

**LEVEL 3 - UNIT 5 – LAW OF TORT  
SUGGESTED ANSWERS – JANUARY 2017**

**Note to Candidates and Tutors:**

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2017 examinations. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on student performance in the examination.

**SECTION A**

1. Examples of statutory torts include those contained in:
  - Consumer Protection Act 1987;
  - Occupiers' Liability Act 1957 or 1984; and
  - Animals Act 1971.Any one example of a statutory tort could have been given.
  
2. A good answer would have contained:
  - an explanation of the duty owed to a neighbour (e.g.: to take reasonable care to avoid acts and omissions which one could reasonably foresee might injure one's neighbour); and
  - an explanation of who is one's neighbour (e.g.: someone so closely and directly affected by such act or omission that one ought reasonably to have them in contemplation when directing one's mind to the act or omission in question).The obvious case to have cited is Donoghue v Stevenson (1932).
  
3. The four tests set out in the case of Alcock v Chief Constable of South Yorkshire (1992) are:
  - was there a close relationship of love and affection between the claimant and the primary victim?
  - was there physical proximity between the claimant and the event or its aftermath?
  - did the claimant become aware of the event or its aftermath with his/her own senses? and
  - did the claimant suffer a sudden shock?

4. Factors considered when assessing the standard of care expected of a defendant could include:
  - The claimant's age.
  - The vulnerability of the claimant.
  - Special characteristics of defendant.
  - The importance of the defendant's objective.
  - The cost of avoiding harm.
5. A good answer would have identified the remoteness test from The Wagon Mound (No.1) (1961): the type or kind of injury must be a foreseeable result of the breach of duty.
6. Vicarious liability is the liability of one person for the tort of another and usually applies where an employer is liable for the tort of an employee committed in the course of his or her employment.
7. To establish the defence of consent (*volenti non fit injuria*) the defendant must show that the claimant knew of the risks attached to his or her conduct and that consent to such risks was freely given.
8. If a defendant establishes the defence of contributory negligence damages will be reduced by an appropriate percentage to reflect fault on the part of the claimant.
9. The loss of amenity is classified as general damages.

## SECTION B

### Scenario 1 Questions

1. (a) A description should have been given of:  
foreseeability – e.g.: foreseeability of the risk of harm;  
proximity – e.g.: relationship between the parties;  
just and reasonableness – e.g.: policy.  
A relevant case is Smith v Littlewoods (1987).  
Here, a good answer would have recognised that there is an established duty of care between an employer and an employee, so the three stage test would not be used.
  - (b) A good answer would have identified the reasonable man test and explained that a breach of duty is omitting to do what a reasonable man would do, or doing what he would not do. The test is objective and a relevant case would be Blyth v Birmingham Waterworks Co (1856). A good answer could also have referred to other relevant factors such as the cost of avoiding harm.
  - (c) The appropriate test would be the 'Bolam' test, which requires that someone with a special skill must demonstrate the appropriate level of skill. Therefore, BootifulBirds Ltd should show the level of skill of a reasonable employer with machinery.
  - (d) A reasonable employer would have ensured that the machine was protected by a guard. However, at the time of the accident this was not so. Other relevant factors could also be applied; for example the cost of attaching the guard would not have been high. BootifulBirds Ltd would, therefore, appear to be in breach of its duty of care to Amy.
2. Causation in fact requires the 'but for' test to be satisfied and causation in law requires that the type of injury is reasonably foreseeable. Amy's fingers would not have been crushed were it not for the failure to fit the guard, and BootifulBirds Ltd ought reasonably have foreseen the risk of this type of injury to Amy's fingers. The company is therefore likely to be liable for the crushing injury to Amy's fingers.

A good answer would have gone on to identify that Amy's refusal to have the suggested operation may constitute a break in the chain of causation, being an act of the claimant, and discussed whether or not Amy's refusal to have the operation breaks the chain of causation.

Relevant case law might include Barnett v Chelsea & Kensington HMC (1969) or The Wagon Mound (No.1) (1961).

3. A good answer would have identified the partial defence of contributory negligence and explained that, under the Law Reform (Contributory Negligence) Act 1945, the defendant must be able to show that the harm suffered by the claimant was partly caused by his or her own fault, that the claimant failed to take reasonable care for his or her own safety or put him/herself in a dangerous position. However, the courts are less likely to find contributory negligence where the claimant is an employee of the defendant.

Here, Amy was partly to blame as she had put her hands in the machine without switching it off. However, Amy is also an employee of BootifulBirds Ltd. The court may or may not, therefore, make a finding of contributory

negligence and Amy's damages may or may not, therefore, be reduced. A relevant case might be Fitzgerald v Lane (1989).

4. (a) General damages are not capable of precise calculation at the date of the trial.
- (b) The general damages that Amy may be able to claim are:
  - Pain and suffering - the injury and treatment to her fingers;
  - Loss of amenity - her inability to pursue her hobby of sewing;
  - Loss of future earnings - the difference between her old and new salaries, and loss of sales of dresses.

## Scenario 2 Questions

1. (a) Candidates could have identified:
  - the control test and explained that this relates to the degree of control exercised over the worker;
  - the organisation test and explained that this asks whether the person concerned is part of the business and whether their work is an integral part of that business; or
  - the multiple test and explained that this is based on the economic reality of the situation, the court looking at all the circumstances.

Relevant case law could include: Ready Mixed Concrete (SE) Ltd v MoP (1968), Cassidy v MoH (1951) or Yewens v Noakes (1880).

Otherwise, they could have identified:

- Mutuality of obligations and explained that an employer is obliged to provide regular work and the employee to make themselves available to do it;
- Whether the individual is required to provide their services personally and explained that an employee generally has no right to appoint a substitute;
- Whether the individual is under the company's control to the extent that the company is 'the master' and explained that this looks at how far the company controls what an individual does and how he does it.

Relevant case law could include: Knight v Fairway & Kenwood Car Service (2012), Carmichael v National Power (1999) McFarlane & Anor v Glasgow City Council (2001).

- (b) A good answer would have discussed the relevance of the control and organisation tests and the use of the multiple test, and perhaps the issues of mutuality of obligations, whether Jez is required to provide his services personally, and the extent to which he is under the company's control. It would then have gone on to consider factors in favour of employed status and those against before reaching a reasoned conclusion.

Factors in favour of employed status include:

- Jez can only work for Ken's Dental Supplies;
- Jez has to work when instructed;
- the van must have 'Ken's Dental Supplies' painted on it;
- the van is maintained & serviced by them;
- delegation of duties is subject to the approval of Ken's Dental Supplies.

Factors in favour of self-employed status include:

- Jez supplies his own van – financial risk;
- Jez can take holidays when he wants;
- Jez can delegate.

2. First candidates should have identified that this question related to vicarious liability and therefore Ken's Dental Supplies will be liable for Jez's torts committed in the course of his employment. A good answer would then have explained what is meant by in the course of employment, i.e.: an act closely connected with the role of the person who committed the tort. Here, Jez committed a tort by driving too fast and losing control of his van. As Jez was still making deliveries, this was probably in the course of his employment, although there is a possible argument that by driving down a bus and taxi lane, he was on a frolic of his own. Subject to this last point, a reasoned conclusion would probably be that Lionel can successfully sue Ken's Dental Supplies. Relevant case law could include Kay v ITW Ltd (1967) or Hilton v Thomas Burton (Rhodes) (1961).
3. (a) A good answer would probably have begun with an explanation of illegality, i.e.: that no legal action can arise from a blameworthy cause. Here, driving down a road reserved for buses and taxis was illegal. Lionel is also guilty as he encouraged Jez to do so. For this reason, the defence may be available to Jez and, therefore, to Ken's Dental Supplies. A relevant case could be Ashton v Turner (1981).  
  
(b) Under s.149 RTA (Road Traffic Accident act) 1988, the defence of consent is not available to passengers in motor vehicles and therefore Lionel cannot be deemed to have consented.
4. Candidates should have identified the existence of a limitation period under the Limitation Act 1980 and, as this action involves personal injuries, the relevant period is three years from the date of injury or the date of knowledge. Here, these dates will be the same as all relevant issues are known on the date of injury and therefore any action must be commenced within 3 years from 31 December 2014 to avoid it becoming statute-barred. A relevant case could be Halford v Brookes (1991).

### Scenario 3 Questions

1. John has to establish:
  - Duty of care – here there is an established duty between road users;
  - Breach of duty – Harjit has driven negligently;
  - Causation – but for Harjit's negligent act, John would not have been injured and the type of injury is reasonably foreseeable.Relevant case law could include Nettleship v Weston (1971), Barnett v Chelsea & Kensington HMC (1969) or The Wagon Mound (No.1) (1961).
2. (a) Candidates should have identified the reasonable man test and explained that it is the omission to do what a reasonable man would do or doing what he would not do. The reasonable man is judged objectively. A relevant case would be Blyth v Birmingham Waterworks Co (1856).  
  
(b) The most likely factor to apply here would be the importance of the defendant's objective when the tort occurred. Here, as Harjit was

driving an ambulance to the scene of an accident, her objective was important. A relevant case would be Watt v Herts CC (1954).

(c) The Results Determination Panel identified significant issues with Question 2 (c). This Question was removed and the candidates' marks were adjusted accordingly to ensure that candidates attempting this Question were not disadvantaged.

3. (a) A secondary victim is someone not directly involved in the accident but who suffers psychiatric harm as a result of seeing or hearing what happens to others.

(b) The four Alcock tests could be applied as follows:

- Physical proximity exists here – Fatima was present at the scene.
- Fatima saw and heard the accident with her own senses.
- Fatima probably suffered sudden shock.
- However, there was no close relationship of love and affection between Fatima and the victims.

A good answer would also have discussed whether depression amounts to a recognised psychological illness. It would also have concluded with a reasoned conclusion that Fatima cannot claim.

4. (a) A primary victim is someone directly involved in the accident or within the zone of physical danger.

(b) A primary victim would have to establish:

- a clinically recognised psychiatric illness – a relevant case might be Hinz v Berry (1970);
- worthy of compensation; and
- caused by the defendant.

If established, a primary victim can be compensated for psychiatric harm. A relevant case might be Page v Smith (1995).

(c) A good answer would have discussed whether Izzy's severe depression amounts to a recognised psychiatric illness and whether Harjit could have foreseen any injury to Izzy (physical or psychological). If so:

- Izzy was in the zone of physical danger – the ambulance was coming towards her;
- a reasonable person in Harjit's position should have foreseen that Izzy could be injured;
- Izzy is therefore a primary victim; and
- could successfully claim against Harjit (or her employers).