CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

LEVEL 3 - UNIT 5 – LAW OF TORT

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers 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 2020 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers 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 performance was in line with expectations and with previous examinations. However, learning centres and tutors should particularly bear in mind the comments made re: QA2 below

The following paragraph has also appeared in the previous reports:

'Candidates are specifically reminded that the full name and year of legislation is expected – while minor errors may be forgiven at the discretion of an examiner, it is not acceptable to provide a statute without citing the year it was passed. Abbreviations such as 'LR(CN)A' should only be used after a statute has been fully named the first time. Similarly, while discretion can be used where possible, it MUST be possible to identify a case from the information given (i.e. enough of the names of the parties/facts to clearly distinguish the case from others).'

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

The majority of candidates were able to name two common law torts from the wide variety available. A small number confused the question with statutory torts.

Question 2

This question was very poorly answered, with a considerable number of candidates unable to say anything of note about the case, while a large proportion of fuller answers focused on issues around the 'immunity' of the police - the question specifically asked instead about 'novel duties'.

Question 3

Most candidates were able to gain at least one mark here, with the many answers focusing on the idea of an increased number of claims. Stronger candidates went on to consider why that would be an issue (e.g. impact on court system, insurance industry etc.)

Question 4

This question was generally well answered, most candidates were able to achieve both marks.

Question 5

Again, the majority of candidates answered this question well.

Question 6

Most candidates are able to repeat 'take the victim as he finds him', but only stronger answers actually explained what this meant. Candidates should note that the rule does require **some** harm to be foreseeable, so an answer along the lines that 'all harm can be recovered whether foreseeable or not' is not necessarily acceptable.

Question 7

A reasonable number of answers were able to discuss the 'close connection' tests. Candidates still appear to have more detailed knowledge of much older cases - while some knowledge of the older approach is of use, teaching should be focusing on the modern application of the law.

Question 8

Almost all candidates knew the period was 3 years, but for the mark to be awarded that period needed to be given a starting point.

Question 9

This question was surprisingly poorly answered. A very common error was to cite legislation without any specific link to death, e.g. the Law Reform (Contributory Negligence) Act 1945.

Section B

Scenario 1

This was by far the least popular scenario, so the comments below are based on a very small sample size.

Question 1

Weaker answers only identified the 'reasonable man' in part(a), stronger answers noted that age is one of the few factors that will be taken into account. In part (b), stronger answers were those that were able to discuss a wider range of relevant factors.

Question 2

This question was generally quite well answered, with a range of relevant heads of damage identified.

Question 3

Answers here were mixed, with some strong candidates able to look at a wide range of facts and link them to the legal authority, while others struggled to go beyond the most basic principles. Part (c) was the question most candidates struggled with most.

Scenario 2

From the papers seen by the Chief Examiner, this was a relatively popular scenario.

Question 1

Generally, candidates were able to at least name Caparo v Dickman and the three elements of the 'test', although only stronger answers provided explanation of each element. Application in part (b) was less widespread, although candidates were able to gain at least some marks here.

Question 2

Performance on both parts was generally determined by how fully the question was answered - weaker candidates only identified a small range of factors/relevant facts while good answers contained a wider selection.

Question 3

This question was surprisingly poorly answered, with the majority of answers seeming to consider *volenti* as likely to apply.

Question 4

Candidates have a range of knowledge in this area and there were some excellent answers and some very poor answers. In general, knowledge of the Fatal Accidents Act (FAA) 1976 seems to be better than knowledge of the 1934 legislation.

Scenario 3

This was the most popular scenario.

Question 1

Candidates were generally able to achieve good marks on this question, although a minority still appear confused between the concept of primary victims and secondary victims.

Question 2

Most candidates could name some of the 'control mechanisms' and marks generally depended on how many were identified/applied.

Question 3

This was the weakest part of the scenario for most candidates. Knowledge on parts (a) and (b) was quite mixed.

SUGGESTED ANSWERS

LEVEL 3 - UNIT 5 – LAW OF TORT

SECTION A

1. Credit was awarded for any relevant torts identified, including, for example, negligence, trespass to land, assault/battery/false imprisonment (trespass to the person), nuisance etc.

2. In Robinson v CC of W Yorkshire (2018), the Supreme Court advocated the use of an incremental approach, by which the court should look at existing precedent to consider whether the 'novel' situation can be decided by analogy with previous cases. The Court advised that judges should be wary of attempting to simply apply a single test, such as the 'three stage test' from Caparo v Dickman (1990), in all situations. However, it was acknowledged that tests such as Caparo remained of value in areas where no analogy with precedent could be made.

3. The floodgates argument is a matter of policy. The argument runs that if the law makes it easier to bring a successful claim, this may lead to a major increase in claimants and/or damages awarded. This in turn may place an undue burden on both the court system and the resources of defendants (and the insurance industry).

4. The general standard of care expected of one who owes a duty is the objective standard of reasonableness, the standard of the reasonable

man, as explained by Alderson B in Blyth v Birmingham Waterworks (1856).

5. The 'but for' test is used to establish factual causation. It asks, 'but for' the acts or omissions of the defendant, would the claimant have suffered harm? The test was expounded in the case of Barnett v Chelsea & Kensington HMC (1969).

6. As a matter of legal causation (remoteness) the 'egg shell skull rule' operates when a claimant suffers particularly severe harm due to an individual quirk or underlying condition. As long as some harm was foreseeable, the claimant may recover for the full extent of his or her injuries. This was demonstrated in e.g. Smith v Leech Brain & Co (1962).

7. Where an employee has intentionally committed wrongdoing, the usual Salmond test cannot apply. Instead, the court developed a new test in the case of Lister v Hesley Hall (2001) - was there a 'close connection' between the wrongdoing and the employment? This test has been upheld in more recent decisions such as e.g. Mohamud v Morrisons (2016).

8. The standard limitation period for personal injury is 3 years from the date of the injury or the date of knowledge.

9. Credit was awarded for any of:
   - Law Reform (Miscellaneous Provisions) Act 1934
   - Fatal Accidents Act 1976
   - Administration of Justice Act 1982.

SECTION B

Scenario 1 Questions

1. (a) The general standard of care expected is an objective one, that of the 'reasonable person' in the defendant's position. However, the courts have made clear in decisions such as e.g. Mullin v Richards (1998) that the age of the defendant is a relevant factor in determining what is reasonable. Therefore, Beryl will be adjudged by the standard of the reasonable child of her age, although as Beryl is 15 years old, this will not represent a significantly lower standard.

   (b) Again, the starting point is reasonableness - here, the standard of the reasonable theme park operator. However, a number of other factors may affect this standard. Where the claimant is a child, and it is foreseeable that children may be particularly exposed to danger, a higher standard may be required (e.g. BRB v Herrington (1972)). Here, it is clearly foreseeable that at an amusement park there will be many children and that, left unsupervised with potential sources of danger such as golf equipment, children may injure themselves.

   A further relevant consideration is the magnitude of the risk (see e.g. Bolton v Stone (1951)) - again, in the circumstances the

chance of injury if children are left unattended is relatively high. Another factor may be the cost of preventing harm, especially as compared to the objective of the defendant (see e.g. Latimer v AEC (1953)). Here, Kempstonland is run (one assumes) to make profit and the cost of taking precautions is relatively low (the cost of a supervisor), so this again may suggest a higher standard of care.

Overall, the standard of care is likely to be high and Kempstonland may well be in breach of their duty.

2. Absal may be able to claim special damages, which are quantifiable losses occurring up to the date of trial. As Absal is a child, it is unlikely that there is a claim for any lost wages, but special damages may be claimed for e.g. medical expenses to date.

Absal may also be able to claim general damages, which are non-quantifiable losses. These will include an award for pain and suffering and loss of amenity and, depending on the severity of the injury, a 'Smith v Manchester' award may also be made, to reflect any loss of capacity to earn money from employment later in Absal's life.

3. (a) Daffyd will owe a duty of care to Frank, as, even if this is not considered an established duty, there is foreseeability, proximity, and it is fair, just and reasonable to impose a duty; and/or the incremental approach would lead to a duty being recognised.

Daffyd is in breach of his duty because he has omitted to do what the reasonable worker would do, and this breach has clearly caused the damage. Daffyd will be liable to Frank, although, as a student, he may not be able to satisfy an award for damages.

(b) In order for Frank to bring a claim successfully against Kempstonland, he must establish that it is vicariously liable for Daffyd's omission. This means that Daffyd must first and foremost be an employee of Kempstonland. To establish whether a person is an employee, the court will use the 'multiple' test developed in Ready Mixed Concrete v MPNI (1968). Factors which suggest Daffyd is an employee of Kempstonland include that he must wear a Kempstonland uniform, that he is told when to work and exactly where to work, which also suggests a measure of control (see e.g. Motorola v Davidson (2001)).

Factors which suggest Daffyd is not an employee, at least of Kempstonland, are that he remains responsible for his own taxes and national insurance and that he only works when needed. This may suggest an insufficient mutuality of obligation (see e.g. Carmichael v National Power (1999)) and/or that he is not sufficiently integral to the organisation.

Daffyd does appear to have committed a tort in the course of employment, so if he is found to be an employee of Kempstonland then the amusement park will be vicariously liable.

(c) While the position of those working for an employment agency is not always clear, case authority suggests that the burden is upon the agency to demonstrate that the worker is not an employee of

theirs, see e.g. Mersey Docks v Coggins & Griffin (1946), and that this burden is a heavy one. The fact that Daffyd is paid by Eager Beavers may well suggest an employment relationship exists.

However, Eager Beavers could argue that control of Daffyd while working is exercised by Kempstonland, and that the situation is therfore more akin to e.g. Biffa Waste Services Ltd & Anor v Maschinenfabrik Ernst Hese GmbH & Ors (2008), where control was considered the relevant factor in establishing liability. It is open to the court to hold both Kempstonland and Eager Beavers jointly and severally liable - an example of this can be found in e.g. Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd & Ors (2005).

Scenario 2 Questions

1. (a) The 'three stage test' was established by the House of Lords in Caparo v Dickman (1990). For a duty to exist under the test, three requirements must be met: foreseeability (that harm must be a reasonably foreseeable consequence of the defendant's conduct); proximity (that the parties are in close enough proximity, see e.g. Watson v British Boxing Board of Control (2001); and that it would be fair, just and reasonable to impose a duty (which allows the court to take account of policy considerations).

   (b) It is foreseeable that Gareth, by flying the drone, could cause harm to those in the area, such as Hephzibah. They are in close proximity in time and space and there is no reason not to impose a duty of care. Therefore, it is likely that a duty of care will be found.

2. (a) The general standard of care expected is an objective one, that of the 'reasonable person' in the defendant's position. This means that the defendant is judged by the standard of a person reasonably competent in the skill/role being performed (see e.g. Nettleship v Weston (1971)). Therefore, Gareth will be judged by the standard of the reasonable drone pilot.

   Further factors which may be considered are: the magnitude of the risk (see e.g. Bolton v Stone (1951)) - flying a drone is an inherently risky endeavour; the magnitude of harm (losing control may well result in very serious injuries to others in the park); and Gareth's objective compared with the cost of taking reasonable precautions.

   (b) Gareth is flying the drone for the very first time and has never flown such a complex or large drone before. He is flying in poor weather conditions (it is 'very windy'), in a public place where members of the public can be expected. Gareth has taken no precautions and has not read the manual. It is highly likely that the court would decide Gareth has not acted as the reasonable drone pilot would and is, therefore, in breach of his duty of care.

3. The defence of *volenti* is essentially one of consent. For the defence to operate, it must be shown that the claimant knew of the risk of harm and freely consented to it (see e.g. ICI v Shatwell (1965)). While Hephzibah was aware that drones may be flown in the park, she was not aware of the particular risks that Gareth was taking, nor did she consent

to his acting unreasonably in flying the drone. Therefore, the defence is unlikely to succeed here.

4. (a) Under the Law Reform (Miscellaneous Provisions) Act 1934, Hephzibah's estate may claim as if she had remained alive. This means a claim can be made for e.g. medical expenses, loss of amenity and loss of earnings - but only up until the date of death. There is no claim for future losses. Furthermore, no claim can be made for pain and suffering, as Hephzibah was not conscious at any point after the accident. Her estate may also claim for funeral expenses.

(b) Under the Fatal Accidents Act 1976, the dependents of the deceased may claim in their own right. A civil partner is classed as a dependent under the Act. Ivy may claim for both a bereavement award (currently set at £12,980) and for the loss of dependency, as Hephzibah was the sole earner in the household.

Scenario 3 Questions

1. (a) A primary victim can be defined as a person to whom physical as well as psychological harm was caused, or to whom physical harm was foreseeable. This is sometimes referred to as being in the 'zone of danger'. In order to claim, the primary victim must demonstrate a recognised psychiatric disorder. A case illustrating these points is e.g. Page v Smith (1995).

(b) Physical harm has been caused to Nick, as he suffered second degree burns. He has subsequently suffered from PTSD, which is a recognised psychiatric injury. Nick is owed a duty of care as a primary victim.

(c) Physical harm has not been caused to Maria. However, such harm was clearly foreseeable as she was in the zone of danger - the office was on fire, and, to an extent, sufficient to injure her colleague. She has subsequently suffered from PTSD which is a recognised psychiatric injury. Maria is owed a duty of care as a primary victim.

(d) Physical harm has not been caused to Orville. He was outside the building when the fire occurred, so such harm does not appear to have been foreseeable - he was outside the 'zone of danger'. He has subsequently suffered from nightmares, which alone is not a recognised psychiatric injury. Orville is not owed a duty of care as a primary victim.

2. (a) In order to be owed a duty of care as a secondary victim, a claimant must meet the 'control mechanisms' established in the case of Alcock v CC of S Yorkshire (1992). The claimant must show that he or she:

- had proximity in space and time to the event or the immediate aftermath;
- had close ties of love and affection with a primary victim;
- witnessed the accident with their own unaided senses;
- suffered sudden shock as a result;
- has a recognised psychiatric injury;

- the injury would have been reasonably foreseeable in a person of 'ordinary fortitude' in the circumstances.

(b) Orville appears to have been proximate in time and space by returning to the building in time to witness the fire - he also sees something of the immediate aftermath, when Maria exits the building. This was witnessed with his own unaided senses and he appears to have suffered a sudden shock as a result.

However, Orville must also demonstrate proximity of relationship. As he is not married to Maria there is no presumption here, therefore Orville must prove close ties of love and affection. Even if he is able to do this, his claim is still likely to fail, as suffering from nightmares alone is not a recognised psychiatric injury. Orville is not owed a duty of care as a secondary victim.

3. (a) It was confirmed by White v CC of S Yorkshire (1999) that there is no special class for 'rescuers' who suffer psychiatric harm - they may only claim if they meet the requirements of a primary or secondary victim. As there is nothing to suggest that Paulina has a close enough relationship with anyone else in the building to constitute 'love and affection', she is unlikely to be able to claim as a secondary victim.

However, as Paulina entered the zone of danger and harm was therefore foreseeable to her, she may well be considered a primary victim - see e.g. Chadwick v BRB (1967).

(b) Now placed on a statutory footing by the Law Reform (Contributory Negligence) Act 1945, the partial defence of contributory negligence operates to reduce the damages due to a claimant to reflect their own contribution to their injuries. It could be argued that Paulina put herself into a dangerous position by choosing to re-enter the building to look for Richard (compare e.g. Davies v Swan Motor Co (1949)).

However, for policy reasons the court will usually avoid discouraging rescuers and *per* Boreham J in Harrison v BRB (1981) it 'can rarely be appropriate' to find a rescuer contributorily negligent. As such, the defence is perhaps unlikely to apply, but if successful may only lead to a minimal reduction in damages.