

December 2022: Marker Guidance: Unit 1

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

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

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

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

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

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

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

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

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

SECTION A (all compulsory – 40%)

Question 1:	Distinguish an offer from an invitation to treat.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	Marks
<p>Required: Candidates must explore further what is meant by an invitation to treat and what might amount to an offer, e.g.</p> <p>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.</p> <p>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.</p> <p>Supply of information: A mere statement of price would only amount to a supply of information.</p> <p>An invitation to treat: Does not have legal force and is instead an invitation to enter into negotiations.</p> <p>Goods displayed on a shop shelf are merely invitations to treat: The court has 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.</p> <p>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. An advertisement may be considered an offer if there are certain terms and evidence of an intention to be bound.</p> <p>A request for tenders: represents an invitation to treat and each tender submitted amounts to an offer unless the request specifies that it will accept the lowest or highest tender or specifies any other condition.</p>	Up to 6 marks

<p>Credit reference to any applicable case authority, e.g: Carlill v Carbolic Smoke Ball Co (1893), Harvey v Facey [1893], Gibson v Manchester City Council (1979), Pharmaceutical Society of Great Britain v Boots Cash Chemists (1952), Fisher v Bell (1961), Partridge v Crittenden (1968) and Spencer v Harding (1870).</p>	
<p>Candidates may set out that for a valid contract the courts will look objectively to see if there is an agreement, e.g</p> <p>In order to be valid: A contract requires agreement, the intention to create legal relations, and consideration.</p> <p>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.</p> <p>Acceptance: If an offer is accepted, a contract is formed at that point.</p> <p>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.</p>	<p>Up to 4 marks</p> <p>A pass must refer to what is needed for an enforceable contract</p>
<p>Candidates may explore further what is meant by an acceptance, e.g</p> <p>Acceptance must be: unqualified and definite and match the terms of the offer. If it does not then the purported acceptance would not in fact acceptance but a counter offer. The General rule is that acceptance must be communicated to the other party. When the offeror requires a specified method of acceptance, the general rule is that acceptance must be given in that way. Acceptance will only be validify the acceptor has authority to accept the offer.</p> <p>Credit reference to any applicable case authority, e.g: Neale v Merret [1930], Felthouse v Bindley [1862], Eliason v Henshaw [1819] and Powell v Lee [1908].</p>	<p>Up to 3 marks</p>
<p>Candidates may explain what is meant by a counter offer and the consequence on the original offer, e.g</p> <p>A counter-offer: Even a small variation in the terms of the original offer may result in a counter-offer. A counter-offer destroys the original offer completely. No offer would exist if the claimant went back to the original offer to accept where a counter offer has been made. To be effective, the counter-offer has to be a legally recognisable offer.</p> <p>Credit reference to any applicable case authority, e.g: Hyde v Wrench (1840) and Stevenson, Jacques & Co v McLean (1880)</p>	<p>Up to 2 marks</p>

Question 2:	Distinguish between a representation and a term of 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, e.g A contractual term is: Any provision forming part of a contract, i.e a promise undertaking that is part of a contract. Representation: It is a statement which may encourage one party to made a contract but not itself part of a contract. 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.	Up to 3 Marks
Candidates may also have explained the different categories of terms, e.g: 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. Conditions: The most important of terms, a term that goes to the root of the contract. If a condition of a contract is breached then the aggrieved party can choose to bring all contractual obligations to an end and will have the right to sue for damages. Warranties: Of less importance to the contract. The result of a breach of warranty is the innocent party can claim damages for that specific breach of contract but will not be able to bring the contract to an end. Contractual obligations will continue despite this breach.	Up to 4 Marks
Candidates may explain the factors the court will consider when differentiating between a representation and a term, e.g: Importance: The importance of the statement will be a factor. The more important the statement the more likely it is to be a term. If the individual relying on the statement makes it clear that the statement was of such importance that they would unlikely have contracted without that guarantee, the presumption is that the statement will be a term.	Up to 8 Marks

<p>Writing: Express terms may be incorporated into a contract by signature so if a statement is in writing, there will be a presumption that it will form a term of the contract. Even if there is a written contract, parties may claim there are other terms in the contract, perhaps ones in another document, or ones from an oral agreement.</p> <p>Timing: The timing of the statement will be a factor. If a party makes a statement and soon after the contract is reduced to writing without the inclusion of the statement in writing then it would be presumed that that statement would not form a term of the contract and would only be a representation. The longer the interval between the statement and the contract there is a greater presumption that the statement is not a term. The presumption can be rebutted if the parties' intentions are clear through another means.</p> <p>Skill and Knowledge: The skill and knowledge of those making the statement will be a factor. If the individual making the statement has some specialist skill/knowledge of the contractual subject matter, or claims to have such knowledge, the presumption is that the statement is more likely to be a term.</p> <p>Credit reference to any applicable case authority on the factors, e.g: Bannerman v White [1861], L'Estrange v Graucob [1934], Routledge v McKay [1954], Inntrepreneur Pub Co v East Crown Ltd [2000], Oscar Whell Ltd v Williams [1957] and Dick Bentley v Harold Smith Motors Ltd [1965].</p>	
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Question 3:	Identify what must be established in order to mount a successful claim in negligence.
Total Marks Attainable	10
Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	
Indicative Content	Marks
<p>Candidates must explain what must be established in order to mount a successful claim in negligence, e.g:</p> <p>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.</p> <p>Credit reference to any applicable case authority e.g: Donoghue v Stevenson [1932]</p>	<p>Up to 3 marks</p> <p>A pass must include the demonstration that the candidate understands what is required to</p>

	establish a negligence claim
<p>Credit a discussion on what it means to owe a duty of care, e.g:</p> <p>Establishing a duty is owed: The Caparo test only needs applying in new and novel cases and the courts should generally establish a duty by looking at existing duty situations and ones with clear analogy.</p> <p>Credit should be given where reference is made to cases on duty, e.g: Donoghue v Stevenson [1932], Caparo Industries v Dickman [1990] and Robinson v Chief Constable of West Yorkshire Police [2018].</p> <p>Foreseeability: Harm must be a "reasonably foreseeable" result of the defendant's conduct.</p> <p>Credit should be given where reference is made to cases on foreseeability, e.g: Fardon v Harcourt Rivington [1932], Smith and Others v Littlewoods Organisation Ltd [1987].</p> <p>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.</p> <p>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].</p> <p>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.</p> <p>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 Chief Constable of South Yorkshire [1992], White v Chief Constable of South Yorkshire Police [1999].</p>	<p>Up to 4 marks</p> <p>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</p>
<p>Candidates may have identified how the courts will determine whether a defendant has breached their duty of care, e.g:</p> <p>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.</p> <p>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.</p>	<p>Up to 4 marks</p> <p>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</p>

<p>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].</p> <p>The factual standard: Is determined by the use of various factors to determine whether the defendant's actual behaviour reached the required standard.</p> <p>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.</p> <p>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.</p> <p>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].</p> <p>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.</p> <p>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], Luxmoore -May v Messenger May Baverstock (a firm) [1990], Shakoor v Situ [2000].</p>	<p>authority to the question posed</p>
<p>Candidates should be credited for a discussion on causation, e.g:</p> <p>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?</p> <p>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].</p>	<p>Up to 4 marks</p> <p>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</p>

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]

Question 4: Identify how the courts will determine whether a defendant has breached their duty of care.

Total Marks Attainable

Fail = 0-7.4
 Pass = 7.5+
 Merit = 9+
 Distinction = 10.5+

10

Indicative Content

Marks

Required: Candidates must identify the relevance of the standard of care and how courts will determine whether a defendant has breached their duty of care, e.g:

Up to 4 marks

<p>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.</p> <p>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.</p> <p>The factual standard: Is determined by the use of various factors to determine whether the defendant's actual behaviour reached the required standard.</p> <p>Reasonable foreseeability: The courts will seek to work out what the defendant ought to have foreseen. This means that cases which involve highly unlikely outcomes are not likely to be successful.</p>	
<p>Credit any attempt by candidates to explain the general standard of care in more depth with reference to authority, e.g:</p> <p>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. In identifying the 'reasonable man', some guidance has been provided by describing him as 'the man in the street' or 'the man on the Clapham Omnibus'. The reasonable man should be considered as acting averagely meaning that defendants are not asked to act perfectly but are held to an average standard. Knowledge of medical conditions may be taken into account. If some defendants were held to be negligent then this would involve blaming them for accidents they had no reasonable way of preventing. However, where a defendant was aware of the risk their medical condition presented then liability may follow.</p> <p>Credit reference to any applicable case authority on the general standard, e.g: Blyth v Birmingham Waterworks [1856], Nettleship v Weston [1971], Hall v Brooklands Auto-Racing Club [1933], Roberts v Ramsbottom [1980] and Mansfield v Weetabix [1998].</p>	Up to 3 marks
<p>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:</p> <p>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. The relevant standard of care in situations where somebody is acting as a professional is not that of the reasonable person. Instead, professionals are judged against the standards of their profession. In the case of the medical profession, the test is whether there was a responsible body of</p>	Up to 3 marks

<p>medical opinion which supported the treating doctor's actions and whether that opinion had a logical basis.</p> <p>Credit reference to any applicable case authority on the general standard, e.g: Phillips v Whiteley [1938], Wells v Cooper [1958], Bolam v Friern Hospital Management Committee [1957], Bolitho v City & Hackney Health Authority [1997], Luxmoore -May v Messenger May Baverstock (a firm) [1990] and Shakoor v Situ [2000].</p>	
<p>Credit any attempt by candidates to describe the factual standard with reference to the factors that will be considered, e.g:</p> <p>Use of the factual standard: There are often novel situations which cause problems with simply referencing the reasonable person due to their unique facts or circumstances. The courts have therefore created a framework which deals with the factors surrounding a given incidence of negligence.</p> <p>These factors include: There are two ways the magnitude of risk affects the relevant standard of care. The first of these is likelihood of risk, and the second is the seriousness of the risk involved. The courts will also take into account the cost of precaution when considering the applicable standard of care. Finally, the courts will apply a lesser standard of care to socially valuable activities. So, the factors the court will consider are 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.</p> <p>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.</p> <p>Credit reference to any applicable case authority on the factual standard, e.g: Bolton v Stone [1951], Paris v Stepney Borough Council [1951], Latimer v AEC [1953] and Watt v Hertfordshire County Council [1954].</p>	Up to 4 marks

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

<p>Question 5:</p>	<p>You work as a Paralegal in the Civil Litigation department at Donoghue and Dove LLP in Cardiff. Your firm has been approached by a new client, Blake Thompson, who is seeking advice in relation to a potential claim for breach of contract.</p> <p>Blake is an interior designer. He has engaged Glassers Ltd as a stained</p>
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glass window maker to replace all the glass in his latest project, the refurbishment of a church in Blaenau Ffestiniog. The total cost of the work has been quoted as being £15,000 and the work was due to be completed by the end of August.

The refurbishment has caused a lot of media interest and Blake has taken advantage of this by arranging photo shoots. He has also organised to hire out the vacant church to a film company for the production of a costume drama. Work on the film was scheduled to begin on the 12 September.

At the start of August, Glassers Ltd informed Blake that they had fallen behind schedule and would be unable to complete on time. Glassers Ltd did not complete all of the work on time and on the 31st August Glassers Ltd began to work on a different project. Blake paid the company £8,000 for work done to date and said to Glassers Ltd “This is in full and final settlement of any money owed”.

Glassers Ltd are now trying to recover the additional £7,000 from Blake. You have been asked to advise Blake whether they can still recover that money.

Write the body of a letter to Blake advising whether Glassers Ltd can recover the additional £7,000.

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: what the courts will look for to determine if there is a contract, a definition of consideration, the rules on consideration, an exploration of the rules on existing contractual duties and part payment of a debt. 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 how the law applies to the facts of the scenario) with very good application and some analysis having regard to the facts. Candidates are likely to observe that IN THIS SCENARIO that there may be evidence that Glassers Ltd received the practical benefit of not having to return to do the work and/or the ability to start further work. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a Pass and Merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. 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 should set out what the courts would look for under the classical theory to identify if there is a contract, e.g:

Up to 2 Marks

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.

To pass candidates are required to demonstrate knowledge of what is required for there is be a contract

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.

Required: Candidates should set out what is meant by consideration and the rules on consideration, e.g:

Up to 4 Marks

Consideration is concerned with: The bargain of the contract. A contract is based on an exchange of promises. Each party must be both a promisor and a promisee.

Consideration may be defined as: Consisting either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other. Consideration is a mutual exchange under which one party must suffer a detriment or receive a benefit as a result of what is promised or given under the contract. This definition requires that one party suffers a detriment or the other party receives a benefit as a result of what is promised under the contract. In most cases there will be both a benefit and a detriment, but strictly only one of these is required to enforce the agreement.

Candidates should set out the rules on consideration, e.g:

Up to 8 Marks

Consideration Must be Sufficient but Need not be Adequate:
 Consideration must be something of value in the eyes of the law. Excludes promises of love and affection. A one sided promise which is not supported by consideration is a gift. The law does not enforce gifts unless they are made by deed. Sufficient consideration must be provided in order for the courts to enforce the agreement. Consideration is sufficient if it is legally recognisable as consideration has been provided. Provided the courts are able to identify some consideration in some shape or form this will be the justification for why the courts will hold the parties to their agreement. The courts are not concerned with the adequacy of consideration i.e

whether that which has been provided relates to the value of that which is being contracted for.

Credit reference to any applicable case authority, e.g: Thomas v Thomas (1842), Chappell v Nestle (1959), Ward v Byham (1956), White v Bluett (1853)

Consideration Must Move from the Promisee: Consideration must move from the promisee. If a person other than the promisee is to provide the consideration, the promisee cannot enforce the agreement.

Credit reference to any applicable case authority, e.g: Tweddle v Atkinson (1861)

Past Consideration: The general rule is that past consideration is no consideration. Consideration must be provided at the time the contract is formed, or at some time in the future, but not before the contract is formed.

The Requested Performance Exception: Past consideration may be valid where it was proceeded by a request. However it must meet three requirements. The three criteria are as follows: 1. The consideration which is 'past' would have operated as valid consideration if the act was done at the promisor's request. 2. There was an understanding there would be the conferment of some kind of reward, payment or benefit for the act. (This requirement is fairly simple and just requires an examination of whether the consideration would normally be valid (is there an economic value, etc). 3. The consideration would have been valid had it been promised in advance of the contract.

Credit reference to any applicable case authority, e.g: Re McArdle (1951), Lampleigh v Braithwaite (1615), Pao On v Lau Yiu Long (1980) and Re Casey's Patents (1892)

Performance of Existing Duties: Generally, performance of an existing duty will be insufficient as consideration. An existing public duty will not amount to valid consideration. Where a party has a public duty to act, this cannot be used as consideration for a new promise. An existing contractual duty will not amount to valid consideration. Performance of an existing contractual duty owed to the same promisor may be valid consideration if the promisor receives a "practical benefit" (or the avoidance of a disbenefit).

Credit reference to any applicable case authority, e.g: Collins v Godefrey (1831), Stilk v Myrick (1809) and Williams v Roffey Bros. & Nicholls (Contractors) Ltd [1991].

Candidates should discuss part payment of a debt, e.g:

Up to 3 Marks

<p>The common law rule that part-payment is not good consideration to support a promise to discharge a debt: Part-payment of a debt is not good consideration as the debtor is doing no more than the contract already demands of him. Can operate harshly against the debtor.</p> <p>The exceptions: Part-payment is insufficient as consideration, but if you provide something <i>in addition</i> to what was originally contracted for (you exceed the terms of your existing duty) then this could amount to sufficient consideration to support the promise to discharge the debt. Something of little value promised in exchange for the discharge of a debt could be valid consideration. Payment in a different form or at a different time could amount to valid consideration.</p> <p>Credit reference to any relevant authority, e.g: Pinnel's Case [1602], Foakes v Beer [1883–84], D&C Builders Ltd v Rees [1966] and MWB v Rock Advertising [2018].</p>	
<p>Candidates should discuss discharge of contract, e.g:</p> <p>Discharge of Contract: Obligations can be discharged under a contract and the contract brought to an end if both parties agree to do this. The parties will form a separate agreement to bring the contract to an end. This agreement must also be supported by consideration to be legally enforceable.</p> <p>A bilateral discharge: Is where both parties receive the benefit of the discharge.</p> <p>A unilateral discharge: Is where only one party (usually the promisee) receives the benefit of the discharge.</p> <p>Performance: When a party has performed his obligations he will be discharged from those obligations under the contract.</p> <p>Performance must be precise and exact: There is a rule that performance of obligations under a contract must be precise and exact. Only if the party fulfils the precise obligations under the contract will he be discharged from these obligations. If the party fails to meet his precise obligations under the contract he may be in breach of contract.</p> <p>Credit reference to any relevant authority, e.g: FW Moore & Co Ltd v Landauer & Co [1921] and Cutter v Powell [1795]</p> <p>Construction of the contract: When assessing the issue of performance under a contract, the courts will construe the contract to determine whether there is the need for a complete or a substantial performance in order for contractual obligations to be discharged.</p>	Up to 7 Marks

Severable obligations: Rather than treating the contract as one big chunk, it may be possible to divide the overall obligations into smaller obligations.

Partial or Substantial Performance: If the obligations under the contract have been substantially performed then the court may construe a failure to perform the outstanding obligations as giving rise to a breach of warranty. If there has only been a partial performance of the contract then the court may construe this as a breach of condition. The courts may construe the contract as requiring only a substantial performance to discharge obligations. This does not mean that a party will not be liable for failing to meet all the obligations under the contract, rather that the contract will be construed as entitling the innocent party to sue for damages in respect of those obligations left unperformed.

Credit reference to any relevant authority, e.g: Sumpter v Hedges [1898], Dakin & Co Ltd v Lee [1916] and Hoenig v Isaacs [1952]

Question 6:

You work as a Paralegal in the Civil Litigation department at an SRA regulated firm in Brighton. You have recently met with a new client, Jessie Turner, regarding her rights and remedies in relation to alleged misrepresentation.

Jessie recently accepted a job in Brighton as a doctor. She contacted Barry Tucker who owns a Victorian building in Brighton which is divided into flats. She went to view one of the flats in order to decide whether to rent it. During the viewing Jessie asked Barry about the condition of the building in general and more specifically about the state of the plumbing and wiring. Barry replied, "Well, I'm no expert but I can tell you that no previous occupant of the flat has had any problems." Reassured, and enchanted by the views of Beach from the flat's windows, Jessie entered into a two-year lease of the flat.

Two months after Jessie moved in a fire broke out in the flat. Jessie was able to extinguish the fire, but it destroyed a valuable painting Jessie had been given by her grandmother. The fire was caused by faulty wiring in the flat. Over the past two years similar fires had occurred in three other flats in the building.

Write the body of a letter of advice to Jessie advising her what misrepresentation is, the types of misrepresentation and whether in your view she has a claim in misrepresentation.

	Write the body of a letter to Miss Green advising what misrepresentation is, explain the types of misrepresentation and explain the remedies that may be available to Mr Bennett.	
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 concentrate on negligent and innocent misrepresentation) 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. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions.
<p>Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+</p>		
Indicative Content:		Marks
<p>Required: The definition of misrepresentation, e.g:</p> <p>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.</p> <p>There are three kinds of misrepresentation: Fraudulent, negligent and innocent.</p>		<p>Up to 2 Marks</p> <p>To pass candidates are required to demonstrate knowledge of what</p>

	misrepresentation is
<p>Credit a discussion on what a statement of fact is, e.g:</p> <p>Statement of Fact: The general rule is that a statement of opinion is not a fact and nor is an estimate. The position is different if the statement maker is in a position to know the true fact. If the statement is made with a reasonable belief and they have reasonable grounds to make this statement, it will amount to a statement of fact. Correspondingly, if the statement maker holds themselves out to have reasonable grounds to make a statement, when in fact this is not true, it will amount to a statement of fact for the purposes of proving misrepresentation.</p> <p>Credit reference to relevant case authority on statements of fact, e.g: Bisset v Wilkinson [1927], Esso Petroleum v Mardon [1976] and Smith v Land and House Property Corp [1884].</p> <p>Ascertaining whether a statement is false: This is not a question of whether the statement is true or false, the degree of falsity is a relevant consideration.</p> <p>Credit reference to relevant case authority on false statements, e.g: Avon Insurance plc v Swire Fraser Ltd [2000].</p>	Up to 3 Marks
<p>Credit any discussion on silence, e.g:</p> <p>Silence: Silence does not usually amount to misrepresentation however the word 'statement' has been broadly interpreted. It has been held that conduct can amount to a statement for the purpose of misrepresentation. A misleading half-truth will amount to a misrepresentation. A misleading half-truth is a true statement which is misleading due to all relevant information not being revealed. 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.</p> <p>Credit reference to relevant case authority on silence, e.g: Sykes v Taylor-Rose [2004], Curtis v Chemical Cleaning & Dyeing co Ltd [1951], Nottingham Patent Brick & Tile Co v Butler [1886] and With v O'Fianagan [1936].</p>	Up to 4 Marks
<p>Candidates should include a discussion on inducement and reliance e.g:</p> <p>Being Aware: There can be no inducement or reliance if the representee was unaware of the false statement. 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. If the representee is given the opportunity to check out the</p>	Up to 4 Marks

<p>statement but does not in fact check it out, they are still able to demonstrate reliance.</p> <p>Credit reference to relevant case authority on inducement and reliance, e.g: Horsfall v Thomas [1862], Attwood v Small [1838] and Redgrave v Hurd [1881].</p>	
<p>Credit any discussion on the types of misrepresentation and the remedies available, e.g:</p> <p>Fraudulent misrepresentation: Where a false representation has been made knowingly, or without belief in its truth, or recklessly as to its truth.</p> <p>Credit reference to relevant authority on fraudulent misrepresentation, e.g: Derry v Peek [1889], Doyle v Olby (Ironmongers) Ltd [1969].</p> <p>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.</p> <p>Burden of Proof: section 2(1) of the Misrepresentation Act 1967 effectively transfers the burden of proof to the defendant. The statute imposes an absolute obligation not to state facts which the representor cannot prove he had reasonable ground to believe.</p> <p>Credit reference to relevant authority on the burden of proof, e.g: Section 2(1) of the Misrepresentation Act 1967, Howard Marine and Dredging Co Ltd v A Ogden and Sons (Excavation) Ltd (1978)</p> <p>Remedies: The same (tortious) measure of damages will apply to both fraudulent and negligent misrepresentations. The award of rescission is subject to the court's discretion.</p> <p>Credit reference to relevant authority on the remedies for fraudulent and negligent, e.g: Royscot Trust Ltd v Rogerson [1991].</p> <p>Innocent misrepresentation: A representation that is neither fraudulent nor negligent. The courts may award damages in lieu of rescission. This decision is entirely at the courts' discretion. Damages will be on the contractual basis.</p> <p>Credit reference to relevant authority on innocent misrepresentation, e.g: Section 2(2) Misrepresentation Act 1967.</p>	<p>Up to 8 Marks</p> <p>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</p>
<p>Credit any discussion on the factors the court will consider when differentiating between a representation and a term, e.g:</p> <p>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</p>	<p>Up to 3 Marks</p>

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.

Credit a discussion of any other relevant case authority on the distinction between a term and a representation, e.g: Routledge v McKay [1954], Bannerman v White [1861], L'Estrange v Graucob [1934], Dick Bentley v Harold Smith Motors Ltd [1965]

Question 7:

You work for Timpson and Spinster Solicitors in Cheltenham. Mr Timpson is a Senior Partner at the firm, and he has approached you to do some work on the file of Duncan Bagshaw. Mr Bagshaw is a new client who recently witnessed, and was injured in, a road traffic accident.

Thomas and Margaret Little were riding home on a motorbike after drinking alcohol at a country pub. Margaret was the pillion passenger. They were involved in a collision with a van driven by Dave Armstrong. It is still unclear who was responsible for the accident. Both Thomas and Margaret were thrown in the air. They were both rushed to hospital. Thomas, whose crash helmet flew off because the chinstrap had not been fastened properly, suffered serious head injuries. Margaret injured her back. Dave suffered a broken arm and severe bruising. He had not been wearing a seatbelt and had been driving at a speed of five miles per hour above the legal limit.

Duncan Bagshaw is a man of nervous disposition. He witnessed the accident and helped out in the aftermath. Duncan suffered several gashes from flying debris and has since suffered from recurring horrific nightmares.

You have been asked to advise Duncan Bagshaw on any claims that may exist and, if so, against whom.

Total Marks Attainable

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

20

Fail	up to 9.9	An answer which deals with the basic requirements of the question, but in dealing with those requirements only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts.
Pass	10+	An answer which addresses MOST of the following points: Candidates must provide an explanation of what must be established for a claim in negligence, identify the relevant law on reasonable foresight, identify the relevant law on reasonable proximity, explain the difficulties with the third strand of the Caparo test and distinguish between primary and secondary victims. 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.
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
<p>Required: Candidates must explain what must be established in order to mount a successful claim in negligence, e.g:</p> <p>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.</p> <p>Establishing a duty is owed: The Caparo test only needs applying in new and novel cases and the courts should generally establish a duty by looking at existing duty situations and ones with clear analogy.</p> <p>Credit should be given where reference is made to cases on duty, e.g: Donoghue v Stevenson [1932], Caparo Industries v Dickman [1990] and Robinson v Chief Constable of West Yorkshire Police [2018].</p>		Up to 3 Marks
<p>Candidates may have identified how the courts will determine whether a defendant has breached their duty of care, e.g:</p> <p>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.</p> <p>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.</p> <p>Credit should be given where reference is made to cases on breach and general standard, e.g: Blyth v Birmingham Waterworks [1856], Roberts v</p>		Up to 4 Marks

<p>Ramsbottom [1980], Mansfield v Weetabix [1998], Nettleship v Weston [1971].</p> <p>The factual standard: Is determined by the use of various factors to determine whether the defendant's actual behaviour reached the required standard.</p> <p>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.</p> <p>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.</p> <p>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].</p> <p>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.</p> <p>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], Luxmoore -May v Messenger May Baverstock (a firm) [1990], Shakoor v Situ [2000].</p>	
<p>Candidates must explain the tests of causation, e.g:</p> <p>Causation: There are two elements to establishing causation in respect of tort claims, with the claimant required to demonstrate that the defendant caused the damage in fact and in law. The claimant has the burden of establishing each.</p> <p>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?</p> <p>Credit reference to any applicable case authority on the but for test, e.g: Cork v Kirby MacLean Ltd [1952] and Barnett v Chelsea & Kensington Hospital Management Committee [1969].</p> <p>Causation in law: The damage should, as a matter of law, be recoverable from the defendant. Requires that there was no intervening act and that the damage is not too remote from the negligent act/omission.</p>	Up to 2 marks

<p>Candidates should discuss claims for psychiatric harm, e.g:</p> <p>Psychiatric harm: As a general rule, sadness, grief or general distress will not give rise to a valid claim. To claim for psychiatric injury the law states that the injury must manifest in a medically recognised psychiatric condition. Post-Traumatic Stress Disorder, Pathological Grief and Personality Disorder are all examples of psychiatric harm that may give rise to a claim in negligence.</p> <p>Credit should be given where reference is made to cases on a recognised psychiatric injury, e.g: Wilkinson v Downtown [1897], Hinz v Berry [1970], Leach v Chief Constable of Gloucestershire Constabulary [1999], Rothwell v Chemical and Insulating Co [2007], Leach v Chief Constable of Gloucestershire Constabulary [1999], Vernon v Bosley (No. 1) [1997] and Chadwick v British Railways Board [1967].</p>	<p>Up to 4 Marks</p>
<p>Candidates should discuss the need for the shock to be caused by a sudden event, e.g:</p> <p>Sudden event: As a means of controlling the claims made under the heading of psychiatric injury, the courts have also stipulated that such injury must now be caused by a sudden event. The idea of 'suddenness' should not be taken to mean 'immediate'.</p> <p>Credit should be given where reference is made to authority cited on a sudden event, e.g: Alcock v Chief Constable of South Yorkshire [1992] and Walters v North Glamorgan NHS Trust [2002].</p>	<p>Up to 2 Marks</p>
<p>Candidates may have discussed the third strand of Caparo on reasonable foresight and identified the relevant law on reasonable proximity, e.g:</p> <p>This requirement of foreseeability: Requires consideration of whether it is foreseeable that the defendant's carelessness could cause damage to the claimant.</p> <p>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]</p> <p>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.</p> <p>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]</p>	<p>Up to 4 Marks</p>

<p>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.</p> <p>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.</p> <p>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].</p>	
<p>Candidates should have explained the distinction between primary and secondary victims, e.g:</p> <p>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.</p> <p>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'.</p> <p>A secondary victim: For a claimant to have a viable claim as a secondary victim, they must satisfy a number of criteria. There must be a close emotional link between the traumatic event and the claimant's psychiatric injury, i.e be closely related in some way to a primary victim. The secondary victim must be both close in terms of 'spatial and temporal proximity', i.e same time, same place. The secondary victim must see or hear the immediate aftermath of the instigating event.</p> <p>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], Chadwick v British Railways Board [1967], McFarlane v EE Caledonia Ltd [1995] and McLoughlin v O'Brian [1983].</p>	<p>Up to 3 marks</p> <p>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.</p>
<p>Candidates should be credited if they discussed any relevant defence, e.g:</p> <p>Contributory negligence: Contributory Negligence is conduct by the Claimant which contributes to his/her own harm.</p> <p>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.</p>	<p>Up to 2 marks</p>

Credit should be given where reference is made to cases on Contributory Negligence, e.g: Fitzgerald v Lane [1989], Anderson v Newham College [2002], Belka v Prosperini [2011], Davies v Swan Motors Co [1949] and O'Connell v Jackson [1972].

Question 8:

You work for Scott and Tanner LLP in Blackpool. You are a Paralegal in the Civil Litigation department and your firm is acting for Mr Gary Fellows.

In January Gary spent the evening at the cinema with his friend Boris. Boris offered Gary a lift home in his car. Driving home Boris swerved to avoid a pheasant and he crashed the car into a tree. The paramedics who attended the scene believed Gary had broken his arm, but otherwise only had minor cuts and bruises. He was taken to hospital to be checked by a doctor.

At the hospital Gary was seen by Dr Tumble, the doctor on duty. Dr Tumble disagreed with the paramedics' opinion and, deciding Gary's arm was not broken but only sprained, put it in a sling without setting it in a cast. Dr Tumble was very busy that evening, so she decided not to bother sending Gary for an X-ray first. Gary returned to hospital the following month with pain in his arm. It transpired that his arm was in fact broken and, because it was not set in the proper cast, the bones had fused together wrongly, resulting in a permanent disability. An expert witness says that there was a chance this might have happened anyway, even if Dr Tumble had not been negligent. Gary must have an operation to re-set the bones, but this will not improve his arm to the condition it was in before the accident.

Write the body of a letter of advice to Gary advising whether he has a claim against Boris and the Doctor.

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.
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. 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
<p>Required: Candidates must outline what is required for a successful action in negligence, e.g:</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>The factual standard: Is determined by the use of various factors to determine whether the defendant's actual behaviour reached the required standard.</p> <p>Reasonable foreseeability: The courts will seek to work out what the defendant ought to have foreseen. This means that cases which involve highly unlikely outcomes are not likely to be successful.</p>	<p>Up to 4 Marks</p> <p>Better responses are likely to have contextualised there explanation of causation by explaining it is one of the elements to prove negligence</p>
<p>Candidates must explain the tests of causation, e.g:</p> <p>Causation: There are two elements to establishing causation in respect of tort claims, with the claimant required to demonstrate that the</p>	<p>Up to 7 Marks</p>

<p>defendant caused the damage in fact and in law. The claimant has the burden of establishing each.</p> <p>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?</p> <p>Credit reference to any applicable case authority on the but for test, e.g: Cork v Kirby MacLean Ltd [1952] and Barnett v Chelsea & Kensington Hospital Management Committee [1969].</p> <p>Causation in law: The damage should, as a matter of law, be recoverable from the defendant. Requires that there was no intervening act and that the damage is not too remote from the negligent act/omission.</p>	
<p>Candidates should be credited for a discussion on causation in fact, e.g:</p> <p>Frustration of the but for test: There will often be scenarios in which there are multiple causes of the claimant's harm. There may be concurrent causes (causes which happen at the same time) or successive causes (causes which take place one after the other).</p> <p>Concurrent Multiple Causes: Where two or more causes operate concurrently it may be factually impossible to determine which one was the cause.</p> <p>General Rule: Where there exists more than one possible cause of an injury or harm, the claimant does not have to show that the defendant's actions were the sole cause of the injury suffered. It must simply be shown that the defendant's actions materially contributed to the harm. It is enough to simply show that a defendant has made a substantial contribution to a claimant's injuries. However, the contribution must be substantial.</p> <p>Credit reference to any applicable case authority on material contribution, e.g: Bonnington Castings Ltd v Wardlaw [1956], Fitzgerald v Lane [1989] and Wilsher v Essex Area Health Authority [1988].</p> <p>Exposure to risk: There are cases where claimants are unable to show that their harm has occurred as a result of the defendant's conduct but they are able to show that their employer has contributed materially to the risk of an injury occurring.</p> <p>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. This principle has become important where cases involve multiple illegitimate exposures to a risk. Only a small contribution towards the increase in risk is necessary to establish causation, so long as that contribution is 'material'.</p>	Up to 7 Marks

<p>Credit reference to any applicable case authority on material increase in risk, e.g: McGhee v NCB [1973], Fairchild v Glenhaven Funeral Services [2002] and Carder v Secretary of State for Health [2016].</p> <p>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.</p> <p>Successive Multiple causes: Where there are two causes occurring in succession it may be possible to identify the factual cause of the damage.</p> <p>Credit reference to any applicable case authority on successive multiple causes, e.g: Baker v Willoughby [1970] and Jobling v Associated Dairies [1982].</p>	
<p>Candidates should be credited for a discussion on intervening acts, e.g:</p> <p>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.</p> <p>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.</p> <p>Credit reference to any applicable case authority on the claimants own act, e.g: Sayers v Harlow Urban District Council [1958] and McKew v Holland [1969].</p> <p>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.</p> <p>Credit reference to any applicable case authority on acts of third parties, e.g: Robinson v Post Office [1974], Knightly v Johns [1982], Barrett v Ministry of Defence [1995] and Webb v Barclays Bank plc and Portsmouth Hospitals NHS Trust [2001].</p>	Up to 3 Marks
<p>Candidates should be credited for a discussion on causation in law and foreseeability, e.g:</p> <p>Foreseeability: In order to be recoverable, the kind of harm suffered must be reasonably foreseeable. Whilst the nature of the harm caused must be foreseeable, the exact series of events leading up to it need not be. As long as a type of damage is foreseeable, then defendants</p>	Up to 3 Marks

will not be able to argue that they did not foresee the extent of damage caused.

Credit reference to any applicable case authority on foreseeability, e.g: Wagon Mound (No 1) [1961], Hughes v Lord Advocate [1963] and Vacwell Engineering Co v BDH Chemicals Ltd. [1971].

Thin skull rule: Take your victim as you find them. This rule applies not only to claimants themselves or their property, but also to the environment surrounding their property.

Credit reference to any applicable case authority on the thin skull rule, e.g: Smith v Leech Brain [1962].