
Examiner's report 2009

2660001 Law of Tort – Zone A

General remarks

The majority of candidates demonstrated a satisfactory knowledge of the main topics, but very often failed to consider the issues raised by the questions in sufficient detail. This was usually because time was wasted in a number of ways. One was to spend time repeating the words of the question. Although only a very few candidates actually wrote out large sections of the question before starting to write, a great many did so in the course of their answers. It was common to read sentences such as, 'Now I have to consider the position of Jennifer who administered antibiotics without carrying out any tests.' This should be avoided, although it is often necessary to draw attention to particular significant facts on which the appropriate advice turns. Another failing is to write out an over-lengthy summary of the law on a particular topic without reference to the facts or to those particular aspects of the topic that are engaged by the facts. The answer to a problem must end up by giving the parties who need advice some indication of the strengths and weaknesses of their case, the facts that would have to be established and the precedents that would have to be distinguished or overruled. The answer to an essay question must focus on the precise words used and the issues that merit discussion. This is referred to in the comments on questions 4 and 5.

Specific comments on questions

Question 1

Stephen works as a cab driver for Prang Ltd. There have never been any complaints about his work or behaviour. The Micawber Health Authority arranged with Prang for Stephen to work for the council for some weeks driving patients without transport of their own to and from hospital appointments. One morning Stephen was in a bad temper and, when a young patient, Toby, started teasing him about his appearance, Stephen stopped the cab, turned round and hit him very hard. Toby struck his head on the door handle and injured his eye. Stephen drove him to the Accident and Emergency Department at Micawber Hospital.

At the hospital a nurse, Jennifer, administered a dose of antibiotics. She did not ask Toby if he was allergic to the antibiotic and carried out no tests. Toby reacted very severely to the antibiotic, was unconscious for some days and has some permanent brain damage. He has also suffered permanent damage to his eye.

Advise Toby.

There is only one claimant (Toby), but a number of issues and your answer should be carefully planned. His first claim arises from the injuries inflicted by Stephen. Stephen has deliberately struck Toby, has clearly committed the tort of battery and is unlikely to have any defence to a claim. Toby would of course want to sue a defendant with the necessary resources to satisfy a claim. The principles of vicarious liability are explained in Chapter 13 of the subject guide. A good answer would give particular attention (a) to whether Prang Ltd or Micawber Health Authority or (improbably) both of them are Stephen's employers, and (b) to whether Stephen is pursuing a personal grudge or is in the course of his employment as set out in *Lister v Hesley Hall* and subsequent cases. The statement that there had been no previous complaints about Stephen rules out any possibility that the health authority might itself be negligent in hiring an unsuitable driver.

Toby's second claim is against Jennifer, for whom the hospital would clearly be vicariously liable. Jennifer undoubtedly owes her patient a duty of care and would appear to be clearly in breach and so there is no need for any extended consideration of these issues. There can, however, be liability only if her negligence was causally relevant; see *Robinson v Post Office* (i.e. if the tests would actually have revealed the allergy). If it is, then Jennifer could be liable for any additional damage (i.e. the brain damage, which means physical neurological damage and not psychiatric injury).

The inter-relation between the two claims available to Toby raises further questions about causation. Stephen would be liable for the initial injury and the permanent eye damage and would be liable for the brain damage if Jennifer's action is not causally relevant. But, if Jennifer's action is causally relevant, does it break the chain of causation? A number of candidates referred to *Baker v Willoughby* and *Jobling v Associated Dairies*, but that is not really the parallel. Jennifer's action was not a separate and independent event causing the same damage, but a failure to put right the consequences of Stephen's tort. The principles of causation are explained in Chapter 4.1 of the subject guide and particular attention should be given to the account of the *Baker* and *Jobling* cases at 4.2.1.

Question 2

The Department of Law at the University of Toytown held a drinks reception in the foyer of the law building after a lecture. The catering was provided by outside caterers, Salmonella plc. During the reception three wine glasses accidentally fell to the floor and were smashed. Karl, a waiter provided by Salmonella, swept the glasses to the side of the foyer and left them for the cleaner to deal with in the morning.

The cleaning is carried out by Filthywipe plc under contract with the university. Lucia is employed by Filthywipe and her duties include cleaning the law building. She is a single mother with a year-old son called Marcus. She had been unable to find suitable child care arrangements for Marcus and very often had to bring him to work with her. This is contrary to the terms of her employment with Filthywipe, but some of the security staff employed by the university had seen Marcus with Lucia and had not stopped her.

On the morning after the party Marcus crawled round the foyer while Lucia was working. He crawled to the place where the broken glass had been left. He picked up and started to eat some crisps which had fallen to the floor but also picked up and swallowed a shard of broken glass. His mouth and throat were badly cut.

Discuss Marcus's possible claims in tort.

Marcus is injured while on the university land. If he has a claim under the Occupiers' Liability Acts, it must be against the university. It is fanciful to treat the Department of Law as a separate entity occupying the premises, and the catering and cleaning company cannot have sufficient control of the premises to qualify as occupiers. This is primarily a question of whether the university has satisfied the standard of care. It is debatable whether Marcus is lawfully on the premises. If he is not, then it must be doubtful if the occupier had knowledge or means of knowledge of the danger (the glass). If he is, have they taken reasonable care for the safety of such a young child? They had arranged for the building to be cleaned in the morning (presumably before other visitors arrived). The glass had been left by outside caterers. This cannot strictly raise the issue of section 2(4) (b) of the 1957 Act which refers to 'construction, maintenance and repair' by the contractor, but perhaps similar reasoning can apply as a matter of common law.

The second possibility is a negligence action against Salmonella based on vicarious liability for Karl. Candidates were divided in their views as to whether Karl had behaved reasonably. Could he reasonably have foreseen that glass swept to the side of the room would cause injury before it was dealt with by cleaners in the usual way?

Question 3

Slapdash Construction Ltd was carrying out road maintenance work. One of its employees, Liam, carelessly severed the electricity cable under the highway with a mechanical digger. The road is in an isolated rural area and the cable serves only a very small number of customers including Tumbledown Castle, the home of Lord Tumbledown.

The incident happened on the Friday before a bank holiday weekend, during which the castle was to be open to visitors to raise funds for a charity, the Society of Upright Gentlefolk (SUG), of which Lady Tumbledown is patron. Lord Tumbledown was advised by health and safety specialists that, because of the ruinous nature of parts of the castle, it would be dangerous to admit visitors until power had been restored. (This did not happen until the following Tuesday.) The castle was therefore closed and Lord Tumbledown had to refund money to visitors who had purchased tickets in advance.

At the time that power was cut off, Lady Tumbledown had been using a computer, which is linked to the castle's database. This caused considerable damage to the system. Lord Tumbledown has a contract with Megabyte Computer Specialists (MCS) to maintain the computer system for an annual fee. As a result MCS have to spend two days restoring the computer system under the terms of the contract.

Advise Lord Tumbledown, SUG and MCS as to any claims they may have against Slapdash Construction.

This question is primarily concerned with an analysis of the rules regarding recovery of damages for economic loss in a negligence action (see Chapter 5.1 of the subject guide). It is stated in the problem that Liam was careless (so there is no doubt about the breach of his duty of care) and there is no doubt that he is in the course of employment with Slapdash Construction. So candidates need spend little time on these issues and effort should be directed to the nature of the loss. The case raises the distinction between pure and consequential economic loss laid down in the *Spartan Steel* case. A satisfactory answer would explain and apply this distinction.

In respect of the closure of the castle, since there is no physical damage to any person or to the castle, the loss suffered by Lord Tumbledown and SUG is purely economic and in principle not recoverable. So far as SUG is concerned, all the policy reasons (see 5.1.3) would deny recovery. They have lost only the hope of future donations and Lord Tumbledown might be persuaded to reschedule the charitable event.

Lord Tumbledown's case is slightly different and a very good answer might have tried to suggest grounds for distinguishing his case from the general rule. Two possibilities are: (i) that there was no danger of indeterminate liability to an unknown number of claimants since the cable served only a small number of customers; and (ii) that Lord Tumbledown had already expended money on printing tickets that would be thrown away and perhaps in purchasing food for visitors at the weekend, which would now have to be destroyed – a kind of physical damage to property.

In respect of the computer there is a question as to whether damage to the computer system (e.g. the loss of data) is to be regarded as physical damage so that consequential economic loss would be recoverable. The problem is that the normal economic loss (the cost of repairs) does not fall on Lord Tumbledown because he gets it done for nothing under his contract with MCS. This is a real economic loss for MCS who, as the result of Liam's negligence, are obliged to have their employees work on the castle's computer for two days without any additional payment. The orthodox view is that such loss is not recoverable and indeed an example of this kind of loss is given by Lord Penzance in his description of economic loss in *Simpson v Thomson* (1877). Many candidates failed wholly to appreciate that MCS were economically disadvantaged by these events. Their contract was rendered less valuable because of the damage done by Liam.

Question 4

'So it seems to me that there is good sense behind our present law that in general an innocent but negligent misrepresentation gives no cause of action. There must be something more than a mere misstatement. I therefore turn to the authorities to see what more is required.' (*Hedley Byrne v Heller* (1963) per Lord Reid).

Discuss this statement in the light of developments in the law since 1963.

Where a question calls for a discussion of a quotation, it is important that the answer picks up on particular aspects of the topic and particular sentiments and is not simply a packaged description of the topic. There are many ways in which this can be done but a good answer should have included at least the following issues.

- a. a brief explanation of the historical context of *Hedley Byrne*.
- b. an explanation of what the 'good sense' was that Lord Reid saw in the (then) present rules
- c. what counted then and counts now as 'something more'.
- d. a clear summary of what the candidate thinks the present law to be and how far (if at all) it has developed since 1963.

Question 5

In your view what are the principal criticisms that can be made of the present law concerning liability in tort for psychiatric damage? If there were to be a statutory reform of the law in this area, what would be your principal recommendations?

A good answer should not just write out a version of the history and current state of the law relating to psychiatric damage. Candidates might legitimately focus on different potential criticisms. What seems worthy of criticism to one candidate might seem attractive to another. An answer should identify clearly the rule (or absence of a rule) that is being considered and explain why it is thought to be wrong. Is it, for example, unjust in principle? Does it differentiate unreasonably between similar claimants or fail to differentiate between claimants who should be treated differently? Or is it overtechnical or confusing and difficult to understand? It would be legitimate, in answering the second part of the question, to argue the view that most problems with this topic would be better dealt with by development of the case law rather than by legislation, but at least some suggestions must be made as to what would be improved by legislation.

Question 6

Dai is the publisher of 'Strong Acid', a satirical website. The website has a weekly feature called 'Pages from the Diary', which consists of a fictional journal of a featured celebrity. Last week the feature was 'Pages from the diary of Cerys Hughes'. Cerys Hughes is a well-known opera singer, who has a reputation for being rather emotional. In this feature, she was presented as slowly losing her sanity over the course of the week, until, in the final day's fictional entry, she was admitted to a mental hospital. She is very unhappy about the manner in which she has been portrayed.

'Strong Acid' has also been conducting an investigation into allegations of corruption within the Greenshire District Council. Last week, it published a feature written by Hamid, a freelance journalist. The feature included the following sentences:

We have it on good authority that, at a private meeting between a number of Greenshire's senior councillors last week, Councillor Jimmy Jones said to Councillor Sally Smith, 'Come on, Sally. You've been on the take for years. You're always interested in a bribe.'

The quoted words are taken from a transcript that was sent to Hamid by an undisclosed, but usually reliable, source. Dai has no other evidence to link Sally Smith with corrupt practices.

Cerys Hughes and Sally Smith are threatening to sue Dai for defamation. Advise him.

The principal issue to discuss in relation to Cerys Hughes is whether the statement on the website is defamatory. This can be argued at two levels. Is it defamatory to suggest that someone has suffered a breakdown in mental health and has had to be admitted to hospital? If it is, there is a further problem in that most readers of this website will know that it presents fictional accounts and that readers are not intended to treat them as being literally true. They are perhaps to be compared to political and other cartoons which are understood to be making fun of their subjects. If the words are defamatory, there is no doubt that they refer to Cerys Hughes (it is the content of the journal and not the character that is fictional) and there is little difficulty about the issue of publication. If the statement is not defamatory, then Dai has no need to rely on any defences. If it is defamatory, there may be some scope for a defence of fair comment. Could this be a fair but exaggerated comment on what is in fact known about Ms Hughes's character? A number of candidates discussed the defence of qualified privilege without considering whether it could be applicable at all. Dai intended the diary as a work of fiction. While he may be entitled to privilege in publishing statements that he honestly believes to be true (if the other elements of the defence are present) candidates did not explain how he could claim privilege in respect of what he intended to be a work of imagination.

It was important also to be clear about the facts in relation to Sally Smith. She wants advice only about suing Dai and not about suing Councillor Jones or Hamid. The statement merely describes a conversation: the usually reliable source has given information only about that conversation and not about whether Sally ever had taken a bribe. In order to escape liability, can Dai (a) establish justification by showing, if he can, that Councillor Jones did make that remark, or (b) establish qualified privilege to communicate to readers of the website the report that such an allegation had been made against Sally?

Question 7

Hamish is the chairman of an organisation called the 'Stop the Nimby Development Committee', an organisation determined to stop the construction of a new bypass round the town. They co-ordinate the activities of environmental activists (concerned with the effect of the development on wildlife) and businesses in Nimby (concerned with the effect on their livelihood). Graft Construction Ltd has been appointed by the Department for Transport as main contractors for the development. The committee learns that several local firms, including Trough Ltd and Yuppy Ltd, have submitted tenders to Graft Construction for various parts of the work and resolves to get these tenders withdrawn.

Hamish tells Trough Ltd that, if it does not withdraw its tender, none of the local traders on the committee will ever do business with them again.

Hamish tells Yuppy Ltd that, if it does not withdraw its tender, the environmental activists will try to block the entrance to Yuppy Ltd's works so that no goods can be taken in or out. Yuppy Ltd withdraws its tender.

As a result of these withdrawals Graft Construction cannot start work on the proper date and incurs contractual penalties to the Department for Transport.

Advise as to any possible claims in tort.

Hamish is speaking on behalf of a committee with a single objective but two different motives. They aim to interfere with the building of the bypass by making it difficult for the main contractor to carry out its work and, in that sense, by causing economic loss to the contractor. This involves the application of the various economic torts (Chapter 10 of the subject guide) and, in particular, of the decision of the House of Lords in *OBG v Allan*, discussed in the *Recent developments*. The various relations between the parties must be carefully explained. The committee does not interfere with any contractual rights between Graft and the other two companies, because the companies have submitted tenders but have not entered into contracts. They do, however, put pressure on the companies. The threat to Trough is not to do business in future, not to refuse to honour any existing contracts, but the threat to Yuppy would appear to be to commit trespass or nuisance so as to impede the business of Yuppy as a means of causing damage to Graft. Candidates should consider the possibility of a conspiracy action if none of the individual economic torts is available.

Question 8

Fred is a tenant farmer living and working at Wuthering Farm, a large arable farm in a remote agricultural area of Northern England. His landlord is Agricultural Entrepreneurs (North) Ltd. Wuthering Farm supplies a large proportion of the potatoes sold to greengrocers in that part of the country. Fred keeps a very large pile of manure, which is used to fertilise the soil in his fields once a year.

Fred's neighbour, Kieran, lives at Merrymeadows Manor, which he bought six months ago. This property had previously been derelict, but Kieran is converting it into a luxury country house hotel. However, his plans are being jeopardised by Fred's activities. The manure pile, which is only twenty metres from the lawn at Merrymeadows Manor, creates a strong smell. Kieran considers that this smell is likely to offend his guests, cause him to lose business and diminish the value of

the house. The manure pile attracts rats, which come into Kieran's property, and eat the flowers in his decorative flower beds. Kieran considers that the rats present a risk to the health of his family and guests.

There is also a large oil drum on Wuthering Farm, which has recently been discovered to have been leaking for several years. The oil has seeped down through the ground into an underground watercourse. As a result, the ponds at Boris's neighbouring fish farm have been seriously contaminated. Evidence suggests that the leaking oil comes from a minute crack caused many years ago by the workers who installed the tank.

Kieran and Boris are threatening to sue Fred and his landlord in nuisance and/or the rule in *Rylands v Fletcher*. Advise them.

This calls for a reasonably straightforward account of the principles of private nuisance to a series of situations and of the application of the rule in *Rylands v Fletcher* to the escape of the oil. Candidates must consider claims against the tenant who has carried on the activities and the landlord who knew the nature of the business and may have been the person who originally started accumulating the oil. Many of the standard elements in a nuisance question have to be considered: definition of nuisance; coming to a nuisance; change of use by claimant; social utility of defendant's business; extent of possible injunction.