September 2021: Marker Guidance: Unit 1

The marking rubric and guidance is published as an aid to markers, to indicate the requirements of the examination. It shows the basis on which marks are to be awarded by examiners. However, candidates may provide alternative correct answers and there may be unexpected approaches in candidates' scripts. These must be given marks that fairly reflect the relevant knowledge and skills demonstrated. Where a candidate has advanced a point that is not included within the marking rubric please do make a note of the same so that it can be raised at the standardisation meeting.

Mark schemes should be read in conjunction with the published question paper and any other information provided in this guidance about the question.

Before you commence marking each question you must ensure that you are familiar with the following:

- ☑ the requirements of the specification
- ☑ these instructions
- ☑ the exam questions (found in the exam paper which will have been emailed to you along with this document)
- ☑ the marking rubric

The marking rubric for each question identifies indicative content, but it is not exhaustive or prescriptive and it is for the marker to decide within which band a particular answer falls having regard to all of the circumstances including the guidance given to you. It may be possible for candidates to achieve top level marks without citing all the points suggested in the scheme, although the marking rubric will identify any requirements.

It is imperative that you remember at all times that a response which:

- ☑ differs from examples within the practice scripts; or,
- ☑ includes valid points not listed within the indicative content; or,
- ☑ does not demonstrate the 'characteristics' for a level

may still achieve the same level and mark as a response which does all or some of this.

Where you consider this to be the case you should make a note on the script and be prepared to discuss the candidate's response with the moderators to ensure consistent application of the mark scheme.

SECTION A (all compulsory – 40%)

Question 1:	Distinguish between an offer and an invitation to treat.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidates must explore further what is meant by an invitation to treat and what might amount to an offer, e.g. ***Pre contractual negotiation:*** If pre contractual negotiations do not amount to offers they may amount to a Supply of Information, a Statement of Intention or an Invitation to Treat. ***An offer:*** Is an expression of willingness to contract on certain terms, with the intention that it shall become binding upon acceptance, thus giving rise to a contract, such as in Carlill v Carbolic Smoke Ball Co (1893). ***Harvey v Facey [1893]:*** A mere statement of price would only amount to a supply of information. ***An invitation to treat:*** Does not have legal force and is instead an invitation to enter into negotiations (see e.g. Gibson v Manchester City Council (1979)). ***Pharmaceutical Society of Great Britain v Boots Cash Chemists (1952):*** The court was asked to analyse where and by whom the offer and acceptance is made when a contract for the sale of goods is formed in a shop. The court held that it would be illogical for goods upon the shelf to be considered an offer in themselves - this would have the unhelpful effect of binding both customer and shopkeeper into a contract as soon as the customer placed the goods in their basket. Instead, it is settled law that the offer is made at the till by the customer, which then gives the cashier the option whether to accept the offer made or not. ***Goods displayed in a shop window and adverts are usually merely invitations to treat:*** The seller of the goods will only have a limited stock, so cannot be liable to sell to everyone who sees the goods/advertisement. ***Fisher v Bell (1961):*** States that goods displayed in a shop window are usually merely invitations to treat.	Up to 6 marks

Partridge v Crittenden (1968): Is an example of the general rule that advertisements of goods tend to also be mere invitations to treat. ***Carlill v Carbolic Smoke Ball Co (1893):*** An advertisement may be considered an offer if there are certain terms and evidence of an intention to be bound. ***An offer may be terminated by:*** Acceptance (forming a contract), rejection (including implied rejection by counter-offer), revocation and by lapse of time. ***Spencer v Harding (1870):*** A request for tenders represents an invitation to treat and each tender submitted amounts to an offer unless the request specifies that it will accept the lowest or highest tender or specifies any other condition.	
Candidates may set out that for a valid contract the courts will look objectively to see if there is an agreement, e.g ***In order to be valid:*** A contract requires agreement, the intention to create legal relations, and consideration. ***Agreement:*** Is one of the key elements required to create a valid contract. English law has long recognised the use of an objective test for agreement, which seeks to identify a valid offer by one party that is accepted by the other. ***Acceptance:*** If an offer is accepted, a contract is formed at that point. ***Counter-offer:*** If the offeree, instead of rejecting or accepting the offer, makes a proposal of his/her own to the offeror, this is known as a 'counter-offer'. This places the offeree in the position of the offeror and the original offer is brought to an end as if it never existed.	Up to 4 marks A pass must refer to what is needed for an enforceable contract
Candidates may explore further what is meant by an acceptance, e.g ***Neale v Merret [1930]:*** Acceptance must be unqualified and definite and match the terms of the offer. The purported acceptance was not in fact acceptance but a counter offer. ***Felthouse v Bindley [1862):*** The General rule is that acceptance must be communicated to the other party. ***Eliason v Henshaw [1819]:*** When the offeror requires a specified method of acceptance, the general rule is that acceptance must be given in that way. ***Powell v Lee [1908]:*** Acceptance will only be validify the acceptor	Up to 3 marks

has authority to to accept the offer.	
Candidates may explain what is meant by a counter offer and the consequence on the original offer, e.g ***Hyde v Wrench (1840):*** A farmer had offered his farm for sale at a price of £1,000. The claimant said he would be willing to pay £950 for the farm, but the farmer refused to sell at that price. Sometime later, the claimant relented and agreed to pay £1,000. By this time the farmer had changed his mind and refused to sell to the claimant. The court held that the claimant's offer of £950 amounted to a counter-offer, which destroyed the original offer completely. No offer existed when the claimant purported to go back to the original offer and accept, and so there was no contract to sell at any price. ***Stevenson, Jacques & Co v McLean (1880):*** To be effective, the counter-offer has to be a legally recognisable offer. The Defendant's argument in this case, that the enquiry from the Claimant was in fact a counter-offer, was rejected by the court as the response was merely a request for information, not a genuine counter-offer. In this case the Defendant offered to sell iron warrants to the Claimant at '40s, net cash, open until Monday'. The Claimants replied, 'will accept forty delivered over 2 months of if not, longest limit you would allow'. Defendant ignored this request and went on to sell warrants to another buyer, shortly before Claimants purported to accept the offer. ***Even a small variation in the terms:*** Of the original offer may result in a counter-offer.	Up to 2 marks

Question 2:	Explain what is meant by the statement 'past consideration is no consideration'.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Candidates must explain the relevance of consideration to the establishment of a binding contract, e.g: **Common law principle -** Consideration is concerned with the bargain of the contract. A contract is based on an exchange of promises. Each party must be both a promisor and a promisee. They must each receive a benefit and each suffer a detriment. This	Up to 3 Marks

benefit or detriment is referred to as consideration. **Thomas v Thomas (1842)** - Consideration must be something of value in the eyes of the law. Excludes promises of love and affection. A one sided promise which is not supported by consideration is a gift. The law does not enforce gifts unless they are made by deed. **Ward v Byham (1956)** – Each case must be decided on its own facts as to whether consideration exists. **Doctrine of promissory estoppel** - Equity will, in some instances, uphold promises which are not supported by consideration	
Candidates should discuss the relevance of past consideration and exceptions e.g: **Re McArdle (1951)** – Authority for the principle that consideration must not be past. **Exception - Lampleigh v Braithwaite (1615)** - Past consideration may be valid where it was proceeded by a request. Party A asked Party B to obtain a pardon for his murder charge. Party B did so, and Party B subsequently promised to pay him £100. This contract would normally not be valid due to the consideration of obtaining the pardon being 'past'. However, the court decided that if the performance (obtaining the pardon) was at the request of the promisor (whoever promised the £100), the performance would constitute valid consideration. **Exception - Pao On v Lau Yiu Long (1980)** - confirmed and restated the requested performance exception first identified in Lampleigh v Braithwaite (1615) Hob 105. The three criteria are as follows: 1. The consideration which is 'past' would have operated as valid consideration if the act was done at the promisor's request 2. There was an understanding there would be the conferment of some kind of reward, payment or benefit for the act. (This requirement is fairly simple and just requires an examination of whether the consideration would normally be valid (is there an economic value, etc). 3. The consideration would have been valid had it been promised in advance of the contract. **Re Casey's Patents (1892)** - Due to the commercial relationship of the parties, it was presumed payment would eventually be promised despite it not being so at the time of performance of the contractual requirements. A mutual understanding should be	Up to 5 Marks

identifiable.	
Credit should be given where candidates explain other common law requirements for valid consideration, e.g: **Chappell v Nestle (1960)** - Consideration must be sufficient but need not be adequate. There is no requirement that the consideration must be market value, providing something of value is given. The courts are not concerned with whether the parties have made a good or bad bargain. **Tweddle v Atkinson (1861)** - Consideration must move from the promisee. If a person other than the promisee is to provide the consideration, the promisee can not enforce the agreement. **Collins v Godefrey (1831)** - An existing public duty will not amount to valid consideration. Where a party has a public duty to act, this can not be used as consideration for a new promise. **Stilk v Myrrick (1809)** - An existing contractual duty will not amount to valid consideration **Pinnel's case (1602)** - Part payment of a debt is not valid consideration for a promise to release the debt in full.	Up to 4 Marks

Question 3:	Explain when a new intervening act may break the chain of causation between the Defendant's breach and the Claimant's loss or damage.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Candidates must explain the relevance of causation, e.g: ***Donoghue v Stevenson [1932]:*** Is now the basis for all negligence actions in England & Wales, requiring a potential claimant to establish the 3 elements before a claim can succeed. ***What must be established:*** The existence of a duty of care (based on the 'neighbour' principle); a breach of that duty; and loss or damage caused by that breach of duty.	Up to 2 Marks Candidates may not have been explicit in their explanation, but, they should have demonstrated knowledge of why causation is important in establishing

	negligence
Candidates should be credited for a discussion on intervening acts, e.g: ***Novus actus interveniens:*** A new intervening act can 'break the chain' of causation between the defendant's breach and the claimant's loss or damage. ***Act of Third Party:*** If the act of a third party is not foreseeable this will break the chain of causation and the original D is not liable for the actions of the third party, against whom the C must direct a separate claim for all future losses. ***Robinson v Post Office [1974]:*** C fell off a defective ladder at work and was taken to hospital and had an anti-tetanus injection. 9 days later, C suffered an adverse reaction to the injection and sustained severe brain damage. The court held that the medical treatment received was in accordance with accepted medical practice and the D employer was liable for all the C's injuries. ***Knightly v Johns [1982]:*** D negligently overturned his car in a tunnel. The police were called to the scene and the inspector initially failed to close one end of the tunnel. He later ordered the C, a police motorcyclist, to drive the wrong way down the tunnel (against the traffic) in order to do so. The motorcyclist was injured in a collision with another non negligent motorist. Held that original D was not liable for the 2nd incident because it had been caused by the negligent inspector in ordering his colleague to drive against the flow of the traffic. ***Barrett v Ministry of Defence [1995]:*** An alcoholic naval officer collapsed following an all-day drinking session. The medical staff failed to administer appropriate medical treatment in time, as a result of which the officer died. The MOD were liable for the negligent medical treatment. The sub-standard treatment was a material cause of the death as adequate and timely medical treatment may have saved the deceased's life. ***Webb v Barclays Bank plc and Portsmouth Hospitals NHS Trust [2001]:*** C injured her knee in a fall at her workplace due to her employer's negligence. She was then negligently advised to have her leg amputated over the knee. Held that the chain of causation had not been broken and that the negligence in advising amputation "had not eclipsed the original wrongdoing". Damages awarded in respect of the amputation were apportioned to 25 per cent to the employer and 75 per cent to the NHS trust. ***Act of the claimant:*** If the act was reasonable the chain of causation remains intact and the D is liable for the actions of the C. If it was not reasonable the chain of causation is broken and the D	Up to 5 marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base and apply the authority to the question posed

is not liable for the actions of the C. ***Sayers v Harlow Urban District Council [1958]:*** C was accidentally locked in a public toilet because there was no handle on the outside door. She tried to climb out by standing on the toilet roll holder which caused her to fall. The court held that the claimants act was not enough to break the chain. ***McKew v Holland [1969]:*** C sustained an injury at work due. His injury left him with a weakness in his leg which was prone to give way. C was walking down a steep concrete staircase without a handrail when his leg was about to give way. C decided to jump down the remaining 10 steps to the bottom rather than risk a fall. He suffered a fractured right ankle. C's action broke the chain of causation. Employer responsible to break.	
Candidates should be credited for a discussion on causation in fact, e.g: ***Causation in fact:*** Requires evidence of a direct causal link between the defendant's negligent act and the damage suffered by the claimant. This is known as the BUT FOR test i.e. 'but for' the defendant's breach of duty would the harm have occurred? ***Cork v Kirby MacLean Ltd [1952]:*** If the harm would not have occurred but for the breach of duty, the breach has caused the harm in the sense required by the tort of negligence. If the harm would have occurred anyway even if the defendant had not been in breach, the breach is not a cause of the harm. ***Barnett v Chelsea & Kensington Hospital Management Committee [1969]:*** Mr Barnett went to casualty complaining of vomiting. The doctor did not examine him but told him to go home and see his doctor. Mr Barnett was suffering from arsenic poisoning and died five hours later. It was held that the hospital management were not liable to his widow despite their negligence. There is no cure for arsenic poisoning and the doctors negligence did not cause Mr Barnett's death. ***Successive Multiple causes:*** Where there are two causes occurring in succession it may be possible to identify the factual cause of the damage. ***Baker v Willoughby [1970]:*** C received severe injuries to his leg in a road accident caused by the D's negligent driving. Sometime later, before the claim was settled, C was shot in his injured leg, which was so badly injured that it had to be amputated. D claimed that the injury to the C's leg was caused by the shooting. Held that the cause of the C's loss was the D's breach of duty. The injury caused by D was so severe that C was no worse off now with no leg than he was before with a severely injured, non-functional leg, so D was	Up to 5 marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base and apply the authority to the question posed

liable for all the C's losses. ***Jobling v Associated Dairies [1982]:*** C suffered an injury at work as a result of the D's negligence. C developed a severe problem with his back, which was not connected to the accident and would have caused him to retire early from work in any event, regardless of the accident. The court held that D was only liable for losses sustained up until the time the C would have had to retire in any event due to the unrelated medical condition. ***Concurrent Multiple Causes:*** Where two or more causes operate concurrently it may be factually impossible to determine which one was the cause. ***Material Contribution:*** Where there is more than one possible cause the claimant must show that the defendant's actions materially contributed to the harm. ***Bonnington Castings Ltd v Wardlaw [1956]:*** C alleged that he had contracted an industrial disease caused by inhaling silica particles which would have been present in the air in any event but in smaller quantities than were present in the D's foundry. Held that C was entitled to recover if he could prove that the presence of greater quantities of dust than normal had made a material contribution to his contracting the disease. ***Fitzgerald v Lane [1989]:*** The claimant stepped into the road without looking and was hit by a car and then by another. The claimant could not show which car had caused the injury but both drivers were liable for the damage suffered. Multiple Causes of Harm: Cases where there are several causes of injury the claimant need only show that the defendant's actions made a material contribution to the damage. ***The 'material increase in risk' test:*** There may be other factors but where the negligence has increased the risk of injury there will be liability. ***Section 3 Compensation Act 2006:*** Placed the material increase in risk test on a statutory footing. This provision meant that a claimant could recover his/her losses in full against any employer, so long as it could be proved that the identified employer had materially increased the risk of exposure to the claimant. ***McGhee v NCB [1973]:*** C cleaned brick kilns then cycled home. There were no washing facilities at the Cs workplace and both his work and the cycling caused him to sweat while brick dust and dirt were on his skin. He suffered from dermatitis and sued. Held that whilst there were other factors the lack of facilities at his work place materially increased the risk of injury so therefore the defendant was liable.	

Fairchild v Glenhaven Funeral Services [2002]: C contracted meso through exposure to asbestos dust. C had worked with asbestos for different employers and evidence could not establish which employers had exposed him to the fatal strain. Held that meso cases were an exception to general rule on causation, so long as C could prove that employers had materially increased the risk contracting the disease, each employer who materially increased that risk was liable to C. ***Carder v Secretary of State for Health [2016]:*** 2.3% of C's total lifetime exposure to asbestos had occurred whilst working at D's hospital. Although the contribution was very small, it was clear from the evidence that it made a 'material contribution' to C's overall condition, and so C was entitled to damages against this employer. Only a small contribution towards the increase in risk is necessary to establish causation, so long as that contribution is 'material'.	
Candidates should be credited for a discussion on causation in law and foreseeability, e.g: ***Causation in law:*** Requires that the damage is not too remote from the negligent act/omission. ***Wagon Mound (No 1) [1961]:*** In order to be recoverable, the kind of harm suffered must be reasonably foreseeable. This case was a Privy Council decision and so persuasive rather than binding in English law. ***Hughes v Lord Advocate [1963]:*** This gave the wagon mound test binding force and extended the test is now: in order to be recoverable the broad kind of harm must be reasonably foreseeable. ***Thin skull rule:*** Take your victim as you find them. ***Smith v Leech Brain [1962]:*** C's husband obtained burn on lip at work caused by negligence of D. The burn became cancerous and he died as a result. He had an existing predisposition to cancer but D was liable for his death.	Up to 4 marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base and apply the authority to the question posed

Question 4:	Describe the test that will be applied in new and novel situations to establish a duty of care.
Total Marks Attainable Fail = 0-7.4 Pass = 7.5+ Merit = 9+ Distinction = 10.5+	10

Indicative Content	Marks
Required: Candidates must explain what must be established in order to mount a successful claim in negligence, e.g: ***What must be established:*** the existence of a duty of care (based on the 'neighbour' principle); a breach of that duty; and loss or damage caused by that breach of duty. ***Donoghue v Stevenson [1932]:*** Is now the basis for all negligence actions in England & Wales, requiring a potential claimant to establish the 3 elements before a claim can succeed. ***Caparo Industries v Dickman [1990]:*** The 'three-stage' test from *Caparo* is reasonable foreseeability of harm to the claimant if the defendant fails to fulfil any duty that may exist; proximity of relationship between claimant and defendant (in time or space); and whether it is fair, just and reasonable to impose a duty of care in such circumstances.	Up to 3 marks
Candidates may explain the concept of 'reasonable foreseeability of harm' and 'proximity', e.g: ***Fardon v Harcourt Rivington [1932]:*** Is an example of how the first part of the test may be applied by the courts. In this case the defendant left his dog inside his parked car. The dog became agitated and broke the glass in the rear window of the car. The claimant was hit by a fragment of glass as he walked past the car resulting in the loss of an eye. The House of Lords held that the chance of a passer-by being hurt by a splinter of glass in these circumstances was so infinitesimally small that no reasonable man could be expected to guard against it, and so no duty of care was owed. ***Smith and Others v Littlewoods Organisation Ltd [1987]*:** That Littlewoods, in ignorance of the facts, could not have reasonably foreseen the damage that occurred and therefore no duty was owed. If Littlewoods had been aware of the facts it's possible that a duty may have been owed. ***The requirement of proximity means:*** That the claimant must be sufficiently close to the defendant, whether as a matter of physical proximity or through a close and direct relationship, such that the acts of the defendant could affect the claimant. ***Home Office v Dorset Yacht Co [1970]:*** Demonstrates the application of the second part of the *Caparo* test. In this case a group of young offenders escaped from Borstal and broke into the claimant's premises nearby. The youths damaged the Club House and stole a yacht, which they crashed into another vessel. The claimants brought a claim in negligence against the Home Office who operated the Borstal. The House of Lords held that the Home Office owed a duty of care to all owners of premises in the vicinity of the Borstal to ensure that they carried out proper supervision and	Up to 3 marks

control over their charges, as it was foreseeable that harm would result from a failure to do so. ***West Bromwich Albion FC v El-Safty [2005]:*** It would not be appropriate to extend this duty to a wider scope of interested parties, i.e the employer.	
Candidates should explain what it means to be fair, just and reasonable to impose a duty of care, e.g: ***The third part of the Caparo test:*** Causes the most difficulty for the courts in its application and creates the greatest source of litigated actions. In applying this third stage of the test, the courts have been guided by a number of policy considerations**.** ***Policy considerations:*** Wider factors outside the strict legal issues or facts of an individual case, which the courts may take into account when reaching a decision. ***Section 1 Compensation Act 2006:*** Expressly gives courts (for the first time) the power to consider the wider implications of any decision to impose liability on a defendant in a tort case. ***L and Another v Reading Borough Council and Others [2007]:*** Social workers made allegations, which later proved to be unfounded, that a father had sexually abused his daughter when she was very young. He had therefore been prevented from seeing her for many years. The CofA rejected his claim for compensation because no direct duty was owed to father because it would not be just and reasonable to impose one.	Up to 3 marks
Credit should be given where candidates should discuss public policy considerations, e.g: ***Wilkinson v Downtown [1897]:*** The claimant successfully claimed damages for shock from a defendant who told her as a joke that her husband had been injured in an accident. ***Hinz v Berry [1970]:*** A pregnant claimant and one of her children witnessed her husband dying and her other three children were badly injured. As a consequence of this she became morbidly depressed. A duty of care was owed and she was entitled to recover damages. ***A primary victim:*** Can be defined as a person to whom physical as well as psychological harm was caused, or to whom physical harm was foreseeable. This is sometimes referred to as being in the 'zone of danger'. ***Page v Smith [1995]:*** C was injured in a minor car accident caused by D's negligence. C was not physically injured but the shock caused his pre-existing chronic fatigue syndrome to worsen significantly. A primary victim could claim for psychiatric injury providing that injury was reasonably foreseeable. The court would	Up to 3 marks

not distinguish between psychiatric and physical injury. ***Alcock v Chief Constable of South Yorkshire [1992]:*** As a result of this case a set of rules were established concerning secondary victims. There must be a close relationship of love and affection with the principal victim. The claimant must be physically close in time and distance from the incident. The claimant must have witnessed the incident with her own senses. The psychiatric harm should be caused by sudden shock. ***White v Chief Constable of South Yorkshire Police [1999]:*** Police officers present at the Hillsborough ground on the date of the Hillsborough disaster sued their employer for damages in respect of the post traumatic stress disorder they suffered. That the rescuers did not satisfy the first test in Alcock and therefore rescuers no longer fell into the category of primary victims. ***Chadwick v British Railways Board [1967]:*** Court held that it was reasonably foreseeable that people, other than employees or professional rescurers, might try to render assistance and might suffer personal injury, physical or psychiatric, as a result. A duty of care was therefore owed.	
Candidates may be credited for any other reasonable point to explain what is meant by a public policy consideration, e.g: ***The 'floodgates' argument:*** An example of a policy consideration. Will the imposition of a duty of care in these circumstances lead to a 'flood' of similar claims? ***Performance of their job or responsibilities:*** An example of a policy consideration. The impact of the imposition of a duty of care on the defendant's performance of their job or responsibilities. ***The role of Parliament:*** An example of a policy consideration. The role of Parliament, rather than the courts, in the making of 'new' law. ***The 'deepest pocket' principle:*** An example of a policy consideration. Who is in a better position to stand the loss. ***Inconsistency:*** An example of a policy consideration. Possible inconsistency with established legal principle. ***Tax-payer or society:*** An example of a policy consideration. The financial burden on the tax-payer or society as a whole and the potential waste of resources.	Up to 3 marks
Candidates may be credited for discussing areas where policy considerations have played a part in determining if a duty is owed, e.g: ***Public bodies performing public duties:*** Is an area where policy	Up to 3 marks

considerations have played a part in determining if a duty is owed. ***Hill v Chief Constable of West Yorkshire [1998]:*** Mrs Hill failed in her action to hold the police negligent for releasing the Yorkshire Ripper after they had had him in custody. ***Osman v UK [2000]:*** A schoolteacher killed his student. The police had been warned that the schoolteacher might do something but had not acted on the warning. The court did not impose liability on the police. This decision was challenged before the European Court of Human Rights. The ECtHR recognised that the public policy constraints were in place to ensure the efficacy of the police but felt that in this case they had not been correctly balanced against the rights of the individual and that Article 6 ECHR had been contravened. ***Pure economic loss:*** Is an area where policy considerations have played a part in determining if a duty is owed. ***Weller v Foot & Mouth Institute [1966]:*** C was a firm of animal auctioneers whose business was no longer able to trade as a result of all animal movements being stopped because of 'foot and mouth' caused by the negligent release of research samples of the disease from the D's laboratory. C had suffered no physical damage to its property and did not own any animals. Not owed a duty of care to protect it against pure economic loss in the form of trading profits. ***Spartan Steel v Martin [1973]:*** D cut through cables supplying C's steel smelter. C sought damages for the loss of part finished goods when the power was cut off and loss of profits on items it would have been able to produce. C could recover the loss of profit on the partially completed items as these items had suffered physical damage. However, the loss of profits represented pure economic loss to C and no duty of care existed in respect of those losses. ***Liability for the actions of third parties:*** Is an area where policy considerations have played a part in determining if a duty is owed. ***Smith and Others v Littlewoods Organisation Ltd [1987]:*** D brought a closed down cinema with the intention of demolishing it and building a supermarket. Whilst the building was still derelict, vandals broke into it & started a fire which damaged neighbouring buildings. Third parties are responsible for their own actions and any claim in negligence will have to be directed to the third party, not towards some other party alleged to owe a duty of care in negligence. ***Topp v London Country Bus (South West) Ltd [1993]:*** D left a bus parked with the keys in the ignition. It was stolen by joy-riders, who crashed into another vehicle, killing C's wife. The court held that although it was undoubtedly negligent for the bus to have been left with the keys in the ignition D owed no duty of care to the C to guard against the voluntary actions of third parties over who D had no control.	

Burgess v Lejonvarn [2016]: Where one party possesses specialist skill or knowledge upon which it is reasonable for the other party to rely it may be possible to claim damages as a result of the actions of a third party.	

SECTION B (choice of 3 out of 4 – 60%)

Question 5:	You work as a Paralegal at Lloyd and Davies LLP in Stockport. Your firm is acting for a doctor, Mark Hamilton. Dr Hamilton has just purchased a medical practice from Dr Jeremy Squire. The practice is situated in central Stockport. Mrs Trevers, a Senior Partner of your firm, is advising Dr Hamilton on issues that have arisen in relation to the purchase. Dr Hamilton and Dr Squire met on 1 April 2019 and discussed the potential purchase. At this meeting, Dr Squire told Dr Hamilton that the practice had a turnover in the region of £365,000 - £415,000 per annum. Dr Squire had based this statement on the actual turnover over the last five years. Dr Hamilton, persuaded by this statement, agreed to purchase the practice. Dr Squire's statement was true at the time it was made. However, subsequently he became ill, contracting Coronavirus (COVID-19). Dr Squire's symptoms lasted for over six months after the infection had gone. He suffered from Post-COVID-19 Syndrome, otherwise known as Long COVID. Many of Dr Squire's patients went elsewhere and by the time the sale was completed the practice was virtually worthless. Mrs Trevers has asked that you write to Dr Hamilton advising whether Dr Squire's statement can amount to a misrepresentation. She has asked that in the letter you explain the types of misrepresentation and the remedies that may be available to Dr Hamilton. Write the body of a letter to Dr Hamilton advising what misrepresentation is, whether you believe this statement may amount to misrepresentation and the potential remedies available should a successful claim for misrepresentation be brought against Dr Squires.	
Total Marks Attainable		20

Fail	up to 9.9	This mark should be awarded to candidates whose papers fail to address any of the requirements of the question, or only touch on some of the more obvious points without dealing with them or addressing them adequately.
Pass	10+	An answer which addresses MOST of the following points: there must be a statement of fact, silence will not usually amount to misrepresentation, the statement must have been relied upon and induced a party into the agreement, there are three types of misrepresentation and the type of misrepresentation will determine the remedies available. Candidates will demonstrate a good depth of knowledge of the subject (i.e. a good understanding of the law and impact of the law on the scenario) with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
Merit	12+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the practical implications and difficulties with proving fraudulent misrepresentation, there is nothing in the facts to support a claim for fraud and therefore, the answer will likely therefore concentrate on negligent and innocent misrepresentation) with very good application and some analysis having regard to the facts. Candidates are likely to observe that IN THIS SCENARIO there are unlikely to be grounds for a claim in misrepresentation. It may be concluded that Dr Squire's statement amounted to innocent misrepresentation. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a Pass and Merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions.

Fail = 0-9.9
Pass = 10+
Merit = 12+
Distinction = 14+

Indicative Content	Marks
Required: The definition of misrepresentation, e.g: ***Misrepresentation:*** A misrepresentation is a false statement of fact (or possibly law), made by one party of the contract to the other party, before the contract was made, with a view to inducing the other party to enter the contract, which does induce the other party to enter into the contract. ***There are three kinds of misrepresentation:*** Fraudulent, negligent and innocent.	Up to 2 Marks To pass candidates are required to demonstrate knowledge of what misrepresentation is
Credit a discussion on what a statement of fact is, e.g: ***Bisset v Wilkinson [1927]:*** A the statement was only a statement of opinion and not a statement of fact and therefore not an actionable	Up to 3 Marks

misrepresentation. ***Esso Petroleum v Mardon [1976]:*** There is no action for misrepresentation if the statement is an estimate of future sales rather than a statement of fact. ***Smith v Land and House Property Corp [1884]:*** Statements may be statements of fact rather than opinion if the maker was in a position to know the facts.	
Credit any discussion on silence, e.g: ***Sykes v Taylor-Rose [2004]:*** Silence does not usually amount to misrepresentation. Here, no misrepresentation occurred when the vendor of a house did not disclose the fact that it had been the scene of a horrific murder of a young girl. ***Nottingham Patent Brick & Tile Co v Butler [1886]:*** "Half-truths" are an exception to the general rule that silence may not amount to misrepresentation. A solicitor told a prospective purchaser that he was not aware of any restrictive covenants affecting the land he was selling but did not go on to add that this was because he had not bothered to check. The court found that this was a misrepresentation. ***With v O'Fianagan [1936]:*** Changes of circumstances are an exception to the general rule that silence may not amount to misrepresentation. If a statement is accurate when it is made but circumstances change before the contract is finally settled this must be disclosed.	Up to 3 Marks
Candidates should include a discussion on reliance e.g: ***Horsfall v Thomas [1862]:*** There can be no inducement or reliance if the representee was unaware of the false statement. ***Attwood v Small [1838]:*** If the representee or their agent checks out the validity of the statement they have not relied on the statement. The claimant was unsuccessful. By getting his own experts to check out the reports he had not relied on the accounts but his own judgment. ***Redgrave v Hurd [1881]:*** If the representee is given the opportunity to check out the statement but does not in fact check it out, they are still able to demonstrate reliance.	Up to 3 Marks
Credit any discussion on the types of misrepresentation and the remedies available, e.g: ***Fraudulent misrepresentation:*** Where a false representation has been made knowingly, or without belief in its truth, or recklessly as to its truth.	Up to 8 Marks To achieve more than a pass, candidates must not simply cite law

Derry v Peek [1889]: Lord Herschell defined fraudulent misrepresentation as a statement which is made either: knowing it to be false, without belief in its truth, or recklessly, careless as to whether it be true or false. ***Doyle v Olby (Ironmongers) Ltd [1969]:*** The correct measure of damages had to include loss of money invested in the business by C and the loss of profits which the business should have made had the representations been true. ***Negligent misrepresentation:*** A representation made carelessly and in breach of duty owed by Party A to Party B to take reasonable care that the representation is accurate. If no "special relationship" exists, there may be a misrepresentation under section 2(1) of the Misrepresentation Act 1967 where a statement is made carelessly or without reasonable grounds for believing its truth. ***Section 2(1) of the Misrepresentation Act 1967 provides:*** '... if the person making the misrepresentation would be liable to damages ... had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe ... the facts represented were true.' If he cannot prove this, the misrepresentation is negligent; if he can, the misrepresentation. is innocent. ***Burden of Proof:*** This effectively transfers the burden of proof to the defendant. ***Howard Marine and Dredging Co Ltd v A Ogden and Sons (Excavation) Ltd (1978) Bridge LJ stated:*** 'the statute imposes an absolute obligation not to state facts which the representor cannot prove he had reasonable ground to believe'. ***Royscot Trust Ltd v Rogerson [1991]:*** Court of Appeal confirmed that the same (tortious) measure of damages will apply to both fraudulent and negligent misrepresentations. As with fraudulent misrepresentation, the award of rescission is subject to the court's discretion. ***Innocent misrepresentation:*** A representation that is neither fraudulent nor negligent. ***Section 2(2) Misrepresentation Act 1967:*** The courts may award damages in lieu of rescission. This decision is entirely at the courts' discretion. Damages will be on the contractual basis.	but should show a greater depth to their knowledge base and apply the authority to the question posed
Credit any discussion on the factors the court will consider when differentiating between a representation and a term, e.g: ***Misrepresentation may be contrasted with:*** Breach of contract. Misrepresentation is independent of the contract, but attaches to it,	Up to 3 Marks

only becoming actionable once the contract has been entered into. Liability in tort is imposed by law; liability in contract arises as a matter of agreement. ***If not a term but a representation:*** The proper course of action would be for misrepresentation and not for breach of contract. ***Routledge v McKay [1954]:*** The timing of the statement will be a factor. The statement was not a term of the contract because of the length of time between the making of the statement and the contract date. The statement was not a term of the contract because of the length of time between the making of the statement and the contract date. The proper course of action would be for misrepresentation and not for breach of contract. ***Credit a discussion of any other relevant case authority on the distinction between a term and a representation, e.g:*** Bannerman v White [1861], L'Estrange v Graucob [1934], Dick Bentley v Harold Smith Motors Ltd [1965]	

Question 6:	You work as a Paralegal in the Civil Litigation department at Trebor and Skully LLP in Brighton. Your firm is acting for Rupert Sweeny who is seeking advice in relation to a potential claim for breach of contract. Mr Sweeny is an accountant. He chose to go for a Christmas holiday in the French Alps at a resort called Troupe. He got a brochure from Alpine Tours Ltd, which described Troupe as a wonderful small resort on a sunny plateau in the midst of beautiful alpine scenery, which in winter becomes a wonderland of sun, snow and ice. Troupe was described as having a wide variety of fine ski-runs. Mr Sweeny chose the Fir Hotel. The brochure described the hotel as offering a house party experience. It said that all of the house party arrangements were included in the price of the holiday and the experience included a welcome party on arrival, afternoon tea and cake every day, a French dinner by candlelight, a fondue party and a farewell party in the hotel's own ice bar. The brochure also stated, "Hire of Skis, Sticks and Boots ... Ski Tuition ... 12 days for £125.00." Mr Sweeny booked 14 days with a ski pack for £1,825.00 and a flight from Heathrow. Mr Sweeny returned from holiday and immediately sought advice from your firm in relation to a potential claim for breach of contract. He has instructed that there was no cake provided with the afternoon tea, there were no ordinary length skis (only mini-skis,

	about 3 feet long), the hotel did not have an ice bar and there were no ski runs in Troupe. Mr Sweeny actually had to travel to a nearby town to ski, which cost him about £200 in bus fares. You need to write to Mr Sweeny explaining whether the statements included in the brochure will constitute express terms of the contract for his holiday. You should also set out in your advice the consequence and likely remedies if you are able to establish the terms of the agreement have been breached. Write the body of a letter to Mr Sweeny advising what terms of a contract are, how they may be incorporated into a contract and the consequence of a breach of terms.
Total Marks Attainable	20

Fail	up to 9.9	This mark should be awarded to candidates whose papers fail to address any of the requirements of the question, or only touch on some of the more obvious points without dealing with them or addressing them adequately.
Pass	10+	An answer which addresses MOST of the following points: The contract will include both express and implied terms, during negotiations many representations may be made but they may not be terms i.e they may not be incorporated into the contract, identify whether the statements form part of the agreement (are terms) or whether they are representations, distinguish between express and implied terms, discuss how express terms are incorporated into an agreement through actual or constructive notice, discuss how implied terms may be imputed into an agreement, distinguish between conditions and warranties and set out the consequence of breach. Candidates will demonstrate a good depth of knowledge of the subject with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
Merit	12+	An answer which includes ALL the requirements for a pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of how the particular statements may be classified). Candidates may have identified that the statement in respect of profits was put in writing and was likely to be important whereas there was no discussion in relation to parking. Candidates will have demonstrated very good application and some analysis having regard to the facts.
Distinction	14+	An answer which includes ALL the requirements for a pass and merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. All views expressed by candidates should be supported by relevant authority and/or case law. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions.

Fail = 0-9.9
Pass = 10+
Merit = 12+
Distinction = 14+

Indicative Content:	Marks
Required: Candidates must demonstrate knowledge of the tribunal structure (candidates are not required to list all chambers). ***To succeed in a claim for breach of contract:*** It is necessary to establish that a valid contract was formed and that an express or an implied term was breached by the defendant.	Up to 1 mark To achieve a pass, candidates must demonstrate an understanding of breach
Required: Candidates must explain what a term is and how they may be incorporated into a contract, e.g: ***Express terms:*** Are the terms distinctly or overtly stated which are agreed by the parties, rather than being implied into the contract. Can be 'actioned' for breach of contract. ***Express terms may be incorporated within a contract:*** With constructive or actual notice. ***Statements made during negotiations:*** May be representations inducing but not forming part of the contract or promises or undertakings that are terms of the contract. These pre-contractual statements can only be 'actioned' if a misrepresentation. ***Implied Terms:*** These are terms that are not expressly agreed between the parties, but still included as part of the contract by operation of custom, practice or law.	Up to 3 marks
Candidates may explain how the court will distinguish between a representation and term, e.g: ***The court will consider various factors when deciding whether a statement is a representation or a term:*** The importance of the statement, whether the statement has been put in writing, the timing of the statement and any specialist knowledge or skill of the party making the statement. ***L'Estrange v Graucob (1934):*** Express terms may be incorporated into a contract by signature. In this case, the claimant bought a vending machine for her cafe. She signed a document which excluded any liability by the sellers for its reliability or fitness. Even though she had not read the document, she was unable to take any action against the seller because by signing the document she had effectively signed her rights away. ***Olley v Marlborough Court (1949):*** Express terms may be incorporated into a contract by actual or reasonable notice. In this case Mr and Mrs Olley booked a holiday at the Marlborough Hotel. On the back of the bedroom door was a notice which stated, "The proprietors of this hotel will not be responsible for articles lost or	Up to 4 marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base and apply the authority to the question posed

stolen unless handed to the management for safe keeping". A thief entered the bedroom and stole valuables belonging to Mrs Olley. The hotel was unable to rely on the exclusion clause because the Olleys only saw the exclusion clause after the contract had been concluded at the reception desk. Thus, the clause did not form part of the contract made with the Olleys and the hotel owners were liable for the loss. ***Chapelton v Barry (1940):*** For an express term to be incorporated into a contract by actual or reasonable notice the document must be contractual in nature. In this case the claimant hired a deckchair from the defendant and was handed a ticket which he did not read. On the back of the ticket, it stated that the Council would not be liable for any damage arising from the use of the deckchair. The chair collapsed injuring the claimant. The court held that this term had not been incorporated into the contract because the ticket could not be expected to contain contractual terms and so the claimant could claim damages	
Candidates may explain actual and constructive notice, e.g: ***Notice:*** Generally classified as either actual notice or constructive notice. Both actual notice and constructive notice are treated as having equal legal effect. ***Actual notice:*** is when notice of an event or state of affairs is known by a person ***Constructive Notice:*** A legal presumption that a party has notice when it can discover certain facts by due diligence or inquiry into the public records. A party found to have constructive notice cannot deny knowledge of a fact because that party did not have actual knowledge, since there is a duty to conduct due investigation. ***Parker v South Eastern Railway Company (1877):*** A customer who left his bag at left luggage office and was issued with a ticket referring to a clause limiting the defendant's liability to goods below a certain value only was bound by that term. The defendant had taken reasonable steps to draw his attention to the limitation by the words printed on the ticket, which C had not read. ***Interfoto Picture Library v Stiletto Visual Programmes Ltd [1989]:*** The more unusual or onerous the clause, the more effort the court will expect from the person wishing to rely on it to draw it to the other party's attention. ***British Crane Hire Corporation Ltd. v Ipswich Plant Hire Ltd [1975]:*** Constructive notice is likely to be seen where the parties are in the same trade or where they have had previous dealings with each	Up to 6 marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base and apply the authority to the question posed

other. ***Hollier v Rambler Motors Ltd [1972]:*** As the claimant had only visited the garage 3 or 4 times over the course of the last 5 years, the term was not incorporated and the defendant was liable for the damage caused to his car by a fire that happened.	
Candidates are required to have considered how the courts may impute terms into an agreement, e.g: ***Implied by Custom:*** Some contracts may be entered into in the context of widely accepted business practices common to all contracts of that type. Therefore, even if the contract does not include an express term that the practice applies, it may be implied that it does. If the parties decide that the practice or custom will not apply they may have to include an express term excluding it. ***Hutton v Warren (1836):*** A tenant farmer claimed that he was entitled to a fair payment for the seeds and labour that he had used on the land when his lease came to an end. The tenant was able to prove to the court that it was a local custom to make such a payment enabled him to succeed in his claim. ***Business efficacy test:*** the proposed term will be implied if it is necessary to give business efficacy to the contract. ***The Moorcock (1889):*** If the contract was considered to be unworkable without the implied term, then the courts would imply a term necessary in order to give the contract 'business efficacy'. ***Liverpool City Council v Irwin [1977]:*** The business efficacy test was seen as a strict test and only used where the contract would be unworkable without the implied term. **Officious bystander test:** the proposed term will be implied if it is so obvious that, if an officious bystander suggested to the parties that they include it in the contract ***Shirlaw v Southern Foundries Ltd [1940]:*** Another test which the courts developed over the years is the 'officious bystander' test. "If, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "Oh, of course"'. ***AG of Belize v Belize Telecom [2009]:*** Court has no power to improve an instrument or contract to make it fairer or more reasonable. The real question the court had to answer in every case was 'would the contended for implied term spell out what the instrument, read as a whole and against the relevant background, would reasonably be understood to mean'? ***Mediterranean Salvage & Towage Ltd v Seamar Trading &***	Up to 6 marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base and apply the authority to the question posed

Commerce (The Reborn) [2009]: Court of Appeal established the, Privy Council, Belize test as the test to be applied in cases of implied terms in England & Wales. ***Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited [2015]:*** Supreme Court held that this formulation in *Belize* has been misinterpreted as suggesting that reasonableness is itself a sufficient ground for implying a term and suggested that the right course is for Lord Hoffmann's speech in *Belize* to be treated as a "characteristically inspired discussion rather than authoritative guidance on the law of implied terms." The court confirmed that Belize did not dilute the traditional business efficacy and officious bystander tests and to the extent subsequent judgments suggested that it had, that approach was mistaken.	
Candidates may have considered how statute may impute terms into an agreement, e.g: ***Terms may be implied into contracts for the sale of goods and services (whether by the Supply of Goods and Services Act 1982 or the Consumer Rights Act 2015):*** That the goods are of satisfactory quality; that the goods are reasonably fit for purpose; that the goods correspond with any description by which they are sold. Where goods are supplied in addition to services outside a consumer contract, eg the installing of a machinery on a production line, the goods are covered by the ***Supply of Goods and Services Act 1982*** ***s.13 SGSA*** implies a term where the supplier acts in the course of a business, that the services will be carried out with reasonable care and skill. ***s.14 SGSA*** implies a term where the service is carried out in the course of a business and no time is specified, that the service will be carried out within a reasonable time. What is considered a reasonable time is a question of fact and will depend on the circumstances. ***s.15 SGSA*** - Where a service is carried out and no price has been agreed there is an implied term that a reasonable charge is payable. This is not limited to services supplied in the course of a business. What is a reasonable charge is a question of fact to be determined in the circumstances.	Up to 3 marks
Candidates may consider how terms are classified and the consequence of breach, e.g: ***Poussard v Spiers & Pond (1876):*** A condition is a fundamental term of the contract. It goes to the root of the contract.	Up to 3 marks

Bettini v Gye (1876): A warranty is a term which is not central to the main purpose of the contract. ***Breach of a warranty:*** Will lead only to a claim in damages (i.e. the contract continues). ***Breach of a condition:*** Will give the 'innocent' party the right to repudiate the contract. Note that this repudiation is the choice of the innocent party - the contract does not automatically come to an end, however serious the breach may be. ***An innominate term:*** Is a term which cannot be classified at the time of formation of a contract as a condition or a warranty. ***The Hongkong Fir (1962):*** A party can claim damages for any breach of an innominate term but can terminate for breach of it only if the breach is sufficiently serious.	
Credit any discussion on damages, e.g: ***The primary remedy for breach of contract:*** Is common law damages. These compensate for faulty performance or non-performance but do not enforce primary contractual obligations. ***Duty to Mitigate:*** The innocent party should do what is reasonable to reduce his loss, and explain the result of not doing so. ***Pecuniary Damages:*** These aim to compensate the injured party for their financial loss. There are 2 main ways the courts will award damages here. ***Reliance Loss (damages for expenses incurred):*** Where it is impossible to quantify accurately what the loss of the bargain actually cost. Instead the awards can be based upon reliance i.e the sums spent out by the injured party in reliance of the other party complying with their obligations. ***Anglia Television v Reed [1972]:*** An actor pulled out of a contract and no replacement could be found in the time scales. The amount the film would have made was uncertain so instead the claimants were awarded the amount they had spent. ***Expectation loss (damages to put the innocent party in the position of a completed contract):*** Damages are awarded here to put the party back in the position they would have been in had the contract been performed. ***The Market Price Rule:*** The Court will try and award the amount the products would have been worth on the day upon which the contract have been completed. ***Speculative Damages:*** Where the court have to estimate damages.	Up to 5 marks

These are not always recoverable. ***Non-Pecuniary Damages:*** These are non financial losses (e.g Mental distress). Traditionally English Courts have been reluctant to award this type of damage. Although there are 2 key exceptions to this rule.	

Question 7:	You work for Thorntons' Solicitors in Portsmouth. Mrs Hewitt is a Senior Solicitor at the firm and she has approached you to do some work on the file of Mr and Mrs Amanda Harnett. On 19 November 2018 Mr Harnett and three of their children were involved in a serious road traffic accident on the A27 near Chichester. Mr Harnett's car was struck by a lorry due to the negligence of the lorry driver. As a result of the accident, Mr Harnett and two of their children suffered severe bruising and shock. Sadly, the third child was so seriously injured that she died almost immediately. An ambulance took the injured parties to hospital. At the time of the accident, another of Mrs Harnett's children was a passenger in a car behind the family being driven by Mr Thomas. Mr Thomas took the child home, told Mrs Harnett of the incident and immediately drove Mrs Harnett to the hospital. When Mrs Harnett arrived at the hospital she found Mr Harnett who told her of her daughter's death. Through a window she could see her two other children in pain and suffering. At the time, those children had not been treated and cleaned up and as a result of what she witnessed Mrs Harnett suffered severe shock, organic depression and a personality change. Mrs Harnett is now seeking advice as to whether she can bring an action against the lorry driver for the psychiatric injury she suffered. Prepare a summary of advice for Mr and Mrs Harnett on what must be demonstrated for a Claimant to be owed a duty of care as a primary or secondary victim in the context of psychiatric injury.
Total Marks Attainable Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+	20

Fail	up to 9.9	An answer which deals with the basic requirements of the question, but in dealing with those requirements only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts.
Pass	10+	An answer which addresses MOST of the following points: Candidates must provide an explanation of what must be established for a claim in negligence, identify the relevant law on reasonable foresight, identify the relevant law on reasonable proximity, explain the difficulties with the third strand of the Caparo test and distinguish between primary and secondary victims. Candidates should refer to the developments in the common law. Some key case law may be included, but this may not be specifically applied or only superficially.
Merit	12+	An answer which includes ALL the requirements for a pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the distinction between primary and secondary victims) with very good application and some analysis having regard to the facts. Candidates are likely to observe that the lorry driver, as a road user, owed a duty of care. Candidates should have identified that Mrs Harnett suffered psychiatric harm. Consideration should have been given to the primary and secondary victims based on application to the facts of the scenario. Candidates are likely to consider whether there are any breaks in the chain of causation caused by Mr Thomas and are likely to have concluded that there was no break. Candidates may have explored the idea that another party's actions may have contributed to her injury and therefore discussed apportionment of damages. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.

Indicative Content	**Marks**
Required: Candidates must explain what must be established in order to mount a successful claim in negligence, e.g: ***What must be established:*** the existence of a duty of care (based on the 'neighbour' principle); a breach of that duty; and loss or damage caused by that breach of duty. ***Donoghue v Stevenson [1932]:*** Is now the basis for all negligence actions in England & Wales, requiring a potential claimant to establish the 3 elements before a claim can succeed. ***Caparo Industries v Dickman [1990]:*** The 'three-stage' test from *Caparo* is reasonable foreseeability of harm to the claimant if the defendant fails to fulfil any duty that may exist; proximity of relationship between claimant and defendant (in time or space); and whether it is fair, just and reasonable to impose a duty of	Up to 3 Marks

care in such circumstances. ***Robinson v Chief Constable of West Yorkshire Police [2018]:*** The Caparo test only needs applying in new and novel cases and that the courts should generally establish a duty by looking at existing duty situations and ones with clear analogy.	
Candidates should have identify the relevant law on reasonable foresight and identified the relevant law on reasonable proximity, e.g: ***This requirement of foreseeability:*** Requires consideration of whether it is foreseeable that the defendant's carelessness could cause damage to the claimant. ***Credit should be given where reference is made to cases on foresight, e.g:*** Fardon v Harcourt Rivington [1932] and Smith and Others v Littlewoods Organisation Ltd [1987] ***The requirement of proximity means:*** That the claimant must be sufficiently close to the defendant, whether as a matter of physical proximity or through a close and direct relationship, such that the acts of the defendant could affect the claimant. ***Credit should be given where reference is made to cases on proximity, e.g:*** Home Office v Dorset Yacht Co [1970] and West Bromwich Albion FC v El-Safty [2005]	Up to 4 marks To achieve a merit or distinction, candidates should not simply cite the relevant rules and principles but must show an ability to apply the rules to the scenario.
Candidates should have explained the difficulties with the third strand of the Caparo test and distinguish between primary and secondary victims in relation to Henry, e.g: ***The third stage of Caparo:*** Involves establishing whether it would be fair, just and reasonable for the courts to find that the defendant owed a duty of care to the claimant. ***Policy considerations may be considered:*** i.e wider factors outside the strict legal issues or facts of an individual case, which the courts may take into account when reaching a decision. ***Credit should be given where reference is made to cases on fair just and reasonable, e.g:*** L and Another v Reading Borough Council and Others [2007] ***Psychiatric harm:*** To claim for psychiatric injury the law states that the injury must manifest in a medically recognised psychiatric condition. ***Credit should be given where reference is made to cases on fair just and reasonable, e.g:*** Wilkinson v Downtown [1897], Hinz v Berry [1970], Leach v Chief Constable of Gloucestershire Constabulary [1999] and Rothwell v Chemical and Insulating	Up to 8 marks

Co [2007]. ***Distinction between primary and secondary victims:*** The law makes a distinction between the duty a defendant has towards primary victims and the duty a defendant has towards secondary victims. ***A primary victim:*** Can be defined as a person to whom physical as well as psychological harm was caused, or to whom physical harm was foreseeable. This is sometimes referred to as being in the 'zone of danger'. ***Credit should be given where reference is made to cases on primary and secondary victims, e.g:*** Page v Smith [1995], Alcock v Chief Constable of South Yorkshire [1992], White v Chief Constable of South Yorkshire Police [1999] and Chadwick v British Railways Board [1967].	
Credit a discussion on causation e.g: ***Causation in fact:*** Requires evidence of a direct causal link between the defendant's negligent act and the damage suffered by the claimant. This is known as the BUT FOR test i.e. 'but for' the defendant's breach of duty would the harm have occurred? ***Barnett v Chelsea & Kensington Hospital Management Committee [1969]:*** The but for test, but for the defendant's action the loss/harm would not have occurred. Mr Barnett went to casualty complaining of vomiting. The doctor did not examine him but told him to go home and see his doctor. Mr Barnett was suffering from arsenic poisoning and died five hours later. It was held that the hospital management were not liable to his widow despite their negligence. There is no cure for arsenic poisoning and the doctors negligence did not cause Mr Barnett's death. ***Novus actus interveniens:*** A new intervening act can 'break the chain' of causation between the defendant's breach and the claimant's loss or damage. ***Act of the claimant:*** If the act was reasonable the chain of causation remains intact and the D is liable for the actions of the C. If it was not reasonable the chain of causation is broken and the D is not liable for the actions of the C. ***Credit should be given where reference is made to cases on acts of claimants, e.g:*** Sayers v Harlow Urban District Council [1958], McKew v Holland [1969]. ***Causation in law:*** Requires that the damage is not too remote from the negligent act/omission.	Up to 9 marks

Thin skull rule: Take your victim as you find them. ***Credit should be given where reference is made to cases on legal causation, e.g:*** Wagon Mound (No 1) [1961], Hughes v Lord Advocate [1963], Smith v Leech Brain [1962] ***Contributory negligence:*** Contributory Negligence is conduct by the Claimant which contributes to his/her own harm. ***Section 1(1) Law Reform (Contributory Negligence) Act 1945:*** Where a person suffers damage as a result partly of his own fault and partly the fault of another(s), a claim shall not be defeated by reason of the fault of the person suffering damage. Apportionment of liability and damages, partial and C cannot be 100% to blame, may reduce damages where contribution is to causation not liability. ***Credit should be given where reference is made to cases on Contributory Negligence, e.g:*** Fitzgerald v Lane [1989], Anderson v Newham College [2002], Belka v Prosperini [2011], Davies v Swan Motors Co [1949] and O'Connell v Jackson [1972].	

Question 8:	You work for Naki and Wright LLP in Basingstoke. You are a Paralegal in the Civil Litigation department and your firm is acting for Fredrick Moore. Mr Moore was a Police Constable and a Police Dog Handler. In 2015, Mr Moore was involved in a serious criminal incident when a man raised a shotgun at his dog. He fired two shots, one of which went very close to Mr Moore. The man did not kill or injure either Mr Moore or the dog, but an armed policeman, who was also at the scene, shot and killed the man. It was an incredibly frightening incident for Mr Moore, who suffered Post Traumatic Stress Disorder as a result. Mr Moore continued his employment as a Police Officer until, in 2019, there was a further incident. Mr Moore was going to stop a drunken driver, Mr Lewis. Mr Moore stood in a roadway indicating that the driver should stop but Mr Lewis drove on. It was not clear whether the driver was acting deliberately or was trying to brake, but the result was that he hit Mr Moore and knocked him down. Mr Moore got to his feet and went to the vehicle, which by then had stopped. He tried to reach for the ignition keys but, as he was doing so, Mr Lewis drove off at speed. This incident caused him minor physical injury but triggered the Post Traumatic Stress Disorder into a more florid form. Whilst the condition had initially

	manifested itself after the first incident, it was after this second incident that it became worse. The second incident has led to Mr Moore being unable to carry on working for the police and he has started working for a local call centre on a much lower salary. He is 44 years of age and had planned to retire from the police force at 55. He would like to bring an action for loss of earnings against Mr Lewis and is seeking the advice of your firm. He has been advised that causation may be an issue. Write the body of a letter of advice to Mr Moore setting out what causation is and why causation may be an issue in this case.
Total Marks Attainable	20

Fail	up to 9.9	An answer which deals with the basic requirements of the question, but in dealing with this only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts. There will be little evidence that candidates have any understanding of the framework governing third party funding, or any view expressed will be unsupported by evidence or authority.
Pass	10+	An answer which addresses MOST of the following points: An outline of the causation in fact, an outline of legal causation, a discussion of problems the courts have faced with causation, a discussion of when the act of a third party may break the chain of causation and a discussion of when the act of the claimant may break the chain of causation. Candidates should identify the relevant issues in the case and deal with the circumstances in their advice.
Merit	12+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of when medical negligence may break the chain of causation and the impact on liability) with very good application and some analysis having regard to the facts. Candidates should note the position with 'at risk' work. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a pass and merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. All views expressed by candidates should be supported by relevant authority and/or case law throughout. Candidates should be able to show critical assessment and capacity for independent thought on the topics. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions.

Fail = 0-9.9
Pass = 10+

Merit = 12+ Distinction = 14+	
Indicative Content	**Marks**
Required: Candidates must explain outline the law on causation in tort, e.g: ***Donoghue v Stevenson [1932]:*** Is now the basis for all negligence actions in England & Wales, requiring a potential claimant to establish the 3 elements before a claim can succeed. ***What must be established:*** the existence of a duty of care (based on the 'neighbour' principle); a breach of that duty; and loss or damage caused by that breach of duty. ***Causation in fact:*** Requires evidence of a direct causal link between the defendant's negligent act and the damage suffered by the claimant. This is known as the BUT FOR test i.e. 'but for' the defendant's breach of duty would the harm have occurred? ***Novus actus interveniens:*** A new intervening act can 'break the chain' of causation between the defendant's breach and the claimant's loss or damage. ***Causation in law:*** Requires that the damage is not too remote from the negligent act/omission.	Up to 4 Marks Better responses are likely to have contextualised there explanation of causation by explaining it is one of the elements to prove negligence
Candidates should be credited for exploring causation in fact, e.g: ***Barnett v Chelsea & Kensington Hospital Management Committee [1969]:*** The but for test, but for the defendant's action the loss/harm would not have occurred. Mr Barnett went to casualty complaining of vomiting. The doctor did not examine him but told him to go home and see his doctor. Mr Barnett was suffering from arsenic poisoning and died five hours later. It was held that the hospital management were not liable to his widow despite their negligence. There is no cure for arsenic poisoning and the doctors negligence did not cause Mr Barnett's death. ***Baker v Willoughby [1970]:*** The courts have had to consider cases where there are concurrent causes. Here the cause of C's loss was D's breach of duty. The injury caused by D was so severe that C was no worse off now with no leg than he was before with a severely injured, non-functional leg, so D was liable for all the C's losses. ***Jobling v Associated Dairies [1982]:*** In some cases where the courts have considered concurrent causes they have apportioned liability. Here the D was only liable for losses sustained	Up to 8 Marks

up until the time the C would have had to retire in any event due to the unrelated medical condition. ***Bonnington Castings Ltd v Wardlaw [1956]:*** The courts have also had to consider cases where there may be a material contribution. Here the C was entitled to recover if he could prove that the presence of greater quantities of dust than normal had made a material contribution to his contracting the disease. ***Fitzgerald v Lane [1989]:*** Cases where there are several causes of injury the claimant need only show that the defendant's actions made a material contribution to the damage. ***McGhee v NCB [1973]:*** The 'material increase in risk' test was developed meaning there may be other factors but where the negligence has increased the risk of injury there will be liability. ***Fairchild v Glenhaven Funeral Services [2002]:*** Meso cases are an exception to general rule on causation, so long as C could prove that employers had materially increased the risk contracting the disease, each employer who materially increased that risk was liable to C. ***Gregg v Scott [2005]:*** The courts have considered the impact on the outcome and whether the negligence made a difference. the House of Lords (3:2) held that as the C's chances of survival were less than 50% even if D had not breached his duty of care, that breach had not caused C's loss and so no liability attached to D. ***Section 3 Compensation Act 2006:*** Placed the material increase in risk test on a statutory footing. This provision meant that a claimant could recover his/her losses in full against any employer, so long as it could be proved that the identified employer had materially increased the risk of exposure to the claimant. ***Carder v Secretary of State for Health [2016]:*** Only a small contribution towards the increase in risk is necessary to establish causation, so long as that contribution is 'material'.	
Credit should be given for discussion on when the acts of third parties may break the chain of causation, e.g: ***Act of Third Party:*** If the act of a third party is not foreseeable this will break the chain of causation and the original D is not liable for the actions of the third party, against whom the C must direct a separate claim for all future losses. ***Robinson v Post Office [1974]:*** The court held that the medical treatment received was in accordance with accepted medical practice and the D employer was liable for all the C's injuries.	Up to 6 Marks

Knightly v Johns [1982]: Held that original D was not liable for the 2nd incident because it had been caused by the negligent inspector in ordering his colleague to drive against the flow of the traffic. ***Barrett v Ministry of Defence [1995]:*** The MOD were liable for the negligent medical treatment. The sub-standard treatment was a material cause of the death as adequate and timely medical treatment may have saved the deceased's life. ***Webb v Barclays Bank plc and Portsmouth Hospitals NHS Trust [2001]:*** The chain of causation had not been broken and that the negligence "had not eclipsed the original wrong doing". Damages awarded were apportioned to 25 per cent to the employer and 75 per cent to the NHS trust.	
Credit should be given for discussion on when the acts of claimants may break the chain of causation, e.g: ***Act of the claimant:*** If the act was reasonable the chain of causation remains intact and the D is liable for the actions of the C. If it was not reasonable the chain of causation is broken and the D is not liable for the actions of the C. ***Sayers v Harlow Urban District Council [1958]:*** C was accidentally locked in a public toilet because there was no handle on the outside door. She tried to climb out by standing on the toilet roll holder which caused he to fall. The court held that the claimants act was not enough to break the chain. ***McKew v Holland [1969]:*** C sustained an injury at work due. His injury left him with a weakness in his leg which was prone to give way. C was walking down a steep concrete staircase without a handrail when his leg was about to give way. C decided to jump down the remaining 10 steps to the bottom rather than risk a fall. He suffered a fractured right ankle. C's action broke the chain of causation. Employer responsible until the break in the chain.	Up to 3 Marks
Credit discussion of on legal causation, e.g: ***Wagon Mound (No 1) [1961]:*** In order to be recoverable the kind of harm suffered must be reasonably foreseeable. This case was a Privy Council decision and so persuasive rather than binding in English law. ***Hughes v Lord Advocate [1963]:*** This gave the wagon mound test binding force and extended the test is now: in order to be recoverable the broad kind of harm must be reasonably foreseeable. ***Thin skull rule:*** Take your victim as you find them.	Up to 3 Marks

Smith v Leech Brain [1962]: C's husband obtained burn on lip at work caused by negligence of D. The burn became cancerous and he died as a result. He had an existing predisposition to cancer but D was liable for his death.	