

LEVEL 4 - UNIT 6 – DAMAGES, SETTLEMENT AND COSTS IN PERSONAL INJURY CASES

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.

Question 1

- (a) Factors which will be relevant in evaluating Tilly's claim for general damages are that she had an overnight admission to hospital and a return visit to hospital for further treatment. Tilly also underwent weekly physiotherapy. It is relevant that she had initial pain and ongoing pain, discomfort and swelling, which necessitated taking painkillers. She also suffered a loss of amenity, as she was unable to enjoy her summer holiday and she was also unable to undertake her paid holiday job. She also has difficulties playing hockey. She has obviously suffered inconvenience due to wearing a plaster cast for 6 weeks and having to mobilise on crutches.
- (b) Tilly can claim on her mother's behalf for the notional cost of care, provided it is over and above the normal family routine. However, the claim cannot be based on her mother's loss of earnings as there is a ceiling principle to prevent excessive claims. The rate which may be claimed is at the national care rates, but a reduction (25%-33%) is made as the duties are done unpaid and no tax or NI is payable. There is relevant case law which a judge will consider, for example, Hunt v Severs (1994), and the judge will assess whether the claim is reasonable and will require evidence in support as to what duties were undertaken which would not otherwise have been done and the time taken.
- (c) In order to put forward a claim for loss of earnings from Tilly's holiday job, we would need to obtain a statement from Tilly. We should also obtain written confirmation from the cafe that Tilly was to be employed throughout the summer and her rate of pay.

- (d) Tilly is entitled to claim in respect of general damages. Tilly can claim interest on general damages at 2% from the date of service of proceedings (not issue). She can also claim interest on special damages at 0.5%, which is the court's special account rate (Jefford v Gee (1970)), which is appropriate here for short term loss from the date of loss and which is not continuing.

Question 2

- (a) The relevance of negotiating on a without prejudice basis is that the negotiations cannot be referred to or disclosed during proceedings or to the judge. This enables parties to be free to discuss issues openly and this encourages and maximises the chance of settlement, which is in line with the overriding objective.
- (b) Pilgrim Henry should put forward the following arguments to rebut the allegation of contributory negligence. Tilly is a minor and was aged 12 at the date of the accident. Therefore, she is likely to have less awareness of risk than an adult. Furthermore, the incident took place on school premises, while Tilly was engaged at a school event, and was under the direction of the staff. She was provided with the shoes by a member of staff and there were no other shoes available to her, despite Tilly having complained that the shoes were too big/that she was not used to wearing shoes with such a high heel.
- (c) The most sensible step to take in order to attempt to compromise Tilly's claim, would be to consider making a Part 36 offer, as this would put the defendant at risk on costs, but would be in Tilly's best interests in respect of costs. If judgment is at least as advantageous to Tilly as the offer made, unless the court thinks it unjust, the claimant is entitled to interest on damages at a rate not more than 10% above base rate; indemnity costs from end of relevant period, with interest on those costs at a rate not exceeding 10% above base rate; and an extra 10% of damages awarded. Further, making an offer makes it more likely that the defendant will continue negotiations or make a counter-offer. If this was done, it would put Tilly at risk on costs and would need very careful consideration as Qualified One-way Costs Shifting (QOCS) applies.
- (d) As Tilly is a minor, the settlement must be approved by the court (CPR Part 21) otherwise the agreement is not valid. As proceedings are already issued, in order to obtain the court's permission, an application for approval must be made and an opinion on the merits of settlement must be filed (CPR PD 21).

Question 3

- (a) Pilgrim can reassure Troy that he can claim for disadvantage on the labour market generally. Although he can return to work, his career has been built doing one form of modelling, and he must now seek work doing other forms of modelling. He may not easily find suitable alternative work and may need to retrain to do other work entirely. The risk is compensated as general damages and is not capable of precise quantification/is usually assessed by reference to pre-accident earnings (see e.g. Smith v Manchester Corporation (1974)).

- (b) Troy can make a claim for his damaged watch as an item of special damages, but he cannot recover its original cost i.e. the £3,500 he paid for it four years ago. The general principle of betterment means that he cannot have something new for old and must ordinarily expect to recover only the cost of the watch based upon its value at the date of the accident. There is a chance that, as it was an expensive watch, it may have increased in value or at least retained its value and this would need careful investigation to ensure Troy is properly compensated.
- (c) Troy is earning £48,000 per year gross – that is £4,000 per month. He believes that he will earn about £1,500 per month gross. Therefore, to arrive at the correct multiplicand, we should subtract what he will earn from what he would have earned i.e. £4,000-£1,500. This gives a figure of £2,500 per month, so the multiplicand over one year is £30,000.
- (d) The benefits which Troy has received will have an impact on his claim for loss of earnings. Under the Social Security (Recovery of Benefits) Act 1997, the defendant/compensator is entitled, on behalf of the state, to recoup benefits which have been paid from relevant compensation payments, e.g. loss of earnings. Credit must be given in the schedule of loss for receipt of benefits reducing the claim for loss of earnings by the amount of deductible benefits received by Troy.

Question 4

Troy's conduct will have an impact on his costs recovery as a factor which can be taken into account in determining the amount to be paid to him. Gable's letter is marked without prejudice save as to costs and so they will be able to refer to the letter in respect of costs arguments. Although the usual rule is that the loser pays the winner's costs, the court has power to determine what costs order to make (CPR 44). Costs on the standard basis means that costs must be proportionate and reasonably incurred, and doubt resolved in favour of the paying party. Costs which are disproportionate or unreasonably incurred might not be allowed. If time has been wasted generally, or through pursuing heads of claim which are now abandoned, this would impact on the amount which can be recovered.