September 2020: 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 the nature and effect of a counter-offer.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidates should set out that for a valid contract the courts will look objectively to see if there is an agreement and the impact of a counter offer, 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. ***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). ***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 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. ***Harvey v Facey [1893]:*** A mere statement of price would only amount to a supply of information.	Up to 5 marks

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. ***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.	
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 has authority to to accept the offer.	Up to 3 marks

Candidates should 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. ***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.	Up to 3 marks

Question 2:	Explain how terms are incorporated into a contract.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidates should have distinguished between a representation and term. Candidates should also have explained the different categories of terms, e.g: ***A contractual term is:*** Any provision forming part of a contract. ***Representation:*** A representation is a statement of fact which does not amount to a term of the contract. This gives rise to no contractual obligation but may amount to a claim in misrepresentation. ***Express Terms:*** These are the terms agreed between the parties or included within the bargain made by the parties. ***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 2 marks This may not have been done explicitly but candidates should have demonstrated knowledge of the difference
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 3 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.	
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
Candidates may have considered how the courts may impute terms into an agreement, e.g: ***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. ***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 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

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. ***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.	
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. ***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.	Up to 2 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:	Identify what must be established in order to mount a successful claim in negligence.
Total Marks Attainable Fail = 0-4.9	10

Pass = 5+ Merit = 6+ Distinction = 7+	
Indicative Content	**Marks**
Candidates must explain what must be established in order to mount a successful claim in negligence, 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 3 marks A pass must include the demonstration that the candidate understands what is required to establish a negligence claim
Credit a discussion on what it means to owe a duty of care, e.g: ***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. ***Foreseeability:*** Harm must be a "reasonably foreseeable" result of the defendant's conduct. ***Credit should be given where reference is made to cases on forseeability, e.g:*** Fardon v Harcourt Rivington [1932], 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], West Bromwich Albion FC v El-Safty [2005]. ***It must be "fair, just and reasonable" to impose liability:*** 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], Hinz v Berry [1970], Page v Smith [1995], Alcock v	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

Chief Constable of South Yorkshire [1992], White v Chief Constable of South Yorkshire Police [1999].	
Candidates may have identified 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. ***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].	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 should be credited for a discussion on causation, e.g:	Up to 4 marks

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 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]. ***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]. ***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]	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:	Identify the standard of duty owed by a defendant who is a professional.
Total Marks Attainable	10

Fail = 0-7.4 Pass = 7.5+ Merit = 9+ Distinction = 10.5+	
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. ***The 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 more 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 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	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

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.	
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. ***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	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

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 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	Up to 3 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

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 in-house at Honey and Muster LLP in Southend on Sea. Your firm is acting for a building company, Seashore Building Renovators (SBR). Three months ago, SBR acquired an old factory in Leigh-on-Sea. SBR purchased the factory with the intention of turning it into luxury flats and therefore entered into a number of contracts in order to carry out the development. Mr Muster, a senior partner of your firm, is advising on those contracts. SBR had approached three firms to quote for the removal of old asbestos coatings from the site. Heritage Removals was the first to visit the site and they told SBR that they were the only firm in Essex that had a licence to carry out the relevant work. Heritage Removals believed this to be true. However, if Heritage Removals had checked on the Public Register of licensed persons, they would have discovered that, three weeks earlier, two new companies in Essex had obtained licences to do this sort of work. As a result of the statement made, SBR thought there was no longer any point in getting other quotes and therefore entered into a contract with Heritage Removals. Heritage Removals has now nearly finished the asbestos removal and SBR has discovered that the two other companies would have been able to do it more cheaply than Heritage

	Removals. Mr Muster has approached you to write a letter to SBR explaining whether the statement that Heritage Removals was the only one in Essex that had a licence to carry out the relevant work is a misrepresentation. Write the body of a letter to SBR advising what misrepresentation is, the types of misrepresentation and whether the statement made by Heritage Removals is a misrepresentation.
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 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	Up to 2 Marks

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.	
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. ***Innocent misrepresentation:*** A representation that is neither fraudulent nor negligent.	Up to 10 Marks

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 for Sutton Solicitors. Mr Sutton is an experienced solicitor at the firm and he has approached you for your assistance in relation to one of his clients, Mrs Patricia Dongle. Last summer, Patricia and her business partners decided to hold their conference at the Royal Castle Hotel (RCH) in Bournemouth. They had booked the largest of two conference rooms at the hotel and the hotel was also to organise the audio-visual equipment for the event. During negotiations with the RCH events team, Patricia had told RCH that the there would be 75 delegates attending the event, that she would like the room set out in cabaret style and that she would need an area of the room sectioned off for the sponsors of the event to have exhibition stalls. She also told RCH there were four sponsors. A day delegate rate of £70 was agreed and the AVI would be an additional cost of £8,000. On arrival in Bournemouth, Patricia visited the RCH reception desk and asked to be taken to the conference room so she could set up

	in readiness of the delegates arriving. When she arrived at the room she was told that there was only enough space for 3 exhibitors and that the room would only take 75 delegates if they did not have desks. Patricia reluctantly agreed to change the room layout. On the morning of the event, one of the sponsors withdrew their sponsorship because they had no space to exhibit. The loss of sponsorship cost Patricia's firm £3000. During the day things went from bad to worse. There was another event being held on the same day and Patricia learnt that they had been allocated the largest conference room, had 75 delegates in attendance and were being charged a £50 day delegate rate. Also, after lunch, some delegates left the event and told Patricia they wouldn't come to any future events because the organisation, seating and venue were terrible. Following the event Patricia received an invoice from RCH for the full amount that had been agreed. Patricia is now seeking advice. Mr Sutton has asked you to write a letter to Patricia explaining whether RCH are in breach of their contract with Patricia's firm and, if so, what the consequences of breach mean in terms of remedy available. Write the body of a letter to Patricia advising what the consequence of a breach of contract is and the remedies that may be available.
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: This matter is a breach of contract matter, 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, discuss how implied terms may be imputed into an agreement, distinguish between conditions and warranties and set out the consequence of breach. Candidates are also likely to have explored the types of damages. 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 the anticipatory and actual breach and the consequence) with 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 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. ***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. ***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. ***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 4 marks
Candidates may explain the factors the court will consider when differentiating between a representation and a term, e.g: ***L'Estrange v Graucob (1934):*** Express terms may be incorporated into a contract by signature. In this case, the claimant bought a	Up to 3 marks

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	
Candidates may explain actual and constructive notice, e.g: ***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.	Up to 2 marks

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 may have considered how the courts may impute terms into an agreement, e.g: ***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. ***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. ***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.	Up to 3 marks
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 are required to 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 4 marks
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	Up to 5 marks

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. 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 Bolster Solicitors in Bradford. Mrs Bolster is the senior partner at the firm and she has approached you for your assistance in relation to one of her clients, Mr Mark Thompson. Six months ago, a solicitor, Harpreet Kaur was driving on the motorway at 2am one Monday morning on her way home from a police station call out. She was driving in the outside lane when her telephone rang. When her phone rang she took her eyes off the road and her car hit the central reservation and spun round in front of the cars driving behind her. Amanda Thompson, through no fault of her own, collided with Harpreet's car and was injured in the accident. She was taken by ambulance to Bradford Hospital. At the hospital, Amanda was examined by Dr Brown, a senior doctor. Dr Brown was distracted by fears over another patient and she negligently failed to check Amanda for concussion, which would have been standard practice. Amanda died during the night from a severe brain injury. It has since been discovered that

	the standard concussion check would not have revealed the fatal injury. Amanda was married with two young children. She was the higher earner in the household. Mr Thompson is seeking advice on any potential claim for damages he may bring. Mrs Bolster has advised that causation will be an issue in any potential claim he may have. Having recently met with Mr Thompson, Mrs Bolster has approached you to write a letter to him setting out the usual test for factual causation in negligence, the meaning of a *novus actus interveniens* and who will be held liable for Amanda's death. Write the body of a letter to Mr Thompson 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 (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 (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 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 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	Up to 8 Marks

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. ***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.	Up to 6 Marks

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. ***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 3 Marks

Question 8:	You work for the Argent Law Agency, an SRA regulated firm specialising in negligence actions. You have been approached by Mr Alfred Hitch who is a senior partner at the firm. He has contacted you in respect of a recent incident that took place locally. Following months of inactivity due to COVID-19, the legendary rock band "Hammer Heads' recently embarked on a tour of the United Kingdom. They performed a warm up gig at a small venue when a spot light fell on to the stage causing a massive explosion which killed one of the band members, Tommy Leo. Unfortunately the lighting rig, which had the spot light on, had been negligently maintained by Band Lighting Solutions Ltd (BLS). Jessica, Tommy's wife, had been watching the gig from a VIP area of the venue. She was physically unharmed but later started to suffer nightmares and depression. This is particularly difficult for her because historically she had suffered with her mental health but had sought help and recovered. Harry, a trainee ambulance man, was one of the first on the scene. This was the first major incident which he has attended. He rushed to the stage but quickly observed that there was nothing he could do. He then spends the next two hours comforting distraught fans. He later suffers from recurring nightmares and panic attacks. Mr Hitch has asked you to prepare a summary of the law for him to use to offer Jessica and Harry advice on their potential claims against BLS. He has directed that you consider whether BLS owe a duty of care to Jessica and Harry for any psychiatric injury that they have suffered. Prepare a summary of advice for Mr Hitch 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. 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. ***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:	Up to 4 marks

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 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.	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 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.	Up to 3 marks

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.	
Candidates should discuss public policy considerations and the role played in claims for psychiatric injury, e.g: ***Wilkinson v Downtown [1897]:*** The claimant successfully claimed damages for shock from the 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. She was entitled to recover as she had demonstrated a recognised psychiatric condition as opposed to feelings of grief and sorrow. ***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 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	Up to 6 marks

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 4 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 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	Up to 4 marks

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.	