LEVEL 4 - UNIT 4 – THE LAW RELATING TO TRIPPING, SLIPPING AND OCCUPIERS' 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. An occupier of premises has sufficient degree of control over the premises to ensure the safety of the premises. This is a common law test and established in Wheat v Lacon (1966).

2. Three classes of lawful visitor to premises are: those with express permission, e.g. a person you invite into your house; those with implied permission, e.g. a person entering a shop; and those with a right to enter, e.g. a police officer.

3. An occupier owes a duty, under s.2(2) Occupiers' Liability Act (OLA) 1957, to take such care as is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited, or permitted, by the occupier to be there.

4. An occupier potentially owes a duty to unlawful visitors, under the Occupiers' Liability Act 1984, in circumstances where the occupier knows, or ought reasonably to be aware, of a danger on the premises, and that others are likely to come into the vicinity of the danger, and that the danger is one that the occupier ought to reasonably guard against. The duty is not owed automatically and the court will determine whether a duty is owed by reference to the risk of injury and the state of the premises

5. In the absence of explanation from the defendant which disproves negligence by the defendant, for example, by showing that the accident was due to a non-negligent cause or that reasonable care had been taken, the doctrine of '*res ipsa loquitur*' raises a presumption that any accident has occurred as a result of negligence. It is for the defendant to rebut this presumption.

6. Examples of reasonable arguments which a supermarket might raise are: that the defendant did not cause the accident; or that there was a proper system in place, which was in operation on the day in question. A supermarket might also argue that the system was operated by competent staff, that the accident was an event which no system could have guarded against or that, depending on the circumstances, the claimant was contributorily negligent.

7. A highway is a way over which there exists a public right of passage. A highway may include: roads, footpaths, pavements and public paths.

8. Examples of evidence to establish breach under s.41 Highways Act 1980 are: photographs of the defect; highway inspection records; witness statements from the claimant and others; and measurements taken of the defect.

9. Concurrent liability, that is liability of two or more defendants, may arise where works on a highway, to which the New Roads and Streets Act 1991 applies, are undertaken by a statutory undertaker, for example, a utilities company, and for which the highway authority also has responsibility under Highways Act 1980.

Section B

Scenario 1

1. (a) Julianne has a duty to any lawful visitors as an occupier, both at common law and under the statutory duty imposed by s.(2)(2) Occupiers' Liability Act (OLA) 1957. The duty is to keep lawful visitors safe, as far as is reasonably practicable, for the purpose of the visit. Winston and Anisha were lawful visitors, as was Ben for some of the time when he was on the premises. Julianne, although not the owner of the premises, had control over the main hall, kitchen and cloakrooms (Wheat v Lacon) and, therefore, should have taken reasonable care to ensure that lawful visitors were reasonably safe when using those areas.

   (b) Although Julianne has a duty to ensure that visitors are safe under s.2(2) Occupiers Liability Act, under s.2(4(b)) OLA 1957, an occupier may not be liable for injury caused by the faulty work of an independent contractor. Julianne had hired the premises, including the kitchen, but had limited control over the operation of the boiler, and is unlikely to be expected to have prevented Winston using the boiler, as she had been assured that the boiler would be mended in time for the party.

   The council is likely to be held to have greater liability as occupier, as they had engaged the contractor, and an occupier may not be liable if the work carried out is beyond the knowledge or expertise of the ordinary reasonable person e.g. Haseldine v Daw (1941). However, the council should have taken reasonable steps to ensure that the contractor was competent and that the work would be reasonably done, especially as a party was being held in the afternoon. Dunford County Council (DCC) cannot rely on the purported exclusion clause in the hire agreement with Julianne, as it breaches the Consumer Rights

Act 2015, and it is not permitted to exclude liability for personal injury or death.

Magic Plumbers are independent contractors engaged by the council, and the work is such that the council would not have the expertise to carry out, and nor would Julianne be expected to check the work. The accident happened solely because of the actions of the contractor in leaving the boiler evidently unrepaired. The warning was wholly inadequate (s.2(4(a)) OLA), as it gave no indication of any risk and was non-specific and placed simply in the kitchen.

Therefore, Winston has the strongest claim against the council and Magic Plumbers. He should be advised to make a claim against them, as he is unlikely to succeed against Julia.

2. (a) Ben attended the party initially as a lawful visitor and would have been owed a duty under the Occupiers' Liability Act s.2(2). However, the Act would no longer be relevant when he was ejected from the party as, at that point, he became a trespasser on the premises generally and certainly when he attempted to re-enter the premises through the window. This is because a lawful visitor becomes a trespasser when he moves outside the scope of his permission, reason or purpose to be on the premises because of boundaries of time or space.

(b) Ben may still be owed a duty of care under the Occupiers' Liability Act 1984 under s.2(3). The duty is owed in respect of a danger on premises, if the occupier is aware of the danger or has reasonable grounds to believe that it exists, and he knows or has reasonable grounds to believe that someone else is in the vicinity of the danger or may come into the vicinity of the danger.

In the circumstances, Julianne is unlikely to be held to have any duty to Ben, as she was not the occupier of the relevant part of the premises. However, Ben may have a claim against the council as occupier under the OLA 1984, because the window was broken allowing him access to the cloakroom. Therefore, the council might be taken to be aware of the potential danger of someone entering through a broken window, and it was a danger against which an occupier might, in all the circumstances, be reasonably expected to offer some protection against. However, it could be argued that, as the window was on the second floor, the accident was not because of any inherent danger or risk due to the state of the premises, e.g. Keown v Coventry NHS Trust (2006) but because of what Ben chose to do on the premises.

(c) Contributory negligence is likely to impact on Ben's claim, as he failed to take reasonable care for his own safety. Under the Law Reform (Contributory Negligence) Act 1945, any damages might be reduced by the percentage blameworthiness attributable to his actions. It might also be argued that Ben willingly accepted the risk (s.1(6) OLA 1984), for example as held in Tomlinson v Congleton BC (2003), and this might defeat his claim entirely.

3. Anisha is a lawful visitor and so the Occupiers Liability Act 1957 applies. Julianne has control of the premises as an occupier. Although the council is also an occupier, it is unlikely to be regarded as having breached its duty of care as the risk arises from activity on the premises whilst under Julianne's

control, and not due to the state of the premises itself, over which the council had control.

Section 2.(3) of the Occupiers' Liability Act 1957 requires an occupier to be prepared for children to be less careful than adults, but an occupier is entitled to expect that parents or guardians will take appropriate care of young children. For example, here, Anisha's mother would be expected to take care of her as held in Phipps v Rochester Corporation (1955).

However, occupiers should guard against 'allurements', that is, those things that are attractive to children, as held in Glasgow Corporation v Taylor (1963) and Jolley v Sutton London Borough Council (2000). In this case, the bubble machine's position in front of the band is likely to be regarded as an allurement to young children. As she had mopped up a spillage, Julianne should have foreseen that the bubble machine created a foreseeable risk arising from the slipperiness of the liquid used.

Therefore, Anisha has a sound claim against Julianne (and possibly also against her own mother). Having regard to Anisha's age, it is unlikely that she will be found to be contributorily negligent.

Section B

Scenario 2

1. (a) (i) Liability arises as the highway authority has a responsibility at common law in negligence and also a statutory duty under s.41 Highways Act 1980. The statutory duty provides that the highway authority is under a duty to maintain the highway. As the pavement where Michaela tripped is a highway, the council has a responsibility to maintain it and may be liable if it does not do so.

(ii) The case of Mills v Barnsley MBC (1992) sets out what a Claimant must establish in order to demonstrate a breach of s.41 Highways Act. Michaela must prove that the highway was in a dangerous condition, which was caused by a failure to maintain, and that her injury resulted from that failure.

(b) Michaela does not appear to have a sound basis for her claim, as it is unclear whether she knows where she fell, other than on a stretch of highway broadly identified as a 'total hazard'. This may not be sufficient, according to Littler v Liverpool Corporation (1968), as the question is not whether the highway as a whole is in an unsatisfactory state, but whether the specific location where the accident occurred is dangerous.

The defect she has measured may not be the defect where she fell. A defect which measures 25mm, such as the one measured by Michaela, is established as a rule of thumb to be one way of assessing danger according to Meggs v Liverpool Corp (1968).

However, such a defect, even if it was shown to be 25mm on the last inspection 11 months ago, and to have caused the trip, might not be considered to have been a sufficient danger necessitating repair, taking all the factors into account.

The fact that she has sustained injury may be more readily established as she received hospital treatment, but the council's liability for that may be difficult to establish.

2. The council may rely upon the statutory defence provided by s.58 Highways Act 1980, and show that it has used such care as was reasonably required, to secure that the part of the highway to which the action relates was not dangerous to traffic. General factors which will be taken into account are: the character of highway; the nature of traffic; appropriate standards of maintenance for different types of highway; what constitutes a reasonable state of repair; actual and constructive knowledge; appropriate inspection system; and any delay in carrying out inspections or repairing defects.

   In this case, the council may suggest that the frequency of inspections is reasonable and applied consistently to all residential areas. However, in the context of the specific location, and given the character of highway and nature of traffic, this may be considered insufficient. The council may argue that they had diligently noted the uneven slabs on the last inspection and had deliberated over the need for repair. It might also be argued that the number of complaints which Michaela has made does not necessarily prove that the complaints were justified, or that the area was dangerous. The council might also argue that the way in which the defect has been measured is unreliable.

3. (a) The Highways Act 1980 s.41 imposes a specific duty in relation to ice and snow. The highway authority is under a duty to ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow or ice. Previously, case law established that there had been no duty to remove snow or ice. In Kasim's case, there had been a fall of snow and a forecast of freezing weather. Therefore, it would have been advisable for the council to order gritting of the roads, to comply with the statutory requirements and codes of practice (for example, management of highways in winter).

   (b) The duty under s.41 Highways Act 1980 arises in relation to the highway itself and to things which may have become part of the highway. This means that the duty extends to both the surface of the highway and its structure. Grit is not part of the structure of the highway (Valentine v Transport for London (2010)). Although grit may be a hazard, it is of a type for which the highway authority would unavoidably, but periodically, be in breach of the duty under s.41, and it would be too onerous to impose a duty to maintain in those circumstances. Therefore, the council cannot be liable for the grit deposit, unless the way in which it was distributed was negligent at common law. There is no evidence of negligence here.

   The statutory duty under s.41A extends to snow and ice as transient hazards and against which the council would wish to guard, hence the gritting. However, there was no lying snow or ice at the time of the accident for which the council could be liable. Therefore, Kasim's claim is likely to fail.