CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2022
LEVEL 3 - UNIT 5 - 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 2022 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

Performance was closely aligned with the expectation of the Examiner(s). Overall, performance was good, with a slight increase in the pass rate overall, although there was a slight fall in the percentage of candidates reaching the highest grade boundary.

As has been covered in some detail in previous reports, candidates tended to do best when asked to simply state their knowledge (on areas such as the elements of negligence, the test used for employment status, or the requirements for a secondary victim). Conversely, the lowest average marks tended to come from questions which asked for considerable application of the law to facts and/or covered a topic perceived as more "difficult" by many candidates (e.g. questions focusing on application of law on *novus actus*, novel duties of care or standards and breach).

Scenario 1 was most popular by some way, most likely due to covering psychiatric harm. While answers on this topic were generally good, I would as always caution centres, tutors and candidates against expecting a given topic to appear on a given paper and would in any event suggest that candidates do choose their scenario carefully.

Regarding technique, there is little to add. Unsurprisingly stronger candidates showed not just evidence of extensive knowledge (backed up by relevant authority) but also a familiarity with the

problem-style questions used in Section B. Weaker answers tended to betray a lack of knowledge and also an inability to apply the law to the facts – often stating the law and then giving a bare conclusion ("X is liable") without explaining how that was reached.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

The vast majority of candidates achieved a pass mark on this question, with most achieving all three marks. As an "introductory" question on Learning Outcome 1 of the Unit Specification, this was expected. Low scoring answers showed no understanding of negligence as a tort.

Question 2

Again a majority of candidates received full marks. Around a quarter of candidates received 0 marks, mainly by naming two common law torts rather than common law duties of care. This is likely due to over-reliance on past papers (which have asked that question)

Question 3

Anecdotally this answer was answered pleasingly well and many answers showed knowledge well beyond the "traditional" view expressed in cases such as *Hill*.

Question 4

Almost half of the cohort received 0 for this question. This was unsurprising for two reasons 1) standard/breach of duty is an area that Level 3 candidates have always struggled with and 2) this question asked about a specific part of that area which weaker candidates might not have studied/revised.

Question 5

There was a roughly equal spread of marks for this question, which seems reasonable given that it combines a difficult area (remoteness) with a straightforward instruction (describing the test)

Question 6

Nearly 80% of candidates got the single mark available here. This was a straightforward test of knowledge.

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Question 7

This was, along with Question 4, probably the "hardest" question on section A, given that it is an area candidates often struggle with and involved knowledge of legal developments in the last two decades. Performance was again spread across all four possible marks which suggested the question performed as intended.

Question 8

Very few candidates failed to gain a mark here.

Question 9

Similar to Question 6, this was a test of knowledge and again the vast majority were able to gain the mark.

SECTION B

Scenario 1

Question 1

This two part question tested knowledge (in part a) and application (in part b) of the law relating to primary victims in claims for psychiatric harm. While less rigorous in practice, the test for primary victims is more complex in some ways than that for secondary victims (which is essentially a learnable checklist) so the Chief Examiner is not surprised that performance was generally good but not as comprehensive as answers to 2(a)

Question 2

2(a) essentially asked candidates to replicate a checklist most will have learned by heart. There is simply no other way to test this Learning Outcome at this level and while psychiatric harm has not always been included on papers so candidates cannot rely on it, anyone taking a look at past papers/reports would know this is something worth memorising.
Question 3

While candidates are strong on psychiatric harm and gravitate to scenarios which examine it, their knowledge is usually weaker on the position of rescuers. Ironically, the law is that rescuers are not treated any differently, so if candidates simply applied the principles they do know well they would often receive a higher mark. In any event, performance on parts (a) and (b) was mixed across a range of marks as I would expect.

Question 4

Given that psychiatric harm is seen as an "easier" topic, I intentionally paired it with causation, seen as one of the more "difficult" parts of the unit spec to add balance to this scenario's demand.

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Scenario 2

Question 1

The "change" to the law on establishing a duty of care (which arguably is not a change at all, but that is something more for the law journals) has been difficult to filter into this subject, given that at level 3 candidates have historically not necessarily been taught the most current and immediate legal developments. In that light, the answers to Question 1 were pleasing as many candidates did take at least some account of the "new" approach.

Question 2
This was the lowest mean mark on this scenario, however I would imagine this was because it combined the relatively new legal principles mentioned re: question 1 with the need to apply the law, and without fail the application part of section B questions attracts a lower mark than the knowledge part. Learners did however produce a range of marks according to their ability.

Question 3

(a) and (b) tested knowledge and application in relation to the defence of *volenti* and was attempted well by candidates. This defence is quite straightforward in that it is a binary yes/no application and is based on "common sense" ideas of consent. (c) achieved a lower mean mark, reflecting that it covered the more complex defence of contributory negligence.

Question 4

This question tested knowledge (part a) and application (part b) of the defence of illegality. This is a difficult area but I intentionally tried to take account of this in the way the question was asked and the responses credited. Performance was very much in line with other "defences" questions and thus was a successful approach.

Scenario 3
Question 1

As noted earlier in this report, candidates have historically struggled with questions relating to the standard of care and this was examined in both parts of Q1. In (a), which attracted the lower mean mark, there were more complex issues requiring knowledge of a range of case law; while (b) was a more straightforward single principle, perhaps reflected in the higher mean mark.

Question 2

After Question 1 asked about standard of care, Question2 asked about breach and there was an inevitable link between these questions – if a candidate did not know what standard to expect, they would struggle to go on to analyse whether it was reached. Marks thus closely followed those given in Q1.

Question 3

Damages is an "easier" subject, included here to balance the "harder" Q1 and Q2. The two parts of this question asked about two different pieces of statutory law and were mainly knowledge-based. Knowledge is historically stronger among level 3 learners of the statute examined in (b) so that this part had a higher mean mark is to be expected.

Question 4

This was another "easier" question, as candidates know that there are certain heads of damages and they can learn these easily enough in case there is a damages-based question. I was glad to see the high mean mark percentage as this shows Q4 did its job in balancing out the scenario as a whole.

	SUGGESTED POINTS FOR RESPONSE LEVEL 3 - UNIT 5 - LAW OF TORT	

SECTION A

Question Number	Suggested Points for Responses	Max Marks
1	- Duty of care - Breach of duty - Resulting in damage/ causation	3
2	- Driver and road user - Employer and employee - Doctor/health care professional and patient - Any other relevant example(s)	2
3	- As a matter of policy - The police do not owe a blanket duty of care - To the public **as a whole** - Relevant case e.g. Hill v CC of W Yorkshire (1988) - But may owe a duty in individual circumstances - Relevant case e.g. Commissioner of Police of the Metropolis v DSD (2018)	4
4	- The court may take a less strict approach/expect a lower standard of care - If the defendant's act has social utility - Relevant case e.g. Watt v Hertfordshire CC (1954) - Reference to s1 Compensation Act 2006	2
5	- Injury must be reasonably foreseeable. - Relevant case e.g. The Wagon Mound (No 1) (1961).	2
6	The "multiple" test/ "economic reality" test	1
7	- Test as to whether tort committed in course of employment - First established in <u>Lister v Hesley Hall Ltd</u> (2001) - Court asks what are employee's function/field of activities - Then is there a 'close connection' between tort and that function/field/their employment	3

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	• Relevant subsequent case e.g. <u>WM Morrison v Various Claimants</u> (2020).	
8	• Under s11 Limitation Act 1980 • The period is 3 years • From the date of injury OR the date of knowledge • Disability may stop time running	2
9	• Damages which can be precisely calculated at the time of trial	1
	Section A Total:	**20 marks**

Section B - Scenario 1

Question Number	Suggested Points for Responses	Max Marks
1(a)	• A "primary" victim is one to whom physical injury is foreseeable • I.e. is in the "zone of danger" • Relevant case e.g. Page v Smith • And has a medically recognised psychiatric injury	4
1(b)	• Absal is not physically injured • But clearly such injury is foreseeable • PTSD is medically recognised • Therefore can claim as a primary victim	4
	Question 1 Total:	**8 marks**
2(a)	• A "secondary" victim must meet the "control mechanisms" • Established in Alcock v CC of S Yorkshire • Proximity in space and time to the event • Or the immediate aftermath • Proximity of relationship/ close ties of love and affection • Witnesses the accident with own unaided senses • Suffers sudden shock • And has a medically recognised psychiatric injury	5
2(b)	• Doyle does not have physical proximity • Usually experience through video is not considered own senses • However simultaneous broadcast was left open as a possibility • And is likely a sudden shock/ wiled to show sudden shock • He does not have a relationship with Absal that will be presumed to be of love and affection/ he will need to prove close ties • Has been diagnosed with a recognised condition • Psychiatric injury would need to be foreseeable in a person of reasonable fortitude • Reasoned conclusion, e.g. Doyle unlikely to be able to claim as a secondary victim unless he can show above	7
	Question 2 Total:	**12 marks**
3(a)	• Rescuers should not be considered a special class of claimant for psychiatric harm • So must qualify as a primary or secondary victim • Relevant case e.g. White & Ors v CC of S Yorkshire Police & Ors (1999) (1)	7

	• If a rescuer enters the zone of danger/ is foreseeably at risk of harm		
	• Can claim as a primary victim		
	• Relevant case e.g. Chadwick v BRB (1967)		
	• Claudia is clearly in the zone of danger/ harm is foreseeable to her		
	• As she enters the wreckage/ the second car crashes nearby		
	• Therefore she is likely to be able to claim		
	• As a primary victim		
3(b)	• Femi does not appear to be in the zone of danger		4
	• So is unlikely to be able to claim as a primary victim		
	• As a secondary victim he must show close ties of love and affection with Absal		
	• Which he does not appear to have		
	• Reasoned conclusion e.g. he is unlikely to be able to claim		
	Question 3 Total:		**11 marks**
4	• Where an act takes place after the original harm is suffered		9
	• Breaking the chain of causation		
	• An action of a third party can constitute a *novus actus*		
	• But it must be unforeseeable		
	• Relevant case e.g. Knightly v Johns		
	• Femi's actions are foreseeable		
	• Because danger invites rescue		
	• And Femi is acting in an emergency		
	• Relevant case e.g. The Oropesa (1943)		
	• And the courts will look more generously upon rescuers		
	• Reasoned conclusion e.g. Femi's acts are unlikely to break the chain of causation.		
	Scenario Total:		**40 marks**

Section B - Scenario 2

Question Number	Suggested Points for Responses	Max Marks
1	• Following the guidance of the Supreme Court	8
	• Relevant case e.g. Robinson v CC of W Yorkshire (2018)	
	• Starting point is to look for an established duty	
	• If not, an incremental approach	
	• By analogy with existing authority	
	• Using the principles from Caparo v Dickman (1990)	
	• Foreseeability	
	• Proximity	
	• Fair just and reasonable to impose duty	
	Question 1 Total:	**8 marks**
2	• If Hester acts negligently in upgrading the computer it is clear this could harm Ioan when using it	6
	• Therefore there is foreseeability	
	• Hester and Ioan are in a contractual relationship	

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		• And Hester is working on an object used/owned by Ioan • Therefore there is proximity • There is no policy reason to prevent liability • Providers of goods and services are usually liable to consumers • Therefore imposing a duty is likely to fair, just and reasonable.	
		Question 2 Total:	**6 marks**
3(a)		• A complete defence • Where the claimant has full knowledge of the risk • And freely/voluntarily • Consents to it • Relevant case e.g. ICI v Shatwell (1965)	**4**
3(b)		• Ioan appears to consent. • Freely and voluntarily. • By telling Hester to go ahead with the overclocking. • To the risk of "serious damage". • But it is arguable that this is not the risk that actually transpired. • Reasoned argument that Ioan has consented to the general risk of overclocking only • Ioan has not consented/does not have knowledge of the actual risk of disabling the safety shut down feature. • Reasoned argument for e.g. serious damage could include personal injury. • Reasoned argument against e.g. Ioan may well have assumed Hester meant to the computer, not to him. • Reasoned conclusion as to whether defence will/will not apply.	**6**
3(c)		• A partial defence • CN operates to reduce the damages awarded • By a proportionate amount • Defence reflects fault of claimant/claimant's contribution to injury • Governed by Law Reform (Contributory Negligence) Act 1945 • Ioan has told Hester to overclock the computer • Ioan has left flammable materials next to the computer • Reasoned conclusion e.g. defence likely to apply	**7**
		Question 3 Total:	**17 marks**
4(a)		• No action may arise from a base cause • Cannot claim if harmed while doing a criminal act • Complete defence • Operation of test: is illegality inextricably linked? • Justification: public policy • Justification: impossible to set standard of care • Relevant case e.g. Ashton v Turner (1981)	**5**
4(b)		• Loan was injured while committing a crime • The crime involved using his computer • Reasoned argument as to inextricable link e.g. not inextricable as may use computer for many different activities	**4**

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	• Reasoned argument as to public policy e.g. allowing someone hurt while harassing girlfriend to recover may outrage public morals • Reasoned conclusion	
	Question 4 Total:	**9 marks**
	Scenario Total:	**40 marks**

Section B - Scenario 3

Question Number	Suggested Points for Responses	Max Marks
1(a)	• Basic standard of reasonable person. • But given that he is a professional/ exercising a special skill. • Judged by the standard of the reasonably competent person with that skill. • Relevant case e.g. Bolam v Friern Hospital Management Committee (1957). • So basic standard will be that of the reasonable chef/ restaurant owner. • Relevant factor: magnitude of the risk. • Relevant case to support e.g. Bolton v Stone (1951). • Relevant factor: vulnerability of C. • Relevant case to support e.g. Paris v Stepney BC (1951). • Relevant factor: Cost of precautions. • Relevant case to support e.g. Latimer v AEC (1953). • Given the factors involved the standard is likely to be high.	9
1(b)	• The law will not take account of personal inexperience. • Because the standard of care is objective. • So the fact that Teresa started last week is not relevant. • Relevant case e.g. Nettleship v Weston (1971). • However, the role in which the defendant is acting is relevant. • Relevant case e.g. Wilsher v Essex AHA (1986). • Thus she will be judged by the reasonable trainee • Rather than the reasonable professional.	5
	Question 1 Total:	**14 marks**
2(a)	• Given that the risk of harm if people are exposed to allergens is very high. • And the restaurant was aware of Saloumeh's allergy/'vulnerability'. • And the cost of precautions was relatively low (£150). • Negligence is doing something the reasonable person would not do. • The reasonable chef would either not have left a trainee in charge of the kitchen. • Or failing to do something that the reasonable person would do. • The reasonable chef would have ensured that that person was properly trained.	7

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	• Reasoned conclusion e.g. Richard is likely to have breached his duty.	
2(b)	• The reasonable trainee would still have avoided cross-contamination • Thus Teresa is still likely to have breached her duty OR • Teresa has not been properly trained to know the correct procedure • Thus Teresa is unlikely to have breached her duty	**2**
Question 2 Total:		**9 marks**
3(a)	• Under the Law Reform (Miscellaneous Provisions) Act 1934. • Her estate may claim as if she was alive/ can claim for anything she could have claimed. • Except lost years/ no claim for future losses. • For the three weeks in hospital. • Can claim special damages. • For loss of earnings/ medical expenses. • Can claim for loss of amenity. • But not for pain and suffering. • Because she was not conscious. • Can also claim funeral expenses.	**7**
3(b)	• Under the Fatal Accidents Act 1977 • Dependents may claim • This includes a person co-habiting with the deceased • For at least two years • As the wife or husband or civil partner of the deceased • Can claim bereavement award • Of £15,120 • Also claim for loss of dependency • Here Saloumeh was sole earner so can claim loss of these earnings	**5**
Question 3 Total:		**12 marks**
4	• Special damages (1) • Any cost of medical treatment/prescriptions etc. (1) • Transport costs to/from hospital/physio etc. (1) • Loss of earnings (1) • General damages (1) • Pain and suffering (1) • Loss of amenity (1) • Including hobby of long-distance running (1) Any other valid response (1)	**5**
Question 4 Total:		**5 marks**
Scenario Total:		**40 marks**

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