CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 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 September 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. The detail below will assist candidates and centres to understand areas of strength and weakness.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Q1: The majority of candidates were able to provide an acceptable definition of negligence. A small minority confused negligence as a general concept with a specific element of the tort (e.g. duty of care).

Q2: This question was well answered with the vast majority naming two examples (the most common being driver to road-user/passenger and employer/employee). There was a significant minority of candidates who were

unable to give any relevant examples (and a subset of this minority named two torts).

Q3: Most candidates identified the concept of the "zone of danger" and stronger answers provided a more legal definition based on the foreseeability of harm. When citing authority for answers such as this, it is preferable that a more modern case is used rather than the early 20th century case law which has to an extent been superseded, if not overruled.

Q4: Almost all candidates correctly identified the standard as objective.

Q5: This question was less well answered across the cohort than most other section A questions. The crucial elements required were identifying that the claimant's act had to over-ride the defendant's wrong, i.e. that the claimant acted unreasonably (and good answers should have provided a case in support). The vast majority of answers not gaining full marks provided a vague explanation which could be confused with contributory negligence (e.g. it was not enough to say "the claimant was partly to blame" or similar).

Q6: Generally, this question was answered very well, with an encouraging proportion of candidates gaining full marks.

Q7: Unfortunately, some answers to question 7 confused the defence of contributory negligence with breaks in the chain of causation (i.e. the opposite of issues with Q5). This is an area to note for tutors and centres. However, most candidates were able to provide at least some relevant explanation of the defence (and/or its effect on damages). As noted in previous reports, it is important that statutes are given their full name and year (see Jan 2020 report for more on this).

Q8: This was the worst performing section A question, with many candidates not demonstrating any meaningful knowledge of the section and only a small minority receiving full credit. Key issues that were commonly missed were that the Act applies to consumer contracts, that the exclusion of liability is for PI not general liability and that section 65 only relates to negligence claims.

Q9: The majority of candidates were able to explain general damages. A minority confused with special damages or simply named an example.

Section B
Scenario 1

This was the most popular scenario.

Q1: Both parts were generally very well answered. Almost all answers were able to identify the three stages of the *Caparo* test and most candidates went on to explain each element. Application in (b) was not quite as strong, with a number of candidates simply stating that the test was met but not explaining how/why, but again performance was good overall.

Q2: This question, perhaps unsurprisingly given the complex area, was answered more poorly than any other individual section B question. It is concerning that such a large proportion of candidates appear to have no knowledge whatsoever of policy beyond a vague understanding of

"floodgates". It should be noted that this is a major element of the unit specification so is likely to be tested in most examinations.

Q3: Answers were generally very good on the topic of psychiatric harm with the vast majority achieving good marks in this question. As always, describing the law was done better than applying it (so marks were highest for (a)) and the more straightforward claim in (b) was generally dealt with more confidently than the "aftermath" issue in (c).

Scenario 2

This was the least popular scenario on the paper. As such, this is a small sample size on which to base generalisations.

Q1: This question was generally answered quite well, with most candidates appreciating the established duty point.

Q2: Candidate performance was generally poor across this question, with a number of answers failing to get beyond the basic reasonable person standard. It should also be noted that only a small proportion of answers appreciated that the standard was not just that of a professional, but that the defendant's inexperience was not relevant.

Q3: It is acknowledged that this is a complex area but its presence on the unit specification means that it does need to be assessed, at least from time to time. Candidates were generally able to appreciate the general need to warn of risks but there appeared to be a lack of up to date knowledge, with much more reference to *Chester v Afshar* than to *Montgomery*.

Q4 As is usual with questions on heads of damages, this was answered very well on the whole.

Scenario 3

Q1: Candidates were able to achieve good marks in this questions, which suggests a good knowledge of issues relating to legal causation and remoteness – albeit among the relatively small group who chose to answer the questions on this scenario. Generally, the distinction between lower and higher credit answers was an ability to go beyond the basic "take your victim as you find them" description of the eggshell skull rule and to discuss legal concepts such as foreseeability of the type of harm.

Q2: This question was answered extremely well. Candidates appear to be moving more toward (correctly) focusing on the "multiple" test rather than very traditional views of control and integration.

Q3: Again, performance was generally good and there was a good amount of discussion of "close connection". Tutors and future candidates are reminded that this area continues to develop and knowledge will be expected of recent developments, such as the two Supreme Court decisions on vicarious liability earlier this year.

Q4: While still acceptable, performance on this question was less strong. Answers generally were strong on (a), requiring as it did knowledge of basic

"but for" causation; there were some truly excellent answers on (b) that would have been high scoring even at level 6, but on the whole candidates tended to lack the detailed knowledge required for the highest marks.

SUGGESTED ANSWERS

LEVEL 3 - UNIT 5 – LAW OF TORT

SECTION A

1. Candidates should have identified the definition of negligence as given by Alderson B, which had two parts: 'omitting to do something which a reasonable man…would do' or 'doing something which a prudent and reasonable man would not do'. Marks were awarded whether the judgment was directly quoted or explained in the candidates own words.

2. Candidates received one mark for any recognised duty. Common examples would include: doctor and patient; lawyer and client; driver and passenger/other road user etc.

3. Candidates were expected to highlight that a primary victim would be (or a secondary victim would not be) in the 'zone of danger', i.e. that some harm was reasonably foreseeable. A relevant case to support this would be e.g. Page v Smith (1995).

4. The standard is objective.

5. Candidates should have identified that the court will look at whether the act of the claimant was unreasonable. A relevant case to support this would be e.g. McKew v Holland (1969).

6. Candidates were expected to identify the need for: a tort to have been committed; the tortfeasor to be an employee or in a relationship akin to employment; and the tort to have occurred in the course of employment.

7. Under the Law Reform (Contributory Negligence) Act 1945, contributory negligence operates as a partial defence. Where a claimant is partly at fault for the damage suffered, damages will be reduced by the amount the court considers just and equitable. A case illustrating the defence being applied would be e.g. Froom v Butcher (1976).

8. Section 65 Consumer Rights Act 2015, states that a term of a consumer contract cannot exclude or restrict liability for death or personal injury resulting from negligence.

9. General damages are damages that cannot be calculated/quantified at the date of trial.

SECTION B

Scenario 1 Questions

1. (a) Candidates should have set out the 'three stage' test established in the case of Caparo v Dickman (1990). This requires firstly that it was reasonably foreseeable that the claimant could be injured by the defendant's negligence (see e.g. Smith v Littlewoods Organisation (1987)); secondly that there was sufficient proximity (whether physical or in terms of relationship) between the parties, such as in Watson v British Boxing Board of Control (2001); and finally that it is fair, just and reasonable to impose a duty of care. This final element allows the court to take account of policy considerations, such as in Mitchell v Glasgow City Council (2009).

   (b) Candidates should have explained that it was foreseeable that Dave could cause harm to Bradley if he acted negligently – the reasonable person in Dave's position as a security guard would foresee this risk. There was clearly proximity between the parties, both physically and through Dave's position of authority over those seeking to enter the festival. Finally, there appear to be no policy reasons which would prevent Dave from being liable, so it seems fair, just and reasonable to impose a duty. It seems likely, therefore, that a duty will be owed.

2. This question allowed for a wide variety of factors to be discussed. Candidates should have begun by noting the general reluctance of the courts to find public authorities liable. Credit was awarded for reasons for this including, *inter alia*, the fact that compensation is funded by the taxpayer, that public funds are being used to compensate individuals rather than for the good of the community, the floodgates argument (particularly relevant to local authorities who are answerable to everyone living in the area), general concerns as to the 'compensation culture', worries about defensive practices, issues of justiciability etc.

   Credit was also awarded for specific reference to the Compensation Act 2006 s.1 and for explanation of how that provision operates – particularly where candidates then drew a link to the charitable nature of 'Kempsfest'.

3. (a) Candidates should have identified the 'control mechanisms' established in the case of Alcock v CC of S Yorkshire (1992). These are that, to be considered a secondary victim, the claimant:
   - had a close relationship of love and affection with a primary victim;
   - had proximity in time and space to the event – or the immediate aftermath;
   - witnessed the event with their own unaided senses;
   - suffered a recognised psychiatric injury;
   - as a result of 'sudden shock'.

   (b) Candidates should have applied the 'control mechanisms' identified in (a) to the facts of the case applying to Alison. Credit was given for all appropriate and reasoned application but the most likely application was:

- close ties of love and affection between A and C will be presumed as they are mother and daughter;
- A has proximity in time and space (she is 50 metres away);
- A witnessed the event with her own unaided senses (as she sees her daughter in the front row disappear from sight as the fence collapses);
- A has suffered a recognised psychiatric injury (PTSD);
- which appears to be the result of sudden shock.

It appears likely that Alison is owed a duty of care as a secondary victim.

(c) Candidates then needed to apply the 'control mechanisms' to Bradley:

- close ties of love and affection between B and C will need to proven as B is merely the 'new boyfriend' of C's mother.
- B does not have proximity to the accident itself, however he does witness the immediate aftermath (20 minutes later, while C is still very clearly injured and distressed – see e.g. McLoughlin v O'Brian (1983));
- B has witnessed the immediate aftermath with his own unaided senses;
- B has suffered a recognised psychiatric injury;
- which appears to be the result of sudden shock.
- B should be able to claim as a secondary victim (a reasoned conclusion either way was credited).

Scenario 2 Questions

1. Candidates should have recognised that the recent Supreme Court decision in Robinson v CC of W Yorkshire (2018) has cast doubt on the traditional interpretation of the seminal decision in Caparo v Dickman (1990). In Robinson their Lordships made clear that they considered the main ratio of Caparo to be that the courts should proceed incrementally in creating new duties of care, by analogy with existing categories. This approach should be preferred to simply applying the 'three stage' test.

   Here candidates could argue medical professionals are well-established as owing a duty to patients – one case example would be the duties owed by doctors to patients, as seen in Cassidy v Ministry of Health (1951). Alternatively, the contractual relationship between the parties could be the basis on which a duty is found.

2. (a) Candidates should have begun by identifying the basic approach of the courts to the standard of care – that this is an objective exercise based on the hypothetical reasonable man. Candidates should have then gone on to explain the particular standard of care expected of professionals under Bolam v Friern Hospital Management Committee (1957). This would involve discussing both 'limbs' of the so-called 'Bolam test' – that firstly the general standard is that of the reasonably competent professional (with the level of experience being irrelevant, see e.g. Wilsher v Essex AHA (1988)), and that, secondly, a professional will not be in breach of his or her duty of care if he or she can show they were acting in accordance with a practice accepted as reasonable by a responsible body of opinion. Stronger answers would have established the 'gloss' on this test

from Bolitho v City and Hackney Health Authority (1996) – that the opinion must be logically defensible (or words to that effect).

Candidates may also have looked at more general factors, such as the likelihood of harm (see e.g. Bolton v Stone (1951)) and the vulnerability of the claimant (see e.g. Paris v Stepney Borough Council (1951)).

2. (b) Candidates should have begun with the base standard of care expected – which will be that of the reasonable qualified physiotherapist. The fact that Hope has little experience is of no relevance.

Answers should have also considered the second limb of the Bolam test, with reference to the comment made by the other physiotherapist. This implies that some other physiotherapists may also have recommended the leg stretch, giving Hope the 'body of opinion' needed to avoid liability. Stronger candidates would have also considered the fact that such a body may be small, but this would in itself not matter. However, the fact that 'only the most old-fashioned' physiotherapists would recommend the exercise may mean the opinion is not actually logically defensible.

Candidate may have applied general factors as noted in (a), such as the high likelihood of harm and the fact that Indira is clearly particularly vulnerable to further harm having recently broken her leg.

Answers should end with a reasoned conclusion as to the standard and likelihood it has not been met.

3. (a) Candidates should have recognised that the need to warn of risks is now governed by the decision in Montgomery v Lanarkshire Health Board (2015), which makes clear that the claimant should have been warned of 'material risks'. A stronger answer would go on to explain that the test has two elements – the objective question of whether a reasonable person would have attached significance to the risk; and the subjective question of whether this particular claimant would have attached significance.

(b) Applying this test, it is likely in any event that a reasonable person would attach significance to a 9% risk that the condition would be made more severe by the treatment. However, even if not, it seems clear from the comments made by Jasmine (that she 'really can't afford to lose any more flexibility') that she personally would have attached significance to the risk. It therefore seems likely there has been a breach of duty.

4. Candidates were credited for every relevant head of damages suggested. This could have included e.g.: loss of earnings to trial, and general damages for future loss of earnings, as it seems likely Jasmine can no longer work as a childminder. This could also potentially give rise to a claim for loss of congenial employment.

Jasmine may have already spent money and/or need to spend money in the future on medical expenses. She may also need to pay someone to

assist her in looking after her own child or children. General damages would be available for pain and suffering and loss of amenity – again particularly relating to being limited in caring for her own child or children.

Scenario 3 Questions

1. Candidates should have recognised the basic principle that damage cannot be claimed if it is too remote from the breach. The test for remoteness is 'reasonable foreseeability' as established in Wagon Mound (No 1) (1961).

   It is clear that what must be foreseen is the *type* of damage, not necessarily its full extent. This means that as long as some harm of that type is foreseeable, the fact that the claimant is particularly susceptible and has suffered worse than the 'average' person is irrelevant. This is known as the 'egg-shell/thin skull rule'. A relevant case to illustrate this is e.g. Smith v Leech Brain (1962).

   Here, physical harm is clearly a foreseeable consequence of the claimant slipping in the puddle of water. It is, therefore, irrelevant that Teemu has suffered more serious injuries than would be expected, and he can claim for the full extent of these injuries.

2. (a) This first part of the question asked candidates to explain the 'multiple' or 'economic reality' test established in Ready Mixed Concrete v Minister of Pensions (1968). This explanation may have included discussion of how the court will look at all the circumstances, with focus on the terms of the contract. The labels given by the parties are not determinative but merely one factor to consider, alongside e.g. remuneration and the level of control being exercised.

   (b) Candidates should have made it clear which factors suggest Umar is an employee, and which suggest he is merely an independent contractor.

   Factors in favour of an employment relationship were:
   - Umar must wear uniform;
   - Umar works predominantly for GoodFare.

   Factors against such a relationship were:
   - Umar can work for others (and does so);
   - Umar owns his own lorry;
   - as such he is taking the financial risk;
   - he is not paid a salary but per job;
   - he also pays his own tax/NI.

3. (a) Candidates may have considered the traditional Salmond tests, and/or the modern approach of whether there is a 'close connection' between the wrongdoing and the employment (see e.g. Lister v Hesley Hall (2001)). Both approaches were credited. Under the traditional approach, it must be shown that the tortfeasor was carrying out an act authorised by their employer (even if in an unauthorised manner). In other words, they must not be on a 'frolic of their own'.

(b) Stronger answers would have also looked at similar previous cases. Candidates could, for example, have identified that the general approach is that an employee travelling to or from work will not be acting in the course of employment unless specifically paid for that travel (see e.g. Smith v Stages (1989) or for application of the modern test Fletcher v Chancery Lane Supplies (2016)). However, cases such as Staton v NCB (1957) do suggest an employee still on their employer's premises may potentially be acting in the course of employment even after their shift has ended.

Candidates received marks for any reasoned application of the law to the facts. This may have included e.g. that Valentina's shift has ended, that her employment takes place in the store, not the car park, that there is no suggestion her actual job involves travel, or that she is paid to do so and, therefore, it seems unlikely that she was acting in the course of employment.

4. (a) A good answer would begin by making it clear that factual causation must be demonstrated in any negligence claim. The usual approach is the 'but for' test, as seen in Barnett v Chelsea & Kensington Hospital (1968) – 'but for' the defendant's negligence, would the damage have occurred?

(b) Candidates should then go on to recognise that where an injury has two successive causes, the 'but for' test is insufficient. The crucial cases to discuss (as outlined in the unit specification) are the conflicting approaches in Baker v Willoughby (1969) and Jobling v Associated Dairies (1982). In Baker the court allowed full recovery against the first tortfeasor even though the injury had been worsened by the later event. However, in Jobling the House of Lords held recovery was limited up to the time of the second cause.

Strong answers may have mentioned the 'vicissitudes of life' argument used in Jobling and/or noted that the courts have generally preferred the Jobling approach, especially when the second cause is non-tortious. Here, the second cause is indeed non-tortious and so recovery is likely to be limited, with damages only awarded up to the point where the disease superseded the original injury.