

**LEVEL 6 - UNIT 13 – 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 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 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

Question 1

The question refers to situations where the claimant suffers a loss as result of the defendant's negligence but a subsequent, unrelated event occurring before the trial makes that loss even worse. The question is whether the later event amounts to a new and independent cause (a novus actus interveniens) that breaks the chain of causation so as to prevent the defendant from being held liable for the claimant's increased loss. The principle is based on fairness: if there is a novus actus it would be unfair to hold the defendant liable for damage not caused by his/her breach of duty (e.g. Corr v IBC Vehicles (2008)). The cases fall into three categories. The claimant's loss may be increased either due to an act of the claimant him/herself, a third party or by an act of nature. The effect of a novus actus interveniens on the defendant's liability to pay damages in relation to the first act of negligence varies according to the circumstances. The cases are, to a large extent, based on common sense.

A deliberate, seriously negligent or very foolish act of the claimant is likely to break the chain of causation. Here, the consequences of the claimant's subsequent unreasonable conduct will not be taken to have been caused by the defendant's original negligence. For example, if the claimant is injured by the defendant's negligence and the claimant subsequently commits suicide, there will be a novus actus if the original injuries did not result in mental illness leading to an 'incapacity in volition' (e.g. Wright v Davidson (1992) approved in Corr). However, where the original injuries negligently inflicted by the defendant consisted of foreseeable serious clinical depression which impaired the claimant's capacity to make reasoned and informed judgments about his future, a subsequent suicide will not break the chain (e.g. Corr).

Similarly, in McKew v Holland & Hannen & Cubitts (Scotland) Ltd (1969) the claimant suffered a leg injury due to his employer's negligence. As a result, his left leg occasionally gave way beneath him. Some time later, the claimant

sustained further injury when his leg collapsed whilst descending some steep stairs with no handrail. The House of Lords held that the claimant's attempt to use the stairs without the assistance of another adult was unreasonable, and so the defendant would not be liable for the second injury. By way of contrast, in Wieland v Cyril Lord Carpets Ltd (1969) the claimant had suffered injuries as a result of the defendant's negligent driving, and was forced to wear a neck collar. This restricted her ability to wear glasses and she consequently fell down some stairs, sustaining further injuries. The defendant was held liable for the full extent of the claimant's injuries as it had been foreseeable that the first accident would affect the claimant's ability to cope with ordinary everyday tasks.

More recent cases have emphasised that a novus actus requires the claimant's conduct to have been unreasonable to a very high degree, otherwise the defendant will be taken to have caused the more severe consequences. (though the claimant may still be contributorily negligent) e.g. Emeh v Kensington AHA (1985), Spencer v Wincanton (2009) and Scott v Gavigan (2016).

Unforeseeable third party conduct which is either deliberate or grossly negligent, and which aggravates the claimant's loss, is also likely to break the chain of causation. Anything less is unlikely to give rise to a novus actus so that the defendant will be liable for two sets of losses. For example, if the claimant's original injuries are made worse because s/he does not subsequently respond well to medical treatment, or s/he receives negligent medical treatment, the defendant will be liable for the full loss. Only medical treatment which is 'so grossly negligent as to be a completely inappropriate response to the injury inflicted by the defendant' will break the chain – Webb v Barclays Bank (2001).

Even if the subsequent third party conduct was unforeseeable, the question remains whether the defendant should be held responsible for the long-term effects of the claimant's original injuries after they have been made worse by the conduct of the third party. In Baker v Willoughby (1969) the pain, suffering, loss of amenity and earning capacity suffered by the claimant following injury to his leg in a road traffic accident was exacerbated when he was later shot in the same leg by armed robbers whilst at work: the leg required amputation. It was not doubted that the supervening event prevented the defendant from being liable for the loss of the claimant's leg. However, the House of Lords held that the defendant would be liable to pay compensation for the claimant's first set of injuries both before and after the shooting. The decision appears to have been motivated by a desire to avoid under-compensating the claimant. Lord Pearson pointed out that even if it had been possible for the claimant to sue the robbers for the injuries sustained in the robbery, he would only have recovered damages for the loss of a bad leg. The defendant's contribution was needed to fully compensate the claimant for the on-going difference between a good and a bad leg.

Unforeseeable natural events that increase the claimant's loss may also operate as a novus actus. In Jobling v Associated Dairies Ltd (1981) the claimant suffered permanent back injury in a slipping accident at work which substantially reduced his earning capacity. He sued his employer for damages. Before the trial took place, the claimant developed an unrelated spinal disease which left him permanently unable to work. The House of Lords held that the defendant should only be responsible for compensating the claimant for his loss of earnings between the date of the accident and the onset of the spinal disease. If the defendant had been forced to continue to pay damages for loss of earnings after the onset of the illness, the claimant would have been over-compensated, as he would have been unable to work anyway. The correctness of Baker v Willoughby was doubted but the decision was not overruled.

Baker and Jobling produce different decisions as to the defendant's on-going liability to pay damages for original injuries inflicted before the supervening event. It seems illogical that the answer should depend upon whether the supervening event took the form of unforeseeable third party conduct rather than an act of nature. As is so often the case in tort law, this awkward distinction can only be justified on policy grounds and the need to achieve corrective justice in individual cases.

Question 2(a)

Vicarious liability is a principle whereby one person, traditionally an employer, is held strictly responsible for a tort committed by another, traditionally an employee. It requires a relationship of employment between the defendant and the wrongdoer (rather than an employer-contractor relationship) together with a close connection between that relationship and the tort so as to make it just that the defendant be held liable to the claimant.

Vicarious liability is based upon policy considerations. The principle promotes the recovery of damages by tort victims in that it imposes liability on those organisations whose activities create risks. These organisations are usually better resourced to meet claims and can usually spread their losses by raising the price of goods/services and by taking out liability insurance. The principle may encourage organisations to raise operating standards: proper training and supervision of staff should reduce incidents that may generate strict liability.

In recent years, the courts have recognised the possibility of dual vicarious liability where workers, who are 'lent' by one business organisation to another (e.g. agency staff), commit torts. This reflects the "increasing complexity and sophistication of businesses in the modern world" where human resources are sometimes shared between enterprises. In Various Claimants v Catholic Child Welfare Society (2013) (the 'Christian Brothers' case), Lord Phillips endorsed the decision of the Court of Appeal, and Rix LJ's approach in Viasystems v Thermal Transfer (2005). Shared vicarious liability may exist in "a situation where the employee in question...is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence". The test is therefore based upon the level of integration of the worker into the employer's business when the tort is committed.

The Christian Brothers case also confirmed that vicarious liability may attach to relationships 'akin to employment': businesses may be fixed with tortious liability arising from a range of working relationships previously outside the remit of the principle e.g. agency staff and those engaged on a 'zero hours' basis. This again reflects the diversification of working practices. The test used to determine the existence of such a relationship was recently refined by the Supreme Court in Cox v Ministry of Justice (2016) and is based on the policy reasons underlying vicarious liability. A relationship other than one of employment is capable of giving rise to vicarious liability where:

1. A tort is committed by an individual who carries on activities as an integral part of the defendant's business (whether or not these activities are commercial/profit-making)
2. the tort results from an activity carried on by the defendant's business in furtherance of its own interests (rather than the activities being entirely attributable to the conduct of the tortfeasor's own independent business, or that of a third party), and

3. the commission of the tort is a risk created by the defendant 'within the field of activities' assigned to the individual in question.

Thus in *Cox*, the Ministry of Justice was found vicariously liable for the negligence of a prisoner kitchen-worker who dropped a sack of rice on his supervisor as she stooped down to clean up a spillage in the kitchen. The prisoner was a trainee who had been helping to prepare meals – activities which were an integral part of the operation of the prison which furthered its aims, and the injuries arose from a risk within the 'field of activities' assigned to the prisoner.

(b)

The tort must be committed 'in the course of employment' or an equivalent relationship for vicarious liability to arise. The relevant test adopted by English judges for over a century derived from *Salmond on Torts* (1st edition - 1907) and included consideration as to whether the wrongful act was an unauthorised mode of doing some act authorised by the employer. This test proved problematic because judges were reluctant to conclude that serious intentional wrongdoing, such as crimes committed by employees in the workplace, were acts authorised by the employer e.g. *Trotman v North Yorkshire CC* (1998). In *Lister v Heselley Hall* (2001) the House of Lords formulated a test applicable to intentional wrongdoing on the part of employees i.e. whether the employee's act was so closely connected with the general nature of his job that it would be fair and just to conclude the employer was vicariously liable. Recently, the Supreme Court in *Mohamud* confirmed this test and gave further guidance as to when a 'close connection' will exist. Lord Toulson, who gave the judgment of the court, set out the guidance in two stages:

1. In broad terms, what functions or 'field of activities' were entrusted by the employer to the employee i.e. what was the nature of the job?
2. Was there a sufficient connection between the employee's position and his wrongful conduct to make it right for the employer to be held liable as a matter of social justice?

Lord Toulson noted that these tests would often be satisfied where employees misuse the position entrusted to them in a way which injures a third party. In *Mohamud* unprovoked violence by a petrol station kiosk attendant against a customer in response to the customer's innocent enquiry was found to be in the course of employment. This was because "attending to customers and responding to their enquiries" was within the 'field of activities' assigned to the worker.

The tests adopted in cases such as *Cox* and *Mohamud* were acknowledged by the Supreme Court to be insufficiently precise to provide a clear answer in borderline cases. As such, they are likely to promote litigation. However, such imprecision is common in tort law. Negligence, for example, is based around concepts such as fairness, justice and reasonableness and reasonable foreseeability of damage. Flexibility is needed given the wide variety of factual circumstances likely to arise. Judges will nonetheless benefit from the guidance available by referring to similar/analogous past cases.

The developments described above have sought to preserve and enhance the ability of tort victims to recover compensation following incidents arising from modern businesses activities.

Question 3

The precise rules that determine whether a duty of care was owed by a defendant to protect a claimant from psychiatric injury, depend upon whether the claimant was a 'primary' or a 'secondary' victim.

This distinction was first articulated by the House of Lords in the case of Alcock v Chief Constable of the South Yorkshire Police (1991), and later affirmed in Page v Smith (1995) and White v Chief Constable of South Yorkshire Police (1999). Primary victims are directly involved in the incident and are either exposed to personal danger, or have a reasonable belief of personal endangerment. They are in the area of physical risk when an incident occurs. Secondary victims are those who are neither in personal danger, nor reasonably believe themselves to be, but who suffer psychiatric harm as a result of perceiving the death, injury or endangerment of a primary victim.

It is much easier for primary victims to establish a duty of care as they need only prove that either physical injury or psychiatric harm was a foreseeable result of the defendant's conduct (Page v Smith). As primary victims are, by definition, physically endangered this test is often readily satisfied. The rules needed to establish a duty of care in respect of secondary victims are far more numerous and difficult to meet. Thus the distinction is one of the mechanisms used to control the numbers of potential claimants, as there are likely to be fewer primary victims than secondary victims, especially in the case of large-scale disasters.

The distinction has been subject to both judicial and academic criticism, most notably by the Law Commission in its report on 'Liability for Psychiatric Illness' (1998) who recommended its abandonment as being artificial and leading to unfair results. For example in Page v Smith the claimant suffered a recurrence of his chronic fatigue syndrome after being involved in a minor car collision caused by the defendant's negligence. The claimant escaped physical injury altogether, and whilst some physical harm had been foreseeable, the claimant's psychiatric injury was not. Even so, the claimant recovered compensation as a primary victim. The outcome compares unfavourably with that of many secondary victims who suffer foreseeable psychiatric harm in much more extreme circumstances, but are denied recovery due to the Alcock criteria.

There can also be a very fine line between those who are inside/outside the area of immediate physical risk (e.g. Young v Charles Church (Southern) Limited (1997)) – perhaps only a few feet. This is bound to lead to arbitrary results given that primary victims are much more likely to recover damages than secondary victims.

The criteria for a duty of care in relation to secondary victims were established in Alcock. The House of Lords acknowledged that they were arbitrary. They have been subject to substantial criticism by the Law Commission and others. Firstly, there must have been close ties of love and affection between the claimant and the primary victim. These close ties are presumed to exist in the case of parent/child and spousal relationships. In other types of relationship, close ties must be proved to the parent/child/spousal standard. Professor Jane Stapleton has commented that this requirement brings the law into disrepute: some of the Alcock claimants were refused recovery because they had 'no more than brotherly love towards the victim', and it seems objectionable for many relatives to have to prove their especial love for the deceased, and to be subject to challenge on this issue by the defence. Even in the case of parent/child and

spousal relationships, the presumption of close ties is not conclusive and can be challenged by the defence possibly leading to a distressing cross-examination of emotionally vulnerable claimants at trial.

Secondly, the requirement to establish physical presence at the incident or its immediate aftermath has been criticised as being arbitrary and unfair. The 'immediate aftermath' doctrine originally developed in McLoughlin v O'Brian (1983) has, in practice, been interpreted to allow close relatives who encounter the consequences of an incident within approximately two hours to recover, so long as the victim has not been 'cleaned up' (e.g. Galli-Atkinson v Seghal (2003)). This raises the question as to why, for example, the recovery of compensation for psychiatric illness should depend upon how soon the mother of an injured child arrives at hospital after being told about an incident.

Thirdly, Alcock requires that the psychiatric harm must have been caused by the claimant's direct perception of the incident or its immediate aftermath and not by hearing about it from someone else. This requirement does not relate to any medical test used to diagnose psychiatric disorder. The Commission also pointed to medical evidence suggesting that secondary victims may suffer a stronger reaction upon hearing about an accident, given that people tend to imagine consequences more gruesome than the reality.

Finally, the requirement that the claimant's psychiatric injury must have been induced by a 'sudden shocking event' that would be sufficiently horrific to a person of ordinary susceptibility, was heavily criticised by the Commission. The criterion has produced injustice in particular cases (e.g. Taylorson v Shieldness Produce Ltd (1994)) and does not relate to any medical test for psychiatric injury. It means that some forms of psychiatric injury, such as PTSD, are easier to recover for than others: a person who suffers depression whilst providing long-term care for a severely injured primary victim would be denied recovery under this criterion, even though such persons seem particularly deserving of compensation. The harshness of the 'sudden shock' criterion can arguably be seen in recent medical negligence cases where the rule was used to deny recovery to claimants who witnessed a sudden deterioration in the condition of close relatives e.g. Liverpool Women's Hospital NHS Foundation v Ronayne (2015).

Ultimately, the Law Commission recommended the abolition of all the Alcock criteria, except the requirement for close ties of love and affection, for which it recommended there should be a 'fixed list' of relationships conclusively presumed to meet the criterion. This would include spouses, parents, children, brothers/sisters and cohabitants of at least two years whatever their sexuality. Whilst the Ministry of Justice rejected the need for reform in its report on The Law on Damages (2009), taking the view that piecemeal reform should continue through common-law development, many commentators take the view that the far-reaching reforms suggested by the Law Commission are still necessary, and can only be achieved by legislation.

Question 4

The tort of defamation aims to protect a person's reputation and hence his/her dignity and livelihood. However, the tort has sometimes had a 'chilling' effect on the freedom of the press, who may have been discouraged from reporting stories about public figures, such as politicians or trading organisations, on the basis of threats of expensive defamation actions.

The elements of defamation are mostly relatively easy to establish and thus appear to favour the interests of claimants. The defendant must have made known to a third party a statement capable of bearing a defamatory meaning, which refers to an identifiable claimant. A defamatory statement may be defined as one which lowers the claimant in the estimation of right-thinking members of society generally (Sim v Stretch (1936)), causes him to be shunned and avoided (Yousopoff v MGM (1934)), or exposes the claimant to hatred, ridicule or contempt (Parmiter v Coupland (1840)). Crucially, there is no requirement for the claimant to establish the falsity of the statement. Whilst 'truth' is a defence, the burden of proof lies with the defendant (see below). Finally, section 1 Defamation Act 2013 (DA 2013) requires the claimant to prove that s/he suffered (or is likely to suffer) serious reputational harm, or serious financial loss in the case of trading organisations.

However, a number of rules aim to balance the media's right to free speech. Certain classes of claimants are excluded from bringing actions, for example governmental/public bodies (Derbyshire CC v Times (1993)) and political parties (Goldsmith v Bhoyrul (1997)). It is important that these bodies are subject to uninhibited public criticism in the interests of democracy and should not be permitted to sue.

The Defamation Act 2013 (DA 2013) brought about a number of changes designed to enhance the freedom of speech. The need to establish serious reputational harm will make it more difficult for claims to be brought in the future and should have a liberalising effect on freedom of speech. The abolition of the 'multiple publication' rule and its replacement with a 'single publication rule' (s.8) will prevent the constant renewal of the 12-month limitation period (and indefinite liability for media organisations) every time internet archive material such as news reports are accessed. Section 9 requires that England and Wales must be the most appropriate jurisdiction in which to bring a claim, having regard to the place where the statement has been published. This provision prevents wealthy foreigners and public figures from suppressing investigative journalism by using British libel law where potentially defamatory material, published abroad (for example on the internet), is merely accessible in the UK. Section 11 removes the presumption in favour of jury trial in defamation cases so that almost all future trials are likely to be dealt with by a judge. Prior to the Act, there had been evidence that wealthy claimants had threatened the considerable cost of defamation jury trials to pressurise poorer defendants (e.g. NGOs) to stifle publication, through fear of being liable for these legal costs if successfully sued.

However, it is the defences to an action in defamation which most clearly promote the media's freedom of speech, by limiting the circumstances in which a claimant will be able to prevent publication of critical material.

Section 4 DA 2013 replaced the common-law 'responsible journalism test' established in Reynolds v Times Newspapers (2001). Newspapers and other media outlets will have a complete defence if they can show they acted responsibly in publishing stories in the public interest (whether based on fact or opinion), even if these prove to be inaccurate, subject to the requirements of the test set out in s.4(1). The new defence applies whatever the medium used to publish. Section 4(3) confirms that newspapers may neutrally report the fact that allegations have been made against someone without having to verify whether the allegations are actually true before publication, provided the paper does not adopt the allegation itself: Chase v News Group Newspapers Ltd (2002).

The defence of 'honest opinion' under s.3 DA 2013 replaced the common law defence of fair comment, latterly restated as honest comment) which allowed persons to express honest opinions however exaggerated, obstinate or prejudiced (Reynolds v Times Newspapers (2001)) on matters of public interest, provided they were not maliciously made. In British Chiropractic Association v Singh (2010) the Court of Appeal held that scientific discussion in the media should always be treated as opinion, thus preventing many claims from being brought against scientists who cast doubt on the efficacy of medical treatments (e.g. by multinational drug companies). Section 3 DA 2013 has now replaced the common law defence, whilst keeping it largely intact. The requirement for 'public interest' has been dropped, and the test is now whether an honest person could have held the opinion on the basis of any fact existing at the time the statement complained of was published (s.3(4)). S.3(3) preserves the decision of the Supreme Court in Spiller v Joseph (2010) that the defendant need only have indicated the basis of his/her opinion in general terms (so that readers are not misled in believing that the facts are worse than they really are). This promotes free speech because few people who write articles in the media or who contribute to discussions on the web, would bother to fully discuss the facts upon which their opinion is based. Protection in relation to the content of scientific and academic journals is preserved under s.6, but only if the published material was peer reviewed by one or more persons with expertise in the area concerned.

The defence of 'truth' under s.2 DA 2013 (which replaces the common-law defence of justification) is a complete defence, even if the material was published maliciously. It need only be proved that the allegations were substantially true - Alexander v North Eastern Rly Co (1865). Not every allegation must be justified, provided what is proved to be true is sufficiently damaging to the claimant's reputation, so that the falsity of the remaining allegations will not make any substantial difference.

Thus, whilst the tort of defamation aims to protect reputational interests, the availability of a range of defences aims to preserve rights to free speech particularly in relation to the publication of material in the public interest and honest opinions. These defences have been bolstered by DA 2013, and along with a range of further substantive and procedural reforms, are likely to provide a better balance between a person's reputational interests and the media's freedom of speech in future.

SECTION B

Question 1(a)

BHT v Activists (trespass to land)

Trespass may be defined as an unjustifiable interference with the claimant's possession of land. The facts disclose two possible trespasses, the first committed by those activists gathered on the public highway, the second by those entering BHT's land.

There is a presumption that BHT, as owners of the land adjoining the highway, will own the soil upon which it rests, up to the middle of the road - Harrison v Duke of Rutland (1892), although this can be displaced by evidence that the subsoil is vested in the highway authority. Any use of the highway other than for legitimate purposes will be a trespass on the soil (and the airspace immediately above the road) as against the owner to whom it belongs. In DPP v Jones (1999)

a majority of the House of Lords confirmed that any reasonable and usual mode of using the highway is lawful, and does not create a trespass, provided it is not inconsistent with the general public's right of passage and re-passage, does not constitute a private or public nuisance, and does not go beyond a reasonable period of time. In DPP v Jones, an assembly on a layby forming part of the highway for the purposes of protest amounted to a reasonable user of the highway as those involved behaved with 'courtesy and civility and restraint' and there was no obstruction to any traffic. If the initial protest on the highway met these criteria, there may have been no trespass at this point.

However, it is clear that those activists who entered BHT's land will be liable for trespass by wrongful entry in view of their voluntary, intentional, deliberate and positive conduct. The tort is actionable per se i.e. without the need for proof of actual damage. It is likely that BHT will wish to seek an injunction to restrain any further incursions onto their land by the activists.

(b)

Activists v Chief Constable (false imprisonment)

False imprisonment is the infliction of bodily restraint which is not expressly or impliedly authorised by law. There is little doubt that the elements of the tort are met in the circumstances described. By penning the protestors in for seven hours there was a complete restraint of their movement because they were unable to break their confinement by moving freely in any direction by reasonable means – Bird v Jones (1845). The confinement was as a result of an intentional, positive and deliberate act e.g. Iqbal v Prison Officer's Association (2009).

However the defence of necessity is likely to operate so as to permit 'kettling' when police action is necessary to prevent an imminent breach of the peace, and greater harm to a third party such as SGE (e.g. Austin v MPC (2009)). It seems likely that the protesters were, at the very least, aiming to disrupt SGE's activities and at worst, hoping to inflict criminal damage.

Bill v Davina (battery)

A battery is the intentional and direct application of force to another person without lawful justification. 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 Bill anticipated the contact). By hitting Bill over the head with the bat, Davina brought about direct physical contact through a positive, deliberate and intentional act. Whilst early authority suggested that Davina'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)).

However, Davina may be able to show that she was acting in defence of her person, in view of Bill's own assault upon her (Cockcroft v Smith (1705)). The use of some force was clearly necessary as Bill appeared to be about to hit Davina with the baseball bat. Hitting Bill over the head so as to cause a fractured skull may represent the use of disproportionate force, even though Davina was acting in the heat of the moment (Cross v Kirkby (2000)).

In the event that Davina is liable for a battery, the Chief Constable for the relevant police area will bear vicarious liability – s.88 Police Act 1996.

Colin v Amy and farm workers (false imprisonment)

Colin's confinement in the barn will give rise to false imprisonment in that he was unable to break his confinement by moving freely in any direction by reasonable means, and the confinement was the result of an intentional, positive and deliberate act. The main issue here relates to Colin's lack of awareness of his confinement. Early authority suggested that a claimant would have to be aware of his 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 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, Colin's lack of knowledge of his confinement will result in a substantial reduction in his entitlement to damages.

(c)

Amy v SGE (trespass to land)

Trespass to land may occur where a person disturbs the subsoil beneath the surface of land in the claimant's possession. In Bocado v Star Energy (2010) the Supreme Court confirmed that the owner of the surface is the owner of the strata beneath it, including any materials found there. This extends down to the point where physical features such as pressure and temperature render the concept of the strata belonging to anybody so absurd as to be not worth arguing about. The strata beneath Amy's land has been disturbed at a depth of 1200 meters for the purposes of extracting shale gas - a depth where the land is clearly capable of being worked/mined. SGE's voluntary, deliberate and intentional act of constructing the horizontal shaft so as to enter Amy's subsoil will give rise to trespass even if the incursion itself was inadvertent and unintended. SGE does not appear to have obtained a licence to enter Amy's subsoil and so will have no defence.

Amy v Colin (trespass to land)

Similarly, Colin's voluntary, deliberate and intentional act of entering Amy's farmland will give rise to a trespass, even if Colin was unaware he was crossing the boundary from BHT's land.

Question 2(a)

Farah v Gita

The first issue is whether Gita is in breach of the well-established duty of care owed by drivers to their passengers (e.g. Nettleship v Weston (1971)). The standard of care expected of drivers is very high given the significant risks involved and the severity of potential consequences e.g. Bolton v Stone (1951), and Gita is also undertaking a commercial activity with a view to making a profit (e.g. Watt v Hertfordshire CC (1954)). It seems inevitable that her pulling away, simply to retain her fare, at a time when she knew Farah was not wearing a

seatbelt and would be likely to attempt to exit the vehicle will amount to a breach of her duty: see Beaumont v Ferrer (2016) which involved similar facts.

The basic test to establish causation is apparently made out here: but for Gita's negligence in pulling away when unsafe to do so, Farah would neither have suffered head injuries in her attempt to jump from the moving vehicle, nor the subsequent blood clot/brain damage (e.g. Barnett v Chelsea and Kensington Hospital Management Committee (1968)). Even if it could be established that the blood clot and brain damage would have been avoided by the prompt arrival of the ambulance, it seems unlikely that Gita would succeed in arguing that a novus actus interveniens should prevent her from being liable for the more serious consequences. A delay on the part of the emergency services is entirely foreseeable, especially during times when demand is likely to be high, and only deliberate or grossly negligent third party conduct is likely to give rise to a break in the chain of causation e.g. Baker v Willoughby (1969).

However, Gita will be able to raise various defences. Firstly, Farah was attempting to make off without paying her fare. This illegality was integral to both Gita's negligence and Farah's potential claim, and probably amounted to sufficiently serious criminal wrongdoing to engage the defence of ex turpi causa (illegality). It appears that Farah's injuries were primarily caused by her own crime rather than Gita's tort (Gray v Thames Trains (2009)). In Beaumont, the Court of Appeal noted that there is a stronger case for the application of the illegality defence in cases such as this one, where the defendant is not involved in a joint criminal enterprise with the claimant. As such Gita is unlikely, as a matter of public policy, to be held liable for Farah's injuries.

If ex turpi causa does not apply, Gita will be heavily contributorily negligent in failing to take reasonable care for her own safety – s.1(1) Law Reform (Contributory Negligence) Act 1945 and a substantial reduction in damages would be likely.

Farah v Ambulance Service

Even if it could be established that the Ambulance Service's delay aggravated Farah's injuries, it is unlikely that Farah would be able to establish that she was owed a duty of care. In Kent v Griffiths (2000) the Court of Appeal held that the Ambulance Service would only owe a duty to a caller once it had accepted the call, having been given the patient's details and the nature of the emergency, knowing that the patient was relying on the service to respond within a reasonable period of time. Lord Woolf MR indicated that no duty would arise where a failure to respond arose due to a lack of resources e.g. where the Service had to choose between conflicting priorities. Such a decision would represent a policy matter unsuitable for resolution through the courts.

As the delayed response in this case arose due to a large number of simultaneous callouts, it appears that Farah will have no claim against the Ambulance Service.

(b)

Iqbal v Henry/construction company

It is likely that Henry is in breach of a duty of care owed to Iqbal and the other local retailers in relation to his careless repair work. Breach of duty was admitted by contractors in similar circumstances in Spartan Steel v Martin (1972) where an electric power cable supplying local businesses was carelessly cut through.

However, the scope of this duty was limited by the Court of Appeal so as to cover only physical damage together with loss of profit arising from this damage (consequential economic loss). Thus Iqbal will be able to claim for the physical damage to his shop and his stock and any loss of profit arising from discounting or abandoning this stock. However, the loss of operating profit whilst his shop closes for two weeks will be regarded as irrecoverable pure economic loss because it does not relate to any physical damage caused to Iqbal's property.

This position is justified by policy concerns. Allowing recovery for loss of profit during enforced closure periods in circumstances similar to those in Spartan Steel would lead to indeterminate liability in relation to the potential number and size of claims. A contractor such as Henry would be liable for exorbitant (and uninsurable) compensation claims, out of all proportion to the magnitude of the negligent conduct. Thus, it is considered preferable to spread the economic losses amongst those affected. The law achieves a balance because it allows for the partial recovery of losses (i.e. consequential economic losses) and it places the onus on those businesses potentially affected to consider how best to reduce their risks e.g. by taking out insurance. Affected businesses are encouraged to resume their operations promptly and the possibility of over-inflated/fraudulent claims is reduced.

As Henry's negligence is likely to have occurred during the course of his employment (or possibly in a relationship 'akin to employment'), the construction company will also bear vicarious liability.

Question 3

Residents v Jason (private nuisance)

The noise disturbance from the cinema may give rise to a claim in private nuisance i.e. an unreasonable interference with the right of the local residents to use and enjoy their land. It is also possible that any blocking of access to residents' off-road parking due to a build-up of traffic on the main road may amount to a private nuisance, as this is connected with Jason's use of his land (e.g. Hubbard v Pitt (1976)).

To sue in private nuisance the residents must have a legal interest in the land affected (Hunter v Canary Wharf (1997)), for example, they must be owner-occupiers or tenants. Jason can be sued as the creator of the nuisance and the occupier of the land from which the noise emanates.

An interference will only amount to an unlawful private nuisance if it is unreasonable. In cases involving sensory discomfort this must be unreasonable in relation to frequency, duration, timing, volume and type of noise. The fact that Jason's activities take place for prolonged periods both during the week and weekends, albeit principally during the summer, suggest an unreasonable interference. It is also significant that weekend evening shows take place at a time when local residents' sleep is likely to be disturbed (De Keyser's Royal Hotel v Spicer Bros (1914)).

The general character of the area is also significant. The question is whether Jason's activities amount to a substantial additional disturbance. Jason will be permitted to show that his existing activities constituted part of the character of the locality unless these amounted to a nuisance - Coventry v Lawrence (No. 1) (2014). The area appears to be mixed residential/commercial e.g. Hirose Electrical v Peak Ingredients (2011). Arguably, those living in a busy town centre

might reasonably be expected to put up with a degree of noise and other disturbance, including that produced by people enjoying leisure time during evenings, possibly extending into the early hours of the morning.

The granting of planning permission to build and operate the cinema, whilst not a defence, may be relevant in that any conditions imposed by WCC (e.g. permitted times and maximum decibel levels) are potential evidence as to what amounts to a reasonable use of the land (Coventry).

The presence of planning permission may also evidence public benefit; Jason's business appears to be a popular attraction and he employs many people. In Coventry the court upheld the view that strong public benefit should result in liability for damages rather than restraint of the tortfeasor's activities by injunction.

If Jason has used the land for 20 years (it is unclear exactly when the business opened during the 1990s) he may have acquired a prescriptive right to transmit sound waves over neighbouring land, even if there have been breaks in continuity (Coventry). If the cinema screenings have become more frequent over the years, it is possible that any prescriptive rights enjoyed by Jason will not authorise the duration and intensity of sound he is currently producing.

Finally, whilst it is no defence to say that the claimants came to the nuisance, it is possible that this rule may only apply where the claimant's use matches the previous use of the land (according to obiter views expressed in Coventry). As the town hall has only recently been converted for residential use, the new occupants may be prevented from complaining that Jason's pre-existing activities are a nuisance.

Finally, Jason may be able to argue that Karen cannot claim in private nuisance because she is 'abnormally sensitive' i.e. an ordinary person would not have suffered sleep disturbance e.g. Heath v Mayor of Brighton (1908). It is likely that this rule has now been supplanted by the remoteness of damage rule: Cambridge Water v Eastern Counties Leather plc (1994); Morris v NRI (2004). Whilst noise interference and sleep disturbance to local residents caused by the night-time operation of an outdoor cinema may be foreseeable types of harm, Jason may counter-argue that sound insulation levels achieved by modern building conversions make such disturbances unforeseeable.

Residents v Jason (public nuisance)

Public nuisance may be defined as an unlawful act or omission which endangers the life, safety, health, property or comfort of the public. The noise created by the operation of Jason's cinema may affect the comfort of the residents. The tort also covers unreasonable obstructions of the public in the exercise of rights common to all, such as the disruption to the use of the public highway near to Jason's cinema.

A class of Her Majesty's subjects must have been affected by the nuisance: Attorney General v PYA Quarries (1957). A block of 28 flats probably represents a sufficient section of the local community to meet this criterion in relation to the noise nuisance, assuming all other residents are affected by the noise. The class of persons affected by congestion on the main road will be considerably wider. The claimants need not have a legal interest in the land affected (Tate & Lyle v GLC (1983)).

In order to sue in public nuisance, the 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)). It is unclear whether any resident (even Karen) has suffered loss that is substantially different in nature and extent from that affecting others in the locality, especially in view of the mixed character of the area. However, it is clearly arguable that local residents will be more severely affected by frequent congestion on the main road compared to others using the highway.

There seems little doubt, given Karen's previous complaints and Jason's probable knowledge of the traffic problems on the main road that the 'fault' element associated with public nuisance will be met here (e.g. Wandsworth London Borough Council v Railtrack plc (2002)). Jason v Lemar (private nuisance).

At one time, it was unclear whether electromagnetic interference caused by the defendant's use of electrical equipment could amount to a private nuisance. Buckley J's obiter view in Bridlington Relay v Yorkshire Electricity Board (1965) was that it could not. The question was left undetermined by the House of Lords. In Hunter v Canary Wharf (1997), a case involving interference with local residents' TV reception caused by the construction of a building. More recently, however, the Court of Appeal in Morris v NRI (2004) accepted the possibility that such interference might give rise to liability in private nuisance as the use of electronic equipment is a feature of modern life. On the facts, the court declined to find liability in private nuisance as the damage suffered by the claimant was too remote.

Consequently, Lemar's deliberate and malicious use of a long-range radio transmitter to disrupt cinema screenings will give rise to an unreasonable interference with Jason's right to use and enjoy his land (e.g. Christie v Davey (1893)). Jason will be entitled to an injunction to restrain Lemar's use of the radio. The loss of profit suffered by Jason is consequential upon his loss of ability to use the land for business purposes and should be recoverable, though Lemar may not be a viable defendant financially (e.g. Andreae v Selfridge (1938)).

Question 4

As the owner-occupier, Nancy appears to have sufficient control over the decking, reclining seat and pool area to realise that a failure to take care may cause injury - Wheat v Lacon (1966). She is therefore an occupier.

Peter v Nancy

The decking will be regarded as 'premises' because it is part of a 'fixed structure' (s.1(3)(a) Occupiers' Liability Act 1957 (OLA 1957)) and the danger therefore arises due to the state of the premises (s.1(1)). Peter is a guest at the party with a written invitation, thus he is a visitor with Nancy's express permission to walk on the decking. Peter will be owed a 'common duty of care' by Nancy under s.2(2) OLA 1957.

In addition to guidelines under s.2(3) OLA 1957 concerning the standard of care, ordinary common law rules apply in determining breach e.g. Tomlinson v Congleton BC (2003). The likelihood of a slipping accident is high when untreated decking becomes wet giving rise to a significant risk of injury, including broken limbs (e.g. Bolton v Stone (1953)). Thus the standard of care owed by the occupiers will be an onerous one. A breach of this high standard seems likely

given the relatively low cost and ease with which the decking might have been regularly cleaned and treated. Quinn v Nancy

The reclining chair appears to be a 'moveable structure' and therefore 'premises' under both Acts (s.1(3)(a) OLA 1957 and Ss 1(2) and 1(9) OLA 1984). If the recliner is defective, the danger arises due to the state of the premises.

A key issue is whether Quinn is a visitor or non-visitor in relation to Nancy. He does not have Nancy's actual authority to enter the house. If Quinn is aware that entry to the party is by written invitation only, he will enter as a trespasser. If he is unaware, the position is likely to depend on whether Nancy's daughter had apparent authority to permit his entry (Ferguson v Welsh (1987)) i.e. whether a person in Quinn's position would expect Nancy's daughter to have the authority to invite him into the house/garden under normal circumstances. If so, Quinn may be owed a common duty of care (s.2(2) OLA 1957) by Nancy as a visitor. There will only be a breach of duty if the chair was defective i.e. the collapse did not occur due to Quinn's misuse. The likelihood and seriousness of potential injury from such an event points to a relatively high standard of care. If the defect might have been identified and remedied through regular inspection, Quinn may be able to recover for his back injury and damage to his smart watch.

If Quinn is a non-visitor, a duty will only arise under s1(3) OLA 1984 if Nancy was, or ought to have been aware that the recliner was dangerous (e.g. through regular inspection), if she knew or ought to have known of a trespasser's presence at the party, and whether it would have been reasonable in the circumstances to offer Quinn some protection (e.g. by removal of the chair). Any duty owed will not cover property damage i.e. Quinn's broken Smartwatch (s.1(8) OLA 1984). The issue of breach is likely to depend on the same factors identified in relation to the 1957 Act.

Richard v Nancy

Whilst he had general permission to enter the premises, Richard became a non-visitor/trespasser when he executed his dive, having exceeded his permitted purpose on the premises e.g. Tomlinson.

It is unclear whether Richard has been injured by a danger due to the state of the premises (Ss 1(1) OLA 1957 and 1984). Diving into a pool, even one which is not clearly marked, may represent a risky activity voluntarily undertaken by a person of full capacity – Tomlinson. As such, Richard may be unable to claim under either Act.

Even if the accident is attributable to defective premises the risk of diving into the shallow end of an unmarked pool is arguably an inherent and obvious one (Geary v JD Wetherspoon plc (2011)). On this basis, it seems unlikely that a duty was owed by Nancy to Richard (she could not reasonably have been expected to provide protection against such a risk – s.1(3)(c) OLA 1984), or that any duty was broken (Tomlinson). Furthermore, the occupiers might raise the complete defence of *volenti non fit injuria* on the basis that Richard had full knowledge of the nature and extent of the risk, and freely consented to it. Richard's drunkenness is unlikely to affect his knowledge, unless it was so extreme that he did not know what he was doing (Morris v Murray (1991)). At the very least, Richard will have been heavily contributorily negligent in causing the accident by failing to take reasonable care for his own safety under s.1(1) Law Reform (Contributory Negligence) Act 1945. In the unlikely event that an

occupiers' liability claim succeeds, the court would reduce Richard's compensation according to his share in the responsibility for the damage.

Sarah v Nancy

Sarah has either suffered injury due to a danger arising from the state of the premises (glass on the floor), or because Nancy, in her capacity as occupier, has permitted the use of glasses for drinking (things done) on her premises, presenting a danger to her visitors. The risk of cutting injuries seems high: poolside breakages might easily occur at a place where guests are likely to dispense with footwear (even if they are not permitted to swim). Glass cannot easily be detected in low light conditions. A failure to obviate the risk by providing plastic glasses may represent a breach of duty on Nancy's part.