Examiners’ report 2011

266 0001 Law of tort – Zone A

Introduction

In answering an essay question, candidates must deal with the subject matter, and the particular issues raised in the question. This examination paper contained two essay questions, Question 2 and Question 4, neither of which were answered well.

When answering problem questions there is generally a lot of material to be covered and it is therefore essential that candidates use the available time wisely. Here are some general points to assist candidates.

- Never waste time copying out the facts of the question. It may sometimes be necessary to refer to particular facts, e.g. to distinguish them from the facts of a particular judicial decision, but many candidates wasted time for instance by copying out the words of Ingrid’s letter in Question 5.

- Where something is stated in the question as a fact (e.g. that someone would have recovered if treated sooner), just accept that and do not discuss whether it is really true or what the position would be if it were not.

- Do not spend a great deal of time setting out detailed aspects of a tort where these are not raised by the particular problem. (See the comments on Question 5 below).

- Candidates should plan their answers. Having read through the question, a candidate might reason in this way: There are many issues in this question and I must ensure that I leave enough time to deal with the difficult issues where there is room for argument and not spend too much time on straightforward points.

A surprising number of candidates referred to no, or almost no, authorities, either statutes or cases. This is not acceptable, even if the facts are well analysed and the legal issues correctly identified. However, candidates need not cite long lists of cases to support well-known propositions of law. Where a point of law is clear and not in dispute it is not usually necessary to refer to more than one or perhaps two illustrative authorities. Where, however, a point is not covered by direct authority or there are conflicting cases, it will be necessary to discuss these in greater detail.

Where reference is made to individual cases below, it must not be assumed that these were the only cases candidates were expected to cite. There are often instances where candidates can choose from a number of alternative cases in order to illustrate or support their solution to a problem.
specific comments on questions

question 1

in january 2009 ryan was aged 19 and a very promising professional footballer. he was expected to have a lucrative career including sponsorship deals. he was experiencing back pain and attended the hippo clinic, a private hospital, where he was seen by sally, a doctor who specialised in sports medicine. she told him (correctly) that he had a congenital weakness in his back and (also correctly) that it would cause increasing pain and disability and that although he might be able to play football for some time longer, there would be a serious risk of long-term injury if he did so. she did not tell him that a small group of surgeons was pioneering a new kind of operation that, if successful, would probably strengthen his back and extend his playing career. such an operation would, however, have involved, as its supporters acknowledge, a statistically significant risk of aggravating the condition and causing more severe pain and disability. the majority of professional opinion (including sally) took the view that this treatment was not sufficiently tested and had too many dangers.

after thinking it over, ryan decided to give up football and to take up employment as a commercial artist, for which he had considerable talent. in august 2009, he started experiencing double vision when he got up in the morning. he telephoned a medical helpline and described his symptoms. tessa, a nurse who dealt with his call, told him that it was almost certainly nothing serious, but that he should go to his own doctor if the condition persisted. the problem did not subside and, by the time he sought help, the condition had become irreversible and he became almost totally blind. if he had been treated at the time he contacted the helpline, his sight would probably have been saved.

ryan has now come to hear about the new surgical procedures for his back trouble and has told friends that, if he had known about them, he would certainly have wanted an operation despite the risks.

advise ryan.

general remarks

this question is a good example of how candidates should plan their answer. a candidate’s thought processes for this question might be as follows:

at the start of the story ryan was a prospective professional footballer: at the end he can’t play football because (a) he has a bad back and (b) he is blind. his blindness has limited his job prospects and has caused other damages. there are two possible negligence claims, those against sally and those against tessa. running through the requirements of the tort, i.e. duty, breach, causation and remoteness, i can identify the following issues where the answer is difficult and i must make sure i cover these fully:

- should sally have told ryan about the new treatment?
- if she had, what are the chances that ryan (leaving aside the blindness) would now be a well-paid professional footballer?
- how has sally’s liability been affected by ryan’s subsequent blindness?
- what standard of care was required of tessa? did she meet it?
On the other hand, the law on the following issues is very clear and I need only deal with these matters briefly or refer to the fact that the answer is stated in the problem.

- It is well established that doctors owe a duty of care to patients.
- I am, in effect, told that Sally was not in breach of her duty in any respect other than that relating to alternative treatment.
- If Sally was in breach of duty and the breach caused the damage, the damage is clearly not too remote.
- A nurse owes a duty of care to her patients, although its precise scope here requires some discussion.
- I am told that, if Tessa was in breach of duty, there is no problem of causation (Ryan’s sight would probably have been saved) and the damage is clearly not too remote. Considering the facts above, what is unclear is whether Ryan delayed too long before seeking further advice.
- Sally and Tessa appear to be employees and, if they have committed a tort, they have certainly done so in the course of their employment, and so I need give only a very brief account of the application of vicarious liability.

Law cases, reports and other references the Examiners would expect you to use
The following cases should certainly have been mentioned: *Chester v Afshar, Baker v Willoughby, Jobling v Associated Dairies*. Other cases should be used to illustrate other aspects of the question.

Common errors
The most common error was to deal in detail with causation in relation to Tessa (where there is very little to say) and to ignore causation in relation to Sally (where it is a very difficult issue). Candidates also frequently misunderstood the decision in *Baker v Willoughby*: this case is about whether the original tortfeasor (the motorist) continued to be liable for the consequences of his action and not about whether he was liable for the loss of the leg in the armed robbery (see 4.2.1. of the subject guide).

A good answer to this question would have carefully considered the scope of the doctor’s duty, in particular how far the doctor should advise about the existence and possible consequences of alternative treatments. The general attitude of the medical profession is towards greater frankness in advising about possible consequences of treatment but, in this case, the argument was how far the doctor should advise about the existence of, and possible consequences of, treatments other than what she was proposing herself. The question states that most doctors thought the treatment too risky and presumably would not recommend it, but it does not state that most doctors would refuse to tell patients about it. The answer should then (assuming that Sally was in breach) discuss what the outcome would have been if she had told Ryan about the alternative treatment. Ryan would have to establish (i) that he would indeed have wanted the alternative treatment, (ii) that one of the pioneers would have thought him a suitable patient (iii) that he would have gone ahead after the risks had been explained and (iv) that the treatment would have worked. Ryan would find it very difficult to establish this on a balance of probabilities, but this might be a situation where loss of a chance was sufficient on the basis that the loss was almost economic loss and that one of the uncertainties was the future behaviour of a third party (the surgeons) (this is discussed in the subject guide at 4.1.2). He certainly does not have to prove on a balance of probability that he would have been able to play for one of the top professional clubs: the loss of a chance would certainly be sufficient here.
A good answer also has to consider the effect of the blindness. In situations like this, two separate questions may arise: (i) whether the original tortfeasor, Sally, is liable for the consequences of the second event (but it is highly unlikely here that his bad back caused his blindness); (ii) whether the damage (loss of football playing career) is attributable to the bad back or to the blindness. That is the issue with which this problem and Baker and Jobling are concerned. Does Sally continue to be liable for the consequences of her negligence even though a separate event would in any case have prevented him enjoying such a career? The facts of this case can be distinguished from both the earlier cases: Mr Baker was affected by a wholly external tort (the armed robbery), Mr Jobling by a natural illness whereas Ryan was affected by a subsequent medical condition which could have been treated but in fact was not. Observations in Gray v Thames Trains suggest that the decision in Jobling is to be preferred, unless the facts are clearly comparable to those in Baker, but the matter remains unresolved. Candidates should also at appropriate points have included brief discussions of the other issues listed above.

**Poor answers to this question...**
Concentrated too much on straightforward issues.

**Question 2**

‘Can there be a duty of care at common law in respect of a negligent exercise, or negligent failure to exercise, a statutory power? It is now apparent that the answer to this question is much simpler than first appeared. The key is to remember that statutory power, and common law duty, are separate and distinct. If a common law duty of care is to arise, it will arise through application of the criteria developed in Donoghue, Hedley Byrne and Caparo, and nothing more complicated than that really needs to be said.’ (Steele, Tort Law)

Discuss.

**General remarks**
The subject matter of this question is clearly contained in the first sentence: the possibility of a negligence claim in respect of the exercise or non-exercise of statutory powers. It emphatically does not call for a general discussion of the concept of duty of care.

**Law cases, reports and other references the Examiners would expect you to use**
Candidates should have referred to a selection of cases such as East Suffolk River Catchment Board v Kent, Stovin v Wise, D v East Berkshire Health Authority, Jain v Trent Strategic Health Authority, Connor v Surrey County Council. This last case contains a summary of the principles and is referred to in the latest recent developments material. There was, however, no need to discuss in any detail the three cases mentioned in the extract.

**Common errors**
Many answers to this question completely misidentified the subject matter, and as a result received only a very low fail mark.

Candidates incorrectly wrote a general essay on duty of care and the three cases mentioned in the quotation, rather than discuss statutory powers. These answers contained almost nothing relevant to the question. Another error was to fail to notice that the quotation referred to statutory powers and not statutory duties. It was therefore irrelevant to discuss the tort of breach of statutory duty or to discuss statutes (such as the Occupiers’ Liability Acts) that have given statutory form to common law duties.
A good answer to this question would...
Have discussed the past and ongoing difficulties the courts face in this area of law. It would also have taken up the particular argument made by Professor Steele and other commentators. She suggests that the courts have often made the subject too complicated by trying to integrate the public law and common law issues and to ask, for example, whether the action of the public authority was within the ambit of the statutory power. Instead she suggests that in a negligence action the court should apply the common law criteria and let these (particularly the Caparo criterion of ‘fair, just and reasonable’) take care of the policy issues resulting from the action being against a public authority exercising or failing to exercise statutory powers. This is certainly a difficult topic and one that the courts and academic writers have found great difficulty in resolving. Candidates were certainly not expected to give ‘the right answer’, but to obtain a good mark they needed to show some understanding of why this is such a troublesome topic and of the approaches that have been adopted in dealing with it.

Poor answers to this question...
Were far too general and wide-ranging.

Question 3

Nancy was employed as a cleaner at a home for the elderly run by Thumbscrew Homes plc. One of the residents, Mrs Black, from time to time over a period of several weeks experienced strange fits. She started shouting and screaming uncontrollably. On one occasion, she grabbed a pair of scissors and stabbed herself in the hand; on another, she tried to attack her daughter, Gwen, who was visiting at the time. Her close friend, Mrs White, who has shared a room with Mrs Black for many years, was not attacked, but has been very distressed by the experience. It has now been discovered that Mrs Black had frequently criticised Nancy for the way she had cleaned her room and that in revenge Nancy had obtained a hallucinogenic drug from her boyfriend and, when she had the chance, had sprinkled a little on Mrs Black’s meal lying by her bedside. Gwen and Mrs White are now suffering from recognised psychiatric illnesses.

Advise Mrs Black, Gwen and Mrs White.

General remarks
There are three different arguments that the claimants could pursue:

- Nancy had committed a tort in the course of her employment and that Thumbscrew Homes plc was vicariously liable.
- Thumbscrew Homes was in breach of a duty of care because it had employed an unsuitable person (Nancy) as a cleaner and ought to have discovered this and taken remedial action.
- Thumbscrew Homes was in breach of a duty of care because it ought to have discovered that Mrs Black’s behaviour suggested that she was, or would become, a danger to herself and to others.

The first of these raises questions of legal principle, particularly (i) identifying Nancy’s tort and (ii) considering whether she was in the course of employment.

Law cases, reports and other references the Examiners would expect you to use
Lister v Hesley Hall and subsequent cases on vicarious liability, particularly for intentional acts of employees. Page v Smith and some other cases on psychiatric injury. Wilkinson v Downton. Reeves v Metropolitan Police Commissioner.
Common errors
See below.

A good answer to this question would...
Have considered what tort Nancy might have committed. There is an argument that she was liable for battery, although it is perhaps more appropriate to consider intentional indirect injury along the lines of *Wilkinson v Downton*. It is clear that she was an employee of the home, but it is more difficult to establish whether she was in the course of employment. She is less concerned with the welfare of residents than the warden in *Lister v Hesley Hall*, but more concerned than the hypothetical handyman or groundsman referred to in that case. In more recent cases such as *Maga v Archdiocese of Birmingham* the courts seem to give course of employment a wide meaning in relation to intentional wrongdoing by an employee.

The second and third issues will turn less on the law and more on whether in fact the claimants can show that the manager or owner of the home should have known of the dangers presented by Nancy or by Mrs Black and should reasonably have taken steps to prevent what happened. Candidates should have discussed how far defendants should protect claimants against themselves (*Reeves*), and considered the claims for psychiatric damage by Gwen and Mrs White. Gwen would clearly be a primary victim if the defendant was Mrs Black, but it is less clear if the defendant is Thumbscrew (either primarily or vicariously). Mrs White is clearly not a primary victim and does not fall within the categories of secondary victims where love and affection are presumed, but she might be able in fact to establish such ties with Mrs Black as a primary victim.

Poor answers to this question...
Dealt with the psychiatric injury issues rather than establishing what, if any, liability arose in the first place. Psychiatric injury is not a tort but a head of damage and therefore the tort has to be established first. Although it is not unreasonable to mention that Mrs Black was herself a tortfeasor towards Gwen, this should have received only the briefest mention.

Question 4
What is meant by ‘strict liability’? In the light of the case law, to what extent is the rule in *Rylands v Fletcher* a tort of strict liability?

General remarks
This question required the account of *Rylands v Fletcher* to be structured in such a way as to explain the extent to which it is still to be regarded as a tort of strict liability.

Law cases, reports and other references the Examiners would expect you to use
Recent cases on the place of the rule in contemporary law, particularly *Cambridge Water Co v Eastern Counties Leather* and *Transco plc v Stockport MBC*. Cases considering the defences to the rule such as *Rickards v Lothian*.

Common errors
Surprisingly many candidates did not seem to know what ‘strict liability’ was. Many confused it with ‘actionability per se’: a tort is actionable per se if the claimant does not have to show that any damage was caused; it is a tort of strict liability if the claimant does not have to prove fault in the sense of intention or negligence on the part of the defendant. A number of candidates made some reference to crimes of strict liability, but did not connect this with tort claims. Strict liability is explained at the start of Chapter 8 of the subject guide. It is also referred to in the opening paragraph on *Rylands v Fletcher* in Lunney and Oliphant.
At the end of answering question 4, a candidate should consider what they have written and ask, ‘Have I actually explained whether the rule in Rylands v Fletcher is still based on strict liability or have I just summarised the rule?’ Only the first kind of answer could receive a high pass mark.

**A good answer to this question would...**

have addressed the question in this way. The last two sentences of the first paragraph on Rylands v Fletcher in Lunney and Oliphant read, ‘This is so irrespective of whether the occupier has been at fault (i.e. it is a tort of strict liability). However, liability is not absolute; there are defences, and the defendant is only liable for the foreseeable consequences of the escape’. These sentences point the way to a good answer. The answer should explain what strict liability is, the central feature of the rule being that the claimant does not have to show that the escape was foreseeable or that it was the result of fault on the defendant’s part. Candidates should then consider (i) to what extent the available defences undermine the idea of strict liability and (ii) whether the tendency to assimilate the rule to nuisance and to require foreseeability of damage (as opposed to foreseeability of escape) has also affected its essential character. A very good answer might also have noted that Australian courts have abandoned the idea of strict liability, a view considered, but rejected, by the House of Lords in the Transco case.

**Poor answers to this question...**

Simply gave a summary of the content of the rule in *Rylands v Fletcher* without connecting it at all to the idea of strict liability.

**Question 5**

An election was taking place for members of the Church Council of St James’s Church, Heathenville. One of the candidates was Goth, who runs his own catering company and who campaigned in a colourful way for a council ‘that is more in tune with the outlook of the Facebook generation than the boring crowd who have been around for too long’. In a letter published in the local newspaper, the Heathenville Gazette, Ingrid wrote, ‘As a newcomer to Heathenville, I have been shocked by the antics of Goth. Surely no true Christian gentleman would issue leaflets so disrespectful to other parishioners. Am I alone in thinking that he may be more interested in drawing attention to his stupid so-called business interests than in the needs of the parish?’

Janet is a blogger and has set up a website called Hypatia.org where she draws attention to matters that she thinks are discreditable to Christians. On her blog, she wrote: ‘I must share this with you. I've no idea what is going on in Heathenville but it sounds like another great outbreak of hypocrisy and self-righteousness. We must ridicule it wherever we find it.’ She then provides a link to Ingrid’s letter.

Discuss whether (a) Ingrid and (b) Hypatia.org may be liable in defamation.

**General remarks**

In this problem it is essential for candidates to take great care to identify the main issues and plan an answer. Advice is sought only in respect of claims against Ingrid and against Janet in respect of her blog. Ingrid may be sued by Goth in respect of her letter to the local press (remember, she had sent a letter to the letters page and was not a journalist as many candidates wrongly stated). The main issues here are the meaning of the words used and whether she has any defences, particularly fair comment. There may be some argument that if she is liable she may be responsible for the further publication. Janet may be sued by Goth and/or by Ingrid in respect of her publication (with commentary) of Ingrid’s letter by a link from her blog. There is
an unresolved issue as to whether such a blog should be treated as libel or slander, and the main issues of substance are whether Janet has actually repeated the original defamation and/or has been responsible for a new defamation and what defences she might have.

Law cases, reports and other references the Examiners would expect you to use
There are several cases that could be used to illustrate various issues, but a discussion of the Supreme Court case of *Joseph v Spiller* would have been particularly appropriate.

Common errors
A number of candidates wrote about issues specifically excluded from discussion, notably whether Goth had defamed members of the parish. Others wrote about issues not even hinted at, such as whether there might be another person called Goth who said the letter could be taken to refer to him, or listed the four situations where slander is actionable *per se* without indicating whether any of them might be relevant.

A good answer to this question would...
Have first identified the content of Ingrid’s letter. There would seem to be three allegations that might be defamatory: (i) that Goth is not a true Christian gentleman (but would a reader of the letter understand that to mean that he was hypocritical in professing to be a Christian or that he did not seem to possess normal Christian virtues?), (ii) that he was insincere in seeking election to the council and was really doing it to promote his business, (iii) that his business interests were ‘stupid’ and ‘so-called’. Would any or all of these be defamatory? The letter is clearly published and refers to Goth. The letter would seem to be provoked by the leaflets which Goth has circulated in the community and which would seem to be a matter of public interest in the locality. A number of candidates knew that the Supreme Court in *Joseph v Spiller* said that fair comment should be renamed ‘honest comment’, but did not seem to know much about the substance of the case. Lord Phillips spoke of two relevant issues: (i) determining whether the words are facts (that have to be proved true) or comment (that has to be proved ‘honest’, particularly where the comment is that the claimant is hypocritical or improperly motivated), (ii) the extent to which the defendant has to identify the facts on which the comment is based.

Two separate issues arise in relation to Janet’s blog: (i) she has provided a link to Ingrid’s letter but has she thereby published the letter or merely reported the fact that a row is going on in Heathenville between members of the parish? (ii) She has written critically about the events in Heathenville (hypocrisy and self-righteousness). If these words are defamatory, can she rely on fair comment and privilege (*Reynolds type*) as defences to any action brought by Ingrid or Goth?

Poor answers to this question...
Often amounted to a general summary of the law of defamation with inadequate application to the facts of the problem. It is not enough to explain what the definition of ‘defamatory’ is without considering what the words mean and whether or not they satisfy the test.
Question 6

Nathan is the owner of a large country house which he hires out for weddings and other functions. The house had been booked for a large wedding party on a Saturday. In the house there is an upper reception room overlooking the main hall. On the Friday Nathan discovered that part of the balustrade at the edge of the upper reception room had become loose. He had difficulty in finding a carpenter who could come at short notice. He had however received a card through his letter box a few days earlier which read: ‘For you’re carpenting and other woods works. Good worker. References availble. Call Dez on mobile tel. 01234 56789.’ Nathan called Dez who came promptly. After he had completed the work, he laid his heavy drill on a table in the hall. One of the legs of the table was unstable and, under the weight of the drill, the table gave way. The drill fell on Dez’s leg, causing him serious injuries.

Nathan examined the balustrade and thought that the workmanship was satisfactory. On the Saturday guests pressed against the balustrade to take photographs of the bridal party arriving: the balustrade gave way and three guests, Tom, Dick and Harry, fell into the hall suffering serious injuries.

Advise Nathan as to his liability in tort to (a) Dez and (b) Tom, Dick and Harry.

General remarks
This is a fairly straightforward question on the Occupiers’ Liability Act 1957. All of the claimants are lawfully on the premises and so the 1984 Act is not relevant. It does call for a good understanding of the 1957 Act and an ability to apply it to the particular facts.

Law cases, reports and other references the Examiners would expect you to use
Occupiers’ Liability Act 1957, particularly ss.1, 2(2), 2(3)(b) and 2(4)(b). Roles v Nathan. Haseldine v Daw and other cases on independent contractors.

A good answer to this question would...
Have considered whether the table was a danger due to the state of the premises and whether an occupier could be expected to take precautions against the risk that a hall table would collapse under the weight of a heavy object. If (which is very doubtful) there was a danger, has Nathan any defence? Section 2(3)(b) does not apply directly, because this was not a risk ‘ordinarily incident’ to Dez’s calling, but similar reasoning may be invoked, perhaps by way of contributory negligence. It could be argued that Dez should have known that the table was not intended to have tools laid on it and might not be suitable.

Tom, Dick and Harry would have a stronger case. A balustrade that gives way would seem to be a danger due to the state of the premises, and in the absence of any physical restraint or verbal warning the guests would not seem to be doing anything unreasonable simply by pressing against the balustrade. Nathan would seek to rely on s.2(4)(b): candidates should consider whether carpentry is something to be entrusted to an independent contractor (Yes?), whether steps had been taken to ensure that Dez was competent (doubtful) and whether steps had been taken to see that the work was competently done (what can be expected of a hotel owner in such circumstances?). Dez was recruited in a hurry through a card put through the letter box, he only had a mobile phone and his card was full of spelling errors. Given the time available, should Nathan have taken further steps to check on Dez’s competence? and If so, what steps? The work had to be done urgently, but Nathan could have roped off the landing so that guests did not go near the balustrade.
**Question 7**
The (fictitious) Chemical Industries (Safety Requirements) Regulations 2008 include the following provisions:

6. An employer shall ensure that each year all employees who handle or otherwise come into contact with or are exposed to the effect of chemicals shall undergo a medical examination.

10. Any person authorised to enter a designated production zone shall be provided with and wear suitable protective clothing at all times.

Joseph has been employed at a chemical factory run by Zircon plc for two years. He has never been asked to undergo a medical examination. While working in a designated production zone, he suddenly collapsed while handling chemicals. The chemicals were spilled, and, as a result, Joseph and his fellow worker Kevin were overcome by fumes. An ambulance was called and Luke, an ambulance man, entered the production zone. He put on a suit of protective clothing handed to him by the receptionist at Zircon. The suit had however been discarded by Kevin that morning as it had a small tear in the side. Chemicals penetrated the suit and caused Luke severe burns.

All the medical experts agree that (i) Joseph collapsed because of a defective heart valve, (ii) this would have been discovered at a medical examination, (iii) the defect was not in any way caused by his work in the factory.

Advise Joseph, Kevin and Luke who have all suffered serious long-term personal injuries.

**General remarks**
There are three claimants, two of whom are employees of Zircon. There are different causes of action and so it is essential to work out what claims may be available to each victim and then to plan the structure of the answer before starting to write.

**Law cases, reports and other references the Examiners would expect you to use**
Cases on civil action for breach of statutory duty (e.g. *Morrison Sports Ltd v Scottish Power UK*, *Hartley v Mayoh*). *Wilsons and Clyde Coal Co v English* and other cases on employer’s liability.

**A good answer to this question would...**
Have considered whether a civil action for breach of statutory duty was available. There is clearly a breach of reg.6 of the 2008 regulations. Perhaps, since its aim was industrial safety, a civil action is available, but (i) did the injury in this case occur in the way that reg.6 was designed to prevent and (ii) was reg.6 for the benefit only of employees so that Joseph and Kevin might have a claim but not Luke? Regulation 10 on its wording clearly may apply to protect Luke, even though he is not an employee, but (i) was the suit ‘suitable protective clothing’ despite the small tear and (ii) is the regulation one of strict liability or does Luke have to show there was fault in giving him the suit with the tear? If these actions fail, Joseph and Kevin might have claims based on a breach of the employer’s duty of care to employees. Did the employers have a common law duty, to ensure the health of their employees and, if so, were the consequences of a breach foreseeable? Luke is not an employee but he could arguably have a common law action in negligence based on Kevin’s carelessness in simply leaving the torn suit lying around and not putting it away safely or reporting it to an appropriate person in the company.
**Question 8**
Zeta and Sigma planned to rob a branch of the Scrooge Bank in Toytown. They asked a friend Pi to drive them to the scene. They knew that Pi had a number of convictions for motoring offences and was at the time disqualified from driving. When they reached the scene, they asked Pi to wait in a nearby side street with the engine running in order to make a quick getaway. The bank staff managed to raise the alarm and Zeta and Sigma fled empty-handed. Zeta managed to get into the car, but Sigma was only half in when Pi panicked and set off. Sigma was thrown out of the car and suffered serious injuries. Pi drove at speed out of Toytown. He saw Kappa crossing the road some distance ahead and kept his hand on the horn as he sped towards him. Kappa was panic stricken and stayed rooted to the spot. Lambda, a pedestrian, saw what was happening and tried to pull Kappa back. Pi swerved at the last moment and almost avoided Kappa and Lambda, but struck them a glancing blow, knocking them over and causing serious injuries. After they left the town, Pi set off for home driving within the speed limit. However, Zeta started arguing with Pi about the way he had left Sigma behind. Pi’s attention was distracted and he failed to notice a broken down van at the side of the road. He drove into it and caused serious injuries to Zeta, who was not wearing his seat belt at the time.

Advise Zeta, Sigma, Kappa and Lambda.

**General remarks**
This question raises a number of issues about the tort of negligence in relation to motoring and possible defences. There are four claimants and again careful planning of the answer is needed. It might be best to deal first with Zeta and Sigma (who were both participants in the original venture) and then with Kappa and Lambda (who were not).

**Law cases, reports and other references the Examiners would expect you to use**
Pitts v Hunt; Ashton v Turner; Law Reform (Contributory Negligence) Act 1945; Road Traffic Act 1988 s.149(3); Nettleship v Weston.

**Common errors**
A very large number of candidates failed even to mention the defence of illegality (ex turpi causa) which is an essential element of the question.

**A good answer to this question would…**
Have pointed out that on the face of it Pi had fallen short of the appropriate standard of care in respect of Zeta and Sigma. There is a theoretical argument that since they both knew that he was disqualified they could only expect a lower standard of care, but this kind of argument was rejected in Nettleship v Weston. So Pi would rely on defences. The first is illegality. In respect of Sigma this is a strong argument, since the damage occurred in the course of a joint illegal activity and the reasoning in Pitts v Hunt would seem to be applicable. The argument is less compelling in respect of Zeta, since Pi’s carelessness and hence Zeta’s injuries were totally unconnected to the original illegal purpose of their journey.

The second defence is illegality, but it would require some ingenuity to get round s.149 of the 1988 Act. The third is contributory negligence. There is a general argument that to accept a lift from a driver known to be disqualified is a failure to take reasonable care of one’s own safety. In respect of Zeta there are further arguments that he had distracted Pi’s attention and that he had failed to wear a seat belt. Pi may have been in breach of duty to Kappa by trying to scare him out of the way (was it unreasonable not to realise that Kappa might have been paralysed by...
fear and unable to react?). Some candidates suggested he was liable for battery, and that is not an absurd, though an unlikely, suggestion. In respect of Lambda, the law concerning the rights of rescuers should have been considered.