

# Support Materials

## Law of Torts (G147)

These materials should be read alongside the approved specimen question paper and mark schemes and specification.

### Section A Question 1:

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The two principal aims of tort law are to compensate the victim and to deter torts in general.

Consider the extent to which the doctrine of vicarious liability helps achieve both of these aims.

[50]

### Example Grade A Answer:

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Vicarious liability is when liability is imposed on a person who has not committed a tort, in this situation this means making an employer liable for any acts committed by an employee. Although this can be seen as harsh it must be remembered that an employee is normally a man of straw and getting compensation would therefore be difficult.

When assessing liability in this area it is important to identify whether a person is actually an employee, the tort must be committed while the employee is in the course of employment and not on a frolic of her own and also the act normally has to be a tort not a criminal act. There is heavy criticism in this due to its harshness since the person who is held liable hasn't committed the tort but it is justified as a deterrent as employers should be aware of their employees actions and the should take care who they hire.

There have been problems identifying if someone is an employee due to the complex nature of working relationships. There have been a number of tests developed to help determine this relationship. The first is the control test also known as master and servant. As the master controls everything a person does he is liable. It is difficult to use this test today as employment relationships have changed but it can be illustrated in the case of *Mersey Docks v Coggins*. In this case a crane driver damaged goods. The company he was working for had hired him out to another party but he was still under the control and direction of his employer and therefore they were held liable.

The second test is the integration test. This test focuses on what the employee does and whether her work is fully integrated into the business. This test can be seen in *Harrison v Macdonald* when it was noted that if your work is an integral part of the business like a ships master you are an employee but if your work is done for the business like a ships pilot you are not an employee. This test has not been widely used.

The final test and most common is the multiple test. This determines the employment

relationship based on certain factors – whether the employee gets a set wage, the employee only works for the employer, does the employee have to obey orders and how is he paid. The position was discussed in *Ready Mixed Concrete* when concrete lorry drivers were discussed. They bought the lorries on hire purchase and had to work in a uniform and drive lorries in the company livery but could sub contract their work to others. There have been a number of other factors that have been developed after this test to determine employment status.

If employers have authorised an act then usually they will be vicariously liable, but in certain situations they can be held liable for acts they haven't authorised, which demonstrates fairness regarding the compensation of the victim but can be harsh on the employer. In *Limpus v London General Omnibus* bus drivers had been forbidden from racing the buses. This was done by some drivers and the claimant was injured. The employer was held vicariously liable.

The courts have allowed liability for unauthorised acts in the course of employment in a number of other areas. In *Century Insurance* an employees negligent acts allowed a claimant to gain damages and in *Rose v Plenty* a milkman who gave an unauthorised lift resulted in the employer being liable as the company was benefiting from the work done.

The courts have restricted employer's liability when the tort committed is not considered to be in the course of employment. In *Beard v London General Omnibus* there was no liability when a conductor drove the bus and injured the claimant as there were express instructions that they should not do this.

Also in the case of *Hilton* the courts decided that if an employee was on a frolic of their own there can be no liability. In this case the employers took an unauthorised break and took a van a crashed it.

This area can be quite confusing as many of the areas that amount to liability also can mean no liability. This is in part due to public policy or the courts trying to give compensation or acting as a deterrent. The courts have tried to deal with this by adding another test in *Lister v Hesley Hall* which involved the housemaster sexually abusing a boy in his care. The court decided that there could be vicarious liability because there was a close connection between the employee's responsibilities and his wrongful acts. This broadens the normal test and adds an extra deterrent.

As can be seen the law regarding vicarious liability has been shaped by the need either to compensate or act as a deterrent. This can be harsh on the employer and the logic of the courts can be questioned. Is it fair that an employer should shoulder the burden of compensation? Although they are more able to pay compensation because of insurance requirements are they really responsible for the acts of their employees under the current state of the law.

It is also questionable about the deterrent effect. The courts have held employers liable even when they employee is acting against instructions. It has been argued that employers should be more careful who they employ and ensure adequate training but the current law seems unfairly

balanced against them.

To conclude vicarious liability has to some respect be developed with compensation and deterrence in mind but the justifications to support it sometimes lack validity.

## Examiner's commentary

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The candidate has written a detailed response for the time allocated. The AO1 is more extensive than the AO2, which could be further developed in the context of the question.

The candidate uses an extensive range of cases and is particularly strong regarding the tests of employment. The explanation regarding course of employment is more variable with some cases fully explored and other just listed in support of a point. The candidate could have also developed the AO1 by focusing on independent contractors and liability for criminal activity, although there was some good comment regarding Lister.

The AO2 is focused on the major themes of compensation and deterrence and the candidate finishes strongly in this area by highlighting the effect of the law. The candidate does also try to contrast cases and areas of inconsistency.

## Example Grade E Answer:

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Vicarious liability is when an employer is liable for the action of his employees. The key in this area is what is an employee?

The first test is the control test. This is the master and servant test. This test can be seen in the Mersey Docks case. In this case a driver caused damage. The driver had been hired out. The company that hired him out was liable as the driver was under the control his original company.

The second test is the integration test. If your work is integrated into the company then you are an employee.

The last test is the multiple test. This can be seen in the case of Ready Mix Concrete. The cement drivers had to wear uniforms and drive lorries that had the company logo. The drivers could hire other drivers and choose their hours of work. The court developed a test for employment.

The employer is not liable if an employee is on a frolic. That means going off a doing something you are not suppose to whilst at work. In the case of the milkman the employer was held liable. In another case involving people going off on a beak they were liable.

Vicarious liability allows people to get compensation. The employee is a man of straw. They have no money. Companies are loaded they should pay. It also stops those people being employed and if you do employ stupid people it your own fault.

## Examiner's commentary

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This answer lacks development and is rushed. There is either a timing issue or the candidate has not fully focused on this area in revision. It is certainly limited in terms of AO1 and AO2.

The strong point of this essay is the narrative on the various test of employment. The candidate can explain the major tests and support them with case law. The discussion on course of employment is in part confused and lack development

AO2 is attempted by the candidate but is lacks any development. The candidate does however try to focus on the two central themes that of compensation and deterrence which is rare in E grade responses.

## Section B Question 6:

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**David takes his young son Eddie to a local theme park, Fundays. David takes Eddie on the 'Fright-of-your-life' roller coaster. Owing to negligent maintenance by Fundays the harness holding Eddie breaks and he plunges to the ground suffering massive injuries. Georgina sees the fall and the injuries to Eddie. She now suffers from post traumatic stress disorder.**

**David phones his wife Hannah who drives directly to the hospital. She arrives one hour later to find that Eddie has died. She suffers from grief and severe depression. Ian, a paramedic who treats Eddie at the scene, is so horrified by the injuries that he suffers post traumatic stress disorder. David has become withdrawn and terrified of heights.**

**Advise David, Georgina, Hannah and Ian on any actions they may have against Fundays for their injuries.**

[50]

### Example Grade A Answer:

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This question is concerned with nervous shock. In order to claim for nervous shock the claimant must be suffering from an actual recognised psychiatric condition capable of having resulted from witnessing of a traumatic event.

Originally no action was possible because of a lack of awareness and expertise on psychiatric illness as per *Victoria Railway Commissioners v Coustass*. Liability was originally limited where a claimant was also at risk of physical injury as in *Dulieu v White*. The law was then extended to cover fear for close family within an area of impact as in *Hambrook v Stokes*. The law was then extended to cover close family within an area of impact and then as decided in *Bourhill v Young* to include claimants within the area of shock. The law in this area went to its widest point in *McLoughlin v O'Brien*.

It is also important that the defendant has a recognised psychiatric condition. It is not acceptable to just suffer grief. Examples of acceptable conditions are post traumatic stress disorder, depression and pathological grief but as discussed in *Reilly v Mersey RHS* claustrophobia is not a recognised condition.

When claiming for nervous shock it is important to distinguish between primary and secondary victims. The criteria for primary victims was laid down in the case of *Page v Smith*, which stated that in order to qualify as a primary victim the claimant must suffer from a psychiatric condition resulting from being present at the scene and in genuine fear of their own safety. In this case Eddie would have been the only person able to claim as a primary victim but as he is dead there can be no claim. The criteria for secondary victims was set out in the case of *Alcock* which stated that in order to claim as a secondary victim the claimant must have proximity in time and space to the injured party (witnessing the immediate aftermath of the incident), close tie of love and affection to the injured party and suffer nervous shock as a result of this.

This area also has special rules concerning rescuers and bystanders. Rescuers are now treated as secondary victims unless they can show according to *White* that they were in actual fear.

There are also special rules concerning bystanders as shown in *McFarlane*.

If this is applied to the scenario David would claim as a secondary victim providing that his withdrawn state and fear of heights could be diagnosed as a recognised condition. He was on the roller coaster with Eddie and so there is no issue with proximity in time and space and as Eddie's father it can be assumed that he has a close tie of love and affection to his deceased son. There is also a remote possibility that he is a primary victim as upon seeing his son fall he could fear for his own safety by believing the ride is not safe.

Georgina would be unable to claim as a primary victim as she was not in fear for her own safety. She would also have difficulties proving that she is a secondary victim because there would be issues regarding close tie of love and affection. Georgina was merely a bystander who witnessed the incident and it is unlikely that the courts would allow her to claim.

In the case of Hannah it is difficult to say whether a claim would be allowed or not. She would not qualify as a primary victim because she was not present at the scene and was not in fear of her own safety. She could however be a secondary victim. She satisfies *Alcock's* requirement of close tie of love and affection as she is the deceased's mother. She arrived at the hospital one hour after the incident which is the same as *McLoughlin* and would therefore be successful under the requirement of immediate aftermath. In this case the claimant saw her family after an accident in hospital and they were covered in blood and in a very distressed state. Hannah's case is slightly different in that she is merely informed of the fact that her son has died she does not actually see him. This may affect the claim. There is also an issue with the fact that she now suffers from grief and severe depression in the past the courts have denied claims in which it is difficult to say the condition directly resulted from the incident. Did this result from the incident, or simply her son's death?

Ian as a paramedic is considered to be a rescuer. The law on nervous shock allows them to claim as primary or secondary victims in their own right. Ian would not qualify as a primary victim as he was not at the scene or in fear for his own safety, a requirement under *White*, to succeed as a primary victim. He would also have problems as a secondary victim as rescuers have to satisfy the *Alcock* criteria. So although he has a genuine condition and was present at the immediate aftermath he does not have a close tie of love and affection so his claim will fail.

## Examiner's commentary

The candidate has a clear and precise understanding of the issues involved in the problem question. The introduction focuses on the themes that will be explored. It is a concise and impressive start.

The candidate then switches to an essay style by outlining the major AO1 issues involved. There is a balance as the candidate explores the AO1 themes central to the question. There is an impressive array of case law that is used.

The AO2 applies the principles outlines to reach informed conclusions about the relevant individuals involved in the scenario. There is a good application candidate starts by highlighting the major issues in the question. Some parts could be further elaborated on e.g. the discussion about Ian.

### Example Grade E Answer:

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This is all about nervous shock. To claim must be a primary or secondary victim. Strict rules apply to both to stop claims.

#### David

David is a secondary victim because he was not at risk.

He has to satisfy the Alcock criteria.

Key issue is that he needs an actual psychiatric condition. A fear of heights is probably not enough. Therefore no claim.

#### Georgina

She is not in fear herself so is a secondary victim. She is a bystander as she is watching. These are covered by McFarlane and they cannot claim as there is no tie of affection.

#### Hannah

This is similar to McLoughlin. She is a secondary victim and has a close tie. Will pass immediate aftermath and has suffered a psychiatric injury. She is highly likely to be able to claim.

#### Ian

Ian's situation is made complex because he is a rescuer. Originally easier to claim but now Ian will have to satisfy the conditions in White. White states that rescuers will be secondary victims unless they can prove they are actual primary ones. Ian will be a secondary victim. He has a recognised condition but will fail the Alcock test there is no tie of love and affection.

### Examiners commentary

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The response is short but highly informative. The candidate can clearly apply the major issues regarding nervous shock, which in context makes it more like a D grade response, but does express the information in a very abrupt bullet point style. If the candidate was to expand and develop their responses it could be a very good answer. This style of response is likely to occur when there are timing issues.

## Section C Question 7:

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Abid is driving his car at 90 miles per hour at night on the wrong side of the road along a dark country lane. Abid collides with another car being driven by Beatrice. Beatrice's passenger, Claudine, is seriously injured in the collision. Beatrice and Claudine were returning from a party where they had both drunk a large quantity of wine. Claudine had accepted a lift even though she knew Beatrice was over the limit and should not be driving.

Evaluate the accuracy of each of the four statements A, B, C and D individually, as they apply to the facts in the above scenario.

**Statement A:** Claudine has no claim in negligence against Abid as he has not breached his duty of care to her.

**Statement B:** Abid is not liable to Claudine in negligence because he can argue that a *novus actus interveniens* by Beatrice.

**Statement C:** Abid has a defence of *volenti non fit injuria* to any claim by Claudine.

**Statement D:** Abid can use the defence of contributory negligence to reduce damages in any claim by Claudine.

[20]

## Example Grade A Answer:

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### Statement A

The statement is wrong. Abid is a road user and clearly owes a duty. He breached this duty when he drove at 90 mph and on the wrong side of the road. This action would not have been done by the reasonable motorist. Abid would easily foresee that his actions would cause some harm.

### Statement B

It is unlikely that the intervening act of Beatrice would break the chain of causation. This situation relates to novus actus of third parties and is only likely to break the chain if it is the operating cause. The drink is not the operating cause so novus actus will fail.

### Statement C

This cannot work as a defence as it is not available under the Road Traffic Acts.

### Statement D

Contributory negligence works by the defendant failing to take care of their own safety and this contributed to the harm. If successful as Claudine as accepted a lift this clearly means that she has not taken care of her own safety. However it is doubtful that this as caused an injury to her. It is doubtful therefore that damages will be reduced.



## Examiner's commentary

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The candidate has focused on the critical issue in each question. The candidate applies the principles of law. The candidate does not use any cases and this is appropriate for this style of question.

The response is a grade A because of the quality and the precision of the AO2. The candidate has a clear appreciation of the law and its applicability in each scenario.

## Example Grade E Answer:

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### Statement A

The statement is wrong. Motorists owe a duty. That duty was breached when he drove below the standard expected. It is not reasonable to drive at that speed and on the wrong side of the road.

### Statement B

This means breaking the chain of causation. The chain cannot be broken this way.

### Statement C

Cannot use this.

### Statement D

Contributory negligence may work and reduce the amount of damages Abid should pay. She got into the car knowing she was drunk. Therefore this should reduce the damages.

## Examiner's commentary

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This logic of the candidate varies. In the response to statement A, the candidate finds the right answer and supports it with appropriate comment. Statements B and C have correct responses but have very limited legal reasoning. Statement D identifies the correct area of law but applies it to reach the wrong conclusion.