

**LEVEL 3 - UNIT 5 – LAW OF TORT
SUGGESTED ANSWERS – JUNE 2017**

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the June 2017 examinations. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

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

SECTION A

1. Tort can be defined as a civil wrong.
2. The effect of **s.2 (1) Unfair Contract Terms Act 1977** is to make clauses /notices void and unenforceable if they seek to exclude liability for personal injury or death resulting from negligence in the course of business.
3. The purpose of damages in tort law is to return the claimant to his/her position before the tort occurred/had the tort not occurred.
4. The Court's likely approach to determining whether a doctor has breached his/her duty of care to a patient is to consider whether the doctor fell below a reasonable standard of care. As a doctor exercises a particular skill this is measured by the standard to be expected of a reasonable doctor in the defendant's position/holding a post at the same level. If the defendant has acted in accordance with a responsible body of opinion in the profession, he/she will not be negligent. See e.g. Bolam v Friern Hospital (1957).
5. 'Reasonable foreseeability' in the context of the three-stage test in Caparo v Dickman (1990), as to whether a duty of care exists, means that the claimant must be a reasonably foreseeable victim of the defendant's negligence.
6. The 'organisation test' may be used to determine whether a skilled professional is an employee in order to establish vicarious liability. The court will consider whether his/her work is an integral part of the organisation. If it is, the individual is likely to be found to be an employee of the organisation.

Relevant cases would be: Cassidy v Minister of Health (1951)/Stevenson, Jordan and Harrison Ltd v Macdonald & Evans (1952).

7. Situations where there may be a break in the chain of causation between a defendant's negligence and the harm suffered by a claimant include:
- An act of the claimant himself/herself;
 - The act of a third party;
 - A natural event.
8. The 'floodgates' argument, in relation to duty of care in negligence, is that a duty of care should not be imposed because it may generate a large number of similar claims. This could result in an onerous financial burden on the insurance industry responsible for paying damages. It is part of the third limb of the test for duty of care in Caparo v Dickman – that it must be fair, just and reasonable to impose a duty. The 'floodgates' argument often underpins public policy decisions made by the courts.

Certain types of harm/types of defendant can give rise to a 'floodgates' argument. Examples where courts recognise the 'floodgates' argument include claims for pure psychiatric harm and claims against public bodies such as the police.

Relevant cases could be: Hill v Chief Constable of West Yorkshire (1988) and/or Alcock v Chief Constable of South Yorkshire (1992).

9. The test for legal causation requires the claimant to prove that the type of injury suffered by the claimant was a reasonably foreseeable result of the defendant's breach of duty of care. The harm suffered by the claimant must not be too remote a consequence of the defendant's negligence.

A relevant case would be: Wagon Mound No. 1 (1961) / Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (1961).

SECTION B

Scenario 1 Questions

1. (a) The court will apply the 'reasonable person' test to determine whether a defendant has breached his/her duty of care owed to the claimant. Breach of duty of care occurs when the defendant did something that a reasonable person, in the same circumstances, would not have done or omitted to do something that a reasonable person would have done. It is an objective test.

A relevant case would be: Blyth v Birmingham Waterworks (1856).

1. (b) William is expected to have the skills of a reasonably experienced farm worker, who in the same circumstances would not have failed to secure the bull paddock. William ought to have foreseen that failure to secure a bull in the presence of 500 people camping on the farm was likely to lead to some damage. The magnitude of risk from the bull was high and it would have been practicable to take precautions (lock the gate). Therefore, William's conduct has fallen below the standard of a reasonable farm worker and he has breached his duty of care.

2. (a) The relevant test for factual causation is the 'but for' test which requires the claimant to prove that but for the defendant's negligence, the claimant's harm/loss/damage would not have occurred. A relevant case would be: Barnett v Chelsea and Kensington HMC (1969). But for William's failure to secure the paddock gate allowing the bull to escape, Abbey would not have suffered any of the injuries.
2. (b) William may argue that the ambulance crew's negligence in not securing Abbey to the stretcher, or allowing her to fall off the stretcher, was a new intervening act of a third party that operated as a defence as it was sufficient to break the chain of causation between William's initial negligent act and the amputation. Therefore, William may argue that he is only liable for the broken leg, not the amputation.

- A relevant case would be Knightley v Johns (1982).

3. (a) Multiple/Economic Reality Test:

- the court will look at all the circumstance in which the individual works, for example;
- is the employee in business on his own account or working for an agreed wage?
- does he take any risk of loss/chance of profit?
- does he provide his own equipment etc?
- does he wear own clothes or work's uniform?
- is he able to delegate work?

See e.g. Ready Mixed Concrete (South East) Ltd v MoP (1968)

3. (b) To determine if William is an employee, applying the 'multiple test', employee status is indicated by, for example:

- provision of accommodation and meals;
- an overall to wear;
- guaranteed 20 hours work;
- stipulation of hours of work;
- is told where to work and what to do;
- not allowed to delegate work;
- he doesn't take any risk of loss;
- doesn't provide any equipment.

Self-employed status is suggested by:

- William pays his own income tax and national insurance contributions;

On balance, William is likely to be employed.

4. (a) The doctrine of vicarious liability makes an employer liable for the wrongful acts of its employee. Vicarious liability arises when:

- a tort has been committed;
- by an employee or a person in a relationship akin to employment, and;

- the tort was committed by a person acting during the course of employment or involved in an activity closely connected with his/her role in the organisation or not on a 'frolic of his/her own'.
4. (b) Brent may be vicariously liable for Abbey's injuries as:
- William has committed a tortious act/been negligent;
 - during course of employment/no evidence that was on frolic of his own;
 - he was feeding the bull on Brent's instructions;
 - (was possibly doing an authorised act in unauthorised way).
- A relevant case would be : Limpus v London General Omnibus Co Ltd (1862)

Scenario 2 Questions

1. (a) An early test to establish whether a duty of care was owed by one party to another was the 'neighbour' test, which stipulates that a person should take reasonable care to avoid acts, or omissions to act, likely to harm his/her neighbour. A 'neighbour' is someone so closely and directly affected by the act that the party should have them in contemplation when directing his/her mind to the acts or omission called into question.

A relevant case would be: Donoghue v Stevenson (1932)

A later test involved three stages: The first stage requires reasonable foreseeability of harm to the claimant from the defendant's conduct. Secondly, there should be a sufficient relationship of proximity between the claimant and the defendant, and then the court must consider that it is fair, just and reasonable, in the interests of public policy, that a duty of care be found to exist

A relevant case would be: Caparo v Dickman (1990)

- (b) Applying Caparo:

- Foreseeable victim: It is reasonably foreseeable that driving off the road and through the fence will cause children on the playing field harm;
- Proximate Relationship: There is sufficient proximity (closeness) between driver and the children as they are in the same area at the same time on the same date;
- Fair, just and reasonable: there are no public policy grounds to deny a duty when driving. Credit was given for answers that reached a different conclusion in relation to public policy.

Credit was also given for stating that this is an established duty situation because similar fact cases (i.e. road traffic cases) have already been determined and a duty recognised. In such situations it is not necessary to apply the three-stage test.

2. (a) (i) A primary victim is directly involved in the incident; he/she is in the range/zone of foreseeable physical harm. However, psychiatric injury does not have to be foreseeable, provided some physical damage is foreseeable.

A relevant case would be: Page v Smith (1995) or Dulieu v White (1901).

Additionally, The primary victim must suffer a diagnosable psychiatric disorder as result of the sudden shock of what they experienced.

A relevant case would be: Hinz v Berry (1970).

2. (a) (ii) The secondary victim is not in physical danger but witnessed the suffering of the immediate victims.

For a duty of care to be owed a secondary victim must prove that he/she suffered a diagnosable psychiatric disorder as a result of sudden shock and that the psychiatric injury is reasonably foreseeable in a person of normal fortitude. The control mechanisms from Alcock v Chief Constable of South Yorkshire (1992) must be met:

- the claimant's proximity of relationship to the immediate victims must be proven by proving close ties of love and affection;
- proximity to the accident or its immediate aftermath is also required;
- the claimant must have witnessed the accident with his/her own unaided senses.

2. (b) (i) Samera is likely to be considered a primary victim because she was at the scene of the accident and had to run out of way of the fire engine – she was therefore in the zone of physical danger. Therefore, some physical injury was reasonably foreseeable. Post-traumatic stress disorder (PTSD) is a recognised psychiatric illness and in this case was caused by sudden shock. Therefore, she is likely to be owed a duty of care.

2. (b) (ii) Carl was not in the zone of foreseeable harm and therefore cannot claim as a primary victim. Although Carl suffers from nightmares and anxiety, they do not appear to be a diagnosable psychiatric disorder. He does not satisfy the *Alcock* control tests to be a secondary victim: he did not suffer a sudden shock through witnessing the accident with his own unaided senses; he was told about the incident by his colleagues and witnessed the incident on television. His exposure lasted from when he was told by his colleagues to when he watched the incident on TV later in the day. He was not at the accident scene or its immediate aftermath, as he saw the TV report on it later that day. He would need to prove close ties of love and affection between him and Katie and Anish because there is no presumption arising from his relationship. He therefore lacks proximity to the incident and proximity of relationship to the immediate victims. He is, therefore, not likely to be owed a duty of care as a secondary victim.

3. If Samera is able to make a successful claim she may be awarded general damages to include pain and suffering for her mental illness and future loss of earnings. She should also receive an award for loss of amenity to reflect that she can no longer enjoy family time with her children. An award for special damages may include pre-trial loss of earnings.

Scenario 3 Questions

1. (a) The Limitation Act 1980 imposes a limitation period for personal injury claims of three years from the accrual of the cause of action, which in this case is the date of the accident. For the purposes of calculating the limitation period, time runs from the day following the day on which the cause of action arose, since parts of the day are ignored. Therefore, time begins to run on 4 August 2014 and Collette's claim must be commenced on or before 3 August 2017.
1. (b) Failure to bring a claim by this date will risk the claim becoming statute barred.
2. (a) The statutory defence available to Harold against Collette's claim is contributory negligence which is a partial defence. Under **s.1 Law Reform (Contributory Negligence) Act 1945** where the claimant's own negligent conduct has contributed to the claimant's harm/damage, the court may reduce damages awarded by an amount deemed just and equitable. Collette's failure to wear a seatbelt put her in a dangerous position and increased the severity of her injuries. Her damages may be reduced to reflect this.

A relevant case would be: Froom v Butcher (1976).

2. (b) Harold cannot bring the defence of *volenti*/consent against Collette's claim as **s.149 Road Traffic Act 1988** expressly prevents drivers using the defence against passenger claims.
3. (a) For an action in negligence against Harold there must be a causal link between his breach of duty of care owed to Bella and the harm and loss she suffered. To establish factual causation the 'But for' test is applicable. The court asks, 'would the claimant have been injured but for the defendant's action?' Applying the test: Bella would not have been injured or subsequently died but for Harold crashing his car into Bella's car.

A relevant case would be: Barnett v Chelsea and Kensington Management Hospital Committee (1969).

3. (b) Legal causation (remoteness of damage test) must be proven: The type of damage suffered must be a reasonably foreseeable result of the defendant's breach of duty of care. Applying the test: a head injury is a type of injury that Harold should have been able to foresee from his negligent driving. The thin-skull rule is also relevant: where some physical injury is foreseeable from the defendant's breach of duty, the defendant becomes liable for the whole extent of damage suffered even though it is not all foreseeable. Therefore, Harold is responsible for Bella's death.

A relevant case would be: Smith v Leech Brain (1962)

- 4 (a) Bella's personal representatives (PRs) may claim the following damages on behalf of her estate: under the **Law Reform (Miscellaneous Provisions) Act 1934**, the PRs can claim everything Bella could have claimed, except future losses. Special damages could include, for example, the repair costs for her car and loss of earnings to death. Funeral expenses are also recoverable (if initially paid by Bella's estate). They could also claim general damages for Bella's pain and suffering to the point of death.
- 4 (b) Bella's widower and children may bring a loss of dependency claim under the **Fatal Accidents Act 1976**.
5. The common law defences available to Harold against Aaron's claim are:

Illegality / ex turpi causa: as Aaron was engaged in an illegal activity of taking the plane without the owner's knowledge or consent when he suffered his injuries, Harold can argue that Aaron's damages arise directly from an illegal activity / they were acting together in a criminal enterprise. It would be contrary to public policy to allow Aaron to recover damages/ no action can be based on an illegal cause. If successful, the illegality defence is a complete defence.

A relevant case would be Pitts v Hunt (1991).

Harold can also argue the defence of *volenti non fit injuria* / consent, which means no injury can be done to a willing person. Harold must prove that Aaron knew of the risk of flying in the plane with an inebriated pilot and voluntarily agreed to the risk. On the facts, Aaron appears to have known of, and agreed to, the risk of severe injury. If successful *volenti* is a complete defence.

A relevant case could be: Poppleton v Trustees of the Portsmouth Youth Activities Committee (2008).

Conclusion: Defences likely to succeed.