



**GCE**

**Law**

**H415/02:** Law making and the law of tort

Advanced GCE

**Mark Scheme for June 2019**

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This mark scheme is published as an aid to teachers and students, to indicate the requirements of the examination. It shows the basis on which marks were awarded by examiners. It does not indicate the details of the discussions which took place at an examiners' meeting before marking commenced.

All examiners are instructed that alternative correct answers and unexpected approaches in candidates' scripts must be given marks that fairly reflect the relevant knowledge and skills demonstrated.

Mark schemes should be read in conjunction with the published question papers and the report on the examination.

**SUBJECT-SPECIFIC MARKING INSTRUCTIONS****Introduction**

Your first task as an Examiner is to become thoroughly familiar with the material on which the examination depends. You should ensure that you have copies of these materials:

- the specification, especially the assessment objectives
- the question paper and its rubrics
- the mark scheme.

You should ensure also that you are familiar with the administrative procedures related to the marking process. These are set out in the OCR booklet **Instructions for Examiners**. If you are examining for the first time, please read carefully **Appendix 5 Introduction to Script Marking: Notes for New Examiners**. Please ask for help or guidance whenever you need it. Your first point of contact is your Team Leader.

**Information and instructions for examiners**

The co-ordination scripts provide you with *examples* of the standard of each band. The marks awarded for these scripts will have been agreed by the Team Leaders and will be discussed fully at the Examiners' Co-ordination Meeting.

The specific task-related indicative content for each question will help you to understand how the band descriptors may be applied. However, this indicative content **does not** constitute the mark scheme: it is material that candidates **might** use, grouped according to each assessment objective tested by the question. It is hoped that candidates will respond to questions in a variety of ways. Rigid demands for 'what must be a good answer' would lead to a distorted assessment. Candidates' answers must be relevant to the question. Beware of prepared answers that do not show the candidate's thought and which have not been adapted to the thrust of the question. Beware also of answers where candidates attempt to reproduce interpretations and concepts that they have been taught but have only partially understood.

**Using the Mark Scheme**

Please study this Mark Scheme carefully. The Mark Scheme is an integral part of the process that begins with the setting of the question paper and ends with the awarding of grades. Question papers and Mark Schemes are developed in association with each other so that issues of differentiation and positive achievement can be addressed from the very start.

This Mark Scheme is a working document; it is not exhaustive; it does not provide 'correct' answers. The Mark Scheme can only provide 'best guesses' about how the question will work out, and it is subject to revision after we have looked at a wide range of scripts.

The Examiners' Standardisation Meeting will ensure that the Mark Scheme covers the range of candidates' responses to the questions, and that all Examiners understand and apply the Mark Scheme in the same way. The Mark Scheme will be discussed and amended at the meeting, and administrative procedures will be confirmed. Co-ordination scripts will be issued at the meeting to exemplify aspects of candidates' responses and achievements; the co-ordination scripts then become part of this Mark Scheme.

Before the Standardisation Meeting, you should read and mark in pencil a number of scripts, in order to gain an impression of the range of responses and achievement that may be expected.

Please read carefully all the scripts in your allocation and make every effort to look positively for achievement throughout the ability range. Always be prepared to use the full range of marks.

### Assessment Objectives

**Three** Assessment Objectives are being assessed across the questions: **AO1**: Demonstrate knowledge and understanding of the English legal system and legal rules and principles, **AO2**: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology, **AO3**: Analyse and evaluate legal rules, principles, concepts and issues.

For **AO2**, there are two elements to the assessment objective:

- Apply legal rules and principles to given scenarios
- Present a legal argument using appropriate legal terminology

These two elements should have equal weighting and be awarded jointly according to the guidance given in the level descriptors and indicative content. For example, to achieve level 4, an answer should include excellent application of legal rules and principles and excellent presentation of legal argument. Further guidance will be given in the standardisation meeting when there is an uneven performance across the elements.

### Levels of Response

Questions in this paper are marked using a levels of response grid. When using this grid, examiners must use a **best-fit** approach. Where there are both strengths and weaknesses in a particular response, particularly imbalanced responses in terms of the assessment objectives, examiners must carefully consider which level is the best fit for the performance. Note that candidates can achieve different levels in each assessment objective, for example a Level 3 for AO1, and a Level 2 for AO2.

To use these grids:

**Determine the level:** start at the highest level and work down until you reach the level that matches the answer.

**Determine the mark within the level:** consider the following:

Descriptor	Award mark
On the borderline of this level and the one below	At bottom of level
Just enough achievement on balance for this level	Above bottom and either below middle or at middle of level (depending on number of marks available)
Meets the criteria but with some slight inconsistency	Above middle and either below top of level or at middle of level (depending on number of marks available)
Consistently meets the criteria for this level	At top of level

**ASSESSMENT OBJECTIVES: BREAKDOWN BY QUESTION****Section A**

Questions 1–2

Assessment Objectives:	AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. <b>10 marks.</b>
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Questions 3–4

Assessment Objectives:	AO3: Analyse and evaluate legal concepts and issues. <b>15 marks.</b>
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**Section B**

Questions 5, 6, 8 and 9

Assessment Objectives:	AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. <b>10 marks.</b>  AO2 1a/1b: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. <b>15 marks.</b>
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Questions 7\* and 10\*

Assessment Objectives:	AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. <b>10 marks.</b>  AO3 1a: Analyse and evaluate legal rules and principles. <b>15 marks.</b>
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Questions that have an asterisk (\*) assess the quality of a candidate's extended response. Levels descriptors are identified in the AO3 column in italics.

## Section A

	Answer	Marks	Guidance
1	<p><i>Explain overruling and distinguishing</i></p> <p>Answers <b>may</b> include:</p> <p><b>Overruling</b> This is where a court in a later case states that the legal principle or precedent decided in an earlier (different) case is wrong. Overruling may occur when a higher court overrules a decision made in an earlier (different) case by a lower court or, if it has the power, one of its own previous decisions.</p> <p>Examples might include: the UKSC overruling a decision of the Court of Appeal in a different case on the same legal point; where the Court of Justice of the EU overrules a past decision it has made in a different case but on the same legal point; or where the UKSC uses the Practice Statement 1966 to overrule a past decision of its own (e.g. in <i>Pepper v Hart</i> overruled the earlier decision in <i>Davis v Johnson</i> on the use of <i>Hansard</i>)</p> <p><b>Distinguishing</b> A method where a judge can avoid an otherwise binding precedent. In order to distinguish the judge must show that there is a difference in the material facts of the two cases in which case the instant case is not bound by the earlier case. Where this occurs the earlier decision need not be followed and a fresh precedent may be set</p> <p>Use any relevant pair of cases to illustrate: <i>Balfour v Balfour</i> and <i>Merritt v Merritt</i>; <i>Rylands v Fletcher</i> and <i>Read v Lyons</i>; <i>R v Brown &amp; Others</i> and <i>R v Wilson</i></p> <p>Credit any other relevant point(s).</p>	<p><b>10</b> <b>AO1</b></p>	<p><b>Use Levels of Response criteria</b></p> <p><b>Level 4 (9–10 marks)</b> Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant statutes and case law.</p> <p><b>Level 3 (6–8 marks)</b> Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant statutes and case law.</p> <p><b>Level 2 (3–5 marks)</b> Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. There will be some reference to statutes and case law.</p> <p><b>Level 1 (1–2 marks)</b> Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of statutes and case law is limited.</p> <p><b>Level 0 (0 marks)</b> No response or no response worthy of credit.</p>

	Answer	Marks	Guidance
2	<p><i>Explain the Golden Rule of statutory interpretation</i></p> <p>Answers <b>may</b> include:</p> <p>Definition of the golden rule:</p> <ul style="list-style-type: none"> <li>• The golden rule is a modification of the literal rule</li> <li>• The golden rule is thought to have its origins in the dictum of Parke B in <i>Becke v Smith</i> ... that the words of an Act should be taken literally but they can be modified or varied to avoid inconsistency with the Act or a repugnant outcome</li> <li>• Judges only use the rule when the use of the literal rule would produce an absurd or unjust result</li> </ul> <p>There are two versions of the rule:</p> <ul style="list-style-type: none"> <li>• Narrow golden rule – where a word or words have two possible meanings but one would produce an unwanted or absurd outcome the court may choose between them (<i>Jones v DPP</i>, <i>R v Allen</i>)</li> <li>• Wide golden rule – where the meaning of a word is not ambiguous but to give it its literal meaning would produce a repugnant outcome (<i>Re: Sigsworth</i>). Here the judge may 'alter' the meaning of the word(s) to avoid the unwanted outcome and give effect to parliament's intentions.</li> </ul> <p>Use appropriate cases to illustrate: <i>Jones v DPP</i>; <i>Re: Sigsworth</i>; <i>R v Allen</i>; <i>Adler v George</i>; <i>Ruther v Harris</i>; <i>River Wear Commissioners v Adamson</i>; <i>Grey v Pearson</i>; <i>Meah v Roberts</i>; <i>Maddox v Storer</i>; <i>R v Pawlicki</i>; <i>R v Samuel</i>; <i>R v National Insurance Commissioner (ex p Connor)</i>; <i>INCO Europe v First Choice Distribution</i></p> <p>Credit any other relevant point(s).</p>	<p><b>10</b> <b>AO1</b></p>	<p><b>Use Levels of Response criteria</b></p> <p><b>Level 4 (9–10 marks)</b> Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant statutes and case law.</p> <p><b>Level 3 (6–8 marks)</b> Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant statutes and case law.</p> <p><b>Level 2 (3–5 marks)</b> Basic knowledge and understanding of the English legal system, rules and principles. The response The response may lack detail in places and is partially developed. There will be some reference to statutes and case law.</p> <p><b>Level 1 (1–2 marks)</b> Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of statutes and case law is limited.</p> <p><b>Level 0 (0 marks)</b> No response or no response worthy of credit.</p>

	Answer	Marks	Guidance
3	<p><i>Discuss the advantages of binding precedent</i></p> <p>Candidates <b>may</b> develop, <i>inter alia</i>, the following points:</p> <p>Certainty ... enables lawyers to advise clients accurately and individuals to plan their affairs according to likely outcomes. Also provides stability for business and fiscal arrangements</p> <p>Fairness &amp; consistency ... like cases are treated alike which is fair, just, certain and rational. The law is not subject to whims of individual judges which lends greater credibility. Cases such as <i>Central London Properties v High Trees</i> are an example of judges trying to do justice in the instant case</p> <p>Flexibility ... despite a fairly rigid system overall, the system allows room for development through distinguishing, overruling and so on which means judges can develop the law to meet changing social, political or moral conditions according to shifting standards <i>R v Ireland &amp; Burstow</i>, <i>Herrington v BRB</i>, <i>R v R</i>, or hold the moral line <i>R v Brown</i></p> <p>Precision ... in a system which has been refining law over hundreds of years the law becomes very precise as minor variations on the same principles arise</p> <p>Time - saving ... because we have such a vast body of precise law to rely on cases do not have to be constantly re-argued from first principle saving lawyers, the court and client's time and money</p> <p>Credit any other relevant point(s).</p>	15 AO3	<p><b>Use Levels of Response criteria</b></p> <p><b>Level 4 (12–15 marks)</b> Excellent analysis and evaluation of a wide range of legal concepts and issues. The response is wide ranging and has a well sustained focus on the question. The key points are fully discussed and fully developed.</p> <p><b>Level 3 (8–11 marks)</b> Good analysis and evaluation of a range of legal concepts and issues. The response has a mainly consistent focus on the question. Most of the key points are well discussed and well developed.</p> <p><b>Level 2 (4–7 marks)</b> Basic analysis and evaluation of legal concepts and issues. The response is partially focused on the question. Some of the key points are discussed and partially developed.</p> <p><b>Level 1 (1–3 marks)</b> Limited analysis of legal concepts and/or issues. The response has limited focus on the question. Discussion of any key points is minimal.</p> <p><b>Level 0 (0 marks)</b> No response or no response worthy of credit.</p>

	Answer	Marks	Guidance
4	<p><i>Discuss the advantages of the Golden Rule</i></p> <p>Candidates <b>may</b> develop the following points. Marks will be awarded on the basis of the quality of analysis and evaluation, given in the levels of response criteria in the guidance column</p> <p>Discuss how the golden rule:</p> <ul style="list-style-type: none"> <li>• can prevent the problems of the Literal Rule e.g. injustice</li> <li>• avoids absurdities caused by poor draftsmanship (<i>Allen</i>)</li> <li>• can put into practice what Parliament really intended (<i>Re Sigsworth</i>)</li> <li>• provides a check on the strictness of the Literal Rule</li> <li>• still respects parliamentary supremacy as it does not give judges complete freedom</li> <li>• upholds Parliament's will more than the Literal Rule, as it assumes Parliament never intends to pass absurd law</li> <li>• allows the judge to choose the most sensible meaning where there is more than one meaning to the words in the Act or Statute (narrow)</li> </ul> <p>Credit any other relevant point(s).</p>	<p><b>15</b> <b>AO3</b></p>	<p><b>Use Levels of Response criteria</b></p> <p><b>Level 4 (12–15 marks)</b> Excellent analysis and evaluation of a wide range of legal concepts and issues. The response is wide ranging and has a well sustained focus on the question. The key points are fully discussed and fully developed.</p> <p><b>Level 3 (8–11 marks)</b> Good analysis and evaluation of a range of legal concepts and issues. The response has a mainly consistent focus on the question. Most of the key points are well discussed and well developed.</p> <p><b>Level 2 (4–7 marks)</b> Basic analysis and evaluation of legal concepts and issues. The response is partially focused on the question. Some of the key points are discussed and partially developed.</p> <p><b>Level 1 (1–3 marks)</b> Limited analysis of legal concepts and/or issues. The response has limited focus on the question. Discussion of any key points is minimal.</p> <p><b>Level 0 (0 marks)</b> No response or no response worthy of credit.</p>

## Section B

5 Advise whether Bob would be successful in an action in *Rylands* against Alice.

<b>Assessment Objectives</b>	<p><b>AO1:</b> Demonstrate knowledge and understanding of the English legal system and legal rules and principles. <b>10 marks.</b></p> <p><b>AO2:</b> Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. <b>15 marks.</b></p>
<b>Additional guidance</b>	The 'indicative content' is an example of valid content. Any other valid content is acceptable and should be credited in line with the levels of response. It is not expected for candidates to cover all of the indicative content.

**AO1 Indicative content**

Answers may:

Explain that a claimant must have an interest in the land to pursue a claim (*Transco*) and that a defendant needs to be either the accumulator or the occupier of the land the dangerous thing was accumulated on *Read v Lyons*

Explain that for a claim in *Rylands v Fletcher*, a claimant will have to show that:

- The thing was brought and accumulated on the defendant's land – *Giles v Walker*
- The thing will be likely to cause mischief if it escapes – *Hale v Jennings Bros*
- There must be an escape but this can be either from land over which the defendant has control *Read v Lyons* or from circumstances over which the defendant has control – *Hale v Jennings*
- The thing escaping causes damage - *Transco v Stockport MBC*
- The damage must be foreseeable – *Cambridge Water v Eastern Counties Leather, Transco v Stockport MBC*

Explain that the use of land must be non-natural or 'extraordinary':

- A potentially dangerous activity (such as the storage of chemicals) – *Cambridge Water v Eastern Counties Leather*
- Things stored in large quantities – *Mason v Levy Autoparts*
- Following *Transco*, use of land should be extraordinary
- Credit any relevant description of damages and remedies

Credit any other relevant point(s)

**AO2 Indicative content**

Answers **may**:

Reason that:

- Bob is the claimant and is able to bring a claim as the occupier of the land affected. Alice is the defendant as she occupies the land on which the escaping material has been accumulated
- Alice has accumulated the dye and it is something which would be likely to do mischief if it escaped
- Dye has escaped due to the worn out containers it has been stored in and it has 'escaped' onto Bob's land
- Storage of large quantities of dyes in a garden shed is likely to be considered as a non-natural or 'extraordinary' use of land
- Damage to Bob's marrows is a foreseeable type of harm resulting from dye leaking into the soil
- The harm is damage to property not personal injury and *can* be claimed for
- There do not appear to be any defences available to Alice

Reach any sensible conclusion supported by appropriate reasoning - it is likely that Alice will be liable in *Rylands*

Credit any other relevant point(s).

	<b>AO1</b>	<b>Mark</b>	<b>AO2</b>	<b>Mark</b>
<b>Level 4</b>	Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant case law.	<b>9–10</b>	Excellent application of legal rules to a given scenario. Excellent presentation of a legal argument which is accurate, fully developed and detailed. Fully appropriate legal terminology is used.	<b>12–15</b>
<b>Level 3</b>	Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant case law.	<b>6–8</b>	Good application of legal rules to a given scenario. Good presentation of a legal argument which is detailed but not fully developed in places. Appropriate legal terminology is used.	<b>8–11</b>
<b>Level 2</b>	Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. There will be some reference to case law.	<b>3–5</b>	Basic application of legal rules to a given scenario. Basic presentation of a legal argument which may lack detail in places and is partially developed. Some appropriate legal terminology is used.	<b>4–7</b>
<b>Level 1</b>	Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of case law is limited.	<b>1–2</b>	Limited application of legal rules to a given scenario. Limited presentation of a legal argument which has minimal detail and is unstructured and/or unclear. Minimal legal terminology is used.	<b>1–3</b>
<b>Level 0</b>	No response or no response worthy of credit.	<b>0</b>	No response or no response worthy of credit.	<b>0</b>

6 Advise whether Elektrix would be successful in an action in negligence against Charlie.

<b>Assessment Objectives</b>	<b>AO1:</b> Demonstrate knowledge and understanding of the English legal system and legal rules and principles. <b>10 marks.</b> <b>AO2:</b> Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. <b>15 marks.</b>
<b>Additional guidance</b>	The 'indicative content' is an example of valid content. Any other valid content is acceptable and should be credited in line with the levels of response. It is not expected for candidates to cover all of the indicative content.

### AO1 Indicative content

Answers may:

Define the basic elements of negligence: duty of care, breach of duty and causation of damage

Explain the factors relevant to establishing a duty of care. Post *Robinson v Chief Constable of West Yorkshire Police (2018)* approach:

- No single definitive test to assess the existence of a duty of care
- In first instance look to apply an existing precedent or statutory authority (e.g. Road Traffic Act 1988). Alternatively, develop the law incrementally and by analogy with existing precedents
  - Use *Caparo* if dealing with a novel case or being invited to depart from a previous authority: *Caparo* Test:
    - Foresight: *Kent v Griffiths*,
    - Proximity: *Bourhill v Young*
    - Fair, just and reasonable: *Mitchell v Glasgow CC*, *Mulcahy v MOD*

Explain possible factors relating to breach:

- Seriousness of harm - *Paris v Stepney*; Likelihood of harm - *Bolton v Stone*; Cost of prevention - *Latimer v AEC*; Social utility - *Watt v Hertfordshire CC*
- Credit reference to any special or particular standards of care (e.g. professionals)

Explain factors relating to causation:

Factual causation established through the 'but for' test – *Barnett v Chelsea & Kensington Hospital*

Remoteness of damage – *Wagon Mound (No 1)*

Breaks in the chain of causation – new intervening acts

Credit any description of relevant defences (such as contributory negligence or *volenti*) or the law relating to any relevant damages such as

pecuniary and non-pecuniary losses; special damages and general damages

Credit any other relevant point(s)

### AO2 Indicative content

Answers may:

Reason that, following *Robinson*, since this is a novel situation the court will have to apply the *Caparo* test:

Harm is foreseeable since it is a large housing estate and he knows he shouldn't operate it with one hand

Charlie is 'proximate' to the built environment around him in 'time and space'

Given the potential harm it would be fair, just and reasonable to impose a duty of care

Conclude that a duty would be owed

Credit alternative/additional discussion of possible existing precedents (such as those that cover model aircraft) or reasoning by analogy based on the same or similar cases

Reason that Charlie has breached his duty of care:

- He has fallen below the standard of the reasonable drone operator by the act of answering his phone
- According to the facts he is aware that he should not do this as well

Conclude that Charlie has breached his duty of care

Reason that Charlie has caused the damage to the power lines and the power cut

- 'But for' Charlie flying the drone (single-handed) in a built-up area, the damage would not have occurred
- The damage to the power lines is not too remote and the power-cut was a foreseeable consequence

Conclude that Charlie caused the damage

Charlie cannot reasonably argue that Elektrix were either *volenti* or contributorily negligent - there is insufficient information

Conclude that Charlie is liable in negligence and credit any other reasonable and justified conclusion

Credit any other relevant point(s).

	<b>AO1</b>	<b>Mark</b>	<b>AO2</b>	<b>Mark</b>
<b>Level 4</b>	Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant statutes and case law.	<b>9–10</b>	Excellent application of legal rules to a given scenario. Excellent presentation of a legal argument which is accurate, fully developed and detailed. Fully appropriate legal terminology is used.	<b>12–15</b>
<b>Level 3</b>	Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant statutes and case law.	<b>6–8</b>	Good application of legal rules to a given scenario. Good presentation of a legal argument which is detailed but not fully developed in places. Appropriate legal terminology is used.	<b>8–11</b>
<b>Level 2</b>	Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. There will be some reference to statutes and case law.	<b>3–5</b>	Basic application of legal rules to a given scenario. Basic presentation of a legal argument which may lack detail in places and is partially developed. Some appropriate legal terminology is used.	<b>4–7</b>
<b>Level 1</b>	Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of statutes and case law is limited.	<b>1–2</b>	Limited application of legal rules to a given scenario. Limited presentation of a legal argument which has minimal detail and is unstructured and/or unclear. Minimal legal terminology is used.	<b>1–3</b>
<b>Level 0</b>	No response or no response worthy of credit.	<b>0</b>	No response or no response worthy of credit.	<b>0</b>

**7 & 10\*** Discuss the extent to which vicarious liability is effective in achieving the aims of fairness, deterrence and apportionment of blame.

<b>Assessment Objectives</b>	<b>AO1:</b> Demonstrate knowledge and understanding of the English legal system and legal rules and principles. <b>10 marks.</b> <b>AO3:</b> Analyse and evaluate legal rules and principles. <b>15 marks.</b>
<b>Additional guidance</b>	The 'indicative content' is an example of valid content. Any other valid content is acceptable and should be credited in line with the levels of response. It is not expected for candidates to cover all of the indicative content.

### AO1 Indicative content

Answers may:

Explain the basic principle of vicarious liability – arises where the employer is liable for the torts of their employees

Explain the main rules for imposing liability – the tortfeasor must be an employee and the tort must occur in the course of employment (or be closely connected with the employment)

Explain any of the basic tests for establishing that the tortfeasor is an employee – the control test – *Mersey Docks & Harbour Board v Coggins & Griffiths*; the integration test – *Stevenson, Jordan & Harrison v Macdonald & Evans*; the economic reality (multiple) test – *Ready Mixed Concrete*; no single test – *Market Investigations Ltd v Minister of Social Security*; 'akin to employment' test - *Cox v MoJ*, *Fletcher v Chancery* and that this includes shared responsibility for employees - *Viasystems v Thermal Transfer* and even independent contractors - *Barclays Bank v Various Claimants*

Explain the circumstances where the tort falls within the course of employment – authorised acts – *Poland v Parr*, acting in an unauthorised manner – *Limpus v London General Omnibus*; or in a purely careless manner – *Century Insurance v Northern Ireland Transport Board*; where the employer benefits from the tort – *Rose v Plenty*

Explain circumstances that are not within the course of employment – employee's activities not within the scope of employment – *Beard v London General Omnibus*; employee on a frolic on his own – *Hilton v Thomas Burton*; giving unauthorised lifts – *Twine v Beans Express*

Explain the 'close connection' test applicable to intentional torts developed in *Lister v Hesley Hall* where there is liability if it can be shown that there was a close enough connection with the employment situation – *The Catholic Brothers case*, *Mohamud v Morrisons* & *Armes v Notts CC*

Credit any other relevant point(s)

**AO3 Indicative content**

Answers may:

**Discuss Fairness**

Effective: The 'benefit and burden' principle (the employer benefits from the employees work so should bear the costs arising from the employees torts)

Effective: The person with power & control over D should be responsible because they are in control of D, are best placed to know the characteristics of D, train them or ultimately dismiss them and benefits from D's activity

Ineffective: Liability without fault is unfair and recent cases using the close connection test have blurred the line between what is connected to the employers business and the behaviour complained of

Ineffective: Lacks natural justice to hold employer liable before he has realised a practice is happening and given an opportunity to address it

**Discuss Deterrence**

Effective: Deters poor work practices and encourages high standards of recruitment, training and supervision of staff

Effective: Nexus makes employer think about wider context of employment (e.g. coming into contact with children/vulnerable)

Ineffective: There is no deterrent effect on the employee if they are not paying

Ineffective: There is no deterrent effect on the employer if they are simply insuring under compulsion

**Discuss Apportionment of Blame**

Effective: Requirement of three elements means there is a standard before blame is attached

Effective: Requirement of a *nexus* between tort and employment

Ineffective: Contradicts basic fault principle – especially where employer has given explicit prohibition and/or extensive training

Ineffective: In many cases liability is effectively strict - e.g. where employer is unaware and hasn't had opportunity to address issue

Credit any other relevant point(s).

	AO1	Mark	AO3	Mark
<b>Level 4</b>	Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant case law.	<b>9–10</b>	Excellent analysis and evaluation of a wide range of legal rules and principles. The response is wide ranging and has a well sustained focus on the question. The key points are fully discussed and fully developed to reach a valid conclusion. <i>There is a well-developed line of reasoning which is clear and logically structured. The information presented is relevant and substantiated.</i>	<b>12–15</b>
<b>Level 3</b>	Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant case law.	<b>6–8</b>	Good analysis and evaluation of a range of legal rules and principles. The response has a mainly consistent focus on the question. Most of the key points are well discussed and well developed to reach a valid conclusion. <i>There is a line of reasoning presented with some structure. The information presented is in the most-part relevant and supported by some evidence.</i>	<b>8–11</b>
<b>Level 2</b>	Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. There will be some reference to case law.	<b>3–5</b>	Basic analysis and evaluation of legal rules and principles. The response is partially focused on the question. Some of the key points are discussed and partially developed to reach a basic conclusion. <i>The information has some relevance and is presented with a basic structure. The information is supported by basic evidence.</i>	<b>4–7</b>
<b>Level 1</b>	Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of case law is limited.	<b>1–2</b>	Limited analysis of legal rules and principles. The response has limited focus on the question. Discussion of any key points is minimal. <i>The information is limited and communicated in an unstructured way. The information is supported by limited evidence and the relationship to the evidence may not be clear.</i>	<b>1–3</b>
<b>Level 0</b>	No response or no response worthy of credit.	<b>0</b>	No response or no response worthy of credit.	<b>0</b>

8 Advise whether Davina would be successful in an action against Newtown Council in occupier's liability.

<b>Assessment Objectives</b>	<b>AO1:</b> Demonstrate knowledge and understanding of the English legal system and legal rules and principles. <b>10 marks.</b> <b>AO2:</b> Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. <b>15 marks.</b>
<b>Additional guidance</b>	The 'indicative content' is an example of valid content. Any other valid content is acceptable and should be credited in line with the levels of response. It is not expected for candidates to cover all of the indicative content.

### AO1 Indicative content

Answers may:

Identify the appropriate area of potential liability as occupiers' liability and that the area is governed by two Acts of Parliament – one covering lawful visitors (The Occupiers' Liability Act 1957) and one covering non-lawful visitors (trespassers) (The Occupiers' Liability Act 1984)

Explain that under the 1984 Act a trespasser is not defined and the common law definition is used: 'a trespasser is someone who goes on land without any sort of permission & whose presence is unknown to O or, if known, is objected to' (*Addie v Dumbreck*) and that a lawful visitor under the 1957 Act can become a trespasser when they go beyond their permission

Identify that the occupier will only owe a duty under s.1(3) of the 1984 Act if:

- (a) He is aware of the danger (or has reasonable grounds to believe it exists)
- (b) He knows or has reasonable grounds to believe that C is in the vicinity of the danger; and
- (c) The risk is one against which, in the circumstances of the case, he may reasonably be expected to offer some protection

s1(4) states duty is to 'take such care as is reasonable in all the circumstances' to prevent injury to trespassers 'by reason of the danger concerned'

Explain that the occupier does not have to warn adult trespassers against the risk of injury arising from obvious dangers (*Ratcliff v McConnell*) and that the occupier is also entitled to take into account the practicality of taking precautions (*Tomlinson v Congleton BC*)

Identify that an occupier is also entitled to expect that a trespasser will not engage in obviously foolhardy pursuits or ones which the claimant's

expertise or training should make them aware of (*Donoghue v Folkestone*)

State that an occupier may also limit the scope of his duty through the use of effective warnings under s1(5) (*Westwood v Post Office*), contributory negligence or *volenti* under s.1(6) (*Ratcliffe v McConnell*)

Credit any other relevant point(s)

### AO2 Indicative content

Answers may:

Reason that:

- Newtown Council will be considered as occupiers since they are in control and possession of the premises (*Wheat v Lacon*) and that the lake would count as premises since these are widely defined (*Wheeler v Copas*) as well as the obvious similarity to *Tomlinson* which also involved a lake as premises
- Davina is a trespasser since she deliberately ignores a sign which says that access to the lake is prohibited - she is therefore covered by the 1984 Act
- Newtown Council will owe a duty of common humanity under the 1984 Act if the three aspects of s.1(3) are satisfied: (1) there is an obvious danger when skating on a frozen lake (as evidenced by the warning sign); (2) Newtown Council must anticipate trespassers being in the vicinity of the danger if they have erected a sign; and (3) did Newtown Council offer enough protection by erecting the sign or should they have done more (e.g. fencing off the entire lake)?
- It is submitted that Newtown Council could reasonably expect that Davina would be aware of the danger since she is an adult with expertise in skating and should be aware of the dangers. If the Council do owe a duty the duty is to take such care as is reasonable in the circumstances e.g. they do not have to fence off the entire lake or spend onerous sums of money in making premises safe (s.1(4)), especially if the danger is obvious (*Tomlinson*)
- Furthermore, the status of the warning sign is sufficient to enable Davina to remain safe (s.1(5)) but she has chosen to ignore it

Conclude that Davina is unlikely to have an actionable case against Newtown Council but, if she did, Newtown Council would be likely to succeed in claiming either:

- Contributory negligence on Davina's part or, possibly,
- *Volenti* (under s.1(6)) if Davina appreciated the nature and degree of the risk more than just its existence

Credit any other relevant point(s).

	<b>AO1</b>	<b>Mark</b>	<b>AO2</b>	<b>Mark</b>
<b>Level 4</b>	Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant statutes and case law.	<b>9–10</b>	Excellent application of legal rules to a given scenario. Excellent presentation of a legal argument which is accurate, fully developed and detailed. Fully appropriate legal terminology is used.	<b>12–15</b>
<b>Level 3</b>	Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant statutes and case law.	<b>6–8</b>	Good application of legal rules to a given scenario. Good presentation of a legal argument which is detailed but not fully developed in places. Appropriate legal terminology is used.	<b>8–11</b>
<b>Level 2</b>	Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. There will be some reference to statutes and case law.	<b>3–5</b>	Basic application of legal rules to a given scenario. Basic presentation of a legal argument which may lack detail in places and is partially developed. Some appropriate legal terminology is used.	<b>4–7</b>
<b>Level 1</b>	Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of statutes and case law is limited.	<b>1–2</b>	Limited application of legal rules to a given scenario. Limited presentation of a legal argument which has minimal detail and is unstructured and/or unclear. Minimal legal terminology is used.	<b>1–3</b>
<b>Level 0</b>	No response or no response worthy of credit.	<b>0</b>	No response or no response worthy of credit.	<b>0</b>

- 9 Advise whether Erica would be successful in an action against Newtown Jet Ski Club in private nuisance.

<b>Assessment Objectives</b>	<p><b>AO1:</b> Demonstrate knowledge and understanding of the English legal system and legal rules and principles. <b>10 marks.</b></p> <p><b>AO2:</b> Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. <b>15 marks.</b></p>
<b>Additional guidance</b>	The 'indicative content' is an example of valid content. Any other valid content is acceptable and should be credited in line with the levels of response. It is not expected for candidates to cover all of the indicative content.

### AO1 Indicative content

Answers may:

Define the tort of private nuisance – an unlawful, indirect interference with another person's use or enjoyment of land or rights over it

Identify that a potential defendant is an occupier of land and that this includes those in control and possession as well as owners *Tetley v Chitty*

Explain that for a claimant to sue he must be able to show an interest in the land affected by the nuisance *Hunter v Canary Wharf*

Identify that there is a difference between nuisance causing physical damage and one causing indirect interference with the enjoyment of land  
*Halsey v Esso*

Identify the type of indirect interference giving rise to liability: Noise or vibrations – *Sturges v Bridgman*; Smoke and fumes – *St Helens Smelting v Tipping*

Explain that the term unlawful actually means unreasonable and identify the elements that may be taken into account in determining whether the use of land is unreasonable:

- Locality – *Kennaway v Thompson*; Duration – *Crown River Cruises v Kimbolton*; Social benefit – *Miller v Jackson*

Explain the possible defences:

- Prescription - *Sturges v Bridgman*; Local authority planning permission *Coventry v Lawrence*; Moving to the nuisance *Miller v Jackson*

Identify the basic remedies:

- Damages – since *Coventry v Lawrence* courts now have wider discretion relating to the award of damages

- Injunctions – prohibitory injunctions: *Kennaway v Thompson*, *Coventry v Lawrence* – consider the relevance of public policy: *Miller v Jackson*

Credit any other relevant point(s)

### AO2 Indicative content

Answers **may**:

Reason that:

- Erica is the claimant as her reasonable use and enjoyment of her land is indirectly affected and she is an occupier as she has a proprietary interest in the land affected (she owns the old house)
- Newtown Jet Ski Club are the defendants as they are causing the interference and whilst they may not own the lake, they have possession and control of the lake during the times the nuisance is being generated (note also the similarity to *Kennaway v Thompson*)
- Since Erica has not suffered any physical damage there is no *prima facie* nuisance and Erica's claim will need to be based on establishing unreasonable use of land by Newtown Jet Ski Club
- The interference is indirect and continuous despite only increasing recently – *Crown River Cruises v Kimbolton*
- Newtown Jet Ski Club may claim that they are protected by planning permission but, since *Coventry v Lawrence*, the UK Supreme Court has ruled that planning permission cannot provide an absolute defence to causing a nuisance as it is now no more than evidence
- Newtown Jet Ski Club may try and claim that Erica has 'moved to the nuisance' but this will not be accepted (*Miller v Jackson*), especially where the claimant is using the premises for the same purpose as his/her predecessor - since Erica is continuing to make residential use of the bungalow this will be the case here - *Coventry v Lawrence*
- Newtown Jet Ski Club may attempt to claim the defence of prescription but this will fail as the UK Supreme Court has now clarified (in *Coventry v Lawrence*) that Newtown Jet Ski Club would need to establish uniform creation of the noise for more than 20 years which, according to the facts given, they could not do

Conclude that Erica is likely to have an actionable case against Newtown Jet Ski Club and advise her of the most likely remedy:

- The most appropriate remedy in this situation would be a prohibitory injunction although damages can be considered where planning permission has been awarded or where the public interest is involved (such as employees losing their jobs) - *Coventry v Lawrence*

Credit any other relevant point(s).

	<b>AO1</b>	<b>Mark</b>	<b>AO2</b>	<b>Mark</b>
<b>Level 4</b>	Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant case law.	<b>9–10</b>	Excellent application of legal rules to a given scenario. Excellent presentation of a legal argument which is accurate, fully developed and detailed. Fully appropriate legal terminology is used.	<b>12–15</b>
<b>Level 3</b>	Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant case law.	<b>6–8</b>	Good application of legal rules to a given scenario. Good presentation of a legal argument which is detailed but not fully developed in places. Appropriate legal terminology is used.	<b>8–11</b>
<b>Level 2</b>	Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. There will be some reference to case law.	<b>3–5</b>	Basic application of legal rules to a given scenario. Basic presentation of a legal argument which may lack detail in places and is partially developed. Some appropriate legal terminology is used.	<b>4–7</b>
<b>Level 1</b>	Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of case law is limited.	<b>1–2</b>	Limited application of legal rules to a given scenario. Limited presentation of a legal argument which has minimal detail and is unstructured and/or unclear. Minimal legal terminology is used.	<b>1–3</b>
<b>Level 0</b>	No response or no response worthy of credit.	<b>0</b>	No response or no response worthy of credit.	<b>0</b>