 total:25 marks	
3	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 - loss of amenity can include loss of dignity, e.g., Richardson v Howie [2004] - loss of amenity during time in a coma is recoverable	**25**

	- 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: - Loss of earnings: ▪ Annual loss calculated and this is the multiplicand ▪ Court does this by taking the gross annual income and accounting for deductions such as income tax ▪ The aim is to place the claimant in the position they would have been if they had earned the money ▪ The aim is to also prevent a claimant being unjustly enriched by being compensated twice ▪ Court applies a multiplier which is the figure representing the number of years the claimant will be unable to work ▪ Court then reduces this amount by considering contingencies of life and the benefits gained from receiving a lump sum of money ▪ Aim is that the lump sum awarded should be exhausted at the end of the period the claimant is unable to work ▪ Investment of lump sums and rates of interest expected governed by s1 Damages Act 1996 - Lost years: ▪ This covers the difference between pre-accident and post-accident working life expectancy ▪ These years are called the lost years (Pickett v British Rail Engineering [1980]) - Future medical care and attention: ▪ This head covers reasonably incurred expenses ▪ Claimant has a choice between using the NHS or choosing private medical care ▪ If claimant is cared for within medical institution and therefore does not incur household expenses, these can be deducted ▪ 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 ▪ If a claimant had previously provided services, they are no longer able to provide, the cost of substitute assistance can be recovered	

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	- Deductions:
	    ▪ Any social security benefits paid to the claimant will be deducted (Social Security Administration Act 1992)
	    ▪ Private insurance or pension payments are generally not deducted (<u>Parry v Cleaver</u> [1969]; <u>Smoker v London Fire & Civil Defence Authority</u> [1991]; <u>Longden v British Coal Corporation</u> [1998])
	
	- Death:
	    ▪ An existing claim survives a claimant's death against their estate (Law Reform (Miscellaneous Provisions) Act 1934
	    ▪ Preserves subsisting action
	    ▪ Cannot recover for future loss of earnings, exemplary damages or defamation
	    ▪ Actions governed by the Fatal Accidents Act 1976
	    ▪ Dependents are listed in s1(3) FAA
	    ▪ Only certain parties can claim for bereavement (parents of those under18 and spouses (s1A FAA; cohabitees (<u>Smith v Lancashire Teaching Hospital</u> [2017])
	    ▪ Sum for bereavement set by Damages for Bereavement (Variation of Sum) (England and Wales) Order 2013
	    ▪ Only one action possible (s2(3) FAA)
	
	- Provisional payments possible:
	    ▪ s32A Senior Courts Act 1981
	- Periodical payments possible
	
	Discussion in relation to assessment of damages:
	
	- objective approach based on compensation and not punishment of wrongdoer
	- damages are not assessed by level of culpability
	- court in <u>Livingstone v Rawyards Coal & Co</u> (1880) stated that the claimant should be compensated only as "nearly as possible"
	- if necessary, can go beyond typical award and apply punitive or exemplary damages, e.g., to reflect conduct of defendant and act as a deterrent to others (e.g., <u>Rooke v Barnard</u> [1964]; <u>Cassell v Broome</u> [1972])
	- must be assessed against alternative remedy of injunction	

	- damages preferable to injunctions as less interference with a citizen's rights - extremely contextual area of law, e.g., difficult to monetise human emotions and speculative concepts such as life expectancy and enjoyment of abilities and hobbies Better answers will: Provide an answer which directly addresses the focus of the question; contain excellent use of statute and/or common law throughout; and, be presented in a coherent and logical structure.	
		Question 3 total:25 marks
4(a)	(a) Legal development: - general approach is that claims for consequential economic loss are possible (Sparten Steel & Alloys v Martin & Co [1973] - claims for pure economic loss are excluded - courts adopt restrictive and cautious approach at expanding circumstances covered - floodgate concerns relating to indeterminate scope of liability (e.g., Ultrameres v Touche [1931]) - only liable if made statement fraudulently, maliciously, to cause intentional harm to a person or their reputation or the statement formed part of a contract (Derry v Peek (1889)) but could be no action for pure economic loss - although decision confirmed in Candler v Crane, Christmas & Co [1951], Lord Denning in dissenting judgement discussed future requirement for categories to expand such as those involving negligent accountants - categories under which liability could arise began to grow in 1960's - liability can arise if a defendant assumes responsibility for a claimant's economic interests (Hedley Byrne & Co v Heller & Partners [1964]) - test of negligence under Donoghue not suitable for these cases and therefore the concept of a 'special relationship' is to be applied (Hedley) - assumption of responsibility approach widely used such as in Spring v Guardian Assurance [1994] and BCCI v Price Waterhouse [1998]) - during 1990's categories expanded further in Caparo v Dickman Industries [1990] in which an alternative approach was proposed for circumstances that did not meet criteria under Hedley - Caparo offered three-part test to establish whether to impose a duty based on the foresight of economic loss, proximity and the fact that it would be just and reasonable to impose such a duty in the circumstances	**15**

	- Proximity difficult to define (see Junior Books v Veitchi [1983]) Better answers will: Provide an answer which directly addresses the focus of the question; contain excellent use of statute and/or common law throughout; and, be presented in a coherent and logical structure.	
4(b)	Area's worthy of consideration: - if no contract exists between the parties, there cannot be proximity or a duty of care, however, if contract exists between parties, contract law will apply and be conclusive - results in complex area for claimants to know what they can claim for - wide area of law therefore not easily to define simply - many cases involving builders and defects with faulty construction of houses that are expanding the understanding and application of the imposition of a duty (e.g., Murphy v Brentwood DC [1990]; Department of Environment v Thomas Bates [1990] - many ways in which economic loss can be suffered and therefore courts must remain flexible, for example, goods damaged in transit complications (e.g., Muirhead v Industrial Tank Specialities [1986]; Leigh & Sillivan Ltd v Aliakmon Shipping [1986]) - cases involving whether the limitations of the scope of liability for claims by people that are no longer able to work (e.g., Dryden & Ors v Johnson Matthey plc [2018]) - involvement within sporting events e.g., West Bromwich Albion FC v El-Safty [2006]) - involvement in employment contexts (e.g., Merrett v Babb [2001]; Neil Martin Ltd v Revenue & Customs Commissioners [2007]) - cases involving defendant possessing or holding themselves out as possessing special skills confirms in these situations that liability will arise if it is known by the defendant that the statement will be reasonably relied upon (e.g., Mutual Life & Citizens Assurance v Evatt [1971]; Esso Petroleum v Mardon [1976]; Chaudhry v Prabhakar [1989]; Burgess & Another v Lejonvarn [2018]) Better answers will: Provide an answer which directly addresses the focus of the question; contain excellent use of statute and/or common law throughout; and, be presented in a coherent and logical structure.	**7**
		Question 4 total: 25 marks

SECTION B

<table>
<tr><th>Question Number</th><th>Suggested Points for Responses</th><th>Marks (Max)</th></tr>
<tr><td>1</td><td>Occupier:

- Anne is the occupier – <u>Wheat V Lacon</u> [1966]
- as the owner, they have primary occupational control

Daniel v Anne:

- skilled worker
- Section 2 OLA 1957 – should appreciate the risks associated with their common calling
- Daniel should have been aware of need to turn power off
- unable to claim successfully as he is a skilled worked, responsible for risks associated with the purpose of his presence on the premises

Colin v Anne:

- neighbour enters without permission – could be considered lawful if they believe they would have had consent
- alternative argument that they could be considered unlawful visitor
- potential to transfer duty to independent contractor (BB)
- Anne would need to show that she was reasonable in hiring BB and reasonably supervised their work
- Discussion on Anne’s potential to transfer liability to BB based on facts based on the checks that were made
- potential defence of consent against Colin
- if considered unlawful visitor the OLA 1984 will apply
- Colin will have to show that the defendant knew there was a risk of trespassers, the risk of danger and did not reasonably prevent harm from being caused
- If determined to be a non-lawful visitor, Colin cannot claim for property damage to phone

Better answers will:

Provide an answer which directly addresses the focus of the question; contain excellent use of statute and/or common law throughout; and, be presented in a coherent and logical structure.</td><td>15</td></tr>
<tr><td>1(b)</td><td>Anne (George) v Restaurant:

- George is a lawful visitor
- due to age the whereabouts of parents can be questioned (Phipps)
- due to age of child court may well find it reasonable for him to have been able to visit the toilet without parental supervision</td><td>10</td></tr>
</table>

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	- warning signs could have discharged duty if had been used Better answers will: Provide an answer which directly addresses the focus of the question; contain excellent use of statute and/or common law throughout; and, be presented in a coherent and logical structure.	
	Question 1 total: 25 marks	
2	Iris v KC: - Iris is a secondary victim as she was not in the zone of danger - would need to meet the requirements in Alcock - she satisfies the requirement of witnessing the incident with her own unaided senses - she has suffered psychiatric harm due to the shocking event - however, presumption of close tie and affection can be rebutted, but facts state they have only just met - would need a close tie of love and affection - this could be satisfied since she is the daughter of Hannah, a primary victim - Narrow approach adopted by the courts in assuming relationships that constitute a close tie of love and affection - However, the court in Alcock reconsidered categorisation given in McLoughlin v O'Brian [1983] and said cases dependent on reasonable foreseeability and so it is open to anyone to attempt to prove their relationship meets the criteria - Closeness of the care is considered foremost as opposed to the nature of the relationship - Iris could claim that their relationship meets this requirement as it had only been recently revived and that this had made them closer than a stereotypical parent-child relationship that can just as easily not result in a close tie of love and affection - claim likely to depend on court assessment of the element of close tie of love and affection Jon v KC: - Jon is a rescuer, but this does not automatically grant him status as primary victim - was originally a secondary but became a primary victim when entered the zone of danger to rescue Hannah (Chadwick v British Transport Commission [1967]) - likely to be successful claim as primary victim Kevin v KC: - as husband of primary victim, Kevin has the potential to claim as a secondary victim - could satisfy the element of close ties of love and affection - did not witness the event with his own unaided senses	**25**

	- being told via a telephone does not satisfy the element of witnessing the shocking event with their own unaided senses - no clear timing for what constitutes immediate aftermath but viewing victim at hospital unlikely to be considered immediate - McLoughlin v O'Brian [1983] - loved one saw the victim before they had been cleaned up - Atkinson & An. V Seghal [2003] - a number of components can be considered as series of events and a series of events can include moment from accident to mortuary so long as there is sufficient proximity to the accident itself - Taylor v A Novo UK [2014] - the court will require physical proximity to the event in order for a claim to be successful - claimant suffering from grief and sadness – these emotions do not constitute psychiatric harm - Vernon v Bosley (No. 1) [1997] - loved ones expected to experience grief and sadness but unless it is so severe that is deemed pathological, law of tort will not compensate Better answers will: Provide an answer which directly addresses the focus of the question; contain excellent use of statute and/or common law throughout; and, be presented in a coherent and logical structure.	
		Question 2 total: 2 marks
3	Neil v Lee: - Mervyn is an employee as per facts - Activity is an authorised act in an authorised way - Lee is liable for injuries caused by his employee Paul v Lee: - Olivia is agency worker - carrying too much per tray is an authorised activity carried out in in unauthorised way - James v London Borough of Greenwich [2008] - common for worker to have contract with the agency and there is a contract between the agency and the company (end user) but usually there is no contract between the agency worker and the end user - James – each case is decided on its own merits and a contract will be implied if necessary if facts indicate that the reality of the relationship is consistent with an employment contract - If considered an employment for her time working at Lee's coffee shop, then Lee will be liable for the injuries sustained by Paul	**25**

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	Steven v Lee: - Richard works for Lee on a zero-contract basis - This means the employer does not guarantee employment - Legal term used to describe casual agreements between an employer and an individual - These contracts do not allow employers to avoid responsibilities and staff employed on this basis are still entitled to employment rights and should be treated fairly - Consider alternative arguments as to whether Richard is to be considered an 'employee' or a 'worker' - Incident involves frolic of his own as Richard detoured from delivery route to undertake personal (e.g., Storey v Ashton [1869]; Limpus v London General Omnibus Co. [1862]; Rose v Plenty [1976]; Century Insurance Co. V Northern Ireland Road Transport Body [1942]) - Must consider whether the employee was doing what they were employed to do - Problems happen when drivers deviate from their prescribed route and are involved in an accident but if they are still on the employer's business they are within the scope of their employment (e.g., Hemphill v Williams [1966]) - Unlikely to constitute a successful claim as damaged Steven's vehicle whilst on a frolic of his own Victor v Lee: - Consideration of Richard's employment status - A crime committed during the course of employment generally falls outside the scope of liability for the employer – unless the actions of the employer expressly authorise - Lister v Hesley Hall [2001] - even if the act is not authorised the court can still consider the action to come within the scope of employment - Close connection between the action and the employment? - Mohamud v Morrison [2016] - employee assaulted customer but close connection test determined he was within the scope of employment - Morrison v Various Claimants [2020] - released personal data but Supreme Court found that it was not closely connected to acts he was employed for - If Richard's actions can be seen as connected to the purpose of his employment, Lee will be liable for the injuries sustained by Victor Better answers will:	

	Provide an answer which directly addresses the focus of the question; contain excellent use of statute and/or common law throughout; and, be presented in a coherent and logical structure.	
	Question 3 total:25 marks	
4(a)	UL v William: - corporation must show suffered serious financial harm (s1(1) DA 2013) - statement in written and permanent form online so is considered libel - can show the statement refers to the claimant - defendant is responsible for the publication - published to at least one person - UL can show harm by cancellation of contract and possible lawsuit - no complications with single publication rule as only one post considered - date starts from the first day statement was posted/published UL v website: - Covered by s5 DA 2013 - Operator can avoid liability if can show they did not post the statement (s5(2)) - Defence can be defeated if claimant can show they could not identify the person who posted the statement, that they notified the operator and that they did not take the required action (ss5(3-10)) - Moderating alone does not defeat this defence - Notified but no action taken for 10 days - E.g., Godfrey v Demon Internet Ltd [1999] – website operator took ten days to take action whilst aware of defamatory statement, therefore liable UL v ISP: - Section 1 DA 1996 - Can show they are not the author, editor or publisher - Must show did not know or had no reason to know of statement - E.g., Bunt v Tilley [2006] – ISP only had passive role and were not aware of the statement Better answers will: Provide an answer which directly addresses the focus of the question; contain excellent use of statute and/or common law throughout; and, be presented in a coherent and logical structure.	**10**
4(b)	Yannis v Zack: - spoken but not recorded statement is slander	**15**

	- claimant does not have to show the recipient believes the statement - must show harm - defence of honest opinion possible (s3 DA 2013) - court must find balance between freedom of expression and protection of reputation - must state why they have the opinion, and no facts confirm their reasoning - can show that honest person would also have held the same opinion in the circumstances - enough to show honestly hold opinion in good faith but no facts give reasoning - no harm can be shown based on the facts of the scenario Yannis v Bold News: - public interest defence (s4 DA 2013) - defendant can disseminate so long as responsible in checking facts - editorial discretion in order to provoke revelation of facts may be possible defence (s4(4) DA 2013; Flood v Times Newspapers [2009]) - journalists should be rigorous in checking facts they intend to publish (Loutchansky v Times Newspapers [2002]; Flood) - defence of truth could apply to facts relating to company actions (s2 DA 2013) - defendant responsible for proving truth of claim - injunction possible – balance of freedom of expression and protection of reputation (e.g., s12 HRA 1998) - claims proven to be untrue - claims relating to the company actions could be published Yannis v Clive (MP): - Parliament proceedings attract defence of privilege - statements can be false, defamatory and malicious - Parliamentary privilege does not extend to statements made outside of Parliament, even if repeating statements previously made in Parliament (Jennings v Buchanan [2004]) - statements made by Clive in Parliament will be protected - statements made by Clive live on TV will not be protected and render him liable - harm shown in removal from involvement in charities - harm shown in being shunned by those around him Yannis v TV company: - broadcasts made on live TV are covered by the defence of innocent dissemination so long as they take reasonable care (s1(1)(b) DA 1996)	

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	- harm shown in removal from involvement in charities - harm shown in being shunned by those around him Better answers will: Provide an answer which directly addresses the focus of the question; contain excellent use of statute and/or common law throughout; and, be presented in a coherent and logical structure.	
	Question 4 total:25 marks	

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