LEVEL 6 - UNIT 13 – LAW OF TORT
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 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 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

Question 1

The question refers to the standard of care used to determine whether a defendant is in breach of a duty of care owed to the claimant.

Any duty owed by a defendant in the tort of negligence is a duty to take reasonable care, not all possible care. Determining breach of duty involves applying a two-stage approach. First of all, the court must decide how much care a reasonable person should have taken in the circumstances – this is the 'standard of care' referred to in the question. Secondly, the court must decide whether the defendant's conduct fell below this standard.

The standard of care is said to be objective because it does not take into account certain personal characteristics of the defendant. For example, inexperience on the part of the defendant does not affect his/her liability. Thus learner drivers are expected to take the same level of care as experienced and competent drivers (Nettleship v Weston (1971)). Junior doctors are expected to exhibit the same degree of care as an ordinary skilled doctor exercising and professing to have the special skill required for the particular position the junior is filling (Wilsher v Essex (1986)). DIY enthusiasts are expected to perform tasks with the same level of care as the reasonably competent tradesperson (Wells v Cooper (1958), at least where they attempt tasks that would prompt an ordinary person to employ a professional (Moon v Garrett (2007)). As successful damages actions are not dependent upon the subjective skill of the particular defendant, there is consistency of approach and this promotes settlements in litigation. Arguably, if persons wish to avoid being held up to standards they have not yet attained, they may chose to avoid the activity in the first place, though insurance is usually available to cover potential liability.

However, there are limited circumstances where the defendant's personal characteristics will be considered in assessing the standard of care, such as a person's young age. Children will not be held liable in negligence unless a reasonable person of the same age would have foreseen injury as being sufficiently probable as to have anticipated it (Orchard v Lee (2009)). This reflects the fact that children are often less able to appreciate risks than adults.

In exceptional circumstances, however, the defendant may not be liable in negligence for involuntarily causing an accident due to some physical or mental condition. In Mansfield v Weetabix (1998) a lorry driver crashed into the claimant's shop having gradually become unconscious due to a state of hypoglycaemia resulting from a malignant insulinoma. The relevant standard of care was said to be that of a reasonably competent driver unaware that he may be suffering from a condition that impaired his ability to drive. The defendant was not liable in negligence for causing the accident as to hold otherwise would have been to impose strict liability. The decision in Mansfield thus appears to be inconsistent with the position concerning learner drivers (Nettleship), who are judged according to higher standards of competence that will be impossible for many to achieve.

In Dunnage v Randall (2015) the defendant, who suffered from paranoid schizophrenia, set himself alight with petrol. His estate was found liable for the severe burns accidentally suffered by the nephew during the incident on the basis that the defendant had failed to meet the standard of care to be expected of a person without a medical problem. The Court of Appeal held that the mental illness should not affect the required standard of care, even if the defendant was incapable of acting rationally, unless the illness rendered the defendant's conduct involuntary in the sense that he had no physical control over his actions. Only then would the mental incapacity negate the defendant's fault or responsibility for the injuries caused. The reasoning of the court in Dunnage has been criticised as setting unrealistically high standards of care for persons with mental disorders. Arguably it creates an unjustified distinction making it easier for persons with physical illness to avoid liability than those with mental disorders. Nonetheless, it is submitted that the decision is justified: taking account of the defendant's mental illness would run contrary to the concept of the reasonable person who can exercise rational choices and act accordingly.

A further consequence of the objective nature of the standard of care is that there will be no breach of duty for failing to take steps to guard against risks which could not reasonably have been anticipated at the date of the accident (e.g. Roe v Ministry of Health (1954)).

The standard of care is said to be a flexible one in the sense that the reasonable person is placed in similar circumstances to those confronting the defendant. For example, a defendant will be expected to take a higher level of precautions if engaged in a risky activity e.g. Miller v Jackson (1977) CF Bolton v Stone (1951). Similarly, if the potential damage or injury arising from the defendant's activity is serious, a reasonable person would be expected to take extra precautions given the increased risk e.g. Lunt v Khelifa (2002).

The standard of care will also be raised where vulnerable claimants are foreseeable victims of the defendant's activity e.g. Haley v London Electricity Board (1964).

Where persons are careless in carrying on a specialist trade or profession, they will be judged according to the standard of the reasonable person who has the same specialist level of skill or knowledge. Paradoxically, whilst this may appear

to suggest higher standards for professionals, critics argue that the Bolam test is too protective of such defendants (Bolam v Friern HMC (1957)). Duties of care can usually be discharged by proof that the professional acted in accordance with a practice accepted as proper by a responsible body of practitioners acting in the same field, even if this body represents a minority view. Arguably the test allows the professions to set their own standards although in extreme cases, the courts remain willing to declare that a recognised trade or professional practice is itself negligent (Bolitho v City and Hackney HA (1997)).

In assessing the standard of care, the courts also recognise that defendants who are placed in a sudden situation of danger, and who must act on the spur of the moment, are not expected to be able to judge the risks too carefully, although they must still act in a manner which is not unreasonable taking account of the demands and difficulties of the situation (e.g. Das International v Manley (2002)). Finally, for those actively engaged in risky sporting activities (or horseplay), it is recognised that participants are likely to be primarily focused on winning the competition/game, and should not be expected to judge the risks to spectators or other participants too carefully. Such persons will usually only be in breach of duty if they acted with reckless disregard for the claimant's safety e.g. Wooldridge v Sumner (1962), Blake v Galloway (2004).

The standard of care may be lowered where the defendant's activities carry some valuable social benefit, even where the risks are high – a point now specifically recognised in s.1 Compensation Act 2006, and more recently in the Social Action, Responsibility and Heroism Act 2015. For example, in Watt v Hertfordshire CC (1954) Denning LJ acknowledged that 'the saving of life and limb justifies taking considerable risk'.

Thus it can be concluded that the standard of care is an objective assessment which, for the most part, excludes the personal characteristics of the defendant whilst, at the same time, allows for flexibility according to the general circumstances in which the accident occurred.

Question 2

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. It has been described as 'protean' i.e. varied in nature. For example, it allows for the removal of encroaching branches and roots and enables actions where the claimant's land is endangered/damaged by hazardous neighbouring premises (e.g. Wringe v Cohen (1940). It is also commonly used to challenge activities on neighbouring land causing unreasonable emanations of noise and vibrations (e.g. Sturges v Bridgman (1879)), dirt and dust (e.g. Hunter v LDDC (1997)), smoke and fumes (e.g. St Helen's Smelting Co v Tipping (1865)), offensive smells (e.g. Bone v Seale (1975) and offensive sights (e.g. Thompson-Schwab v Costaki (1956)). It may also restrain nuisance telephone calls made to private property (e.g. Khorasandjian v Bush (1993)) and conduct on the highway interfering with private property (e.g. Hubbard v Pitt (1976)).

Private nuisance aims to protect land interests rather than the physical integrity of the person. This means that those suing must have a proprietary interest in the land affected (Hunter v LDDC). It is also highly unlikely that damages for personal injury can be recovered (e.g. Hunter v Canary Wharf (1997); Transco v Stockport MBC (2003)). The focus on land interests also means that is easier to establish an action where the claimant has suffered physical damage to land - St Helen's Smelting Co.

The requirement for unreasonable interference allows for a degree of give and take between neighbouring occupiers of land, especially in cases where the claimant suffers sensory discomfort only. Here, continuity or repetition is required before a court will find the disturbance is unreasonable. The nature of the locality is important. Disturbances which take place in rural or residential areas are more likely to be regarded as nuisances (e.g. Sturges) than those that occur in commercial/industrial areas (e.g. Hirose Electrical UK Ltd v Peak Ingredients Ltd (2011)).

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.

Whatever the type of damage suffered, there will be no nuisance if the claimant only suffers harm because s/he is abnormally sensitive to the defendant's activity (Robinson v Kilvert (1899)). It is likely that this rule has now been supplanted by the 'remoteness of damage' test (e.g. Cambridge Water v Eastern Counties Leather plc (1994); Morris v NRI (2004).

Where the claimant suffers material harm, defendants cannot avoid liability by arguing that their activities benefit the community as a whole (e.g. Kennaway v Thompson (1981). However, strong social utility may result in an award of damages, rather than an injunction - Coventry.

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 - Coventry.

Persons may acquire a prescriptive right to commit a private nuisance by continuing it, without challenge, for a period of 20 years e.g. Sturges.

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), at least in cases where the claimant's use matches the previous use (Coventry).

Private nuisance is sometimes said to be a strict liability tort: if there is unreasonable interference with the claimant's use of land, it is no excuse that the defendant took all reasonable steps to prevent the disturbance e.g. Rushmer v Polsue & Alfieri Ltd (1907); Adams v Ursell (1913). The tort in Rylands v Fletcher (1868), a specific application of private nuisance, also imposes strict liability for damage to land in certain 'escape' cases, though it is rarely successfully invoked. However, private nuisance requires some personal fault because interference with the claimant's use/enjoyment of land must have been unreasonable in the first place. The remoteness of damage principle also applies. Additionally, nuisances caused by an act of a trespasser/nature require proof of negligence (e.g. Sedleigh-Denfield v O'Callaghan (1940).

Public nuisance may be defined as an act (or a failure to discharge a legal duty) which endangers the life, health, property or comfort of the public, or which obstructs the public in the exercise or enjoyment of rights common to all Her Majesty's subjects (R v Rimmington; R v Goldstein (2005)).

Unlike private nuisance, public nuisance is both a tort and a crime (it is an either-way offence with no maximum sentence). In order to sue in the tort of public nuisance, claimants must have suffered special damage in excess of the general annoyance and inconvenience experienced by the public (e.g. Holling v

Yorkshire Traction Co Ltd (1948)). The Attorney General and local authorities are empowered to seek injunctions to prevent public nuisances on behalf of the community.

Public nuisance is a versatile tort, covering similar environmental disturbances to private nuisance (e.g. noises and smells) where these affect a wider section of the public. In fact, in A-G v PYA Quarries Ltd (1957) it was said that a legitimate way of proving a public nuisance is to establish a sufficiently large collection of private nuisances. The tort also applies where the defendant's conduct endangers the life, health, property or comfort of the public. The criminal offence is often used to prosecute public disorder/misbehaviour where the rights of the community to use public spaces without danger, annoyance or interference is compromised.

Public nuisance is a rights-based, rather than a property-based tort, meaning that claimants need not have a proprietary interest in the land affected. For example, claims are possible where the defendant unreasonably obstructs a public right of way (Holling). It is also possible to sue for personal injury (e.g. Re Corby Group Litigation (2008)).

Public nuisance requires proof that a section of the public was actually or potentially affected. For example in A-G v PYA, noise and vibrations from the use of explosives in the defendant's quarry affecting 28 local houses and a farm were considered to be a public nuisance. There must be a common injury: a series of nuisance telephone calls/letters targeted at different individuals would not be actionable (Rimmington).

Public nuisance is a fault-based tort requiring proof of negligence. There will be no liability unless the defendant knew (or ought to have known) of the nuisance, and despite having the means to stop it, failed to do so within a reasonable period of time e.g. Wandsworth London Borough Council v Railtrack plc (2002)).

Prescription is no defence in the tort of public nuisance.

Thus, there is a degree of overlap between the torts of private and public nuisance in relation to the types of behaviour and interference giving rise to liability. However, private nuisance aims to protect private property interests. Public nuisance aims to protect public rights, is more clearly fault-based and is also a crime.

Question 3(a)

The police enjoy a *de facto* immunity in negligence in relation to the investigation of crime where it is alleged that more careful enquiries would have resulted in the earlier apprehension of a criminal so as to protect potential victims. The 'immunity' was first recognised in Hill v Chief Constable of West Yorkshire (1989), though in reality, it is simply an application of the principle that persons owe no duty to prevent third parties from causing harm to a claimant - Michael v CC South Wales (2015). In Hill a claim brought by the mother of the final victim of the Yorkshire Ripper failed. This was principally due to the lack of proximity between the police and the victim: at the time of the murder, the identity of the killer was unknown, and Hill was just one of many potential victims living in the Yorkshire area. Lord Keith also justified the decision on policy grounds. Imposing a duty would, he thought, promote 'defensive policing', open the floodgates of litigation leading to a diversion of public resources and the detraction of the police from their primary role. He did not believe that recognising a duty would lead to higher policing standards.

The policy reasons articulated in Hill have been used to deny police liability in a variety of circumstances. In Alexandrou v Oxford (1993) the Court of Appeal held that the police were under no duty to respond to 999 calls either promptly, or at all. The House of Lords applied the Hill principle in Brooks v MPC (2005) to deny that the police service owe a duty of care to potential witnesses. In delivering the judgment of the court, Lord Steyn argued that imposing a duty in these circumstances would prevent the police from adopting a robust approach in assessing a person as a possible suspect, witness or victim, and would lead to an unduly defensive approach in combating crime. Critics argue that, as a matter of policy, prosecution witnesses who are relied upon by the police to give evidence should receive special status for protection in negligence (CF Swinney v CC Yorkshire (1997)).

Controversially, the Hill principle has been applied in cases of domestic violence involving close proximity where the police were in a position to help, having been made aware of an imminent threat of death/serious injury to an identifiable individual e.g. Smith v CC Sussex Police (2008) and Michael. In Michael, the Hill principle was upheld on policy grounds by 5:2 in the Supreme Court. Lord Toulson, on behalf of the majority, thought that recognising a duty of care in favour of victims of domestic violence would create illogical distinctions with other crimes/victims who have no claim e.g. where there are reports of imminent criminal damage, and cases involving 'bystanders' caught up in acts of violence that the police might have prevented. Whilst the 'defensive policing' argument was specifically doubted, there was no evidence to suggest that imposing a duty would improve the police investigation of, or lead to a reduction in domestic violence. Imposing a duty would negatively impact on police budgets/public funding as forces would have to defend civil legal actions, whether successful or unsuccessful. It was pointed out that investigatory failures may already lead to disciplinary consequences (as occurred in Michael's case) and that imposing a duty would force the police to prioritise reports of threats and violence, where the allocation of resources should be a policy matter for the police.

In a powerful dissent, Lord Kerr considered that the police should owe a duty to victims of serious violence in cases of close proximity, bringing them into line with other professional people who may be held liable for failing to exercise reasonable care and skill. He considered the principle that 'wrongs should be remedied' to be the most important policy factor addressed by the law, particularly in cases involving the protection of life and physical well-being. The fairness created by imposing a narrowly defined duty would outweigh any illogical distinctions that might arise. Recognition of a duty, he thought, would lead to improvements in police response to domestic abuse. Lord Kerr pointed out that a lack of evidence of possible adverse consequences arising from the imposition of a duty did not prevent the Lords from imposing liability on advocates in Arthur JS Hall & Co v Simons (2002).

The decision of the Supreme Court in Michael means that the Hill 'immunity' principle must now be regarded as settled law for the foreseeable future, even in cases of close proximity between the police and victims of violence. The only alternative actions available to such victims or their families are public law claims brought under Arts 2&3 ECHR (the right to life; prohibition of torture, inhuman or degrading treatment/punishment) pursuant to sections 6&7 Human Rights Act 1998 e.g. Sarjantson v CC Humberside Police (2013); DSD v MPC (2015). These claims are very narrowly defined and if successful, result in relatively low awards of damages.

3(b)

The police service may be liable for positive acts of carelessness (misfeasance) in carrying out their daily operations which create a foreseeable risk of harm. For example, a decision to discharge an 'old-style' CS gas canister, which created a fire risk, into a firearms shop containing highly combustible materials without fire-fighting equipment to hand resulted in a breach of duty in Rigby v Chief Constable of Northamptonshire (1985). The court held that a decision to delay the introduction of new-style CS gas devices, which did not present a fire risk, was not negligent because this was a policy decision concerning the allocation of resources.

Misfeasance in relation to operational matters is also apparent in cases where police have admitted liability for causing physical injury e.g. Knightley v Johns (1982) where an inspector negligently instructed a police motorcyclist to drive through a tunnel against the flow of traffic in order to seal the entrance, resulting in a head-on collision. See also Alcock v CC South Yorkshire (1991) where the police admitted liability for negligent crowd control leading to 95 deaths and the injury of over 400 football spectators.

The police may also be liable for failing to take reasonable care upon voluntarily assuming responsibility for the claimant's safety, under the extended Hedley Byrne principle. This occurs infrequently. Examples include cases where the police fail to take reasonable care to prevent persons, who are known suicide risks, from deliberately taking their own lives whilst in police custody e.g. Kirkham v CC Greater Manchester Police (1990); Reeves v MPC (1999). A further example may arise where the police voluntarily assume responsibility to keep an informant's details confidential. In Swinney v CC Yorkshire (1997) the claimant passed on information concerning a violent individual suspected of murdering a police officer, having sought and received assurances that her identity would be kept safe. However, her details were stolen from an unattended police vehicle and passed to the suspect. The claimant suffered psychiatric harm after receiving threats of violence and arson from the individual concerned. On a striking out application, the Court of Appeal held that a duty was arguably owed to the claimant. Public policy required that informants should be protected, thereby encouraging them to come forward thus preserving 'springs of information'.

Question 4

The defences of contributory negligence, consent and illegality apply generally to a number of different torts including negligence. The burden of proof lies with the defendant, on the balance of probabilities.

Section 1(1) Law Reform (Contributory Negligence) Act 1945 permits a court to reduce the claimant's damages to the extent it thinks 'just and equitable' where s/he was partly at fault for the loss suffered. For example, the claimant may have been partly responsible for the accident (e.g. a pedestrian who walks into the road without looking), or his/her act or omission may have increased his/her injury (e.g. where a car passenger fails to wear a seatbelt). The level of care a claimant might reasonably be expected to take for his/her own safety will vary according to the circumstances. For example, the standard may be reduced to take account of persons who make 'wrong decisions' which increase their loss when confronted with emergency situations (e.g. Jones v Boyce (1861)), or those injured whilst attempting rescue (e.g. Baker v Hopkins (1959)). Rescuers are not usually found to be contributorily negligent unless they did something so foolhardy as to amount to a wholly unreasonable disregard for their own safety. Child claimants must take the same level of care for their own safety as would be

expected of reasonable children of the same age e.g. Gough v Thorne (1966). The courts also make allowances for workers whose sense of danger may be impaired by noisy or repetitive tasks, fatigue or confusion e.g. Caswell v Powell Duffryn Associated Collieries Ltd (1939).

In addition, it must be proved that the claimant's carelessness caused or materially contributed to the loss or damage s/he suffered (e.g. Owens v Brimmell (1977)). If so, the court will apportion liability between the parties on a percentage basis according to the claimant's 'share in the responsibility' for the loss, and the claimant's damages will be reduced accordingly. The percentage reduction will depend upon the 'causative potency' of each party's conduct, with a possible further adjustment to reflect relative blameworthiness - Davies v Swan Motor Co Ltd (1949). For example, motorists are usually found to be more blameworthy than pedestrians as they are in control of a potentially 'dangerous weapon' e.g. Baker v Willoughby (1970); Jackson v Murray (2015). In commonly occurring accident situations (e.g. where the claimant fails to wear a seatbelt - Froom v Butcher (1975)) the courts may adopt a standardised percentage reduction so as to enable parties and their lawyers to predict quantum and to promote settlements.

Thus contributory negligence effectively balances the relative culpability of defendants and claimants.

Consent (*volenti non fit injuria*) is a complete defence which, if successfully raised, reduces the defendant's liability for committing a tort to nothing. For this reason, the courts have often been reluctant to allow the defence, especially given the alternative of reducing damages on a finding of contributory negligence. In some areas, the defence has been removed e.g. s.149(3) Road Traffic Act 1988 prevents consent being raised against a passenger where the motorist is subject to compulsory insurance.

To establish the defence it must be proved that the claimant had full knowledge of the nature and extent of the risk, and freely consented to it either expressly or impliedly. However, these elements are often difficult to establish. One possible exception concerns spectators or participants in sporting activities/horseplay who are taken to have consented to injuries caused by things done in the ordinary course of competition, even if there was an error of judgement or lapse of skill on the part of those involved. The tortfeasor would have to act with reckless disregard for the safety of the claimant before the defence of consent would fail e.g. Wooldridge v Sumner (1962); Blake v Galloway (2004).

In assessing full knowledge, the claimant will not be taken to have consented to risks caused by the defendant's negligence if there was no reason to anticipate such a possibility e.g. Slater v Clay Cross (1956). Those with impaired ability to recognise risks, such as children, probably cannot be *volenti*.

In deciding whether the claimant was willing to forego a legal action for any loss that might be suffered due to the defendant's tort, the claimant must usually be free from any pressure to accept the risk (e.g. financial, social or moral) otherwise there will be no real freedom of choice and the consent will not be freely given. For example, workers are often under financial pressure to keep their jobs and may 'grudgingly' accept risks created by their employment (e.g. Smith v Baker (1891)). Rescuers are arguably subject to moral pressure to act and will not consent to risks voluntarily undertaken unless there was no real danger (e.g. Cutler v United Dairies (1933)).

Finally, the defence of illegality may apply where the claimant is the 'victim' of a tort whilst involved in serious wrongdoing. If successful the defence will extinguish the defendant's liability but it is rare for claims to be defeated by illegality. The defence is based on public policy. It applies where a claim arises from a serious illegal act (this is a question of degree) and the injury suffered by the claimant was primarily caused by his crime rather than the defendant's tort e.g. Ashton v Turner (1981); Pitts v Hunt (1991); Vellino v CC Greater Manchester Police (2001) and Joyce v O'Brien (2013). The defence also applies where a claimant suffers psychiatric harm by reason of the defendant's tort and, consequently, later commits a crime resulting in loss of liberty e.g. Gray v Thames Trains (2009).

Thus it can be seen that contributory negligence, the most frequently invoked general defence, best promotes fairness between the parties in that it reduces a defendant's liability to take account of mutual blame. Consent and illegality extinguish the defendant's liability altogether despite clear evidence that the defendant committed a tort. However, these defences are highly circumscribed and are rarely successfully pleaded. The former is only likely to apply in extraordinary cases where the claimant willingly accepted risks without inducement or pressure (e.g. ICI v Shatwell (1965)). The latter is primarily based on public policy grounds rather than the need to promote a fair outcome between the parties.

SECTION B

Question 1(a)

FLL's liability to Amina

Amina's may have a claim under Occupiers' Liability Act 1957 (OLA 1957). A danger arose due to the state of the premises - s.1(1) OLA 1957 i.e. the rotten wooden fence on the elevated walkway (a 'fixed structure' – s1(3)(a) OLA 1957). Amina is a visitor whilst using the walkway. As a ticket holder, she will have FLL's express permission to go to those areas of the theme park to which customers are permitted access, including the walkway. FLL, as occupier (i.e. the person who has sufficient control over the walkway, and is therefore in a position to prevent accidents – Wheat v Lacon (1966)) will owe her a duty of care under s.2(2) OLA 1957 to 'take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited to be there'.

The likelihood and seriousness of injury associated with falling through the rotten wooden fence onto the concrete path below (Tomlinson v Congleton BC (2003)) together with the fact that the FLL runs a commercial venture undertaken for profit (Watt v Hertfordshire CC (1954)) points to a high standard of care in this case. Section 2(3) OLA 1957 provides that occupiers should expect children to be less careful than adults. However, occupiers are entitled to assume that very young children, who are not capable of recognising obvious dangers, will be accompanied and supervised by a responsible adult (e.g. Phipps v Rochester Corp (1955)) and will be prevented from encountering the risk. However, Phipps is unlikely to apply where the danger is not apparent. It seems unlikely that Amina's parents could reasonably have been expected to have been aware of the danger posed by the rotten fencing (e.g. Marsden v Bourne Leisure (2009)), and there is no suggestion that Amina was not being properly supervised by her parents at the time of the accident.

The ease and low cost with which the risk might have been eliminated, for example by instituting a regular inspection regime, so as to identify and repair the leaking roof and to replace the rotten wooden fence panels (perhaps with less degradable material) strongly suggests a breach of FLL's duty.

There are no issues concerning causation or remoteness of damage in Amina's case, and no defences appear to apply.

FLL's liability to Colin

Colin has been injured by a danger due to the state of the premises (s.1(1)(a) Occupiers' Liability Act 1984 - the electrical wire mesh being a 'fixed structure' – s.1(2)). However, in climbing over the fence, Colin entered the park as a non-visitor (i.e. a trespasser): he did not have FLL's implied or express permission to be in the park or use the dodgems. Colin will only be able to establish that FLL owed him a duty of care if the three stage test under s.1(3) OLA 1984 is met. Any duty will not extend to the protection of Colin's property i.e. his jacket (s.1(8)). Firstly, it is unclear whether FLL were aware of, or had reasonable grounds to believe that a danger existed (s.1(3)(a)). It would need to be established whether the ride had been subject to regular inspection and maintenance. It is unclear whether FLL knew or had reasonable grounds to believe that Colin may come into the vicinity of the danger. If a trespasser were to gain entry to the park, it is inevitable that s/he would gain entry to the various rides, including the dodgems. It would be relevant to discover whether FLL were aware that persons were gaining unauthorised entry to the park. On the other hand FLL may argue that, with a robust entry system and the erection of the tall perimeter fence, the presence of a trespasser on the dodgems could not reasonably have been anticipated e.g. White v St Albans City and District Council (1990) – s.1(3)(b). Arguably the risk was not one against which FLL could reasonably have been expected to offer Colin some protection (s.1(3)(c)) given that Colin's entry to the park and the dodgems involved the commission of a criminal offence (obtaining services dishonestly contrary to s.11 Fraud Act 2006).

(b)

Assuming Deena is a lawful visitor on the dodgems, FLL will owe a duty of care in relation to any personal injury or property damage under s.2(2) OLA 1957. Breach of this duty would have to be established. Here, the principle of *res ipsa locquitur* may enable the court to presume a breach, assuming the reason for the accident is unknown: the electrical wire mesh was either under FLL's control, or persons for whom FLL were responsible (e.g. Gee v Metropolitan Rly (1873)) and the mesh would not normally come loose unless proper care had been taken (e.g. Ward v Tesco Stores (1976)).

The issue is whether the duty will extend to protect Deena and Ernie from suffering medically recognised psychiatric injury.

FLL's liability to Deena

Deena has suffered post traumatic stress, which is medically recognised psychiatric harm and thus potentially recoverable. If Deena was physically endangered by FLL's negligence she will be a primary victim (Page v Smith (1996)). It is unclear whether Deena was placed in the immediate 'zone of danger' during her escape from the dodgems, though the fire is said to have spread rapidly. If so, some personal injury (either physical or psychiatric) would have been foreseeable as a result of FLL's negligence (Page). Thus Deena will be able to recover for her psychiatric harm as a primary victim even if her illness

was induced by the perception of what happened to others, rather than through fear for her own personal safety (e.g. Young v Charles Church (Southern) Ltd (1997)).

If a court were to find that Deena was not personally endangered in the fire, she will be a secondary victim, and her claim will fail for want of close ties of love and affection with any of the immediate victims (Alcock v CC South Yorkshire (1992)).

FLL's liability to Ernie

Ernie is a secondary victim, as he was some distance away from the danger zone at the time of the accident (Alcock). The permanence and severity of his symptoms, together with his need to take medication for depression suggests that he has also suffered medically recognisable psychiatric injury.

Ernie may struggle to establish that FLL owed a duty of care in relation to his psychiatric harm. Whilst Ernie was present at, and had a direct perception of the accident, and his psychiatric harm may have been caused by a 'sudden shock', the necessary close ties of love and affection are not presumed to exist in the case of siblings (Alcock). Proximity may require closeness of care and not just a close relationship (McLoughlin v O'Brian (1983)). If Ernie and Deena are young siblings living in the same family unit, a close relationship will be easier to establish. However, closeness of care comparable with typical spousal or parent/child relationships may be absent.

Question 2(a)

Fred's liability to Edward

An assault is an act of the defendant which causes the claimant reasonable apprehension of the infliction of a battery on him. By producing the bottle of liquid and threatening to spray the contents into Edward's face, Fred acted intentionally, and in a positive and deliberate way. Fred's words (the verbal threat to spray the contents of the bottle in Edward's face) are accompanied by threatening actions – Read v Coker (1853) (i.e. the production of the bottle), though it is likely that Fred's words alone would be regarded as an assault (R v Ireland (1997).

Fred's actions appear to have caused Edward to anticipate immediate physical contact. It seems likely that Edward believed he would be sprayed in the face with acid unless he gave Fred the cash he was carrying, and he surrendered the money as a result. Edward's apprehension of immediate physical contact was probably reasonable in the circumstances (e.g. Thomas v NUM). The wearing of a safety helmet is unlikely to offer full protection against the spraying of acid, which is still likely to make contact with areas of the body that are not sufficiently covered. Edward would not have known that Fred's bottle contained only water. It seems that a conditional threat may still give rise to an assault, even though the victim is given an option to avoid violence: Read.

(b)

Harry's liability to Fred - initial punch

It appears that the elements of the tort of battery will be easily satisfied here (the battery may also have been preceded by an assault if Fred anticipated the

contact). By punching Fred hard in the stomach, Harry brought about direct physical contact through a positive, deliberate and intentional act. While early authority suggested that Harry's contact must have been carried out in 'anger' (Cole v Turner (1704)) or with 'hostility' (Wilson v Pringle (1987)), it seems likely that this requirement now means nothing more than acting without lawful justification (F v West Berkshire Health Authority (1989)).

Harry was entitled to use reasonable force to recover/retain KFL's goods. Reasonable force was also justified in carrying out an arrest (see below). It seems unlikely, however, that a hard punch to the stomach constitutes proportionate force in either case, especially as this was seemingly done in advance of any request to return the goods or to accompany Harry back to the store. Harry is therefore probably liable in battery.

Harry's liability for false imprisonment

Fred and Gina's confinement in KFL's offices will give rise to false imprisonment provided that they were unable to break their confinement by moving freely in any direction by reasonable means (e.g. Bird v Jones (1845)), and the confinement was the result of an intentional, positive and deliberate act (e.g. Iqbal v POA (2009).

However, it is likely that Harry had a lawful excuse to detain Fred in arresting him without warrant under s.24A Police and Criminal Evidence Act 1984. Fred was in the act of committing an indictable offence (s.24A(1)(a)), Harry had reasonable grounds to believe the arrest was necessary to prevent Fred from making off before the arrival of a constable, and consequently that it was not reasonably practicable for a constable to make the arrest instead (s.24A(3)).

Gina was not arrested, so lawful excuse under s.24A defence does not arise. She was unaware of her confinement. Early authority suggested that a claimant would have to be aware of his/her unlawful confinement to sustain an action in false imprisonment – Herring v Boyle (1834). However, in Meering v Grahame-White Aviation (1920) the Court of Appeal held, without reference to Herring that such knowledge was not required. Atkin LJ, however, stated that a claimant who is unaware of his/her false imprisonment would probably be entitled to purely nominal damages.

The better view, strongly supported by Lord Griffiths in Murray v MOD (1988), appears to be that no knowledge of the unlawful confinement is required due to the overriding importance of the right to liberty. However, Gina's lack of knowledge of her confinement will result in a substantial reduction in her damages.

Harry's liability to Ivan

Harry will be liable to Ivan in the tort of battery in the same way as he will be to Fred for the initial punch (and assault if Ivan anticipated immediate physical contact). Under the doctrine of transferred intention, Harry need only have intended to make contact with someone (e.g. Livingstone v MOD (1984)). It does not matter that his intended victim was not his actual victim. Harry will have no defence in relation to his battery on Ivan.

KFL's vicarious liability

As Harry's employer, KFL will be vicariously liable for Harry's torts if these were committed during the course of his employment i.e. if there was a sufficiently close connection between Harry's batteries on Fred and Ivan, and his false imprisonment of Gina to make it fair and just that KFL should be held responsible - Lister v Hesley Hall (2001). As a store detective, the use of reasonable force to arrest those in the act of committing theft is well within the 'field of activities' entrusted by KFL to Harry, and there is likely to have been a sufficient connection between Harry's position and his wrongful conduct to make it right for KFL to be held liable as a matter of social justice - Mohamud v WM Morrison Supermarkets plc (2016). Thus KFL will be vicariously liable for Harry's torts.

Question 3

Employers owe a long-established duty to take reasonable care so as not to expose their employees to unnecessary risk. In Wilson & Clyde Coal Co v English (1937) Lord Wright said that this duty included an obligation to provide competent staff, adequate materials and a safe system of work. The duty is personal and non-delegable (McDermid v Nash Dredging and Reclamation Co (1987)) meaning that employers such as LCS cannot discharge their responsibility by delegating performance of the duty to an employee or contractor, such as Michael, even if they reasonably believe him to be competent to perform the role.

LCS's liability to Nathan

LCS is not only under a duty to provide Nathan with adequate personal protective equipment such as full body suits and breathing apparatus, but it is also under a duty to ensure that a safe system of work is devised and implemented. Thus in Pape v Cumbria County Council (1992) it was not enough for a cleaning lady, who worked with detergents and chemical cleaning products, to be supplied with rubber gloves. The Council were also expected to instruct the cleaner as to the importance of wearing the gloves and to establish a system of supervision to ensure compliance. In Clifford v Charles Challen & Son (1951) the Court of Appeal found that a safe system of working required protective equipment to be made available at the place it was needed together with supervision to ensure employees used the equipment. Denning LJ pointed out that workers undertaking routine tasks are often heedless for their own safety, may become careless and must be supervised to ensure that slackness is not tolerated. In Woods v Durable Suites Ltd (1953) the Court of Appeal distinguished their earlier decision in Clifford by holding that any duty owed by the employer did not extend to providing a supervisor, constantly watching, to ensure that a workman of full age and experience followed instructions in the use of readily available protective equipment.

It is arguable that the decision in Woods is distinguishable here. Nathan's failure to observe safety procedures appears to be well known (he is 'notoriously lax') and, given the very high risks associated with asbestos fibre inhalation, it is possible that a lack of supervisory intervention will place LCS in breach of the high standard of care owed to Nathan.

It is unclear whether Nathan's serious lung condition was caused by LCS's breach of duty, or by events preceding his employment with LCS. The nature of Nathan's illness is important here. Cumulative conditions such as asbestosis, where repeated exposure increases the severity of the symptoms, may enable the court to find a causal link on the basis that LCS's breach materially contributed

towards Nathan's illness (Bonnington Castings v Wardlaw (1956)). In such a case LCS's liability to pay damages would be apportioned according to the extent to which their breach contributed towards Nathan's illness - Holtby v Brigham and Cowan (2000).

If Nathan has suffered a condition where the precise timing of the trigger cannot be determined by medical science (e.g. mesothelioma), the position is different. The starting point is to assess the likelihood of the cancer having been triggered by reference to the level and duration of exposure to asbestos fibres throughout each period of employment. If, on the balance of probabilities, this was likely to have occurred during LCS's employment, LCS will be fully liable for the cancer - the 'but for' test will be satisfied. If this cannot be established, a court would be likely to hold LCS liable on proof that its breach materially increased the risk of Nathan's injury, as there are exceptional policy grounds for relaxing the 'but for' test to achieve corrective justice against employers in such cases – Fairchild v Glenhaven Funeral Services (2003). The Fairchild doctrine may apply here as Nathan suffered harm from a single factor (negligent exposure to asbestos fibres) but there were multiple possible sources, given Nathan's different periods of employment. If Nathan had contracted mesothelioma, he would have been entitled to recover his full loss from any one of his employers, including LCS - s.3 Compensation Act 2006. However, the 2006 Act does not cover other types of illness/disease. Thus if the Fairchild doctrine applies to Nathan's circumstances, he would only be entitled to damages against LCS apportioned according to the probability that his illness was triggered during his most recent employment – Barker v Corus (2006). There are no issues with remoteness of damage in this case.

However, Nathan's failure to take reasonable care for his own safety in not wearing protective equipment is likely to lead to a substantial reduction in compensation according to his 'share in the responsibility for the damage' - s.1(1) Law Reform (Contributory Negligence) Act 1945.

LCS's liability to Paula

LCS's duty to provide competent staff may, in certain circumstances, extend to disciplining or dismissing employees who do not attain adequate standards despite proper training and supervision. Thus the question of whether LCS were in breach of the duty they owed Paula will depend upon whether it had reason to expect that such a situation might arise. There is no suggestion that Ola was a known practical joker who had previously put fellow employees in danger (Hudson v Ridge Manufacturing Co Ltd (1957)). LCS are therefore unlikely to face liability for single, unpredictable incidents e.g. Smith v Crossley Bros (1951) & Graham v Commercial Bodyworks Ltd (2015).

LCS's liability to Quinn

LCS owe Quinn a duty to provide adequate plant and equipment. This includes a duty to properly inspect and maintain equipment, such as the angle grinder, to ensure they are fitted with proper blades. In view of the likelihood and seriousness of the potential injuries arising from the fracturing of a worn, rapidly rotating cutting disc and the cost and ease with which the accident might have been prevented by regularly replacing the blade, it is likely that LCS will be in breach of the high standard of care owed to Quinn. No issues concerning causation or remoteness arise in Quinn's case.

It is unclear whether a technician might be expected to check the state of angle grinder cutting discs on their own account, especially if this can be done by

cursory visual inspection. If so, Quinn may be found to have omitted to take reasonable care for his own safety in failing to identify the issue/request a new cutting disc, and his damages will be reduced on a finding of contributory negligence.

Question 4

Steven will have to establish that each allegation made against him has either caused, or would be likely to cause serious reputational harm under s.1(1) Defamation Act 2013 (DA 2013) if his claims are to proceed. Alternatively, as the statements may affect his activities as a self-employed person, he will be able to show that he has, or is likely to suffer serious financial loss as a result (s.1(2)). Allegations of unfitness to undertake his work as a minibus driver and to work with children may lead to the ending of his self-employed activities with WJS, so this criterion appears to be satisfied.

Steven v Rick (email to school) – libel

Defamation consists of publishing (making known to a third party) a statement capable of bearing a defamatory meaning, which refers to an identifiable claimant. If the defamation is in permanent form, such as an email, it will amount to a libel. Rick's email message appears to be defamatory. He clearly published a statement naming Steven to a third party i.e. the school receptionist. The email contains a clear allegation of Steven's unfitness to carry out his duties, and that he is knowingly putting children in danger, thus the statement would tend to lower Steven in the estimation of right-thinking members of society generally (e.g. Sim v Stretch (1936)) and would appear to be defamatory.

A further question arises as to whether Rick may be liable for the school receptionist's repetition of his comments when she forwarded the message to the Head Teacher and school governors. Such a repetition would ordinarily act as a *novus actus interveniens,* meaning that Rick would only be liable for his original email, and not the receptionist's subsequent repetition of it. However, an exception arises where the repetition is the natural and probable consequence of the original publication (Slipper v BBC (1991)). An email sent to a general school information inbox is bound to be read by an administrator and then forwarded to the appropriate person(s). Thus the receptionist's forwarding of the email to the Head Teacher was inevitable given the concerns raised about the safety of those children Steven was responsible for. It is unclear whether such a wide dissemination of the message to all the school governors was justifiable. This wider repetition may not have been a 'natural and probable' consequence of Rick's message and he may not be held liable for these defamatory emails.

Rick may be able to rely on the defence of publication on a matter of public interest under s.4(1) DA 2013. The statement, whether fact or opinion, concerned a matter of public interest (the protection of children), and it is likely that Rick reasonably believed this to be the case.

Steven v school receptionist (forwarding of Rick's email) – libel

The receptionist made Rick's defamatory statements known to further third parties i.e. the Head Teacher and school governors. The statements, which name Ken, are defamatory as described above.

For the same reasons as Rick, the receptionist may benefit from the defence of publication on a matter of public interest under s.4 DA 2013 in relation to the email forwarded to the Head Teacher. However, this defence will fail in relation

to the other emails if the receptionist did not reasonably believe that publishing the statement to all the school governors was in the public interest.

Steven v Rick (Facebook posting) - libel

Rick would have to prove publication i.e. that the posting has been accessed and read by third parties. The extent of this publication will be relevant to whether Steven can show that he has suffered serious harm, however, it is likely that a school Facebook page will have been accessed by a number of individuals.

The statement does not refer to Steven by name, however, ordinary, sensible people, proved to have special knowledge of the facts (i.e. that Steven is the school's minibus driver) would reasonably believe that the statement referred to him (e.g. Morgan v Oldhams Press Ltd (1971)).

The statement is clearly capable of bearing a defamatory meaning because it maintains the allegation that Steven is unfit to work with children. As the basis of Rick's allegation is not explained, it is likely that a darker meaning arises through false innuendo i.e. there is a possible implication that Steven engages in the physical/sexual abuse of children because reasonable persons guided by general knowledge might interpret the posting this way according to the natural and ordinary meaning of the words used e.g. Lewis v Daily Telegraph Ltd (1964). It will be no defence for Rick to argue that he did not appreciate his statement might be interpreted in this way when he published it e.g. Baturina v Times (2011).

A defence of honest opinion by Rick is likely to fail. Whilst the Facebook statement is presented as an opinion ('I believe' - which might satisfy s.3(2)), the basis of Rick's opinion is not indicated either in specific or general terms so he cannot satisfy s.3(3)).

In addition, the defence of publication on a matter of public interest is bound to fail. An unfounded allegation of child abuse is not one Rick could reasonably have believed was in the public interest.

Steven v Facebook/school

As a web hosting company, Facebook may also be liable for publishing Rick's defamatory statement, the elements of the claim having been discussed above. However, they will have a defence of innocent dissemination under s.1(1) Defamation Act 1996, if, upon notification of Rick's post, they investigated and removed the posting (e.g. Godfrey v Demon Internet (1999).

The school may also be liable for publishing the statement by omission if they failed to remove the posting (which could be done without difficulty or expense) upon becoming aware of it e.g. Byrne v Deane (1937).

Facebook will also have a defence as the 'operator of a website' under s.5 DA 2013 by proving that someone else posted defamatory material on their site (s.5(2)), despite their moderator's role (s.5(12)). If Rick is identifiable as the person who posted the information, Steven will not be able to defeat this defence (s.5(3)).