CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

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

Candidates and learning centre tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' **comments contained within this report,** which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

Despite several previous Examiner Reports advising centres, tutors and candidates about the changes in the development of the law of tort, many candidates still referred to the previous precedents. Therefore, this advice is repeated in this report.

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.

Candidates should be advised that only information that can gain marks for legal knowledge, analysis or application should be provided in order to save the candidate time and effort in the exam. Many answers contained unnecessary introductions containing nothing worthy of credit in terms of answering the question and were, in fact, the candidate merely reciting text from the question or scenario or stating the purpose of their answer. The same applies for conclusions that merely repeat information that has already been credited earlier in the answer.

Essay questions, particularly at Level 6, will ask for candidates to focus on a particular issue within an area of law, however, many candidates spent sometimes as much as the first half of their answer laying out information about a duty of care in general. Candidates should be advised to make any such explanation of the topic at hand should be brief and focus should be concentrated on answering the specific focus of the question. In particular, at Level 6, examiners are not looking for a candidates' knowledge of basic rules of the duty of care but their increased ability to engage in debates surrounding these rules and laws.

In many answers, there was information provided, particularly in problem questions that could not be credited, for example, information relating to Law Commission reforms that have been recommended within the answer to a scenario. Here candidates must only provide the relevant law on the topic at hand and focus on analysing the facts. For example, in the essay based on the duty owed by the emergency services and, the relevant services that the question required to be analysed were specifically stated but many candidates only provided information relating to the police and therefore resulted in only being able to be awarded a set amount of points.

In addition, many simply provided general information about, for example, the duty owed by the police or described a defence, but provided no analysis. For these answers, only a minimal amount of marks can be awarded for legal knowledge as the majority of marks are going to be awarded for discussions that focus on analysis.

Candidates should be advised to read very carefully what is required of them in problem questions, in particular which claimants to advise. Some candidates spent time and effort on parties involved within the scenario but were not asked to be included, for example, in the psychiatric harm scenario, many advised as to the liability of Kevin to Orla but she was not in the list of names within the question being set at the end of the scenario and so could not be awarded any marks.

Issues of this nature also arose relating to what information should be included in essay questions that were separated into (a) rules and (b) focused analysis. Candidates should be advised to be clear on what is required from each question and to allocate their time and knowledge accordingly.

Quite a few candidates clearly run out of time and were either unable to submit sufficient amount of answers or were unable to complete an answer in a developed way. Candidates must be more aware of timing and allocate their time more evenly.

On a positive note, there appeared to be much more well-structured answers this year with many candidates using IRAC or similar methods in which to structure their advice to claimants in problem questions. This approach to problem questions is a hugely important part of a candidate being able to achieve the maximum amount of marks available.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1 (Defences)

This was one of the most popular essay questions and was, for the most part, answered quite well. For those candidates that received poor grades for this question, they only discussed the defences in general and provided little in the way of focus and analysis on the requirements of the question.

Candidates were asked to discuss whether the ability of each defence to provide a balance between claimants and defendants, however, many candidates either did not do this at all, or merely referred to this focus in a sentence or two or attempted to summarise the ability of any defences to do this in a conclusion.

When studying these topics, candidates are advised to also, alongside the rules and requirements for this areas of law, investigate issues that arise within tort law and ensure they are able to analyse, for example, criticisms or case law developments.

Question 2 (Nuisance)

This was the least popular questions and was only attempted by a few candidates.

For those that did attempt this question the answers were, as above, with the defences essay – quite good answers in terms of the rules and relevant cases, but it was extremely rare that a candidate provided an analysis on the focus of the question which was the extent to which these torts impose strict liability. As stated above, candidates really need to be able to discuss the areas of law covered within the course beyond basic rules and requirements.

Question 3 (Causation)

This was an extremely popular question and was answered well. Many candidates showed a good understanding of the cases involved in causation and showed a good understanding of how these cases are applied. In particular, many candidates showed comprehensive knowledge of cases involving multiple potential defendants.

The question was split into two parts – the first required a general explanation of the 'but for' test, whilst the second part required information relating to when this test can be departed from. Unfortunately many candidates did not allocate this information correctly between the two parts and appeared to write all they knew in (a) and then, once they had read (b) more fully, realised that most of that information had been given to (a). Candidates are advised to read each question very carefully and take the time to ensure that the correct facts etc are allocated to the correct sub-question.

Question 4 (Duty of care and policy re: emergency services)

This was the most commonly answered essay question by far. Many candidates showed a good understanding of the duty owed by the police. Not so many candidates could discuss the duty owed by the other two emergency services that formed part of the requirements of the question. Some candidates did not provide any information about the duty owed by the fire service or the ambulance service or, if they did, it was fairly minimal.

Again, as with earlier essays, many candidates simply provided information and cases that outlined the duty owed by the emergency services in a very generalised way rather than engaging in a discussion relating to the circumstances in which a duty would or not be owed.

Candidates must take the time to break down an essay question in order to make sure they know exactly what is being asked of them. Only a small portion of the marks for these types of questions can be allocated for general information. The point of these questions at Level 6 is to determine if candidates can discuss these areas of law beyond legislative provisions and common law principles.

Section B

Question 1 (Occupier's Liability)

This was the most commonly answered problem question and was answered quite well by the majority of candidates. However, there were a couple of issues that appeared in most of the answers. One of these was candidates citing the sections and sub-sections of the Occupiers Liability Acts incorrectly. This has also been discussed in earlier examiner reports but was a common mistake this year too.

Question 2 (Employer's Liability)

This was a fairly popular choice and most candidates were easily able to discuss the duty that is owed by employers to their employees. For the second part of the scenario, candidates were also able to show good understanding of the rules relating to junior doctors owing a duty to their patients and their inexperience not being considered. However, not many candidates could

develop their application of these rules and so provided quite minimal analysis.

Question 3 (Psychiatric harm)

This was the second most commonly answered problem question and was answered quite well. Many candidates understood the distinction between primary and secondary victims and the test that needs to be passed for those claiming to be a secondary victim. Many candidates also showed comprehensive knowledge of the relevant case law, such as those relating to the rules relating to rescuers and the debates surrounding the 'immediate aftermath'.

Common inaccuracies included candidates not reading the exact wording of the problem question, for example, the fact that Michael was stated as being Lisa's boyfriend, but many candidates assumed he was the child's father and immediately applied the rules to his claim as such. Candidates were required to discuss the presumption of parentage for Lisa and Michael's status as the 'boyfriend' and the impact this may have on the element of 'close tie of love and affection'.

Question 4 (Trespass to the person)

This was a fairly popular question. Many candidates showed a comprehensive understanding of the elements that constitute the torts of assault, battery and false imprisonment. Application of these rules was applied fairly well throughout the entries and correctly assessed.

There were some doubts amongst many candidates relating to the issue of the claimant's knowledge of their 'false imprisonment' and whether or not the claimant knew of any alternative escape route. One option that could have been discussed was whether any 'teacher authority' or the thought of 'getting into more trouble' may have been a means of restraint, but only one candidate offered this an option.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 13 – LAW OF TORT

SECTION A

Question 1

The defences of contributory negligence, consent and illegality apply generally to a number of different torts including negligence. The burden of proof lies with the defendant, on the balance of probabilities.

Section 1(1) Law Reform (Contributory Negligence) Act 1945 permits a court to reduce the claimant's damages to the extent it thinks 'just and equitable' where s/he was partly at fault for the loss suffered. For example, the claimant may have been partly responsible for the accident (e.g. a pedestrian who walks into the road without looking), or his/her act or omission may have increased his/her injury (e.g. where a car passenger fails to wear a seatbelt). The level of care a claimant might reasonably be expected to take for his/her

own safety will vary according to the circumstances. For example, the standard may be reduced to take account of persons who make 'wrong decisions' which increase their loss when confronted with emergency situations (e.g. Jones v Boyce (1861)), or those injured whilst attempting rescue (e.g. Baker v Hopkins (1959)). Rescuers are not usually found to be contributorily negligent unless they did something so foolhardy as to amount to a wholly unreasonable disregard for their own safety.

Child claimants must take the same level of care for their own safety as would be expected of reasonable children of the same age e.g. Gough v Thorne (1966). The courts also make allowances for workers whose sense of danger may be impaired by noisy or repetitive tasks, fatigue or confusion e.g. Caswell v Powell Duffryn Associated Collieries Ltd (1939).

In addition, it must be proved that the claimant's carelessness caused or materially contributed to the loss or damage s/he suffered (e.g. Owens v Brimmell (1977)). If so, the court will apportion liability between the parties on a percentage basis according to the claimant's 'share in the responsibility' for the loss, and the claimant's damages will be reduced accordingly. The percentage reduction will depend upon the 'causative potency' of each party's conduct, with a possible further adjustment to reflect relative blameworthiness - Davies v Swan Motor Co Ltd (1949). For example, motorists are usually found to be more blameworthy than pedestrians as they are in control of a potentially 'dangerous weapon' e.g. Baker v Willoughby (1970); Jackson v Murray (2015). In commonly occurring accident situations (e.g. where the claimant fails to wear a seatbelt - Froom v Butcher (1975)) the courts may adopt a standardised percentage reduction so as to enable parties and their lawyers to predict quantum and to promote settlements.

Thus contributory negligence effectively balances the interests of defendants and claimants by measuring their relative culpability.

Consent *(volenti non fit injuria)* is a complete defence which, if successfully raised, reduces the defendant's liability for committing a tort to nothing. For this reason, the courts have often been reluctant to allow the defence, especially given the alternative of reducing damages on a finding of contributory negligence. In some areas, the defence has been removed e.g. s.149(3) Road Traffic Act 1988 prevents consent being raised against a passenger where the motorist is subject to compulsory insurance.

To establish the defence it must be proved that the claimant had full knowledge of the nature and extent of the risk, and freely consented to it either expressly or impliedly. However, these elements are often difficult to establish. One possible exception concerns spectators or participants in sporting activities/horseplay who are taken to have consented to injuries caused by things done in the ordinary course of competition, even if there was an error of judgement or lapse of skill on the part of those involved. The tortfeasor would have to act with reckless disregard for the safety of the claimant before the defence of consent would fail e.g. Wooldridge v Sumner (1962); Blake v Galloway (2004).

In assessing full knowledge, the claimant will not be taken to have consented to risks caused by the defendant's negligence if there was no reason to anticipate such a possibility e.g. Slater v Clay Cross (1956). Those with impaired ability to recognise risks, such as children, probably cannot be *volenti.*

In deciding whether the claimant was willing to forego a legal action for any loss that might be suffered due to the defendant's tort, the claimant must usually be free from any pressure to accept the risk (e.g. financial, social or moral) otherwise there will be no real freedom of choice and the consent will not be freely given. For example, workers are often under financial pressure to keep their jobs and may 'grudgingly' accept risks created by their employment (e.g. Smith v Baker (1891)). Rescuers are arguably subject to moral pressure to act and will not consent to risks voluntarily undertaken unless there was no real danger (e.g. Cutler v United Dairies (1933)).

Finally, the defence of illegality may apply where the claimant is the 'victim' of a tort whilst involved in serious wrongdoing. If successful the defence will extinguish the defendant's liability but it is rare for claims to be defeated by illegality. The defence is based on public policy. It applies where a claim arises from a serious illegal act (this is a question of degree) and the injury suffered by the claimant was primarily caused by his/her crime rather than the defendant's tort e.g. Ashton v Turner (1981); Pitts v Hunt (1991); Vellino v CC Greater Manchester Police (2001) and Joyce v O'Brien (2013). The defence also applies where a claimant suffers psychiatric harm by reason of the defendant's tort and, consequently, later commits a crime resulting in loss of liberty e.g. Gray v Thames Trains (2009).

Thus it can be seen that contributory negligence, the most frequently invoked general defence, best promotes a fair balance between the interests of claimants and defendants in that it reduces a defendant's liability to take account of mutual blame. Consent and illegality extinguish the defendant's liability altogether despite clear evidence that the defendant committed a tort. However, these defences are highly circumscribed and are rarely successfully pleaded. The former is only likely to apply in extraordinary cases where the claimant willingly accepted risks without inducement or pressure (e.g. ICI v Shatwell (1965)). The latter is primarily based on public policy grounds rather than the need to promote a fair outcome between the parties.

Question 2

Private nuisance is defined as an unreasonable interference with the claimant's use or enjoyment of his/her land, or some right over or in connection with it.

As private nuisance is a tort which aims to protect land interests, it is necessary for those suing to have a proprietary interest in the land affected (Hunter v LDDC (1997)). Those potentially liable include anyone who has a sufficient degree of control over the thing or activity which causes the nuisance, whether or not they are occupiers of the land from which the nuisance originates or have any legal interest in it (LE Jones v Portsmouth CC (2002)).

In assessing 'reasonableness', the courts consider the nature and seriousness of the harm suffered by the claimant. Activity causing physical damage to the claimant's land is much more likely to amount to a private nuisance than one which merely causes sensory discomfort: St Helen's Smelting Co v Tipping (1865). This applies irrespective of the nature of the locality and even where the damage was caused by only a very brief 'state of affairs' e.g. Crown River Cruises v Kimbolton Fireworks (1996). However, there will generally be no nuisance if the claimant only suffers damage because s/he is abnormally sensitive to the defendant's activity (i.e. a 'normal' person would not have

been affected) - Robinson v Kilvert (1889). The principle applies both to physical damage and sensory discomfort cases. It is likely that this rule has now been supplanted by the 'remoteness of damage' test (Wagon Mound (No.1) (1961)) which simply asks whether the interference suffered by the claimant was reasonably foreseeable e.g. Morris v NRI (2004).

Where the defendant's activity results in sensory discomfort, a degree of continuity or repetition is usually required before a court will find the disturbance to be unreasonable. The intensity of the interference is also considered. Given the reluctance of the courts to stifle economic development, temporary building works are unlikely to be regarded as a private nuisance provided that the defendant takes reasonable steps to minimise the annoyance to neighbours during the construction process (e.g. Andreae v Selfridge & Co (1938)).

In cases of sensory discomfort, the nature of the locality is also important: disturbances which take place in rural or residential areas are more likely to be regarded as nuisances (e.g. Sturges v Bridgman (1879)) than those that occur in commercial/industrial areas, where neighbouring occupiers will already be used to a certain amount of background noise and pollution (e.g. Hirose Electrical UK Ltd v Peak Ingredients Ltd (2011)). The question is whether the disturbance caused by the defendant is a substantial addition to that which already existed in the vicinity. A defendant is permitted to argue that his/her activities constituted part of the existing character of the area, provided that these did not amount to an unlawful private nuisance - Coventry v Lawrence (No.1) (2014).

In private nuisance, defendants cannot avoid liability by arguing that their activities benefit the community as a whole, for example by providing employment or services to the public, at least where these result in physical damage to land or serious sensory discomfort e.g. Kennaway v Thompson (1981). However, the 'social utility' argument, if successfully raised, may result in an award of damages rather than an injunction: Coventry (No.1).
The creation of a nuisance on purpose to annoy or injure a neighbouring landowner will often render a person's use of land unreasonable (e.g. Christie v Davey (1893)) giving rise to an unlawful private nuisance.

It is frequently asserted that private nuisance is a strict liability tort i.e. it is a civil wrong which can be established without the claimant having to prove fault on the part of the defendant. This is partly true, in the sense that once it has been established that there has been an unreasonable interference with the claimant's use and enjoyment of his land, it is no excuse for the defendant to say that s/he took all reasonable steps to prevent the interference. For example, in Adams v Ursell (1913) the court granted an injunction to prevent the operation of a fried fish shop in a predominantly 'good class' residential area. Almost all residents within a 60-yard radius had previously signed a petition to the local council complaining about unpleasant aromas from the shop. It was no defence to the claim in private nuisance for the fried-fish shop owner to assert that he used the best appliances, kept his shop very clean, used fresh fish, and took great pains to avoid causing a smell.

However, private nuisance arguably does not truly impose strict liability because at least some degree of personal fault is required on the part of the defendant if a claim is to succeed. For example the need to establish an *unreasonable* interference i.e. a level of disturbance that goes beyond the 'give and take' which can reasonably be expected between neighbouring

occupiers of land, is likely to involve an element of fault on the part of the defendant.

Similarly the remoteness of damage rule, which requires that the defendant ought reasonably to have foreseen the type of harm suffered by the claimant as a consequence of his/her nuisance-making activity arguably also involves some level of personal fault e.g. Cambridge Water v Eastern Counties Leather plc (1991).

Furthermore, if the defendant alleges that the nuisance was caused by the act of a trespasser or an act of nature, liability is based upon negligence. This is because the defendant will not be held legally responsible unless s/he knew or ought to have known of the risk, and failed to take reasonable steps to prevent or minimise it within a reasonable period of time e.g. Sedleigh-Denfield v O'Callaghan (1940).

The tort in Rylands v Fletcher is regarded as a specific application of the tort of private nuisance (Cambridge Water). It imposes strict liability, without any requirement to prove unreasonable interference, where physical damage is caused to the claimant's land by an isolated escape of a dangerous thing from the defendant's land. However, the tort has become almost redundant in modern times, mostly due to the difficulty in establishing that the defendant brought a 'dangerous' thing onto his/her land. This requires proof that the thing must be likely to do mischief or damage if it escapes, and that its presence involved a non-natural use of the defendant's land. According to Lord Bingham in Transco v Stockport MBC (2003) these requirements will only be satisfied if the defendant brought or kept on his land an exceptionally dangerous or mischievous thing which had an extraordinary or unusual use. These difficulties would thus appear to negate any potential benefits associated with Rylands being a strict liability tort. As Rylands is now seen as a specific application of the tort of private nuisance, an element of fault is also arguably present in the requirement that the damage suffered by the claimant must not be too remote. Again, where the defendant alleges that the escape resulted from the act of a trespasser/act of nature, liability will be based on negligence.

Public nuisance may be defined as an act 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 covering similar environmental disturbances to private nuisance (e.g. noises and smells) where these affect a wider section of the public. In A-G v PYA Quarries Ltd (1957) it was said that a legitimate way of proving a public nuisance is to establish a sufficiently large collection of private nuisances.

A material interference with one of the rights protected by the tort is required for a public nuisance. Unlike private nuisance it is not necessary to establish a proprietary right in the land affected to sue and it is also possible to recover for personal injury (e.g. Re Corby Group Litigation (2008)) The tort is only actionable by individuals who have suffered 'special damage' in excess of the general annoyance and inconvenience experienced by the public (e.g. Holling v Yorkshire Traction Co Ltd (1948)). It also requires that a sufficiently large section of the local community must have been affected (PYA Quarries). However, unlike private nuisance, public nuisance is a fault-based tort requiring proof of negligence e.g. Wandsworth London Borough Council v Railtrack plc (2002)). Thus public nuisance is not a strict liability tort.

Question 3(a)

In the tort of negligence, a claimant will only succeed upon proof, on the balance of probabilities, that s/he suffered loss/damage as a result of the defendant's breach of duty i.e. the defendant's breach must have caused or materially contributed towards the claimant's loss. The 'but for' test is applied to establish a link between the defendant's breach and the claimant's loss: but for the defendant's carelessness, would the claimant have suffered the loss complained of? If the damage would have occurred in any event the defendant will not be liable in negligence.

In cases where the loss suffered by the claimant is alleged to have resulted from a single cause, the 'but for' test can usually be applied without difficulty, even if it operates to deny liability. Thus in Barnett v Chelsea and Kensington Hospital Management Committee (1968) a doctor's breach of duty in failing to examine a patient who had sustained arsenic poisoning was found not to have caused the patient's death as the evidence indicated that even prompt medical attention would not have saved the man's life.

The 'but for' test also operates fairly and reasonably where the evidence indicates, on the balance of probabilities, that the defendant's tort caused part of the claimant's injury (e.g. see the 'divisible' injury cases such as Bonnington Castings v Wardlaw (1956) and Holtby v Brigham and Cowan (2000)), or was one of the causes of the entire injury (e.g. see the 'indivisible' injury cases such as Bailey v MOD (2009) and Williams v Bermuda Hospitals Board (2016)). The requirement for proof that the defendant's tort materially contributed towards the claimant's harm in these cases does not, however, represent any departure from the 'but for' test, because the evidence must indicate that the claimant probably would not have been injured (or so badly injured) had it not been for the defendant's conduct. Liability is apportioned where the claimant has suffered a divisible injury, but not where the harm is indivisible.

Difficulties occur where there are several possible causes of the claimant's loss, and it cannot be established on the balance of probabilities whether the defendant's carelessness was one of these causes. In many cases the 'but for' test operates to prevent liability. Thus in Wilsher v Essex Area Health Authority (1988) a premature baby was negligently given an excess of oxygen by hospital staff, potentially resulting in damage to the retinas of the child's eyes. The child also suffered from five other conditions, all associated with premature birth, any of which could have been responsible for causing the injury. The House of Lords held that the claimant had failed to produce sufficient evidence to demonstrate that the negligently inflicted oxygen was the probable cause and had therefore failed to prove on the balance of probabilities that the blindness had been caused by the negligence of the hospital.

This 'all or nothing' approach in which a claimant receives full damages on being able to establish a greater than 50% chance that the defendant's breach caused his loss, but absolutely nothing otherwise, is now followed in medical negligence cases where a number of different factors may have been responsible for the claimant's injury e.g. Hotson v East Berkshire Health Authority (1987). In Gregg v Scott (2005) a majority of the House of Lords refused to alter the common law to allow individuals to recover a proportion of the compensation they would have been entitled to receive if the defendant's negligence were the only possible cause of the injury suffered.

Such a radical change in the law was thought to be a reform suitable only for Parliament.

Question 3(b)

In some truly exceptional cases involving strong public policy factors, the courts have relaxed the 'but for' test to prevent particularly deserving claimants from going uncompensated. One such situation is where the loss suffered by the claimant was caused by a single factor, but there were different possible sources, at least one of which was a serious breach by an employer of its health and safety duties. In Fairchild v Glenhaven Funeral Services Ltd (2002) a number of employees contracted mesothelioma many years after being exposed to asbestos dust during different periods of employment. They had not been provided with adequate personal protective equipment by their employers. As medical science could not tell which period of employment had given rise to the fatal exposure, the employees concerned would have lost their claims if required to establish causation using the 'but for' test on a balance of probabilities against each employer. The House of Lords followed their earlier decision in McGhee v National Coal Board (1973) in allowing the employees' claims on the basis that each employer's failure to provide protective equipment had materially increased the risk of mesothelioma contraction. For similar policy reasons, in Sienkiewicz v Greif (2011) a seven member Supreme Court held that the Fairchild 'material increase in risk' test should also apply where an employee had been negligently exposed to asbestos during a single period of employment, even though the employer's breach only gave rise to an 18% enhanced risk of cancer.

Fairchild does not represent the only situation where the 'but for' test has been relaxed on public policy grounds. In Chester v Afshar (2004) a surgeon, in breach of duty, failed to warn a patient of a small risk (1-2%) of serious complications arising from neurosurgery following a request from the patient for full disclosure of the risks. As a result, the patient agreed to the procedure. The 1-2% risk materialised and she suffered serious neurological damage. The patient later admitted that, if properly advised, she would not have refused the operation altogether (the only scenario in which the 'but for' test could establish a causal link). Instead she would have sought a second opinion before consenting to the same procedure at a later date with the same inherent risk. A majority of the House of Lords held that it would be necessary to treat the 'but for' test as being satisfied in such cases in order 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. It seems inevitable that this approach will now be followed more widely in cases where patients are not fully informed about the potential risks of different forms of treatment or non-treatment (Montgomery v Lanarkshire Health Board (2015)).

It can be concluded that the 'but for' test is the mechanism used to establish factual causation in the vast majority of negligence actions. However, the courts have acted pragmatically to modify the 'but for' test in truly exceptional circumstances where this was necessary as a matter of legal policy and in the interests of justice.

Question 4

The police service

While the police owe a general duty in public law to prevent violence and disorder, the question is whether they owe a duty of care in the tort of negligence to protect specific individuals from suffering harm.

In Robinson v CC West Yorkshire Police (2018) the Supreme Court confirmed that the police service, as a public authority, are subject to exactly the same liability in the law of negligence as private individuals and bodies, except where the common law or statute provide otherwise. It is therefore incorrect to describe the police as enjoying a specific 'immunity' in relation to their role of crime prevention/investigation, as had often been the case following the decision of the House of Lords in Hill v Chief Constable of West Yorkshire (1989). Thus, the police may owe a duty of care when a positive act of carelessness creates a foreseeable risk of personal injury. In Robinson, the police were liable when they attempted to detain a suspected drug dealer, whom they knew would be likely to resist arrest, in a moderately busy high street on a Saturday morning. This took place in close proximity to pedestrians including Mrs Robinson, a frail 76-year-old lady, with the result that the suspect and two of the arresting officers fell on top of the claimant during a struggle, causing her serious injury. Further examples of positive police conduct that have resulted in negligence liability are to be found in Rigby v CC Northamptonshire (1985) and Alcock v CC South Yorkshire (1991). In the latter case the police admitted liability for the deaths and physical injuries arising from negligent policing and crowd control during the Hillsborough disaster.

However in Robinson Lord Reed pointed out that the police, in common with private individuals and bodies, are not usually under a duty of care to protect individuals from a danger which they themselves did not create, including injuries caused by third parties such as criminals e.g. Hill, Smith v CC Sussex Police (2008) and Michael v CC South Wales (2015). This is simply an application of the principle that there is usually no liability for a pure omission in the tort of negligence i.e. there is no duty to provide the claimant with a positive benefit. Such duties usually only arise where they are voluntarily undertaken e.g. in the law of contract and the law of trusts. Exceptionally, the police may owe a duty to protect persons from harm by third parties where they have specifically assumed responsibility for an individual's safety (this requires a representation by the police which is relied upon by the claimant) e.g. An Informer v A Chief Constable (2012) and Swinney v CC Northumbria (1997) or where the police created the danger in the first place (i.e. through a positive act) e.g. AG for the British Virgin Islands v Hartwell (2004) and Robinson.

The principle that the police are not usually under a duty of care to protect individuals from a danger which they themselves did not create has, controversially, been applied in cases of domestic violence involving close proximity where the police were in a position to help. For example, in Smith and Michael the police were not liable for failing to promptly intervene even though they had been made aware of an imminent threat of death/serious injury to an identifiable individual. In Michael, the Supreme Court based its decision primarily on the grounds that public bodies, in common with private individuals, generally owe no duty to prevent the occurrence of harm (a pure omission). In terms of policy, the majority thought that recognising a duty of

care in favour of victims of domestic violence would create illogical distinctions with other crimes/victims who have no claim e.g. where there are reports of imminent criminal damage, and cases involving 'bystanders' caught up in acts of violence that the police might have prevented. While the 'defensive policing' argument raised by Lord Keith in Hill was specifically doubted, there was no evidence to suggest that imposing a duty would improve the police investigation of or lead to a reduction in domestic violence. Imposing a duty would negatively impact on police budgets/public funding as forces would have to defend civil legal actions, whether successful or unsuccessful. It was pointed out that investigatory failures may already lead to liability in criminal law, or disciplinary consequences (as occurred in Ms Michael's case) and that imposing a duty would force the police to prioritise reports of threats and violence, where the allocation of resources should be a policy matter for the police.

In a powerful dissent, Lord Kerr considered that the police should owe a duty to victims of serious violence in cases of close proximity, bringing them into line with other professional people who may be held liable for failing to exercise reasonable care and skill. He considered the principle that 'wrongs should be remedied' to be the most important policy factor addressed by the law, particularly in cases involving the protection of life and physical well-being. The fairness created by imposing a narrowly defined duty would outweigh any illogical distinctions that might arise. Recognition of a duty, he thought, would lead to improvements in police response to domestic abuse. Lord Kerr pointed out that a lack of evidence of possible adverse consequences arising from the imposition of a duty did not prevent the Lords from imposing liability on advocates in Arthur JS Hall & Co v Simons (2002).

The decisions of the Supreme Court in Michael and Robinson mean that in most cases, the police are unlikely to face liability in negligence for failing to respond to calls for help, even in cases of close proximity with victims of violence. The only alternative actions available to such victims or their families are public law claims brought under Arts 2&3 ECHR (the right to life; prohibition of torture, inhuman or degrading treatment/punishment) pursuant to sections 6&7 Human Rights Act 1998 e.g. Sarjantson v CC Humberside Police (2013); DSD v MPC (2018). However, these claims are narrowly defined and even if successful, result in modest damages awards.

The Fire Service

The same act/pure omission distinction applicable to the Police Service also applies to the fire brigade. In Munroe v London FB (1997) the fire brigade attended and dealt with a fire on wasteland caused by exploding special effects pyrotechnics. They failed to check the claimant's adjoining premises where smouldering material subsequently caused a fire. This was treated as an omission to deal with the consequences of the act of a third party and thus there was no liability. In Church of Jesus Christ of Latter-Day Saints v W Yorkshire F&CDA (1997) the fire brigade were unable to fight a fire caused by a third party because their failure to inspect and maintain the fire hydrants in the neighbourhood meant that there was inadequate water. This was again held to be an omission for which there was no liability. However, in Capital & Counties Bank plc v Hampshire CC (1997) the Court of Appeal held that the fire brigade would be liable if they responded to an emergency call and, through a positive act of carelessness, made the claimant's position worse than if they had failed to attend at all. Smith LJ stated:

"…the fire brigade are not under a common law duty to answer the call for help, and are not under a duty to take care to do so. If, therefore, they fail to turn up, or fail to turn up in time, because they have carelessly misunderstood the message, get lost on the way or run into a tree, they are not liable."

In Capital & Counties Bank plc a fire had broken out in the roof void of a section of a commercial building. The fire service responded positively to the 999 call. However, the Chief Fire Officer negligently ordered that the sprinkler system should be turned off before the seat of the fire was located. As a result, the fire spread rapidly through the roof void resulting in the complete destruction of the whole of the building. The Court of Appeal awarded damages against the Fire Service on the basis that its positive careless act had resulted in more extensive damage than if there had been no response (the service having failed to prove that the same damage would have occurred anyway).

The Ambulance Service

Anomalously, in Kent v Griffiths (2000) the Court of Appeal held that the ambulance service may owe a duty to a patient once it has accepted a call (having been given the patient's name and address and the nature of the emergency), knowing that the patient is relying on the service to respond within a reasonable period of time. In reaching this decision, the court equated the functions fulfilled by ambulance paramedics with those of other healthcare professionals such as doctors and nurses, who have long been subject to a common law duty to their patients. Commentators point out that the decision in Kent may illustrate an unwillingness on the part of the courts to create illogical distinctions between the standards expected from public and private sector service providers (e.g. private ambulance services). However, the decision opened up a clear anomaly between the ambulance and the other emergency services where there is a failure to adequately respond to a call for help.

SECTION B

Question 1

The Occupiers' Liability Acts 1957 and 1984 (OLA 1957 and 1984) determine the circumstances in which persons who have control over premises owe a duty of care for the safety of those who come on to those premises. The 1957 Act imposes a 'common duty of care' on occupiers in relation to the safety of visitors i.e. those expressly or impliedly authorised by the occupier to be on the premises (s.2(2) OLA 1957). OLA 1984 assumes that no such duty is owed by an occupier in relation to the safety of non-visitors, such as trespassers, unless a duty can be established by reference to a three-stage test (s.1(3) OLA 1984).

Wessex University will be occupiers of the lecture theatre, the uneven concrete walkway and David's office. This is because the University have day-to-day control over the building and its contents/the grounds and ought to realise that a failure to take care may cause injury - Wheat v Lacon (1966). Similarly, Wessex Harbour Board have sufficient control over the concrete pile below the waterline (a fixed structure to which the obligations of an occupier extend under s 1 (3) (a) OLA 1957 and s 1 (2) and (9) OLA 1984) so as to be occupiers of these premises. Alison, Ben, Callum and Eileen have all suffered

losses due to dangers arising from the state of the premises and thus have potential claims under the Occupiers' Liability Acts.

Alison v Wessex University

As an IT contractor, Alison will have had Wessex University's express permission to be in the lecture theatre. As such, she was owed the 'common duty of care' as a visitor under s.2(2) of the 1957 Act.

Section.2(3) of the 1957 Act makes it clear that the standard of care expected of the occupier is a variable one taking into account 'the degree of care, and want of care which would ordinarily be looked for in such a visitor…'. The standard of care owed by the University to Alison will be a lower one given that, in the exercise of her calling, Alison should appreciate and guard against any special risks ordinarily incident to her job, so far as the University leave her free to do so (s.2(3)(a) OLA 1957). However, it seems unlikely that, as an IT contractor, Alison could reasonably be expected to know that the bar light might be poorly fixed and liable to come away from the ceiling. Thus this is not a special risk she would be expected to guard against e.g. Bird v King Line Ltd (1970). The likelihood and seriousness of the harm arising from the risk of a poorly fixed bar light falling from the ceiling suggests a high standard of care in this case.

It is likely that the University will seek to argue that it discharged its duty by hiring a competent contractor – HE Facilities Management Ltd - to fit the bar light under s.2(4)(b) OLA 1957. Whilst the fitting of a suspended bar light may be a sufficiently specialist and technical task to be reasonably entrusted to an independent contractor (Haseldine v Daw (1941)), it is unclear whether the University or its employees undertook any basic checks to ensure that the light was properly fixed. The facts are also silent as to whether reasonable steps were taken to ensure the contractor's competence. If the University succeed in discharging their duty under s.2(4)(b), any claim by Alison would need to be brought against the contractor in negligence.

Ben v Wessex University

Ben is owed a common duty of care under s.2(2) OLA 1957 as he is a student with Wessex University's express or implied permission to use the concrete walkway. The standard of care owed by the university to candidates whom the university knows (or ought to know) are sight-impaired will be higher than for sighted individuals e.g. Paris v Stepney BC (1951). Thus whilst the visual warnings (the yellow cross-hatching and hazard sign) of the uneven surface may be adequate to discharge the University's duty to visitors with unimpaired vision, this is unlikely to apply to sight-impaired candidates such as Ben. Thus the warnings are unlikely to be enough to discharge the University's liability to Ben – s.2(4)(a) OLA 1957. It seems likely that the University will be in breach of the duty it owes Ben on account of its failure to take measures to remove the bump from the walkway.

There appear to be no issues with causation or remoteness, nor do the University appear to have any defences available to them.

Callum v Wessex University

Callum entered David's office as a trespasser (i.e. a non-visitor) because he went to a part of the premises he was not permitted to go to and/or a place

where no-one would reasonably expect him to go to (e.g. Lee v Luper (1936)) without a member of staff being present. Alternatively, by entering the office to locate examination material on David's computer, Callum went beyond his permitted purpose whilst on university premises. This means that any duty of care would have to be assessed according to the three-stage test under s.1(3) OLA 1984.

If David was aware of the raised carpet tile (this seems likely as this sort of defect does not usually suddenly appear) then the University will have had reasonable grounds to believe that a danger existed (s.1(3)(a)). It is not clear whether the University had reasonable grounds to believe that a student, such as Callum, might enter the office as a trespasser, though this is arguable where a door is left unlocked by a staff member (s.1(3)(b)). The final criterion is that the risk must have been one against which, in all the circumstances, the University might reasonably have been expected to offer Callum some protection (s.1(3)(c)). There can be little doubt that protection against the risk of tripping on a raised carpet tile would reasonably have been expected if Callum had waited until David's return before entering the office, especially given the magnitude of the risk and the ease and lack of expense required to rectify the problem. It might also be reasonable to expect such protection to be provided to candidates entering the office without permission.

If the University owed Callum a duty of care, it seems likely that this will have been broken given the likelihood and magnitude of harm arising from a tripping incident set against the low cost and ease with which a raised carpet tile can be fixed flat against the floor.

If Callum can establish breach of duty on the part of Wessex University he will be able to recover damages for his personal injury (the bruises) but not his damaged property i.e. the smashed tablet screen (s.1(8)).
Eileen v Wessex Harbour Board

When Eileen dived into the harbour from the slipway it is likely that she will have done so as a trespasser. Even if she was a visitor on the slipway (which seems unlikely) she went beyond her permitted purpose whilst on the Board's premises - swimming was not permitted. Entering the water also involved going to a part of the premises Eileen was not permitted to go to and/or a place where no-one would reasonably expect her to go to, especially in mid-winter and late at night e.g. Lee v Luper (1936).

It is highly unlikely that the Harbour Board owed Eileen, as a non-visitor, a duty of care under s.1(3) OLA 1984. Even if the Board were (or ought to have been) aware of the danger posed by the concrete pile, it would probably not have had reasonable grounds to believe that a trespasser might come into its vicinity by diving into the water late on a winter's night e.g. Donoghue v Folkestone Properties Ltd (2003). As such, Eileen is unlikely to be owed a duty of care under the 1984 Act.

Question 2(a)

Graham v KEL

Employers owe a long-established duty to take reasonable care so as not to expose their employees to unnecessary risk. In Wilson & Clyde Coal Co v English (1938), Lord Wright said that this duty included an obligation to provide competent staff, adequate materials and a safe system of work. The

duty is personal and non-delegable (McDermid v Nash Dredging and Reclamation Co (1987)) meaning that employers such as KEL Ltd cannot discharge their responsibility by delegating performance of the duty to an employee (or a contractor), such as Frank, even if they reasonably believe him to be competent to perform the role.

There is likely to be a breach by KEL Ltd of a number of aspects of the employer's primary duty of care in this case. This is especially in view of the high standard of care that will apply given the likelihood and seriousness of harm (as evidenced by Graham's injuries) arising from the operation of defective, high speed, machinery.

Firstly, the fact that the surface grinding machine lacked an adequate safety guard and that KEL failed to supply Graham with safety goggles or face protection will probably give rise to a breach of its duty to provide adequate plant and equipment.

Additionally, the mishandling and incorrect storage of the abrasive wheel and the failure to ensure that it was correctly installed on the surface grinding machine is likely to represent a breach of the requirement to design and implement a safe system of work.

There are no issues with either causation in fact or remoteness of damage in relation to this claim. Even if KEL could not reasonably have foreseen that Graham would suffer consequences as serious as those resulting from Helen's medical treatment, they must nonetheless 'take their victim as they find him'. This will include Graham's physical vulnerability i.e. his rare reaction to the ant-tetanus injection e.g. Robinson v Post Office (1974).

However, KEL may argue that Helen's conduct in administering the anti-tetanus injection, without first testing Graham with a small amount of the vaccine to check for an adverse reaction, amounts to a *novus actus* interveniens. If successful in this argument, they will not be liable for Graham's subsequent injuries (i.e. his permanent brain damage resulting from the seizure). However, only medical treatment which is 'so grossly negligent as to be a completely inappropriate response to the injury inflicted by the defendant' will break the chain – Webb v Barclays Bank (2001). An anti-tetanus injection probably represented appropriate treatment given Graham's lacerations, and so it seems unlikely that the administration of such an injection, without an initial test, amounted to grossly negligent treatment e.g. Robinson v Post Office (1974). Thus it seems likely that KEL will be liable for the full extent of Graham's injuries.

Graham v Helen (NHS Trust vicariously)

If Helen was negligent, the NHS Trust she works for will accept vicarious liability under the NHS Indemnity Scheme.

The first issue is whether Helen is in breach of the well-established duty owed by healthcare professionals to their patients. Junior doctors, such as Helen, are expected to exhibit the same degree of care as ordinary skilled doctors exercising and professing to have the special skill required for the particular position the junior is filling (Wilsher v Essex (1986)). However, it seems unlikely that any reasonable body of such medical practitioners would have failed to administer a small 'test' dose of the vaccine, given that this is

described as 'standard procedure'. Thus Helen is probably in breach of her duty- Bolam v Friern HMC (1957).

However, it is not clear that Helen's breach caused or materially contributed towards Graham's seizure and subsequent brain injury. Graham suffered a rare reaction to the anti-tetanus injection a week later. Thus it seems unlikely that a test dose would have revealed any issues and that Helen would have administered a full dose in any event. Applying the 'but for' test to Helen's negligence it appears that Graham would have suffered a permanent brain injury anyway (Barnett v Kensington & Chelsea HMC (1968)).

Question 2(b)

Ivan v Frank (KEL vicariously)

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. KEL will be vicariously liable if a tort is committed by one of its employees (or a person in a similar relationship) during the course of his/her employment (or similar relationship).

By punching Ivan in the face, Frank will be liable in battery because he intentionally and directly applied force to Ivan's body without lawful justification.

Frank is described as having been 'employed' by KEL and so a necessary relationship exists to render KEL potentially vicariously liable.

The main issue is whether the battery occurred in the course of Frank's employment. This will depend upon the application of the 'close connection' test which was introduced by the House of Lords in Lister v Hesley Hall (2001). In WM Morrison Supermarkets plc v Various Claimants (2020) a unanimous Supreme Court upheld Lord Nicholls' formulation of the 'close connection' test in Dubai Aluminium Co Ltd v Salaam (2002), as being 'authoritative'. The question is whether Frank's wrongful conduct was so closely connected with acts he was authorised to do that, for the purposes of KEL's liability, it may fairly and properly be regarded as done by Frank while acting in the course of his employment. This test should be applied in the light of guidance to be derived from decided cases. The Supreme Court held that in cases of deliberate wrongdoing intended to inflict harm on a third party (other than sexual abuse) a vital factor is whether the employee was purporting to act on or about his employer's business (albeit in a wrongful or misguided way) or whether the employee was acting purely for his own reasons e.g. pursuing a personal vendetta or an act of personal vengeance.

It seems likely that the battery at the staff Christmas party was within the scope of Frank's employment. The party was an official social event organised by KEL. As the argument leading to the battery related to the Trade Union Representative's (Ivan's) concerns about the Health and Safety Executive report, Frank was arguably purporting to act on or about his employer's business, exercising his authority as Works Manager. Frank's battery was therefore so closely connected with acts he was authorised to do that, for the purposes of KEL's liability, it may fairly and properly be regarded as done by Frank while acting in the course of his employment

Thus KEL will probably be vicariously liable to Ivan for Frank's battery.

Question 3

Kevin has admitted liability in negligence for the property damage, deaths and physical injuries of those involved in the accident. In order to establish whether his duty to prevent such loss 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 due to Kevin'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'.

Kevin's liability to Lisa and Michael

It is unclear whether Lisa and Michael suffered recognisable psychiatric harm, though their 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 both Lisa and Michael were prevented from entering the burning cottage by firefighters it seems likely that they are secondary victims as neither claimant was personally endangered. As Lisa is Nina's mother, close ties of affection between them will be presumed to exist. It is less clear whether this criterion will be met in Michael's circumstances as he is Lisa's boyfriend and not Nina's father. Close ties will not be presumed to exist in such relationships. Michael would have to prove the presence of such ties to the parent/child standard. He may be able to do so if he has been closely involved in Nina's upbringing in a caring role i.e. as a father figure (e.g. McCarthy v CC South Yorkshire (1996)).

Subject to Michael's possible lack of close ties, the remaining Alcock criteria would appear to be met. Both claimants were physically present and had a direct perception of the accident whilst it was on-going (the cottage was still on fire when the couple arrived) or, alternatively, its immediate aftermath. The latter concept encompasses those such as Lisa and Michael who, from close proximity, come very soon upon the scene of the accident (McLoughlin v O'Brian (1983). It also seems likely that any psychiatric response suffered by Lisa and Michael was caused by a 'sudden shock' in relation to the discovery of the burning cottage.

Kevin's liability to Nina

Nina has suffered both physical injuries and recognised psychiatric harm (clinical depression). As such, the rules concerning 'pure' psychiatric injury do not apply to her. As Lord Steyn explained in White v Chief Constable South Yorkshire Police (1998) the psychiatric element will be regarded as part and

parcel of Nina's personal injury for which she will receive damages in relation to her pain, suffering and loss of amenity.

It does not matter that Nina previously suffered from depression. Even if Nina was unduly prone to such illness, the 'thin-skull' rule will apply and Kevin must take his victim as he finds her e.g. Page.

Kevin's liability to Jessica

It is unclear whether Jessica suffered recognisable psychiatric injury as a result of witnessing the destruction of her cottage and its contents and/or as a result of the overwhelming guilt she felt as a result of hiring Kevin. Again, medical expert evidence would be needed to establish the point.

Recovery of psychiatric harm resulting from witnessing the destruction of property was considered by the Court of Appeal in Attia v British Gas plc (1987), a case involving similar facts to those affecting Jessica. British Gas admitted that it owed a duty not to damage the house and its contents. The court recognised the possible existence of a duty in relation to the psychiatric harm provided this was a reasonably foreseeable consequence of the defendant's negligence. Bingham LJ gave the example of a scholar's life work of research or composition being destroyed before his eyes due to the defendant's careless conduct, as a possible situation justifying recovery. This suggests that the duty owed by Kevin to avoid damaging Jessica's property may also extend to any psychiatric injury she suffered as a result of witnessing the destruction of her house and life-time painting collection.

However, the status of Attia is uncertain, having been decided before the House of Lords formulated the 'control mechanisms' applying to secondary victims i.e. those suffering psychiatric harm due to witnessing the death, injury or imperilment of those with whom they had close ties of love and affection in Alcock. Attia was not fully considered in Alcock nor in White or Page, the other leading cases on negligently inflicted psychiatric harm. Thus Jessica's prospects of successfully claiming against Kevin on these grounds are uncertain.

Jessica might also claim as an 'unwitting agent'. It is arguable that, due to Kevin's negligence, Jessica was made to believe that she was the immediate and involuntary cause of Orla's death and Nina's injuries (e.g. Dooley v Cammell Laird & Co Ltd (1951), W v Essex County Council (2000)). The scope of this 'special category' of primary victim is somewhat uncertain, and it is unclear whether the reasonableness of Jessica's belief will be an issue here: Kevin was the immediate cause of the fire and it appears that Jessica took reasonable steps to hire a competent contractor. Cases such as Hunter v British Coal Corp (1998) also require claimants falling within this category to have been proximate to the accident, both in time and space. Jessica was not present when the fire broke out, and it is not even clear whether she arrived at the scene of the accident whilst the blaze was still in progress.

Kevin's liability to Paula

Paula has suffered recognisable psychiatric injury i.e. PTSD. In White it was held that professional rescuers were not a special category of victim, but subject to the usual rules for recovery for primary and secondary victims. It appears that Paula was personally endangered because she entered the burning building and pulled Orla's body from the flames. As such she will be

able to recover by merely proving that physical injuries were foreseeable (Page).

If Paula was not personally endangered in carrying out her rescue, any claim as a secondary victim would fail in the absence of proof of close ties of love and affection with any of the 'immediate' victims.

Kevin's liability to Richard

Richard has suffered recognised psychiatric harm – PTSD. He will be a secondary victim as he was not at the scene of the accident and was not physically endangered.

While close ties of love and affection are presumed to exist between parents and their children, Richard will have difficulty establishing the remaining Alcock criteria. He was neither present at the scene of the accident nor did he have a direct perception of it. Whilst Richard must have been told about the accident shortly afterwards, information concerning the involvement of a close relative in an accident conveyed by a third party cannot amount to a direct perception e.g. Ravenscroft v Rederiaktiebølaget Transatlantic (1992).

Furthermore, mortuary identifications usually fall outside the immediate aftermath, both due to time lapse and because the victim's body has often been 'cleaned up' at this stage. In Alcock, Lord Jauncey considered that attendance to victims for the purposes of body identification (rather than to rescue or to provide comfort) was a further reason for regarding mortuary visits as falling outside the immediate aftermath.

Question 4

Roger's liability (and Kempston College vicariously)

An assault is an act of the defendant which causes the claimant reasonable apprehension of the infliction of a battery on her. In throwing the foam ball, Roger acted in a positive and deliberate way. Sarah reasonably anticipated immediate physical contact: the ball was thrown directly at her and she saw the object approach out of the corner of her eye. It is unclear whether Roger intended that Sarah should anticipate immediate physical contact: he may have assumed she was too engrossed in checking her smartphone to see what was happening. If, however, he was aware that she might notice the approaching ball, Roger is likely to be liable: subjective recklessness is probably sufficient for liability in trespass to the person e.g. Bici v MOD (2004).

A battery is the intentional and direct application of force to another person without lawful justification. It appears that the elements of the tort of battery will be easily satisfied here. By throwing the ball at Sarah, Roger brought about direct physical contact through a positive, deliberate and intentional act. Whilst early authority suggested that Roger's 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 without lawful justification (F v West Berkshire Health Authority (1989)). It does not matter that the contact was brought about through the intermediary of an object (e.g. Scott v Shepherd (1773)). Roger will be fully liable for all the consequences flowing from his initial, intentional contact,

including the injuries sustained by Sarah when she fell off the chair e.g. Williams v Humphrey (1975).

Kempston College is likely to bear vicarious liability for Roger's assault and battery on Sarah. This is because there is either likely to be a part-time employment relationship between the College and Roger or a relationship 'akin' to employment, and not one where Roger was carrying on a business on his own account as an independent contractor (Barclays Bank plc v Various Claimants (2020). Furthermore, Roger's torts appear to be so closely connected with acts he was authorised to do (student classroom management and discipline) that for the purposes of Kempston College's liability, the wrongful conduct may fairly and properly be regarded as done by him while acting in the ordinary course of his employment (WM Morrison Supermarkets plc v Various Claimants (2020)).

Roger's act of walking menacingly towards Sarah with his hand raised is unlikely to amount to an assault. His words "if you weren't my student you would pay for that!" apparently negate his threatening actions (e.g. Tuberville v Savage (1669)) so that any apprehension of the imminent application of force on Sarah's part would not be reasonable (e.g. Thomas v NUM (1986)). Proof of intention on Roger's part to induce such a perception might also be difficult to establish.

Sarah's liability

By throwing the pen at Roger, Sarah may be liable in the tort of assault if her act caused Roger to reasonably apprehend the infliction of an immediate battery.

Trevor also has a claim against Sarah in the tort of battery. By throwing the pen, Sarah brought about direct physical contact through a positive, deliberate and intentional act. To be found liable Sarah need only have intended to apply force to someone (or have been subjectively reckless), and it will not matter that Trevor was not the intended victim: Livingstone v Ministry of Defence (1984). This is often referred to as the doctrine of transferred intention.

Victor's liability (Kempston College vicariously)

Victor may be liable in the tort of false imprisonment, which is defined as 'an act of the defendant which directly and intentionally causes the confinement of the claimant within an area delimited by the defendant'. By instructing the security guard to stand guard outside the Examinations Office to prevent Ursula from leaving, Victor acted in a direct and intentional manner. However, it is unclear whether this resulted in a total restraint on Ursula's liberty. She must have been unable to break her confinement by moving freely in any direction by reasonable means (Bird v Jones (1845)). There is some authority to suggest that the use of an unfastened door leading to trespassory exit through another person's property is not unreasonable - Wright v Wilson (1701).

A further issue relates to Ursula's possible lack of awareness of her confinement over the ten-minute period, given that Victor had secretly instructed a member of security staff to prevent her from leaving the office. Early authority of the Court of Exchequer suggested that a claimant would have to be aware of her 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/her 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, it seems that Ursula's lack of knowledge of her confinement will result in a substantial reduction of her entitlement to damages.

If Victor is liable in false imprisonment, Kempston College is likely to bear vicarious liability for similar reasons to those discussed in relation to Roger. Even if Victor is not an employee of the College he is likely to be in a relationship 'akin' to employment rather than carrying on a business on his own account as an independent contractor. Furthermore, Victor's tort appears to be so closely connected with acts he was authorised to do (i.e. exercising his investigatory function as a Chief Invigilator) that for the purposes of Kempston College's liability, the wrongful conduct may fairly and properly be regarded as done by him while acting in the ordinary course of his employment.

Kempston College's liability (delay at exit barriers)

It seems unlikely that the College would be liable in false imprisonment to its candidates, including Ursula, for the delays experienced in exiting the building. This is because occupiers such as the College are entitled to impose reasonable conditions on the manner in which people leave the premises (e.g. under a contract) Robinson v Balmain New Ferry Co Ltd (1910).

Ursula's liability to Kempston College (trespass to goods)

By writing on the computer screen in permanent marker pen, Ursula did an act which directly and deliberately interfered with the College's chattel through physical contact (e.g. Vine v Waltham Forest LBC (2000)). She had no lawful justification. Ursula is therefore liable for trespass to the College's goods ('wrongful interference with goods' – s.1(1) Torts (Interference with Goods) Act 1977).