The purpose of this report is not to give the answers to the questions themselves but to indicate what the examiner was looking for in the answers.

Overall,
• To pass each question, students had to identify the correct cause of action and show some application of the facts to the law.
• To be rewarded a credit, students had to satisfy the requirements of a pass, and show good application of the facts to the law.
• To be rewarded a distinction, students had to satisfy the requirements of a credit, and also identify and show great insight into the key issues.

For the subject overall, the highest mark was 94%.

The marks distribution for the subject was as follows:

<table>
<thead>
<tr>
<th>Grade</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Distinction</td>
<td>32</td>
</tr>
<tr>
<td>Credit</td>
<td>27</td>
</tr>
<tr>
<td>Pass</td>
<td>24</td>
</tr>
<tr>
<td>Fail</td>
<td>21</td>
</tr>
</tbody>
</table>

Question One:
Highest Mark: 48/50
Lowest Mark: 16/50
Median mark: 37/50

Before discussing the particulars of each part of this question, it is necessary to make a general comment about the students’ approach to the question. The best answers came from students who were able to not only meet all the elements, but were able to identify which elements needed more comprehensive discussion and analysis and then spend sufficient time indulging in this. Students who simply listed, as a shopping trolley, the elements of negligence with no real analysis of the issues or certain facts were given passes, and sometimes fails if they did not engage with the facts at all.

There were three main actions that needed to be discussed:
1. Jordan’s action against Ricky for negligent misstatement occasioning pure economic loss,
2. Jordan’s action against Ricky for negligence occasioning personal harm, and
3. Jordan’s action against Dr Day for professional negligence (failure to warn of risks).

(1) Negligent Misstatement
The student needed to consider whether the advice given to Ricky amounted to negligent misstatement. Establishing a Duty of Care, according to Tepko requires the student to consider Duty as a question of fact, requiring students to consider a number of issues that a court would look at to make such a determination.

(2) Negligence – personal harm

One of the most essential requirements of the course is that students are able to understand the intention element and how it creates a point of difference between the intentional torts, and negligence. In this case, Ricky meant to hit the golf ball, but he certainly did not intend to hit Jordan. To make the distinction in this case, the student should have referred s3B of the Civil Liability Act. It was acceptable to argue the intentional tort of battery, but the better approach would have been to argue negligence; it being an established duty category of sportspeople to each other, or if this was unknown to the student a work through either incrementalism or through the Caparo Test.

Breach required the student to apply the calculus of negligence, as per s5B of the Civil Liability Act. Whilst not contentious, the breach stage required the student to really engage with the facts and use case law to assess, in particular, the possible seriousness of harm and likelihood of occurrence. The more analytical the student was in applying the law to the facts, the more the student was rewarded. In this case, there were no costs associated with taking precautions, but rather a set of actions that Jordan could have taken to be more careful.

It was very important to consider two defences available: contributory negligence (given Ricky was angry at himself and not watching) and the assumption of risk. It was this latter defence that needed further discussion, as the student needed to assess whether or not golf was a dangerous recreational activity and whether getting hit was an obvious risk.

(3) Professional Negligence

The action against Dr. Day required the student to demonstrate an understanding of professional negligence, as it sits under the Civil Liability Act ss5O and ss5P. The students who answered successfully were able to identify that the rule in s5P is expressed as an exception to s5O, and thus requires an application from the law espoused in Rogers v Whittaker.

Question Two:
Highest Mark: 19/20
Lowest Mark: 5/20
Median Mark: 14/20

This question tested the student's grasp of the intentional tort of assault. In particular this question tests the student's understanding of how words can amount to a threat. The best students assessed each threat made to Christine separately; that is, the “speak English or die!” comment by Roy, and the “everyone on the bus wants you dead!” comment by Terry. There was also the
issue of whether Kevin preventing exit from the back door of the bus constituted a false imprisonment.

Each of these comments were testing something different. With Roy’s comment, the student needed to demonstrate an understanding of when a conditional threat amounts to assault. Terry’s comment tested the student’s ability to define whether there was a specific threat.

The student who tried to address all three comments in the one go, overall, seemed to miss the nuances of the tort of assault, and did not tend to show a sufficient depth of understanding of the law.

The other issues needed to be addressed were the potential battery and false imprisonment. The student needed to address was the potential battery that Christine could bring against Terry for when he threw a rock at the bus. The only contentious element here was that of directness, as it was not the rock who hit Christine, but rather the shattered glass. No harm was needed, as the tort of battery is actionable per se. Regarding the false imprisonment, there needed to be a discussion whether the prevention of exit from the back door of the bus constituted “total restraint.”

**Question Three:**

Highest Mark: 10/10  
Lowest Mark: 1/10  
Median Mark: 7/10

This question was clearly a case of private nuisance. The loss of enjoyment came from the immaterial interference of the way that Malcolm flew his drone around his perimeter (in it’s flying course, camera and noise). A dive into the facts was necessary here, particularly around how the drone could have been flown differently, or whether other alternatives could have been used.

In the second part, firstly the student had to go through the cases of *Oldham v Lawson*, *Khorasandjian v Bush* and *Hunter v Canary*. Students were required to conclude that given the tort of nuisance is a land-based tort, then only people who have a legal or equitable right to the land can make a claim. This was made abundantly clear in lectures. Students were rewarded if they went as far as saying that this issue hasn’t been considered in Australia yet, and only the Victorian authority of *Stockwell v Victoria* has applied *Hunter*. 