

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JUNE 2021
LEVEL 6 – UNIT 13 - 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

Several previous Examiner Reports had advised centres, tutors and candidates about the changes in the development of the law of tort. However, for several exam series, many candidates still referred to the previous precedents.

In this paper, those that discussed the cases of Donoghue and Caparo when discussing the application of the duty of care rules were in the minority. The vast majority of candidates showed a good understanding of the developments in this area and presented an excellent analysis of the court's modern approach and mindset.

Centres are advised to continue to emphasise this point when teaching this unit and its application ensuring candidates make a special effort when studying this area to, not only understand any changes such as these, but also the reasoning for them. Candidates must explain that 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 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. A better idea for conclusions is to save some information relating to the points that have been raised in order to conclude and directly answer the question whilst gaining points for 'fresh' facts/arguments, such as recommendations for any reforms.

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.

For example, in the essay based on the emergency services owing the public a duty of care, many candidates showed good understanding of the law and relevant cases. However, those that could not discuss the reasoning behind the court's decisions in relation to these public bodies, are unable able to gain almost half of the mark available.

There was an element in many of the entries of a pre-revised template. This is not advised due to candidates finding it difficult to then adapt their 'scripted essay' to the particular focus of the question in the exam.

Learners are advised to understand the general elements, be able to discuss a minimum of 3-4 issues relating to an area of law and be ready to discuss those concerns, criticisms, reforms etc, whilst directly addressing the wording of the specific question posed on the day of the examination.

Candidates should be prepared for varying topics from the specification to be combined.

When candidates use case law in essays, it is important that the reasoning for the inclusion of the case is included, for example, how does the case support the candidate address or illustrate a question/point? Many candidates simply inserted case names. Whilst this shows knowledge it does nothing to indicate understanding of the role of the case in meeting the requirements of the specific question that has been asked. Developing an answer to show why a particular case has been used is vital.

Candidates should be advised to read very carefully what is required of them whether in an essay or problem question. Issues 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. In this session there were many entries that had information duplicated between (a) and (b), whereas, if both parts of the question had been

looked at before beginning the answer, this information could have been separated accordingly and saved the candidate a lot of wasted time and effort. The information will only be expected from a candidate once and likewise, can only be credited the once.

There was a distinct lack of the use of IRAC for problem questions. This structured approach is strongly advised for candidates to be sure that they are covering all required elements to a scenario and applying those elements in full.

When working through a scenario, candidates should be more willing to discuss alternatives outcomes, along with their reasoning. For example, on the issue of the aftermath for questions involving psychiatric harm, there is enough cases that could be used in order to debate whether this element is satisfied or not. In scenario's where there is any 'grey areas', in which it is not clear whether an element has been established, it is perfectly acceptable to include in an answer the reasons as to why an element may be satisfied and then to raise alternative arguments to the contrary. In fact, this is advised for the candidate to show greater understanding of the application of the law in these types of cases, in which discretion is a necessity and to avoid an incorrect answer.

In every session there are incomplete entries and comments have often been made in Examiners' Reports advising candidates to take care when allocating time to each question. This year the number of incomplete entries was very low. An alternative to not attempting a question due to time restraints, is to outline or bullet-point the information as, this way, there is the opportunity to gain some credit for basic knowledge rather than missing out altogether.

Only a couple of entries attempted more questions than is required and so candidates are advised to take a few minutes before they begin to run through the exams instructions and to pre-read the questions before attempting them. This may feel time-consuming but will prevent many common errors and so, ultimately, is a key time-saver and point-gainer.

SECTION A

Question 1 (Vicarious Liability)

This was one of the most popular essay questions. For those candidates that received poor grades for this question, this was due to them only discussing the law in this area in general and provided little in the way of focus and analysis on the requirements of the question.

Candidates were asked to assess the requirements, however, many candidates either did not do this at all, or merely referred to this focus in a sentence or two.

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

There was virtually no discussion of modern employment circumstances, with candidates seemingly relying on stereotypical, almost template-like lists of points and cases. Only a couple of candidates mentioned any modern cases such as Hawley v Luminar Leisure Ltd (2006) and Barclays v Various Claimants (2020).

This question was split between the requirements of there being a relationship of employment and those establishing that an employee was in the course of employment. This is one of the questions that contained a lot of duplication in the information provided within (a) and (b). Candidates are advised to check over all questions prior to planning what section requires which information.

Question 2 (Standard of Care)

Many answers contained much of the case law involved when courts are assessing whether a duty of care has been breached as opposed to establishing a standard.

The wording and focus of the question must be a key driver when a candidate is planning the information they will use in their answer. As mentioned above, candidates must be prepared to adapt their knowledge to provide a discussion that is aimed at the 'angle' put forward by the question.

This question required the candidate to describe whether the rules used are flexible, however, only a few candidates were able to directly address this aspect of the rules, avoiding an answer with only generalised knowledge.

Many candidates raised the typical cases such as Nettleship and the issues surrounding professionals. However, there were not many answers that contained discussion of the standard of care being lowered, for example, cases involving rescuers and sporting activities.

Question 3 (Occupiers' Liability)

This was a very popular question. Many of the answers to this essay question showed a good understanding of the 1957 Act but hardly any provided an analysis as to whether these rules resulted in a just outcome.

Answers based on the 1984 Act were less satisfactory. When discussing this Act, there is ample opportunity to discuss fairness due to liability being imposed on occupiers despite the claimant being unlawfully on their premises. This opportunity was missed by many as was the issues of obvious risks and those willingly accepting a risk. This issue was evident when candidates were discussing either of the Acts.

This topic is a common example of one in which candidates generally can show great knowledge of the rules and fair knowledge of case law. However, as mentioned throughout, centres and candidates must be aware of issues attached to areas/Acts and be able to discuss the judicial mindset behind their application. When using case law, it is imperative that a candidate includes reasoning as to why they included a particular case and how it relates to the question at hand.

Question 4 (Duty of Care and Emergency Services)

This was one of the most answered essay questions. Many candidates showed a good understanding of the law relating to whether those working for the emergency services owe a duty of care to the public.

Most answers used the correct and modern case law and were able to discuss the approach taken by the courts. Many answers contained a discussion relating to whether the police would be liable dependent on whether they had committed a positive act or whether the harm had been caused by an omission. The facts of these modern cases were also quite well known and discussed.

Answers on the duty imposed upon the ambulance and fire service were relatively brief in comparison to those of the police. Many incorrectly discussed the case of Kent, citing the fact that the call had been logged as opposed to being accepted.

Overall, candidates appear to be up to date with the current law and approach on this issue and so my recommendation would be for this to be extended in terms of the ambulance and fire service.

SECTION B

Question 1 (Employers' Liability)

This question was a popular choice with candidates and for the most part was answered well.

Many candidates did well at identifying the law in relation to the various incidents and a good attempt at the use of relevant case law was attempted by quite a few.

It was noted that there was a lack of knowledge of the special rules that are applied when the case is one involving mesothelioma.

Question 2 (Psychiatric Harm)

This was an extremely popular choice, and most candidates were easily able to discuss the law in relation to what a claimant would need to establish to bring a successful claim.

Most candidates were able to distinguish whether a claimant was a primary or secondary victim but many of the answers merely contained a lot of information about the rules that are to be applied when a court is determining the status of a particular claimant.

Few candidates recognised that if a claimant is a victim due to physical harm but also suffers psychiatric harm, that only the rules on remoteness need to be considered and that the claimant is not subjected to the normal rules.

Too many assumed each medical 'condition' that was mentioned was sufficient for this type of claim, without providing a discussion that highlighted if there may be potential doubt as to the severity of the condition.

This was mostly evident for discussions relating to the immediate aftermath element of a psychiatric harm case. Many candidates did not raise relevant case law or sufficient levels of discussion as to whether or not this element had been satisfied. Many candidates feel the need to be unnecessarily definitive in their statements, whereas, in legal scenarios such as these, the candidate is going to inevitably be faced with questions that they either do not have the answer to, or do not have all the information with which to provide a full answer. This is when a candidate is expected to discuss alternative outcomes to fully show understanding of the contextual application of legal rules.

Many candidates incorrectly discussed the issues relating to when a claimant has been exposed to psychiatric harm via a live broadcast. The proper approach is that if the broadcast shows identifiable individuals suffering harm, then this will be considered an intervening act.

Question 3 (Trespass to the Person)

This was a popular problem question and candidates showed good general knowledge of the law. However, much of the application was superficial and was not backed with authority.

The most common issue identified with this problem question was the lack of comprehensive coverage answers as many candidates did not cover all potential issues available.

Few discussed any potential justification for the detention of the claimants, and again, this reinforces earlier recommendations that candidates must be prepared to discuss potential alternatives. They do not have to choose an outcome and 'be judge and jury' as such, but rather provide a discussion as to any potential outcome based on the facts (or, sometimes, more importantly, the lack of facts). Few also discussed the citizen's arrest angle for this question.

It is for this reason that this question was the least well-handled.

Question 4 (Medical Negligence and Damages)

This was one of the most popular problem questions and whilst it was answered very well by most candidates, it was very often without authority.

Candidates performed generally well with issues of consent, such as identifying whether it would be considered valid but not many candidates used a range or modern cases such as the case of Montgomery v Lanarkshire Health Board to support their statements.

Virtually all candidates were able to identify and discuss the heads of claim and provided good answers that identified the key elements the claimant would be compensated for.

Many of these answers, however, were badly structured. Candidates should take time identifying and allocating each part of the information required and ensure that it is logically applied alongside the rules and presented in a coherent structure.

**SUGGESTED POINTS FOR RESPONSES
LEVEL 6 – UNIT 13 - 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(a)	<p>An answer which consists of reasoned assessment, breaking down the issue into sections and highlighting those of higher importance/relevance. There should be a conclusion which indicates merits and flaws and is supported with evidence where appropriate</p> <p>General discussion of rules, for example</p> <ul style="list-style-type: none"> • Principle results in an employer being liable for torts committed by employees if committed during the course of employment • Requires relationship of employment rather than employer-contractor relationship • Requires a close connection between the relationship of employment and the tort committed • Tort must be committed in the course of employment • Relevant test originated from <u>Salmond</u> (1907) and included consideration as to whether wrongful act was unauthorised mode of doing something authorised by the employer • For cases involving intentional serious wrongdoing by an employer, test formulated in <u>Lister v Hesley Hall</u> [2001] • Underlying moral and practical justifications of vicarious liability i.e. deterrence, compensation and enterprise risk • Enterprise risk is a risk arising from the delegation of tasks to staff as part of the activities of the enterprise, that would not exist otherwise - see recent development in <u>Various Claimants v Morrison</u> [2020] - close connection to tasks and consideration of motive 	12

	<ul style="list-style-type: none"> • Organisations are strictly liable even though they may have made every effort to recruit, train and supervise their employees • Promotes recovery of damages • Organisations better resourced to meet claims • Organisations can spread the losses by raising the prices of goods and/or services and taking out insurance • Unrealistic and unworkable to expect individual employees to insure themselves • Encourages organisations to raise operational standards, for example, the proper training and supervision of staff 	
Q1(b)	<p>An answer which consists of reasoned assessment, breaking down the issue into sections and highlighting those of higher importance/relevance. There should be a conclusion which indicates merits and flaws and is supported with evidence where appropriate</p> <p>Discussion of the development of the doctrine</p> <ul style="list-style-type: none"> • Widening of concept of course of employment to cover intentional acts closely connected with work duties • Modern extension re: relationships akin to employment • Widened liability to cover situations involving dual liability – when an employer is lent to another employer (<u>Viasystems v Thermal Transfer</u> [2005]; <u>Various Claimants v Catholic Child Welfare Society</u> [2015] (Christian Brothers Case)) • Based on level of integration of employee in both organisations • Reflects increasing complexities of businesses in a modern world • Liability extended to relationships akin to employment, for example, agency workers and those on zero-hour contracts (Christian Brothers) • Test for relationships akin to employment refined in <u>Cox v MoJ</u> [2016] – three-part test • Scope widened in cases involving serious wrongdoing by an employee in <u>Mohamud v Morrisons</u> [2016] • Liability extended to public body/local authority for sexual abuse committed by foster parents (<u>Armes v Nottinghamshire CC</u> [2018]) • <u>Various Claimants v Barclays Bank</u> clarification on status of independent contractors; different tasks can result in a different status; facts of a case can override any express agreements between the parties 	13

	<ul style="list-style-type: none"> • Imprecise concepts but flexibility needed due to the wide variety of factual circumstances • Developments have preserved and enhanced ability of victims to recover compensation following incidents arising from modern business activities 	
	Total	25 marks

Question Number	Suggested points for responses	Max Marks
A2	<p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Define elements:</p> <ul style="list-style-type: none"> • Duty involves taking reasonable care • Court uses two-stage test to determine if a duty has been breached: how much care a reasonable person should have taken in the circumstances and whether or not the defendant's conduct fell below that standard • The standard of care to be expected is assessed objectively • The court does not usually take into account personal characteristics of the defendant • For example, inexperienced learner drivers are held to the same standard as a qualified and competent driver (<u>Nettleship v Weston</u> 1971) • For example, junior doctors are held to the same standard as a qualified and competent doctor (<u>Wilsher v Essex HA</u> 1986)) • However, courts do sometimes consider personal characteristics, for example, in relation to children • Children expected to act in the same way as a reasonable child of the same age would act (<u>Orchard v Lee</u> 2009)) • The defendant can escape liability if it was an accidental cause of harm/damage (<u>Mansfield v Weetabix</u> (1998)) • If the defendant is a professional, they will be judged according to their profession's standards, for example, in the cases of Bolam and Bolitho, doctors can claim their actions were standard practice and that a body of medical opinion would have acted in the same way <p>Discuss issues relating to standard of care:</p> <ul style="list-style-type: none"> • As claims do not consider the subjective skill of a defendant, there is a consistent approach • Not considering the subjective skill of a defendant promotes settlements 	25

	<ul style="list-style-type: none"> • The rules attempt to avoid fixing defendants with unrealistic expectations • An objective standard means there would be no breach of duty for failing to take steps to guard against risks which could not reasonably have been foreseen, for example, <u>Roe v Ministry of Health</u> (1954) • Vulnerability of the claimant is a relevant factor eg., <u>Paris v Stepney</u> [1951] • The way in which the courts determine standard results in flexibility, for example, if engaged in risky activities, the standard is increased, whereas, if the defendant was in a situation of sudden danger, the standard of care expected would be lessened as they may act ‘in the spur of the moment’ • Fairness can be achieved due to the social utility of a defendant’s conduct being considered, for example, s1 Compensation Act 2006, Social Action, Responsibility and Heroism Act 2015, and <u>Watt v Hertfordshire CC</u> 1954 in which Denning confirmed that the taking of a risk can be justified (i.e fire brigade) 	
Total	25 marks	

Question Number	Suggested points for responses	Max Marks
Q3	<p>An answer which consists of reasoned assessment, breaking down the issue into sections and highlighting those of higher importance/relevance. There should be a conclusion which indicates merits and flaws and is supported with evidence where appropriate</p> <p>Outline of Occupiers' Liability Act 1957:</p> <ul style="list-style-type: none"> • Common duty owed by occupiers to keep visitors to their premises safe (s2(2)) • Covers lawful visitors – those with express or implied permission • Definition of occupier left to common law (s1(2)) • Occupational control test used in <u>Wheat v Lacon</u> 1966 • Covers claims for personal injury and property damage (s1(3)(b)) • Does not cover liability for dangerous activities voluntarily undertaken by the claimant, for example, Tomlinson • Breach tested objectively under ordinary common law principles – likelihood someone could be injured, seriousness of any injury that might occur (<u>Wagon Mound</u> (1967)), any social value of the activity (Watt) and any preventative measures that were taken (<u>Latimer v AEG</u> (1953)) • Higher standard expected if visitor is a child – they are to be expected to be less careful than adults (s2(3)) • Specialists and contractors are expected to understand and guard against any risks associated with their common calling (S2(3)) • Warnings given by an occupier may result in the duty being discharged (S2(4); <u>Roles v Nathan</u> (1963)) • An occupier does not have to guard against obvious risks, for example, Tomlinson <p>Outline of Occupiers' Liability Act 1984:</p> <ul style="list-style-type: none"> • Covers non-visitors • Requirements to be satisfied before occupier will owe a non-visitor a duty of care – aware of the danger, aware of the possibility of a non-visitor and a reasonable expectation that precautions should have been taken • Only covers claims for personal injury and not for property damage (s1(8)) 	25

Discussion of elements governing claims against occupiers:

- Case laws role in limiting scope of statutory rules to protect occupiers from unfair claims
- Both Acts cover dangers due to defective state of the occupier's premises, and also dangers arising due to things (e.g. activities) the occupier permits to take place on his premises
- However, accidents resulting from dangerous activities voluntarily carried out by persons of full capacity not covered eg, Tomlinson v Congleton Borough Council (2003)
- Further application of principle resulting in prevention of unjust claims seen in line of other cases e.g., Keown v Coventry Healthcare NHS Trust (2006) and Poppleton v Portsmouth Youth Activities (2008)
- In assessing breach of duty, ordinary common law principles apply such as likelihood, seriousness, social utility and cost of preventative measures eg., Latimer v AEC (1953)
- Both statutes contain specific provisions relevant in assessing standard of care and whether it has been discharged, eg., s2(3)(a) OLA 1957 requires higher standards of care re: child visitors
- Principle limited in Phipps v Rochester Corporation (1955) to prevent transfer of parental responsibility; occupiers entitled to assume that young children are accompanied by a responsible adult when visiting their premises
- S2(3)(b) OLA 1957 also allows occupiers to assume that specialists, such as contractors, will recognise and guard against risks commonly associated with their jobs whilst visiting premises (e.g. Roles v Nathan (1963))
- Similarly, s.2(4)(a) of the 1957 Act acknowledges that a warning provided by or on behalf of the occupier may discharge the duty of care, provided the warning is enough to enable the visitor to avoid the risk (see also s.1(5) OLA 1984)
- Courts confirm that the need to provide a warning does not apply in relation to risks which ought to be obvious to the visitor (Tomlinson)
- For example, in Darby v National Trust (2001) the Trust were not in breach of any duty for failing to provide warning signs discouraging persons from swimming in a pond
- Therefore, whilst the Acts apply to a wide range of accident situations occurring on another person's

	premises, legislation is reasonably circumscribed, and courts interpret provisions sensibly so as to prevent unfair claims against occupiers	
Total		25 marks

Question Number	Suggested points for responses	Max Marks
Q4	<p>An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against</p> <p>The Police Service</p> <ul style="list-style-type: none"> • Police subject to the same liability in negligence as private individuals and bodies (<u>Robinson v CC West Yorkshire Police</u> (2018)) and so have no specific 'immunity' • Distinction between positive acts of carelessness creating foreseeable risk of personal injury and pure omissions • Discussion of positive act cases e.g. <u>Robinson, Rigby v CC Northamptonshire</u> (1985) and <u>Alcock v CC South Yorkshire</u> (1991) • Discussion of cases involving pure omissions i.e. no duty to protect individuals from a danger not created by police, including injuries caused by third parties such as criminals e.g. <u>Hill v Chief Constable of West Yorkshire</u> (1989), <u>Smith v CC Sussex Police</u> (2008) and <u>Michael v CC South Wales</u> (2015) • Exceptional liability for omissions where police specifically assumed responsibility for an individual's safety e.g. <u>An Informer v A Chief Constable</u> (2012) and <u>Swinney v CC Northumbria</u> (1997) or where the police created the danger in the first place e.g., <u>AG for the British Virgin Islands v Hartwell</u> (2004) • Discussion of policy reasons for lack of duty in cases of domestic violence involving close proximity where the police were in a position to help, and criticism of this position e.g., Lord Toulson vs Lord Kerr/Lady Hale in <u>Michael</u> • Possible discussion of contrasting human rights/public law position e.g., Arts 2 & 3 ECHR <p>The Fire Service</p> <ul style="list-style-type: none"> • Explanation that the same act/pure omission distinction applies as per the police service • Fire brigade only liable if they respond to an emergency call and, through a positive act of carelessness, make the claimant's position worse than if they fail to attend at all e.g., <u>Capital & Counties Bank plc v Hampshire CC</u> (19) 	25

	<p>The Ambulance Service</p> <ul style="list-style-type: none"> • Explanation that the 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 e.g., <u>Kent v Griffiths</u> (2000) • Discussion of policy reasons for this anomalous position 	
Total		25 marks

Section B

Question Number	Suggested points for responses	Max Marks
Q1	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications</p> <p>Explanation of the law in this area :</p> <ul style="list-style-type: none"> • Employers' owe long-established duty to take reasonable care so as not to expose employee's to unnecessary risks • Duty includes an obligation to provide competent staff, adequate materials and a safe system of work (<u>Wilson & Clyde Coal v England</u> (1937)) • Duty is personal and non-delegable (<u>McDermid v Nash Dredging & Reclamation Co</u> (1987)) meaning employers cannot discharge their responsibilities by delegating performance of the duty to another employer or contractor, even if they reasonably believe them to be competent to perform the role • Employer must not only provide equipment, but a safe system of work must be devised and implemented • <u>Pape v Cumbria CC</u> (1992) it was not enough for a cleaning lady, who worked with detergents and chemical cleaning products, to be supplied with rubber gloves – Council were also expected to instruct the cleaner as to the importance of wearing the gloves and to establish a system of supervision to ensure compliance • <u>Clifford v Charles Challen & Son</u> (1951) - safe system of working requires protective equipment to be made 	25

available at the place it was needed together with supervision to ensure employees used the equipment

- Denning in Clifford stated that workers undertaking routine tasks are often heedless for their own safety, may become careless and must be supervised to ensure that slackness is not tolerated
- Woods v Durable Suites Ltd (1953) – court distinguished their earlier decision in Clifford by holding that any duty owed by an employer did not extend to providing a supervisor, constantly watching, to ensure a workman of full age and experience followed instructions in the use of readily available protective equipment
- Causation discussed – factual causation using but for test (Barnett v Chelsea and Kensington Hospital (1968)) and legal causation (Bonnington Castings v Wardlaw (1956))
- How damages can be apportioned – eg., Fairchild doctrine (Fairchild v Glenhaven (2003)); Holtby v Brigham and Cowan (2000); and, Barker v Corus (2006)
- Issues relating to breach, such as, cost of prevention (eg., Latimer v AEC (1953)) and social utility (eg., Watt v Hertfordshire CC (1954))
- Cases involving practical jokes, for example, Hudson v Ridge Manufacturing Co Ltd (1957); Smith v Crossley Bros. (1951); and, Graham v Commercial Bodyworks Ltd (2015)
- Possible defences, such as, contributory negligence – s1(1) Law Reform (Contributory Negligence) Act 1945; s3 Compensation Act 2006 re: mesothelioma

Application of the facts:

Ben:

- Discussion of damages being apportioned between previous employers and assessing impact of periods of self-employment
- Nature of illness important
- Cumulative conditions such as asbestosis, where repeated exposure increases the severity of the symptoms, may enable the court to find a casual link on the basis that KAR's breach materially contributed towards the employee's illness (Bonnington)
- In such a case, the employer's liability to pay damages would be apportioned according to the extent to which the breach contributed (Holtby)
- If employee had suffered a condition where the precise timing of the trigger cannot be determined by medical science the position is different

- Starting-point is to assess likelihood of the cancer having been triggered by reference to the level and duration of exposure throughout each period of employment
- If, on the balance of probabilities, this was likely to have occurred during employment with the D, the employer will be fully liable for the cancer – the but for test will be satisfied
- If this cannot be established, a court would be likely to hold the employer liable on proof that its breach materially increased the risk of injury, as there are exceptional policy grounds for relaxing the but for test to achieve corrective justice against employer's in such cases (Fairchild)
- Fairchild doctrine – may apply here as employee suffered harm from single factor – regular exposure – but there were multiple possible sources given the employees different periods of employment
- Employee contracted mesothelioma so he would be entitled to recover full losses from any one of his employer's – s3 Compensation Act 2006
- If Fairchild doctrine applies to this employee's circumstances, he will only be entitled to damages apportioned according to the probability that the illness was triggered during most recent employment (Barker)
- Defence of contributory negligence for periods of self-employment will only operate if the employer can prove that this failure caused or materially contributed towards the harm caused, for example, Owens v Brimmell (1977)
- Discussion of employee's complacency giving rise to possible contributory negligence defence
- Employees' failure to observe safety procedures appears to be known of and given the high risks association with asbestos, it is possible that a lack of supervision will place the employer in breach of the high standard of care owed to the employee

Collins:

- Employer owed employee duty of care to provide adequate plant and equipment
- A lack of supervision will place the employer in breach of the high standard of care owed to the employee
- Includes duty to properly inspect and maintain equipment
- In view of likelihood and seriousness of potential injuries arising from this type of incident and the cost and ease which the accident might have been prevented, it's likely the employer will be in breach of their duty

	<ul style="list-style-type: none"> • No issues concerning causation or remoteness arise • Employer may argue that the employee omitted to take reasonable care for their own safety in failing to identify the issue/request, and their damages could be reduced on a finding of contributory negligence • Unlikely outcome, due to the inexperience of the employee <p>Ellie:</p> <ul style="list-style-type: none"> • Employer’s duty to provide competent staff may, in certain circumstances, extend to disciplining or dismissing employees who do not attain adequate standards despite training and supervision • Question of whether employer was in breach of their duty will depend on whether it had reason to expect that such a situation might arise • Employer’s unlikely to be liable if it was a single, unpredictable incident, eg., <u>Smith v Crossley Bros. (1951)</u> and <u>Graham v Commercial Bodyworks Ltd (2015)</u> • Facts state that the employee was a known practical joker who had previously put fellow employee’s in danger (Hudson v Ridge Manufacturing Co Ltd (1957)) • Employer, therefore, likely to face liability 	
Total		25 marks

Question Number	Suggested points for responses	Max Marks
Q2	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications</p> <p>Discussion of relevant rules:</p> <ul style="list-style-type: none"> • Alcock (1991), <u>Page v Smith</u> (1995) and <u>White v Chief Constable of South Yorkshire</u> (1999) • Distinction between physical and psychiatric harm • Distinction between primary and secondary victims • Primary is personally endangered or reasonably believes themselves to be • Secondary is neither personally endangered nor reasonably believe themselves to be • Primary victims need only prove physical harm was foreseeable (Page) • Must be foreseeable in person of reasonable fortitude (White) • Secondary victim must meet the criteria set out in Alcock • Must hear or see the incident with their own senses • Must have close tie of love and affection with a victim • Must have been at the incident or the immediate aftermath • Must have suffered psychiatric harm due to a sudden shock • Denning in <u>Hinz v Berry</u> {1970} - cannot be mere feelings of grief, sorrow, worry, financial strain etc – must be recognisable form of psychiatric harm (nervous shock) • Will still be considered the immediate aftermath so long as the scene has not been cleaned up (<u>Galli-Atkinson v Seghal</u> 2003)) <p>Application of the facts:</p> <p>Frank:</p> <ul style="list-style-type: none"> • Primary victim as was passenger on train • Unable to work and suffers clinical depression – psychological harm but no need to prove <p>Harry:</p> <ul style="list-style-type: none"> • Secondary victim – facts state he was not in danger • Criteria in Alcock must be satisfied – recognised condition, own senses, time and space satisfied but no close tie of love and affection 	25

	<p>Jamal's Dad:</p> <ul style="list-style-type: none"> • Arrived at hospital so not primary victim • Criteria in Alcock must be satisfied • Discussion of whether insomnia sufficient medical condition • Discussion relating to close tie of love and affection but was not present at the time of the event or its immediate aftermath and did not hear with own sense • Discussion of timing of immediate aftermath – Jamal was still in emergency room covered in blood <p>Lisa:</p> <ul style="list-style-type: none"> • Saw event on TV so not primary victim • Criteria in Alcock must be satisfied – discussion as to whether she could rebut the presumption to claim a close tie of love and affection; was not at the scene so did not witness the event or its immediate aftermath and did not witness the event with her own senses despite viewing live 	
Total		25 marks

Question Number	Suggested points for responses	Max Marks
Q3	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications</p> <p>Application of the facts:</p> <p>Michael and Noman v Mr Owen/School – locked in classroom:</p> <ul style="list-style-type: none"> • Potential claim for false imprisonment • False imprisonment is the infliction of bodily restraint which is not expressly or impliedly authorised by law • Actionable per se i.e. without need to prove the claimant suffered any harm • Discussion of impact on their lack of awareness of being locked in – do not need to be aware but damages will be nominal <p>Michael and Noman v Mr Owen/School – locked in headteacher's office:</p> <ul style="list-style-type: none"> • Potential claim for false imprisonment • Discussion of impact on the fact that there is another means of escape – another, unlocked, door was present, but, the claimants did not attempt to open it <p>Noman v Michael – threat outside the store:</p> <ul style="list-style-type: none"> • Potential claim for assault • Discussion relating to threat being negated <p>Paul v Michael – grabbing and threatening the guard:</p> <ul style="list-style-type: none"> • Threat towards the guard is potentially an assault • Assault is the deliberate act of the defendant which causes the claimant to reasonably apprehend the infliction of battery on them • Potential argument based on negated assault “<i>If</i> you don't let me go.....” • Grabbing of the guard's coat is potentially battery • Battery is the unlawful/unjustified intentional and direct application of force to an individual • Actionable per se i.e., without need to prove the claimant suffered any harm 	25

	<p>Michael v Paul – locked in store office:</p> <ul style="list-style-type: none"> • Potential claim for false imprisonment • Discussion of ability of guard to be able to hold the claimant under the circumstances under the defence of authority • If the person being falsely imprisoned was being restrained by a legal authority or if the person restraining them was doing so through their legal duty, this would be a full defence • This may apply, for example, if a person was caught shoplifting and detained by a security guard waiting for the police to arrive 	
Total		25 marks

Question Number	Suggested points for responses	Max Marks
Q4(a)	<p>An explanation which clarifies the situation with a detailed account of how and why it has occurred. It should make complex procedures or sequences of events easy to understand and define key terms where appropriate.</p> <p>Explain the rules in relation to medical negligence:</p> <ul style="list-style-type: none"> • <u>Montgomery v Lanarkshire Health Board</u> (2015) – court departed from Sidaway/Bolam test and confirmed doctrine of informed consent • Doctors must now take reasonable care to ensure adults of sound mind are aware of any material risks associated with both recommended and reasonable alternative treatments • Doctors must communicate in understandable terms and not just convey the information in consent forms • What is material and therefore disclosable will depend on facts on each case • Information considered disclosable would include all risks that the actual patient and any reasonable person in the patients’ position would be likely to attach significance to • Only permitted exception is necessity, for example, if the patient is unconscious • Exception could include, for example where a doctor reasonably considers that disclosure of information would seriously damage the patient’s health (the therapeutic exception) • Priority now accorded to patient autonomy (eg., <u>Chester v Afshar</u> (2004)) 	15

	<p><u>Samira:</u></p> <ul style="list-style-type: none"> • Discussion of liability not being established due to her actions not being voluntary • Discussion of liability being established due to her prior knowledge of the possibility of the condition reoccurring <p><u>Professor Thomas/Hospital Trust:</u></p> <ul style="list-style-type: none"> • Discussion of liability for those risks not disclosed • Discussion of liability for those risks explained not clearly • Discussion of liability for those risks the doctor chose not to disclose in the best interests of the patient • Ability of claimant to claim for loss of earnings, loss of amenities and pain and suffering • Only the claimant and not their partner can claim for their on-going medical care costs and the claim would be capped to the full commercial rate for employing a professional carer (<u>Housecroft v Burnett (1986)</u>) 	
Q4(b)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications</p> <p>General discussion of the rules relating to damages:</p> <ul style="list-style-type: none"> • Distinction made between special and general damages • Special damages can be calculated precisely, e.g., pre-trial loss of earnings • General damages cannot be precisely calculated, either because they arise after the trial (e.g., future loss of earnings) or because the loss cannot be easily quantified in monetary terms (i.e. non-pecuniary loss) e.g., pain, suffering and loss of amenity • Further distinction made between pecuniary losses which have an intrinsic monetary value e.g., loss of earnings, and non-pecuniary losses, which do not • Losses further broken down into a number of 'heads' of damages under which separate awards are calculated • Special damages include pre-trial loss of net income • Entitlement to reasonable medical and other expenses incurred before the trial/settlement e.g., therapeutic equipment, adaptation of the home, nursing care and hospital travel • Cost of private medical care is also recoverable, even though NHS treatment is available - s.2(4) Law Reform (Personal Injuries) Act 1948 	10

	<ul style="list-style-type: none"> • The court will take annual loss of earnings as the 'multiplicand' and will multiply the figure by the number of years over which the loss is expected to occur (the 'multiplier') • A reduction in the multiplier is applied using actuarial tables to ensure the claimant is not overcompensated by the 'investment value' of early receipt of a lump sum • The multiplier may also be decreased to reflect any likelihood that the claimant's working life would have been reduced e.g., due to childcare • Conversely, the multiplicand may be increased to reflect likely future salary rises from promotion etc • If the claimant's injury is such that it is likely to reduce their life expectancy, a split multiplicand/multiplier calculation may be adopted for the 'lost years' - <u>Pickett v British Rail Engineering Ltd (1980)</u> • Deductions from any award will be made to prevent double compensation • These include statutory sick pay, and 'hotel' costs whilst she is cared for at public expense e.g., in hospital (s.5 Administration of Justice Act 1982) • Income and disability related benefits received are also subject to 'clawback' from the overall award under Social Security (Recovery of Benefits) Act 1997 • The claimant's future medical and other care-related expenses are calculated in a similar way to future loss of earnings • Annual on-going medical and care costs form the multiplicand • The latter include any third-party service (e.g. cleaning, gardening) that has become necessary: <u>Schneider v Eisovitch (1960)</u> • Non-pecuniary losses claimable as general damages include pain, suffering and loss of amenity, both before and after trial/settlement. These losses are calculated by reference to precedents (making allowances for inflation) and Judicial College tariff guidelines • 'Pain and suffering' is assessed subjectively and will include the increased pain resulting from the surgical injuries and necessary medical treatment as well as anxiety concerning possible deterioration, reduced life expectancy and future medical treatment • Loss of amenity compensates for the loss of enjoyment of life arising from reduced capacity e.g., loss of movement 	
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	<p>Application to facts:</p> <ul style="list-style-type: none">• Loss of earnings• Loss of amenity• Pain and suffering• Issues relating to partner being full-time carer – as some services will be provided by her partner, claim is capped at the full commercial rate for employing a professional carer (<u>Housecroft v Burnett (1986)</u>)	
	Total	25 marks