CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

LEVEL 6 - UNIT 13 – 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

As with recent Chief Examiner's Reports, this document commences with a reminder concerning developments in the law at the start of 2018. Candidates should be aware that the Caparo three-part 'formulation' is no longer regarded as a 'test' to be applied to a specific set of novel circumstances for the purposes of assessing the existence of a duty of care in negligence. In Caparo Lord Bridge was at pains to point out that concepts such as 'proximity' and 'fairness' are merely convenient labels to attach to features of a situation where a duty of care may be recognised. As Lord Toulson, who delivered the majority judgment in Michael v Chief Constable South Wales Police (2015) pointed out (at para 106), the 3-part formulation should not be taken as a blueprint for deciding cases involving novel facts. In February 2018 the Supreme Court handed down judgment in the case of Robinson v Chief Constable West Yorkshire Police (2018). The majority dismissed the idea that there is a Caparo 'test'. Lord Reed re-asserted (at para 29) that the starting point is to consider whether each factual situation gives rise to a duty of care according to existing precedents. If the claim is genuinely novel:

"The courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable."

In other words, it is the 'incremental approach' that should be followed in novel circumstances. Therefore, candidates who persist in analysing the existence of a duty of care by reference to foreseeability, proximity and fairness/justice/reasonableness are no longer discussing good law.

It should be noted that both problem and essay questions on negligence liability in the Level 6 Law of Tort exam are likely to focus on circumstances where existing case law has either established that a duty, or no duty exists, or that a duty will be recognised only in prescribed and limited circumstances. For example, in Question B1, the assessment of the existence of a duty of care was determinable by reference to the decision of the Supreme Court in Montgomery v Lanarkshire Health Board (2015), which confirmed that doctors owe a duty to take reasonable care to ensure adults of sound mind are aware of any material risks associated with both recommended and reasonable alternative treatments.

Overall performance was significantly improved since the historic low point of January 2019 (33%). The high success rates seen this time were partly a result of candidates adopting good examination technique, but more particularly the candidates at this sitting were clearly more knowledgeable, having revised sufficiently to answer the questions in greater detail and analytical depth. Many candidates were therefore, in all likelihood, able to avoid questions that might have been perceived to be 'more difficult' having revised sufficiently widely to ensure they had a choice when it came to question selection.

It is inevitable that the commentary contained in a Chief Examiner's Report will tend to focus on what candidates did less well, in the hope that the feedback will be acted upon in future examination sessions. The details that follow should therefore be read in the overall context of a generally very positive performance on the part of the majority of candidates in the January 2020 paper.

There was a roughly equal preference for answering essay and problem questions at this sitting. 181 essay questions from Section A were answered compared to 187 problem questions from Section B.

As with previous examinations, many candidates were unprepared to deal with questions focusing on specific aspects of negligence liability e.g. breach of duty, employers' liability, negligent patient advice cases, psychiatric harm etc. Instead it was common to find candidates regurgitating learned revision notes covering all aspects of negligence liability (often incorporating commentary as to the circumstances in which a court might be prepared to recognise a duty of care in novel fact situations) and which covered the examined areas only briefly and at a wholly superficial level. Candidates answering problem questions sometimes did not adopt the IRAC (or similar) technique, and individual claims were sometimes not identified or separately analysed with candidates attempting to discuss several claims simultaneously. The use of supporting authority was sometimes seen as entirely optional: it was not

uncommon to find scripts almost entirely devoid (or in some cases entirely lacking in the use) of case law.

Learning Centres and candidates are referred to the specific commentary (below) in relation to each question on the paper as well as the Suggested Answers. This should help tutors and candidates gauge the level of knowledge and understanding necessary to succeed in a formal written assessment which is designed at the level applicable to final year undergraduate LLB candidates.

For the avoidance of doubt, in relation to the Law of Tort syllabus Learning Outcome 4, candidates can expect to see questions focusing on specific aspects of negligence liability such as breach of duty, causation in fact and remoteness of damage. In relation to 'duty of care', questions may focus on a single specific area where public policy has played a significant role in determining the existence of a duty e.g. pure economic loss, psychiatric harm, public body liability, omissions etc. Candidates who are unable to analyse specific aspects of negligence liability or specific 'duty of care' situations in detail are unlikely to be able to pass questions designed to assess this very important area of the syllabus.

Candidates are reminded that where a single question is broken down into two or more parts (e.g. Questions A2, and B1), their answers should also be presented in the same format, rather than as a single amalgamated response.

A general point concerning the discussion of the facts of precedents in examination answers: in *essay* questions it is often (though not always) relevant to *briefly* describe how the court applied the law to the facts of the dispute in order to reach its conclusion. This will often enable the candidate to illustrate the legal point s/he is making. However, in *problem* questions it is usually enough for candidates to simply quote the legal rule established or applied in the past case and to relate the law to the facts of the problem, quoting the case name as the source. A discussion of case facts in problem questions would usually only be appropriate when (a) the facts of the problem are so similar to the facts of a precedent that discussion of the latter may indicate how a court would be likely to resolve the issues in the hypothetical scenario (b) the facts of the problem are so (materially) different to those of a similar/analogous precedent that a court might legitimately be prepared to depart from the precedent by distinguishing it.

Candidates should note that they are *not* required to quote case years in the exam and that they will not be penalised if they fail to do so. However, at the tuition stage case years are important because, amongst other things, they will often help candidates understand the chronological development of the law.

Section A – general points concerning essays

The best essays were written by candidates who had clearly spent time planning their responses in order to address the specific focus of the question. These candidates were able to develop a 'running commentary' permitting the reader to understand how each point made related to the essay title, and enabling the candidate to provide a more explicit answer to the question. For example, the best answers to Question A1 not only discussed the rules that determine the standard of care in the tort of negligence but also considered which ones promote damages recovery by claimants whilst, at the same time, preventing defendants from being fixed with unrealistic/impossibly high

standards. Similarly, in Question A2(b) the best candidates not only identified the main criteria for establishing vicarious liability, they also considered the extent to which these criteria enhance the protections provided by employer's primary liability.

As with previous Law of Tort exams, there were a significant number of candidates who insisted on reciting apparently pre-learned passages, revision notes or sometimes complete essays, concerning the general elements of negligence liability in their essay responses, irrespective of the context. Such passages were sometimes encountered in Questions A1, A2(a) and B1. It is vital that candidates read the questions carefully and take time to plan the content of their answers in order to focus only on what is relevant.

As with previous examinations in this subject, relatively few candidates were able to develop critical commentary on the law in key areas. The knowledge and skills required to develop and demonstrate critical evaluation are essential at level 6, and Learning Centres generally need to do more to encourage their candidates to think critically about the law, its policy objectives and whether particular torts adequately protect the interests they are designed to safeguard.

Section B – general points concerning problem questions

The best candidates displayed good technique when approaching the problem scenarios by splitting up their scripts logically so as to deal with the different possible claims under separate headings.

Insufficient knowledge of the detailed elements required to establish liability (and relevant defences) in all the areas examined often prevented candidates from spotting all the main issues pertaining to each potential claim.

Insufficient or inaccurate knowledge of the law effectively penalises candidates twice when answering a problem question: a rule not quoted (or correctly quoted) cannot be related to the facts of the scenario in order to accurately predict legal liability.

Some candidates provided a large 'block of law' at the beginning of their answers, often including irrelevant rules of law which did not arise for discussion according to the facts, before going back and applying these principles in relation to each claim. This approach tended to result in candidates running out of time. It is not a word-efficient technique because candidates must repeat the rules to make sense of their later application. The 'block of law' approach almost invariably caused the candidate to omit to apply one or more of the relevant legal tests.

Many candidates needed to develop their problem-solving technique by adopting the IRAC approach (or similar). It was common to find candidates discussing the law and their conclusions as to liability without stating the reasons for these conclusions.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1 (breach of duty)

This was a popular essay question.

The best candidates were able to describe the rules that determine the standard of care in negligence for the purposes of assessing breach of duty i.e. how much care a reasonable person would/should have taken in the circumstances. In doing so they were able to explain how the rules achieve fairness to both claimants and defendants. For example, the existence of an objective standard that ignores subjective inexperience on the part of the defendant, clearly promotes damages recovery for claimants. Similarly, an increased likelihood/seriousness of harm associated with the defendant's activity will lead to higher standards of expected care. On the other hand, the rules also avoid fixing defendants with unrealistic/impossibly high standards. For example child defendants are assessed by the standards of the reasonable person of the same age; lower standards apply to those who involuntarily cause accidents due to an unknown and undiscoverable physical disability; persons are not liable for failing to take steps to guard against risks which could not reasonably have been anticipated at the date of the accident; lower standards will apply in a range of circumstances e.g. where the defendant is involved in an activity that carries some valuable social benefit.

Weaker candidates sometimes recited pre-learned material concerning the general elements of negligence liability in their essay responses, covering principles relating to breach of duty in relatively brief detail. There was often a degree of confusion over case law concerning the existence of a duty of care, especially in relation to the emergency services.

Question 2 (employer's primary liability and vicarious liability)

This question asked (in part (a)) candidates to analyse the circumstances in which employers owe a primary duty of care to avoid exposing employees to unnecessary risks and (in part (b)) to critically evaluate the extent to which the rules on vicarious liability complement the protections enjoyed by employees, as identified in part (a).

In part (a) candidates generally displayed good knowledge of the various aspects of the employer's primary, non-delegable duty of care. Many provided case law to illustrate the duty to provide competent staff, adequate plant/equipment, a safe system of work and to provide a safe workplace. Relatively few candidates, however, considered the circumstances in which an employer may face primary liability for an employee's stress-related harm. A number of candidates spent much of their time discussing the nature of the employment relationship, thus missing the point/main focus of the question.

In part (b) the best candidates considered how the rules on vicarious liability (especially in relation to the recent developments) have enhanced the protections enjoyed by employees identified in part (a). They noted that, whilst vicarious liability may protect any person who suffers a loss as a result of a tort committed by an employee (or quasi-employee), the principle equally applies where the claimant/victim is another employee. The expansion of the

relationships to which the principle attaches so as to cover those that are 'akin to employment' has enabled some employees to claim vicariously for injuries suffered even though, on the facts, there was no breach of the employer's primary duty e.g. to provide a safe system of work (see Cox v MOJ (2016) and Various Claimants v Barclays Bank plc (2018)).

Similarly, the development and expansion of the close connection test is likely to enhance the protection for employees where tortfeasors commit acts which are only loosely connected with their employment e.g. Lister v Hesley Hall (2001) and Mohamud v WM Morrison Supermarkets plc (2016).

Weaker candidates tended to launch into a discussion of the policy reasons underpinning vicarious liability without considering whether the doctrine and the recent developments complement existing protections resulting from employers' primary liability. There was often confusion between employers' primary liability and secondary (vicarious) liability throughout parts (a) and (b).

Question 3 (defamation)

This was the least popular question on the paper and it also attracted the lowest average score. The question required candidates to critically evaluate whether the law of defamation adequately protects the freedom of expression of media organisations.

The best candidates described the interests protected by defamation, and the need to balance these against the freedom of expression of the media. They went on to explain the elements of defamation, noting the ease with which these elements may be established (apart from the more recently introduced requirement for 'serious' harm under s.1 Defamation Act 2013) given the absence of the need to prove falsity. This discussion was then balanced with a description of various features that aim to redress the balance by ensuring adequate press freedom e.g. governmental/public bodies and political parties are excluded claimants; Defamation Act 2013 has introduced a variety procedural reforms to bolster press freedom and the existence of various common law and statutory defences promote the media's right to freedom of speech by limiting the circumstances in which a claimant will be able to prevent publication of critical material.

Many candidates appeared to be unprepared to answer a question on this area of the syllabus. In some cases the question was clearly a 'last resort'. A considerable number of responses incorrectly stated that defamation is a statutory tort, and/or that defamation requires proof on the part of the claimant that the statement made by the defendant was untrue. Many responses omitted to define the elements of the tort and confined themselves to a description of the statutory defences that could be readily sourced from the statute books.

Question 4 (occupiers' liability)

This was the most popular essay question, achieving the highest average score of all the questions on the paper. It required candidates to consider whether the Occupiers' Liability Acts achieve a fair balance between the interests of occupiers and those of claimants.

The best candidates discussed the role of the 1957 and 1984 Occupiers' Liability Acts in regulating the nature and scope of the duty owed by occupiers to entrants (visitors and non-visitors) and some aspects of standard of care, noting that the remaining elements of liability have been left to the common law. There was an explanation (with supporting case and statutory authority) of elements/features that may appear to promote wide-ranging/unrestricted liability e.g. the meaning of 'premises' and 'occupier', and an explanation of the 'common duty of care' under the 1957 Act. However, this was balanced with discussion of elements/features that appear to restrict liability, thus preventing a proliferation of claims. For example, there is a heavily restricted duty to non-visitors under s.1(3) OLA 1984; non-visitors are limited to claims for personal injury and death only (s.1(8) OLA 1984); there is usually no liability for dangerous activities voluntarily carried out by persons of full capacity whilst on the occupier's premises (e.g. Tomlinson v Congleton Borough Council (2003)); the higher standard owed to child visitors does not permit a transfer of parental responsibility for very young children to occupiers who happen to control accessible bits of land (Phipps v Rochester Corporation (1955)); lower standards are usually owed to 'specialists'; an occupier's duty may be discharged by the provision of an adequate warning and there is no duty to warn against 'obvious dangers' (Tomlinson).

In general, many candidates needed to take care over the accuracy of their statutory referencing/pinpointing. For example, s.2(3)(b) Occupiers' Liability Act 1957 was often quoted incorrectly as 's.3(b)' and s.1(3) Occupiers' Liability Act 1984 as 's.3' i.e. the main section reference was often omitted.

Weaker candidates often relied on their statute books for a summary of the main principles of law, without reference to case law, and there was often little attempt to consider whether the Acts achieve a fair balance between the interests of occupiers and those of claimants. There was also frequent confusion between warnings (which aim to prevent occupiers from becoming liable in the first place by discharging the standard of care) and exemptions of liability (which aim to exclude/limit liability which has already arisen).

Section B

Question 1 (negligence)

This was a problem question concerning negligent patient advice (part (a)) and the basis upon which compensatory damages are awarded to claimants who suffer serious non-fatal injuries (part (b)).

In part (a) the best candidates were able to describe and apply the specific duty owed by medical practitioners to take reasonable care to ensure adults of sound mind are aware of any material risks associated with both recommended and reasonable alternative treatments - Montgomery v Lanarkshire Health Board (2015). In the circumstances there seemed little doubt that Ben would have been in breach of this duty in relation to Aileen. Issues relating to causation by reference to the decision of the House of Lords in Chester v Afshar (2004) were then considered according to the different possible outcomes if, hypothetically, Ben had provided full advice as required. It was noted that the NHS Trust Ben works for would accept vicarious liability for Ben's probable negligence.

Weaker candidates frequently asserted that the Bolam test continues to apply in patient advice cases. They were unable to fully articulate the issues

concerning factual causation. It was common to find candidates engaging in a general duty/breach/causation analysis by reference to very general pre-learned revision notes covering these points.

Part (b) was generally well-answered with many candidates being able to articulate the framework of rules concerning the recovery of compensatory damages for serious non-fatal injuries. However, very few candidates discussed the possibility of the recovery of Smith v Manchester Corporation damages for loss of earning capacity. Many asserted that Calvin would be able to claim compensation for his loss of salary as a result of his future care for Aileen, without appreciating that only Aileen could claim her on-going medical and care costs, and that her claim would be capped at the full commercial rate for employing a professional carer (Housecroft v Burnett (1986)). A large number of candidates appeared to think that the relevant principles were to be found in the Compensation Act 2006.

Question 2 (trespass to the person/goods and the tort in Wilkinson v Downton)

The main issues arising in this question were whether Damian would be liable for:

- An assault in relation to Edward by throwing the pen at him.
- A battery in relation to Ms Franklin (who was hit by the pen), given that Damian intended to apply force to Edward.
- Trespass to Mr Gilbert's goods by scratching his car.
- The tort in Wilkinson v Downton in relation to sending a series of unwanted sexually suggestive text messages to Hina.

There was also an issue as to whether Mr Gilbert had falsely imprisoned Damian by locking him in a detention room (apparently without Damian's knowledge) for five minutes.

The best candidates engaged in a full analysis of the issues by reference to case law and were able to apply the elements of each tort to the circumstances described.

Weaker candidates tended to omit discussion of the possible assault in relation to Edward and/or the claim relating to trespass to goods. There was little or no reference to relevant case law. Relatively few candidates were able to precisely state the elements of Wilkinson v Downton or to apply these to the facts.

A number of candidates confused negligence concepts e.g. the standard of care owed by children, and the incidents were often discussed in terms of reasonable foreseeability.

Question 3 (psychiatric injury)

This was the most popular question on the paper and resulted in the second highest average score.

The main issues were whether:

- Gary's estate could recover damages for his psychiatric harm and subsequent death resulting from Gary's suicide (or whether the latter amounted to a *novus actus interveniens*).
- Ivan would be able to recover as either a primary or secondary victim.
- Mary would be able to recover as a secondary victim given her lack of proximity to the original accident involving her mother, or its immediate aftermath.
- Norma would be able to recover as a secondary victim in relation to the death of her fiancée. The main issues here were whether Norma's experiences were sufficiently 'horrific' from the perspective of a person of 'ordinary fortitude', there being a possible argument that her condition only arose because she had previously suffered a depressive illness. There were also issues as to whether her psychiatric harm was caused by a sudden shock/assault upon her senses, or an accumulation of gradual assaults on Norma's mind. Finally, it was unclear whether Norma's perception of events fell within the 'immediate aftermath'.

Stronger candidates explained the rule structure (by reference to case law) in relation to primary and secondary victims, noting that Gary's case fell outside these rules altogether as he had not suffered 'pure psychiatric injury'. The rules were then applied sensibly to Ivan, Mary and Norma's potential claims.

A number of candidates ignored the point made in the question that KBS Ltd had admitted liability for the physical injuries and the death arising from the inadequately protected warehouse racking system. Thus a discussion of the nature of the duty of care owed by KBS Ltd to the immediate victims under principles relating to employer's/occupiers'/vicarious liability was not needed, nor was there a need to consider breach of duty or (with the exception of Gary) causation. In Ivan, Mary and Norma's cases, the only issue was whether KBS Ltd's duty extended to persons suffering pure psychiatric harm.

In relation to Ivan, it was common for candidates to assert that 'work colleagues' might be able to prove 'close ties of love and affection' as secondary victims. The pre-Alcock case of Dooley v Cammell Laird (1951) was often quoted as authority for this proposition. This is highly unlikely e.g. see Robertson v Forth Road Bridge Joint Board (1995). It should be noted that if anything, Dooley establishes that such persons might exceptionally fall within a special class of primary victim where, due to the negligence of another, the claimant was made to feel responsible for the victim's death/injury/endangerment. This would require the claimant to have been a direct actor in the incident and not merely a passive victim – Hunter v British Coal (1998).

In relation to Norma, candidates frequently asserted that she would be able to recover as a person with a 'thin skull' without appreciating that a threshold test must first be applied to her as a secondary victim i.e. it must have been reasonably foreseeable that a person of ordinary fortitude might suffer psychiatric harm as a result of Norma's experiences (McLoughlin v O'Brian (1983)). Only if this threshold test is passed would the 'thin skull' principle

apply i.e. Norma would be able to recover for the full extent of her loss, even if this was more severe than an 'ordinary' person would have suffered. Unfortunately for Norma, the other elements of her claim as a secondary victim would probably have been insurmountable.

Question 4 (nuisance liability)

The main issues in this question were whether:

- Orla had a claim against NPPS in private nuisance as an occupier of neighbouring premises in relation to nuisances committed by its licencees. This raised further issues as to whether noise from the arguments between the occupants of the bail hostel fell within 'ordinary residential use'. Candidates needed to assess whether there had been an 'unreasonable interference' with Orla's amenity interest arising from the depositing of the hazardous rubbish on her land e.g. in relation to duration, frequency and locality. The relevance of 'public benefit' in relation to NPPS's activities might have been discussed as well as a possible defence of statutory authority. There were also further points relating to the relevance of planning permission and the availability of remedies including injunctions.
- Orla had a claim against Richard in private nuisance as someone who may have 'authorised' NPPS's nuisances
- Orla and Philippa had claims against NPPS in public nuisance. This partly depended upon whether a class of Her Majesty's subjects had been affected by NPPS's activities and whether Orla and Philippa suffered special or particular damage over and above the annoyance and inconvenience experienced by the public in general.
- NPPS's likely claim against Orla in private nuisance based upon Orla's malicious response to its activities.

Many candidates who answered this question were unable to fully describe the elements of private nuisance and therefore failed to identify at least some of the relevant issues affecting the potential claims. In some instances, the torts of private and public nuisance were not defined as a starting point for answering the question.

Weaker candidates tended to omit consideration of Richard's potential liability in private nuisance as a landlord, and also few considered NPPS's liability in private nuisance as the occupier in control of licensees who were creating a nuisance. It was common for candidates to assume that the depositing of beer cans and syringe needles gave rise to land damage without any specific indication of this fact in the question.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 13 – LAW OF TORT

SECTION A

Question 1

Determining breach of duty in the tort of negligence requires a two-stage enquiry. First of all, the court must decide how much care a reasonable person should have taken in the circumstances – this is the 'standard of care' referred to in the question. Secondly, the court must decide whether the defendant's conduct fell below this standard.

Any duty owed by a defendant in the tort of negligence is a duty to take reasonable care, not all possible care. The aim is to provide a balance by enabling accident victims to recover compensation whilst at the same time ensuring that liability is appropriately fault-based and that defendants are not liable for failing to observe unrealistic or impossibly high standards

The standard of care is objective and does not take into account certain personal characteristics of the defendant. For example, inexperience on the part of the defendant does not affect his/her liability. This achieves fairness by allowing claimants to recover damages irrespective of the subjective skill of particular defendants. A consistent approach leads to predictability of case outcomes, promoting settlements in litigation. For example, learner drivers are expected to take the same level of care as experienced and competent drivers (Nettleship v Weston (1971)). Junior doctors are expected to exhibit the same degree of care as an ordinary skilled doctor exercising and professing to have the special skill required for the particular position the junior is filling (Wilsher v Essex (1986)). DIY enthusiasts are expected to perform tasks with the same level of care as the reasonably competent tradesperson (Wells v Cooper (1958), at least where they attempt tasks that would prompt an ordinary person to employ a professional (Moon v Garrett (2007)). Whilst it may seem unfair to judge inexperienced/unskilled defendants in this way, arguably, defendants may choose to avoid certain activities in the first place if they wish to avoid being judged by standards they have not yet attained. In addition, insurance is usually available to cover potential liability.

There are limited circumstances where the defendant's personal characteristics will be considered in assessing the standard of care, such as a person's young age. Children will not be held liable in negligence unless a reasonable person of the same age would have foreseen injury as being sufficiently probable as to have anticipated it (Orchard v Lee (2009)). This fairly reflects the fact that children may be less able to appreciate risks than adults.

In exceptional circumstances defendants may not be liable in negligence for involuntarily causing accidents due to some physical or mental condition. In Mansfield v Weetabix (1998) a lorry driver crashed into the claimant's shop having gradually become unconscious due to a state of hypoglycaemia resulting from a malignant insulinoma. The relevant standard of care was said to be that of a reasonably competent driver unaware that he may be suffering from a condition that impaired his ability to drive. The defendant was not liable

in negligence for causing the accident as to hold otherwise would have been to impose strict liability. The decision in Mansfield thus appears to be inconsistent with the position concerning learner drivers (Nettleship), who are judged according to standards of competence that will be impossible for many novices to achieve. Arguably deserving claimants may go uncompensated where persons involuntarily cause accidents due to an unknown physical disability, though these cases are likely to be rare.

In Dunnage v Randall (2015) the defendant, who suffered from paranoid schizophrenia, set himself alight with petrol. His estate was found liable for the severe burns accidentally suffered by his nephew during the incident on the basis that the defendant had failed to meet the standard of care to be expected of a person without a medical problem. The Court of Appeal held that the mental illness should not affect the required standard of care, even if the defendant was incapable of acting rationally, unless the illness rendered the defendant's conduct involuntary in the sense that he had no physical control over his actions. Only then would the mental incapacity negate the defendant's fault or responsibility for the injuries caused. The reasoning of the court in Dunnage has been criticised as setting unrealistically high standards of care for persons with mental disorders. Arguably it creates an unjustified distinction making it easier for persons with physical illness to avoid liability than those with mental disorders. Nonetheless, it is submitted that the decision is justified: taking account of the defendant's mental illness would run contrary to the concept of the reasonable person who can exercise rational choices and act accordingly. Furthermore, the ability of claimants to recover damages should not depend upon the subjective mental health of individuals who cause accidents.

A further consequence of the objective nature of the standard of care is that liability will not be unfairly imposed for failing to take steps to guard against risks which could not reasonably have been anticipated at the date of the accident (e.g. Roe v Ministry of Health (1954)).

In order to achieve a fair balance between the parties, the courts assess the level of care a reasonable person would have taken according to the specific circumstances confronting the defendant at the time of the accident. This means that there will be some circumstances where 'reasonable care' is set at a high level in order to protect claimants, and others where the standard is lowered to achieve fairness for defendants.

Claimants receive a greater level of protection if defendants are engaged in risky activities where a higher level of precautions would reasonably be expected (e.g. Miller v Jackson (1977); cf Bolton v Stone (1951)) and/or where the potential damage or injury arising from the relevant activities is likely to be serious e.g. Lunt v Khelifa (2002). The standard of care will also be raised where vulnerable claimants are foreseeable victims of the defendant's activity e.g. Haley v London Electricity Board (1964).

Where defendants are careless in carrying on a specialist trade or profession, they will be judged according to notionally higher standards of the reasonable person who has the same specialist level of skill or knowledge. Whilst this suggests a higher level of protection for claimants, critics argue that the Bolam test is too protective of specialists (Bolam v Friern HMC (1957)). Duties of care can usually be discharged by proof that the professional acted in accordance with a practice accepted as proper by a responsible body of practitioners acting in the same field, even if this body represents a minority

view. Arguably the test allows the professions to set their own standards although in extreme cases, the courts remain willing to declare that a recognised trade or professional practice is itself negligent (Bolitho v City and Hackney HA (1997)).

Conversely, the standard of care may be lowered to achieve fairness for defendants. For example, it is recognised that those who are placed in a sudden situation of danger, and who must act on the spur of the moment, are not expected to be able to judge the risks too carefully, although they must still act in a manner which is not unreasonable taking account of the demands and difficulties of the situation (e.g. Das International v Manley (2002)). For those actively engaged in risky sporting activities (or horseplay), it is recognised that participants are likely to be primarily focused on winning the competition/game and should not be expected to judge the risks to spectators or other participants too carefully. Such persons will usually only be in breach of duty if they acted with reckless disregard for the claimant's safety e.g. Wooldridge v Sumner (1962), Blake v Galloway (2004).

The standard of care may also be lowered where the defendant's activities carry some valuable social benefit, even where the risks are high – a point now specifically recognised in s.1 Compensation Act 2006, and more recently in the Social Action, Responsibility and Heroism Act 2015. For example, in Watt v Hertfordshire CC (1954) Denning LJ acknowledged that 'the saving of life and limb justifies taking considerable risk'.

Thus, subject to the issues identified in relation to involuntary defendants, and those exercising a specialist trade or profession, it can be seen that the approach for determining the standard of care in negligence broadly promotes a fair balance between the interests of claimants and defendants.

Question 2(a)

Employers have long owed a personal and non-delegable duty to avoid exposing employees to unnecessary risk. This is a single duty that may be broken down into four separate aspects. Lord Wright in Wilson & Clyde Coal Co. Ltd v English (1937) identified a duty to provide competent staff, adequate plant/equipment and a safe system of work. Additionally, employers owe a duty to provide a safe workplace.

The duty is said to be personal and non-delegable because the employer cannot discharge his/her legal responsibility by assigning health and safety tasks to a person s/he reasonably believes to be competent to perform the role e.g. McDermid v Nash Dredging and Reclamation Co. Ltd (1987).

The duty to provide competent staff encompasses the selection, training and supervision of employees. In extreme cases there may be a need to dismiss employees who consistently failed to attain proper safety standards. For example, in Hudson v Ridge Manufacturing Co Ltd (1957) The employer was found liable after one of its employees, a serial practical joker, wrestled the claimant to the ground in a mock attack and injured his wrist. Despite an earlier reprimand and warning, no effective steps had been taken by the employer to address the employee's habitual misconduct. By way of contrast in Smith v Crossley Bros Ltd (1951) the employer was not liable for an unforeseeable act of battery committed by two apprentices on another employee, there having been no previous incidents.

The duty to provide adequate plant and material requires, for example, the provision of proper personal protective equipment and the need to maintain working equipment in a proper condition. An employer may be liable for injuries caused by dangerous machinery where the defect could have been discovered upon reasonable inspection e.g. Davie v New Merton Board Mills Ltd (1959). There may also be liability for injury caused by latent defects under the Employer's Liability (Defective Equipment) Act 1969, though successful claims under the Act still require proof of fault by a third party, such as a manufacturer or the supplier of the equipment.

The most frequently invoked aspect of the employer's general duty is the requirement to provide a safe system of work. Not only must such a system be designed, it must also be implemented. For example, in Pape v Cumbria County Council (1992) it was not enough for a cleaning lady, who worked with detergents and chemical cleaning products, to be supplied with rubber gloves. The Council were also expected to instruct the cleaner as to the importance of wearing the gloves and to establish a system of supervision to ensure compliance. This duty extends to protect 'persuadable' employees e.g. Bux v Slough Metals Ltd (1974) but not necessarily to experienced employees who surreptitiously ignore safety procedures e.g. Woods v Durable Suites (1953).

The duty to provide a safe system may also extend to protecting employees from psychiatric injury arising through stress at work. In such cases, the ordinary principles of employer's liability apply, namely the employer owes a duty to do whatever a reasonable and prudent employer would have done to protect the employee from such injury, taking positive thought for the safety of its workers in the light of what it knew or ought to have known about the employee's state of health – Barber v Somerset CC (2004).

Finally, there is a duty to provide a safe workplace. This duty also applies where employees are sent to work elsewhere, although the standard of care may be limited given that the employer will not usually control third-party premises. In such cases the extent of the employer's duty will depend upon a variety of factors such as the nature of the workplace, the type of work to be done as well as the experience of the employee concerned e.g. Cook v Square D Ltd (1992).

2(b)

Vicarious liability is a principle of liability whereby one person, traditionally an employer, may be held strictly responsible for a tort committed by another, traditionally an employee. It may protect any person who suffers a loss as a result of a tort committed by an employee (or quasi-employee), including where the claimant/victim is another employee.

Vicarious liability covers torts committed by persons in a relationship 'akin to employment': Various Claimants v Catholic Child Welfare Society (2013). Cox v Ministry of Justice (2016) has enhanced the possibility of a successful action even where the claimant's employer was not in breach of its primary duty. MoJ was found vicariously liable for the negligence of a prisoner kitchen-worker who accidentally dropped a sack of rice on his supervisor as she stooped down to clean up a spillage in the kitchen. The prisoner was found to be in a relationship 'akin to employment' with the prison service because training inmates and helping to prepare meals were integral activities to the operation of the prison, furthering its aims, and the injuries arose from a risk within the 'field of activities' assigned to the prisoner. This allowed Mrs Cox

(an employee catering manager) to claim vicariously for her injuries even though, on the facts, there was no breach of her employer's duty to provide a safe system of work.

The extension of vicarious liability to relationships 'akin to employment' will clearly protect, in specific circumstances, claimant employees injured by tortfeasors who would not themselves previously have been regarded as employees e.g. Various Claimants v Barclays Bank plc (2018).

The expansion of vicarious liability to cover, in certain circumstances, serious acts of intentional wrongdoing has also enhanced employee protection. In Lister v Hesley Hall (2001) the House of Lords held that a tort would be treated as occurring in the course of employment if the employee's act was so closely connected with the general nature of his/her job that it would be fair and just to conclude the employer was vicariously liable.

Initially, this extension appeared to have only a limited impact on workplace violence unless friction or confrontation was inherent in the employer's business, so that a close connection with the tort could be identified e.g. Wallbank v Wallbank Fox Designs Ltd (2012) cf. Graham v Commercial Bodyworks Ltd (2015).

In Mohamud v WM Morrison Supermarkets plc (2016) the Supreme Court confirmed the Lister test but gave further guidance as to when a 'close connection' will exist. Lord Toulson, who gave the judgment of the court, set out the guidance in two stages:

1. In broad terms, what functions or 'field of activities' were entrusted by the employer to the employee i.e. what was the nature of the job?
2. Was there a sufficient connection between the employee's position and his wrongful conduct to make it right for the employer to be held liable as a matter of social justice?

Lord Toulson noted that these tests would often be satisfied where employees misuse the position entrusted to them in a way which injures a third party. In Mohamud an unprovoked and serious racist attack by a petrol kiosk attendant on a customer following a request at the counter to print documents from a USB stick was found to be 'in the course of employment'. This was because "attending to customers and responding to their enquiries" was within the 'field of activities' assigned to the worker and the subsequent attack on the petrol station forecourt was part of a seamless and continuous sequence of events.

Despite these developments, in most cases where the workplace merely presents an opportunity for acts of violence between workers, there is unlikely to be a sufficiently close connection to justify vicarious liability. However, there may be exceptional cases where employees receive protection even where violence occurs outside the workplace provided the close connection test is met and there was a 'seamless and continuous sequence of events'.

An exceptional case involving unusual facts was Bellman v Northampton Recruitment Ltd (2018) an assault by a managing director on an employee at a drinking session following a staff Christmas party was found to be in the course of employment. This was because the director's 'field of activities' were widely drawn in that he was responsible for all management decisions within a small 'round-the-clock' company and could exercise his authority at any

time. There was a close connection between his role and the assault because, at the time, he had been castigating the claimant over an employment-related matter. However, Irwin LJ emphasised that Bellman should not be taken as authority for the proposition that employers are to become insurers for violent and other tortious acts by their employees. Liability will not arise merely because there is an argument about work-related matters which leads to an assault, even if one colleague is markedly more senior than the other.

Vicarious liability therefore does enhance employee protection because it may extend to circumstances where there is no breach of the employer's primary duty of care.

Question 3

The tort of defamation aims to protect a person's reputation and hence his/her dignity and livelihood. However, the tort has sometimes had a 'chilling' effect on the freedom of the press, who may have been discouraged from reporting stories about public figures, such as politicians or trading organisations by threats of expensive defamation actions.

The elements of defamation are, for the most part, relatively easy to establish and thus do not appear to favour media organisations. The defendant must have made known to a third party a defamatory statement which refers to an identifiable claimant. A defamatory statement may be defined as one which lowers the claimant in the estimation of right-thinking members of society generally (Sim v Stretch (1936)), causes him to be shunned and avoided (Yousopoff v MGM (1934)), or exposes the claimant to hatred, ridicule or contempt (Parmiter v Coupland (1840)). Where a statement is capable of bearing more than one meaning a court will select a single meaning that a typical, ordinary reasonable reader would have been most likely to attribute to the words in the context in which they appeared. Thus statements appearing in a tweet or a facebook posting may not be interpreted in the most defamatory possible way given the casual, conversational style of these media (e.g. Stocker v Stocker (2019)), whilst statements in news articles/reports may be subject to a more elaborate analysis given the greater time for reflection on the part of the reader.

Finally, section 1 Defamation Act 2013 (DA 2013) requires the claimant to prove that s/he suffered (or is likely to suffer) serious reputational harm, or serious financial loss in the case of trading organisations (see below).

The claimant does not have to establish that the defamatory statement is untrue as part of the cause of action. In fact the statement is presumed to be untrue and the burden of establishing its truth lies on the defendant: s 2 Defamation Act 2013 (DA 2013) and this burden can be a heavy one, particularly as damages may be increased where an unsuccessful defence of truth is seen as having given greater prominence to the defamation and accordingly increased the harm: Aldington v Tolstoy (1989). This can be characterised as tending to inhibit the media, even where they have some basis for asserting the truth of the statement but it is not watertight. However, where a defence of truth succeeds in respect of a substantial part of the allegations, it may be that the other allegations do not seriously harm the claimant's reputation and as a result the defence will succeed: s 2 (3) DA 2013, replicating the position at common law: Alexander v NER (1865).

However, a number of rules aim to balance the media's right to free speech. Certain classes of claimants are excluded from bringing actions, for example governmental/public bodies (Derbyshire CC v Times (1993)) and political parties (Goldsmith v Bhoyrul (1997)). It is important that these bodies are subject to uninhibited public criticism in the interests of democracy and should not be permitted to sue.

The DA 2013 introduced a number of changes designed to enhance freedom of speech. The need to establish serious reputational harm has made it more difficult for claims to be brought and should have a liberalising effect on freedom of speech. The abolition of the 'multiple publication' rule and its replacement with a 'single publication rule' (s.8) prevents the constant renewal of the 12-month limitation period (and indefinite liability for media organisations) every time internet archive material such as news reports is accessed. Section 9 requires that England and Wales must be the most appropriate jurisdiction in which to bring a claim, having regard to the place where the statement has been published. This provision prevents wealthy foreigners and public figures from suppressing investigative journalism by using British libel law where potentially defamatory material, published abroad (for example on the internet), is merely accessible in the UK. Section 11 removes the presumption in favour of jury trial in defamation cases so that almost all future trials are likely to be dealt with by a judge. At the end of 2018 there had reportedly been no jury trials since the 2013 Act came into force. Prior to the Act, there had been evidence that wealthy claimants had threatened the considerable cost of defamation jury trials to pressurise poorer defendants (e.g. NGOs) to stifle publication, through fear of being liable for these legal costs if successfully sued.

However, the defences to an action in defamation most clearly promote the media's freedom of speech, by limiting the circumstances in which a claimant will be able to prevent publication of critical material.

Section 4 DA 2013 replaced the common-law 'responsible journalism test' established in Reynolds v Times Newspapers (2001). Newspapers and other media outlets have a complete defence if they can show they acted responsibly in publishing stories in the public interest (whether based on fact or opinion), even if these prove to be inaccurate, subject to the requirements of the test set out in s.4(1). The defence applies whatever the medium used to publish. Section 4(3) confirms that newspapers may neutrally report the fact that allegations have been made against someone without having to verify whether the allegations are actually true before publication, provided the paper does not adopt the allegation itself: Chase v News Group Newspapers Ltd (2002).

The defence of 'honest opinion' under section 3 DA 2013 replaced the common law defence of honest comment but kept it largely intact. The former requirement that the opinion had to concern a matter of 'public interest' was dropped, and the test is now whether an honest person could have held the opinion on the basis of any fact existing at the time the statement complained of was published (s.3(4)). S.3(3) preserved the decision of the Supreme Court in Spiller v Joseph (2010) that the defendant need only have indicated the basis of his/her opinion in general terms (so that readers are not misled into believing that the facts are worse than they really are). This promotes free speech because few people who write articles in the media or who contribute to discussions on the web, would bother to fully discuss the facts upon which their opinion is based. Protection in relation to the content of scientific and

academic journals is also preserved under s.6, but only if the published material was peer reviewed by one or more persons with expertise in the area concerned.

Thus, whilst the tort of defamation aims to protect reputational interests, the availability of a range of defences aims to preserve rights to free speech particularly in relation to the publication of material in the public interest and honest opinions. The substantive and procedural reforms arising from DA 2013 appear to adequately protect the freedom of expression of media organisations.

Question 4

The Occupiers' Liability Acts (OLA) regulate the nature and scope of the duty owed by persons who control premises in relation to those who come onto their premises. The Acts also cover some of the principles to be considered in deciding whether there has been a breach of duty, although these reflect ordinary negligence principles. Issues concerning causation and remoteness are still determined in relation to the common law, and the same general defences applicable in negligence are available to occupiers. Thus, to a large extent, the 'control mechanisms' that regulate liability in negligence apply equally to occupiers' liability claims.

The statutory regime itself has been designed to apply to a broad range of circumstances where incidents occur (most frequently) by reason of defective premises, whilst at the same time placing limits on those who can sue and the circumstances in which a breach may occur.

'Premises' for the purposes of both Acts are widely defined to include 'any fixed or moveable structure, including any vessel, vehicle or aircraft' (s.1(3)(a) OLA 1957 and ss 1(2) and 1(9) OLA 1984), meaning that a wide range of situations are covered. For example, in Wheeler v Copas (1981) even a ladder was held to be 'premises'. Both Acts leave the definition of 'occupier' to the common law (s.1(2) OLA 1957 s.1(2)(a) OLA 1984) and the wide formulation in Wheat v Lacon (1966) catches any person who has sufficient control over premises and ought to realise that a failure to take care may result in injury.

The 1957 Act imposes a 'common duty of care' (s.2(2) OLA 1957) on occupiers in respect of all visitors - those who have the occupier's express or implied permission to be on the premises. However, the 1984 Act lays down a number of conditions that must be satisfied before an occupier can be said to owe a 'non- visitor', such as a trespasser, a duty of care. The three requirements for a duty of care to arise under s.1(3) of the 1984 Act are, in practice, very restrictive so that claims are unlikely to succeed in most cases unless brought by 'innocent' child trespassers. It requires actual or reasonable grounds for awareness on the part of the occupier of the existence of a specific danger, and that a trespasser might come into its vicinity. In addition, the risk must have been one against which the occupier might reasonably have been expected to offer the non-visitor some protection. The Law Commission, whose report led to the passing of the 1984 Act, explained that whilst a house owner might reasonably be expected to warn a visitor of a missing step on a staircase, it would be entirely unreasonable to expect the occupier to offer any protection at all against this type of danger to a burglar. The type of loss recoverable by non-visitors is also limited. Whilst the 1957 Act allows for compensation in respect of damage to property, as well as for personal injury

and death (s.1 (3) (b) OLA 1957), non-visitors are limited to claims for personal injury and death only (s.1 (8) OLA 1984).

Case law has also had an important role to play in limiting the scope of the statutory rules so as to protect occupiers from unfair claims. Both Acts cover dangers due to the defective state of the occupier's premises, and also dangers arising due to things (e.g. activities) the occupier permits to take place on his/her premises. However, accidents resulting from a dangerous activity voluntarily carried out by persons of full capacity are not covered. Thus in Tomlinson v Congleton Borough Council (2003) an 18-year-old man broke his neck when he hit his head on the sandy bottom of a lake in a public park whilst executing a shallow dive. His claim against the local authority occupier failed. Lord Hoffman observed that a person who goes mountaineering incurs the risk that he might stumble or misjudge where to put his weight, and that an accident could not be attributed to the defective state of the mountain. Further application of this principle resulting in the prevention of unreasonable claims can be seen in a line of other cases such as Keown v Coventry Healthcare NHS Trust (2006) and Poppleton v Portsmouth Youth Activities (2008). Equally, there is no duty to warn either visitors or nonvisitors in relation to an obvious risk: Staples v West Dorset (1995) and an alternative basis of the decision in Tomlinson.

In assessing breach of duty, ordinary common law principles apply such as the likelihood that someone may be injured, the seriousness of the injury which might occur, the social value of the activity which creates the risk and the cost of preventative measures (Tomlinson). In addition, both statutes contain specific provisions which are relevant in assessing the standard of care and whether this has been discharged by the occupier. For example s.2 (3)(a) OLA 1957 requires higher standards of care on the part of occupiers in relation to child visitors, who are likely to be less risk-aware than adults. This principle had already been limited in Phipps v Rochester Corporation (1955) to prevent a transfer of parental responsibility to occupiers who happen to control accessible bits of land. The court held that occupiers are entitled to assume that very young children are accompanied by a responsible adult when visiting their premises so that they do not succumb to obvious dangers.

S.2(3)(b) OLA 1957 also allows occupiers to assume that specialists, such as contractors, will recognise and guard against the sorts of risks commonly associated with their jobs whilst visiting premises (e.g. Roles v Nathan (1963)). Similarly, s.2(4)(a) of the 1957 Act acknowledges that a warning provided by or on behalf of the occupier may discharge the duty of care, provided the warning is enough to enable the visitor to avoid the risk (see also s.1(5) OLA 1984). Here again the courts have confirmed that the need to provide a warning does not apply in relation to risks which ought to be obvious to the visitor (Tomlinson). For example, in Darby v National Trust (2001) the Trust were not in breach of any duty for failing to provide warning signs discouraging persons from swimming in a pond. The claimant got into difficulties and drowned whilst bathing. The court held that warning notices would have told the deceased no more than he already knew.

The ordinary rules of negligence must be applied in deciding whether any breach of duty caused the claimant to suffer reasonably foreseeable loss or damage. These limitations sometimes prevent claims where the alleged default of the occupier would have made no difference to the outcome e.g. where a fence would not have deterred an act of trespass prior to an accident e.g. Scott and Swainger v Associated British Ports (2000).

It can herefore be seen that whilst the Occupiers' Liability Acts apply to a wide range of accident situations occurring on another person's premises, the legislation itself is reasonably circumscribed, and the courts have interpreted the provisions sensibly so as to strike a fair balance between occupiers and claimants.

SECTION B

Question 1(a)

Aileen v Ben (NHS Trust vicariously): negligent treatment advice

If Aileen is able to establish negligence, the NHS Trust Ben works for will accept vicarious liability for his tort under the NHS Indemnity Scheme.

In Montgomery v Lanarkshire Health Board (2015) the Supreme Court confirmed that doctors owe a duty to take reasonable care to ensure adults of sound mind are aware of any material risks associated with both recommended and reasonable alternative treatments. Furthermore, to discharge their duty, medical practitioners would have to communicate with their patients in understandable terms and not just convey the information in a consent form.

What is 'material' and thus disclosable will depend on the facts of each case but will include risks that the actual patient and any reasonable person in the patient's position would be likely to attach significance to. This requires consideration of a broad range of factors including the known/likely personal characteristics and values of the individual patient. For example, if Aileen were clearly established to be a person who would rather trust Ben than receive details concerning the risks of treatment, a duty of full disclosure is unlikely to arise. However, this possibility may be unlikely given the sensitive nature of the procedure. The very limited 'therapeutic exception' i.e. where a doctor reasonably considers that disclosure of information would seriously damage the patient's health, would not seem to apply here.

Thus, Ben's failure to disclose the risk of very serious complications arising from the surgery, albeit a small one, appears to represent a breach of his duty to Aileen.

However, it is unclear whether Ben's failure to disclose material treatment risks caused Aileen's injuries in fact. This will depend on proof of Aileen's likely conduct had she been properly advised. If Aileen would probably have consented to the surgery anyway the 'but for' test will not be made out (e.g. Barnett). On the other hand, if Aileen can prove that she would probably not have agreed to the surgery at all she will be entitled to succeed. Likewise, if Aileen would probably not have consented to the surgery *on this occasion*, perhaps in order to take further advice before deciding whether to have the operation at another time, then the court will treat the 'but for' test as having been established. In Chester v Afshar (2004) a majority of the House of Lords held that this was necessary to vindicate the patient's rights of autonomy and dignity. To do otherwise would be to negate the duty of full disclosure where

it was needed most i.e. for patients concerned to receive full advice and make a fully informed choice by seeking further advice.

1(b)

If negligence is established, Aileen will be entitled to compensation to reflect her condition following surgery by comparing it with her likely prognosis without the operation (restitutio in integrum). Normally only one action can be brought against the defendant, and a single lump sum will be awarded to cover Aileen's losses both before and after the trial/settlement. An award of provisional damages, which allows the case to be reopened in Aileen's favour in the event of a specific deterioration is available under s.32A Senior Courts Act 1981, but only in limited circumstances.

A distinction is made between special and general damages. Special damages are losses that can be calculated precisely, e.g. pre-trial loss of earnings. General damages cannot be precisely calculated, either because they arise after the trial (e.g. future loss of earnings) or because the loss cannot be easily quantified in monetary terms (i.e. non-pecuniary loss) e.g. pain, suffering and loss of amenity.

A further distinction is made between pecuniary losses which have an intrinsic monetary value e.g. loss of earnings, and non-pecuniary losses, which do not. Losses are further broken down into a number of 'heads' of damages under which separate awards are calculated.

Special damages include pre-trial loss of net income. Aileen will also be entitled to her reasonable medical and other expenses incurred before the trial/settlement due to the injuries she has suffered e.g. therapeutic equipment, adaptation of the home, nursing care and hospital travel. The cost of private medical care is also recoverable, even though NHS treatment is available - s.2(4) Law Reform (Personal Injuries) Act 1948.

As Aileen is unable to resume full employment due to her injuries, an award for future loss of earnings will be made. The court will take her annual loss of earnings as the 'multiplicand' and will multiply the figure by the number of years over which the loss is expected to occur (the 'multiplier'). A reduction in the multiplier is applied using actuarial tables to ensure Aileen is not over-compensated by the 'investment value' of early receipt of the lump sum. The multiplier may also be decreased to reflect any likelihood that Aileen's working life would have been reduced e.g. due to childcare. Conversely, the multiplicand may be increased to reflect likely future salary rises from promotion etc.

If Aileen's injury is such that it is likely to reduce her life expectancy, a split multiplicand/multiplier calculation may be adopted for the 'lost years' - Pickett v British Rail Engineering Ltd (1980). The multiplicand will be reduced to remove Aileen's own living expenses during the period she is not expected to survive. This will still allow recovery for income that would probably have been applied for the benefit of the Aileen's dependents or other persons during the 'lost years'.

As Aileen's injuries may result in future redundancy, placing her at a disadvantage in the labour market, an award for loss of earning capacity may be available (Smith v Manchester Corp (1974)).

Deductions from Aileen's award will be made to prevent double-compensation. These include statutory sick pay, and 'hotel' costs whilst she is cared for at public expense e.g. in hospital (s.5 Administration of Justice Act 1982). Income and disability related benefits received are also subject to 'clawback' from the overall award under Social Security (Recovery of Benefits) Act 1997.

Aileen's future medical and other care-related expenses are calculated in a similar way to future loss of earnings. Annual on-going medical and care costs form the multiplicand. The latter include any third-party service (e.g. cleaning, gardening) that has become necessary: Schneider v Eisovitch (1960). As some of these services will be provided by Calvin (who is giving up work to help Aileen live independently in her own home), the claim will be capped at the full commercial rate for employing a professional carer (Housecroft v Burnett (1986)) even if Calvin earned a higher salary in his former administrative role.

Non-pecuniary losses claimable as general damages include pain, suffering and loss of amenity, both before and after trial/settlement. These losses are calculated by reference to precedents (making allowances for inflation) and Judicial College tariff guidelines. 'Pain and suffering' is assessed subjectively and will include the increased pain resulting from the surgical injuries and necessary medical treatment as well as anxiety concerning possible deterioration, reduced life expectancy and future medical treatment.

Loss of amenity compensates for the loss of enjoyment of life arising from reduced capacity e.g. loss of movement such as Aileen's inability to play football and go clubbing, and loss of sexual function etc. Aileen will also be entitled to a sum to compensate her for loss of marriage prospects resulting from her paralysis.

Question 2

Damian's liability to Edward (assault)

An assault is an act of the defendant which causes the claimant reasonable apprehension of the infliction of an immediate battery on him. By throwing the pen at Edward, Damian acted intentionally, and in a positive and deliberate way. It seems likely that Edward reasonably anticipated immediate physical contact because he ducked to avoid being hit by the pen which passed just over his head. Given that Edward was able to see the approaching pen (presumably he did not have his back turned toward Damian) it also seems likely that Damian intended that Edward would anticipate immediate physical contact.

Damian's liability to Ms Franklin (assault and battery)

Ms Franklin probably has a claim against Damian in the tort of battery. A battery is the intentional and direct application of force to another person without lawful justification. By throwing the pen so that it struck Ms Franklin in the face, Damian brought about direct physical contact through a positive and deliberate act. It does not matter that the force was applied through the intermediary of an object e.g. Scott v Shepherd (1773). Whilst early authority suggested that the contact must have been carried out in 'anger': Cole v Turner (1704), or with 'hostility': Wilson v Pringle (1987), it seems likely that this requirement now means nothing more than acting, as Damian did, without justification: F v West Berkshire Health Authority (1989).

To be found liable Damian need only have intended to apply force to someone (or to have been subjectively reckless), so it will not matter that Edward was the intended victim and not Ms Franklin: Livingstone v Ministry of Defence (1984). This is often referred to as the doctrine of transferred intention. Thus all the elements of battery appear to be satisfied.

If Ms Franklin anticipated contact with the pen before it struck her, Damian will also be liable for assault, for similar reasons to Edward (above). Damian's intention that Edward would anticipate immediate physical contact will be 'transferred' to Ms Franklin. Alternatively it may be possible to prove that Damian was aware of an unjustified risk (subjective recklessness) that the pen might miss its primary target and hit a person sitting in the immediate vicinity.

Damian's claim against Mr Gilbert in false imprisonment/Kempston Manor Secondary School vicariously.

False imprisonment is the infliction of bodily restraint which is not expressly or impliedly authorised by law. The detention of a child for disciplinary purposes is authorised both under the common law (e.g. Fitzgerald v Northcote (1865)) and by statute (Education and Inspections Act 2006). Under the common law the power of detention arises from the in loco parentis principle under which parents delegate their authority for the welfare of their children, including disciplinary matters, to the child's school head teacher. However, the detention may be for a period or in such circumstances as to take it outside the bounds of legitimate parental discipline and correction e.g. R v Rahman (1985). If so, there may be false imprisonment.

On one view, if a one-hour detention after school is authorised by law and is therefore not false imprisonment, it may make no difference if a child is locked in a detention room for only five minutes during this period. On the other hand, it might also be argued that any period of detention goes beyond the bounds of reasonable discipline and correction if the child's safety is compromised e.g. in the event of a fire. If so, there may be a false imprisonment if the elements of the tort are met. It is clear that Damian's confinement in the detention room was as a result of an intentional, positive and deliberate act on the part of Mr Gilbert, for whose actions the school will be vicariously liable. However, Damian would have to establish that there was a complete restraint of his movement in that he was unable to break his confinement by moving freely in any direction by reasonable means – Bird v Jones (1845). This will depend upon whether there was a reasonable means of escape from the room.

A further issue relates to Damian's apparent lack of awareness of his confinement. Early authority of the Court of Exchequer suggested that a claimant would have to be aware of his unlawful confinement to sustain an action in false imprisonment - Herring v Boyle (1834). However, in Meering v Grahame-White Aviation (1920) the Court of Appeal held, without reference to Herring that such knowledge was not required. Atkin LJ, however, stated that a claimant who is unaware of his false imprisonment would probably be entitled to purely nominal damages.

The better view, strongly supported by Lord Griffiths in Murray v MOD (1988), appears to be that no knowledge of the unlawful confinement is required due to the overriding importance of the right to liberty. However, Damian's lack of knowledge of his confinement will result in a reduction of his entitlement to

damages which, in view of the brief five-minute lock-in period, are unlikely to be substantial in any event.

Damian's liability to Mr Gilbert (trespass to goods)

By scratching the paintwork on the car, Damian did an act which directly and deliberately interfered with Mr Gilbert's chattel through physical contact (e.g. Vine v Waltham Forest LBC (2000)). He had no lawful justification. Damian is therefore liable for trespass to Mr Gilbert's goods ('wrongful interference with goods' – s.1(1) Torts (Interference with Goods) Act 1977).

Damian's liability to Hina (Wilkinson v Downton)

The tort in Wilkinson v Downton (1897) occurs where the defendant, by words or conduct, intentionally and without justification causes physical or recognised psychiatric harm to the claimant. No direct threat to the defendant's person is required. Whilst the tort has been applied to protect victims of unwanted sexually suggestive electronic messages (e.g. ABC v West Heath 2000 Ltd (2015)), the application of the elements of Wilkinson v Downton in these circumstances is not likely to be straight forward.

In OPO v Rhodes (2015) the Supreme Court summarised the tort in Wilkinson v Downton as requiring (a) a conduct element (b) a mental element and (c) a consequences element.

The conduct element requires words or conduct directed towards the claimant for which there is no justification or reasonable excuse. A series of unwanted text messages of a sexual nature would be likely to meet this criterion assuming they are threatening and/or abusive.

The mental element requires proof of an intention to cause physical harm, psychiatric injury or severe mental/emotional distress. Unlike assault and battery, recklessness is not sufficient for liability (OPO). An intention may be difficult to establish in the circumstances. Much will depend upon how Hina reacted to Damian's texts and Damian's knowledge of Hina's state of mind. For example, if Damian persisted in sending explicit unwanted messages in the knowledge that this was causing Hina to suffer severe emotional distress, this criterion may be satisfied.

The consequences element requires proof that the claimant suffered either physical or psychiatric harm. There is no suggestion that Hina suffered either of these. However, in OPO, Lord Neuberger was prepared to accept that if the tort can be committed by an intent to cause severe distress, the suffering of this form of harm should suffice for liability. Whilst Hina is said to have suffered great emotional distress and is consequently not attending school, it remains unclear whether this type of harm is actionable as a matter of law.

Question 3

KBS Ltd has admitted liability in negligence for the deaths and physical injuries of those involved in the accident. In order to establish whether its duty to prevent physical harm extends to persons who suffered 'pure psychiatric harm', each claimant must firstly prove that s/he suffered a medically recognisable psychiatric illness (e.g. Hinz v Berry (1970)). Assuming this criterion is met, those who were personally endangered by KBS's negligence will be primary victims who may recover upon proof that either physical or

psychiatric harm to the claimant was reasonably foreseeable in the circumstances (Page v Smith (1996)).

If the claimant was not personally endangered, s/he will be a secondary victim and the establishment of a duty of care is much more difficult. Not only, with the benefit of hindsight, must psychiatric harm have been reasonably foreseeable in relation to a person of 'ordinary fortitude' in the defendant's position, but the criteria from Alcock v Chief Constable South Yorkshire Police (1991) must also be met. A duty of care will only extend to those who had a relationship based upon close ties of love and affection with the immediate victim, who were physically present and had a direct perception of the accident or its immediate aftermath, and whose psychiatric response was caused by a 'sudden shock'.

Gary v KBS Ltd

Gary has suffered both physical injuries and recognised psychiatric harm. As such, the rules concerning 'pure' psychiatric injury do not apply to him. As Lord Steyn explained in White v Chief Constable South Yorkshire Police (1998) the psychiatric element will be regarded as part and parcel of Gary's personal injury for which he will receive damages in relation to his pain, suffering and loss of amenity.

Whilst KBS Ltd will be liable for Gary's head injuries and his serious clinical depression, there is an issue as to whether they can also be held liable to Gary's estate for his subsequent death resulting from suicide. A deliberate, seriously negligent or very foolish act of the claimant may break the chain of causation. Case law indicates that there will be a *novus actus interveniens* if the original injuries did not result in mental illness leading to an 'incapacity in volition' at the time of the suicide (e.g. Wright v Davidson (1992) approved in Corr v IBC Vehicles (2008)). However, where the original injuries negligently inflicted by the defendant consisted of foreseeable serious clinical depression which impaired the claimant's capacity to make reasoned and informed judgments about his future, a subsequent suicide will not break the chain (e.g. Corr). Whilst further evidence is required as to whether Gary's serious clinical depression led to an 'incapacity in volition', it seems likely that Gary's suicide did not amount to an intervening act and there will be no break in the chain of causation between KBS's negligence and Gary's death.

Ivan v KBS Ltd

It is unclear whether Ivan suffered recognisable psychiatric harm, though his flashbacks of the incident may well be indicative of a condition such as post-traumatic stress disorder. The point would need to be established by expert psychiatric evidence. As Ivan 'narrowly' avoided being hit by the collapsing rack it appears that he was personally endangered by KBS's negligence (i.e. he was in the 'zone of danger') and he is therefore a primary victim. As such he will be able to establish a duty of care by showing that he was a reasonably foreseeable victim of physical harm, even though he escaped such injury (e.g. Page) and his psychiatric harm was caused through sight or hearing of what happened to Harry (e.g. Young v Charles Church (Southern) Ltd (1997)). Thus, Ivan is likely to be able to recover for any psychiatric harm suffered.

Mary v KBS Ltd

Mary has suffered medically recognised psychiatric injury (PTSD) after witnessing the sudden and unexpected death of her mother. She was not personally endangered by KBS's negligence and will therefore be regarded as a secondary victim. Jessica is Mary's mother, and so close ties of affection will be presumed to exist (Mary's role in caring for Jessica suggests the presumption is unlikely to be rebutted). It also appears that Mary's PTSD resulted from a 'sudden shock'. However, Mary was neither present at, nor had a direct perception of the accident or its immediate aftermath. At the time of her death, Jessica had been making a full recovery having suffered apparently only minor physical injury in the accident three weeks earlier. Mary's perception could not be described as being part of a single seamless event or a 'drawn-out experience' so as to bring her within the 'immediate aftermath'. Her circumstances are therefore distinguishable from cases such as Walters v North Glamorgan NHS Trust (2003) or Galli-Atkinson v Seghal (2003) in which the claimants succeeded on this point. Instead Mary witnessed a separate event that was not a direct continuation of the original accident. On similar facts and reasoning in Taylor v A Novo Ltd (2009) the Court of Appeal concluded that the claimant was not owed a duty of care.

Norma v KBS Ltd

Norma suffered clinically recognised psychiatric harm as a secondary victim – she was not personally endangered by KBS's negligence. Whilst the presumption of close ties of love and affection probably extends to those engaged to be married, according to Lord Keith's observations in Alcock, Norma will struggle to satisfy the other control mechanisms required for a duty of care.

Firstly, even with the benefit of hindsight, it seems unlikely that a court would be prepared to accept that a person of ordinary fortitude would foreseeably have suffered psychiatric harm as a result of Norma's experiences. In Liverpool Women's Hospital NHS Foundation Trust v Ronayne (2015) on similar facts the Court of Appeal held that the witnessing of a close relative on a life support system (an experience the claimant had been 'prepared for' by a warning from a doctor beforehand) was not sufficiently exceptional or 'horrific' by objective standards to affect a person of ordinary 'robustness'. Norma's experience would ordinarily be expected where a person develops sepsis and is being treated in hospital. A court may conclude that Norma's condition arose because she had previously suffered a depressive illness e.g. McFarlane v EE Caledonia Ltd (1994).

In addition, it is unclear whether Norma's psychiatric harm was caused by a sudden shock/assault upon the senses. Again, on similar facts in Ronayne, the claimant's psychiatric harm was found to have been caused by a continuum or series of events giving rise to an accumulation of gradual assaults on the claimant's mind and a gradual dawning realisation that her fiancé's life was in danger.

Thus, it seems unlikely that Norma has a claim in relation to her severe clinical depression.

Question 4

Orla v NPPS (private nuisance)

Private nuisance can be defined as an unreasonable interference with the claimant's use or enjoyment of her land. Orla will only be able to sue if she has a legal interest in the land affected - Hunter v LDDC (1997). Whilst not stated in the question, it seems likely that Orla has a proprietary interest in the house next to the bail hostel, either as owner/occupier or as a tenant. However Orla's young daughter, Philippa, will have no such interest and therefore no claim in private nuisance, though she may have a claim in public nuisance (see below).

An action in private nuisance ordinarily lies against the creator of the nuisance and/or the occupier of the premises from which the nuisance emanates. However, a claim against the individual residents responsible for creating the disturbances would be impractical here: it will be impossible for Orla to establish which residents caused the relevant interferences and it is likely that there is a degree of fluidity in those living at the bail hostel at any one time.

However, it was established in Lippiatt v South Gloucestershire Council (1999) that an occupier, such as the NPPS, may be liable for the activities of its licencees even if these take place away from the occupier's land. In Lippiatt the council was found liable after it failed to evict travellers from its land within a reasonable period of time. The travellers were either trespassers or licensees of the council who dumped rubbish and excrement on neighbouring farms. Orla brought the disturbance to NPPS's attention thus affording it a reasonable opportunity to eliminate or reduce the problem.

The placing of the beer cans and drug-taking equipment in Orla's garden may give rise to a claim in private nuisance against NPPS. It is less likely that the noise derived from the arguments between the occupants of the bail hostel will amount to such a nuisance as this would appear to arise from an activity which represents an ordinary use of residential land e.g. Southwark LBC v Mills (1999), although if these incidents became extremely frequent and/or prolonged such as to constitute an altogether egregious interference with use and enjoyment it might be regarded as going beyond such ordinary use.

In assessing whether the depositing of the hazardous rubbish amounts to a private nuisance, a court will consider the duration and frequency of the disturbance. It is stated that Orla often discovers beer cans and drug-taking equipment in her garden. The character of the area is also significant: the fact that this was once a sought-after residential area with apparently little public drug use suggests that NPPS's activities have given rise to a substantial additional interference compared to what was there before. Whilst NPPS's activities are arguably socially beneficial (see below), this will not excuse serious interference with Orla's use and enjoyment of her land: Kennaway v Thompson (1981).

If the establishment and/or operation of the bail hostel is authorised by or under statute (here s.13 Offender Management Act 2007), this might provide a defence for NPPS e.g. Allen v Gulf Oil Refining Ltd (1981). A court would have to determine, as a matter of statutory construction, whether Parliament intended to exclude the possibility of individuals bringing private nuisance claims according to the wording of the relevant Act. However, the defence will not cover nuisances that go beyond the disturbance inevitably resulting from

what has been authorised, or those that could have been avoided by taking reasonable care. Even if the defence of statutory authority is applicable here (the premises are said to have been approved by the Home Office for use as a bail hostel) it is arguable that with proper supervision and enforcement of its 'house rules' (e.g. through drug-testing), the issues with alcohol and drug-taking on or away from the hostel premises might have been reduced. Thus statutory authority may not operate as a defence in relation to the depositing of the beer cans and drug-taking equipment in Orla's garden if this problem was reasonably preventable.

In Coventry v Lawrence (No.1) (2014) the Supreme Court confirmed that, whilst the existence of planning permission is no defence, it may provide evidence of public benefit. The court also upheld the view that a strong public benefit may affect the claimant's remedy e.g. leading to an award of damages rather than an injunction restraining or prohibiting the nuisance. Bail hostels arguably play an important public protection role in the effective supervision of actual and suspected offenders who might otherwise 'disappear' into local communities. Thus, any successful claim by Orla may result only in an award of damages. In any event, an injunction to restrain NPPS's activities is unlikely to be available given Orla's unfair response to the hostel's activities by lighting bonfires (the 'clean hands' rule).

Orla v Richard (private nuisance)

Richard may also be liable as a landlord if he authorised NPPS's nuisance by letting the premises in circumstances where it was virtually certain/inevitable/very highly probable that a nuisance would result from the permitted use of the premises e.g. Coventry v Lawrence (No.2) (2014); Tetley v Chitty (1986). It is arguable that actual and suspected offenders resident at a bail hostel might cause the sorts of disturbance Orla is complaining about. It seems likely that Richard knew of NPPS's intended use for the property at the time of the letting given the nature of the voluntary organisation's activities. It is unclear whether these consequences were sufficiently probable for Richard to have authorised any nuisance by NPPS given that NPPS might reasonably have been expected to supervise its residents effectively. If Richard expressly prohibited acts of harassment and anti-social activity in the tenancy agreement with NPPS, it is unlikely he will be taken to have authorised the nuisance (Smith v Scott (1972)).

Orla and Philippa v NPPS (public nuisance)

A public nuisance is an act (or a failure to discharge a legal duty) which endangers the life, health, property or comfort of the public, or which obstructs the public in the exercise or enjoyment of rights common to all Her Majesty's subjects - R v Rimmington; R v Goldstein (2005). It is a crime as well as a tort.

Philippa, via Orla - her litigation friend, may be able to bring a claim as there is no requirement for a legal interest in the land affected. Additionally, unlike private nuisance, personal injury (Philippa's bleeding finger) is recoverable in public nuisance e.g. Re Corby Group Litigation (2008).

A public nuisance requires that a class of Her Majesty's subjects must have been affected by the nuisance e.g A-G v PYA Quarries (1957) i.e. there must be a common injury. The increased incidence of knife crime, burglary and drug dealing affecting residents on the outskirts of Kempstonville appears to

indicate a material interference with the life, health and property of a sufficient cross-section of the local community for a public nuisance.

In order to sue in the *tort* of public nuisance, the claimant must prove that s/he suffered some special or particular damage over and above the annoyance and inconvenience experienced by the public in general e.g. Holling v Yorkshire Traction Co Ltd (1948). Philippa's injury, and the threat to health caused by the depositing of drug-taking equipment in the garden affecting both Orla and Philippa arguably represents 'special damage' when compared to the general problems of anti-social behaviour experienced by members of the wider community. The 'fault' element associated with public nuisance also appears to be present: NPPS was clearly aware of the issues following Orla's complaints and, despite having the means to prevent the problem, appear to have failed to do so within a reasonable period of time – Wandsworth LBC v Railtrack (2001).

NPPS v Orla

NPPS have the necessary legal interest in the land affected to bring a claim as they are tenants. Orla's use of her land to create a disturbance on purpose to demonstrate her opposition to the hostel by lighting noxious bonfires is clearly causing a substantial and unreasonable interference with use and enjoyment of the hostel which will inevitably be regarded as unreasonable, because her actions are malicious e.g. Christie v Davey (1893). NPPS would appear to be entitled to seek an injunction against Orla to restrain this activity.