

**CHIEF EXAMINER COMMENTS WITH
SUGGESTED POINTS FOR RESPONSES**

JANUARY 2021

LEVEL -3 UNIT- 5 LAW OF TORT

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the January 2021 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

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

CHIEF EXAMINER COMMENTS

Candidate performance was very much in line with previous Level 3 examinations. Knowledge of the syllabus was generally solid, although as always there was a minority who appeared entirely unprepared for the examination. Candidates usually were stronger at repeating learned knowledge than in applying it and performance was, as is usually the case, better on section A than section B as a result.

CANDIDATE PERFORMANCE FOR EACH QUESTION

SECTION A

Q1. The vast majority of candidates were able to define tort as meaning a "civil wrong". Those who failed to obtain the mark on this question tended to define negligence rather than tort as a general concept.

Q2. Most candidates obtained at least one of the two marks available here. Candidates tended to recognise that there was an element of policy in this part of the "test", although fewer candidates were able to name a relevant case and a very small number named a case post *L v Reading Borough Council* which is nearly 15 years old.

Q3. This was by some way the least well-answered question in section A. Candidates tended to fall into one of three categories: those with good knowledge of the provision; those who recognised the provision was about protecting “desirable activities” but incorrectly thought that it related to existence (rather than standard) of duty; and those, the majority, with no knowledge of the provision.

Q4. This question was generally very well answered. Candidates who failed to obtain full marks tended to have either confused primary and secondary victims or to have provided unclear or ambiguous definitions. Candidates are reminded that extremely brief answers may not attract marks (e.g., “three types of proximity” without further explanation).

Q5. This question was generally well answered, although around 20% of candidates demonstrated a lack of knowledge of the area.

Q6. Most candidates obtained at least one mark on this question, although performance was mixed. Stronger answers identified when the test was useful, how it operated and provided an example. Weaker answers tended to only achieve one or two of those marks.

Q7. Almost all candidates were able to correctly define vicarious liability.

Q8. Most candidates were able to identify the general principle of the defence and anecdotally most were aware it was a complete defence. Stronger papers tended to be those which explained justifications for the defence and/or provided case examples.

Q9. Almost all candidates were able to correctly identify the purpose of damages.

SECTION B

Scenario 1

Q1. Candidates struggled more than expected with this question, with a considerable proportion seeming to be unable to go beyond a very basic “reasonable man” analysis at best. It is suggested that this may be due to a lack of application skills rather than knowledge of the specific area and candidates are reminded that practising problem scenario questions is a crucial part of preparation for this exam.

Q2. This question was generally relatively well answered. Most candidates were able to identify the three requirements for vicarious liability to arise and to provide at least some discussion of what may be required to establish whether a tort was committed in the “course of employment”. However, two key points to note are, firstly, that a considerable number of candidates showed weak application skills in considering a librarian retrieving a book to be a clear example of a frolic of one’s own; and secondly, that only strong candidates referred to the modern “close connection” approach. Given recent Supreme Court authority in the area please note that less and less credit will be given for answers compromised solely of the older law on the area of vicarious liability, both in terms of course of employment (i.e., the Salmond test) and a relationship giving rise to such liability (i.e., control test, organisation test).

Q3. Answers on this question were generally good and given the above comments it was heartening to see how many candidates were able to discuss the concept of relationships “akin to employment”.

Q4. Only a minority of candidates went beyond the basic “reasonableness” standard and/or spotted the issue of what was foreseeable at the time of the accident. This led to a low average mark for this question.

Scenario 2

Q1. The vast majority of answers made the basic point that exclusion for personal injury/death is not allowed under statute law. Better answers were able to identify the relevant statutory provision and explain why the CRA rather than UCTA applied.

Q2. Most candidates achieved at least a pass mark across the two parts of this question. Points that were commonly made included the relevant Act, the three-year time period and, in (b), that time only begins to run on the claimant’s 18th birthday. Less commonly made points included that the specific section number, application of the law to facts, and the idea that being under the age of 18 is a “disability” under s14.

Q3. Part (a) was generally well answered, which is perhaps to be expected given that it was a straightforward question on the “but for” test. Knowledge on section (b) was less common although a good proportion of stronger scripts did make at least some of the points credited on the mark scheme and there were some very good answers.

Q4. Answers were mixed on this topic, with most candidates obtaining some credit (usually getting points as to special damages and loss of amenity claims in part (a) and application of the concept of dependency in part (b)). A considerable number of candidates did not seem aware that no damages for pain and suffering will be awarded in such cases, and some did try to argue a claim for lost years.

Q5. This was a generally well answered question although a minority of candidates were only able to name one head of damages.

Scenario 3

Q1. Candidates generally did not answer this question particularly well. Many candidates still seem wedded to the idea of the three-stage test in all situations. Tutors and candidates are reminded that post-Robinson this is clearly not the appropriate approach and should bear in mind that candidates are expected to recognise common established duty situations and apply the law accordingly.

Q2. Answers to this question were mixed, with some very strong answers and some which seemed to miss the purpose of the question entirely. However, the majority were around the pass mark, with a recognition of how basic “but for” causation may operate but only stronger candidates going on to consider the specific ideas of the “balance of probabilities” (or the alternative material increase in risk approach).

Q3. Most candidates were able to identify the egg-shell skull rule and provide some application. The “average” candidate is still too reliant on simply stating

that “you take your victim as you find them” without explaining how the rule actually operates. Weaker candidates often missed the purpose of section (b), discussing damages instead. Candidates are reminded that as a matter of exam technique, part questions are used specifically to highlight a thematic link.

Q4. Knowledge of the second limb of Bolam was limited to stronger candidates and this question was generally either answered extremely well or very poorly.

SUGGESTED POINTS FOR RESPONSES

LEVEL -3 UNIT- 5 LAW OF TORT

The purpose of this document 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 2021 examinations. The Suggested Points for Responses 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.

Candidates and learning centre tutors should review this document in conjunction with the question papers and the Chief Examiners’ reports which provide feedback on candidate’s performance in the examination.

SECTION A

Question Number	Suggested Points for Responses	Marks (Max)
Q1	A definition that recognises ‘tort’ is <ul style="list-style-type: none"> • A civil wrong 	1
Q2	An explanation that makes reference to the following points <ul style="list-style-type: none"> • Often seen as a matter of policy • Allows the court a residual discretion • Relevant case expanding on this element e.g. <u>Michael v CC of S Wales (2015)</u> 	2
Q3	An explanation that makes reference to the following points <ul style="list-style-type: none"> • When considering standard/breach of duty • The court should consider whether requiring D to take particular steps • Could prevent a desirable activity taking place • Or discourage persons from undertaking functions in connection with a desirable activity 	3
Q4	An identification that makes reference to the following points <ul style="list-style-type: none"> • Recognised psychiatric injury • Close ties of love and affection • Proximity in time and space • Witnessed with own unaided senses • Sudden shock • Reasonably foreseeable in person of normal fortitude 	3

Q5	An explanation that makes reference to the following points <ul style="list-style-type: none"> • The greater the risk • The greater the precautions required • Relevant case e.g. <u>Bolton v Stone</u> (1951) 	2
Q6	An explanation that makes reference to the following points <ul style="list-style-type: none"> • Multiple causes/ "where it is hard to determine which D is to blame" or similar • D will be liable if makes material contribution to risk of harm • Relevant case e.g. <u>McGhee v NCB</u> (1973) • Reference to relevant example e.g. industrial disease cases 	3
Q7	A definition that makes reference to the following points <ul style="list-style-type: none"> • Where an employer/ a person is liable • For the wrongdoing/acts of another 	2
Q8	An explanation that makes reference to the following points <ul style="list-style-type: none"> • no action may arise from a base cause • cannot claim if harmed while doing a criminal act • Complete defence • Operation of test: is illegality inextricably linked? • Justification: public policy • Justification: impossible to set standard of care • Relevant case e.g. <u>Ashton v Turner</u> (1981) 	3
Q9	An identification that makes reference to the following points <ul style="list-style-type: none"> • to put the claimant in the position they would have been in had the tort not occurred • To compensate (the claimant) 	1
Section A Total: 20 marks		

Section B - Scenario 1

Question Number	Suggested Points for Responses	Marks (Max)
Q1a	An explanation that makes reference to the following points <ul style="list-style-type: none"> • General standard of reasonableness • An objective standard • Objective of D is a relevant factor • Here Council is balancing limited budget • Cost of precautions is a relevant factor • Relevant case e.g. <u>Latimer v AEC</u> (1953) • Here cost of extra ladders may be excessive • Reasoned conclusion e.g. unlikely Council has acted unreasonably 	6
Q1b	An explanation that makes reference to the following points <ul style="list-style-type: none"> • Standard of reasonable person/librarian • Magnitude of risk is a relevant factor • Here chance of accident is high/ reference to risk by using the wheeled chair • Cost of precautions is a relevant factor • Here cost is essentially zero, just waiting to use ladder 	5

	<ul style="list-style-type: none"> Reasoned conclusion e.g. likely B has not acted as reasonable person 	
<i>Question 1 Total: 11 marks</i>		
Q2	<p>An explanation that makes reference to the following points</p> <ul style="list-style-type: none"> Must be a tort committed By an employee Here Brie clearly an employee In the course of employment Traditional test – doing an authorised act Includes if doing in unauthorised manner Relevant case on this e.g. <u>Rose v Plenty</u> (1976) Can be argued Brie is authorised to locate books Albeit this is not the approved manner Modern test – close connection Relevant case on this test e.g. <u>Mohamud v Morrison</u> (2016) An increasingly broad approach to this Relevant recent case e.g. <u>Bellman v Northampton Recruitment</u> (2018) Here clearly a close connection with her work as librarian Reasoned conclusion 	10
<i>Question 2 Total: 10 marks</i>		
Q3a	<p>An explanation that makes reference to the following points</p> <ul style="list-style-type: none"> Explanation of control test Explanation of organisation test Explanation of multiple test Relevant case e.g. <u>Ready Mixed Concrete</u> (2010) Recognition that multiple test is main test used today May also be liable where relationship is “akin to employment” Relevant case e.g. Christian Brothers case 	6
Q3b	<p>An explanation that makes reference to the following points</p> <p>Application – in favour:</p> <ul style="list-style-type: none"> Must wear uniform Told when to work Arguably meets control test <p>Application – against:</p> <ul style="list-style-type: none"> No remuneration Volunteer, can leave at any time Insufficient mutuality of obligation Likely fails organisation test <p>Akin to employment</p> <ul style="list-style-type: none"> No need for employment contract for liability Does not need to be a commercial activity Relevant case e.g. <u>Cox v Ministry of Justice</u> (2016) <p>Conclusion</p> <ul style="list-style-type: none"> Reasoned conclusion either way 	7
<i>Question 3 Total: 13 marks</i>		
Q4	<p>An explanation that makes reference to the following points</p> <ul style="list-style-type: none"> Judged by role not by experience 	6

	<ul style="list-style-type: none"> • Relevant case e.g. <u>Bolitho v City and Hackney HA</u> (1997) • Standard of reasonable librarian • However, foreseeability judged at time of accident • Not with benefit of hindsight • Relevant case e.g. <u>Roe v Minister of Health</u> (1954) • Standard may be lower when acting in an emergency/ rescuer 	
Reasoned conclusion either way		
<i>Question 4 Total: 6 marks</i>		
Scenario Total: 40 marks		

Section B - Scenario 2

Question Number	Suggested Points for Responses	Marks (Max)
Q1	An explanation that makes reference to the following points <ul style="list-style-type: none"> • Hetty intends to exclude liability • This is a contract between a trader and a consumer • S.65 Consumer Rights Act 2015 • Where clause intends to exclude for death/PI • Resulting from negligence • Will have no effect • Therefore, will not prevent claim by Imran 	5
<i>Question 1 Total: 5 marks</i>		
Q2a	An explanation that makes reference to the following points <ul style="list-style-type: none"> • Governed by Limitation Act 1980 • Section 11 • In personal injury cases • Time limit will be 3 years • From accident • Or date of knowledge • Date of knowledge here is date of accident • Period expires June 2020/c. 6 months ago • Claim likely statute-barred 	8
Q2b	An explanation that makes reference to the following points <ul style="list-style-type: none"> • Section 14 • Where claimant is "under a disability" • Including being under 18 years of age/ i.e. from 18th birthday • Period will start when ceased to be under disability • So Kelly has c. 3 years to bring her claim 	3
<i>Question 2 Total: 11 marks</i>		
Q3a	An explanation that makes reference to the following points <ul style="list-style-type: none"> • D must be shown to be the factual cause of C's injuries • The usual test is the "but for" test • Relevant case e.g. <u>Barnett v Chelsea & Kensington Hospital</u> (1969) • But for the negligence of D, would C be injured? 	4

Q3b	An explanation that makes reference to the following points <ul style="list-style-type: none"> • Meaning of <i>novus actus</i> = break in chain of causation • Hetty is the original cause of Jenna's injuries • Can be through act of a 3P • Usual rule – must be unforeseeable • Where medical treatment, must be grossly negligent to break • A high bar to meet • Relevant case e.g. <u>Webb v Barclays Bank</u> (2001) • Reasoned conclusion either way 	6
<i>Question 3 Total: 10 marks</i>		
Q4a	An explanation that makes reference to the following points <ul style="list-style-type: none"> • May claim as if she was alive • Note will be no claim for pain & suffering • As Hetty not conscious at any point • May still claim for loss of amenity • Loss of earnings/medical expenses • But only up to death/ no claim for future losses • Can also claim funeral expenses 	6
Q4b	An explanation that makes reference to the following points <ul style="list-style-type: none"> • Dependents may claim • This includes a child • No claim for bereavement by a child • Claim for loss of dependency • Here Jenna was sole earner so can claim loss of these earnings 	4
<i>Question 4 Total: 10 marks</i>		
Q5	Identification of the following points <ul style="list-style-type: none"> • Special damages • Any cost of medical treatment/prescriptions etc. • Transport costs to/from hospital/physio etc. • Personal property damaged in the accident • General damages • Pain and suffering • Loss of amenity • Potentially a Smith v Manchester award • Any other valid response 	4
<i>Question 5 Total: 4 marks</i>		
Scenario Total: 40 marks		

Section B - Scenario 3

Question Number	Suggested Points for Responses	Marks (Max)
Q1a	An explanation that makes reference to the following points <ul style="list-style-type: none"> • Starting point is to look for established duty of care • Well established that hospital will owe duty of care • Relevant case e.g. <u>Barnett v Chelsea & Kensington Hospital</u> (1969) 	4

	<ul style="list-style-type: none"> No need to distinguish between medical and non-medical staff Relevant case on this point e.g. <u>Darnley v Croydon NHS Trust (2018)</u> 	
Q1b	<p>An explanation that makes reference to the following points</p> <ul style="list-style-type: none"> General standard of reasonableness So standard is that of a reasonable hospital An objective standard Negligence includes omission to do something reasonable man would do Hospital has failed to provide required training And should have provided him with the list of questions Reasoned conclusion e.g. Hospital likely in breach 	5
<i>Question 1 Total: 9 marks</i>		
Q2	<p>An explanation that makes reference to the following points</p> <ul style="list-style-type: none"> The usual test is the "but for" test Relevant case e.g. <u>Barnett v Chelsea & Kensington Hospital (1969)</u> But for the negligence of D, would C be injured? Difficult to apply as 25% chance that yes, 75% that no Instead could use material increase in risk test Relevant case e.g. <u>McGhee v NCB (1973)</u> But as a medical negligence case should use the 'balance of probabilities' approach From <u>Bolitho v City and Hackney HA (1997)</u> Relevant case affirming e.g. <u>Gouldsmith v Mid Staffordshire Hospitals General NHS Trust (2007)</u> Here causation more likely than not so will be found 	8
<i>Question 2 Total: 8 marks</i>		
Q3a	<p>An explanation that makes reference to the following points up</p> <ul style="list-style-type: none"> the damage must not be too remote from the breach The general test is that of reasonable foreseeability Relevant case e.g. <u>Wagon Mound (No 1) (1961)</u> It is the type of harm that must be foreseen Not the extent of the harm 	4
Q3b	<p>An explanation that makes reference to the following points</p> <ul style="list-style-type: none"> So as long as some injury is foreseeable the fact it is worse for a given person is irrelevant The defendant must take the victim as he finds them This is known as the egg-shell/thin skull rule Relevant case e.g. <u>Smith v Leech Brain (1962)</u> Reasoned conclusion e.g. Naveen can claim for full extent 	4
<i>Question 3 Total: 8 marks</i>		

Q4a	<p>Responses should refer to any of the following</p> <ul style="list-style-type: none"> • General standard = reasonable man • No account taken of experience/lack of – judged by role • Relevant case e.g. <u>Nettleship v Weston</u> (1971) • Reference to <u>Bolam v Friern Hospital</u> (1957) • Where D professing a special skill • Judged by reasonable man with that skill • However, will not be in breach if can show acted in accordance with responsible body of opinion • Opinion must be logically defensible • Relevant case e.g. <u>Bolitho v City and Hackney HA</u> (1997) • Court should not judge between rival schools of thought • Size of body is not relevant • Relevant case on application of Bolitho e.g. <u>Maynard v West Midlands HA</u> (1985) 	9
Q4b	<p>Responses should refer to any of the following</p> <ul style="list-style-type: none"> • Dr Quinton should be judged as reasonable doctor • Appears to have acted in accordance with a body of opinion • Albeit a small minority • Opinion does seem logically defensible • Because it used to be standard treatment • Court will not judge based on numbers • Court will not prefer one responsible body over another • Dr Quinton has a duty to warn of risks/ failing to mention the side effects could be a breach • Relevant case on warning e.g. Chester, Montgomery etc. • Reasoned conclusion e.g. likely not in breach 	6
<i>Question 4 Total: 15 marks</i>		
Scenario Total: 40 marks		