June 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:	Explain how the Postal Rule is an exception to the principle that acceptance must be communicated.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidates should explain that acceptance is one of the elements of an agreement, e.g: ***For a valid contract:*** the courts will look objectively to see if there is an agreement. 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. ***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). ***Acceptance:*** If an offer is accepted, a contract is formed at that point providing the other requirements are satisfied.	Up to 3 marks A pass must refer to what is needed for an enforceable contract to contextualise the requirement to look objectively at the individual elements
Candidates may explore the relationship between offer and acceptance in more detail, e.g ***Revocation of Offer:*** An offer may be revoked any time before acceptance. ***Byrne v Van Tienhoven [1980]:*** An offer was made on 11 October and accepted on this date. The defendants attempted to withdraw the offer at some later date, probably 20 October. It was held that the attempt to withdraw the offer was ineffective because it had already been accepted. Point of Law: The general rule with revocation is that it must be communicated before acceptance. ***Dickinson v Dodds [1876]:*** Dodds offered to sell Dickinson his house for £800 on Wednesday 10 June 1874 and promised to keep the offer open until 9am on the Friday. He withdrew the offer on the Thursday but Dickinson tried to accept the offer at 7am on the	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

Friday. It was held that the offer had not been accepted by Dickinson because it had been validly withdrawn before he could do so. ***Consequence of Acceptance:*** An offer is made irrevocable by acceptance. ***Ramsgate Victoria Hotel and Montefiore [1866]:*** If the offer is expressed to last only for a set period, it will terminate upon the expiration of this period. If the duration of the offer is not specified, it will terminate after a reasonable time has passed. ***Mirror the offer:*** Acceptance must mirror the offer otherwise it will be considered a counter offer. ***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. ***Powell v Lee [1908]:*** Acceptance will only be validify the acceptor has authority to to accept the offer. ***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. ***DB UK Bank Ltd (t/a DB Mortgages) v Jacobs Solicitors [2016]:*** The Defendant firm of solicitors had made a without prejudice offer to settle the Claimant's professional negligence claim against them. Some 10 months later, only a few days before trial, the Claimant	

made a CPR Part 36 offer that it would accept the sums contained in the Defendant's offer. The Defendant no longer wished to settle on those terms (as substantial extra costs had been incurred by both parties in the interim) and argued that this was a counter-offer. The court held that the Defendant's original offer did not comply with the terms of CPR Part 36, and so was a common law offer. Had it been a Part 36 compliant offer, the doctrine of implied rejection at common law would not have applied (*Gibbon v Manchester City Council*) and the offer was sufficiently certain to be capable of acceptance by the Claimant. Because the Defendant's offer was a common law offer, the Claimant's Part 36 offer amounted to a counter-offer, which impliedly rejected the original offer (*Hyde v Wrench*). There was, therefore, nothing for the Claimant to accept, the action was not compromised and would have to proceed to trial.	
Candidates should explore the general rule relating to acceptance and identify exceptions to the rule e.g ***Entores v Miles Far East (1955):*** The general rule relating to the acceptance of an offer is that acceptance must be communicated to the offeror. ***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. ***Brogden v Metropolitan Railway (1877):*** Acceptance had been made by conduct. ***Carlill v Carbolic Smoke Ball Co [1893]:*** A unilateral offer was an exception to the general rule that an advert will amount to an invitation to treat. In unilateral contracts acceptance is completed by action. The act is the form of acceptance. ***Adams v Lindsell (1881):*** This case established the postal rule. The Postal Rule is an exception to this general rule. Where the use of the post is contemplated by the parties as a means of accepting the offer, then a properly posted (stamped and addressed) acceptance is treated as complete on the posting of the letter, not its delivery to the offeror. ***Household Fire Assurance v Grant (1879):*** Acceptance had taken place as soon as it was posted.	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

Question 2:	Distinguish between a representation and a term of the contract.

Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidates must explain the distinction between a representation and a term, e.g: ***A representation is:*** A statement made outside the contract. It may induce a party to enter a contract, but is not, per se, a term. ***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. ***There are a number of factors used to distinguish between a representation and a term:*** The importance of the statement; whether the statement was reduced to writing; the timing in negotiations when the statement was made; any special knowledge of the maker of statement in relation to its content; and whether the maker of the statement invited the other party to verify it.	Up to 5 marks To achieve a pass candidates must have explained the difference between a representation and a term – setting out the factors the court would consider
Candidates may explain the factors the court will consider when differentiating between a representation and a term, e.g: **Bannerman v White [1861]:** The importance of the statement will be a factor. The more important the statement the more likely it is to be a term. Seller's statement was understood and intended by both parties to be part of the contract. A reasonable man would not buy if he had known that the hops had sulphur. ***L'Estrange v Graucob (1934):*** Express terms may be incorporated into a contract by signature so it a statement is in writing it is more likely to be a term than representation. ***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. ***Dick Bentley v Harold Smith Motors Ltd [1965]:*** The skill and knowledge of those making the statement will be a factor. The defendant's statement in relation to the mileage of the car was a term of the contract. The defendants were, as motor dealers,	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

involved in the running of a car business whereas the plaintiffs were not.	
Required: Candidates may explain how a term 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. ***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 could have explained actual and constructive notice, e.g: ***Olley v Marlborough Court (1949):*** Express terms may be incorporated into a contract by actual or reasonable notice. In this case 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 because they did not have notice and the hotel owners were liable for the loss. ***Parker v South Eastern Railway Company (1877):*** For actual notice, must take reasonable steps to draw to attention the term. Here the words printed on the ticket. ***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. ***J Spurling Ltd v Bradshaw [1956]:*** Denning LJ's red hand rule comment where he said, Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient. ***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 other. ***Hollier v Rambler Motors Ltd [1972]:*** There may be constructive notice where there is consistent dealings.	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 3:	Explain the tests used to establish causation in negligence.
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 demonstrate knowledge of why causation is important in establishing negligence
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.	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

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 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 was 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 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	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

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 wrong doing". 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 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 to break.	
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	Up to 4 marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their

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.	knowledge base and apply the authority to the question posed

Question 4:	Explain the approach the court will take when assessing the standard of care.
Total Marks Attainable Fail = 0-7.4 Pass = 7.5+ Merit = 9+ Distinction = 10.5+	10
Indicative Content	**Marks**
Required: Candidates must Identify how the courts will determine whether a defendant has breached their duty of care, e.g: ***Breach of duty requires two things:*** That the defendant failed to reach the appropriate legal standard required and as a matter of fact, the defendant's actions fell below the required standard. ***General Standard:*** The general standard of care is an objective one. Anyone who owes a duty of care is judged against the standard of a 'reasonably competent' person exercising their skill, no matter how experienced or inexperienced the person who owes the duty is. ***Factual Standard:*** Is determined by the use of various factors to determine whether the defendant's actual behaviour reached the required standard.	Up 2 marks To achieve a pass candidates should describe the relevance of the applicable standards
Credit any attempt by candidates to explain the general standard of care in depth with reference to authority, e.g: ***The general standard is:*** An objective test, people will be judged against the standard of a 'reasonably competent' person	Up to 4 marks To achieve more than a pass, candidates must not simply cite law but should

exercising their skill no matter how experienced or inexperienced the person who owes the duty is. ***Blyth v Birmingham Waterworks [1856]:*** 'Negligence is the omission to do something a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or something which a prudent or reasonable man would not do'. ***Roberts v Ramsbottom [1980]:*** A 73 year old man was negligent when he continued to drive his car and caused an accident despite symptoms indicating he had had a stroke. ***Mansfield v Weetabix [1998]:*** The defendant driver was unaware of a rare medical condition which impaired his ability to drive. That it would not be reasonable to impose liability on the driver in this case as a reasonable person could not expect him to take action on a condition of which he was unaware. ***Nettleship v Weston* [1971]:** The claimant, an experienced driver of many years, agreed to give driving lessons to the defendant. During a lesson the learner driver drove the vehicle into collision with a lamp-post, injuring the claimant. The court held that the learner driver was to be judged against the same standard as a reasonably prudent qualified driver and so was liable, despite her lack of experience and skill.	show a greater depth to their knowledge base and apply the authority to the question posed
Credit any attempt by candidates to explain the general standard of care with reference to situations where D is exercising a special skill, e.g: ***Where D is exercising a special skill:*** Will need to reach the standard of care of the reasonable practitioner of the skill is claiming to have. ***Phillips v Whiteley [1938]:*** The defendant, a jeweller pierced the claimant's ears which later developed an infection. The court held that a jeweller is not a surgeon and so is not bound to take the same precautions as a surgeon. On the facts, the defendant had taken all reasonable precautions that a competent jeweller would take and had not breached his duty of care. ***Wells v Cooper [1958]:*** The defendant, an amateur DIY enthusiast, fitted a door handle in his home. The claimant visited the defendant's house and pulled on the new handle, which came away in his hand, causing him to fall backwards down several steps. The Court held that the defendant was to be judged against the standards of a reasonably competent carpenter, not the standards that would be expected of a professional carpenter. This was the sort of job that a reasonable householder might do for himself, and that was the appropriate standard. There was no breach of the duty of care to his visitor.	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

Bolam v Friern Hospital Management Committee (1957): Where the defendant is acting in a professional capacity, he or she will be judged by the standard of the reasonable competent person in that role or profession. ***Bolitho v City & Hackney Health Authority [1997]:*** The *Bolam* test was developed further in this case. In this case a two-year-old boy suffered serious brain damage following respiratory failure and a failure to intubate. Several expert witnesses provided differing opinions on whether it was acceptable medical practice to intubate in such circumstances. The House of Lords held that the test was whether there was a responsible body of medical opinion which supported the treating doctor's actions and whether that opinion had a logical basis. On this test, the doctor had not been negligent as the opinions supporting refusal to intubate had a logical basis. ***Luxemoore -May v Messenger May Baverstock (a firm) [1990]:*** The defendant auctioneers valued two paintings at £30. The paintings turned out to be by the artist George Stubbs and sold at auction for £88,000. The court held that valuation of a picture was not an exact science and in deciding not to attribute the picture to a particular artist a valuer was not necessarily guilty of professional negligence. ***Shakoor v Situ [2000]:*** A practitioner of traditional Chinese herbal medicine did not have to meet the standard of skill and care of a reasonably competent practitioner of orthodox medicine, but he did have to take account of relevant reports in orthodox medical journals. The defendant was not liable for breach of duty when one of his patients died of liver failure as he was unaware of the dangers presented by alternative medicine.	
Credit any attempt by candidates to describe the factual standard with reference to the factors that will be considered, e.g: ***These factors are as follows:*** The likelihood that damage will occur, the severity of the possible outcome, the cost of avoiding the breach of duty, and the importance of the defendants purpose. ***Factors are balanced:*** The first two factors are weighed up against the last two factors. If the weight of the first two factors outweighs the second two, this tends to suggest that the duty has been breached. If the reverse is true, this tends to suggest that there has been no breach of duty. ***Bolton v Stone [1951]:*** Is an example of the effect of this 'balancing act'. In this case the claimant was hit by a cricket ball as she left her house. The ball had been hit from the cricket ground, which was over 150 yards away. The evidence was that a ball had only been hit that sort of distance from the ground on 4 or 5 occasions over a	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

period of 30 years. There was a fence around the ground, but the shot which hit the claimant had cleared that. The court held that the rarity of the event catered for compared with the cost of putting an even higher fence around the ground to prevent it from happening at all meant that there was no breach of duty in this case. ***Paris v Stepney Borough Council [1951]:*** Is an example of the effect of this 'balancing act'. The claimant, who had only one functioning eye, worked as a mechanic. He was asked to clean off the underside of a vehicle without being provided with safety goggles. A metal splinter hit him in his good eye, resulting in total blindness. The court held that the consequences of a breach of duty for this claimant were devastating and the cost of providing safety goggles was very low. In these circumstances, there was a breach of duty. ***Latimer v AEC [1953]:*** A flood at the defendant's factory was dealt with by spreading sawdust on the floor where most of the workers were employed. The supply of sawdust ran out, so part of the flooded floor remained untreated. The claimant slipped on the untreated area and suffered serious injury. The court held that the risk of slipping had been significantly reduced by the use of the sawdust and the only alternative course of action would have been to close the whole factory, resulting in lost production and wages. Weighing the alternatives, the defendant had fulfilled its duty of care and was not liable to the claimant. ***Watt v Hertfordshire County Council [1954]:*** The claimant was a fire-fighter attending an emergency call to a trapped motorist. The only vehicle capable of carrying the heavy jack required was engaged on another call, so a lorry was commandeered from a member of the public. On the way to the emergency, the lorry was involved in another accident, as a result of which the jack moved, trapping and injuring the claimant. The court held that the social usefulness of the defendant's actions in answering an emergency call far outweighed all other factors, and so there was no breach of duty in this case.	

SECTION B (choice of 3 out of 5 – 60%)

Question 5:	You work at Barkers and Bonkers LLP in Cheltenham. Your firm is acting for a farmer, Giles Bancroft. Giles has just purchased a llama farm from Mrs Henrietta Marshall. Mr Bonkers, a senior

	partner of your firm, is advising Mr Bancroft on issues that have arisen in relation to the purchase. Mrs Marshall was a llama farmer at Priory View Farm. In September 2020 she advertised the farm for sale and Mr Bancroft, having seen the advert, visited the farm. Mr Bancroft had previously farmed pigs, cows and sheep. He told Henrietta that he wanted to buy a farm where different animals could roam together. Mrs Marshall stated that she used to farm 100 cows at Priory View Farm and because of this she thought that, as well as the 20 llamas currently on the farm, there would also be room for about 100 pigs and 100 sheep. Mr Bancroft was really pleased to hear that the farm had 20 llamas and told Mrs Marshall that this was very important to him because he had none of his own. Mrs Marshall described the llamas as 'friendly girls' and also pointed out that the farm made profits of £60,000 a year. Approximately three months later Mr Bancroft and Mrs Marshall met to sign a 'Memorandum of Sale', which stated: 'Sale of Priory View Farm, all fixtures, fittings and stocks. £750,000.' They signed the memorandum and Mr Bancroft took possession of the farm in February 2021 and moved in with his 100 pigs and 50 sheep. Later that day, he was shocked to discover that there were only 15 llamas. At the end of the first month, Mr Bancroft bought 5 more llamas. The new llamas were not well received by the other llamas, who kept attacking them. Unfortunately, it also became clear that there was only room for the 100 pigs on the farm and Mr Bancroft had to sell his 50 sheep. When Mr Bancroft looked through the farm's accounts he discovered that it had only made profits of £50,000, not £60,000. Mr Bonkers has asked that you write to Mr Bancroft advising whether Mrs Marshall's statements about both the room on the farm for more animals (about 100 pigs and 100 sheep) and the profits of £60,000 a year, are misrepresentations. He has also asked that you explain the types of misrepresentation and the remedies that may be available to Mr Bancroft.

	Write the body of a letter to Mr Bancroft advising what misrepresentation is.
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 Mrs Marshall's statement about the animals is likely to be viewed merely as a statement of opinion because Mr Bancroft has farmed pigs and sheep This will not ground a claim in misrepresentation. In terms of the profits, the facts suggest a claim for misrepresentation may be possible however further information and evidence would need to be considered to advise. 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 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.	Up to 3 Marks
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 the costs consequence of discontinuance 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.	Up to 3 Marks

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.	
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. ***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.	Up to 10 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

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.	
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, 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]	Up to 3 Marks

Question 6:	You work as a paralegal in the civil litigation department at Tanner and Tucker LLP in Plymouth. Your firm is acting for a Donny Diamond. He recently decided to buy a fish and chip shop business and has sought advice from Ms Timms, a solicitor at your firm, in relation to the purchase. Miss Charlene Heather recently decided to sell her fish and chip shop business, which runs from 92 Grand Parade, Plymouth. She put a 'For Sale' sign outside the shop which Donny saw one morning whilst he was out for a run. Later that day he went into the shop to enquire about buying the business. He has instructed your firm that he explained to Miss Heather how important it was for him to buy a profitable business and she had said that, over the past five years, the business had made substantial profits averaging £25,000 per annum. Miss Heather also told Donny that if he wanted to buy the

	business he should act quickly, because the business was being put up for auction the following week. Donny considered the matter for a couple of days. Concerned that he might miss out if the business were sold at auction, he went back to Miss Heather and agreed to buy the business. Donny and Miss Heather negotiated a price and exchanged copies of a Memorandum of Sale. The Memorandum of Sale said: 'Sale by Miss Charlene Heather of the fish shop located at 92 Grand Parade, Plymouth to Donny Diamond for £100,000. To include the lease, contracts, stock and goodwill. Profits averaging £25,000 per annum over the last five years.' After buying the business Donny was shocked to discover that the premises belonging to the business had no parking facilities, which he had assumed they would have. As a result, it was difficult to attract new customers. He also discovered that the auction had been cancelled, so there had been no rush for him to buy it. Donny would like advice on whether the statement 'Profits averaging £25,000 per annum over the last five years' is a term of the contract. He would also like advice on whether the inclusion of parking facilities may have been a term. Miss Timms has asked you to write the body of a letter to Mr Diamond explaining whether the statement about profits is an express term of the contract. She has also asked you to set out in your advice how terms may be implied by the courts on the particular facts of a case and whether a term that the business would have parking facilities will be implied in this way into the contract. Write the body of a letter to Mr Diamond advising what terms of a contract are and how they may be incorporated into a contract.
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 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 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	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
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	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

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 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.	base and apply the authority to the question posed
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'.	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

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 & 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 (whether by the Sale of Goods Act 1979 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. ***In a commercial sale of goods contract:*** Terms will be implied by the Sale of Goods Act 1979. Each of the terms implied by the Sale of Goods Act 1979 is implied as a condition of the contract.	Up to 2 marks

Section 13(1) the Sale of Goods Act 1979: The goods correspond with the description by which they are sold. ***Section 14(2) the Sale of Goods Act 1979:*** That the goods are of satisfactory quality. ***Section 14(3) the Sale of Goods Act 1979:*** That the goods are reasonably fit for purpose.	
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. ***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.	Up to 3 marks

Question 7:	You work for Harrisons Solicitors in Shrewsbury. Mrs Harrison is a senior partner at the firm and she has approached you to do some work on the file of Mr Percy Benson. In 2020 Mr Benson was suffering from severe headaches, he had tried to take both paracetamol and ibuprofen, but the headaches would not subside. He was also suffering with blurred vision. On 5 October 2020, Mr Benson attended the Emergency Department (A&E) at Shrewsbury Hospital. He spoke to the receptionist, Lisa. Lisa was new and had not received the appropriate training and failed to ask Mr Benson a set of mandatory questions that A&E receptionists should ask when a patient arrives complaining of headaches. The list of questions Lisa should have asked Mr Benson included whether the patient had suffered loss of vision and whether they felt dizzy. Had Lisa asked Mr Benson these questions, he would have answered 'yes' to both and

	consequently would have been assessed as a high-risk patient. Instead, he was assessed as a low-risk patient and had to wait two hours for medical attention. Because of the delay, Mr Benson suffered a serious stroke. If he had been processed quickly as a high-risk patient, there is a 75% chance the stroke would have been prevented. Mr Benson later found out that he had an underlying genetic disorder, which made the effect of the stroke much worse. Most people would have suffered only temporary symptoms but, due to his genetic disorder, Mr Benson was paralysed for life. Mr Benson is seeking advice on any potential claim for damages he may bring. Mrs Harrison has advised that causation will be an issue in any potential claim he may have. Having recently met with the client, Mrs Harrison has approached you to write a letter to him setting out whether Shrewsbury Hospital owed him a duty of care and, if so, whether that duty was breached. Mrs Harrison would also like you to set out whether Mr Benson will be able to establish factual causation, what is meant by causation in law and whether he is likely to recover damages for the full extent of his injuries. Write the body of a letter to Mr Benson advising on the issue of causation in negligence.
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: 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 with very good application and some analysis having regard to the

		facts i.e candidates will have explained that the but for test would be frustrated or difficult to apply here because of the chance of the stroke occurring, candidates should therefore have suggested the material increase in risk test would be applied, candidates also likely to have commented that so long as some injury is foreseeable the fact that it is worse for some people would be irrelevant. 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 (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 when a duty is owed, what the courts will consider to determine a breach of duty and what causation is, e.g: ***Recognised Class:*** Certain situations where a duty is known to be owed - e.g. Doctor. ***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. ***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. ***Breach of duty requires two things:*** That the defendant failed to reach the appropriate legal standard required and as a matter of fact the defendant's actions fell below the required standard. ***Causation in fact:*** Requires evidence of a direct causal link between the defendant's negligent act and the damage suffered by the claimant. ***Causation in law:*** Requires that the damage is not too remote from the negligent act/omission.	Up to 5 Marks To pass candidates should have set out what needs to be established for negligence and the requirement that the breach must have caused loss and damage
Candidates should have developed their exploration of whether the duty owed had been breached, e.g:	Up to 6 Marks To achieve more than a pass, candidates

General Standard: The general standard of care is an objective one. Anyone who owes a duty of care is judged against the standard of a 'reasonably competent' person exercising their skill, no matter how experienced or inexperienced the person who owes the duty is. ***Credit should be given where reference is made to cases on breach and general standard, e.g:*** Blyth v Birmingham Waterworks [1856], Roberts v Ramsbottom [1980], Mansfield v Weetabix [1998], Nettleship v Weston [1971]. ***The factual standard:*** Is determined by the use of various factors to determine whether the defendant's actual behaviour reached the required standard. ***These factors are as follows:*** The likelihood that damage will occur, the severity of the possible outcome, the cost of avoiding the breach of duty, and the importance of the defendant's purpose. ***Factors are balanced:*** The first two factors are weighed up against the last two factors. If the weight of the first two factors outweighs the second two, this tends to suggest that the duty has been breached. If the reverse is true, this tends to suggest that there has been no breach of duty. ***Credit should be given where reference is made to cases on the factual standard skill, e.g:*** Bolton v Stone [1951], Paris v Stepney Borough Council [1951], Latimer v AEC [1953, Watt v Hertfordshire County Council [1954]. ***Where D is exercising a special skill:*** Will need to reach the standard of care of the reasonable practitioner of the skill is claiming to have. ***Credit should be given where reference is made to cases on special skill, e.g:*** Phillips v Whiteley [1938],Wells v Cooper [1958], Bolam v Friern Hospital Management Committee (1957), Bolitho v City & Hackney Health Authority [1997], Luxemoore -May v Messenger May Baverstock (a firm) [1990], Shakoor v Situ [2000].	must not simply cite law but should show a greater depth to their knowledge base and apply the authority to the question posed
Candidates should have developed their discussion on factual 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? ***Credit should be given where reference is made to cases on causation in fact, e.g:*** Barnett v Chelsea & Kensington Hospital	Up to 7 Marks

Management Committee [1969], *Baker v Willoughby* [1970], *Jobling v Associated Dairies* [1982], Bonnington Castings Ltd v Wardlaw [1956], McGhee v NCB [1973], Fitzgerald v Lane [1989], Fairchild v Glenhaven Funeral Services [2002].	
Candidates may be credited for discussion on breaks in the chain of causation, 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. ***Credit should be given where reference is made to cases on acts of third parties, e.g:*** Robinson v Post Office [1974], Knightly v Johns [1982], Barrett v Ministry of Defence [1995], Webb v Barclays Bank plc and Portsmouth Hospitals NHS Trust [2001], Webb v Barclays Bank plc and Portsmouth Hospitals NHS Trust [2001]. ***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].	Up to 2 Marks
Candidates should have developed their discussion on legal causation, e.g: ***Causation in law:*** Requires that the damage is not too remote from the negligent act/omission. ***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]	Up to 4 Marks

Question 8:	You work for Bennet and Thompson LLP in Dagenham. For some time now you have been working from home because of COVID 19. During a break from the lockdown restrictions in October last year Amrit, Julie and Marcus, three of your colleagues, were going into the office for a day to collect some files and do some work which was difficult to do remotely. Amrit and Julie are in a relationship and drove to the office

	together. Amrit drove and Julie was seated in the front passenger seat. Both Amrit and Julie were wearing their seatbelts. Part of the journey required them going on the Motorway, Amrit always obeyed the 70mph speed limit. When on the motorway Amrit followed a large lorry being driven by Henry. Henry lost concentration because he was using his mobile phone while driving and he hit the barrier on the central reservation. Henry's lorry spun round blocking the path of Amrit and Julie. Despite braking as soon as possible, Amrit continued at speed and crashed his car into Henry's lorry. Marcus was driving on the same stretch of motorway, just behind Amrit and Julie's car. He witnessed the crash and had just enough time to swerve and narrowly avoid the other vehicles. Marcus was not physically harmed by the incident, but was shocked and distressed and has suffered from depression since the incident. Amrit, Julie and Henry were taken to hospital. Amrit had suffered a fractured skull and Julie had fractured her left ankle. Julie's leg was placed in plaster and she was advised to use a crutch whenever walking. Two weeks later, Julie tried to walk their dog without her crutch. She stumbled and fell, causing the ankle further injury, a result of which is a much worse outlook for recovery. Although Marcus was physically unharmed by the incident, he began to suffer from nightmares and panic attacks soon afterwards. He has been diagnosed with Post-Traumatic Stress Disorder (PTSD). Amrit knows you've been studying tort law as part of the costs law qualification. He telephoned you last night and has asked you to prepare a summary of the law for him so that he can understand any potential claims. Prepare a summary of advice for Amrit 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	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: 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 Henry, as a road user, owed a duty of care to Amrit and Julie and Marcus. Candidates are likely to have identified that Marcus was nearly involved in the accident and physical harm to him was foreseeable (he was within the 'zone of danger'). Candidates should have identified he suffered psychiatric harm; therefore, he is a primary victim and Henry owes him a duty of care. Candidates are likely to observe that the acts of Amrit are unlikely to have breached the chain of causation in respect of the harm caused to either Julie or Marcus. Candidates may have explored the fact that Julie'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 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 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.	Up to 3 marks

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. ***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]	Up to 8 marks

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 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 and Julie's choice to walk the dog without her crutches, 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	Up to 9 marks

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. ***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].	