LEVEL 4 - UNIT 2 – THE LAW RELATING TO EMPLOYERS' LIABILITY
SUGGESTED ANSWERS – JANUARY 2018

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide candidates and tutors with guidance as to the key points candidates should have included in their answers to the January 2018 examinations. The suggested answers 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 by the suggested answers.

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

SECTION A

1. The test applied is multi-factorial: Ready Mixed Concrete (South East) v MPNI (1968). Overall, the question is whether the relationship is more consistent with employment than self-employment.

2. The concept of a 'relationship akin to employment' extends vicarious liability to people who are not employed under a contract of employment, although they are to some extent controlled or managed by the religious authorities. In a series of cases, culminating in The Catholic Child Welfare Society & Ors v Various Claimants & The Institute of the Brothers of the Christian Schools & Ors (2012), the courts have confirmed that, provided the relationship between the primary tortfeasor and the responsible body provides a sufficient degree of control as to be analogous with employment, vicarious liability may attach. The key elements are that the tortfeasor is acting on behalf of the defendant, is doing so in the context of the defendant's business or vocation, and the defendant has put the tortfeasor in a position to cause the harm.

3. This is a duty of care which remains on the party concerned (e.g. an employer: Wilsons & Clyde Coal Company v English (1938)), even though its performance may in certain respects be delegated to a third party, such as an independent contractor. In other words the performance of the duty, but not the duty itself, may be delegated. The employer will remain primarily liable in the event of a breach of duty by the contractor causing harm to the employee.

4. The question of whether there has been a breach of duty is a question of fact. It is determined objectively. The standard required is that of the 'reasonable man': Blyth v Birmingham Waterworks (1856). The court will determine, in the light of all the circumstances, whether the acts or omissions of the defendant fell below the appropriate standard.

5. This test is relevant where the harm of which the claimant complains is cumulative in nature. This includes certain industrial diseases, where the severity of symptoms is directly proportional to the extent of exposure to dust or some other causative agent. Rather than applying the standard 'but for' test for causation, it is sufficient for the claimant to demonstrate that the exposure to which the defendant is potentially liable is more than minimal, and has, therefore, made a material contribution to the harm he has sustained: Bonnington Castings v Wardlaw (1956). The court may apportion damages accordingly.

6. The basic approach is the multiplier/multiplicand one. The multiplicand is the annual figure for loss of earnings net of tax and national insurance. It may be adjusted to allow for any likely change in circumstances, such as promotion or requalification. The multiplier reflects the number of years, actuarially adjusted, for which the claimant could expect to receive this income. The actuarial adjustment reflects the vicissitudes of life, and also the effect of early receipt of a lump sum. It can be further adjusted for specific contingencies such as comorbidities.

7. The primary limitation period for personal injury claims is three years from the date when the cause of action accrued, or the 'date of knowledge': ss 11, 12 Limitation Act 1980. If the claim is brought after this date, the defendant can have the claim dismissed as time-barred. Section 14 Limitation Act defines the date of knowledge as the date when the claimant was aware:

    - that he had suffered significant injury;
    - that the injury was attributable to a particular act or omission;
    - of the identity of the defendant.

8. A case will exit the protocol at this stage if liability is denied, or contributory negligence alleged. It will also do so if the defendant fails to respond to the claims notification form, or where the defendant alleges that the claims notification form does not contain adequate mandatory information. It will also exit if the value of the claim is appropriate for the small claims track.

9. Even where the parties agree the value of the claim at Stage II, the court must approve the settlement. Whether the case is resolved following a settlement hearing or at the Stage III assessment of damages, the Stage III fixed costs type A, B and C are all payable.

SECTION B

Scenario 1 Questions

1. Vicarious liability applies where an employee commits a tort in the course of his employment. Tom has committed a tort.

   The information given indicates that there may be a dispute as to whether Tom is an employee of Sofafit, or is in business on his own account as an independent contractor. His contract appears to be drafted on the assumption that he is an independent contractor, but it is necessary to consider all the circumstances: Ready Mixed Concrete (South East) v MPNI (1968). The fact that he does similar work for other companies is of little significance; he could in principle have a series of part-time contracts of employment. There is mutuality of obligation, at least in relation to the scheduled maintenance tasks. The court may rigorously scrutinise whether the tax and national insurance provisions reflect reality, or are designed to produce an advantageous outcome for the parties in terms of the amount and timing of payments due to the state. Against this, Tom does provide his own tools and equipment, and the services he is providing are specialised and not highly integrated into the ordinary business of Sofafit. Overall, the arguments are quite finely balanced, and the final decision may rest with whether the court concludes that this is an attempt to avoid liability for PAYE and Class 1 National Insurance contributions.

   If the court concludes that Tom is employed under a contract of employment, then there is no doubt that there is the necessary close connection to constitute course of employment. This is a classic case of an unauthorised mode of performance of an authorised activity, which is sufficient to establish the necessary connection: Dubai Aluminium v Salaam (2002).

2. Sofafit has delegated performance of its duty to Tom. Even if Tom is found to be an independent contractor, this will not exonerate the company and it will remain liable to Jenny in relation to any failure to fulfil any part of the duty. The duty extends to the provision of safe fellow employees, a safe system of work and safe plant and equipment: Wilsons & Clyde Coal Company v English (1938).

   It seems clear that the frame provided to Jenny was not fit for purpose, as it had not been reassembled properly after maintenance. The law generally imposes a high standard on employers in such situations and there seems to be a clear breach of the duty to provide safe equipment. Furthermore, if there were evidence to suggest that management and supervisors condoned laxity in the use of the hydraulic lifts, there may also be liability for failing to operate a safe system of work, even though such a system has been devised.

3. While the complete defence of *volenti non fit injuria* is in principle available to Sofafit, it is extremely rare for it to be applied in employers' liability cases. It is generally accepted that the employee is not in a position to give the free and informed consent which is required: Bowater v Rowley Regis (1948).

   The partial defence of contributory negligence is available where harm is caused partly by the fault of the claimant. By virtue of the Law Reform (Contributory Negligence) Act 1945 the court can, in such cases, apportion damages to the extent that it is just and reasonable to hold the claimant

liable. This approach is favoured by the court, as it enables cases to be disposed of fairly. Once the court has determined that the defendant is in breach of duty, it is highly likely to use contributory negligence to allocate responsibility: Scott v Gavigan (2016). In this case, Jenny's contribution would appear to be significant. She has chosen to ignore equipment which was provided specifically to protect her against the type of incident which has occurred. It appears to have been a conscious choice taken for her convenience.

4. There is no real issue with causation in fact. 'But for' the initial injury, Jenny's knee would not have given way, and she would not have sustained the further injuries: Barnett v Kensington & Chelsea HA (1968). The type of harm is foreseeable as generally this is viewed in broad categories, so there is no issue with remoteness.

   Sofafit may argue that participating in the fun run constituted a *novus actus interveniens* which broke the chain of causation in law. This argument has been accepted where the actions of the claimant could be characterised as foolhardy as in McKew v Holland Hannen & Cubitts (1969). However, the modern approach seems to be to treat such actions as capable of constituting contributory negligence, but not as breaking the chain of causation: Spencer v Wincanton (2009); Scott v Gavigan (2016) Accordingly, Sofafit is likely to be liable for the additional damage, subject to an additional deduction for contributory negligence, if it is considered that undertaking the fun run was inappropriate behaviour.

5. The essential objective of this category of damages is to put the claimant in the position she would be in had the accident not occurred, so far as money can do so. It will be necessary to obtain medical evidence on the extent of all the injuries for which Jenny is entitled to recover, including any predictable future complications which may affect her entitlement. This may include evidence that the accident has accelerated pre-existing conditions. It will also be necessary to obtain factual evidence as to the impact of the injuries on Jenny's enjoyment of hobbies, and how the injuries affect her ability to carry out ordinary activities.

   Once there is a clear picture, an actual figure will be determined by reference to precedents contained in collections such as Kemp & Kemp and also the Judicial College Guidelines.

Scenario 2 Questions

1. Gopher Timber Ltd (Gopher Timber) owes Ahmed a non-delegable duty of care: Wilsons & Clyde Coal Company v English (1938). This is a tripartite duty extending to provision of safe fellow employees, a safe system of work and safe plant and equipment. On the facts, it is the last of these that is relevant. Gopher Timber may delegate the performance of aspects of the duty to Mexiar Ltd, but remains liable if the contractor fails to perform properly.

   There will be a breach of duty if a reasonable employer would have identified the corrosion and taken appropriate precautions. The standard imposed is a high one and the court is likely to find that there has been a breach. Causation is clearly present in relation to the injury sustained, and there are no issues of remoteness. There is nothing to suggest that Gopher Timber can avoid liability.

2. This claim appears to be suitable to be dealt with under the Pre-action Protocol for low value Employers' Liability and Public Liability claims. This is intended for claims which do not exceed £25,000 in total, but for which the normal track would not be the small claims track. Here, we are told that the likely award of general damages is approximately £17,000, which is well above the small claims track limit of £1,000, and, although there are some special damages in addition, the only known element is loss of earnings of approximately £1,500. As a result the Protocol appears appropriate.

   The procedure under the Protocol involves submission of details of the claim to an electronic portal. The claimant's legal representatives must complete a Claim Notification Form which will be submitted via the portal to the defendant and the defendant insurers. This contains details of the parties, the incident, the consequences of the incident, the basis of liability and details of litigation funding. They must also obtain a certificate of relevant benefits from the CRU.

3. At Stage II of the Protocol procedure, Ahmed's legal representatives must prepare a settlement pack which contains details of the various elements of the claim with supporting evidence, including medical reports, and a settlement figure acceptable to the claimant. The defendant has 15 days to respond with a counter offer and there is a further period of 20 days for negotiations. If the parties cannot reach agreement on a settlement figure, the defendant must pay a non-settlement payment in the amount of its final offer.

   The claimant must prepare and serve a court proceedings pack and issue a Part 8 claim form.

   The case will proceed to Stage III in which a judge will assess damages. This may be on the basis of the written submissions, or may involve an oral hearing.

4. Fixed costs are payable in respect of each stage of the Protocol procedure, normally at the conclusion of that stage. Stage I costs are £300 in all cases, Stage II costs depend on the value of the claim, but would be £1,300 for a case valued at above £10,000. Stage III costs comprise a legal representatives fee (£250) and, where there is an oral hearing, an advocate's fee (£250). Certain disbursements, namely court fees where appropriate, and the cost of medical reports, are also recoverable.

5. (a) Under the Law Reform (Miscellaneous Provisions) Act 1934, Karen's claim against Gopher Timber at the date of her death survives for the benefit of her estate. However, any claim for future loss of earnings after the date of her death does not survive.

Karen's estate has a claim on the ordinary principles for personal injury claims for the period between the accident and her death six weeks later. This will include an appropriate amount for special damages, which will include net loss of earnings for the period and any other medical or other expenses incurred. General damages are also available. On the facts, Karen was in a coma and suffered no pain or suffering, so there will be no recovery for this element, but there will be a loss of amenity, as this is assessed on an objective basis: West v Shephard (1964). The estate may also recover funeral expenses (although these may also form part of a claim under the Fatal Accidents Act 1976).

(b) A new claim may be made by Karen's dependants for loss of dependency under the Fatal Accidents Act 1976. On the facts given there are two potential dependants. Eve, who is Karen's daughter, will have a claim, at least until such time as she reaches adulthood and becomes self-sufficient. Zak may qualify if he and Eve have been living together in the same household as husband and wife for two years. While Eve and Zak have been informally engaged, it is not clear whether the formal requirements under the Act have been met.

Any claim is based on the harm sustained by the claimant. As Karen has been working, there may be a loss of financial dependency, but there will also be the issue of the loss of the benefit of Karen's services as mother and partner. If Zak has a claim, the appropriate multiplier will be calculated from the date of trial: Knauer v Ministry of Justice (2016).