LEVEL 6 - UNIT 13 – 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 set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which 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

Question 1

Where liability in negligence is established, the claimant is entitled to full compensation for the loss/damage suffered. This is intended to restore the claimant to his/her position before the accident, so far as money will allow.

Normally only one action can be brought against the defendant, and a single lump sum will be awarded to cover the claimant's losses both before and after the trial/settlement. As the award is final, predictions must be made about the effect of these injuries on the claimant's life. In Lim Poh Choo v Camden & Islington Area Health Authority (1979) Lord Scarman commented that there is '…only one certainty: the future will prove the award to be either too high or too low.' An award of provisional damages, which allows the case to be reopened in the event of a specific deterioration is now available under s.32A Senior Courts Act 1981, but in limited circumstances.

A distinction is made between special and general damages. Special damages are losses that 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.

A further distinction is made between pecuniary losses which have an intrinsic monetary value e.g. loss of earnings, and non-pecuniary losses. Losses are 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. Reasonable medical and other expenses incurred before the trial/settlement due to the injuries suffered may also be claimed, e.g. therapeutic equipment, adaptation of the home,

nursing care and hospital travel. The cost of private medical care is also recoverable, even though NHS treatment is available - s.2(4) Law Reform (Personal Injuries) Act 1948. This was criticised by Lord Denning in Lim Poh Choo. He cited cases the Pearson Commission (1979) reported of relatives transferring the claimant to NHS care following the receipt of such damages.

Future loss of earnings (pecuniary losses and general damages) typically accounts for much of the award, especially for younger claimants. The court takes the claimant's predicted annual loss of earnings as the 'multiplicand' and multiplies 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 over-compensated by the 'investment value' of early receipt of the lump sum. The multiplier may also be decreased to reflect the likelihood that the claimant's working life would have been reduced e.g. due to illness or childcare. Conversely, the multiplicand may be increased to reflect likely future salary rises from promotion etc.

Where the severity of the claimant's injury is likely to reduce life expectancy, a split multiplicand/multiplier calculation may be adopted for the 'lost years' - Pickett v British Rail Engineering Ltd (1980). The multiplicand is reduced to remove the claimant's own living expenses during the period s/he is not expected to survive, so as to avoid over-compensation. The remaining fraction is recoverable because this is likely to have been applied for the benefit of dependents or other persons during the 'lost years'.

Deductions are made to prevent double-compensation. These include statutory sick pay, and 'hotel' costs whilst the claimant 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.

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) which has become necessary: Schneider v Eisovitch (1960). If provided by a relative, these services will be valued between nil and the full commercial rate for employing a professional carer (Housecroft v Burnett (1986)) depending upon whether the relative is giving up work to provide care.

Non pecuniary losses claimable as general damages include pain, suffering and loss of amenity, both before and after trial/settlement. No monetary award can ever truly compensate a claimant for these losses. They are calculated by reference to precedents (making allowances for inflation) and Judicial College tariff guidelines. 'Pain and suffering' is assessed subjectively and includes pain caused by the injuries and necessary medical treatment as well as anxiety concerning possible deterioration, reduced life expectancy and future medical treatment. Damages are not awarded for significant periods where pain is not experienced due to unconsciousness: Wise v Kaye (1962). Loss of amenity compensates for the loss of enjoyment of life arising from reduced capacity e.g. loss of movement and sensory functions. Unlike pain and suffering, loss of amenity is assessed objectively (West v Shephard (1964)) and is recoverable even if unconscious. Permanent unconsciousness would result in an award at the top of the scale.

In Lim Poh Choo Lord Denning strongly criticised awards for loss of amenity and future loss of earnings to claimants rendered permanently unconscious or insensible due to serious brain damage. He argued they should merely be

awarded a sum sufficient to ensure their care and comfort for life. He observed that higher awards do not benefit the claimant, but impose an unnecessary burden on tortfeasors such as the NHS. At worst, relatives might opt to keep the claimant alive to maximise damages, rather than make a humane choice to withdraw life support.

The Law Commission considered this issue (Damages for Personal Injury: Non-pecuniary loss (1999) LC259). No recommendations for change were made. The Commission found that current medical science cannot conclusively assess the levels of awareness of those apparently unconscious: thus refusing recovery for non-pecuniary loss might under-compensate some claimants. Problems were also highlighted with misdiagnosis of patients in a vegetative state, some of whom later recover and report prior awareness accompanied by an inability to communicate with close relatives. Respondents to the Commission's consultation pointed to the fact that it would be unjust to award lower compensation to those with catastrophic injuries than to claimants with less serious ones. As such, the law of tort might lose some of its potential to deter and would undervalue/ trivialise the experiences of those most seriously injured. In particular, denying non-pecuniary loss would place the close relatives of those severely injured at a substantial disadvantage compared to those who can claim loss of dependency following the victim's death under the Fatal Accidents Act 1976.

Question 2(a)

Battery is the intentional and direct application of force to another person. The tort aims to protect people against physical interference by intentional, positive and deliberate acts so as to preserve individual rights of autonomy and self-determination.

It was once said that the commission of a battery required touching 'in anger' (Cole v Turner (1704)) or 'hostility' on the part of the defendant Wilson v Pringle (1987), but it is now acknowledged that the criterion is lack of justification e.g. F v West Berkshire Health Authority (1989).

Any intentional touching of a patient by a medical practitioner during the course of medical treatment is potentially a battery in the absence of a justification such as valid consent or the defence of necessity.

In Chatterton v Gerson (1981) Bristow J held that a medical practitioner need only inform the patient in broad terms about the general nature of an intended procedure for the patient to provide 'real' consent. Whilst a consent obtained through fraud or misrepresentation would not be 'real', a failure to disclose all the risks associated with intended treatment would not invalidate the patient's consent, though this may give rise to liability in negligence.

It is submitted that this approach is justified: whether a patient has been adequately informed of proposed treatment risks depends upon whether the doctor took reasonable care. This issue relates more to negligence than battery.

Assuming that lack of consent is established, issues of causation do not arise in battery (the tort is actionable *per se*) and it is irrelevant that the claimant would have consented had the general nature of the procedure been explained.

In F v West Berkshire Health Authority the House of Lords held that the defence of necessity would justify medical intervention where the patient temporarily or permanently lacks capacity to consent, the treatment is in the patient's best interests and the particular treatment provided is appropriate according to the

Bolam test. Lord Goff expressed the view that a surgical procedure on a patient rendered unconscious in an accident should go no further than is reasonably required before s/he recovers consciousness and is able to make his/her own choices in relation to further treatment. These principles are now largely reflected in the Mental Capacity Act 2005.

2(b)

In Sidaway v Bethlem Royal Hospital Governors (1985) a majority of the House of Lords held that the test from Bolam v Friern Hospital Management Committee (1957) should be applied to determine whether a failure to fully advise a patient of proposed treatment risks would give rise to a breach of a doctor's established duty to his/her patient. This would depend upon whether the omission was accepted as proper by a responsible body of medical opinion. However, whilst the Bolam test is arguably appropriate to determine the issue of negligence in the diagnosis or treatment of patients, the test effectively makes the disclosure of information a matter of clinical judgment (rather than being an issue for the court to decide) and encourages a paternalistic approach on the part of practitioners.

In Sidaway, Lord Scarman, dissenting, advocated an 'informed consent' approach, similar to that adopted in the US. He viewed the ability of patients to make their own treatment decisions as a basic human right. Lord Scarman thought that doctors should warn patients of risks inherent in proposed procedures: a failure to disclose a risk that later materialised resulting in injury, and which would have been avoided by the patient if s/he had been properly advised, would lead to liability.

In Montgomery v Lanarkshire Health Board (2015) a unanimous 7-member Supreme Court departed from Sidaway, confirming that the doctrine of 'informed consent' is now part of English law. Lords Kerr and Reed jointly rejected the use of the Bolam test on the grounds that the disclosure of risk/benefit information does not usually require any special medical skill. Doctors would now be subject to a duty to take reasonable care to ensure adults of sound mind are aware of any material risks associated with both recommended and reasonable alternative treatments. To promote an informed decision, practitioners would have to communicate with their patients in understandable terms and not just convey the information in a consent form.

What is 'material' and thus disclosable will depend on the facts of each case, but will include risks that the actual patient and any reasonable person in the patient's position would be likely to attach significance to. This requires consideration of a broad range of factors including the known/likely personal characteristics and values of the individual patient.

The only permitted exceptions would be in relation to necessity (e.g. emergency treatment where the patient is unconscious) and limited situations where a doctor reasonably considers that disclosure of information would seriously damage the patient's health (the 'therapeutic exception').

The decision in Montgomery confirms a departure from the Bolam test in patient advice cases by the lower courts, starting with the decision of the Court of Appeal in Pearce v United Bristol Healthcare NHS Trust (1998). It brings English law into line with other Commonwealth jurisdictions such as Canada and Australia, and, significantly, with General Medical Council guidelines issued to doctors since 1998. It confirms the priority now accorded to patient autonomy and the right of self-determination following cases such as Chester v Afshar

(2004) and decisions of the ECtHR under Article 8. It recognises that patients are now empowered consumers who are capable of understanding information available from a variety of sources such as the internet.

Montgomery acknowledges some potential problems with the new approach, but dismisses each of these. For example, for those patients who would rather trust their doctors than receive details concerning the risks of treatment, a duty of full disclosure would not arise.

Whilst time constraints for healthcare consultations might render the duty difficult to discharge, the court noted that GMC guidance already requires full disclosure, and doctors 'who have less skill or inclination for communication' would be 'obliged to pause and engage in the discussion which the law requires'.

It was felt that giving responsibility to patients for their choice of treatment by empowering them with knowledge of the uncertainties and risks involved would be likely to reduce, rather than increase litigation. The court acknowledged that abandoning the Bolam test would make the outcome of litigation less predictable, but this disadvantage would be outweighed by the benefits of promoting patient dignity and choice.

The decision in Montgomery is welcome confirmation that the doctrine of informed consent is part of English law.

Question 3

Pure economic loss is financial loss unrelated to any personal injury or property damage suffered by the claimant. It arises in separate 'categories' where, for policy reasons, recovery is excluded by denying a duty of care, or restricted.

'Relational' financial loss arising from negligent damage to someone else's property is generally irrecoverable. In Spartan Steel v Martin (1972) the defendant contractor negligently damaged an electric cable which supplied the power to the claimants' furnace. The Court of Appeal permitted the claimants to recover the cost of damage to the melt-in-progress at the time of the power cut (physical damage) and loss of profit arising from this (consequential economic loss). Profit on four further melts that would have been processed during the power cut was found to be irrecoverable pure economic loss, unrelated to physical damage to the claimants' property.

Allowing recovery for such loss of profit would lead to indeterminate liability in relation to the potential number and size of claims. A contractor would be liable for exorbitant (and uninsurable) compensation claims, out of all proportion to the magnitude of the negligent conduct. Thus, it is considered preferable to spread the economic losses amongst those affected. The law achieves a justifiable balance because it allows for the partial recovery of losses (i.e. consequential economic losses) and it places the onus on businesses potentially affected to consider how best to reduce their risks e.g. by installing backup generators or by taking out insurance. Affected businesses are encouraged to resume their operations promptly and the possibility of over-inflated/fraudulent claims is reduced.

Some critics argue that this rule has been applied too widely to prevent recovery in situations where there is no risk of indeterminate liability e.g. The Aliakmon (1986), though this decision was also justified because it avoided undermining the voluntary allocation of risks by contracting parties.

A further exclusionary rule applies where the claimant purchases a building or product that was defective at the time of supply. The decision of the House of Lords in Murphy v Brentwood DC (1991) (overruling Anns v Merton LBC (1978)) confirms that the cost of repairing or replacing a defective building or product is always to be regarded as irrecoverable pure economic loss, and not 'damage to property' as Lord Wilberforce had suggested in Anns.

In addition, a local authority/builder/architect is not liable in negligence for any damage caused by a defective building to persons or other property after the defect has become apparent. The law treats the danger as being removable at this point, even though the owner lacks the resources to make the property safe.

This exclusionary rule is also justified on policy grounds. As Lord Keith pointed out in Murphy, if the local authority had been found liable in negligence for carelessly approving inadequate foundations, the duty would logically extend to the manufacturer of any product. This might allow the subsequent purchaser of an article (i.e. not just the original buyer) to claim the cost of repair/ replacement, even if the defect was discovered before any damage occurred, and even if the product was merely unusable and not dangerous. Not only would this lead to indeterminate liability covering the purchase of both real property and chattels, it would undermine the law of contract because persons other than the original purchaser would benefit from contractual obligations as to workmanship and quality/fitness for purpose of goods.

Protection against the loss suffered in Murphy is available by taking out first party household insurance. Commentators also point out that the common law should not provide wider consumer protection than exists under statute i.e. the Defective Premises Act 1972 which was passed following thorough Law Commission consultation.

Since the decision in Hedley Byrne v Heller & Partners (1964) it has been possible to claim damages for pure economic loss caused by reasonable reliance on negligent statements made by the defendant. However, the criteria are heavily circumscribed so as to prevent indeterminate liability: careless statements are easily/frequently made and are potentially transmissible to a wide audience. The precise test to apply in negligent statement cases has remained elusive, but following CEC v Barclays Bank plc (2006) it now appears that a duty may either arise where:

- On an objective assessment, the defendant voluntarily assumed responsibility for what was said to the claimant (e.g. where there was a 'relationship equivalent to contract'), or
- The 3-part 'test' from Caparo v Dickman (1990) applies, namely foreseeability, close proximity and the presence of policy justifications making it fair, just and reasonable to impose a duty. Proximity requires a 'special relationship' in which the defendant prepared advice for a particular purpose, knowing that it would (or would be likely to) be communicated to, and relied upon by the claimant for that purpose. This prevents statements put into general circulation from attracting indeterminate liability (e.g. Caparo). A 'special relationship' also requires the claimant's reliance on the statement to have been reasonable in the circumstances.

These tests have been used to impose liability on advice-providers in some cases (e.g. Smith v Bush (1990), Morgan Crucible v Hill Samuel (1991), Spring v Guardian Assurance Ltd (1995), Law Society v KPMG Peat Marwick (2000)) where a 'flood of similar claims' would be unlikely, and damages claims would naturally be limited.

Perhaps unsurprisingly, there has also been an extension of the Hedley Byrne principle beyond negligent advice cases to situations where persons suffer pure economic loss due to the negligent provision of professional services (which are very often largely based on advice). The extension occurred during the 1990s with cases such as Spring (duty of care owed by reference-providers to current/ex employees), Henderson v Merrett Syndicates (1995) (duty of care owed by Lloyd's Insurance market underwriting/managing agents to their 'Names'), White v Jones (1995) (duty of care owed by solicitors to the 'disappointed' beneficiaries of a will) and Williams v Natural Life Health Foods (1998) (no duty owed by a company director for advice in the absence of a personal assumption of responsibility to the advisee). Again, liability in this fourth category is heavily restricted by the requirement for an 'assumption of responsibility' for the claimant's economic welfare, or a 'special relationship' involving close proximity between the parties.

Question 4

Private nuisance is defined as an unreasonable interference with the claimant's use or enjoyment of his/her land, or some right over or in connection with it. The issue of 'reasonableness' is an objective test involving a balancing of conflicting interests. On the one hand persons ought to have the right to use their land as they see fit. On the other hand, there is a need to consider the interests of neighbouring occupiers who should have a right to peaceful enjoyment of their own land. The courts appreciate that there ought to be a certain amount of give and take (or 'live and let live') between neighbouring occupiers of land, and only if a 'normal person' would find an interference to be truly unreasonable in all the circumstances, will there be a private nuisance. For example, it is well established that activities which are necessary for the ordinary use and occupation of houses and land, and which are done with proper consideration for the interests of neighbouring occupiers, will not amount to a private nuisance e.g. Southwark London Borough Council v Mills (1999).

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

In balancing these interests, and assessing 'reasonableness', the courts consider the nature and seriousness of the harm suffered by the claimant. Activity causing physical damage to the claimant's land is much more likely to amount to a private nuisance than one which merely causes sensory discomfort: St Helen's Smelting Co v Tipping (1865). This applies irrespective of the nature of the locality and even where the damage was caused by only a very brief 'state of affairs' e.g. Crown River Cruises v Kimbolton Fireworks (1996). However, there will generally be no nuisance if the claimant only suffers damage because s/he is abnormally sensitive to the defendant's activity (Robinson v Kilvert (1899). This is because objectively, a normal person would not be affected. The principle applies both to physical damage and sensory discomfort cases. It is likely that this rule has now been supplanted by the 'remoteness of damage' test (Cambridge Water v Eastern Counties Leather plc (1994)) which asks whether the interference suffered by the claimant was reasonably foreseeable – Morris v NRI (2004).

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

In cases of sensory discomfort, the nature of the locality is also important: disturbances which take place in rural or residential areas are more likely to be regarded as nuisances (e.g. Sturges v Bridgman (1879)) than those that occur in commercial/industrial areas, where neighbouring occupiers will already be used to a certain amount of background noise and pollution (e.g. Hirose Electrical UK Ltd v Peak Ingredients Ltd (2011)). The question is whether the disturbance caused by the defendant is a substantial addition to that which already existed in the vicinity. A defendant is permitted to argue that his/her activities constituted part of the existing character of the area, provided that these did not amount to an unlawful private nuisance - Coventry v Lawrence (No.1) (2014). In residential areas it will clearly be much less reasonable to create interferences (especially noise) during the night when local residents' sleeping patterns are likely to be disturbed (e.g. De Keyser's Royal Hotel Ltd v Spicer Bros Ltd & Minter (1914)).

In private nuisance, defendants cannot avoid liability by arguing that their activities benefit the community as a whole, for example by providing employment or services to the public, at least where these result in physical damage to land or serious sensory discomfort (e.g. Kennaway v Thompson (1981). It would be unfair to make the claimant suffer serious damage or inconvenience for the benefit of the public as a whole. However, the 'public benefit' or 'social utility' argument may result in an award of damages, rather than an injunction: (Coventry v Lawrence (No.1) (2014). This raises the possibility that nuisance-making businesses who can argue that their activities benefit the public, may be able to 'buy off' civil legal actions in this area in future cases.

The creation of a nuisance on purpose to annoy or injure a neighbouring landowner will often render a person's use of land unreasonable (e.g. Christie v Davey (1893)) giving rise to an unlawful private nuisance.

The only true defences to a claim in private nuisance are statutory authority and prescription, both of which operate within very narrow parameters. For example, a grant of planning permission does not amount to statutory authority (Wheeler v Saunders (1996)), nor does it establish reasonable use. This is because planning authorities do not just consider the effect of a proposed development or a change of use on neighbouring landowners, but must take into account many other public interest factors, some political and economic, which are not relevant to whether an activity gives rise to an unlawful private nuisance in tort (Coventry).

It is no defence to say that the claimant came to the nuisance, in other words that the defendant was there first (e.g. Sturges v Bridgman). However, this rule may only apply in cases where the claimant uses the land for the same purpose for which it had been previously used (Coventry).

Balancing the conflicting interests of neighbouring occupiers of land is central to the tort of private nuisance, and is assessed by application of the 'reasonable user' test. The court is not immediately concerned with the wider public interest:

the utility of the defendant's conduct will not prevent liability, though such considerations may ultimately affect the remedy available to the claimant.

SECTION B

Question 1

As operator of the health centre, WAHA is the occupier of the waiting room (Adrian), the dental surgery and chair (Charles) and the woodland (Francine). WAHA has sufficient control over these areas and ought to realise that a failure to take care may cause injury: Wheat v Lacon (1966).
Adrian v WAHA

Adrian has suffered injury due to a danger arising from the state of the premises (the waiting room floor has not been left free from obstruction), or because WAHA, in its capacity as occupier, has permitted the use of toys (things done) on its premises which present a danger to its visitors – s.1(1) Occupiers' Liability Act 1957. As a patient with an appointment, Adrian has the occupier's permission to be in the waiting room and is therefore a visitor. Accordingly, WAHA owes Adrian the 'common duty of care' (s.2(1)) to 'take such care as in all the circumstances of the case is reasonable' to see that Adrian 'will be reasonably safe in using the premises for the purposes for which he is invited or permitted to be there' (s.2(2)).

s.2(3) of the 1957 Act makes it clear that the standard of care expected of the occupier is a variable one taking into account 'the degree of care, and want of care which would ordinarily be looked for in such a visitor…'. Ordinary common law rules also apply in determining breach e.g. Tomlinson v Congleton BC (2003). The likelihood of a tripping accident seems high given the known vulnerability of patients with impaired vision such as Adrian (e.g. Haley v LEB (1964), and the consequences of an elderly patient falling are potentially severe, as in Adrian's case (e.g. Paris v Stepney BC (1951)). Thus the standard of care owed by WAHA will be high. A breach seems likely given the probable cost and ease with which a system of supervision might have been implemented. In addition, Adrian may be assisted by the common law principle of *res ipsa loquitur.* A presumption of negligence is likely to arise because:

1. The accident was such that, in the ordinary course of things, it would not normally happen if a system had been adopted by WAHA to ensure that toys were promptly cleared away.
2. The toys and waiting room were under the control of WAHA or their employees.
3. The reason for the accident is unknown on the facts: if Adrian had sufficient information to establish that there was no proper system for regular inspection of the waiting room floor he would be able to establish a breach of duty without resorting to the principle of *res ipsa locquitur*.

These facts will allow the court to presume WAHA were negligent unless it can provide a reasonable explanation for the accident, not involving negligence on its part. This will be difficult unless WAHA can prove that the obstruction had been there for such a short period that there was no reasonable opportunity for the toy to have been removed by a member of staff (e.g. Ward v Tesco Stores (1976)).

No issues of causation or remoteness arise according to the facts. Adrian's claim under OLA 1957 is likely to succeed.

Charles v WAHA

The dental chair will be regarded as 'premises' for the purposes of the 1957 Act, as it is a 'fixed structure' (s.1(3)(a)), so the danger arises due to the state of the premises (s.1(1)). Charles is a visitor and is owed the common duty of care by WAHA for the same reasons as Adrian. WAHA may successfully argue that they discharged their liability to Charles by hiring a competent contractor to service the chair under s.2(4)(b) OLA 1957. The technical nature of the maintenance work means that it is reasonably entrusted to an independent contractor, and WAHA would not be expected to ensure the work was done properly. In addition WAHA appear to have taken reasonable steps to ensure the competency of the contractor: the manufacturer of the chair is likely to be an appropriate expert - Maguire v Sefton BC (2006).

Assuming WAHA can discharge its duty under s.2(4)(b), Charles's only option will be to pursue a claim in negligence against Davis and Ellington (e.g. Haseldine v Daw (1941)).

Francine v WAHA

Francine has been injured due to the state of the premises, the broken wire fence having been a fixed structure. In cases where an occupier has given the impression that the use of the land was permitted e.g. for recreational purposes, an implied permission for its use may arise. If so, entrants may be regarded as visitors and subject to the protection of the 1957 Act. However, such an implied licence to enter will not easily be inferred by the courts (e.g. Edwards v Railway Executive (1952)). Furthermore, in Harvey v Plymouth City Council (2010) the Court of Appeal observed that whilst there may be an implied licence to use open land in built-up areas where there is nothing to suggest its use is restricted, any licence will only permit ordinary recreational uses carrying normal risks, such as dog-walking.

Thus if Francine is smoking cannabis and drinking alcohol, she is probably a trespasser on WAHA's premises. Establishing that WAHA owed her a duty under s.1(3) of the 1984 Act may be difficult. It is unclear whether WAHA knew, or had reasonable grounds to believe that the wire fence was in a state of disrepair, or that teenagers were using the woods for illicit purposes in the vicinity of the danger. In addition, it is far from clear whether the risk posed by the fence was one against which WAHA could reasonably be expected to offer drink/drug-consuming teenagers some protection.

If a duty is owed, it has arguably been broken: the likelihood and seriousness of injury resulting from a hidden trip hazard where people are known to walk suggests a high standard of care. WAHA may be in breach due to a failure to identify the defect and repair the fence in a timely fashion. Repair costs are likely to have been modest and well within WAHA's extensive resources.

If Francine can establish breach of duty on the part of WAHA she will be able to recover damages for her personal injury but not her damaged jeans (s.1(8)).

Question 2(a)

Gaston will be vicariously liable to Josie if she can prove that:

1. Imran committed a tort
2. Imran was either employed by Gaston or in a relationship 'akin to employment'

3. There was a sufficiently close connection between the tort and the employment (or the relationship 'akin to employment') that it would be fair and just to hold Gaston vicariously liable.

Tort: negligence

Imran appears to be in breach of a duty of care owed to Josie. Positive acts of carelessness resulting in direct and foreseeable personal injury are likely, without more, to give rise to a duty of care e.g. Marc Rich v Bishop Rock (1996), Perrett v Collins (1998). The spillage of hot beverages over customers is clearly a foreseeable risk of carelessness on Imran's part.

The relatively high risk associated with carrying hot drinks in confined, potentially crowded indoor places, the seriousness of the possible harm to customers and the fact that the activity is undertaken in the context of a profit-making venture will result in a high standard of care, which Imran failed to discharge by attempting to carry too many items. No issues of causation or remoteness arise in the circumstances.

Employment or a relationship 'akin to employment'

It is unlikely that Imran is in a long-term employment relationship with Gaston. A 'zero hours' arrangement will often lack the necessary 'mutuality of obligations' between the parties required for an employment relationship: Gaston appears to be under no obligation to offer Imran work, and there appears to be no corresponding obligation on Imran to accept work (e.g. Carmichael v National Power plc (1999)). Imran's work is described as 'occasional'. However, it may be that each accepted period of work amounts to a short-term contract of employment.

Alternatively, following recent decisions of the Supreme Court in Cox v MOJ (2016) and Various claimants v Catholic Child Welfare Society (2013) Imran is probably in a relationship 'akin to employment' with Gaston. The three most 'significant' features of a such relationship were identified by Lord Reed (who gave the judgment of the court) in Cox and appear to be present here:

1. Negligence was committed as a result of an activity being carried out by Imran on behalf of Gaston.
2. Imran's waiting activities were an integral part of Gaston's coffee shop business.
3. The spillage of hot coffee on Josie was a risk inherent within the 'field of activities' assigned to Imran by Gaston.

Close connection

It is clear that the careless spillage of coffee on a customer is an unauthorised mode of carrying out an activity authorised by Gaston e.g. Century Insurance v Northern Ireland Road Transport Board (1942) and therefore in the course of Imran's employment/relationship akin to employment. Alternatively, applying the 'close connection' test from Lister v Hesley Hall Ltd (2002) there appears to be a sufficient connection between Imran's job in serving coffee to customers at their tables and the negligent act of spilling coffee over Josie, so as to make it just for Gaston to be held liable.

2(b)

Tort: battery

Karen intentionally applied force to Leon's body by the positive and deliberate act of throwing hot coffee over him. She therefore committed a battery.

It does not matter that there was no direct physical contact between them e.g. Scott v Shepherd (1773). As Leon suffered scalding injuries, it is clear that there was some direct contact with the liquid. The touching appears to have been 'in anger' (Cole v Turner (1704)) and demonstrates 'hostility' on Karen's part (Wilson v Pringle (1987)), although the battery need only have been without justification e.g. F v West Berkshire Health Authority (1989).

There is no justification. Karen was not acting in self-defence. Nor is contributory negligence a defence to battery (Co-operative Group Ltd v Pritchard (2011)).

Employment or a relationship 'akin to employment'

Gaston:

Agency workers are rarely regarded as employees of the client (e.g. James v Greenwich LBC (2008)), but for reasons similar to Imran, there is likely to be a relationship 'akin to employment' between Karen and Gaston. Her battery was committed whilst preparing coffee on behalf of Gaston, coffee-making being an integral part of Gaston's business. In Cox, Lord Reed observed that the risk of an individual committing an intentional wrong in the field of activities assigned to them is a 'fact of life'.

Hattie:

No details are given about the relationship between Hattie and Karen, and it would have to be established whether there was an employment relationship e.g. by applying the 'economic reality' test from Ready Mixed Concrete (1968).

There may be a relationship 'akin to employment'. The battery was committed as a result of the supply of staff to Gaston's shop. Karen was sent on Hattie's behalf, for Hattie's benefit and as an integral part of Hattie's business.

The possibility of dual vicarious liability was established by the Court of Appeal in Viasystems v Thermal Transfer Ltd (2005) and confirmed by the Supreme Court in Catholic Child Welfare Society. If Karen is so much a part of both Hattie and Gaston's work, businesses or organisations that it is just to make both employers answerable for her negligence, both will bear vicarious liability.

In Viasystems Rix LJ observed that, where the employee is contracted out labour, in the sense that she is selected and possibly trained by the lender (Hattie) and hired out as an integral part of the lender's business, but employed at the hirer's site (Gaston) using the hirer's equipment, and subject to the hirer's directions, vicarious liability is likely to be shared.

Alternatively, the court may determine which 'employer' has direct responsibility for managing the activity and attach vicarious liability to them: Hawley v Luminar (2005).

Close connection

In Mohamud v WM Morrison Supermarkets plc (2016) (a complementary judgment to Cox delivered immediately afterwards), the Supreme Court affirmed the 'close connection' test from Lister v Hesley Hall Ltd (2002) as being of universal application and provided further guidance as to its application.

According to Lord Toulson, who gave the judgment of the court in Mohamud, a 'close connection' must be considered in two stages:

1. In broad terms, what 'field of activities' had been entrusted by the employer to the tortfeasor i.e. what was the nature of his/her job?
2. Was there are a sufficient connection between these activities and the wrongful conduct to make it right for the employer to be held liable in the interests of promoting social justice?

There appears to be a sufficient connection between Karen's job, which requires her to make coffee, and her intentional wrongdoing so as to make it just for each employer to be held liable. The risk of an agency worker committing a battery on a client's customer is inherent where the worker is customer-facing.

In Mohamud Lord Toulson observed that the necessary connection would exist in cases where the tortfeasor used/misused the position entrusted to her in a way which injured the claimant. This would make it just that the employer(s) who selected her and put her in that position should be held responsible.

Question 3(a)

Oscar's estate v local authority

Negligence is failure to discharge a duty of care owed to the claimant, which causes him to suffer loss/damage of a reasonably foreseeable type. Oscar's estate will acquire a right of action against any tortfeasors under s.1(1) Fatal Accidents Act 1976 upon his death.

Problems establishing a duty of care arise where the defendant's carelessness was a failure to act (non-feasance), or where the defendant is a local authority/public body (where liability for regulatory failure is usually restricted on policy grounds).

There is no general duty to prevent others from causing harm: Smith v Littlewoods Organisation Ltd (1987). In Smith, Lord Goff identified four exceptional situations where liability may arise for failing to prevent the effects of other people's actions (subsequently affirmed by the House of Lords in Mitchell v Glasgow City Council (2009)). These include:

(a) situations where there is a special relationship between the defendant and claimant or the defendant and the wrongdoing party;

(b) situations where the defendant fails to take reasonable steps to abate a known danger created by another, where the defendant has control over the source of danger

The facts here are similar to Mitchell. The House of Lords held the council's failure to alert either the police or the deceased to the situation fell outside the exceptions. The council had never assumed responsibility for the claimant's safety, they did not create the danger posed by the killer or have direct control

over him, nor had they undertaken to avert this risk. In addition, policy considerations dictated that it would not be fair, just or reasonable to impose a duty on social landlords to provide such warnings. If intervention to reduce anti-social behaviour gave rise to a voluntary assumption of responsibility, landlords would be deterred from doing so. Alternatively, imposing a duty might encourage the adoption of defensive practices: landlords might issue warnings as a matter of routine and for no good reason, thus causing undue alarm. Allowing negligence claims against social landlords in these circumstances would divert limited resources away from the fulfilment of other important functions.

Thus, according to clear precedent, the local authority will not be liable in negligence for failing to take further steps to protect Oscar. No duty of care was owed to him in the circumstances.

Oscar's estate v police service

In Michael v Chief Constable of South Wales (2015) a seven member Supreme Court upheld, by majority, the principle from Hill v Chief Constable South Yorkshire Police (1998) that the police owe no duty to individuals in relation to the careless investigation or suppression of crime. Controversially, the Hill 'immunity' principle was held to apply even in cases of close proximity where the police service was in a position to assist the victim, and had agreed to do so, as here. The decision was based on policy. If a duty of care were held to exist, this might be extended to a much wider class of potential claimants e.g. cases where there are reported threats to commit other types of crime such as criminal damage, and other types of victim such as 'bystanders' caught up in acts of violence that the police might have prevented. The majority were also concerned that recognition of a duty would require a diversion of resources into prioritising reports of domestic violence – a policy decision that should not forced upon the police by the courts.

Oscar's estate will have no claim against the police service in the tort of negligence, though a public law claim under Ss6&7 Human Rights Act 1998 may lie for breach of Art 2 ECHR on proof that the 'authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identifiable individual' – Osman v UK (1998).

Oscar's estate v ambulance service

In Kent v Griffiths and others (No.2) (2000) the Court of Appeal held that the London Ambulance Service owed a duty to a caller once it had accepted a call (having been given the patient's name, address and the nature of the emergency), knowing that the patient was relying on the service to respond within a reasonable period of time. The transportation of patients to hospital by paramedics was equated to the care functions of hospital medical staff, who have long been subject to a duty of care in the tort of negligence.

A breach of duty seems inevitable in Oscar's case: the ambulance service was aware of the severity of the potential consequences of a delay according to the nature of Oscar's reported injuries and the fact he was unconscious. The delay arose because the crew stopped for food, and not for reasons outside the ambulance service's control.

However, it is unclear whether Oscar would have died 'but for' the ambulance service's breach of duty – Barnett v Kensington and Chelsea Hospital Management Committee (1969). Medical evidence would be needed to establish

whether Oscar's life would probably have been saved if the crew had responded to the emergency call without delay.

3(b)

In Capital & Counties Bank plc v Hampshire CC (1997) The Court of Appeal confirmed that the fire service would only be liable in negligence for positive acts of carelessness which make the claimant's position worse than if they had failed to attend. Smith LJ stated:

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

Thus, no duty was owed to the police service in relation to the delayed arrival and the consequent destruction of the police station.

The flood damage to Nigel's shop could result in liability; it represents damage that would not have occurred but for the positive act of carelessness in damaging the fire hydrant. The standard of care expected is likely to be lower where the aim is to save life (Watt v Hertfordshire CC (1954)) and where the defendant acts in an emergency (Das International Ltd v Manley (2002)). Whilst more information would be needed as to the manner in which the hydrant was damaged, liability depends on this being unreasonable, and so a breach, even in an emergency situation.

Question 4

Rosie v Quincy

Rosie has suffered medically recognised psychiatric harm (severe depression) from witnessing the destruction of her life's work. Recovery of psychiatric harm resulting from witnessing the destruction of property was considered by the Court of Appeal in Attia v British Gas plc (1987). British Gas owed a duty not to damage the property itself. The court recognised the possible existence of a duty provided psychiatric harm was a reasonably foreseeable consequence of the defendant's negligence. Bingham LJ gave the example of a scholar's life work of research or composition being destroyed before his eyes due to the defendant's careless conduct, as a possible situation justifying recovery. Quincy clearly owes a similar duty in respect of the art works, and Rosie's claim would therefore fall squarely within the Attia criteria. However, the status of Attia is uncertain, having been decided before the House of Lords formulated the 'control mechanisms' applying to secondary victims i.e. those suffering psychiatric harm due to witnessing the death, injury or imperilment of those with whom they had close ties of love and affection in Alcock v Chief Constable South Yorkshire Police (1992). Attia was not fully considered in Alcock nor in White v Chief Constable South Yorkshire Police (1999) or Page v Smith (1996), the other leading cases on negligently inflicted psychiatric harm. Thus Rosie's prospects of successfully claiming against Quincy are uncertain.

Theo v Quincy

It is unclear whether Theo has suffered medically recognisable psychiatric harm. He will have no claim otherwise: Hinz v Berry (1970). The severe effect of the incident on his life, including a permanent inability to work caused by feelings of guilt, may suggest psychiatric harm. This must be established by expert medical opinion.

Theo will be a primary victim if he was personally endangered by Quincy's negligence. It is unclear whether Theo was at the reception and in the area of immediate physical danger when the fire broke out. If so he can recover by merely proving that personal injury was a foreseeable consequence of Quincy's negligence - Page v Smith. The means by which the psychiatric harm was triggered is immaterial: it does not matter that the claimant escaped physical harm and that the psychiatric response was caused through sight and hearing of what happened to others (Page). Presumably the Page test would also extend to a person who was physically endangered and whose psychiatric harm was caused by feelings of guilt.

It is unclear whether Theo is Quincy's employee, and the House of Lords in White concluded that employees are not, as such, primary victims.

If Theo is a secondary victim (i.e. if he was not personally endangered by Quincy's negligence) he does not appear to have the necessary close ties of love and affection with any of those killed or injured. The closeness and intimacy of the relationship must be equivalent to that of the normal spousal relationship or that of parent/child (Alcock). This test prevents even close work colleagues from claiming as secondary victims (e.g. Robertson v Forth Road Bridge Joint Board (1995)).

Theo might claim as an 'unwitting agent'. It is arguable that, due to Quincy's negligence, Theo was made to believe that he was the immediate and involuntary cause of the death and injury of those at the reception (Dooley v Cammell Laird & Co Ltd (1951), W v Essex County Council (2000)). The scope of this 'special category' of primary victim is somewhat uncertain, and it is unclear whether the reasonableness of Theo's belief will be an issue here: the failure of the sprinkler system is arguably the primary cause of the disaster. Cases such as Hunter v British Coal Corp (1998) require claimants falling within this category to have been proximate to the accident, both in time and space. This, again, will depend upon whether Theo was present during the reception. If so, Theo has a better claim as a 'traditional' primary victim.

Victoria v Quincy

Victoria has suffered PTSD which is medically recognised psychiatric harm. She will be regarded as a secondary victim who was not personally endangered.

At first sight, Victoria appears to meet most of the criteria necessary for recovery. With the benefit of hindsight, a person of 'ordinary fortitude' sharing Victoria's experiences might foreseeably have suffered psychiatric harm as a result of Quincy's negligence (McLoughlin v O'Brian (1983)).

The Alcock 'control mechanisms' appear to establish proximity. The necessary close ties of love and affection are presumed to exist in normal spousal relationships and probably exist between those engaged to be married (in Alcock, Lord Keith noted that these ties are often 'stronger in the case of engaged couples than in that of persons who have been married to each other for many

years'). Victoria was not present at the scene of the accident, and is unlikely to have had a direct perception of it: TV images are subject to the broadcasting code of ethics which prohibit images depicting individuals in pain, and are edited (Alcock). However, Victoria is likely to have participated directly in the 'immediate aftermath' (McLoughlin). She probably arrived at the hospital soon after the incident as she rushed there upon seeing live images of Quincy being taken away in an ambulance. We are told that she witnessed the extent of Quincy's 'horrific' burns. It is also likely that Victoria's PTSD will have arisen from a 'sudden shock', especially if the immediate aftermath is taken to consist of a number of components extending over a short period of time (Walters v North Glamorgan NHS Trust (2002), Galli-Atkinson (2003)). Here the immediate aftermath may be regarded as an uninterrupted sequence of events extending from the time of the accident (which Victoria witnessed via TV, albeit not with a 'direct perception') until she saw Quincy in hospital.

Victoria may be denied recovery on policy grounds. Here, the tortfeasor's (i.e. Quincy's) injuries were arguably 'self-inflicted' because they were caused by his own negligence. In Greatorex v Greatorex (2000) the Queen's Bench Division held that, in these circumstances, it would not be fair, just and reasonable to allow family members to sue one another for self-inflicted harm. This might have the effect of limiting the right to self-determination, promote undesirable claims between family members and adversely affect family relationships.

Wayne v Quincy

In White it was held that professional rescuers were not a category of primary victim, but subject to the usual rules for recovery for primary and secondary victims. If Wayne was personally endangered, e.g. by entering the burning gallery, he can recover as a primary victim. Otherwise, any claim as a secondary victim would fail in the absence of proof of close ties of love and affection with any of the 'immediate' victims.