Multiple Choice

1. Which of the following is a correct statement of the law?
   In the tort of negligence, if a claimant is partly responsible for his/her own injuries, then:
   A. No compensation can be recovered from the defendant
   B. The defendant is fully liable if he/she was mainly responsible for the injuries
   C. If the defendant was negligent, he/she remains fully liable for all the injuries caused
   D. The compensation will be reduced to take account of the claimant’s share of the responsibility

   ANSWER: D

2. In the tort of negligence, damages are payable in respect of:
   A. Reasonably foreseeable losses
   B. Losses which are a direct consequence of the breach of duty
   C. All the losses caused by the breach of duty
   D. Losses which are within the contemplation of the parties

   ANSWER: A

3. Which ONE of the following is correct?
   A. Professional advisers cannot be liable in respect of negligent advice in the tort of negligence, but may be liable for breach of contract
   B. Professional advisers cannot be liable for breach of contract in respect of negligent advice, but may be liable in the tort of negligence
   C. Professional advisers may be liable in respect of negligent advice in either contract or tort
   D. Professional advisers cannot be liable in respect of negligent advice in either contract or tort

   ANSWER: C

Typical Exam Questions


   ANSWER:
In the tort of negligence, even where a factual causal link between the commission of the tort and the damage suffered by the claimant is established, it is possible for a respondent to raise the issue of remoteness of damage in law. To put it another way, the breach of duty must be a cause of the damage in law as well as in fact. The test of remoteness in law was laid down in, The Wagon Mound (1961), in fairness to respondents, it was held that a respondent will only be liable for damage of the kind or type reasonably foreseeable in the circumstances. Thus, e.g. if only property damage was reasonably foreseeable in a particular set of circumstances there would be no liability for personal injury suffered in that situation. See, e.g., Tremain v Pike; Bradford v Robinson Rentals; Stewart v West African Air Terminals Ltd.

There is no requirement under this rule that the damage must be sustained in a precisely foreseeable manner. See, e.g., Hughes v Lord Advocate, but see Doughty v Turner Manufacturing; Jolley v Sutton LBC. Neither is it necessary that the precise extent of the damage be reasonably foreseeable, e.g., Vacwell Engineering v BDH Chemicals. Furthermore, the so-called ‘egg-shell skull’ rule (or the ‘thin skull’ rule) constitutes an exception to the Wagon Mound Rule. This means that a respondent can be held reasonable for damage aggravated by the physical or mental peculiarities of the claimant. Eg, Smith v Leech Brain; Dulieu v White; Brice v Brown; Robinson v The Post Office; Page Smith.

PAST EXAMINER’S COMMENTS
This was not a popular question. A lot of candidates were ‘lost’ here, with many of them showing only the flimsiest of knowledge, in some cases confusing remoteness in contract with that in tort.

This was a routine question requiring an explanation of the ‘reasonable foresight’ test of ‘kind’ or ‘type’ of damage, as laid down in ‘The Wagon Mound’ and later cases.

5. (a) What is meant by res ipsa loquitur in the law of tort?

ANSWER:
The general rule is that if the claimant is to succeed in a negligence action he must prove that the respondent has broken his duty of care. An exception occurs when the maxim res ipsa loquitur (the thing speaks for itself) applies. In Scott v London and St Catherine Docks (1865) it was stated that the maxim applies where ‘the thing is shown to be under the management of the respondent, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care’. In such cases there is prima facie evidence of a breach of duty. The burden of proof is then shifted to the respondent who must prove that he did show reasonable care. The existence of res ipsa loquitur does not therefore guarantee success for the claimant, it is merely a rule
of evidence. For example in *WARD v TESCO STORES (1976)* an accident occurred due to a spillage of yoghurt on a shop floor. It was held that the facts placed a burden of proof upon the shopowners to show that it did not occur because of lack of care on their part. They were unable to do this and the claimant therefore succeeded.

(b) Harry is driving his car when suddenly the brakes fail. He is unable to stop and a crashes into a motorcycle ridden by Susan damaging the motorcycle and injuring Susan. Advise Harry as to his civil liability.

**ANSWER:**

Harry should consider the possibility of a negligence claim brought against him by Susan. Susan would have to show that Harry owed her a duty of care. She would be able to do this since a road user owes a duty to fellow road users. Susan would also be able to show that she had suffered damage. Susan’s difficulty would be in proving that Harry has broken the duty of care since she is in no position to know why the car crashed. The facts, however, infer negligence. It can be seen that the passage quoted in a. above will apply. ‘Res ipsa loquitur’ will therefore shift the burden of proof from Susan to Harry. Thus if he is to avoid liability Harry must show that he has not broken his duty of care. He will be able to do this if he can show that he exercised the care and skill that a reasonable car driver would have exercised. This is an objective test. It therefore may not be sufficient if Harry merely proves that he has done his best.

It is clearly not possible to give any conclusion on the facts given. There are many possible explanations for the brakes failure, for example a negligent service at a local garage. Harry will, however, be presumed by the court to be negligent unless he can provide an alternative explanation indicating that he was not at fault.

6.

(a) Define public nuisance and distinguish it from private nuisance.

**ANSWER:**

A public nuisance is an unlawful act which endangers the health, safety, or comfort of the public (or some section of it), or obstructs the exercise of a common right. Examples are the sale of contaminated food, or obstruction of the highway. Principles of ‘give and take’ are relevant to the definition of nuisance. Thus, for example, a temporary highway obstruction of moderate size may be permissible. A private nuisance is an unlawful interference with the use or enjoyment of another person’s land. It may consist of actual injury to property as where fumes kill shrubs, or it may be an interference with health or comfort, for example noise, smoke, or smells.

Public nuisance differs from private nuisance in that; (i) it is a crime as well as a civil wrong; (ii) an isolated act may be a public nuisance; (iii) it need not involve interference with the use or enjoyment of land; (iv) several people must be affected; (v) a right to commit a public
nuisance cannot be acquired by long use; and (vi) it is an unlawful activity, whereas private nuisance is only an unlawful interference, the activity itself normally being lawful.

(b) The noise and vibrations from the Acme Plastics Ltd’s factory annoy all the residents of Park Road. One of the residents, Mr Evans, is particularly annoyed because on one occasions a piece of hot plastic waste material from one of the factory chimneys fell on to his house causing damage to the roof. Advise the residents and Mr Evans.

ANSWER:
Both noise and vibrations potentially fall within the definition of private nuisance stated above. However, it does not follow that such harm always constitutes a nuisance, regard must be had to the principle of ‘give and take’ between neighbours. It may be relevant to consider for example how far the act complained of is excessive, its duration and whether the defendant has shown only lack of care. For example in **ANDRAE v SELFRIDGE (1938)** a hotel owner recovered damages from the defendant who was demolishing the adjoining premises. Although building and demolition do not usually constitute a nuisance, since they are socially desirable, if the amount of noise and dust created is unnecessarily great, a nuisance will be committed. It thus appears that the residents will have a good chance of success if they sue A.P. Ltd for private nuisance. They should claim an injunction to prevent the factory from operating until the noise and vibrations have been prevented, and damages for any loss suffered.

In respect of the damage to his house Mr Evans cannot sue for private nuisance since it was an isolated act which caused the damage. He should sue A.P. Ltd for negligence. He would be able to show that he is owed a duty of care, and that he has suffered damage. He would not need to show that the company had broken their duty of care since res ipsa loquitur would apply and shift the burden of proof to A.P. Ltd who would have to show that the accident did not occur due to their lack of care. It seems probable that they would not be able to show this. Mr Evans is also therefore likely to succeed.

7. Advise Thomas whether an action for negligence is likely to succeed against each of the parties in the following cases, explaining the relevant principles of law involved.

(a) Albert, a practising accountant, upon whose advice Thomas made an investment which proved to be worthless.

ANSWER:
**CAPARO INDUSTRIES v DICKMAN (1990)** is the leading case concerning negligent statements by accountants causing economic loss. The House of Lords (now the Supreme Court) stated that the criteria for the imposition of a duty of care were foreseeability of damage, proximity of relationship, and the reasonableness or otherwise of imposing a duty. To establish proximity all of the following factors will typically need to be present.
(i) The advice was required for a purpose made known to the adviser when the advice was given.

(ii) The adviser knew that his advice would be communicated to the recipient in order that it should be used for this purpose.

(iii) It was known that the advice was likely to be acted on without independent inquiry.

(iv) It was acted on to the recipient’s detriment.

To prove that the loss was foreseeable Thomas would need to show that Albert’s advice was typical of the advice given by a practising accountant. He would have some difficulty doing this, since it is not normally within the province of an accountant to give investment advice, particularly since such advisers need to be authorised under the **FINANCIAL SERVICES AND MARKETS ACT 2000**. With regard to proximity Thomas would need to show i. to iv. above. Clearly he would not be able to do this if Albert had made the statements generally or to other persons or for other purposes.

Even if it could be established that a duty was owed, the duty would only be broken if Albert fell below the standard that could be expected of a reasonably competent member of the accountancy profession.

On the facts given it is not possible to come to a firm conclusion, although it seems unlikely that Thomas could succeed.

(b) Bernard, a barrister, who represented Thomas in a recent case and who conducted the case badly.

**ANSWER:**

In **RONDEL v WORSLEY (1969)** the claimant, who had been convicted of causing grievous bodily harm, sued his barrister, claiming that he would not have been convicted if his case had been conducted properly. It was held that no action could be brought against the barrister. The main reason for the decision is that an action against the barrister would amount to a re-trial of the original case, and this would not be in the public interest.

However in **HALL v SIMONS (2000)** the House of Lords (now the Supreme Court) ruled that a barrister should no longer have immunity. It was suggested that someone convicted of a criminal offence would first have to exhaust normal judicial process before considering a negligence action against his barrister. Therefore Thomas should lodge an appeal with the Court of Appeal (Criminal Division).

(c) Charles, a car driver, whose car skidded and crossed on to the wrong side of the road where it collided with Thomas’s car.

**ANSWER:**

Charles will be liable to Thomas if he

(i) Owed him a duty of care,
Broke the duty of care, and

Thomas suffered damage, which was not too remote, as a result of the breach of duty.

i. and iii. above are present. The problem will be to establish a breach of duty by Charles. If he is to do this Thomas will have to show that Charles did not act as a reasonable car driver. It seems likely that he will be aided by the rule of evidence known as ‘res ipsa loquitur’ (the thing speaks for itself). This applies where the ‘thing’ is under the control of the defendant and the accident is such as in the ordinary course of events does not occur if proper care is taken. If the maxim applies the burden of proof is shifted to the defendant who must show that he did exercise proper care. For example in _RICHLEY v FAULL (1965)_ where the facts were similar to those stated in the question res ipsa loquitur was held to apply, and since the defendant could not give a satisfactory explanation he was held to be liable. This does not necessarily mean that Charles will be liable, there may be many satisfactory explanations for the skid which are consistent with Charles acting as a reasonable driver, for example the car may have been serviced incorrectly, or Charles may have swerved and skidded to avoid a pedestrian.

(d) David, a demolition worker, who carelessly injured a fellow worker thereby causing Thomas, who was passing by at the time to suffer nervous shock.

ANSWER:
Generally a claimant will be entitled to compensation for damage suffered if the damage is the reasonably foreseeable result of the negligent act. However, even though nervous shock is often reasonably foreseeable, the courts are reluctant to apply the general principle of foreseeability to such cases. There are two reasons for this, firstly, such injury would be far more easy to fake than physical injury, secondly, it would vastly increase the potential claimants in a particular case, putting pressure on the legal system and causing substantial increases in insurance premiums. Damages for nervous shock are therefore usually limited to situations where the plaintiff actually witnesses the death or serious injury of a close relative (_ALCOCK v CHIEF CONSTABLE OF WEST YORKSHIRE (1991)_). Furthermore the shock must be in the nature of a psychiatric illness, mere grief and sorrow do not entitle the claimant to damages. It is therefore clear that Thomas will not be able to sue David.

8. (a) What is the distinction between libel and slander, and why is it important?

ANSWER:
Libel and slander are the two torts that comprise defamation. A defamatory statement is a false statement that tends to injure the claimant’s reputation or causes him to be shunned by ordinary members of society. Libel is defamation in a permanent form or a statement made for general reception. It includes writing, pictures and waxworks. Radio, television and
theatrical performances are libel by virtue of statute (DEFAMATION ACT 1952 and THEATRES ACT 1968). Slander is a defamatory statement that lacks permanence, for example words or gestures. The distinction is important for two reasons. Firstly, libel is a crime whereas slander is not. Secondly, libel is only actionable per se (i.e. without the need to prove loss). Slander is only actionable per se in the following cases:

(i) If it imputes a crime punishable by imprisonment.
(ii) If it imputes certain diseases e.g. AIDS.
(iii) If it imputes unchastity or adultery in a woman (but not a man).
(iv) If it calculated to damage the claimant in any trade, office or profession held or carried on by him.

(b) Mike, a radio journalist, recorded a private interview on his tape recorder with one Quip, a prominent politician, in which Quip accused Red, a political opponent, of being a traitor to his country and that he had ‘sold out to the Russians’. Is this statement defamatory, and if so, is it libel or slander? Would your answer be the same if Mike broadcast the interview from the radio station for which he works?

ANSWER:
If Quip is to succeed in a defamation action he must prove:
(i) That the statement is defamatory i.e. it is false and would tend to lower the claimant in the estimation of right thinking members of society or make them shun or avoid that person.
(ii) That the statement refers to him.
(iii) That the statement was published i.e. communicated to at least one person other than him.

In this case the words (if taken literally) are clearly defamatory unless Red has actually sold secrets to the Russians. Quip’s defence would be that such language is commonplace in political debate and that ‘sold out’ refers to a state of mind rather than acceptance of money, consequently Red’s reputation would not suffer. However, it is suggested that this defence would not succeed. Concerning classification as libel or slander, tape recordings present a problem since there is no case on them, however, it is more likely to be libel and this would certainly be the case if the tape were broadcast.

9.
(a) In what circumstances is an employer liable for the wrongful acts of his employees?

ANSWER:
Vicarious liability means liability for the torts of others, and it arises because of a relationship between the parties. The relationship may be either employer/independent contractor, or employer/employee (master/servant). A parent is not vicariously liable for his child’s torts.
The general rule is that the employer is liable for the torts of his servant. A person is a servant if the employer retains the right to control not only the work he does, but also the way in which he does it. This classic test is often unsuitable for professional servants such as doctors. Here it may be necessary to consider such criteria as payment of salaries and the power of dismissal. If the master is to be vicariously liable, the servant’s tort must be committed within the course of his employment. – The tortious act must be a wrongful way of going what the employee is employed to do. It may be negligent, fraudulent, or even forbidden provided it is within the scope of his employment. In Rose v Plent (1976), a notice at a milk depot, addressed to the milkmen stated,

‘Children must not in any circumstances be employed by you in the performance of your duties’.

Contrary to this instruction the defendant employed a small boy who was later injured due to the defendant’s negligent driving. Since the boy was the means by which the defendant did his job the employers were held liable despite their clear instruction that boys should not be employed by milkmen.

In contrast in Beard v London General Omnibus Co (1900), a bus conductor attempted to turn a bus around at the end of its route and in doing so caused an accident. His employers were not liable since he was employed only to collect fares, and not to drive buses.

Where the master is vicariously liable, the servant is generally also liable, but if a blameless master is held vicariously liable a term is implied in the servant’s contract that he will indemnify the master – Lister v Romford Ice (1957).

(b) Eric, an accountant, is sent by his employer to audit the accounts of a client. Eric’s instructions prohibit him from giving any advice on the investment of surplus funds. However, he does give such advice carelessly and, in acting upon it, the client suffers loss. To what extent is the employer liable for this loss?

**ANSWER:**

If the client is to be successful against Eric’s employer he must show

(i) That Eric was negligent; and
(ii) That Eric was acting within the scope of his employment

To show negligence the client must prove

(a) That Eric owes him a duty of care;
(b) That Eric has broken the duty by failing to exercise reasonable care; and,
(c) That the client has suffered reasonably foreseeable loss as a result of Eric’s breach of duty.

(b) and (c) above are clearly satisfied. However, in Caparo Industries v Dickman (1990) it was held that if a duty is to be owed it must be

(i) Reasonably foreseeable that the statement will be relied on;
(iii) That there is close proximity of relationship between the client and the adviser; and

(iii) Reasonable to impose a duty.

In Eric’s case it is arguable that it is not reasonably foreseeable that the client would rely on Eric’s advice without independent enquiry, since Eric is an auditor, not somebody who would normally be expected to give investment advice.

It is therefore probable that Eric was not negligent. However, even if he was negligent, he may not be within the scope of his employment. An employee will be within the scope of their employment if the tortious act is a wrongful way of doing what they are employed to do. For example in *Rose v Plenty (1976)* a milkman, contrary to clear instructions, allowed a young boy to help him deliver the milk. The boy was injured when his leg was caught between the van and the kerb. It was held that the employer was vicariously liable because the milkman was using the boy as a means of doing his job. Even a fraudulent act will not necessarily be outside the scope of a person’s employment. In Eric’s case he is not auditing in an unauthorised manner, he is doing something quite different i.e. giving investment advice. It is therefore likely that he is outside the scope of his employment and the employer would not be liable.

10. Mr Adams and Mrs Barker are neighbours. Mr Adams has, in the last 2 years, done the following things on Mrs Barker’s land without her permission:

a. He has allowed the roots of his tree to extend into Mrs Barker’s garden, where they have undermined the foundations of Mrs Barker’s house.

b. He has moved the boundary fence which he shares with Mrs Barker one metre into Mrs Barker’s land.

c. He has dug a hole in Mrs Barker’s garden, and taken soil from it for his own garden.

What torts, if any, has Mr Adams committed?

**ANSWER:**

(a) A nuisance is an unlawful interference with the use or enjoyment of another person’s land. In contrast to trespass the interference is indirect rather than direct. At one time the courts held that a person could not be liable in nuisance for failure to act in connection with a condition naturally arising on his land for example in *Pontardawe RDC v Moore-Gwyn (1929)* the respondent was held not liable when there was a natural fall of rocks from his land onto the claimant’s land. However, in *Davey v Harrow Corporation (1958)*, a case which involved encroaching tree roots, the respondent was held liable. It therefore seems clear that Mr Adams will be liable in nuisance (even if he did not plant the tree). It is also possible that he would be liable if sued for negligence.

(b) Trespass to land is the direct interference with a possession of another person’s land without lawful authority. It includes entering on land, remaining on land after permission to stay has been withdrawn or placing objects on land. Moving the boundary fence onto Mrs Barker’s land is a clear trespass to land. Mrs Barker would be able to obtain a court order
that the fence be restored to its correct position. In addition the court would make an award of damages. If the fence actually belongs to Mrs Barker rather than Mr Adams there would also be a trespass to goods.

(c) Entry onto Mrs Barker’s land to dig the hole is clearly trespass. Once the soil has been detached it ceases to be land and becomes goods. By removing the soil Mr Adams commits a trespass to goods as well as the tort of conversion. Conversion is a dealing with the plaintiff’s goods which is a denial of the plaintiff’s right to use and possess those goods. Any measure of damages related to the market value of the soil would probably be inappropriate. Mrs Barker should seek an injunction prohibiting any further trespass and sufficient damages to enable the land to be restored to its original state.

11. (a) What is meant in the law of torts by a ‘novus actus interveniens’?

ANSWER:

One of the general defences to a tort action is remoteness of damage. i.e. That the loss suffered by the claimant is not sufficiently closely linked to the respondent’s tort because the loss is not reasonably foreseeable. (*The Wagon Mound (1961)*).

A novus actus interveniens is one factor which may break this link. It is an unforeseeable incident which changes the course of events. It could either be an act of the claimant himself, or of a third party over whom the respondent had no control. For example in *Hogan v Bentinck Collieries (1949)* an employee sustained a broken thumb due to his employer’s negligence. Acting on bad advice he had it amputated. It was held that the unreasonable amputation was a novus actus interveniens and therefore the claimant could only recover damages for a broken thumb. There are, however, situations when an action which is arguably a novus actus interveniens will not break the link between the claimant and the respondent. For example in *Scott v Shepherd (1773)* a lighted squib was thrown onto a stall in a market place, and from there to another stall, and from there to Shepherd, whom it injured. It was held that the onward throwing was not a novus actus interveniens since it was an instinctive and foreseeable act done in the ‘agony’ of the emergency created by the defendant’s tort. The same is true when the intervening act is a rescue. For example in *Haynes v Harwood (1935)* a boy caused a horse to bolt into a crowded street. A policeman was injured whilst trying to bring the horse to a halt. His negligence action succeeded, since the defence of volenti cannot be invoked against a rescuer, nor could it be claimed that his act was a novus actus interveniens since the act of rescue was foreseeable. If a novus actus interveniens is proved by the respondent it will enable the defence of remoteness to be invoked. This will not enable the respondent to avoid primary liability but it will enable him to avoid payment of some or all of the damages claimed by the claimant.

(b) Arthur is employed by A B Ltd. Because of his employer’s negligence Arthur sustains a broken leg.

Consider A B Ltd’s liability if:
(i) Arthur is left with a severe limp because of an error made by the surgeon who set his leg in plaster.

(ii) Arthur’s workmates, believing that he has merely dislocated a joint attempt to manipulate his leg back into place. This makes Arthur’s injury much worse and it becomes necessary to amputate his leg.

ANSWER:

(i) In an attempt to limit the award of damages AB Ltd should plead that the error by the surgeon was a novus actus interveniens. Although mistakes are occasionally made in hospitals such serious errors are rare. In addition, the actions of the surgeon are entirely out of AB Ltd’s control. The situation is very similar to HOGAN v BENTINCK COLLIERIES. The defence will succeed, and AB Ltd’s liability will be confined to compensation for Arthur’s broken leg.

(ii) AB Ltd will again plead novus actus interveniens. In this case, however, success is in more doubt. It is reasonably well known that if a person is injured, and a fracture is suspected, it is best to leave him until medical help arrives. Many people, however, either do not realise this, or forget it in the ‘heat’ of the moment, and inflict greater injury on a person by trying to help him to his feet, or by pulling him out of wreckage. It is suggested that such action, although unwise, is reasonably foreseeable, and would not therefore amount to a novus actus interveniens. If this suggestion were not accepted by the court Arthur would have two further chances of success. Firstly, he could claim that AB Ltd was negligent (for a second time) in failing to provide a system of supervision which prevented such unwise action by employees. Secondly, if Arthur could prove that the employees were themselves negligent, AB Ltd as their employer may be held vicariously liable for their tort.

On balance it seems that AB Ltd will be unable to avoid full liability for Arthur’s injuries.

12. To what extent is a supplier of goods liable in civil law (both for negligence and under the CONSUMER PROTECTION ACT (1987)) for injuries caused by those goods to people with whom he has no contractual relationship?

ANSWER:

To succeed in a negligence action a consumer will need to prove, on the balance of probabilities, the following three elements. That the respondent owed him a duty of care. To determine whether a duty is owed the courts will apply the ‘neighbour test’ laid down in DONOGHUE v STEVENSON (1932). In this case the claimant’s friend purchased a bottle of ginger beer manufactured by the respondent and gave it to the claimant. She drank most of the bottle before discovering the decomposed remains of a snail. She became ill and sued for negligence. It was held that a person owes a duty to anyone who he can reasonably foresee would be injured by his acts or omissions. Such persons were described as ‘neighbours’. Clearly therefore a manufacturer of goods owes a duty, not only to the purchaser of those goods, but to anyone who is likely to consume, use, or be affected by those goods. That the respondent broke the duty of care. The duty will be broken if the
respondent fails to act as a reasonable person in the respondent’s position would have, i.e. it is an objective test, it is not ‘Did he do his best’?

Finally the claimant must show that he has suffered damage.

a. This damage must be caused to a substantial extent by the respondent’s conduct.

b. The damage must be sufficiently closely related to the negligent act, i.e. it must not be too remote. Loss is not too remote if a reasonable man would have foreseen the type. For example in LAMB v CAMDEN BOROUGH COUNCIL (1981) negligent council workmen broke a water main and P’s house was flooded. He recovered damages for loss due to flooding, but not for further damage caused by squatters who moved in while his house was unoccupied as a result of the flooding. This was not considered to be a reasonably foreseeable result of the negligence.

In most cases the damage must be either physical injury to the claimant’s person or property or economic loss consequential upon physical injury, e.g. lost wages as a result of a broken leg.

The CONSUMER PROTECTION ACT 1987 provides an additional remedy to those already available in tort against suppliers of defective goods. Compensation may be recovered for death, personal injury or damage to private property but not for pure economic (financial) loss. As with negligence, persons other than the buyer may claim. Liability is strict. The basic rule is that where damage is caused wholly or partly by a defect in a product the producer or supplier shall be liable for the damage. The injured person must still prove the product was defective and that the defect caused the injury. A ‘product’ must be movable and industrially produced, for example cars are products, but buildings are not. Farm produce is not a product unless subjected to a manufacturing process, thus potatoes are not products, but potato crisps are.

S.3 lays down the criteria for judging defectiveness. There is a defect in a product if the safety of the product is not such as persons generally are entitled to expect, taking all circumstances into account, including:

   a. The presentation of the product, including instructions and warnings.
   b. The use to which it could reasonably be expected to be put.
   c. The time when the product was supplied.

The omission of ‘reasonably’ from the phrase ‘entitled to expect’ suggests a stricter standard than that normally applied in tort. However, reasonableness is retained in the factors that the court must take into account.

S.4 provides a defence in the following situations:

   a. That the defect is attributable to compliance with any enactment.
   b. That he did not at any time supply the product.
c. That the supply was otherwise than in the course of a business.
d. That the defect did not exist in the product at the time of supply.
e. That the state of scientific and technical knowledge at the relevant time was not such that the producer might be expected to have discovered the defect.
f. That the defect constituted a defect in a product in which the product in question had been comprised and was wholly attributable to the design of the subsequent product.
g. More than 10 years has elapsed since the product was first supplied.

13. (a) Explain the meaning and effect of the following defences which may be put forward to an action in tort:

(i) Consent.
(ii) Contributory negligence.
(iii) Statutory authority.

ANSWER:
The defence of consent (also known as volenti non fit injuria) means that the respondent claims that the claimant was aware of the risk of harm and consented to that risk. The consent must be freely given, in full appreciation of the nature of the risk of injury. A consent given under protest, or in fear of dismissal from employment is no consent (BOWATER v ROWLEY REGIS CORPORATION (1944)). Similarly if a person is injured carrying out a rescue the defence will not apply since the moral duty to effect a rescue will negate the possibility of a freely given consent (HAYNES v HARWOOD (1935)).

(i) The consent may be express (for example it may be an agreed contract term) or implied where, for example, the parties participate in a hazardous sport. Some statutes, for example the ROAD TRAFFIC ACT 1972, exclude the defence of consent. Under this Act a negligent driver cannot plead consent against a passenger who has been injured.

(ii) To succeed in the defence of contributory negligence the respondent must show that the claimant failed to take reasonable care for his own safety. The failure may either contribute to causing the accident itself, or contribute only to the nature and extent of the claimant’s injuries, for example by failing to wear a seatbelt. If the defence is successful the claimant’s damages for the actual injuries suffered are reduced according to his share of responsibility. The court does not speculate on what injury the claimant would have suffered if there had been no contributory negligence.
(iii) A Statute (or delegated legislation) as the supreme source of law can authorise acts that would in other circumstances constitute a tort. Absolute statutory authority imposes a duty on the public body to act. The body will not be liable for damage resulting from the exercise of that authority, provided it acted reasonably and there was no alternative way of performing the act.

Where statutory authority is conditional the public body has the power to act but is not bound to do so. A defence will exist only if the relevant act is carried on without interference with the rights of others.

Some statutes provide for compensation. In such cases the claimant can receive no more than the maximum allowed by the Act even if this is less than the actual loss. If the statute does not provide for compensation the presumption is that the claimant’s private rights remain and an action may be brought for the full loss.

(b) What remedies may follow a successful tort action?

**ANSWER:**

The main remedy is an award of damages. They are intended to compensate the claimant by putting him in the position he would have been in if the tort had not taken place. They are not intended to punish the respondent. An award of damages may include compensation for personal injury, loss of goods or property or (in the case of negligent statements) pure economic loss.

In personal injury cases damages will be awarded under itemised headings, for example loss of amenity, pain and suffering, loss of expectation of life and so on. *Ordinary* damages are assessed by the court as compensation for losses which cannot be positively proved or ascertained, for example pain and suffering. They will depend upon the court’s opinion as to the nature and extent of the claimant’s injuries. *Special* damages are those which can be positively proved, for example damage to clothing or the cost of repairing a damaged car.

Where a plaintiff has won a case, but suffered no real loss the court may award *nominal* damages, for example £1, in recognition of the fact that a wrong has been suffered. *Exemplary* damages will be granted when the court intends to punish the defendant for his act and to deter others form similar action in future. Such awards are comparatively rare.

In some cases, for example where the claimant complains of nuisance, damages may not be an appropriate remedy. The court may therefore award an injunction. A *prohibitory injunction* forbids the respondent from doing something and a *mandatory injunction* orders something to be done. An injunction is an equitable remedy awarded at the discretion of the court. Thus in *Miller v Jackson (1977)* although the claimant was able to establish that a cricket club were guilty of negligence and nuisance in allowing cricket balls to be struck out of their ground onto the claimant’s premises, the claimant was not awarded an injunction, since the court felt that a greater public interest was served by allowing cricket to be played
on a ground where it had been played for over 70 years. The claimant was, however, awarded damages for both past and potential future injury.

(a) An occupier owes a common duty of care to lawful visitors who enter his premises. Explain this statement.

**ANSWER:**
The duty of occupiers of premises towards lawful visitors is governed by the *OccuPIERS’ Liability Act 1957*.

(i) An ‘occupier’ is a person who has some degree of control over the premises. He need not necessarily be the owner. It is also possible for there to be more than one occupier.

(ii) ‘Premises’ includes land, buildings, fixed, or moveable structures such as pylons and scaffoldings; and vehicles, including ships and aeroplanes.

(iii) ‘Visitors’ are persons lawfully on the premises, such as customers in shops and factory inspectors.

The extent of the duty is laid down in S2(2) of the Act: ‘A duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is permitted by the occupier to be there’.

This duty is merely an enactment of the common law duty to act as a reasonable man. The Act states that all circumstances of the case are relevant in determining the duty owed. Therefore the occupier:

a. Must be prepared for children to be less careful than adults. In the case of very young children the occupier is entitled to assume that they will be accompanied by an adult.

b. May expect a person who is doing his job to guard against the ordinary risks of his job. For example in *Roles v Nathan (1963)* the plaintiffs, who were chimney sweeps, were employed by D to block up holes in the flues of a coke fired heating system. Despite a warning from D they attempted to do this while the coke fire was lit, and they were both killed by carbon monoxide gas. Their executor’s action failed since it was a risk incidental to their job which they should have foreseen and guarded against.

An occupier will not be liable if the injury results from the faulty work of an independent contractor, provided the occupier took reasonable steps to ensure that the contractor was competent. The occupier may also be able to escape liability by giving an adequate warning of the danger, although the *Unfair Contract Terms Act 1977* prevents the exclusion of
liability for causing death or personal injury by negligence. The occupier may also plead consent or contributory negligence as a defence.

(b) Walter, the owner of a warehouse, spreads rat poison on slices of bread with the intention of putting it down to attract and destroy vermin. Simon, an employee with learning difficulties, who has forgotten his lunch, finds the bread and eats a slice, as does Young, a small boy who has wandered into the warehouse. Both Simon and Young become seriously ill. Discuss the possible liabilities of Walter.

ANSWER:
As Simon is one of Walters’ employees, he is a lawful visitor and he is owed the common duty of care described in S2(2) above. By placing a dangerous item such as poisoned bread in the workplace the premises are not reasonably safe, particularly if it is not obvious to employees that the bread is poisoned. As to whether Walter exercised reasonable care – if he knew that Simon had learning difficulties the standard of care is high, on the principle that Simon is a vulnerable person – PARIS v STEPNEY BOROUGH COUNCIL (1951). It would appear that Walter is liable to Simon under the OLA 1957.

However, employees also have a responsibility for their own safety. Simon has clearly not had sufficient regard for his own safety by taking and eating the bread. He is therefore likely to be regarded as having contributed to the extent of his injury. His damages would be reduced under provisions in the LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT 1945 by an amount reflecting the blame attributable to him.

Young is a trespasser. The OCCUPIERS LIABILITY ACT 1984 governs the liability of occupiers of premises towards trespassers. Under the Act the occupier owes a duty if:

(i) He is aware of the danger or had reasonable grounds to believe that it exists; and

(ii) He knows, or had reasonable grounds to believe, that someone is in (or may come into) the vicinity of the danger; and

(iii) The risk is one against which in all the circumstances of the case he may reasonably be expected to offer that person some protection.

Walter knows of the existence of the danger and that serious illness is a risk against which some protection ought to be offered. The matter on which the question gives no information is Walter’s state of knowledge as to the likelihood of persons such as Young being within the vicinity of the poisoned bread. Assuming Walter is aware of some likelihood that young trespassers may enter, Young will be owed a duty of care under the OLA 1984.

The duty is to take such care as is reasonable in all the circumstances to see that the person to whom the duty is owed does not suffer injury on the premises by reason of the danger
concerned. Circumstances which will be taken into account in deciding whether or not Walter has broken his duty include the seriousness of the danger, the type of trespasser likely to enter and, possibly the financial ability of Walter to guard against the danger. It is unlikely that Walter could successfully raise a plea of contributory negligence against Young, because it is not reasonable to expect children to guard against their own safety. Walter therefore owes a duty to Young and he has broken this by failing to prevent children entering the premises and coming into contact with dangerous substances. If a warning notice does exist it may prevent liability to an adult, but is unlikely to affect liability towards young children, who are known to take little or no notice of such warnings. Walter would therefore be liable to Young.