
Examiner's report 2009

2660001 Law of Tort – Zone B

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, 'Next I am asked to advise Sam who had been playing football and took a shower without asking Tom's permission.' 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 precedent that would have to be distinguished or overruled. These issues are considered particularly in the comments on question 1. 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

Sheila, who lives in Australia, came in January 2009 for a two-month visit to her daughter Ruth and her family in England. She had not seen them for three years. In February she went to the children's playground, run by St John's Church, with her six-year-old granddaughter Linda. The local council, the Miserly District Council, had a statutory power to inspect such playgrounds but had not done so for six years. Linda played on a chute but on one descent her foot became trapped and she suffered a nasty gash on her ankle. Sheila managed to extricate her and took her to the Accident and Emergency Department at the Miserly Hospital. There were many patients waiting treatment. Hilda, the nurse who first examined Linda, classed her as being of low priority. Linda was not fully examined for eight hours. By that time Sheila had telephoned Ruth, who joined them at the hospital. When she was eventually treated, Linda's wound was found to have been very badly infected. The wound did not heal and, to save Linda's

life, it was necessary to amputate her foot. If she had been seen immediately on arrival, the medical evidence is that she would have made a complete recovery after a few weeks.

Both Sheila and Ruth have suffered a recognised psychiatric injury.

Advise as to any claims in tort by Linda, Ruth and Sheila.

This question contained a number of parties and distinct issues. Linda suffered physical injuries and her mother and grandmother sustained psychiatric injuries. The clearest answers were those which first discussed Linda's various claims and then dealt with the claims of the older women, provided, of course, that they had left enough time to deal with the psychiatric damage issues adequately.

Considering Linda, her first claim would be against St John's Church which organised the playground, apparently on its own premises, and therefore might be liable under the Occupiers Liability Act 1957. Many candidates ignored this claim entirely whereas those who did answer it tended to give too much detail. There is no reason to doubt that Linda was using the playground lawfully under supervision and for its proper purpose; nothing more is required than a brief explanation of what she would have to establish to succeed in a claim under the 1957 Act.

On the other hand, a high proportion of candidates thought that Linda's best claim was against the Miserly District Council. This was usually the result of a serious misrepresentation of the question. Many answers described the council as having a statutory **duty** (even sometimes a duty to maintain the playground). This is emphatically not what the question stated. The council merely had a **power** and it was a power only to **inspect** the playground. The possible liability of public bodies with statutory powers is discussed in Chapter 5.4 of the subject guide (and subsequent *Recent developments*). Such claims are difficult to sustain, especially in the present kind of case where the council had simply failed to exercise its powers at all. It was not even a case where the council had, for instance, sent in inspectors but had failed to act on their recommendations (where an argument as to assumption of responsibility might arise).

Linda's second claim would be against the hospital (either vicariously for any tort committed by Hilda or directly). There is no doubt that the nurse owes a duty of care and it is stated that, if she was negligent in not giving immediate treatment, this was a cause of Linda's further injuries. However there is room for more argument as to whether she was negligent: a hospital has to have some system for prioritising emergency cases.

If the nurse is not negligent, then the church will be liable for all the consequences of the initial injuries (assuming them to be foreseeable). But what if the nurse is negligent? Does this break the chain of causation? Many candidates referred to *Baker v Willoughby* and *Jobling v Associated Dairies*, but these cases do not provide a particularly helpful parallel. The hospital's actions are not a separate and independent cause of the same damage but a failure to put right what the church had done. An explanation of these cases is to be found in Chapter 4.2.1 of the subject guide.

The claims of Ruth and Sheila would be as secondary victims in relation to their psychiatric damage. Many candidates failed to make clear whether they were considering actions by the women against the church or against the hospital.

Finally, although most candidates knew the limiting criteria that secondary victims must satisfy, many failed to consider the basic question of whether either incident was a kind that could foreseeably lead to psychiatric injury.

Question 2

Mr and Mrs Jones were having substantial refurbishment work carried out at their house by Jerrybuilders Ltd. They went away for a weekend leaving their 17-year-old son Tom at home on his own. They told him that in no circumstances was he to invite any of his friends into the house. Tom went out with a group of friends on the Saturday night and took some of them home with him to play computer games.

One of the friends, Sam, had been playing football that afternoon and, without asking Tom, decided that he would take a shower. When he turned on the shower tap, the head of the shower (which had been installed the previous week by Jerrybuilders) fell off and hit him in the eye causing serious injuries. Sam had already lost the sight of the other eye as a baby and the injury in the shower has left him nearly blind.

Tom called an ambulance to attend to Sam. When Una, a paramedic, was pushing Sam out of the house in a wheelchair to the waiting ambulance, she fell into a trench alongside the front path. The trench had been dug by Jerrybuilders and covered with a sheet of metal, which was too flimsy to support the weight of the wheelchair. Una broke her leg and was off work for several weeks. Sam did not receive any further injuries.

Advise Sam and Una.

Although there is refurbishment work in progress, Mr and Mrs Jones appear still to be living in the house (although absent for the weekend) and would be the occupiers. The builders might also be occupiers for certain purposes or could be sued in negligence as non-occupiers. It is far-fetched to treat Tom as the occupier just because his parents are briefly absent. There is a problem about the status of Sam. First, he is probably originally a lawful visitor in that he is entitled to assume that Tom was allowed to invite him home, unless he (Sam) actually knew of the parental embargo. This argument would be stronger if Sam had previously been taken home by Tom while his parents were there; it would be weaker if the nature of the party and the number of invitees were such that a reasonable person would realise that the parents would object. Even if he is initially a lawful visitor, he might become a trespasser by using the shower without express permission. This is arguable (candidates had very different views on this) and so Sam's entitlement should be considered under both the 1957 and 1984 Acts. Most candidates did this, although they sometimes confusingly tried to apply the provisions of one Act when they were dealing with the other. Una would certainly be a lawful visitor (even if she had been summoned to attend to a trespasser) and her claim has to be considered under the 1957 Act, taking into account what her profession dictates she should know about how to remove a patient in a wheelchair.

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 causes 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 Chapter 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

'My conclusion is that a duty to use care in statement is recognized by English law, and that its recognition does not create any dangerous precedent when it is remembered that it is limited in respect of the persons to whom it is owed and the transactions to which it applies.' (*Candler v Crane, Christmas and Co.* (1951) *per* Denning LJ.)

Discuss this statement in the light of subsequent developments. Could a judge express himself in the same words today?

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. The theme in the quotation was liability for negligent mis-statement and not economic loss. Of course the two topics overlap to a considerable extent but an answer which amounted to a summary of the law on the recovery of economic loss was seriously misdirected. Lord Denning's was a dissenting judgment in 1951 and so the focus of candidates' answers should have been on whether his view of what the law should be represents the current position. There should therefore have been an account of the historical development and also some reflections on whether the present law is adequately captured by the quotation.

Question 5

'Recent decisions concerning vicarious liability were no doubt motivated by a desire to do justice, but have left the law in an unclear and unprincipled state.'

Discuss.

This question likewise called for something more specific than a summary of the law on vicarious liability. First, it should have identified particular recent developments. The most obvious candidates were *Lister v Hesley Hall* and its successors and the recent cases such as *Viasystems*, which considered the position of borrowed servants. Secondly, it had to explain the particular concept of 'justice' which may have motivated these decisions. Thirdly, it had to explain whether the law was now either unclear or unprincipled. For instance, it might be thought unclear whether *Lister* applies only to intentional wrongdoing by an employee and whether it has blurred the distinction between vicarious and primary liability. Candidates are entitled to agree or disagree with the quotation or to agree in part and disagree in part. What is important is that the argument is

logically presented and is based on an accurate representation of the various cases.

Question 6

Basil runs *Straight to the Ear*, a 'talking newspaper' for blind people made available to subscribers as a digital audio file. The audio files are stored on a website hosted by Superhighway plc, an internet service provider. A new edition of *Straight to the Ear* is uploaded every week.

For the last few months, Basil has been running a campaign against Vizaid Ltd ("the company"), a small private company making and selling goods designed to assist blind people with everyday tasks. The company is controlled by its two leading shareholders, Henry and George. Basil dislikes Henry and George and considers that the company's products are far too expensive. He also thinks that the company conducts its business in an exploitative manner. Last week, *Straight to the Ear* included the following passage:

It's well-known to listeners to *Straight to the Ear* that the people involved in running Vizaid Ltd are crooked. Their products are over-priced and are much too expensive for most people with a visual impairment. However, we've now learned something else that is pretty disgraceful. Their employees are paid only the national minimum wage.

It is true that two of the company's long-standing employees are paid only slightly more than the national minimum wage. However, a number of other employees are paid significantly more. Henry, George and the company are threatening to sue Basil and Superhighway plc for defamation over the words quoted above.

Discuss.

There are three claimants, but the positions of Henry and George are identical and that of Vizaid raises only the separate question of whether a company can sue in defamation. There are two defendants. There is not a great deal to say about reference to the claimants or about publication (except in relation to the special position of an internet provider). The bulk of the answer should have been directed to the meaning of the words and possible defences, but candidates too often simply provided a general summary of these topics and did not apply this summary to the particular facts. There were several different allegations. Were they defamatory? What did they mean? Were they fact or opinion? Were they true?

Here is an illustration of how the question might have been tackled in respect of one of the allegations. An allegation was that 'their employees are paid only the national minimum wage'. First of all, is that allegation defamatory? Many candidates thought that it clearly was and many others that it clearly was not. Secondly, would those words convey to the readers that (a) **all** employees receive only the minimum wage, or that (b) **some** employees receive only the minimum wage? Thirdly, either way, it is a statement of fact not opinion and therefore would have to be proved true and not merely fair. Fourthly, if (a), then the statement is clearly false. If (b), it is arguable that it is at least substantially true.

This kind of analysis could also be applied to other allegations: that the company is crooked, their goods are over-priced and so on. In the light of

this analysis, there are arguments about the defence of justification (in respect of facts) and of fair comment (in respect of opinion). There is also a possible defence of qualified privilege. This is not so much a *Reynolds* type of privilege as the more traditional kind where there was a communication between people who had a duty (albeit a self-imposed one) to communicate to particular people (the blind) information of particular interest to them.

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 and 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

A charitable company, Second Chance Ltd, has recently opened Eskdale, a residential home for ex-offenders, in a large house at the centre of Brownville, a small commuter village. The company has planning permission for this use of the property. The first residents at Eskdale are all men who have served lengthy periods of imprisonment for very serious crimes. Local residents fear that these residents will cause personal injury and damage in the village at some point, although no such injury or damage has yet occurred.

Last month, the company held the annual Second Chance Ball at Eskdale. This caused significant problems for the other residents of Brownville. For a weekend, roads within the village were very congested and residents found difficulty in driving in and out of the village. Furthermore, on the night of the Ball, music was played at high volume, disrupting the sleep of Brownville's residents.

The company has obtained planning permission for, and erected, a wind turbine to generate electricity for Eskdale. When the turbine is running, it produces a very high-pitched sound, which is imperceptible to humans, but is very disturbing for dogs. Roderick's boarding kennels have lost a great deal of business as a result.

Last week, during a storm, one of the blades of the turbine blew off and landed on the home of Janice, a resident of Brownville. As a result, Janice suffered serious injuries. Scientific investigations have failed to discover the cause of the accident. The construction, assembly and maintenance of the turbine appear to have been in accordance with most advanced practice.

Consider whether the above facts disclose any potential actions in nuisance and/or under the rule in *Rylands v Fletcher*.

Most candidates gave a reasonable account of nuisance and the rule in *Rylands v Fletcher*, though often with a much more elaborate account of public nuisance than was warranted. They did have some trouble with the first paragraph of the problem because of the lack of physical damage. A good answer would have considered whether the tort of nuisance has anything to say in reconciling the competing interests. The residents are fearful that their quality of life will be diminished: they will be afraid to leave their houses unoccupied, to go out in the evenings or to let their children play in the parks. On the other hand, the charity is doing socially valuable work with ex-offenders. There was also some confusion in the fourth paragraph. It is established that damage in the *Rylands* tort must be foreseeable, but this is not the same as requiring the escape to be foreseeable.