LEVEL 3 - UNIT 5 – LAW OF TORT
SUGGESTED ANSWERS – JANUARY 2018

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide candidates and tutors with guidance as to the key points candidates should have included in their answers to the January 2018 examinations. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

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

SECTION A

1. Candidates could have identified any two of:

   - the tort of negligence;
   - the tort of trespass;
   - the tort of nuisance;
   - any other common law tort(s).

2. In order to establish a duty of care in a novel duty situation, it must first be shown that a reasonable person in the position of the defendant would have foreseen that injury or damage could be caused to this victim as a result of his or her acts or omissions. It is clear from cases such as Smith v Littlewoods Organisation Ltd (1987), that the focus is on the consequences of the defendant's own actions, rather than the acts of others.

3. As a matter of public policy the courts have been reluctant to find that the emergency services owe a general duty of care to the public. In Hill v CC of W Yorkshire (1988), a police force was held to owe no duty to exercise reasonable care in the investigation of a crime. A number of reasons have been given for this reluctance, such as the 'floodgates' argument, the fear that this would encourage defensive practices, the fact that such liability may not be the best use of the services' resources and that it would have the effect of imposing liability for omissions.

4. A primary victim is someone who is within the 'zone of danger', i.e. someone to whom physical harm is foreseeable, however minor this harm may be (see for example Page v Smith (1995)).

5. As is clear from cases such as Bolton v Stone (1951), the greater the risk of harm being caused as a result of a certain act or omission, the greater the precautions that should be taken to avoid breach of the duty of care.

6. The test established in Barnett v Chelsea & Kensington HMC (1969) is known as the 'but for' test and is used to establish factual causation. The test asks, but for the negligence of the defendant, would the claimant have suffered the harm or damage complained of.

7. The traditional approach to vicarious liability was that a defendant would only be responsible for the acts of another if that person was an employee of the defendant. However, due to a long line of cases involving persons, such as priests, who are not technically 'employees', the courts have now established the test that the relationship must be 'sufficiently akin to that of employer and employee' (as per Lord Phillips, The Catholic Child Welfare Society & Others v Various Claimants & Others (2012)).

8. Contributory negligence is a partial defence, governed by the Law Reform (Contributory Negligence Act) 1945. It operates to reduce the damages awarded to a claimant, where he or she is partly at fault for the damage suffered.

9. Candidates could have identified damages awarded for:

    - future loss of earnings;
    - handicap in future employment (i.e. Smith v Manchester (1974) awards);
    - pain and suffering;
    - loss of amenity;
    - mental distress.

SECTION B

Scenario 1 Questions

1. (a) The test for establishing the standard of care required is an objective one, based on the notion of the 'reasonable man'. A relevant case would be Blyth v Birmingham Waterworks Co (1856). When a duty of care is owed in a situation where a party is exercising a specific skill, the standard is that of the reasonably skilled defendant. As an objective test, no account will be taken of a lack of skill or experience. For example, a learner driver is still judged by the standard of the reasonably skilled driver (Nettleship v Weston (1971)). The standard here, will be that of the reasonable builder of a display stand.

   (b) A duty of care is breached when the defendant does something which the reasonable man would not do, or fails to do something that the reasonable man would have done. Here, a reasonable builder of the display stand would install the roof correctly, and/or employed a suitable expert to do this, and/or checked the roof was properly attached. As she has failed to do this, Crystal's conduct is below the standard of care required and she has breached her duty of care.

2. Relevant factors that could be discussed when establishing the standard of care required would include:

   - The likelihood of harm. Here, it appears highly likely that harm will arise if the surface is not treated, and so is slippery to stand or walk on. A relevant case would be Bolton v Stone (1951);
   - The age/ vulnerability of the claimant. It is clear that children may take less care, especially as they are likely to be excited in the circumstances. A relevant case would be Jolley v Sutton LBC (2000);
   - The cost of avoiding harm. Crystal can remove the danger cheaply and easily, by paying £25 to treat the plastic sheeting. A relevant case would be Latimer v AEC (1953).

   It is clear that through a combination of these factors, the standard of duty owed by Crystal is high, and her actions have fallen short of this standard. She has breached her duty of care.

3. The requirement of legal causation in tort law, means that the damage claimed must not be too remote from the breach. The test of remoteness is what is foreseeable, see Wagon Mound (No 1) (1961). However, once a type of damage is foreseeable, the magnitude of this damage is irrelevant. As such, just because a particular claimant suffered greater injury than the average person, this in itself will not prevent full damages from being claimed (Smith v Leech Brain (1962)). This principle is known as the 'egg-shell skull rule'. Applying the rule to Bradley, it was a foreseeable result of Crystal's breach that physical harm may be suffered by him. As such, it is irrelevant that the harm he actually suffered is greater than that of the average child, and he will be able to claim damages for all of his losses.

4. (a) *Volenti non fit injuria* loosely translates as 'no harm can be done to a willing person' and is sometimes called the defence of consent. It will operate when the claimant knows of the risks posed by the defendant's conduct and willingly or freely consents to these risks.

(b) Anya does not know that Crystal has installed the stand herself, lacking the requisite skills or experience. She therefore does not know of the risks attached to operating the stand and, therefore, cannot and has not consented to these risks.

5. Candidates may have identified any of the following:

General damages

- pain and suffering (most notably during her stay in hospital);
- loss of amenity (as she cannot continue making pots);
- loss of future earnings (as she received money from selling the pottery);
- loss of congenial employment.

Special damages

- earnings lost during her time off work while injured;
- costs of medical treatment;
- costs of damage to the pottery at the fair.

Scenario 2 Questions

1. (a) A secondary victim is someone who witnesses a shocking event, but is not themselves within the 'zone of danger' (i.e. physical harm to them is not foreseeable).

(b) The 'control mechanisms' which limit the scope of those owed a duty of care as secondary victims come from the case of Alcock v Chief Constable of S Yorkshire Police (1991). The potential claimant must show:

- proximity of relationship: it must a relationship containing 'close ties of love and affection';
- proximity in time and space: to the accident or immediate aftermath;
- that they witnessed the accident with their 'own unaided senses';
- that they suffered a recognised psychiatric disorder;
- that this disorder was as a result of the 'sudden shock' of what they witnessed;
- that this disorder was foreseeable in a person of normal fortitude.

2. (a) As the mother of a child involved in the accident, Frances has the requisite proximity of relationship. She was 100 metres away from the accident, so also had physical proximity to the accident, which she witnessed with her own unaided senses. She appears to have suffered a recognised psychiatric disorder (PTSD) and this appears foreseeable in the circumstances. The only possible argument against Frances being owed a duty of care as a secondary victim is if it is shown that she developed PTSD as a result of brooding on the possible consequences of the accident, rather than as a result of sudden shock. Unless this is the case, Frances appears likely to be able to establish that she is owed a duty of care as a secondary victim.

(b) As the father of a child involved in the accident, Gary also has proximity of relationship. He also appears to have suffered a sudden shock. However, none of the other criteria are met: he does not have physical proximity to the accident (as he was at home); he did not

perceive the accident with his own unaided senses (it was through the phone connection that he heard the crash); and he has not, on the facts, suffered a recognised psychiatric condition (see for example Hinz v Berry (1970)). Gary is extremely unlikely to be owed a duty of care as a secondary victim.

3. Traditionally, the courts were willing to treat rescuers more generously in claims for psychiatric harm, on policy grounds. However, the modern position is stated in White v Chief Constable of S Yorkshire Police (1999), which made clear that a rescuer must claim under the recognised categories of primary or secondary victims.

   Harpreet will not be able to claim as a secondary victim as (on the facts as given) he does not have close ties of love and affection with anyone involved. However, when carrying out the rescue, he has braved the fire which starts in the aftermath. As such, he has entered the 'zone of danger' and will, therefore, be considered a primary victim. In order to claim as a primary victim, Harpreet must demonstrate that some physical harm was foreseeable, see e.g. Page v Smith (1996). Clearly physical harm is foreseeable here, and Harpreet will be owed a duty as a primary victim.

4. The Limitation Act 1980 imposes various limitation periods for different types of claims. In a claim for personal injury caused by negligence, Section 11 of the Act states that such an action must be brought within 3 years of the date of the accident, or date of knowledge of the injury, if later. The date of the accident was at some point in March 2015, so the limitation period will expire exactly three years later, in March 2018. Harpreet is still within the time limit to bring a claim, but should be advised to act quickly. If he does not begin his claim before the limitation period expires, his claim will be statute-barred and this will act as a complete defence (unless the court exercises its discretion to extend the limitation period).

Scenario 3 Questions

1. (a) The tests that the court may use are:

   - The 'control' test:
     which looks at the degree of control an employer exercises over a worker. A relevant case would be Yewens v Noakes (1880);
   - The 'organisation' or 'integration' test:
     which looks at whether the worker is an integral part of the business. A relevant case would be Cassidy v Ministry of Health (1951);
   - The 'multiple' test:
     which looks at all of the circumstances in which the person involved works. A relevant case would be Ready Mixed Concrete Ltd v Minister of Pensions (1880).

   (b) Applying the 'multiple' test, candidates could have identified some or all of the following factors:

   Suggesting Paul is an employee:

   - he must work when asked to do so;
   - he is provided with a uniform by Martin;

- he is working for an agreed wage, rather than taking a financial risk;
- he does not appear to be able to delegate.

Suggesting Paul is not an employee:

- Paul works elsewhere, so is not employed exclusively;
- he does not receive sick pay or holiday pay;
- there is no guarantee of work;
- he is paid in cash, so will pay his own tax and National Insurance contributions.

A reasoned conclusion should be provided explaining whether Paul is likely to be found to be an employee or not to be an employee.

NOTE: Credit for application of the alternative tests was awarded.

2. The notice could be considered to be an exclusion clause. As Rachel is a consumer, this will be governed by the Consumer Rights Act 2015. Under section 65 of this Act, a person cannot exclude liability for death or personal injury where this is caused by negligence. Rachel has suffered personal injury as a result of Paul's negligence; therefore the clause will not be effective.

3. Nadia is a permanent member of staff, so it can be assumed that she is an employee. It also appears clear that she owes a duty to Oliver, that she has breached this duty by driving drunk, and that her breach has caused the damage Oliver suffered. Therefore, Nadia has committed a tort. The question will be whether this tort was committed 'in the course of employment', or had a 'close connection' with her employment.

   Nadia finished her shift some time ago, and has not been asked by her employer to give the lift to Oliver. It is likely that this will be considered outside the course of her employment and so Martin will not be liable. A relevant case would Hilton v Thomas Burton (Rhodes) Ltd (1961).

4. (a) The personal representatives of Oliver's estate can bring a claim in his estate's name under the Law Reform (Miscellaneous Provisions) Act 1934.

   (b) Such a claim may include any damages that could have been claimed by Oliver himself, but cannot include future losses.

   In this scenario, the claim is likely to include general damages to cover the pain, suffering and loss of amenity suffered by Oliver between the accident and his eventual death. It may also include a claim for special damages regarding any financial losses during this week (such as lost wages) and for funeral expenses.

   (c) Such a claim could be brought under the Fatal Accidents Act 1976 for the benefit of Oliver's dependants. The Act allows such a claim if Oliver would have been entitled to bring a claim had death not ensued from the accident.

   (d) It could include a claim for a bereavement award, and also a claim for financial losses suffered by the loss of dependency upon Oliver.

5. *Volenti non fit injuria* loosely translates as 'no harm can be done to a willing person' and is sometimes called the defence of consent.

   The defence of *Volenti* cannot be used against a passenger in a road traffic accident, due to the operation of Section 149(3) Road Traffic Act 1988.