

## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JUNE 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 June 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

Overall performance was in line with historical averages and anecdotally the standard of papers as a whole was very much in line with previous exam sessions. There remains a clear distinction between candidates who have clearly learned and revised the subject as a whole, and those who have attempted to "question spot" by only focusing on a handful of topics. It can only be reiterated once again that the latter is almost always unsuccessful given that the paper tests as much of the syllabus as is reasonably possible within CILEx guidelines – which also ensure that there is no guarantee any one particular topic will or will not be examined on a given paper.

**Section A**

**Question 1**

More than half of candidates achieved the mark available here. Correct answers identified one of a wide variety of statutory torts, while incorrect answers usually named a common law tort such as nuisance or negligence.

**Question 2**

The majority of candidates “passed” this question but less than a quarter achieved full marks. Candidates tended to be able to define the concept but only the strongest answer explained the objective nature of the test and/or provided case authority.

**Question 3**

Just over half the cohort achieved full marks on this question and less than 8% failed to achieve at least one of the two marks. The most common reason for 1 rather than 2 marks was stating the floodgates argument two different ways, rather than providing a second reason.

**Question 4**

While just under two thirds of the cohort received at least one mark, performance was surprisingly poor on this question given that all that was needed was to state factors from what is a considerably lengthy list. In general discussion of standard and breach was weak right across the paper and centres and tutors may want to further emphasise the importance of this element in future teaching.

**Question 5**

As a relatively large section A mark allocation this question unsurprisingly had mixed performance. Candidates were usually able to name the tests (i.e. “but for” and “reasonable foreseeability”) but tended to be less able to explain them accurately.

**Question 6**

Intended to be one of the easier questions on the paper, question 6 saw good performance but more than a quarter of candidates only named one of the two potential defendants. Anecdotally the vast majority of these answers suggested not reading the question properly, as they defined vicarious liability rather than answering the question asked (and thus getting a mark for saying the employer could be liable for an employee’s wrongdoing).

### **Question 7**

Knowledge of *volenti* was generally good. A small minority confused with *ex turpi*.

### **Question 8**

This was generally very well answered with almost two thirds of candidates achieving full marks.

### **Question 9**

The majority of candidates were unable to name one of the two relevant statutes. Given that these are two of only a handful of Acts mentioned in the unit specification, this is concerning.

## **Section B**

### **Scenario 1**

#### **Question 1**

Both parts of this question were generally answered relatively well, with most candidates familiar with the general reluctance of the courts to hold the police liable in negligence. An encouraging proportion of scripts the Chief Examiner marked showed good knowledge of more recent developments and cases such as Michaels and Robinson. In part (b) the vast majority of answers focused on 'Caparo' three stage liability – tutors and centres should be aware that the incremental approach based on analogy with existing case law should also be taught given the comments of the Supreme Court in Robinson especially.

#### **Question 2**

Candidates tended to be able to explain and apply factual causation but struggled with the issues of legal causation relating to *novus actus*. Anecdotally candidates appear to understand the concept of what a new intervening act is, but are rarely familiar with the important tests (i.e. for third parties, the foreseeability of the act) that actually decide whether a *novus actus* has occurred.

#### **Question 3**

There was a wide range of marks given for both parts of this question, reflecting the depth of knowledge of individual candidates. As is often the case, weaker answers tended to simply set out the legal principles while stronger answers actually applied them to the facts.

### **Scenario 2**

#### **Question 1**

This question was generally answered well. Perhaps the most oft-forgotten point was the need to show that the injury is a medically recognised psychiatric illness. Candidates are also reminded to explain how they reach their conclusion – e.g. *why* someone is or is not a primary victim.

## **Question 2**

Performance was generally good on part (a) with a majority of answers obtaining full marks by listing all or almost all of the Alcock control mechanisms. Weaker answers tended to lose marks by being too vague (e.g. “the claimant must have proximity.” or “they must suffer injury” etc.) or simply displaying inadequate knowledge.

Performance was more mixed on part (b) with a wide range of marks, although the majority did receive at least 50% of the marks and thus a “pass” on the question. Stronger answers methodically applied all of the Alcock criteria, whereas weaker answers tended to focus on just a handful of points and seemed to believe that as long as some criteria were present liability would be established.

The two most common errors in application were: 1) stating that friendship would lead to an automatic presumption of close ties of love and affection; and 2) rather surprisingly, stating that clinical depression is not a recognised psychiatric illness.

## **Question 3**

This was notably the worst performing question in Scenario 2 and from papers the Chief Examiner had sight of (the majority of the cohort) this was in almost all instances due to an overly simplistic approach. Few candidates began with the legal principles of remoteness or explained how the “eggshell skull” rule works under those principles. Instead, the vast majority of answers simply named the rule, limited explanation only to the phrase “you take your victim as you find them” and occasionally cited Smith v Leech Brain as an authority.

## **Question 4**

Generally knowledge of damages was very good, as has historically been the case. As always, a minority confused general with special and vice versa.

## **Scenario 3**

This was the least popular scenario, being answered by less than one in ten candidates with performance generally not as high as the other scenarios. It is recommended that centres and tutors need to focus more on the issues this scenario examined (breach of duty and vicarious liability) as students seem to lack confidence and knowledge on these topics in particular

## **Question 1**

As in the section A question on standard of care, there was a notable lack of knowledge on this question, with the majority of candidates attempting it failing

to obtain a 'pass' mark of >4. The mark scheme was very widely drafted and in many ways this should have been an easy question given even basic knowledge of the factors that decide standard/breach so again, it is concerning that candidates seemed to lack said knowledge.

### **Question 2**

Performance was generally better on this question and most candidates were able to achieve the basic requirements for a pass – essentially citing the multiple test and applying it. However, there was a lack of knowledge of recent case law which should be noted by centres and tutors. It is crucial that those teaching this subject remain current in their knowledge and ensure that recent higher court authority is taught to students. While at level 3 the complexities of this area may be beyond the average student, for almost none of the cohort to seem at all aware of crucial modern principles such as relationships “akin to employment” or the “close connection” test is simply not acceptable. These are the principles that the courts will use and thus they are the principles that candidates should be taught.

### **Question 3**

As above – answers tended to take a 'Salmond' approach (or fail to explain relevant law at all) and very few candidates seemed aware of the concept of the close connection test. This concept has been a fundamental part of vicarious liability for twenty years now!

**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 June 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	Max Marks
Q1	<ul style="list-style-type: none"> <li>• Occupier's Liability Act 1957</li> <li>• Occupier's Liability Act 1984</li> <li>• Consumer Protection Act 1987</li> <li>• Any other relevant example</li> </ul>	1
Q2	<ul style="list-style-type: none"> <li>• The harm</li> <li>• Must be a foreseeable result of the defendant's actions</li> <li>• By a reasonable person in D's position</li> <li>• This is an objective test</li> <li>• Relevant case expanding on this element e.g. <b>Haley v London Electricity Board</b></li> </ul>	3
Q3	<ul style="list-style-type: none"> <li>• Fear of many claims/ "opening the floodgates"</li> <li>• Danger of fraudulent claims</li> <li>• An area best left to Parliament</li> <li>• Difficulty of proving psychiatric harm/evidence</li> <li>• Issues relating to causation</li> <li>• Any other valid consideration</li> </ul>	2
Q4	<ul style="list-style-type: none"> <li>• D has particular skill/ D is a professional</li> <li>• Magnitude of risk</li> <li>• C is child/vulnerable</li> <li>• D is child</li> <li>• D's objective/ "public good"</li> <li>• Cost of avoiding harm</li> <li>Any other relevant factor</li> </ul>	2
Q5	<ul style="list-style-type: none"> <li>• Causation in fact relates to the need for a factual link</li> <li>• Between the tortious act and the harm</li> <li>• Reference a relevant test, e.g. 'but for' test</li> <li>• Causation in law relates to concept of remoteness</li> <li>• Harm must not be too remote from the tort</li> <li>• Reference to relevant test, i.e. "reasonable foreseeability"</li> </ul>	4

Q6	<ul style="list-style-type: none"> <li>• The employer</li> <li>• The employee</li> </ul>	2
Q7	<ul style="list-style-type: none"> <li>• A complete defence</li> <li>• Where C voluntarily/freely accept the risk (1)</li> <li>• With full knowledge of the risk(s)</li> <li>• Relevant case e.g. <b>ICI v Shatwell</b></li> </ul>	2
Q8	<ul style="list-style-type: none"> <li>• Adequate definition of general damages (e.g. “damages which cannot be precisely calculated at time of trial”)</li> <li>• Adequate definition of special damages (e.g. “damages which can be precisely calculated at time of trial”)</li> <li>• Identification of relevant example of each type of damages</li> </ul>	
Q9	<ul style="list-style-type: none"> <li>• Law Reform (Miscellaneous Provisions) Act 1934</li> <li>• Fatal Accidents Act 1976</li> </ul>	1
<b>Total</b>		<b>20 marks</b>

## Section B - Scenario 1

Question Number	Suggested points for responses	Max Marks
Q1(a)	<ul style="list-style-type: none"> <li>Courts traditionally reluctant to extend liability</li> <li>For policy reasons</li> <li>Reference to particular reason e.g. floodgates</li> <li>Reference to case example e.g. <b>Hill v CC of W Yorkshire</b></li> <li>But no blanket immunity</li> <li>Police can be liable if positive act</li> <li>Relevant recent case e.g. <b>Robinson v CC of W Yorkshire</b></li> </ul>	7
Q1(b)	<ul style="list-style-type: none"> <li>PC Carter does not owe B a duty as a matter of course</li> </ul> <p><u>Either</u></p> <ul style="list-style-type: none"> <li>By analogy with existing case law</li> <li>The police can owe a duty to protect a claimant from a danger created by the police themselves</li> <li>Relevant example e.g. <b>Knightly v Johns</b></li> </ul> <p><u>Or</u></p> <ul style="list-style-type: none"> <li>It is reasonably foreseeable that moving the car could cause injury</li> <li>PC Carter has proximity by telling B to move the car</li> <li>Policy grounds are unlikely to prevent liability for a positive act that creates a danger</li> </ul> <ul style="list-style-type: none"> <li>Reasoned conclusion e.g. PC Carter is likely to owe a duty of care.</li> </ul>	5
	<b>Question 1 Total</b>	<b>12 Marks</b>
Q2(a)	<ul style="list-style-type: none"> <li>D must be shown to be the factual cause of C's injuries</li> <li>The usual test is the "but for" test</li> <li>Relevant case e.g. <b>Barnett v Chelsea &amp; Kensington</b></li> <li>But for the negligence of D, would C be injured?</li> </ul>	4
Q2(b)	<ul style="list-style-type: none"> <li>Otherwise known as a <i>novus actus interveniens</i></li> <li>Where an act takes place after the original harm is suffered</li> <li>Usual rule – must be unforeseeable</li> <li>Relevant case e.g. <b>Knightly v Johns</b></li> </ul>	3
Q2(c)	<ul style="list-style-type: none"> <li>"But for" A's negligence, B would not be injured</li> <li>So A is the original cause</li> <li>PC Carter telling B to move her car is unforeseeable/ alternative argument</li> <li>No choice but to comply/ cannot refuse</li> </ul>	6

	<ul style="list-style-type: none"> <li>• So there is likely to be a break/ no break</li> <li>• Therefore PC Carter/A is the operative cause</li> </ul>	
	<b>Question 2 Total</b>	<b>13 Marks</b>
Q3(a)	<ul style="list-style-type: none"> <li>• A partial defence</li> <li>• CN operates to reduce the damages awarded</li> <li>• By a proportionate amount</li> <li>• To reflect fault of claimant/claimant's contribution to injury</li> <li>• Governed by Law Reform (Contributory Negligence) Act 1945</li> <li>• Here there is no evidence B has contributed to the injury/ reasoned argument to the contrary</li> <li>• And/or that B was acting under PC Carter's orders and thus as the reasonable person would</li> <li>• Therefore defence unlikely to apply/ reasoned argument to the contrary</li> </ul>	7
Q3(b)	<ul style="list-style-type: none"> <li>• Bella must bring her claim within the limitation period</li> <li>• Under Limitation Act 1980</li> <li>• Section 11</li> <li>• The relevant period for a personal injury claim</li> <li>• Is 3 years</li> <li>• From the date of accident/knowledge</li> <li>• The period is likely to expire next month</li> <li>• At which point her claim will be "statute-barred"/ limitation will prevent a claim</li> </ul>	8
	<b>Question 3 Total</b>	<b>15 Marks</b>
<b>Scenario 1 Total</b>		<b>40 Marks</b>

## Section B - Scenario 2

Question Number	Suggested points for responses	Max Marks
Q1(a)	<ul style="list-style-type: none"> <li>• A “primary” victim is one to whom physical injury is foreseeable</li> <li>• I.e. is in the “zone of danger”</li> <li>• Relevant case e.g. <b>Page v Smith</b></li> <li>• And has a medically recognised psychiatric injury</li> </ul>	4
Q1(b)	<ul style="list-style-type: none"> <li>• H is physically injured/ had to run through flames</li> <li>• So clearly foreseeable/ in zone of danger</li> <li>• PTSD is medically recognised</li> <li>• Therefore can claim as a primary victim</li> </ul>	4
Q1(c)	<ul style="list-style-type: none"> <li>• Physical injury does not seem foreseeable/ I is not in the zone of danger</li> <li>• Because he is kept back from the fire/ is not in the building</li> <li>• Therefore cannot claim as a primary victim</li> </ul>	3
	<b>Question 1 Total</b>	<b>11 marks</b>
Q2(a)	<ul style="list-style-type: none"> <li>• A “secondary” victim must meet the “control mechanisms”</li> <li>• Established in <b>Alcock v CC of S Yorkshire</b></li> <li>• Proximity in space and time to the event</li> <li>• Or the immediate aftermath</li> <li>• Proximity of relationship/ close ties of love and affection</li> <li>• Witnesses the accident with own unaided senses</li> <li>• Suffers sudden shock</li> <li>• And has a medically recognised psychiatric injury</li> </ul>	6
Q2(b)	<ul style="list-style-type: none"> <li>• Isaac has physical proximity</li> <li>• As he is outside and sees Holly being treated</li> <li>• So he witnesses the immediate aftermath</li> <li>• Relevant case on proximity/aftermath e.g. <b>McLoughlin v O’Brien</b></li> <li>• He experiences this with his own senses</li> <li>• And is likely a sudden shock/ will need to show sudden shock</li> <li>• He does not have a relationship with H that will be presumed to be of love and affection/ he will need to prove close ties</li> <li>• Depression is a recognised condition</li> <li>• But psychiatric injury would need to be foreseeable in a person of reasonable fortitude</li> <li>• Reasoned conclusion, e.g. Isaac may claim as a secondary victim if he can show above</li> </ul>	8
	<b>Question 2 Total</b>	<b>14 Marks</b>

Q3	<ul style="list-style-type: none"> <li>• Causation in law must be shown/ the damage must not be too remote from the breach</li> <li>• The general test is that of reasonable foreseeability</li> <li>• Relevant case e.g. <b>Wagon Mound (No 1)</b></li> <li>• It is the type of harm that must be foreseen</li> <li>• Not the extent of the harm</li> <li>• So as long as some injury is foreseeable the fact it is worse for a given person is irrelevant</li> <li>• This is known as the egg-shell/thin skull rule</li> <li>• Relevant case e.g. <b>Smith v Leech Brain</b></li> <li>• Reasoned conclusion e.g. K can claim for full extent</li> </ul>	7
	<b>Question 3 Total</b>	<b>7 Marks</b>
Q4	<ul style="list-style-type: none"> <li>• Correct explanation of/ heading above accurate examples of special damages</li> <li>• Any cost of medical treatment/prescriptions etc.</li> <li>• Transport costs to/from hospital/physio etc.</li> <li>• Personal property damaged in the accident, e.g. laptop</li> <li>• Course fees/ cost of deferring a year's study</li> <li>• Correct explanation of/ heading above accurate examples of general damages</li> <li>• Pain and suffering</li> <li>• Loss of amenity</li> <li>• Particularly due to the facial scarring</li> <li>• Any other valid response</li> </ul>	8
	<b>Question 4 Total</b>	<b>8 Marks</b>
<b>Scenario 2 Total</b>		<b>40 Marks</b>

### Section B - Scenario 3

Question Number	Suggested points for responses	Max Marks
Q1(a)	<ul style="list-style-type: none"> <li>• General standard of reasonableness</li> <li>• An objective standard</li> <li>• Therefore inexperience is irrelevant</li> <li>• Relevant case e.g. <b>Nettleship v Weston</b></li> <li>• Where D is professional/exercising special skill</li> <li>• Higher standard is expected</li> <li>• Relevant case e.g. <b>Bolam v Friern Hospital</b></li> <li>• Greater the risk of harm, higher the standard</li> <li>• Relevant case e.g. <b>Bolton v Stone</b></li> <li>• Lower the cost of avoiding harm, higher the standard</li> <li>• Relevant case e.g. <b>Latimer v AEC</b></li> <li>• Any other relevant factor e.g. C vulnerable as beginner</li> <li>• Case to support any other factor e.g. <b>Paris v Stepney by analogy</b></li> <li>• Reasoned conclusion e.g. likely to be a high standard expected</li> </ul>	9
Q1(b)	<ul style="list-style-type: none"> <li>• P will be judged by standard of the reasonable professional instructor</li> <li>• There is a high risk of harm</li> <li>• Because this is an inherently dangerous activity</li> <li>• The cost of avoiding is essentially zero</li> <li>• Because all that is required is supervision</li> <li>• R is a beginner so the reasonable instructor would supervise her</li> <li>• P has failed to supervise her</li> <li>• Therefore P is likely to be in breach of her duty</li> </ul>	5
	<b>Question 1 Total</b>	<b>14 marks</b>
Q2(a)	<ul style="list-style-type: none"> <li>• Recognition that multiple test is test used today</li> <li>• Explanation of multiple test</li> <li>• Relevant case e.g. <b>Ready Mixed Concrete</b></li> <li>• May also be liable where relationship is “akin to employment”</li> <li>• Relevant case e.g. <b>Christian Brothers case</b></li> </ul>	5
Q2(b)	<p><b>Application – in favour:</b></p> <ul style="list-style-type: none"> <li>• Must wear uniform</li> <li>• Some form of remuneration</li> <li>• Element of control over what she does</li> </ul>	9

	<p><b>Application – against:</b></p> <ul style="list-style-type: none"> <li>• Not paid a salary</li> <li>• Must pay own taxes/NI</li> <li>• Choice as to when to work</li> <li>• Insufficient mutuality of obligation</li> <li>• Does not appear to be integrated into organisation</li> </ul> <p><b>Akin to employment</b></p> <ul style="list-style-type: none"> <li>• No need for employment contract for liability</li> <li>• Policy factor: KSC has more means to compensate</li> <li>• Policy factor: KSC carrying out a business activity</li> <li>• Policy factor: P to some extent under control of KSC</li> <li>• Relevant case e.g. <b>Cox v Ministry of Justice</b></li> <li>• However <b>Supreme Court decision in Various Claimants v Barclays</b></li> <li>• May mean that liability is contracting/ less likely</li> </ul> <p><b>Conclusion</b></p> <ul style="list-style-type: none"> <li>• Reasoned conclusion either way</li> </ul>	
	<b>Question 2 Total</b>	<b>14 Marks</b>
Q3(a)	<ul style="list-style-type: none"> <li>• Traditional test – doing an authorised act</li> <li>• Includes if doing in unauthorised manner</li> <li>• But not a “frolic of one’s own”</li> <li>• Relevant case on this e.g. <b>Rose v Plenty</b></li> <li>• Modern test – close connection</li> <li>• Relevant case on this test e.g. <b>Mohamud v Morrison</b></li> <li>• An increasingly broad approach to this</li> <li>• Relevant recent case e.g. <b>Bellman v Northampton Recruitment</b></li> <li>• However <b>Supreme Court decision in Various Claimants v Morrison</b></li> <li>• May mean that liability is contracting/ less likely</li> </ul>	8
Q3(b)	<ul style="list-style-type: none"> <li>• S is authorised to perform first aid</li> <li>• Is doing this in an unauthorised manner</li> <li>• And/or a close connection with her work as ski instructor</li> <li>• This is not a frolic of her own</li> <li>• Reasoned conclusion</li> </ul>	4

	<b>Question 3 Total</b>	<b>12 Marks</b>
	<b>Scenario 3 Total</b>	<b>40 Marks</b>