#### SUMMARY QUESTIONS

###### ESSAY QUESTIONS

1. With specific reference to case law, explain the rules establishing the doctrine of vicarious liability. Identify the justifications for the doctrine and assess how many are still appropriate to businesses in the modern era.

**Indicative content outline answer:**

* Vicarious liability is a doctrine that holds an employer liable for the torts of someone else (namely his/her employee).
* The two tests – employee status and that the tort occurred in the employee’s ‘course of employment’ must be considered and discussed in relation to the body of case law on the subject.
* The cases and issues surrounding course of employment should include identification that it would involve an authorized act conducted in an unauthorized way (e.g. express prohibitions - *Limpus v London General Omnibus and Iqbal v London Transport Executive* [1973]; providing lifts - *Twine v Bean’s Express* [1946] and *Rose v Plenty;* acts incidental to employment - *Crook v Derbyshire Stone Ltd* [1956], *Paterson v Costain & Press (Overseas)* [1979], *Smith v Stages* [1989] and *Century Insurance Co. Ltd v Northern Ireland Road Transport Board* [1942]; deviation from a task - *Storey v Ashton* [1869]; and criminal acts – including *Heasmans v Clarity Cleaning Ltd* [1987], *Daniels v Whetstone Entertainments and Allender* [1962], *Lister v Hesley Hall* [2001] and *Majrowski v Guys & St. Thomas’ NHS Trust* [2006].
* One overriding explanation for the doctrine has been that the employer had expressly or impliedly authorised the employee’s action (*Tuberville v Stamp* [1697]) and therefore should satisfy any claims on the basis of damage or injury as a consequence.
* The employer may have employed a negligent employee or had failed in his/her duty to adequately control the employee and hence ‘set the whole thing in motion’ (*Duncan v Findlater* [1839]).
* The employer derives financial benefit from the work of the employee he/she should be responsible for losses (referred to as ‘enterprise risk’).
* The employer also has ‘deeper pockets’ than the employee and as such is in a better financial position to satisfy claims, as increasingly, the employer is no longer an individual but a corporation.
* A corporation may be able to distribute any losses much more successfully than would a private individual where a claim could lead to significant financial losses. A corporation may be able to reduce dividends to shareholders, reduce payments to staff or management and so on to generate the revenue to pay any claim. Private individuals do not have such options.
* Compulsory insurance is also required of employers that ensures damage caused to employees will be compensatable.
* A major rationale for vicarious liability’s justification has been the concept of accident / tort prevention (*Limpus v London General Omnibus* [1862] and *Rose v Plenty* [1975]). Holding an employer financially liable for the torts of an employee provides an effective incentive for his/her proactive approach to ensure safe systems of work are in place and the employees are controlled to an extent that will limit, as far as possible, any torts being committed.

2. ‘Owners/occupiers of land have unfair responsibilities when it comes to trespassers. If an adult trespasses on land, they take responsibility for their own action and the owner/occupier should not be placed under additional duties to seek their protection.’

In relation to the duties imposed on owners/occupiers of land by statute and the common law, critically assess the above statement.

**Indicative content outline answer:**

* The OLA 1957 requires that the occupier of premises take reasonable care to ensure that a visitor to their premises will be reasonably safe.
* A visitor is a person who comes onto premises with the express or implied permission of the occupier. The lawful visitor may also become a trespasser if they wrongfully use the premises (*Owners of SS Otarama v Manchester Ship Canal Co*.).
* The duty to take care provided through the OLA 1957 s. 2(2) is ‘…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 purposes for which he is invited or permitted by the occupier to be there.’
* As such the duty is taken with regard to the activities that the visitor is permitted to be on the premises to perform. Examples of the reasonable use of premises have been demonstrated in *Tomlinson v Congleton BC*, and a key feature of the recent judicial decisions has been an expectation of the person to exercise common sense and to take care of their own safety.
* The obligation to protect the safety of children visiting premises is greater than adults, and the occupier has a duty to ensure that warning notices and barriers offer a sufficient deterrent against danger.
* Where the visitor to the premises does so as part of their job, such as tradesmen (builders, electricians and so on), they are deemed to have a better understanding of the inherent risks in the pursuit of that activity, than would an ordinary visitor (*Roles v Nathan (t/a Manchester Assembly Rooms)*).
* Claims under the OLA 1957 may be made in respect of personal injury, losses or damage to property (insofar as it satisfies the requirement of reasonableness).
* A major extension through the enactment of the OLA 1984 was to broaden the common law duty owed to trespassers.
* It imposes a duty of care on the occupier to trespassers and persons entering land without the permission or consent of the occupier. These are known as non-visitors.
* The obligation on the occupier is to take reasonable care to ensure that the non-visitor is not injured due to any danger on the premises. The obligation may be removed through adequate warnings and protective measures being taken to identify (and minimise) the risk. The occupier owes the duty where:
* They are aware of the danger, or ought reasonably be aware that a danger exists;
* They must be aware, or have reasonable grounds to believe that the non-visitor is in the vicinity of the danger and may enter the premises (regardless of any lawful right to be in the area); and
* The danger must be of a type that it is reasonable to expect the occupier to protect against.

**PROBLEM QUESTIONS**

1. Nigella wishes to develop her cooking skills and consequently decides to purchase a microwave oven. She visits the Electrical Superstore and purchases a new microwave, which she uses successfully for the first time to cook a meal for her family. The second time she uses the microwave she uses the timer feature. Nigella puts on the timer for 30 minutes, as per the manufacturer’s instructions, and leaves her home to visit a friend. When she returns the microwave has set on fire destroying the oven and the food. The fire has also badly damaged the kitchen units on which the microwave oven was placed and her flat screen television (worth over £800). The kitchen is also going to require redecorating due to the smoke from the fire.

Advise Nigella as to her legal position.

**Indicative content outline answer:**

* A claim may be brought under the Sale of Goods Act 1979 to replace the microwave oven, but this would not provide a remedy for the damage to the kitchen and television.
* To claim for the losses associated with the microwave oven an action may be made against its manufacturer through a torts (negligence) claim. However, this would be very difficult, complex, and potentially involve great costs.
* An alternative would be to claim through the Consumer Protection Act 1987. The CPA 1987 protects those individuals who may have suffered injury as a result of the product they purchased, or where the product caused damage (and hence loss) to their property.
* The law of contract entitled the claimant to protection against a faulty product NOT for any losses attributed to this (as part of the concept of remoteness of damage). Therefore, the legislation was drafted to provide a justiciable remedy.
* The importance of the CPA 1987 in assisting claimants is by establishing the strict liability of the manufacturer. The claimant does not have to prove intention or negligence on the part of the defendant, only that there is a causal link between the product and the damage sustained by the claimant. This liability is only removed if a defence can be made under the CPA’s provisions.
* To be successful the claimant must bring their claim within three years of their awareness of the damage or defect in the product, and they must establish the following criteria –

1) The product contained a defect;

2) The claimant suffered damage;

3) The damage was caused by the defect; and

4) The defendant was either a producer; a marketer (own-brander); an importer; or a supplier into the European Union (EU) of the product.

* The claimant who has access to the CPA 1987 includes any person who suffers injury to themself or damage to their private property (the CPA 1987 does not extend to business property).
* The product to be covered by the Act must be one that is ordinarily used for private consumption. This includes the following:
* Manufactured Products: This definition includes the components of other products.
* Substances Won or Abstracted: The products under this section include electricity, water and gas.
* Industrial or Other Processes: This includes agricultural products that have been subject to some industrial process.
* The types of damage that are included in the CPA 1987 are death, personal injuries sustained, and any damage to property that the claimant uses as part of his/her private consumption. However, the CPA 1987 also requires that the damage must exceed a value of £275, which does not include the damage to the product itself. This is to ensure that the courts are not overwhelmed by voluminous cases, and there is a restriction on claims for pure economic loss.

***Defences Under the CPA***

* Section 4 outlines the possible defences that can be raised in the event of a claim under the CPA 1987:
* Compliance with the Law: If the product complies with the relevant safety standards established in UK and EU law, and the defect can be attributed to the standards.
* Non-supply of the Product: If the defendant did not supply the product in the course of their business (if making a product for sale was, for example, a past-time or hobby).
* The Defect did not exist at the Time of Supply: If at the time of the supply of the product the defect did not exist then there will be no liability on the part of the defendant.
* Acceptable Risks in Development: There exists a special defence for those defendants who release new products onto the market, and who have used all available research and expertise to minimise any potential risk to the claimant. If, despite these safety standards, the claimant is still injured or property damaged, the defendant will be able to raise this defence to the action.
* As such, unless the television is a new designed product that could fall under the ‘acceptable risks in development’ defence, the other tests are satisfied and Mary’s claim will succeed. The damage caused was in excess of £275, the product was ordinarily supplied for private consumption, and it implies that the goods were supplied in the EU.
* Therefore, Nigella will be able to claim for the damage and loss due to the defect of the microwave oven from the manufacturer as it is a qualifying product, Nigella is a consumer, and the damage is in excess of £275.

2. Wanda works as an employee at Crazy Hair—a hairdressing salon owned by Jason. Alec comes into the salon to have his hair cut and styled by Wanda. As Wanda begins to dye Alec’s hair she accidentally puts too much peroxide in the solution and as it is applied to Alec’s hair his scalp is burned, which causes him pain and discomfort. Alec later has a severe reaction to the solution used by Wanda and is hospitalized, which results in Alec missing several days of work as a consequence of the expensive medical treatment he requires.

Advise Alec of his rights. Advise Wanda and Jason of their liability and any action Jason may take against Wanda.

**Indicative content outline answer:**

* The question requires consideration of negligence liability and vicarious liability.
* Alec has been injured through the possible negligence of an employee (Wanda) of Jason t/a/ Crazy Hair.
* The tests of negligence will be identified and described – a duty of care; breach of duty; and consequential damage. As these have been identified in the answers to the questions in Chapter 13, they are not replicated here.
* The tests to establish the doctrine of vicarious liability are that the tortfeasor is an employee, and the tort occurred in the course of his/her employment.
* In an attempt to limit potential liability, employers may specifically instruct their employees to act in a certain way, or seek to prohibit certain actions that may likely lead to torts being committed.
* The employer is seeking to limit his/her exposure to risk of harm to property and persons, but the success or failure of such instruction may be viewed from the perspective of whether the employee had been expressly told not to do something, and he/she contradicted this instruction (no vicarious liability); or whether the employee is told not to perform an authorized task in an unauthorized way (liability may be established).
* Wanda is performing her job, an authorized task, only she has done this in an unauthorized way. She is acting in the course of her employment and hence Alec may bring his action against Jason.
* The deep pockets theory will be relevant as he may find greater success in suing Jason and obtaining the remedy awarded by the court.
* Remember, bringing the action against Jason does not stop the liability of Wanda. Jason may seek to recover the compensation he has had to pay from her, and there may be consequences for dismissal / disciplinary action due to her gross misconduct / negligence.