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Examiners' Report
Lead Examiner Feedback

January 2021

Pearson BTEC Nationals
In Applied Law (20168K)
Unit 1: Dispute Solving in Civil Law

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Introduction

This was, by any measure, an exceptional session. In 2020 the ongoing global pandemic led to the cancellation of the 2006 assessment. This year it has also caused the very late decision to allow centres to decide for themselves whether the 2101 assessment should go ahead. As a result, the number of learners who actually sat the 2101 assessment was considerably fewer than those originally entered. Furthermore, the learners will each have experienced a considerable variety of personal and educational circumstances leading up to the assessment, the impact of which would be impossible to quantify. However, the 2101 cohort performed very well and this report provides an objective view of that performance regardless of the wider circumstances which were taken into consideration in the awarding process.

Unit 1 forms one of two mandatory units for the Certificate and one of three mandatory units for the Extended Certificate. It contributes 50% of the available marks required for the Certificate.

The assessment followed an established format. In preparing for the assessment, learners will have benefited from making use of the 1806, 1901, 1906 and 2001 past papers, mark schemes and LE Reports. Furthermore, Pearson have made a variety of other support materials available. These include the specification, delivery guides, on-line and face-to-face training sessions, two sets of specimen assessment materials and a set of exemplar responses with accompanying examiner commentaries.

In Unit 1 learners learn about the civil justice system including the civil courts, the track system and appeals as well as alternative methods of dispute resolution and sources of both funding and advice. They also study precedent and the law of negligence. Learners also develop legal skills in research and will use these skills to investigate the way in which precedent might apply to negligence in a given situation by constructing liability and considering potential remedies. Lastly, learners learn how to reference legal sources and how to communicate professionally with colleagues and clients.

Unit 1 is assessed twice yearly in January and May. The assessment is based on two key events. Firstly, the pre-release of the 'Part A' materials followed a week later by further information and the assessment itself in 'Part B'. The 'Part A' pre-release materials contain legal resources which act as a research catalyst ahead of the 'Part B' assessment. Learners have up to 6 hours during the period between 'Part A' and 'Part B' to undertake their research and

produce, individually, up to two sides of A4 notes of legal authorities considered relevant in the light of the 'Part A' information. Learners will be allowed to take these notes into the 'Part B' controlled assessment.

The 'Part B' assessment is a 1 hour and 30-minute session taken under supervised and controlled conditions (please refer to the Administrative Support Guide) during a timetabled session on a date set by Pearson. The assessment consists of two discrete tasks each worth 30 marks. Learners should be encouraged to split their time equally between the two tasks. Task 1 consists of a file note and Task 2 is a client letter. In both tasks the 30 marks have traditionally been distributed across four assessment *foci*. However, this year saw the introduction of our **newly updated assessment focus grids** (see pages 4 to 6 of the 2101 Mark Scheme) which have re-aligned the assessment *foci* and the associated marks into a new grid:

1806 to 2001:
AO1 Selection and understanding of legal principles relevant to context (**8**)
AO2 Application of legal principles and research to data provided (**8**)
AO3 Analysis and evaluation of legal authorities, legal principles and concepts (**10**)
AO4 Presentation and structure (4)
Total: (30)

2101 onwards:
AO1 Selection and understanding of legal principles relevant to context (**10**)
AO2 Application of legal principles to facts, analysis of arguments and evaluation of legal principles and arguments to reach conclusions (**16**)
AO3 Presentation and structure (4)
Total: (30)

During the 'Part B' controlled assessment, learners are required to produce their work using a computer. The two tasks along with a candidate declaration of authenticity are then submitted along with a learner record sheet and a centre register. In line with the new requirements, all centres provided these materials in hard copy which was much appreciated. A number of centres submitted work without including signed authentication sheets, registers and/or learner record sheets.

Introduction to the Overall Performance of the Unit

The overall performance during this session was consistent with the four previous sessions. The number of entries, as stated above, were considerably higher than any previous session although the size of the actual final cohort was much reduced by the lockdown and the late decision to allow schools and colleges to decide whether or not to hold the assessment.

Areas requiring improvement

Learners should **not**:

- Use and apply the *Caparo* approach to establishing a duty of care when the *Robinson* approach should be used.
- Follow some form of prescribed template or tick-list where a list of items is run through regardless of whether they are relevant or not.
- Write their own narrative 'running commentary' on the given facts. Unless a link is being made between a given fact and the application of a legal principle, it will not gain any credit.
- Put material for task 2 (e.g. contributory negligence or damages) in task 1 or *vice versa*, where it cannot be credited.
- Make bald assertions without reasoning and evidence.
- Use generic evaluation where it is not relevant.

Areas of good practice:

- Generally good use of appropriate authorities.
- Where application was done well, it made good use of the source facts provided in 'Part B'.
- Many learners are now tailoring their responses more accurately and, as a result, having less timing issues across both tasks.
- Making good use of the two sides of A4 notes.
- Most learners presented their work in an appropriate and thoughtfully structured manner, often through use of relevant headings and sub-headings.

Other Issues in 2101

- There are no defences to negligence in the Pearson Unit 1 specification so *volenti* is not creditworthy in task 1. Contributory negligence comes under the heading of damages in the specification so it can only be credited in relation to the potential impact on damages in task 2.

- Some learners continue to struggle with sorting out who the parties are and who is suing whom. There were, for example, common references to Daryll using Caz's insurance policy to fund his case, that it was down to Daryll to take greater precautions (as a breach issue) or discussing Daryll's liability because he was the teacher.

- There is a persistent issue around the concept of foresight: it is foresight of the harm that is required not foresight of the accident or incident that caused the harm.

- Some learners are still confusing 'causation of damage' (a task 1 issue) with 'damages' (a task 2 issue). There is no credit for so-called 'cross-over' material which means that a number of learners failed to achieve credit for what would have been creditworthy material had it been offered in the right task.

- Many learners in task 1 include irrelevant material such as *volenti*, contributory negligence, *res ipsa loquitur*, multiple causes, intervening acts, and the thin-skull rule. This wastes time and the learners then find themselves short of time to properly complete task 2 even though they know what to write. The same learners will often feel as though they have to try and apply these areas and will 'force' the case facts to fit a legal concept inappropriately.

- Some learners have clearly been taught to include introductory material on the background and history of duty of care, generic material on precedent or generic evaluation at the end of each section without any relevance to the context of the question. This gains no credit and wastes the learner's time often causing a lower overall score as they struggle to complete task 2.

- There is a tendency to talk about 'ADR' in generic terms in task 2 rather than a specifically named type. Learners need to explain (or even 'state') a specific type to gain credit.

- Advice (where you go to get help/advice) and funding (how you pay for your case) are often confused.

If appropriate please refer to the specification and/or sample assessment materials (SAMs) located on the BTEC First qualification webpage located here.

Individual Questions

Question 1 (File Notes)

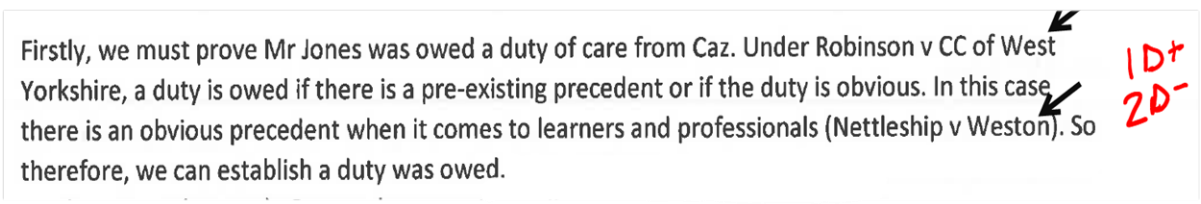
Assessment focus: AF1

Most learners did well here. At the top of the mark range was a requirement that learners explain each element of negligence with appropriate supporting authorities. The new mark grids and the additional 2 marks allowed us to draw a distinction between 'stated' law (bands 1 and 2) and 'explained' law (bands 3, 4 & 5) and this gave us greater differentiation and rewarded learners more appropriately.

Duty of care

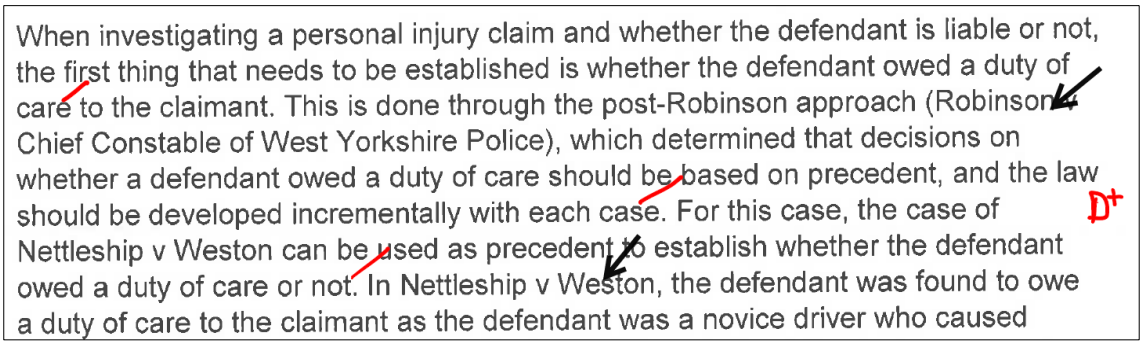
Most learners scored well providing they explained rather than stated the law. This was also due to our continuing to accept a dual route to establishing a duty of care. However, on 20/11/20, an update was shared with all centres to explain the approach we would be following in respect of establishing a duty of care in future external assessments. Since there will not be any external assessment in 2106, this is the last session in which learners will be credited equally, regardless of which route they described when explaining how a duty of care should be established. In an assessment such as this one where there was a clear and obvious precedent (*Nettleship* v *Weston*), learners who solely explain the three stage *Caparo* test will not, in the future, score full marks.

Right way to establish a duty of care 1:


Firstly, we must prove Mr Jones was owed a duty of care from Caz. Under Robinson v CC of West Yorkshire, a duty is owed if there is a pre-existing precedent or if the duty is obvious. In this case there is an obvious precedent when it comes to learners and professionals (Nettleship v Weston). So therefore, we can establish a duty was owed.

1D+
2D-

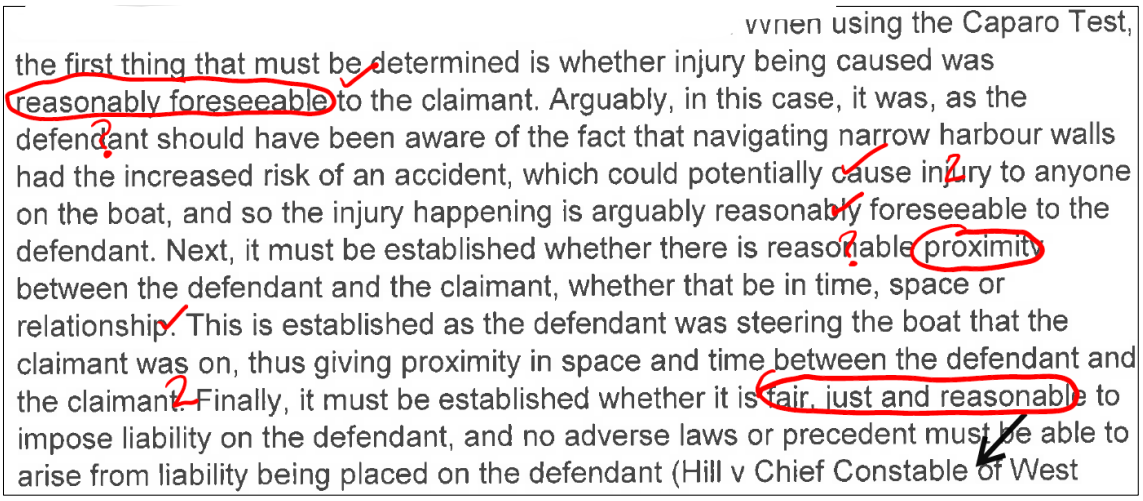
Right way to establish a duty of care 2:



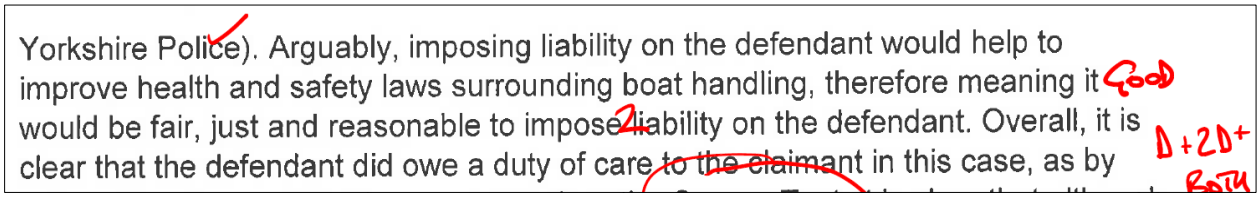
When investigating a personal injury claim and whether the defendant is liable or not, the first thing that needs to be established is whether the defendant owed a duty of care to the claimant. This is done through the post-Robinson approach (Robinson v Chief Constable of West Yorkshire Police), which determined that decisions on whether a defendant owed a duty of care should be based on precedent, and the law should be developed incrementally with each case. For this case, the case of Nettleship v Weston can be used as precedent to establish whether the defendant owed a duty of care or not. In Nettleship v Weston, the defendant was found to owe a duty of care to the claimant as the defendant was a novice driver who caused

D+

Caparo approach – done well and credited but will no longer gain full credit in future sessions if used in a case where there is a clear and obvious precedent:



When using the Caparo Test, the first thing that must be determined is whether injury being caused was reasonably foreseeable to the claimant. Arguably, in this case, it was, as the defendant should have been aware of the fact that navigating narrow harbour walls had the increased risk of an accident, which could potentially cause injury to anyone on the boat, and so the injury happening is arguably reasonably foreseeable to the defendant. Next, it must be established whether there is reasonable proximity between the defendant and the claimant, whether that be in time, space or relationship. This is established as the defendant was steering the boat that the claimant was on, thus giving proximity in space and time between the defendant and the claimant. Finally, it must be established whether it is fair, just and reasonable to impose liability on the defendant, and no adverse laws or precedent must be able to arise from liability being placed on the defendant (Hill v Chief Constable of West



Yorkshire Police). Arguably, imposing liability on the defendant would help to improve health and safety laws surrounding boat handling, therefore meaning it would be fair, just and reasonable to impose liability on the defendant. Overall, it is clear that the defendant did owe a duty of care to the claimant in this case, as by

Good

D+2D+

Breach

Once again, this paper was based on the concept of breach. On this occasion the legal principle was arguably simpler to explain. This is because *Nettleship* reflects the straightforward point that a learner is judged at the standard of the reasonable (and competent) experienced defendant. In 2001, on the other hand, the position relating to the standard of care for child defendants required an appreciation of the distinction made in *Orchard* v *Lee* (decided on

culpability) from that in *Mullins* v *Richards* (decided on foresight). Most learners did well providing the straightforward breach point was explained and supported with an appropriate authority. If there is a clear breach at this stage there is no need to go on and consider every single possibility that the standard of care might be altered. In order for any alteration to be relevant there would have to be something obvious in the facts to justify it before explaining the relevant law.

How to establish breach:

> We must now look to breach to see if Caz has breached her duty of care now that we have established she has one. For this we will need to compare her to a reasonable man (Blyth v Birmingham waterworks). This still applies even though she is a learner because learners are held to the same standard as a reasonable man (Nettleship v Weston). She will be held to the standards of a reasonable boat driver (Montgomery v Lancashire).

Causation

Factual causation was generally explained well with few errors and/or missing authorities. It was a very straightforward 'but for' (*Barnett*) situation and probably was not necessary to go on and consider legal causation but most learners offered something on the harm not being too remote (*Wagon Mound*). However, what was absolutely unnecessary was to explain the law on *res ipsa locquitor*, the thin skull rule, multiple causes and the 'type' of damage foreseeable etc – these seem to be part of a determined 'check list' approach which can lead learners into wasting valuable time.

How to establish causation:

> Finally, we must prove that Caz was the factual cause of harm. This can be done using the but for test (Barnett v Kensington Hospital). But for if Caz had put the boat in reverse, as instructed, in order to steer around the children, the boat would not have crashed. Next, we must prove the damage was not remote (Wagon Mound). Damage is remote if it is unforeseeable. In this case it was foreseeable that crashing the boat into the harbour wall and Mr jones being thrown overboard would have caused serious head injuries (Hughes v Lord Advocate).

Assessment focus: AF2

Most of the AF2 was straightforward. Some learners could have made the task easier by leaving out extraneous material. There is still some confusion around applying some of the more abstract concepts. The key skill in this AF lies in the quality of the evidence-based reasoning. The process has three steps: 1. The learner presents a legal principle; 2. The learner applies the

principle to the appropriate facts given in 'Part B'; and 3. The learner draws a conclusion (i.e. that the particular element is made out or not).

Changes to the mark grids mean that the 18 marks previously available for application (8) and evaluation (10) are now merged into a single category (16) and split between 5 rather than 4 bands. This allows for much greater learner access and differentiation. Learners can be rewarded for anecdotal and narrative attempts at band 1 and will make progress through bands 2 to 4 by offering correct application of each of the 3 elements of negligence. The availability of more marks in the new grids means that within each band, a learner's work can be credited as basic, adequate or good. This will largely depend on the completeness of the application and the quality of the reasoning process, and making good use of the given facts.

The fifth band rewards the quality of the conclusion and any relevant critical evaluation that may have been offered either alone or in combination.

Other issues:

Failing to sub-conclude and conclude

Including conclusions and using them to determine liability can be important discriminators on this task.

Conclusions may be:

- Terminal – at the end of the response brining the answer together
- Interim – sub-conclusions as the candidate goes along (X owes a duty of care, has breached his duty or has caused damage)
- Bald – either terminal or interim – unsupported statements (X is liable in negligence)
- Reasoned & justified – (X is liable because – followed by an explanation)
- Conclusions should NOT be conditional – X 'may' or 'could' be liable or 'if X then Y but if X then Y'

Lack of reliance on the 'Part B' materials

As a vocational qualification, learners who can 'think on their feet' will always perform well. As stated above, the learners who make links between the facts given in 'Part B' and the legal principles applicable, score high AO2 marks. Students need to practice this skill using past papers and made-up mini-scenarios.

Critical evaluation

As a result of the mark grid changes, it is now possible to achieve full marks with or without critical evaluation (e.g. all three elements well applied and a reasoned and justified conclusion = 16/16). Critical evaluation is still recognised and rewarded at any level; however, as an applied law qualification, such evaluation will have to have some relevance to the question. So, for example, commenting on the inherent unfairness of an objective test being applied to learners is relevant to the scenario, but abstract evaluation about the impact of the Robinson case on the police has no relevance.

Irrelevant evaluation (not in context of question):

A benefit to Robinson v CC West Yorkshire is that the police and emergency services (DSD v Commissioner of Met) can be held liable for negligence, however this may not always be a good thing since it could open the floodgates and the emergency services are underfunded if they are going to be sued often. IRVT

Relevant evaluation (in the context of the question):

It can be argued that it is unfair to hold learners to the same standard of care as the reasonable man because they haven't had as much experience. On the other hand, learners should be because they share the same space as reasonable men and therefore should be responsible if they put someone else's safety at risk. Ev

Assessment focus: AF3

This assessment focus relates to the quality of the presentation and structure and remains unchanged. It is not an assessment of the quality of spelling, punctuation or grammar. Broadly speaking it works in this way:

- A **complete** task which is effective (**4**) marks
- An **incomplete** task where the content which is there is effective (**3**) marks
- An **ineffective** task – this will typically be where the learner has provided law and/or legal application but it is presented in a format which would be confusing to the reader and, therefore, ineffective (**2**) marks
- An **anecdotal** response – this is where the learner has engaged with the task and attempted to respond to the question but in an entirely anecdotal (i.e. without any reference to the relevant law) manner (**1**) mark

Question 2 (Client Letter)

Given the vocational nature of the qualification, it is pleasing to see learners engaging with the client advice task with authenticity and enthusiasm. In general, the client letters were done to a high standard and scored higher marks than the file note. The most common reason for not scoring higher marks was the degree of completeness.

Mark Grid Changes

The client letter task clearly sets out in 'Part B' (pg.4) what this task requires:

> Prepare a solicitor's letter that shows your understanding of:
> • the likely **damages** Daryll could expect if he is successful
> • the ways the claim could be **funded** and alternative sources of **advice**
> • the use of **Alternative Dispute Resolution** instead of using the appropriate **civil court** for Daryll's case.

So, the five key issues are damages, funding, advice, ADR & the civil courts. Under the old four-band mark grid it was not possible to reward each of the five elements discretely so issues were often 'paired' (e.g. 'funding & advice' or 'ADR & CJS'). This meant that we were not able to differentiate as accurately as we would have liked. However, the five-band mark grid has allowed us to reward each of the key issues separately, giving a much more accurate picture of the overall performance of the whole cohort and to reward learners' efforts more appropriately.

Aspects demonstrating good practice:

- The new mark schemes (specimens having been released in advance by Pearson with updated exemplars) seem to have been widely disseminated and understood. Most learners who completed the task had a clear understanding that they needed to cover all five issues.
- As a vocational qualification, there was clear evidence that the A4 element of the specification (Legal Skills) was demonstrated through the ability to provide appropriate and relevant client advice in the requisite format.
- Letters were confident and knowledgeable providing accurate and reassuring information to the client.

Areas for improvement:

- A significant minority of learners focused too heavily on damages to the detriment of the other two areas

- A few learners had obvious timing issues, usually due to spending too much time on task 1, or the damages element of task 2, or both
- Some letters had too much 'technical/legal information' for a client orientated task

Assessment focus: AF1

The driver for progress through the five bands was completeness. Once again, the new mark grid has given us the ability to discriminate between 'stated' and 'explained' responses with some limited credit in band 1 for bald or anecdotal points. Thus, five explained points would be the top of band 5.

One issue worth reflecting on with learners here is the relative differences in the amount of content between the 5 key elements. For example, there is quite a lot that could be explained about damages, but not a great deal to say about the High Court or the multi-track, other than what they are. Learners should be conscious of this and tailor their responses accordingly. Consequently, the 'amount' of content may vary depending on the particular element the learner is covering. In this respect, damages would usually be the broadest element to consider and this will often be obvious from the amount of support or 'prompts' in the source materials in 'Part B'. There may be additional issues such as mitigation of loss or contributory negligence. Conversely, where a range of options exist, there is no need to explain every single one. For example, it is not necessary to list every type of ADR or funding. If the facts indicate that mediation or a CFA would be a good choice, then simply describe that one. It is better to have one well explained point than numerous stated or bald points.

Learners should also try and make letters 'audience appropriate'. Some letters were over-worked with too much information and/or too much technical detail when considering the audience. A few letters set out a side-and-a-half just on damages. Try and stick to things that are relevant to the client and their scenario. For example, there is generally no legal aid for PI cases, so do not waste time explaining it only to discount it.

Assessment focus: AF2

Generally, this assessment focus was dealt with very well, especially on damages. The new marking grids have opened up access to 16 marks across 5 bands so that each of the five key elements of the task could be covered and credited separately. Once again, limited credit was possible within band 1 for anecdotal points but the main route of progress through the bands was the completeness of the application across all five issues. At each band,

learners' efforts could be credited as basic, adequate or good which offered greater differentiation and recognition of individual effort.

As for task 1, the best responses made strong links between the facts provided in the sources and the corresponding legal advice referring to the client and their issue specifically to underscore the link. Lack of completeness was the most common reason for lower scores, but most learners managed some accurate advice even if they could not cover all the elements required by the task. There were some apparent timing issues which can be linked to spending too much time on irrelevant issues in task 1 and/or damages in task 2. Covering a narrower range of issues well is better than applying too many in insufficient detail. The narrow issues in the paper were:

Damages

Daryll's action would be for both special damages (lost earnings, relief fisherman etc.) and general damages (pain, suffering and, as a fisherman, fear of water). Furthermore, some learners had a clear understanding of the distinction between lump sums and structured settlements, and which would be most appropriate here. Lastly, some learners appropriately picked up on the contributory negligence issue here.

This example shows good links between the source facts and the point of advice:

There are 2 types of damages these a special and general damages. Special damages are pecuniary losses, these are monetary losses that are incurred between the injury and the trial. This would be lost earnings, which would be the three months you took off work, the £4,000 a month to run the boat and the £20,000 a month for the paintings. It would also be a if a family member has spent significant money of time with you because of your injury and the medical expenses. General damages are split into 2 sub categories of pecuniary and non – pecuniary. The pecuniary would be the lost earnings after the trial, because you wanted to become a professional painter and you cannot do so because of your loss of coordination, you can claim compensation for loss of amenity, which is a loss of being able to paint and be coordinated. It would also cover a future special living accommodation. Non – pecuniary is harder to calculate which is why the judicial studies board has set tariff points for specific injuries. It accounts for pain and suffering which would be your fear of open water and you struggling to go anywhere you think might come into contact with it.

Advice

The inference here is that it is 'alternative' advice, i.e. from someone other than you as his solicitor (or barrister/legal executive where appropriate). Here a good alternative source of advice might be the Citizen's Advice.
Better to try and 'explain' one type than simply 'list' a number:

> To fund your case, you have multiple methods available. You can use insurance, trade unions, pro bono, your own funds, state funding or conditional fee arrangements.

Funding

Most learners recognised the fact that, given his circumstances, Daryll might be able to afford to pay for his own lawyer or, perhaps more appropriately, he could use a CFA given their suitability to PI cases. Good example of a client being advised about a CFA in 'customer-friendly' terms:

> Alternatively, you can use a Conditional Fee Agreement (CFA), more commonly known as a 'No Win, No Fee' agreement. These were designed with personal injury cases in mind, as you do not have to pay or only partially pay legal costs if you don't win your claim, and you can pay your fees with the money you have won in compensation if you do win. Although CFAs are good for personal injury cases, it is worth being mindful of additional hidden costs that are associated with these sorts of agreements; we would advise you to read their terms carefully before accepting one.

Alternative Dispute Resolution

Most learners recognised that mediation would be the most suitable for Daryll. In this example the explanations are brief but accurate and the application takes the form of generic evaluation but it is still relevant to the client:

> Mediation is where a third party, neutral and unbiased mediator will ask the two parties questions to allow them to come to a conclusion. An advantage is that its free, however, a disadvantage is that it is usually used for family cases, not cases with large sums of money and it is non-binding.
>
> Conciliation is similar to mediation but the third party is more pro active in coming to a conclusion, An advantage is the third party being proactive but again, like mitigation, a disadvantage is that it is usually used for family cases, not cases with large sums of money. It is also non-binding.
>
> Arbitration offers a binding award, it is similar to court with arbitrators acting like judges. It can be as formal or as informal as you wish. These are all advantages. However, the disadvantage is that it is not free so court may be the best option anyway.

Civil justice system

most learners were able to work out that a case involving >£50k would come under the financial band placed on the multi-track and tried in the High Court. There is not a great deal to say about the civil justice system. It is really just a matter of identifying and applying the right track and court. However, this learner has enhanced the response by offering the client some relevant contextual advice:

> Your case will need to be allocated to a track by the judge, small claims look at cases of up to £10,000 or £1,000 personal injury, fast track (£10-£25k) and multi-track looks at complex or £25,000+ cases. Most cases are heard in the County Court, with multi track cases potentially being heard in the High Court. Your case is likely to be a multi-track case, heard in the High court. The process of going to court is one which involves many different procedures. As it provides a legally binding decision and a definitive win/lose outcome, it is clear why many choose to go down this route. The win/lose outcome is not always effective as it can cause tension between the parties, regarding court costs, blame and general disagreement. There is no middle ground which in some cases may be more beneficial. It is also very expensive and strenuous emotionally.

Assessment focus: AF3

Everything said above regarding AF3 for task 1 applies equally here. However, there were more 'incomplete' tasks on task 2 so (3) was a more common score. For some reason, the civil justice issues (track and court) were the most commonly missed point.

Summary

Key advice for future development includes working with learners in order to:

- Discourage them from using an inflexible tick-list or template which forces many of them to waste time on irrelevant points that gain no credit.
- Encourage them to use the *Robinson* approach to establishing a duty of care instead of needlessly wasting time on the three-stage *Caparo* test.
- Recognise the relevant issues by a close reading of the facts provided in 'Part B' and only dealing with those issues supported in the source.
- Distinguish between the parties better so that they recognise the correct claimant and defendant.
- Ensure they clearly understand the difference between the demands of each task, especially (causation of) damage and damages, so that issues are dealt with in the right task.
- Encourage the development of 'thinking on their feet' skills by practicing with lots of past papers and SAMs. Learners will do far better by developing their ability to recognise what is important and focus on that rather than the rote learning of fixed lists of material they are unable to use selectively.
- Discourage inclusion of irrelevant material such as lengthy introductions to negligence and its historic development from *Donoghue* – the task is a file note not an essay.
- Improve the clarity and communication of information by setting information out more clearly and accessibly – e.g. by using headings and sub-headings where appropriate.

If appropriate please refer to the specification and/or sample assessment materials (SAMs) located on the BTEC First qualification webpage located here.