CHIEF EXAMINER REPORT

JUNE 2024

LEVEL 6 UNIT 13 – TORT LAW

The purpose of the report is to provide candidates and training providers with guidance as to the key points candidates should have included in their answers to the June 2024 examinations.

The 'suggested points for responses' sections sets out points that a good (merit/distinction) candidate would have made.

Candidates will have received credit, where applicable, for other points not addressed.

Chief Examiner Overview

The use of case law still requires some additional work by most candidates. Those that achieved good marks will have approached their use of case law in such a way that the judicial mindset and reasoning for the outcome of cases is explained and used to address the question. Alternatively, the impact of the outcome of cases on those involved has been used to illustrate concerns within areas of law.

There continues to be many responses to problem questions that include mere inclusion of the stated facts. This information must be used in a particular way to attract credit. Candidates are advising the clients that have been involved in these incidents and therefore there is nothing creditworthy in information that repeats to the client what happened. Facts should be used in such a way that they show how a legal issue must be raised and discussed and the impact of the connecting of those facts to the legal rules.

A common mistake that was made that candidates were using legislation and principles from multiple areas of law. For example, in the question relating to occupiers' liability, many candidates ran through the steps of a duty of care claim. Each question will only relate to one area of law.

The mixing of information also occurred during the application of the law in problem questions. Each candidate should be addressed separately with each element of the relevant law to be applied to them before moving onto another claimant. It is also advisable to run through the incidents in the order in which they occur.

Candidates must take care to deal with each claimant individually. All elements of their claim must be covered and concluded before the candidates move on to another claimant.

Student Performance and Suggested Points for Responses

It is noted that the low numbers of candidates taking the Level 6 exams limits the scope for constructive feedback to be given and for firm conclusions to be reached. Therefore, feedback on student performance may be limited.

Section A

Question 1	25 marks
This was a popular question, even though it addressed a challenging area of law (illegality). The question required candidates to discuss the significant changes following the court's ruling in Patel. After the 1994 case of Tinsley, courts used the reliance principle, allowing claims if the claimant did not rely on illegality. However, subsequent cases yielded inconsistent rulings, with varying tests based on causation and foreseeability, as seen in Gray v Thames in 2009.	
Suggested Points for Response:	
A number of points are included below. **Pre-Patel discussion:** • Claimant is the victim of a tort whilst involved in serious wrongdoing • As far back as 1775, in Holman v Johnson, the courts were unwilling to "aid a man who founds his case of action upon an immoral or illegal act" • Before 2016, courts used reliance principle (Tinsley v Millgan (1994)) • Tinsley and Milligan were involved in social security fraud that resulted in a case involving trust and property law; due to trust law principle Milligan was entitled to an equitable interest regardless of their illegal arrangement **Post-Patel discussion:** • Fundamental change in approach after the case of Patel v Mirza (2016) • Mirza kept money given to him by Patel in an attempt to benefit from insider trading but due to the illegal transaction never actually taking place the courts 'ignored' the illegality and focused on the unjust enrichment of the defendant • The Supreme Court in Patel clarified that claimants could recover despite an arrangement being illegal as recovery merely places the parties back into the position, they would have been had the illegality not occurred preventing defendants being unjustly enriched • Court in Patel discussed how the reliance principle from Tinsley did not have universal application preventing a flexible approach when assessing whether public interest would be harmed if recovery is granted • The ruling in Patel has been described as a "re-writing of the law" • Lord Neuberger in Patel believed that due to illegality being a policy-driven defence, the writing of strict rules was inappropriate • In contrast, Lord Mance JSC in Patel felt that this change in approach would "introduce a novel dimension" and Lord Sumption stated that this would be "far too vague and potentially far too wide to serve as the basis on which a person may be denied his legal rights" • Outcome of Patel results in considerations being given to purpose of the illegal activity, any relevant policy issues and whether denial of recovery would be a proportionate response • a proportionate response based on the link between the illegality and the claim	

Question 2	25 marks

This popular question drew many responses that covered a wide range of topics. Good responses provided examples illustrating public interest's importance and used cases to explain the impact on individual rights. Concluding by discussing arguments for and against these examples helps ensure comprehensive coverage of all areas.

Suggested Points for Response:

A number of points are covered below

General outline:

- Under private nuisance, liability for physical damage is strict
- Strict liability debates based on the rule in Rylands v Fletcher
- Liability is based because use of the land is non-natural and the damage caused is physical
- Liability imposed as strict liability dates back to the 1800's involving a burst reservoir
- Courts both widened and restricted the scope of claims under nuisance and the application of strict liability
- If an activity is authorised by statute, claimants have been referred to as "suffering a private loss for public benefit" (see Geddis v proprietors of Bann Reservoir (1878); Dunne v North-Western Gas Board (1964))
- Natural acts exclude liability (E.g., Carstairs v Taylor (1871))
- Liability is still based on rules of remoteness as the rule in Rylands is founded in principles of nuisance and should not be imposed for unforeseeable damage
- Claims are not permitted for personal injury (see Cambridge Water Co. V Eastern Counties Leather plc

Arguments for strict liability could include:

- Encourages those who create a risk to take as much precaution as possible
- Easier to convict defendants such as corporations
- Only carry low penalties
- Most attempt to regulate behaviour to empower society to operate effectively
- There are alternatives available

Arguments against strict liability could include:

- can just show the defendant had been negligent
- unjust if a defendant has done all that they can
- could allow the defence of due diligence to alleviate harshness
- no evidence to say imposition of this liability is any more effective than negligence
- could discourage people taking socially desirable activities
- proportionality principle discussion
- decisions involve considerations of public policy
- still need to maintain control over the floodgates and limitations on the liability of defendants
- balance between interests of the public and those of individuals required to regulate behaviour

Question 3	25 marks

Many responses were of high quality, addressing a wide range of issues. Candidates demonstrated good knowledge of relevant case law and effectively used the wording of the question in their arguments. To improve, candidates should ensure they fully address inclusion and the reasoning behind legal approaches, as well as their impacts.

Suggested Points for Response:

General Outline:

- Duty involves taking reasonable care
- Court uses two-stage test to determine if a duty has been breached: how much care a reasonable person should have taken in the circumstances and whether or not the defendants conduct fell below that standard
- The standard of care to be expected is assessed objectively
- The court does not usually take into account personal characteristics of the defendant
- For example, inexperienced learner drivers are held to the same standard as a qualified and competent driver (Nettleship v Weston 1971)
- For example, junior doctors are held to the same standard as a qualified and competent doctor in that particular position (Wilsher v Essex HA 1986)

Discuss issues relating to standard of care:

- As claims do not consider the subjective skill of a defendant, there is a consistent approach
- If the defendant commits an act or omission the reasonable man would not have, the defendant will have breached their duty of care (Hazell v British Transport Commission 1958)
- The court must decide whether a reasonable person would do the same thing (Etheridge v East Sussex CC 1999)
- An objective standard means there would be no breach of duty for failing to take steps to guard against risks which could not reasonably have been foreseen, for example, Roe v Ministry of Health 1954
- Not considering the subjective skill of a defendant promotes settlements
- The rules attempt to avoid fixing defendants with unrealistic expectations
- An objective assessment limits floodgates concerns (e.g., could use illness as excuse such as in Roberts v Ramsbottom 1980 in which the defendant suffered heart attack and diabetic attack whilst driving)
- Due to there being no accurate standard, circumstances can exist under which the level of care can vary according to the risk (Glasgow Co. v Muir 1943)
- Vulnerability of the claimant is a relevant factor e.g., Paris v Stepney [1951]
- Circumstances can be considered, for example, in cases involving children (e.g., Mullins v Richards 1998; Orchard v Lee 2009)
- Rules relating to sporting events will be considered (e.g., Condor v Basi 1985)

Question 4	25 marks

This two-part question was popular, though responses showed potential for improvement. Careful planning and relevance to each section are key. Many responses concentrated on the issue of airspace but there was a distinct lack of a *range* of issues. Good responses demonstrated a solid grasp of leading principles in part a). Expanding the range of issues and examples will enhance the depth and quality of responses.

Suggested Points for Response:

Part A

- Principles permitting claims against interference with an interest in land:
- Intentional entry onto or interference
- Without permission or lawful right
- Onto another's land
- Can include, for example, squatting and fly tipping
- Defences include licence, justification, necessity and *jus tertii* (land is possessed by a third-party)
- Remedies include injunctions, damages and the removal of trespassers
- Land includes not only everything on the surface but everything beneath it down to the centre of the earth and the space directly above (Gifford v Dent 1926; Kelsen v Imperial Tobacco 1957; Grigsby v Melville 1974)
- Ownership carries with it the right to the airspace above to such height as is necessary for the ordinary use and enjoyment of the land and the structures on it (Bernstein v Skyviews and General Ltd 1978)
- Stopping point recently been described as the place where pressure and temperature make concepts of ownership absurd (Bocardo SA v Star Energy UK Onshore Ltd 2010)
- Various cases have come before the courts such as those involving drilling (see Bocardo)
- An unauthorised trespass into a neighbour's airspace will normally be restrained by injunction (see Trenberth (John) Ltd v National Westminster Bank Ltd 1979)

Part B

- Tort being actionable per se shows the fundamental importance of protecting interests in land and continued need
- Invaluable tort as covers many circumstances/types that other torts do not (Kelsen v Imperial Tobacco)
- Objective assessment for the award of damages (see Pennock v Hodgson 2010)
- A deliberate interference can result in aggravated damages being awarded (e.g., Owers v Bailey 2006)
- Low thresholds render requirements easy to satisfy supports a continued use
- Court does not need to show the defendant intended the trespass, only the activity (e.g., Gilbert v Stone 1647)
- Claimants can bring claim for innocent/mistaken entry (Conway v George Wimpey 1951)
- Claimants can bring claim for a negligent entry (League Against Cruel Sports v Scott 1986)
- Enables cases to be brought against trespassers that cannot be named (e.g., Canary Wharf v Brewer & Ors. 2018; O2 Arena (Arisco Ltd v Law & Ors. 2019; Cameron v Liverpool Vicotria Insurance 2019; Quintain (Wembley Retail Park) Ltd v Persons Unknown 2023)
- Must be a real and imminent risk of trespass to land being committed, impossible to name the persons involved in committing the trespass, be possible to give effective notice of any injunction and the terms of the injunction must be sufficiently clear to enable persons

potentially affected to know what they must not do and have clear geographical and temporal limits (Boyd v Ineos Upstream Ltd 2019)
- Must take care with the wording of any injunctions against 'Persons Unknown' (see RGCM Ltd v Lockwood & Ors. 2019; Hampshire Waste Services Ltd & Ors. V Persons Unknown 2003)
- Issues relating to losses permitted under heads of damages (e.g., see Davies v Bridgend CBC 2023 in relation to Japanese Knotweed and its potential to cause a diminution of the value of land by a more than trivial physical encroachment; previously, for example, in Williams v British Rail 2020 in which damages were not permitted due to nearby knotweed causing only pure economic loss)

Section B

Question 1	25 marks

In the case of Callum, who remained a lawful visitor due to his age and being under the care of the creche, candidates should have addressed the role of the creche staff and the legal responsibilities of parents. Given Callum's age, it's unlikely that responsibility would fall on the child or parents, so responses should focus on the care provided by the creche and relevant court approaches to young children in such settings. Regarding Belinda, who became a non-visitor upon entering a prohibited area, responses should have explored issues such as the role of independent contractors and the transfer of liability by the occupier. It was important to discuss how liability is managed when transferring is not permitted and how consent from the claimant affects the situation.

Suggested Points for Response:

A number of points are covered below

Andrew:

- Lawful visitor as a guest
- OLA 1957 applies
- Kempston Manor is the occupier (Wheat v Lacon (1966))
- 1– duty relate to the state of the premises or to things done or omitted to be done on them
- 2 – duty is to keep the visitor reasonably safe
- 2 – contributory negligence can be applied if an individual fails to take care of their own safety
- 2 – consent is a potential defence if a visitor willingly accepts the risks involved
- Adequate system to be in place and risks assessments must be undertaken
- Allison v London Underground (2008) a tube train drivers appeal was allowed as the equipment that caused the workplace injury should not have been implemented without a risk assessment taking place
- Court of Appeal in Allison confirmed that the adequacy of training is to be judged according to what the employer should have foreseen and not what they did foresee; foresight would be based on the risk assessment (if any)
- Contradictory case law based on knowledge of the defendant, for example, in Young v Kent County Council (2012) the risks had been identified in a risk assessment and the school knew of the risks of children trespassing across the skylight, whereas in Buckett v Staffordshire County Council (2015) an assessment had identified that the skylight was not defective and therefore no action was to have been expected from the defendant.

Callum:

- Callum is a lawful visitor as a guest at the hotel and a child under the care of the hotel's creche therefore the OLA 1957 would apply
- 2(3)(a) – occupiers are to expect children to be less careful than adults
- Barriers and signage must be age-appropriate and adequate
- As 6-year-old Callum should have been supervised by creche staff which are under a duty of care
- No parental supervision expected under the circumstances
- As Donna's employer the hotel would be vicariously liable

Belinda:

- Originally lawful visitor as guest
- Status changes due to entering prohibited area
- OLA 1984 applies (s1(1)) to non-visitors if they are aware of the danger; aware of non-visitors in the vicinity; and could reasonably take precautionary measures to prevent harm
- 1(6) – consent is a potential defence if a visitor willingly accepts the risks involved
- Potential for KC to transfer liability to DC as an independent contractor – facts state they were responsible when hiring, but no information on whether DC were reasonably supervised

Question 2	25 marks

In discussing the police's response to Erica's home, candidates could have further explored the Hill principles, differentiating between acts and omissions, addressing causation, and considering the police's discretion in decision-making as seen in Woodcock. When it came to ambulance services, candidates should have included discussions on cases like Kent, particularly focusing on the lack of liability when non-attendance is due to resource constraints. Fire crews' liability should be linked to their actions causing harm, with relevant cases such as Capital Counties Bank providing context.

Suggested Points for Response:

Police attendance at Erica's home:

- Historically immunity enjoyed by the police service from owing duty of care to the public confirmed in Hill v Chief Constable of West Yorkshire (1989)
- Courts will consider whether the claim involved positive actions or an omission (Stovin V Wise (1996)
- Mere knowledge of a victim or a threatened danger does not automatically give rise to liability (Van Colle v Chief Constable of Hertfordshire (2008))
- The police are not responsible for the actions of third parties (Michael v Chief Constable of South Wales (2015))
- Rulings regarding whether to impose a duty are not based on policy grounds but principles relating to omissions (Robinson v Chief Constable of West Yorkshire (2018))
- The court can question whether the police had caused harm or had they merely not provided a benefit such as protecting a victim (N v Poole (2019))
- In Tindall v Thames Valley Police (2022) the court confirmed that the police are subject to the same law of tort as private individuals but under the principle of omission, for example, by assuming responsibility or creating the danger
- Court in Tindall highlighted how mere attendance at a scene by the police does not constitute an assumption of responsibility

Ambulance attendance at Erica's home:

- The acceptance of a call and dispatching of an ambulance establishes a duty of care (Kent v Griffiths (2000)
- It is not whether there was a delay but whether there was an avoidable delay such as having no good reason (Kent)

- Calls are categorized and ambulances dispatched according to prioritization and a duty will not be breached if a delay is due to limited resources (Kent)
- If a patient was incorrectly categorized during the triage assessment and this leads to complications due to a delay, this could constitute a breach of duty
- Answering a call and merely attending the scene does not give rise to a duty, it is the assurances and subsequent reliance that the court consider (such as in Sherratt v CC of Greater Manchester (2018) in which the ambulance service were held liable due to assurances given and an incorrect downgrading of priority status)

Fire service attendance at Erica's home:

- Fire service will only be liable if they cause harm by a positive act and/or make a situation worse (Capital Counties Bank v Hampshire CC (1997); AJ Allan v Strathclyde Fire Board (2016))
- Unlikely fire service will be held liable

Police incident injuring Gina:

- Due to the harm being caused by a positive act of the officer liability could be imposed
- proximity and foresight may well be established due to the setting in which the chase took place
- in this case the police have actively caused the harm

Question 3	25 marks

In answering this question, it is crucial to first assess the status of the claimant and how it impacts the potential outcome before addressing other claimants. For instance, Jasper, being a rescuer, should have been clearly debated, with relevant references to SARAH 2015 adding depth to the discussion.

Regarding Indie, some candidates mistakenly classified her as a primary victim rather than a secondary victim. The analysis should have included a discussion on the requirement of having a close tie of love and affection with a primary victim. It is important to note that while presumptions exist for certain relationships, such as between mother and child, these are rebuttable, and other significant relationships can also be demonstrated to establish the closeness needed. For Manuel's case, it was essential to explore the tort under Wilkinson v Downton and cover the specific elements required for this tort. This aspect was frequently overlooked but is vital for a comprehensive answer.

In Olive's case, the analysis should have addressed the 'slow burn' type of cases, including those like Sion, Taylor, Ronayne, and Young. The recent Supreme Court ruling in the conjoined appeals of Paul, Polmear, and Purchase marked a significant shift. The Court abolished the outdated requirement for a 'shocking event' or for the event to be 'horrific,' focusing instead on causation.

The Court emphasised that harm must stem directly from the event, not from a subsequent death by a primary victim. It clarified that for a secondary victim to succeed, they must witness an 'accident'—defined as an external event likely to cause injury. This ruling also highlighted the distinction between accidents and medical negligence, expanding the scope for secondary victims under the slow burn effect and offering more flexibility in these cases.

Suggested Points for Response:

A number of points are covered below

Jasper:

- Jasper would qualify as a rescuer and primary victim
- Rescuers do not hold a special status (White)
- Will have been considered induced into the rescue (Alcock)
- It is foreseeable someone would intervene (Chadwick v British Rail 1967)
- Cannot use consent as a defence as rescuing someone is not a choice
- Jasper placed himself into the zone of danger to help Harriett and therefore likely KN liable

Indie:

- Would be classed as secondary victim as not in the zone of danger
- Would have to satisfy the requirements in Alcock
- She did witness the incident with her own senses
- She was at the incident as opposed to the aftermath
- Despite reforms recommended and plans previously put before Parliament regarding the expansion of categories for parties considered to have a close tie of love and affection, the court would have to be persuaded that their childhood friendship satisfied this requirement
- Indie has developed PTSD so this would satisfy the requirement of psychiatric harm due to the shocking event

Manuel:

- Was not at the scene but notified of incorrect information over the telephone

- In claim as secondary victim, would be considered that he did not witness the incident with his own senses, he was not at the scene or the immediate aftermath, the close tie of love and affection and their recently started relationship would come under question, and it would be questionable as to whether nightmares would qualify as psychiatric harm

Olive:

- Was not at the scene so could only claim as secondary victim
- Did not witness the incident with her own senses, nor was she at the immediate aftermath
- Prima facie the relationship of mother and daughter could satisfy the requirement of a close tie of love and affection, however, this can be rebutted, for example, if they were not close
- Agoraphobia must qualify as psychiatric harm
- Historically those not at the scene or aftermath have been unable to claim

Question 4	25 marks

The incident involving Rosie sending an email was handled adeptly by most candidates, although a discussion on her potential use of the defence of honest opinion would have strengthened responses.

For the online statements, candidates should have explored the potential defence of truth and discussed the liability of platform operators, including the statutory defences provided by the 2013 Regulations.

Regarding Terry's potentially slanderous comment, there was an opportunity to consider his claim that his words were merely banter and the potential defence of truth. In the second part of the question, candidates needed to address the type of harm required if the claimant was a company or organisation. While many focused on Peter's motives, which is irrelevant (see Berkoff), the emphasis should have been on the defamatory nature of the statement and its impact on the claimant.

Suggested Points for Response:

A number of points are included below

Part A:

Peter v Kempston Contractors/Rosie:

- **Statement** made within email therefore constitutes libel
- Identifies the claimant (s1 Defamation Act (DA) 2013))
- Statements likely to lower estimation and cause serious harm to Peter's reputation; contracts have been cancelled (s1 DA 2013)
- Rosie clearly meant to send the statements, but motive and intention is irrelevant (see Berkoff v Burchill 1996)
- Potential defence of honest opinion (s3 DA 2013) possible for Rosie if she can show it was an opinion that was based on facts (either contained or referred to in the statements made)

Peter v Steven:

- Statements posted online therefore constitute libel
- Statements made refer to the claimant
- Statements were published
- Peter would have to show they caused serious harm
- Potential defence of truth (s2 DA 2013) available to Steven due to findings of the criminal record

- Defendant must show the imputations were substantially true; do not need to show all the comments were true, just those that carried the 'defamatory sting'
- Burden is on the defendant to prove the truth behind the statements
- Due to Steven using a fake profile, there is the potential for Peter to bring the claim against the platform operators on which the statements were published
- Defamation Act 1996 provides a defence for innocent dissemination for those that were not the author, editor, or publisher of the statements and did not know, or have reason to believe, they were causing or contributing to defamatory statements

Peter v Terry:

- Statements were made verbally therefore constitute slander
- Statements refer to the claimant
- Statements were communicated to third parties
- Peter would need to show the statements caused serious harm
- A defendant cannot rely on a rumour under the s2 defence of truth unless they can show that the rumour was true

Part B

Kempston Contractors v Peter:

- Statements made were in written form therefore constitute libel
- Identifies the claimant
- Statements must be shown to have caused the company serious financial harm (S1(2) DA 2013)
- Peter's motive and intention are irrelevant (Berkoff)
- Facts similar to those in McDonald's v Steel and Morris 1997
- Does not need to be shown that all the statements were true, so long as the statement with a substantial defamatory 'sting' is true, the defence under s2 would be available