**LEVEL 4 - UNIT 3 – THE LAW AND PRATICE RELATING TO ROAD TRAFFIC ACCIDENTS**
**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 (a) A contingency fee / deductible amount in a damages-based agreement, is the agreed costs payable to the client's solicitor if the claim succeeds. The contingency fee / deductible amount is calculated as a percentage of the client's damages and based on a risk assessment at the time the agreement was made.

1 (b) The contingency fee/deductible amount is deducted from the client's damages on conclusion of the (successful) claim, but limited to a maximum amount of 25% of the client's damages.

2. Section 41 Highways Act 1980 creates a statutory duty on a Highway Authority to maintain a highway (maintainable at the public expense). The duty is non-delegable. Therefore, the court will consider that the Highway Authority remains liable for subcontractor's negligent repair/reinstatement of the road surface: Dabinett v Somerset County Council (2006).

3. Examples of extensions which may be included in a motor insurance policy on the use of the insured vehicle include: 'any qualified driver to drive the vehicle with the policyholder's permission'; 'additional drivers to drive the vehicle provided they are over a specified age'; and 'driving other cars' extension, which permits the policyholder to drive any other vehicle in an emergency situation.

4. The purpose of the claimant's solicitor carrying out an ASKCUE PI search is to check a claimant's claims history, as the database records previous incidents/claims reported by a policyholder to his/her insurer. The search is designed to reduce the risk of fraudulent claims. The claimant's solicitor must record confirmation of the search on the CNF/RTA1.

5. Where a claimant motorcyclist is injured in a road traffic accident by a defendant's negligent driving but had not fastened the chin strap of his/her helmet, the court is likely to find the claimant contributorily negligent if fastening the chin strap would have reduced the severity of injuries or avoided the injuries. The court is likely to reduce the claimant's damages awarded by approximately 10%: Capps v Miller (1989).

6. Section 38(7) of the Road Traffic Act 1988 permits the Highway Code to be admissible in evidence in relation to a breach of duty of care, but breach of the Highway Code does not automatically mean that the defendant was negligent: Powell v Phillips (1972); Goad v Butcher (2011).

7. A search of the Motor Insurers Database enables the claimant solicitor to determine if a defendant vehicle was covered by a valid insurance policy at the time of accident.

8. When valuing a personal injury road traffic accident claim to ascertain whether or not the claim should be pursued under the Pre-Action Protocol for Low Value Personal Injury Road Traffic Accidents (the 'RTA Protocol'), the claimant's solicitor must not include vehicle repairs, the pre-accident value of the vehicle, motor insurance policy excess and any claim for vehicle hire.

9 (a) Reasons for a claim to leave Stage 1 of the RTA Protocol include: the defendant fails to complete the CNF/RTA1 Insurer Response, or fails to admit liability, or admits liability but alleges contributory negligence (other than the claimant's failure to wear a seatbelt). Other reasons include: the defendant notifies the claimant that there is inadequate information provided in the CNF/RTA1, or the defendant notifies the claimant that the value of the claim would place it in the small claims track if proceedings were issued.

9 (b) 'Soft-tissue injury claim' is defined in the RTA Protocol as a claim brought by motor-vehicle occupant where the significant injury is a soft-tissue (whiplash) injury and the claim may include a claim for minor psychological injury.

## SECTION B

### Scenario 1 Questions

1. Further evidence that the claimant's solicitors may need to assess liability includes an expert accident-reconstruction report, which should contain measurements of distances involved, and an estimate of how long Rafad was visible to Paul before impact. The solicitors may also obtain an engineer's report for Paul Domino's car and maintenance records of Paul Domino's vehicle, to include an assessment of the condition of the vehicle before the accident. If the police attended the accident scene, a police accident report should be available, which may contain details of other witnesses, such as the friends playing with Rafad before the accident and any passengers from the bus who were still in the vicinity and saw the accident.

   Details of the weather conditions at the time of the accident should also be obtained. Hospital triage notes may be useful if Rafad was conscious and provided an account of the accident to the ambulance crew; this would be a near-contemporaneous account. However, he is young and sustained a

serious head injury; therefore, the court may not weigh Rafad's account provided to the ambulance crew as too significant.

Any conviction of Paul Domino in relation to this incident may be relevant to establishing his negligence in the accident. If so, Rafad's solicitor may be able to plead the conviction as relevant evidence in support of the allegation of negligent driving.

2 (a) To determine whether a car driver has breached his/her duty of care, the court applies an objective test and measures the driver's conduct against that of a reasonable driver in the same circumstances: Blyth v Birmingham Waterworks (1856). Paul Domino was under notice that children were likely to be in vicinity because it was a residential area with houses and flats, he was approaching a park entrance, it was a Saturday, therefore, no school. Paul Domino glimpsed children playing on the Education Centre's steps as he approached the stationary bus. He should have anticipated that pedestrians, including children, may emerge from in front of the bus to cross the road. He was familiar with the area and, therefore, like the bus driver, would have known that children were often in the vicinity. Therefore, Paul Domino should have reduced his speed and covered his brakes, but there is no evidence that he did either. A court is likely to find that Paul Domino breached his duty of care. Credit was given for an alternative reasoned conclusion.

2 (b) As a general rule, pedestrians owe a duty of care to other road users. Therefore, Rafad should have kept a lookout for cars: Birch v Paulsen (2012). A court will assess Rafad's conduct against that of a reasonable child of the same age, intelligence and experience. Paul Domino may argue that Rafad was old enough to understand his responsibilities as a pedestrian and/or the dangers of the road. Therefore, he may argue that Rafad's conduct contributed to/partly caused his injuries and the court should reduce any damages awarded to Rafad to reflect his degree of blame. Usually, the court will not consider that a child as young as 10 years of age is sufficiently mature to understand his/her responsibilities. However, in Toropdar v D (2009), a 10-year-old boy ran into the road in front of a bus without warning and the court held him partly responsible and reduced damages.

3 (a) Medical evidence must be obtained under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (the RTA Protocol), because the value of the claim is below £25,000. The defendant insurer has admitted liability and, therefore, the claim has reached Stage 2 of the RTA Protocol. We can instruct an expert of our choice, without reference to the defendant's representatives, to examine Rafad and provide a medical report. We will also request that the expert reviews Rafad's medical records.

3 (b) As the defendant insurer has refused to make a voluntary interim payment, and we cannot secure upfront funding for the recommended treatment, we will need to issue court proceedings under CPR Part 7. We can then make an application to the court for an interim payment to cover the cost of Rafad's treatment. The claim will, therefore, leave the Pre-Action Protocol for Low Value Personal Injury Claims (the 'RTA Protocol'). It would be sensible to request that the defendant insurer

reconsider making a voluntary interim payment before we issue proceedings and make an application.

4. As the defendant insurer appears to be seeking to avoid the insurance policy (and refuses to deal with Rafad's claim), we should make an application to the Motor Insurers Bureau (MIB) under its Uninsured Drivers Agreement 2015 and join the MIB as a second defendant to court proceedings. Credit was also given for recognition that an insurer cannot usually avoid third-party claims against its policyholder because of its policyholder's failure to maintain his/her car. In such circumstances, the MIB will probably insist that the insurer deals with Rafad's claim as a Road Traffic Act insurer.

5 (a) The success fee owed to our firm is 20% x costs, i.e. 20% x £8,360 = £1,672. The success fee does not exceed the personal injury cap of 25% of damages (25% x £20,000 = £5,000). Therefore, the firm's total costs are £8,360 (from the opponent) plus the success fee of £1,672 (from the client's damages) = £10,032. Plus VAT and disbursements.

5 (b) Rafad's damages are damages awarded minus the success fee, i.e. £20,000 - £1,672 = £18,328.

**Scenario 2 Questions**

1. Rachel Foster owes Craig Hopworth a duty of care in law not to cause harm to Craig as another road user: Nettleship v Weston (1971) / Donoghue v Stevenson (1932). Rachel owes Craig a duty of care in the circumstances, as he is sufficiently close/proximate to her car to have been in the zone of foreseeable physical harm. In other words, he was a foreseeable claimant because he was approaching the junction from which Rachel was waiting to turn and would have been foreseeable to Rachel.

2 (a) if Rachel is convicted of a breach of section 36 of the Road Traffic Act 1988, this may be relevant to an allegation that Rachel negligently emerged from a side road onto a major road, and may be pleaded and admitted in evidence in Craig's civil claim against Rachel under section 11 of the Civil Evidence Act 1968.

2 (b) Craig Hopworth's solicitors can rely on Rachel's breach of the Highway Code as admissible evidence on the question of liability.

3 (a) Following receipt of notification of Craig Hopworth's claim on 4 January 2018, Aldrite Insurance must send an Acknowledgement, electronically through the RTA portal, the next business day: Friday, 5 January 2018. They must then complete the Insurer Response section of the CNF/RTA1 to provide a liability response and send this, electronically, to the claimant's solicitors within 15 business days which means by 26 January 2018.

3 (b) An allegation of contributory negligence would usually mean that the claim leaves the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (the 'RTA protocol'). However, the exception to this rule is where contributory negligence is alleged for the claimant's failure to wear a seatbelt. In such circumstances, the claim will continue in the RTA Protocol.

3 (c) (i) The claimant solicitors have disclosed the medical report as part of the RTA5/Stage 2 Settlement Pack along with details and evidence in support of special damages, and a settlement offer.

3 (c) (ii) Your firm/Aldrite Insurance has 15 business days, from the day after receiving the RTA5/ Stage 2 Settlement Pack, to consider the pack and accept the offer, or make a counter offer. If a counter offer is made, both parties' representatives have 20 business days to negotiate settlement. They can extend this period by agreement.

4. Aldrite Insurance is responsible for the type of damage which is a reasonably foreseeable result of Rachel's negligence (Wagon Mound No.1 (1961)). However, where the claimant has a pre-existing condition/ vulnerability, and some physical harm was foreseeable from the defendant's conduct, the defendant becomes responsible for the whole extent of the harm suffered, even though this was not foreseeable. This is known as the 'egg shell skull/thin skull rule': Smith v Leech Brain and Co Ltd (1962). Therefore, Aldrite Insurance is likely to have to pay damages for Craig's pre-existing cancerous condition.

5. In a personal injury claim, an unsuccessful claimant is usually protected from an order to pay the successful defendant's costs by qualified one-way cost shifting (QOCS): CPR Rule 44.14. However, where the claim has been found to be fundamentally dishonest, the claimant loses QOCS costs protection, and the defendant can enforce a costs order against the claimant for the whole value of the costs order, provided the court gives permission: CPR Rule 44.16. Therefore, Aldrite Insurance should be able to pursue Craig for its costs.