



14-19 CHANGES
A LEVEL

Support Materials

GCE Law H534:

**Teacher Support Booklet:
Law of Torts**



RECOGNISING ACHIEVEMENT

Contents

Contents	1
Exemplar Candidate Work: Law of Torts (G157)	2
Exemplar Candidate Work: Law of Torts Special Study (G158)	20
Sample Classroom Activity: Law of Torts (G157)	35
Sample Classroom Activity: Law of Torts Special Study (G158)	38
Suggested Reading List: Law of Torts (G157)	40
Suggested Reading List: Law of Torts Special Study (G158)	41

Exemplar candidate work Law of Torts (G157)

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

Question:

‘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:

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 AO2 it must be remembered that an employee is normally a man of straw and getting compensation would therefore be difficult. AO2

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 AO2 but it is justified as a deterrent as employers should be aware of their employees' actions and they should take care who they hire. AO2

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. AO2 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 ship's master you are an employee but if your work is done for the business like a ship's pilot you are not an employee. This test has not been widely used. AO2

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

RECOGNISING ACHIEVEMENT

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. AO2

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 unauthorized 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. AO2 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. AO2 This is in part due to public policy or the courts trying to give compensation or acting as a deterrent. AO2 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. AO2

As can be seen the law regarding vicarious liability has been shaped by the need either to compensate or act as a deterrent. AO2 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? AO2 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. AO2

It is also questionable about the deterrent effect. AO2 The courts have held employers liable even when they employee is acting against instructions. AO2 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. AO2

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. AO2

General comments

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. AO1 achieved Level 5 because of the range of knowledge and the number of supporting cases. AO2 only reached top Level 4 because, while the candidate did produce a balanced discussion and reached a conclusion, many of the comments made could have been developed further.

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.

The answer shows effective communication with the information and discussion presented in a well planned and logical sequence with appropriate legal terminology accurately used. It therefore achieves Level 5 for AO3.

Mark

AO1	21
AO2	16
<u>AO3</u>	<u>5</u>
Total mark	42

Synopticism

The candidate has a good appreciation of the topic area in the context of the Law of Torts in general (the essay title in any case focuses on the major aims of Torts, compensation and deterrence – and the candidate is careful throughout to link comment back to the point of the question), and to issues such as the development of the law, the role of judges and the impact that they may have on development, as well as issues of justice and morality.

Comments on justice appear in the 1st, 2nd and 13th paragraphs. Comments on development appear in the 3rd, 5th, 8th, and 13th paragraphs, although the comment was not generally developed. Comments on the focus of the question, compensation and deterrence appear in the 1st, 2nd, 10th, 11th, 12th and 13th paragraphs

Stretch and challenge

There are some hints at stretch and challenge in the candidates answer although insufficient development of incisive comment and only fleeting hints at sophistication for the candidate to achieve a grade at A*.

There are hints in the 1st, 2nd, 11th, 12th and 13th paragraphs that the candidate understands the judicial reasoning behind imposing vicarious liability and is also able to make valid criticisms of this reasoning, but these are more bald comment than measured argument. The candidate makes a very good comment on the inconsistency of precedents in the area in the first sentence of the 10th paragraph, but unfortunately does not develop the point. Particularly in the 10th paragraph the candidate understood the significance of the judgment in *Lister v Hesley Hall* but again did not develop the point.

Examiner's advice

The candidate not only has a clear understanding of the law but also a critical awareness, being able to link a number of relevant comments into an overall argument.

For AO1 little more would have been required to lift the mark to the top of Level 5. This may have included e.g. use of a case such as *Whittaker v Minister of Pensions* to illustrate the integration test, a few more cases illustrating torts in or not within the course of employment, and more development on *Lister v Hesley Hall*.

For AO2 the candidate has identified most of the critical points but to attain Level 5 and particularly maximum AO2 marks the candidate needed to develop these points further as identified above.

Example Grade E Answer:

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. AO2

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. AO2 The employee is a man of straw. They have no money. Companies are loaded they should pay. AO2 It also stops those people being employed AO2 and if you do employ stupid people it is your own fault. AO2

Examiner's commentary

General comments

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 both 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 also lacks development

AO2 is attempted by the candidate but it lacks any real 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.

For AO1 the candidate achieves a high Level 2 mark for the range of information supplied which includes a basic definition, reference to three tests of employment with cases cited and vague reference to cases identifying acts within or not within the course of employment. None of the information or cases is developed and in certain instances the cases are identified by facts rather than the name so the answer cannot be considered adequate but is clearly limited in content.

For AO2 the candidate offers a bald appraisal of the Ready Mixed case and also some limited rationale on the connection between vicarious liability and compensation of the victim of the tort with three or four discreet comments in the final paragraph. Again the extent of the comment allows the candidate to achieve Level 2 but nothing is developed and the comment does not amount to most of the more obvious points of criticism. So it is a limited discussion and rather is a collection of sporadic comment than an argument, although there is some focus on the question set which is often not the case with grade E answers.

For AO3 what is communicated is reasonably accurate and there is a structure so the candidate achieves Level 3.

Mark

AO1	10
AO2	7
<u>AO3</u>	<u>3</u>
Total mark	20

Synopticism

There is little evidence of synopticism in the answer. In the 1st paragraph the candidate does appreciate that vicarious liability relates to employment. In the 4th paragraph there is implied recognition that development of the area is by judicial interpretation and the importance of case law is again highlighted in the 5th paragraph. Finally there is some reasoning in the concluding paragraph.

Stretch and challenge

As would be expected from a grade E answer there is no evidence of stretch and challenge. The candidate has deployed both AO1 and AO2 skills, which is not always the case with such answers. However, none of the higher level skills are evident.

Examiner's advice

The candidate has shown some appreciation of the topic and is aware of the major tests, some case law and has some critical awareness also. However, both the factual content and the comment lack any real development and are limited in scope and detail.

For AO1, while the candidate has covered a reasonable range of the topic, there is little if any detail. The best factual elements are the coverage of the tests for employment but even these lack detail and expansion. With more revision the candidate could have expanded more, explained the tests and used the cases referred to in order to explain them in more depth, as well as giving a case illustration for the integration test. The case law explaining the need for the tort to be within the course of employment is sparse and blunt. Inclusion and coverage of cases such as *Limpus*, *Beard*, *Century Insurance* etc would clearly have increased the mark dramatically, as well as greater expansion on the cases indicated. Some coverage of the more difficult and contentious areas, particularly *Lister* would also have increased the candidate's mark and level.

For AO2 the candidate, unusually at grade E, has understood a number of critical points. However, these are generally presented as bald points with no expansion. The candidate has the beginning of a point in the 4th paragraph and with some discussion of the need for tests of employment and the impact that they have on compensation and deterrence this could easily have lifted the mark. Similarly the final paragraph includes a number of valid points for discussion but needed expansion and development for a higher mark. The final point, for instance could have been linked to deterrence, the imposition of vicarious liability can act as a deterrent to an employer to engaging poor quality staff and failing to train or discipline them. Again some discussion of cases such as Lister and the way in which this expands the scope of vicarious liability could have gained many more marks for the candidate. One final point, as can be seen from the answer there is only a glimmer of AO2 prior to the last paragraph. As a rough guide candidates, particularly in lower grades could improve their AO2 performance significantly if they strive to include a comment after each piece of information they give.

For AO3 the structure of the answer was quite reasonable, beginning with a definition, identifying the tests of employment, and to an extent the test of in the course of employment, and finishing with some critical comment. Adding a conclusion would have enhanced the mark. There were some noticeable errors of spelling and grammar but these did not detract excessively from what the candidate had communicated.

Question:

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:

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 Coutrass*. AO2 Liability was originally limited where a claimant was also at risk of physical injury as in *Dulieu v White*. The law was then extended AO2 to cover fear for close family within an area of impact as in *Hambrook v Stokes*. The law was then extended AO2 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'Brian*. AO2

It is also important that the defendant has a recognised psychiatric condition. It is not acceptable to just suffer grief. AO2 Examples of acceptable conditions are post traumatic stress disorder, depression and pathological grief but as discussed in *Reilly v Mersey RSH* 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. AO2 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. AO2 He was on the roller coaster with Eddie and so there is no issue with proximity in time and space AO2 and as Eddie's father it can be assumed that he has a close tie of love and affection to his deceased son. AO2 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. AO2

Georgina would be unable to claim as a primary victim as she was not in fear for her own safety. AO2 She would also have difficulties proving that she is a secondary victim because there would be issues regarding close tie of love and affection. AO2 Georgina was merely a bystander who witnessed the incident AO2 and it is unlikely that the courts would allow her to claim. AO2

In the case of Hannah it is difficult to say whether a claim would be allowed or not. AO2 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. AO2 She could however be a secondary victim. AO2 She satisfies Alcock's requirement of close tie of love and affection as she is the deceased's mother. AO2 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. AO2 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. AO2 This may affect the claim. AO2 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. AO2 Did this result from the incident, or simply her son's death? AO2

Ian as a paramedic is considered to be a rescuer. AO2 The law on nervous shock allows them to claim as primary or secondary victims in their own right. AO2 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. AO2 He would also have problems as a secondary victim as rescuers have to satisfy the Alcock criteria. AO2 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. AO2

Examiner's commentary

General comments

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. It is of course perfectly possible for a candidate to gain a high AO1 mark by good use of a few key cases, *McLoughlin v O'Brian*, *Alcock v Chief Constable of West Yorkshire*, *Page v Smith*, *White v Chief Constable of South Yorkshire* being the major ones together with more specific cases on the nature of the injury itself such as *Reilly v Merseyside HA* or *Vernon v Boseley*. The candidate has offered more than these and so secures Level 5.

The AO2 applies the principles outlined to reach informed conclusions about the relevant individuals involved in the scenario. There is a good application and the candidate starts by highlighting the major issues in the question. Some parts could be further elaborated on e.g. the discussion about Ian. Nevertheless the candidate easily achieves Level 5.

The structure is clear and logical and the candidate is at ease with appropriate legal terminology and shows a high level selectivity skill, securing Level 5. The case of *Coultas* in the 2nd paragraph is miss-spelt, but this is an easy slip in exam conditions and in no way detracts from the high quality of the answer.

Mark

AO1	22
AO2	18
AO3	<u>5</u>
Total mark	45

Synopticism

The candidate has an excellent understanding of the topic area. The candidate is not only able to apply the appropriate law thoughtfully and selectively, and generally accurately, and therefore shows a high level of competence in legal reasoning, but in the 1st paragraph has also been able to demonstrate a critical awareness of the anomalies in the area and how these have impacted on the development of the law, and how judicial decisions impact on various classes of claimant justly or unjustly.

The choice of words such as 'widest point' in the 2nd paragraph and 'special rules' in the 5th paragraph demonstrate the candidate's understanding that judges are imposing limits and treating different claimants differently in order to restrict the number of successful claims, rather than applying first principles in all cases.

High level application skills are shown in 6th, 7th, 8th and 9th paragraphs and in most instances the legal reasoning leads into carefully measured outcomes.

Stretch and challenge

There are elements of stretch and challenge in the candidate's answer which probably would secure an A* grade. There is certainly sophistication shown in the high level skills.

In the 2nd and 3rd paragraphs the candidate lays the foundations for the application that follows by laying out the development of the basic principles. The 2nd, 3rd, 4th and 5th paragraphs clearly indicate the candidate's appreciation that the development of the law is as a result of judicial precedent and there is comment along the way on the justice, inconsistency etc or otherwise of these developments. The 6th, 7th, 8th and 9th paragraphs demonstrate high level, selection, and incisive skills of application and legal reasoning; although in the 5th paragraph the candidate may have used analogy with existing case law more to reach a conclusion on the nature of the injury. The understanding of the difficulties associated with causation shown in the last two sentences of the 8th paragraph is excellent and very perceptive, although again it may have been even more impressive with reference to cases such as *Taylor v Somerset* and/or *Calascione v Dixon*.

Examiner's advice

The candidate not only has a clear understanding of the law but also a critical awareness as well as clear legal reasoning ability at a very high level. With a little more attention to detail the candidate would have been able to achieve maximum marks.

For AO1 little more would have been required to lift the mark to the top of Level 5. More development of *Bourhill* in the 2nd paragraph and *McFarlane* in the 5th paragraph in the context of Georgina's situation in the 7th paragraph, and the addition of a case such as *Reilly or Tredget v Bexley or Vernon v Boseley* for the nature of the injury to David in the 6th paragraph, and the latter case particularly for Hannah's injury, as well as a little more development of *Alcock* (e.g. the presumption of close tie as against those claimant's who must prove the tie, or more definition on witnessing i.e. by own unaided senses, sight or hearing) would have easily lifted the AO1.

For AO2 there are two key ways in which the candidate could have lifted some excellent application to the maximum. Firstly, while the candidate's style of answering is not unique, defining the law and introducing the case law, followed by the application, this does have the possible effect in lesser candidates than this to leave a lot of the actual application of law for the examiner to imply, or to contain irrelevant information. Here the candidate has excellent selection of appropriate information and in places (in paragraphs 8 and 9) has introduced the law alongside the application. This latter approach is much better since the candidate is more likely to apply each and every aspect of the law to the facts. So for instance here in the 6th paragraph the candidate could have followed the first sentence with more analogy with the case law on the injury itself to achieve application of greater depth. Similarly, the candidate could have followed the last two sentences of the 8th paragraph with analogy of the case law on causation of the injury to the same effect. This in itself leads on to the second point which is that the candidate has not always covered every aspect of the individual situations in full, for instance by not dealing extensively with the injury as above.

Example Grade E Answer:

This is all about nervous shock. AO2 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. AO2

He has to satisfy the Alcock criteria. AO2

Key issue is that he needs an actual psychiatric condition. A fear of heights is probably not enough. Therefore no claim. AO2

Georgina

She is not in fear herself so is a secondary victim. AO2 She is a bystander as she is watching. AO2 These are covered by McFarlane and they cannot claim as there is no tie of affection. AO2

Hannah

This is similar to McLoughlin. AO2 She is a secondary victim and has a close tie. AO2 Will pass immediate aftermath AO2 and has suffered a psychiatric injury. AO2 She is highly likely to be able to claim. AO2

Ian

Ian situation is made complex because he is a rescuer. AO2 Originally easier to claim but now Ian will have to satisfy the conditions in White. AO2 White states that rescuers will be secondary victims unless they can prove they are actual primary ones. AO2 Ian will be a secondary victim. AO2 He has a recognised condition AO2 but will fail the Alcock test there is no tie of love and affection. AO2

Examiner's commentary

General comments

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, or where the candidate has a reasonable appreciation of the law but has not revised sufficiently to answer in detail.

For AO1 the candidate is aware that there is a difference between primary victims, and of the existence of, and of some aspects of the Alcock test for secondary victims, and that there are different rules for bystanders with McFarlane being cited but not explained or used, and for rescuers with some limited explanation of White. The candidate therefore achieves a Level 2 response which is not Level 3 owing to the lack of detail and explanation.

The AO2 is much better and achieves high Level 3. If the application was not quite so curt and lacking detail Level 4 may have been possible. The candidate has applied most of the appropriate tests to each potential claimant but, for instance, does not actually apply the Alcock criteria to David, omits the nature of the injury for Georgina and only partly applies the test Alcock test, states without explanation appropriate tests for Hannah, although is a little more expansive for Ian.

For AO3 what is communicated is reasonably accurate, if not detailed, some appropriate legal terminology is used, and there is a structure, albeit a simplistic one, so the candidate achieves Level 3.

Mark

AO1	9
AO2	11
<u>AO3</u>	<u>3</u>
Total mark	23

Synopticism

Because of the extent of the AO2 there is some evidence of synopticism in the answer. The candidate shows good identification skills in the 1st paragraph, and some reasonable if not detailed or extensive legal reasoning in the 2nd to 5th paragraphs.

Stretch and challenge

As would be expected from a grade E answer there is no evidence of stretch and challenge. The AO2 application skills are quite high for an E grade candidate, and the candidate clearly has an understanding of the appropriate law. However, the candidate is not explaining the law and therefore the application is not detailed and so the higher level skills are moderate and not high level.

Examiner's advice

The candidate clearly understands the topic and is aware of the key law. However, the factual element and the case law lack detail and development. While there is some quite strong application the answer is more in the style of a Section C answer than the more detailed response that would be expected in Section B.

For AO1, the information provided is quite limited. The candidate is aware of the importance of the exact nature of the injury, of the distinction between primary and secondary, of some of the criteria for claiming successfully in either category, that there are special rules for bystanders and rescuers, and has cited four cases, Alcock, McFarlane, McLoughlin and White. This is a good range and with detailed explanation of all of these the candidate could probably have secured Level 4. This would have included defining the necessary injury, defining both primary and secondary victims, identifying all of the Alcock criteria (witnessing with own unaided senses is omitted in the answer), definition of bystander and rescuer, and more detail on the case law, showing how the principles apply in each. The answer could also have been enhanced with the inclusion of case law on the injury, for example Reilly, Tredget or Vernon, and also case law on proof of causation, for example Calascione, Sion, or Taylor v Somerset. Bourhill may have been a better choice of case as an example of bystanders on the facts in question here.

For AO2 the application is quite good but lacks the detail and depth that the additional AO1 indicated above would have given it, e.g. close analysis of the rules in *Alcock*, categorisation of the individual claimants by reference to full definitions etc. There is some limited reference to the actual injury in three of the answers but in the form of bald statements rather than reasoned analysis, and there is no mention of the injury in Georgina's case. There were some causal difficulties in Hannah's case that could have been explored. The answer would have also benefited from application of all three *Alcock* criteria in each case. Statements such as 'A fear of heights is probably not enough' in relation to David and 'This is similar to *McLoughlin*' in relation to Hannah showed understanding by the candidate but too much was left to be implied and the candidate could have achieved much higher marks with detailed analysis explaining why the candidate was reaching these conclusions.

The AO3 mark is very much influenced by what the candidate has achieved for AO1 and AO2. The style of the response is not the most appropriate for a Section B answer and, in terms of effective communication, the candidate has only provided limited information for AO1 and some adequate application of most of the more obvious points for AO2.

Question:

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 there was 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:

Statement A

The statement is wrong. AO2 Abid is a road user and clearly owes a duty. AO2 He breached this duty when he drove at 90 mph and on the wrong side of the road. AO2 This action would not have been done by the reasonable motorist. AO2 Abid would easily foresee that his actions would cause some harm. AO2

Statement B

It is unlikely that the intervening act of Beatrice would break the chain of causation. AO2 This situation relates to novus actus of third parties AO2 and is only likely to break the chain if it is the operating cause. AO2 The drink is not the operating cause so novus actus will fail. AO2

Statement C

This cannot work as a defence as it is not available under the Road Traffic Acts. AO2

Statement D

Contributory negligence works by the defendant failing to take care of their own safety and this contributed to the harm. As Claudine has accepted a lift this clearly means that she has not taken care of her own safety. AO2 However it is doubtful that this has caused an injury to her. AO2 It is doubtful therefore that damages will be reduced. AO2

General comments

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 entirely 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.

In A the key issues identified by the candidate are that a duty of care is owed by motorists, that the defendant has fallen below the standard of a reasonable motorist, and that harm is foreseeable. With the addition of a correct conclusion this is clearly Level 5.

For B the candidate recognises a *novus actus* by a third party and that this only breaks the chain of causation if it is an operative cause of the damage which it is not. A correct conclusion is also offered to reach Level 5 again.

The answer to C is a bit terse and brief but the reasoning and conclusion are otherwise spot on for Level 4.

For D the candidate has identified the significant elements of the defence and reasoned correctly that causation presents a difficulty for any successful claim and again achieves Level 5 as a result.

Mark

AO2	18
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Stretch and challenge

There is ample evidence of stretch and challenge here. The candidate has good perception and incisive legal reasoning skills and also understands perfectly the demands of the different style of assessment.

Examiner's advice

The candidate shows great confidence in this style of assessment and is able to score very high marks through high level legal reasoning skills. With more attention to detail in part C, as indicated above, the candidate could have achieved maximum marks.

Example Grade E Answer:

Statement A

The statement is wrong. AO2 Motorists owe a duty. That duty was breached when he drove below the standard expected. AO2 It is not reasonable to drive at that speed and on the wrong side of the road. AO2

Statement B

This means breaking the chain of causation. The chain cannot be broken this way. AO2

Statement C

Cannot use this. AO2

Statement D

Contributory negligence may work and reduce the amount of damages Abid should pay. She got into the car knowing she was drunk. AO2 Therefore this should reduce the damages.

Examiner's commentary

General comments

The 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, and also lacks full explanation of the defence.

In answer A the candidate has given correct reasoning, understanding the existence of a duty and the way in which the standard of care would be measured, and reaches an appropriate conclusion. There is no mention of foreseeable harm but the answer is still sufficient for Level 4.

Answer B shows good identification and concludes correctly but without explanation of why so can only reach Level 2.

Answer C is very curt, and while in essence it is a correct answer there is no legal reasoning apparent so the candidate cannot achieve more than Level 1.

For answer D the candidate understands the effects of the defence and gives partial reasoning. However, the reasoning is not complete and the conclusion is unlikely to be correct in the circumstances so the candidate can only achieve Level 2.

Mark

AO2

9

Stretch and challenge

As would be expected from a grade E answer there is no evidence of stretch and challenge. The candidate probably has understanding of the area and there is some limited application in some of the four answers. However, there is no detailed application of legal reasoning and so the higher level skills are not apparent to any extent.

Examiner's advice

Unusually for an E grade the candidate has not really engaged in the style of assessment. Usually E grade candidates, who may, for instance, struggle with the critical skills required for Section A answers or lack the depth or detail necessary for Section B answers, take heart from the narrower model of assessment where they are able to deploy their understanding and legal reasoning to gain higher marks and lift their overall mark.

The candidate has made a good attempt at A and with more development on the nature of the breach e.g. that harm is foreseeable Level 5 could have been achieved.

For B the candidate clearly understands the effect of a *novus actus* but then uses only limited application. A much higher mark could have been achieved by discussing the causative nature of the injury and by pointing out that the intervening act is not the actual cause of the injury.

The answer to C lacks any reasoning at all and could therefore be a guess. Even a statement such as 'The defence of *Volenti* is not available in the case of road traffic accidents' would have secured a much higher mark.

For D the candidate understands the effect of the defence but the legal reasoning that follows is limited. If the candidate had focused on the need to show that the claimant failed to take care of her own safety and whether this partially caused the injury, this would have secured much higher marks regardless of the conclusion.

Exemplar candidate work Law of Torts Special Study (G158)

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

Question:

- 1) Discuss the extent to which the precedent in *Page v Smith* [Source 11 page 7 Special Study Materials] represents a development of the law on nervous shock (psychiatric damage).

[16]

Example Grade A Answer:

Page v Smith involved a man who suffered a recurrence of ME after being in a car crash in which he was not otherwise injured. *Page* was clearly a primary victim AO2 because, like in *Dulieu v White* AO2 he was present at the scene of the single traumatic event and he was at risk of some foreseeable harm, AO2 and he suffered foreseeable harm. AO2 *Dulieu v White* was the first case to allow a claim for nervous shock AO2 but only for primary victims. AO2 This limitation was later criticised in *Hambrook v Stokes*. AO2

With a primary victim it does not matter that the claimant suffered psychiatric rather than physical injury. AO2 As Lord Lloyd says in lines 17 to 18 of the Source AO2 'a distinction should not be drawn between physical and psychiatric injury' and he repeats the same point in lines 33 to 34. AO2

The case represents a major development in the law AO2 because the House of Lords was prepared to accept *Page's* claim despite him already suffering from ME and therefore being more susceptible to psychiatric injury. AO2 The judges are applying the thin skull rule. AO2 This contrasts with the rules on secondary victims AO2 where a person can only claim if they have the same phlegm and fortitude as a reasonable person. AO2

Examiner's commentary

General comments

The candidate achieves maximum marks for this. The candidate is careful not to rely too heavily on the facts of the case when there are only AO2 marks available but does give enough information to put the claim in context.

The candidate shows a clear understanding of the definition of primary victim and has shown the similarity with the principle in *Dulieu v White*. The point on *Hambrook* is tangential but useful critical context.

The candidate scores high marks also by understanding that the point of the question is development of the law, by using an appropriate linked case, and by explaining effectively two other key points on the development of the law on primary victims: that only some harm need be foreseeable, and the application of the thin skull rule.

As a result the candidate achieves Level 5 for AO2 by engaging in a strong discussion on three relevant points.

The candidate has also appreciated the nature of source based exams and made useful references back to the source. The answer is also well expressed and economical in its language and fluid in its recognition of critical points and achieves Level 5 for AO3 also.

Mark

AO2	12
AO3	4
Total mark	16

Synopticism

There is clear evidence of synopticism in the answer because the candidate has showed good understanding of the case in the context of the overarching theme, used a linked case very effectively to show both development and judicial creativity, (and indeed included another more tangential case but for contrasting purposes) and has also shown evaluative and analytical skills of a high level.

Stretch and challenge

For the reasons identified in 'Synopticism' there is clear stretch and challenge in the answer. While there is no AO1 requirement, the candidate has deployed both AO1 and AO2 skills, the latter at a high level. More importantly the candidate understands the very different demands of the specific type of question and of source based questioning. This is a clear A* answer.

Examiner's advice

This is an excellent answer achieving maximum marks. The candidate may have included more points of comment but was nevertheless able to succeed at the highest level with what is contained so this shows excellent time management.

Page v Smith concerned a fairly minor road accident in which one of the drivers negligently turned out of a junction and caused the other driver to run into him. Page had suffered from myalgic encephalomyelitis (ME). He said that he had been recovering from the illness and hoped to go back to work as a teacher. Page was a primary victim AO2 and he suffered foreseeable harm as a result of the accident AO2 and it didn't matter that it was psychiatric harm. AO2 Lord Lloyd gives five propositions regarding nervous shock in the source.

Examiner's commentary

General comments

This candidate has realised that it is important to refer back to the source but has not used it very wisely. The first four lines merely repeat almost verbatim from the source the basic facts of the case when it is the principle and developments that come out of the case that are important.

There is some merit in the answer. The candidate has recognised that Page is a primary victim, although gets limited credit for this because there is no explanation why. The best part of the answer is the recognition that Page suffers foreseeable harm and that it does not matter that it is psychiatric harm, although again it would have gained more marks to develop this further.

The blanket reference to the five points that appear in lines 22-37 can gain little credit because even if there is some relevant material there it is being left to the examiner to extract it.

The candidate could have secured higher marks by focusing on the issue of development of the law.

With one reasonably developed point and one point without real explanation the candidate has made some of the more obvious points to achieve Level 2 for AO2.

The answer is too narrative in style for the demand of the type of question and there is only limited analysis for AO2 so AO3 also achieves no more than Level 2.

Mark

AO2	5
AO3	<u>2</u>
Total mark	7

Synopticism

There is very little evidence of synopticism in the answer. The candidate has the skill to extract from the source but has done so in a narrative rather than an evaluative sense. The best point made by the candidate is that on foreseeable injury and there is some development of the point. Otherwise there is little explanation.

Stretch and challenge

As would be expected from a grade E answer there is no evidence of stretch and challenge. The candidate has shown some quite limited AO2 skills but none of the higher level skills are really evident.

Examiner's advice

The candidate is clearly aware of the demands of source based papers and has tried to use the source. However, this is done in a fairly unsophisticated way. The first three to four lines are merely copying factual information from the source, when there are no marks available for AO1. The candidate also wastes the opportunity to score marks with the last sentence. The blanket reference to points made in the source can gain no credit. The candidate could have scores marks for giving specific line references to those of Lord Lloyd's points that were relevant to the question. Not all were. Many more marks could have been gained for a full definition of primary victim, and an explanation of why Page was a primary victim, and the application of the 'thin skull' rule to primary victims, and indeed for developing the point included on foreseeable harm. Besides this the overarching theme includes development of the law so there ought to have been a linked case included also.

Question:

- 2) As Lord Ackner observed in *Alcock* [Source 9 page 5 lines 1-3 Special Study Materials] “Because shock is capable of affecting such a wide range of persons, Lord Wilberforce in *McLoughlin v O’Brien* concluded that there was a real need for the law to place some limitation upon the extent of admissible claims.”

Consider the extent of the limitations applied to secondary victims and whether they do in fact meet a ‘real need’.

[34]

Example Grade A Answer:

The law on secondary victims has developed in a very restrictive way AO2 in contrast to primary victims. AO2 The law has created many limitations on claims by secondary victims AO2 and all of these limitations are because of the fear of opening the floodgates to claims. AO2 However, it can also be said that because of the inherent differences between primary victims and secondary victims that the law has developed fairly. AO2

Firstly nervous shock or psychiatric damage is where the claimant must prove that he or she is suffering from a ‘recognisable psychiatric illness’, so mere emotions like distress and grief are insufficient. According to the case of *Alcock* ‘psychiatric injury encompasses all form of mental neuroses and personality change’. It was in this leading case that Lord Oliver introduced the terms ‘primary victim’ and ‘secondary victim’ AO2 which means the first are those victims who are directly affected by the accident or were in the zone of physical danger whereas the second of these are those people who have suffered psychiatric illness as a result of witnessing another’s exposure to physical injury. In fact both categories were explained in the earlier case *Bourhill v Young*. AO2

A common criticism of nervous shock is that secondary victims are treated much more harshly than primary victims. AO2 Primary victims only have to prove that they have suffered foreseeable harm and were present at the incident causing the shock. It also does not matter if they are already suffering from a psychiatric illness they can still claim because of the thin skull rule (see question 1 Page v Smith). Secondary victims on the other hand have to prove a wide range of things before they can claim successfully. AO2 Primary victims originally only had to show that they feared for their own safety (*Dulieu v White*). Gradually however a process evolved AO2 so that in *Hambrook v Stokes* a mother saw a lorry going down hill without a driver towards where she had left her children. She suffered psychiatric illness and the court allowed her claim. *Chadwick* shows how the courts have been more lenient to primary victims AO2 when the court compensated a rescuer by saying that he was a primary victim. This has changed however in *White*. AO2 So primary victims find it much easier to claim AO2 but secondary victims find it much harder. AO2

In *McLoughlin v O’Brien*, Lord Wilberforce laid down the criteria for secondary victims in his landmark decision. AO2 In the case some time after an accident a mother arrived at a hospital to find her family (husband and children) covered with mud and blood (so their condition was the same as it would have been at the scene of the accident). The mother suffered psychiatric damage and a personality change. According to Lord Wilberforce the mother was a secondary victim and could be compensated in the circumstances. She had satisfied the requirements of

RECOGNISING ACHIEVEMENT

(a) proximity of relationship i.e. she had a close and loving relationship with her family and the law recognises that this exists between spouses and between parents and children (b) proximity in time and space to the event or its 'immediate aftermath' as was the case here (c) perceiving the events with her own unaided senses.

These requirements show that the law is restrictive in relation to secondary victims. AO2 Besides this in Page v Smith a highly significant concept of 'normal fortitude and phlegm' was identified AO2 that applies to secondary victims but not to primary victims. AO2 Secondary victims must also prove that the incident induced the shock. AO2

The cases show that it is necessary to impose strict requirements on secondary victims and to preserve the divide between secondary victims and primary victims in order to prevent the floodgates from opening AO2 and also to distinguish between genuine claims and fraudulent claims AO2 which would be far easier in the case of secondary victims. AO2 Judges have applied discretion when considering cases AO2 and have borne in mind policy considerations in reaching decisions. AO2 Alcock, where the judges approved the criteria set in McLoughlin, concerned the Hillsborough disaster and the friends and relatives of the victims who died who were claiming for psychiatric injury suffered as a result of the deaths of the victims. Some of these friends and relatives arrived at the mortuary 8 to 9 hours after incident. The court held that they were secondary victims and could not satisfy proximity in time and space or 'immediate aftermath'. Others could not say that they had witnessed the event with their own unaided senses because they had seen it on TV and a brother who had been at the ground failed in his claim because the court said he did not have a close enough tie of love and affection to his brother who died in the disaster. The decision was justified because with the number of potential friends and relatives of the dead if the court had allowed these claims the floodgates really would have opened. AO2

It has also been criticised that it is far easier to recover damages for a physical injury than it is for a secondary victim to recover for genuine psychiatric injury. AO2 The Law Commission in its 1998 Report 'Liability for Psychiatric Harm' has presented proposals for reform, AO2 particularly of the McLoughlin criteria. They say that only the close tie of love and affection requirement should be retained and this should be extended to brothers and sisters and to cohabitantes.

Therefore there are strict limitations on claiming as a secondary victim AO2 which may have produced harsh results AO2 but these are justified to limit the number of claims AO2 particularly since the categories of primary and secondary victims are expanding. AO2 In Walters for instance a mother was able to claim when the court stated that the shocking events leading up to her baby's death was a single event lasting 36 hours and in W v Essex parents who discovered that their children had been abused by a boy they were fostering were also able to claim. AO2

Examiner's commentary

General comments

The candidate has been able to write at length and to include extensive comment for AO2 as well as much detail for AO1. In fact the candidate begins to comment as early as the first paragraph and lays out the basis of an argument.

For AO1 the candidate has included a wide range of cases. Not all are dealt with in detail and many more could have been used. However, the most critical cases are dealt with in detail and a good understanding of the definitions of primary and secondary victims and of the Alcock criteria are also evident. Besides this the candidate has been able to make reference to some fairly recent cases such as *Walters* and *W v Essex* which do not conform absolutely to the way in which the criteria are usually applied. The candidate easily achieves Level 5 for AO1 and could have gained maximum AO1 marks with a bit more depth and detail on *White* and the other rescuer cases and also some examination of bystanders.

There is also critical comment in most paragraphs and the candidate engages in a balanced argument for AO2 and deals with both aspects of the question set, not just the limitations on secondary victims but the justifications for those limitations. There is also reference to the Law Commission's proposals for reform. The candidate also has a very good concluding paragraph which neatly draws together the strands of the argument in the substantive paragraphs and in consequences achieves high Level 5 (maximum marks) for AO2.

The candidate has gone beyond the pure information given in the sources and scores high marks as a result. There is a logical and progressive structure and the explanations are very clear and the candidate achieves Level 4 for AO3.

Mark

AO1	15
AO2	14
AO3	4
<hr/>	
Total mark	33

Synopticism

There is significant evidence of synopticism in the answer. The candidate carefully sets out the basis of the problem in the 1st paragraph; identifies the possible justifications for the restrictions; and contrasts with primary victims. There is extensive analysis and evaluation of the law in all seven paragraphs. The candidate also discusses development in all seven paragraphs; and reference to the role of judicial law making in all seven paragraphs. Besides this there is also some reference to suggested reforms in the 6th and 7th paragraphs.

Stretch and challenge

The candidate has shown both competence and confidence in the higher level skills. The fact that there is comment in every paragraph indicates that the candidate has an advanced critical awareness. The candidate shows a clear understanding of the development of the various principles and besides having a good focus on the relative fairness of the treatment of secondary victims is also able to give some illuminating arguments on the justifications for the restrictions at the start and end of the 6th paragraph. The conclusion is also very lucid and incisive and also introduces some of the modern inconsistencies in the application of the restrictions. Besides this the candidate shows good understanding of the skills requirements of source based papers, for instance with the citation of a previous answer in the 3rd paragraph. The essay would achieve A*.

Examiner's advice

The candidate has only fallen short of maximum marks on AO1, and this could easily have been picked up with some detail on White, or on bystander cases, or possibly on causation. Otherwise the discussion is excellent.

Example Grade E Answer:

Nervous shock is when a person suffers from a psychiatric illness after a traumatic event. To get damages for nervous shock the victim has to prove the following: close ties of love and affection with the people involved which could be a married partner or children. It is hard for siblings to get damages. AO2 The court must also look at proximity, was the victim in the vicinity of the accident or far away from it or heard about the incident some time after. If it was far away or after then they can't receive damages. The rules for secondary victims are in a case called Alcock which involved the Hillsborough disaster.

There are two types of victim in nervous shock: primary and secondary. Primary are those who were actually involved in the accident and then suffered from psychiatric illness. Secondary victims are those that saw something horrific and then suffered shock as a result. There is a case, McLoughlin v O'Brien where a husband and his children were in a car crash and taken to hospital and his wife was phoned and rushed to the hospital and found her youngest daughter was dead and her other daughter and son were badly injured and bloody and dirty from the crash and her husband. She suffered from severe shock and changed personality and was awarded compensation because it was like being present at the accident.

Cases where secondary victims try to claim don't tend to succeed as much as primary victims. AO2 For instance there was a woman in the Hillsborough disaster who saw televised scenes of the disaster and who knew a relative was in the stadium but her claim failed because she hadn't witnessed the disaster by being there and seeing it and hearing it. This is another thing that secondary victims have to prove. AO2 If she had been there it might have been different.

There is another case, Bourhill v Young where a lady miscarried her baby after she got off a tram heard a crash and went round the tram and saw blood on the road where a motorcycle accident happened. Under nervous shock she couldn't claim because she had no close ties with the motorcyclist and she didn't see the accident with her own unaided senses. So she could not get damages for nervous shock.

Overall when they are looking at secondary victims the courts are understandably more concerned with not opening the 'floodgates' to claims than they are with justice. AO2 Primary victims are treated far more reasonably than secondary victims AO2 they only have to prove they were there and at risk of some harm secondary victims have many more hurdles to cross. AO2 It seems that the number of primary victims at an incident is less than the number of secondary victims who potentially might have a claim. So the courts must strike a balance between rewarding compensation to deserving claimants and opening the 'floodgates' to too many people. AO2

Examiner's commentary

General comments

The answer is a bit disorganised, for instance two of the Alcock criteria are introduced in the 1st paragraph while the third requirement is not mentioned until the end of the 3rd paragraph. The essay would have also benefited from more explanation and expansion in places. Besides this it is fairly narrative and lacks critical comment which is typical of a grade E answer.

However, the candidate gains a reasonable amount of credit for AO1. There is a partial definition of nervous shock and some reasonable definitions of primary and secondary victims. The candidate also has a reasonable understanding of the Alcock criteria and has included other cases with some reasoning of why the claimant succeeded in *McLoughlin v O'Brien*. So there is adequate knowledge just about. The candidate achieves a low Level 3.

Critical comment tends to be limited and mainly appears in the final paragraph, although the floodgates argument is referred to and there is some comparison drawn with the treatment of primary victims by contrast, and some attempt at justifying the reason for the limitations. Nevertheless the argument is not developed or applied to the cases used so there can only be limited marks for AO2, the candidate getting most of their marks from AO1. Higher marks would have come with more comment.

The structure of the answer is quite weak, with relatively haphazard arrangement of paragraphs mainly of narrative on a few cases. There is some comment but not really a discussion and so only Level 2 is achieved for AO3.

Mark

AO1	8
AO2	5
AO3	2
<hr/>	
Total mark	15

Synopticism

There is little evidence of synopticism in the answer. The answer is very narrative and uncritical, more a list of case facts. There is only very little, and generally unconnected and undeveloped comment and the higher level skills are not evident.

Stretch and challenge

As would be expected from a grade E answer there is no evidence of stretch and challenge. The candidate has shown only limited AO2 skills, sporadic limited comment but no analysis or evaluation.

Examiner's advice

The candidate has achieved a middle grade E, through some breadth of knowledge and a few points of comment. For AO1 the candidate would not have to have done a lot to achieve a much higher mark, full definitions of the action, primary victims, secondary victims, and bystanders also in the context of the question, and considered examinations of *Page v Smith*, *White*, and a fuller more coherent examination of *Alcock* together with some case law on the injury itself and causation and the candidate would have been into the highest level. As it is the candidate has only utilised three cases and more on the facts rather than effectively examining the principles.

The AO2 is also quite thin. There are a couple of isolated comments prior to the last paragraph but most of the comment is in the conclusion so there is not really any discussion. There were many points of discussion that could be developed e.g. the restrictive interpretation of tie of love and affection and the difficulties in close friends and workmates claiming, as well as bystanders, the restrictive interpretation of immediate aftermath, but this could have been contrasted with the position in cases such as *Walters* and *W v Essex*. Besides this there could have been discussion on the causation issues and gradual shock as well as reference to the suggested reforms.



Question:

- 3) A large crane is being used in building work immediately adjacent to the law school where Chris works as a lecturer. Through the negligence of the construction firm, Bodgejob, part of the crane falls off and drops on Chris as he is walking into the law school causing him severe injuries.

Consider the possibility of each of the following succeeding if they claim against Bodgejob:

- a) Jennifer, a lecturer and Chris's friend, is in the law school at the time of the accident, and on hearing of the accident looks through the window and seeing the extent of Chris's injuries suffers post traumatic stress disorder.

[10]

- b) Sukhy, another lecturer and close friend of Chris's, on hearing of the accident rushes out of the law school and realising that Chris's heart has stopped, resuscitates him and keeps him alive until the emergency services arrive. While Sukhy is doing this there is always a danger that more of the crane will drop. Sukhy suffers severe depression as a result and cannot return to work.

[10]

- c) Karen, Chris's wife, is called immediately and is at the hospital entrance when Chris arrives in the ambulance. She suffers grief when Chris is pronounced dead.

[10]

[30]

Example Grade A Answer:

(a)

Jennifer has a recognised psychiatric illness (PTSD). AO2

Jennifer is a secondary victim – under White by looking through the window she is not at risk so is not a primary victim. AO2

She passes two Alcock tests – present at the scene and witnesses the event with her own unaided senses. AO2

But she fails Alcock on close tie of love and affection AO2 – she is only Chris's work friend (Piper Alpha case) so has no claim. AO2

(b)

Sukhy has a recognised psychiatric illness (severe depression) AO2

Unlike Jennifer, Sukhy may be a primary victim because the crane may fall so he is in danger AO2 and he is also a rescuer as in Chadwick so he may claim. AO2

Otherwise he would fail under Alcock on close tie. AO2

(c)

Karen's case is like McLoughlin v O'Brien AO2 – she sees Chris at the hospital in the same state soon after so falls in immediate aftermath. AO2

Karen is a secondary victim as a wife her close tie is presumed. AO2

But grief is not a recognised psychiatric injury AO2 so Karen's claim fails. AO2

General comments

The candidate has answered in a brief note form which is perfectly acceptable for question 3. The important thing is whether the principles of law are correctly applied.

The candidate secures sufficient marks for grade A because appropriate principles are applied to all three scenarios and because most marks for question 3 are given for AO2. In each answer for instance there is a reasoned explanation of why the claimant is a primary or secondary victim. The reference to rescuer in (b) of course could have been expanded on, whereas the reference to McLoughlin in (c) includes some reason for the comparison being made. The candidate has not always backed up the principles with citation for AO1, for example when deciding whether there is a recognised psychiatric injury, but has used appropriate case law in places (e.g. 'the Piper Alpha case' is an acceptable reference to *McFarlane v EE Caledonia*). With one or two more cases the candidate would have secured maximum marks.

For AO1 the candidate achieves Level 4 as there is understanding of the appropriate tests, although the third criterion is left to be implied in (b) and (c) and there is no case citation for the injury, which is different in each situation so could have been supported by three different cases.

The third Alcock test is missing from (b) and (c) rescuer might have been developed more in (b) so, while a high Level 5 is achieved, this falls just short of maximum AO2 marks.

Mark

AO1	8
AO2	<u>19</u>
Total mark	27

Synopticism

There is clear evidence of synopticism because the candidate has deployed legal problem solving skills effectively in all three situations using very highly developed identification skills.

Stretch and challenge

There is ample evidence of stretch and challenge in the answer. The candidate has a precise understanding of the different aspects of each problem situation and is careful to consider the injury in each case and provide reasoning not just for the type of victim chosen but how the appropriate criteria would be applied. While there could have been further development as indicated above, the candidate would achieve grade A*.

Examiner's advice

The candidate only needs a little more development of both AO1 and AO2 for maximum marks.

For AO1 the most obvious is the inclusion of cases in support of denoting the injuries as recognised or not recognised, and possibly a little more development on definitions.

For AO2 all the candidate really needed to do was to remember to apply all the criteria in each scenario.

(a)

Jennifer is a secondary victim so she has to pass the Alcock three part test in order to claim. AO2 This is the class of persons whose claims should be recognised, the proximity of the claimant in time and space to the accident, and the means by which the shock is caused to the claimant. Jennifer passes the last two parts of the test AO2 but she fails the first one because she is only Chris's friend not his wife so she cannot claim. AO2

(b)

Sukhy is a rescuer because he is trying to keep Chris alive until the emergency services arrive. AO2 After White rescuers are secondary victims. Sukhy will not be able to claim as a secondary victim because he is only Chris's friend. AO2

(c)

Karen is a secondary victim. AO2 She is not at the scene but she gets to the hospital straight away so she passes the Alcock test. AO2 She is Chris's wife so unlike Jennifer and Sukhy she can claim AO2 because wives are presumed to have a close tie of love and affection with their husbands.

Examiner's commentary

General comments

This candidate generally understands the difference between primary and secondary victims and has been able to use the Alcock test taking the three parts from the headings in Source 9. There is also some limited understanding of White. The candidate shows limited knowledge and understanding and achieves Level 2 for AO1.

Application is not generally detailed but the candidate does identify that Jennifer is a secondary victim with no obvious close tie to Chris and that a close tie is presumed in Karen's case.

The candidate also gains credit for the reasoning in part (b) although would have gained higher marks for recognising the possibility of Sukhy being a primary victim because he is at risk.

The reasoning is also correct as far as it goes in part (c). However, the conclusion is wrong because of the lack of a recognised psychiatric injury. The candidate has omitted to mention the injury in all three and clearly could have got much higher marks for doing so.

The application is also quite limited, particularly as a key aspect, the injury, is omitted. Therefore the answer achieves Level 2 for AO2.

The candidate could have secured much higher marks even just by developing all of the points made.

Mark

AO1	4
<u>AO2</u>	<u>8</u>
Total mark	12

Synopticism

There is limited evidence of synopticism in the answer because the skills deployed are limited. The candidate has some reasonable identification skills but has only applied the law to a limited extent and omits to apply key principles.

Stretch and challenge

As would be expected from a grade E answer there is no evidence of stretch and challenge. The candidate has deployed both AO1 and AO2 skills but in a limited way and none of the higher level skills are evident to any extent.

Examiner's advice

The candidate needs to apply the law in depth so both AO1 and AO2 need more development.

For AO1 the candidate needed to identify the significance of the injury and use cases to illustrate which injuries will and which will not be recognised, give a more detailed explanation of Alcock and also of White, use *Duncan v British Coal* or *Rough & Robertson v Forth Road Bridge* for (b), and possibly *McLoughlin v O'Brien* for (c).

For AO2 the candidate has some reasonable identification, but has not fully applied the law to cover every aspect of the scenario in any of the situations, for instance there is no reference to the injury in any of the three situations. Application of the Alcock criteria, the rules on primary victims, bystanders and immediate aftermath also needed much more depth.

Sample Classroom Activity: GCE Law (H534): Law of Torts - G157

Vicarious Liability Scenarios

Are the following employers vicariously liable in the following scenarios?

Mark is a driver for Bulldoze. He has to buy his own lorry and can select on which days he wants to work. The lorry has to be painted in the company colours and can only be used on company business. He does have to wear a company uniform and he cannot hire other drivers in his place. He is paid a fixed amount but gets a bonus for the hours he works. Mark drives the lorry through a house causing significant damage.

Jenna and Kat both work for a railway company. Jenna is a driver and Kat is a ticket collector. The company rules state that only drivers are allowed to drive the train and that they must not exceed 70 mph. Jenna is running late and drives at 90 mph. This speed causes the train to shake and a passenger falls and is injured. Kat asks Jenna if she can drive the train. Jenna is tired so agrees. Kat brakes too hard causing some passengers to be injured.



RECOGNISING ACHIEVEMENT

Bobby works in a petrol station. He notices that one of the customers is looking shifty. Bobby goes up to the customer and asks him to pay. The customer tells Bobby that he has forgotten his wallet. Bobby assaults the customer and takes his watch in respect of the payment.

In pairs develop a scenario regarding vicarious liability. Pass your scenario to another pair to complete. They will give you their scenario in return.

Scenario



RECOGNISING ACHIEVEMENT

Rylands v Fletcher Defences

Match the cases to the defences

Peters v Prince of Wales Theatre

Nicholls v Marsland

Green v Chelsea Waterworks

Eastern & South African Telegraph v Cape Town

*Perry v Kendricks Transport
claimant]*

Dunne v North Western Gas

The Charing Cross Case

Volenti non fit injura

Common Benefit

Act of God

Act of a stranger

[Damage caused by the fault of the

[Statutory Authority]

Sample Classroom Activity: GCE Law (H534) Law of Torts Special Study - G158

Note

These activities are based on the special study theme and materials for the equivalent unit from the GCE Law H124/H524 specification. The nature of the classroom activities remains the same regardless of the special study theme.

Please seek advice from OCR as to what the current special study theme is.

Activity 1 – Identifying the key points in cases for question 1

Read Source 10 lines 11 to 30 on *White v Chief Constable of South Yorkshire* and the case or other text materials on the case and identify the critical points from the judgment of the case. Use the completed list as a revision aid.

Suggested list of critical points that can be found in the case:

- The Court of Appeal in *Frost v Chief Constable of South Yorkshire Police* recognised that rescuers had traditionally been accepted as primary victims;
- The case was also brought and succeeded on basic employers' liability;
- The House of Lords in *White* reversed the Court of Appeal because it held that the officers were not genuine primary victims, as they were not at risk of any personal danger
- The House of Lords also held that they would fail the *Alcock* criteria for secondary victims because they had no close ties with the victims;
- So to recover rescuers either have to be genuine primary victims or genuine secondary victims;
- The House of Lords recognised that it would be unjust to give damages to the police officers when all of the claims by relatives in *Alcock* had failed;
- This last point is just a disguised policy consideration.

Activity 2 – Identifying critical comment in Sources in the Special Study Materials booklet for AO2 in question 2

Read Source 8 and identify critical points as a series of bullet points citing the lines in which the critical comment can be found. Use the completed list as a revision aid.

Suggested list of critical comment that can be found in source 8:

- ‘Historically the courts have been extremely cautious about admitting claims for psychiatric harm’ (lines 1 to 2);
- ‘This was partly due to judicial scepticism about the authenticity of psychiatric harm’ (lines 2 to 3)
- [this was] ‘based to some extent upon doubts about the validity of psychiatry as a medical discipline’ (lines 3 to 4);
- ‘initial fear of a flood of fraudulent claims’ (lines 4 to 5);
- ‘replaced with the fear of a multiplicity of genuine claims if the neighbour principle was applied in an unqualified manner to this type of harm.’ (lines 5 to 6);
- ‘Scepticism about the nature of psychiatric damage and concerns about a possible flood of claims led to more or less strict limits as to who could recover and in what circumstances.’ (lines 19 to 20).

Suggested Reading List GCE A2

Law of Torts (G157)

<i>Tort Law</i> 2 nd edition	C.Turner	Hodder
<i>Unlocking Torts</i> 2 nd edition	C.Turner & S.Hodge	Hodder
<i>Tort Key Facts</i> 2 nd edition	C.Turner	Hodder
<i>Tort Key Cases</i>	C.Turner	Hodder

Suggested Reading List GCE A2 Law of Torts Special Study (G158)

Candidates should be familiar with the Special Study Materials.

Where available to candidates they should research the appropriate chapters in the texts and reports on the cases used in the Special Study Materials.

Suggested text:

Chris Turner. *Tort Law 2nd Edition*. Hodder Arnold. 2007. Chapter 6.2