

GCE

Law

H415/02: Law making and the law of tort

Advanced GCE

Mark Scheme for November 2020

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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.

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Annotations

| Annotation | Meaning |
|---|---|
|  | Very well developed point (WDP) |
|  | Unclear |
|  | Applied point |
|  | Developed point (DP) |
|  | Well developed point (WDP) |
|  | Not answered question |
|  | Not Relevant |
|  | Point |
|  | Repetition |
|  | Sort of |
|  | Point has been noted, but no credit has been given / blank page has been checked for response |
|  | Correct |
|  | Applied |
|  | Spare 1 |

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 and concepts.

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 the bottom 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 Objective: | AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 10 marks |
|-----------------------|--|

Question **3-4**

| | |
|-----------------------|--|
| Assessment Objective: | AO3 1b: Analyse and evaluate legal issues. 15 marks |
|-----------------------|--|

Section BQuestion **5,6,8 and 9**

| | |
|-----------------------|---|
| Assessment Objective: | AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 10 marks |
| | AO2 1a/1b Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. 15 marks |

Questions **7*** and **10***

| | |
|-----------------------|--|
| Assessment Objective: | AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 10 marks AO3 1a: Analyse and evaluate legal rules and principles. 15 marks |
|-----------------------|--|

Questions that have an asterisk (*) assess the quality of a candidate's extended response. Level descriptors are identified in the AO3 column in *italics*.

Section A

| | Answer | Marks | Guidance |
|---|--|---------------------------------|--|
| 1 | <p><i>Describe three influences on parliamentary law-making</i></p> <p>Answers may include:</p> <ul style="list-style-type: none"> • Government Policy (accept political influences or manifesto promises) – lead to legislation in each Queen’s Speech including major Acts such as the Human Rights Act 1998. Consider Private Members’ Bills – e.g. Michael Colvin MP introduced the Computer Misuse Act 1991 • Public Inquiries - such as the Cullen Report which was a response to the Snowdrop Campaign after the Dunblane massacre – it led to the Firearms (Amendment) Act 1997 • Public opinion - (often expressed through the media) has led to legislation such as the Forced Marriage (Civil Protection) Act 2007 and the Dangerous Dogs Act 1991 • Pressure Groups - such as Stonewall who campaigned for the repeal of section 28 of the Local Government Act 1988 which was included in the Local Government Act 2003 • Judicial Decisions - such as the gaps in the law highlighted by the House of Lords in <i>R v Preddy</i> (1996) which was addressed in the Theft (Amendment) Act 1996 • The Law Commission – full-time, permanent law reform body: the Law Commission Act 1965 and the Law Commission Act 2009 – e.g. Occupier’s Liability Act 1984 • Credit any other relevant law-making initiative such as Royal Commissions, technological, social and moral changes and <i>ad hoc</i> government reviews – e.g. Sir David Clementi’s report on the legal profession led to the Legal Services Act 2007 <p>Credit any other relevant point(s).</p> | <p>10 AO1</p> | <p>Use Levels of Response criteria</p> <p>Level 4 (9–10 marks) 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>Level 3 (6–8 marks) 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>Level 2 (3–5 marks) 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>Level 1 (1–2 marks) 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>Level 0 (0 marks) No response or no response worthy of credit.</p> |

| | Answer | Marks | Guidance |
|---|---|---------------------------------|--|
| 2 | <p><i>Describe the ratio decidendi and the obiter dicta of a judgment</i></p> <p>Answers may include:</p> <ul style="list-style-type: none"> • Precedent operates because the legal reasons for past decisions are recorded in judgments • These judgments have two parts the <i>ratio decidendi</i> and the <i>obiter dicta</i> <p><i>Ratio decidendi</i></p> <ul style="list-style-type: none"> • The <i>ratio decidendi</i> (reason for deciding) is the part of the judgment in which the judge explains the principles of law upon which his/her decision is based • This is what creates a binding precedent for judges to follow in future, similar cases. Judgments made by a higher court are binding on all courts beneath them • Examples of well-known <i>ratios</i> include: Donoghue v Stevenson (1932), Carlill v Carbolic Smoke Ball Co Ltd (1892) & R v Dudley & Stevens (1884) <p><i>Obiter dicta</i></p> <ul style="list-style-type: none"> • The judgment will also include other material known as <i>obiter dicta</i> (other things said). For example, a judge may comment on what his/her decision would have been if the facts of the case had been different • <i>Obiter dicta</i> are not binding but may form a persuasive precedent • It is sometimes difficult to separate the <i>ratio decidendi</i> from the <i>obiter dicta</i> • An example of <i>obiter dicta</i> which became important in a subsequent case is R v Howe (1987) which was followed as a persuasive precedent in R v Gotts (1992) <p>Credit any other relevant point(s).</p> | <p>10 AO1</p> | <p>Use Levels of Response criteria</p> <p>Level 4 (9–10 marks) 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>Level 3 (6–8 marks) 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>Level 2 (3–5 marks) 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>Level 1 (1–2 marks) 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>Level 0 (0 marks) No response or no response worthy of credit.</p> |

| | Answer | Marks | Guidance |
|---|--|---|---|
| 3 | <p><i>Discuss the advantages and disadvantages of influences on parliamentary law-making</i></p> <p>Answers may include the following:</p> <ul style="list-style-type: none"> • Government Policy (accept political influences or manifesto promises) – benefit from having a ‘mandate’ since the government have been elected. However, there is a lack of parliamentary time and some matters (e.g. budgets and taxation) take priority • Private Members’ Bills are good as they allow individual MPs to raise important issues on behalf of their constituents. However, very few such bills are successful because, unless they have government backing they are unlikely to be given sufficient parliamentary time • Public Inquiries - often enjoy strong government and political support in recognition of tragic disasters and the strength of public opinion. However, some reports are criticised as ‘knee-jerk’ reactions which go too far and over-regulate the area concerned (e.g. all seated football stadia) • Public opinion - (often expressed through the media) successful and effective in drawing attention to certain issues and allow government to respond. However, the media do not always give a balanced view and have their own political agendas. Also, it can be difficult to reflect public opinion in a diverse pluralist society • Pressure Groups – have limited success. Many are successful in raising the profile of an issue but few are successful at getting the law changed (e.g. Fathers for Justice have been a high-profile pressure group but have yet to achieve their political aims). Other groups such as Stonewall have, arguably, been more successful. Problems can arise when two pressure groups have conflicting interests & want opposing things | <p>15 AO3 1b</p> | <p>Use Levels of Response criteria</p> <p>Level 4 (12–15 marks) 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>Level 3 (8–11 marks) 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>Level 2 (4–7 marks) 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>Level 1 (1–3 marks) 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>Level 0 (0 marks) No response or no response worthy of credit.</p> <p>To attain Levels 3 and 4 candidates need to discuss both advantages and disadvantages.</p> |

| Answer | Marks | Guidance |
|--|-------|----------|
| <ul style="list-style-type: none">• Special interest groups – can have the benefit of expertise but can have undue influence because of funding relationships (e.g. union & big business donations)• Others: Emergency situations – provide a fast legislative response but may lead to poor legislation if not properly considered; Royal Commissions – offer flexibility and expertise but can be costly and time-consuming; Judicial decisions – offer legal expertise and a response to faulty legislation but undermine separation of powers; The Law Commission – despite early success rates and the promise of major reforms through codification, the Law Commission has had problems with a lack of political will to devote legislative time to their proposals as well as issues with workload and budgetary constraints <p>Credit any other relevant point(s).</p> | | |

| | | | |
|---|---|-----------------|--|
| 4 | <p><i>Discuss the disadvantages of precedent</i></p> <p>Answers may include the following:</p> <ul style="list-style-type: none"> • Rigidity ... precedent can be inflexible with bad decisions being perpetuated – especially if it takes a long time for suitable cases to get to the appeal courts that can change the law (<i>R v R</i> [1992]). Issues such as leave to appeal, the small workload of the UKSC and resources also inhibit development • Volume and complexity ... thousands of reported cases make it difficult to identify and locate relevant case law. The judgements can be very long with no clear distinction between <i>obiter</i> and <i>ratio</i> (<i>Dodd's Case</i> [1973]) making it difficult to identify key principles • Illogical distinctions ... practices such as 'distinguishing' lead to 'hair-splitting' which, in turn, can lead to certain areas of law becoming over-complex. The minor differences between some cases can be so small as to make the distinction appear illogical • Lack of responsiveness ... courts can only deal with cases which are brought before it. Consequently, unless parliament legislate, there is nothing the judges can do to reform the law – their hands are tied until suitable cases come along • Unpredictable and unreliable ... the result of a case can be uncertain until the appeal process is exhausted. Also, multiple judges (in appeal cases) reaching the same decisions by different lines of reasoning undermines confidence • Unjust ... some argue that every case is different and should be argued from first principles rather than applying reasoning from a past case which is only similar • Instant impact without retrospective effect ... can result in injustice (especially in criminal cases with custodial sentences) where the offender's action was not unlawful at | 15 AO3 1b | <p>Use Levels of Response criteria</p> <p>Level 4 (12–15 marks) 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>Level 3 (8–11 marks) 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>Level 2 (4–7 marks) 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>Level 1 (1–3 marks) 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>Level 0 (0 marks) No response or no response worthy of credit.</p> |
|---|---|-----------------|--|

| | | | |
|--|---|--|--|
| | <p>the time of commission</p> <ul style="list-style-type: none">• Undue influence ... a single judge (or a small number) who hear many cases/appeals of the same type can have a disproportionate role in the development of the law in that area and individual biases and prejudices are not balanced out. There is also evidence that judges try to manipulate precedents to achieve particular outcomes (Lord Denning in <i>Miller v Jackson</i>)• Democracy and judicial law-making ... there is a view that judges can and do use precedent to 'make law' (e.g. <i>R v R</i> [1991]) and that they do not have the mandate to do so because, according to the theories of separation of powers and supremacy of parliament, only parliament should make law. However, many judges argue that they are simply adapting existing legal rules to fit changing social conditions (so-called declaratory theory) <p>Credit any other relevant point(s).</p> | | |
|--|---|--|--|

Section B

5 Advise whether Anytown Football Club would be vicariously liable for the sexual abuse committed by Viktor.

| | |
|------------------------------|--|
| Assessment Objectives | AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 10 marks. AO2: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. 15 marks. |
| Additional guidance | 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 – one party (usually an employer) is fixed with liability for the torts of another party (usually an employee)

Explain the main rules for imposing liability:

- Tortfeasor commits a tort
- Tortfeasor must be an employee or in a position akin to employment
- There must be a close connection between what the employee was employed to do and the employee's conduct
- The Catholic Child Welfare Society and others v Various Claimants and The Institute of the Brothers of the Christian Schools and others (The Christian Brothers Case (CBC)); Armes v Nottingham County Council (Armes); Cox v Ministry of Justice (Cox); Lister v Hesley Hall (Lister); Mohamud v WM Morrison Supermarkets plc (Morrison)

Explain the basic tests for establishing that the tortfeasor is an employee:

- Tortfeasor must satisfy the tests developed through CBC; Cox & Armes - to be in a position 'akin to an employment'
- Since Various Claimants v Barclays Bank plc (2017) EWHC 1929 (QB) & Various Claimants v Barclays Bank plc (2018) Civ 1670,* this can include independent contractors
- ** The law stated above was accurate at the time this exam was set and throughout most of the 2018/20 course. However, in April 2020, the United Kingdom Supreme Court (UKSC) handed down its decision in **Barclays Bank plc v Various Claimants (2020) UKSC 13**, an appeal against the above case. In reversing the Court of Appeal's decision, the UKSC re-instated the position that employers can use an effective 'independent contractor defence' when faced with claims in respect of third-party contractors. OCR policy is that students are not expected to be aware of changes in the law that happen in the 12 months immediately before an examination. See below for application.*

- Conventional tests: Control test - Mersey Docks & Harbour Board v Coggins & Griffiths; Integration test - Stevenson, Jordan & Harrison v Macdonald & Evans; Economic reality (multiple) test - Ready Mixed Concrete v MPNI

Explain there can be liability for the intentional torts (crimes) of employees where these comply with the close connection test set out in the CBC and affirmed in Morrison and Armes:

- what was the field of activities entrusted by the employer to the relevant employee i.e. what was the nature of his job? and
- was there sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice?

Credit any other relevant point(s)

AO2 Indicative content

Answers may:

Reason that:

Since the case involves an intentional tort, the most appropriate approach would be the one set out in Armes:

- I. is the relevant relationship one of employment or "akin to employment"? and
- II. if so, was the tort sufficiently closely connected with that employment or quasi employment?

The CBC sets out five criteria to determine 'akin to employment' status (affirmed in Cox and Armes):

- D is more likely to have the means to compensate the victim than the tortfeasor and can be expected to have insured against that liability. This would be true for Viktor as Anytown Football Club (AFC) would, presumably, have compulsory insurance and any insurance Viktor had would be invalid since he has died
- The tort will have been committed as a result of activity being undertaken by the employee on behalf of the employer. Since Viktor was responsible for all the check-ups for newly appointed football players, it can be said that the abuse took place as a result of activity undertaken on behalf of AFC
- D's activity is likely to be a part of the business activity of the defendant. As a pre-requisite for new players, the check-ups are part of the business activity of AFC
- The employer, by employing the employee to carry on the activity, will have created the risk of the tort committed by the employee. Performing the check-ups put Viktor in a position of opportunity which means the club has created the risk
- The employee will, to a greater or lesser degree, have been under the control of the employer. The check-ups were a requirement of the club and their nature and scope would have been under the control of the club who were paying Viktor for his services

Candidates should be credited for pointing out that the second, third and fourth of these criteria have been given particular emphasis since Cox

An additional consideration here is whether Viktor's potential status as an independent contractor would mean he is not in a relationship 'akin to employment'. However, based on Barclays*, it would not be possible to argue that vicarious liability cannot exist on the basis that the third party is an employed independent contractor. Route A: Thus, Viktor would be an employee or in a situation 'akin to employment' (see above) even if he was a self-employed independent contractor. Route B: *In the light of the above change in the law, learners will be credited with the alternative reasoned and justified conclusion regarding Viktor's employment status

Was the tort (crime) sufficiently closely connected to the employment?

- The first question is what functions or "field of activities" have been entrusted by the employer to the employee?
- Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice

It was AFC's requirements which put the claimants in a position of risk. AFC specified the nature of the check-ups as well as specifying the physiotherapist. The check-ups were closely connected with the relationship between AFC and Viktor. They were the whole purpose of the relationship. Without them the relationship would not have existed. Given the trust placed in professionals working in intimate circumstances like this, there would be strong social justice justification in holding AFC liable for Viktor's actions

Route A: Explain that AFC **will be vicariously liable** for the historic abuse alleged by the former employees because Viktor is an employee and there is a close connection between his employment and the tort of battery. Route B: *Also accept that AFC are **not liable** since, in spite of the close connection, Viktor is not an employee but an independent contractor (provided this is explained and justified with accurate supporting authority)

Credit any other relevant point(s).

| | AO1 | Mark | AO2 | Mark |
|----------------|---|-------------|--|--------------|
| Level 4 | 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. | 9–10 | 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. | 12–15 |

| | | | | |
|----------------|---|------------|--|-------------|
| Level 3 | 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. | 6–8 | 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. | 8–11 |
| Level 2 | 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. | 3–5 | 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. | 4–7 |
| Level 1 | Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of case law is limited. | 1–2 | 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. | 1–3 |
| Level 0 | No response or no response worthy of credit. | 0 | No response or no response worthy of credit. | 0 |

6 Advise whether Dr Penberthy would be liable in negligence for the death of Treeve.

| | |
|------------------------------|--|
| Assessment Objectives | AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 10 marks. AO2: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. 15 marks. |
| Additional guidance | 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 elements of negligence: duty of care, breach and causation of damage

Explain the factors relevant to establishing a duty of care. Robinson v CC West Yorkshire approach:

- No single definitive test to assess the existence of a duty of care
- In first instance look to apply an existing precedent (e.g. Bolam v Friern Hospital Management Committee (Bolam), Bolitho v City & Hackney Health Authority (Bolitho) or any relevant medical negligence case)

- Alternatively, develop incrementally and by analogy with existing precedents
- Only 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

Explain possible factors relating to breach:

- Falling below the standard of the reasonable man – Vaughan v Menlove
- The special or particular standards of care for (medical) professionals: Doctor in breach where he/she failed to gain informed consent (test of materiality) - Montgomery v Lanarkshire Health Board (Montgomery). Doctor in breach where practice was not in accordance with a responsible body of medical opinion (Bolam) and did not behave in a way which withstands logical analysis (Bolitho)
- Factors affecting the standard of care: Seriousness of harm - Paris v Stepney; Likelihood of harm - Bolton v Stone; Cost of prevention - Latimer v AEC; Social utility - Watt v Hertfordshire CC

Explain factors relating to causation:

- Factual causation established through the 'but for' test – Barnett v Chelsea & Kensington Hospital (Barnett)
- Remoteness of damage – Wagon Mound (No 1)
- Breaks in the chain of causation – new intervening acts

Credit any other relevant point(s)

AO2 Indicative content

Answers may:

Reason that:

Dr Penberthy will owe a duty of care because he is on duty at the hospital where Treeve arrives as a patient. This will be established based on:

- Numerous well-established existing precedents involving medical negligence such as Montgomery, Bolam or Barnett, or
- Reasoning by analogy from the same or similar cases, or
- If novel, application of the three-stage test from Caparo

Dr Penberthy will have breached his duty of care because:

- Dr Penberthy's actions have fallen below the standard of the reasonable doctor because either (a) Dr Penberthy failed to gain or consider

informed consent - Montgomery or (b) where candidates argue that Treeve is unconscious and lacks the capacity to consent, Dr Penberthy's actions were not a practice in accordance a responsible body of medical men and defied logical analysis - Bolam

- The evidence for this is that Dr Penberthy decided to (i) give 'an old-fashioned method of treatment' which (ii) involved 'using an unusual drug' and, furthermore, (iii) it was 'against hospital policy' and (iv) the 'vast majority' of doctors would not have used it

Has Dr Penberthy 'caused' the death of Treeve?

- Initially it would appear that Dr Penberthy's actions were the factual cause of Treeve's death. But, the autopsy establishes that Treeve died because of his pre-existing injuries and not because of Dr Penberthy's treatment
- Consequently, Dr Penberthy is not the factual cause of Treeve's death as seen in Barnett where it was decided that the patient would have died in spite of the doctor's treatment (or failure to treat)
- Furthermore, the harm would not be too remote; nor would there be any breaks in the chain of causation
- Thus, Dr Penberthy is not the factual or legal cause of Treeve's death

Conclusion

- Conclude that Dr Penberthy will not be liable in negligence. Despite owing a duty of care and breaching that duty, his acts did not cause Treeve's death

Credit any other relevant point(s).

| | AO1 | Mark | AO2 | Mark |
|----------------|--|-------------|--|--------------|
| Level 4 | 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. | 9–10 | 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. | 12–15 |
| Level 3 | 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. | 6–8 | 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. | 8–11 |
| Level 2 | Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. | 3–5 | Basic application of legal rules to a given scenario. Basic presentation of a legal argument which may | 4–7 |

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|----------------|---|------------|--|------------|
| | There will be some reference to statutes and case law. | | lack detail in places and is partially developed. Some appropriate legal terminology is used. | |
| Level 1 | 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. | 1–2 | 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. | 1–3 |
| Level 0 | No response or no response worthy of credit. | 0 | No response or no response worthy of credit. | 0 |

7 & 10* Discuss the extent to which the law on what constitutes private nuisance effectively balances competing interests. Do not discuss defences or remedies.

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| Assessment Objectives | AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 10 marks. AO3 1a: Analyse and evaluate legal rules and principles. 15 marks. |
| Additional guidance | 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:

Definition

- An unlawful (unreasonable) interference with a person's use or enjoyment of land or some right over, or in connection with it

Who may claim?

- The claimant must have an interest in the land affected – Hunter v Canary Wharf Ltd

What may amount to a nuisance?

- Physical damage will be a *prima facie* nuisance: Halsey v Esso Petroleum; Indirect nuisances include: smells: Adams v Ursell; noise from neighbours: Baxter v Camden London Borough Council (No 2); TV Reception: Bridlington Relay Ltd v Yorkshire Electricity Board / Hunter v Canary Wharf; General noise/dust/heat/light/vibrations: Halsey v Esso Petroleum; cliff subsidence (sudden): Holbeck Hall Hotel and Another v Scarborough Borough Council; sex shop lowering tone & house values: Laws v Florinplace Ltd; natural 'accidents': Leakey v National Trust; blocked culverts: Sedleigh-Denfield v O'Callaghan; noisy neighbours: Coventry v Lawrence

What amounts to an unreasonable interference?

- Duration: Crown River Cruises Ltd v Kimbolton Fireworks Ltd; sensitivity of plaintiff: Network Rail Infrastructure Ltd v CJ Morris; locality: Laws v Florinplace Ltd, Kennaway v Thompson; utility of defendant's conduct: Adams v Ursell; effect of malice: Christie v Davey; seriousness of interference: Miller v Jackson; effect on claimant's human rights?: Marcic v Thames Water

AO3 Indicative content

Answers may:

Discuss why nuisance may be seen as **effective** in balancing interests:

- Effective in avoiding situations where one person's interests are protected at the expense of the other party where the other party is acting unreasonably
- Outcomes can produce a fair resolution between neighbours which resolves differences and prevents escalation of bad feeling – Thompson v Kennaway
- Considering the effect of public policy can be effective in evening up imbalance between individual rights and 'big business'
- The willingness to consider the changing nature of a locality provides the flexibility to balance conflicting interests effectively - Coventry v Lawrence
- Flexibility over who may constitute a defendant provides claimants with greater access to justice – Cocking v Eacott
- Further flexibility over duration provides an effective means of recourse even where the interference is short-term – Crown River Cruises v Kimbolton
- Recent developments under the Human Rights Act may prove effective in strengthening the position of some claimants - Marcic v Thames Water
- Wide range of possible nuisances is effective in providing justice through scope
- It is relatively easy to prove nuisance where there is physical damage, placing claimants in a stronger position when confronted with a better resourced defendant – Halsey v Esso
- The test of unreasonableness gives the court flexibility to apply give and take and reach a just outcome

Credit limited discussion of why the tort may be **ineffective** in balancing interests where used in context:

- Restrictive definition of what constitutes a nuisance is possibly ineffective – TV in Hunter v Canary Wharf
- Social benefit to the wider community can sometimes outweigh the interests of an individual (to their detriment) – Miller v Jackson
- Statutory authority can leave a claimant with no remedy for intolerable interferences which may refute give and take
- Statutory nuisance is probably a more effective control of most modern nuisances suggesting that private nuisance struggles to be effective
- Limiting claimants to those with an interest in the land limits just outcomes which is ineffective - Hunter v Canary Wharf
- Ease with which cases can be proved where there is physical damage (compared to proving interference with enjoyment) can be unjust on defendants
- Nuisance ineffective where claimants are private individuals who are poorly resourced by comparison to well-resourced defendants
- Making defendants potentially responsible for naturally occurring hazards based on awareness and a failure to avert, could be argued to be an unfair burden (Leakey v National Trust), although there are limits on its scope – Holbeck Hall Hotel v Scarborough Borough Council
- Ineffective where statute provides complete protection to the activity of some landowners

Credit any other relevant point(s).

| | AO1 | Mark | AO3 | Mark |
|----------------|---|-------------|---|--------------|
| Level 4 | 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. | 9–10 | 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> | 12–15 |
| Level 3 | 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. | 6–8 | 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> | 8–11 |
| Level 2 | 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. | 3–5 | 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> | 4–7 |
| Level 1 | Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of case law is limited. | 1–2 | 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> | 1–3 |
| Level 0 | No response or no response worthy of credit. | 0 | No response or no response worthy of credit. | 0 |

8 Advise whether Oldtown Pet Shop will be liable for the injuries sustained by Shaun in occupier's liability.

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| Assessment Objectives | AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 10 marks. AO2: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. 15 marks. |
| Additional guidance | 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:

Describe the general provisions of the Occupiers' Liability Act 1957 (OLA 57): Occupiers' liability concerns liability owed for damage arising from the state of the premises. Liability arises under the OLA 57 for lawful visitors

- The OLA 57 involves a common duty of care owed to visitors under s.2(1) and that the scope of that duty (under s.2(2)) is to keep the visitor reasonably safe for the purposes for which he/she is invited
- Identify that under s.1(2) of the OLA 57 a visitor can be an invitee, a licensee, or someone with a contractual or legal right to enter
- Explain that the term 'occupier' is not in the OLA 57 but is broadly defined in common law and can include anyone who is in possession or control of premises (Wheat v Lacon)
- Explain that premises are broadly defined in s.1(3) of the OLA 57 (Wheeler v Copas)
- Explain that children are owed a higher and 'special' duty of care under section 2(3)(a) of the OLA 57 (Phipps v Rochester Corporation, Glasgow Corporation v Taylor, Jolley v London Borough of Sutton, Perry v Butlins Holiday World)

Identify the basic acceptance that a child is more at risk and that the standard of care is measured subjectively rather than objectively (s.2(3) & Moloney v Lambeth BC)

Identify that an occupier must be prepared for children to be less careful than adults. If the occupier allows a child to enter the premises then the premises must be reasonably safe for a child of that age (Perry v Butlins Holiday World, Jolley)

Explain the approach to allurement. A child is less likely to appreciate the risks an adult would and may be attracted to the danger (Glasgow Corporation, Jolley). However, the mere existence of an allurement on its own is not sufficient grounds for liability (Liddle v Yorkshire CC)

Identify that the distinction between adults and children is one of 'fact and degree' where their understanding of risk is concerned

Explain also that case law identifies that the occupier may expect parents to supervise young children (Phipps v Rochester Corporation)

Identify that an occupier is entitled to assume that very young children will be accompanied by someone looking after them (Phipps, Bourne)

Leisure v Marsden, Simkiss v Rhondda DC) and limitations on this duty (Simonds v Isle of Wight)

Explain that there is a broad view of foreseeable harm so that the occupier need not foresee the specific harm (Jolley v Sutton LBC)

Warnings are only effective to the extent that they are capable of making the visitor safe s.2(4)(a)

Credit any other relevant point(s)

AO2 Indicative content

Answers may:

In respect of Shaun:

- Reason that Oldtown Pet Shop (OPS) are the occupiers and defendants as they have control and possession of the premises
- Explain that Shaun is a lawful visitor as a customer would be seen as a licensee for the purposes of entering a shop
- Discuss the fact that OPS owe Shaun a higher duty of care by virtue of s.2(3)(a) (Moloney v Lambeth)
- Credit reference to the allurement principle as regards the parrot (Taylor v Glasgow Corporation)
- Consider whether OPS will be able to rely on the principle that the occupier may expect parents to supervise young children (Phipps v Rochester) although this is doubtful give Shaun's age
- Identify that the type of harm is entirely foreseeable
- Explain that it is unlikely that OPS can rely on the sign as a warning because, given the circumstances, it was not capable of making Shaun safe
- Shaun would lack the understanding required for OPS to claim he was *volenti*
- Credit reasoning that Shaun should have been supervised
- OPS are likely to be found liable in the circumstances

Credit any other relevant point(s).

| | AO1 | Mark | AO2 | Mark |
|----------------|--|-------------|--|--------------|
| Level 4 | 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. | 9–10 | 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. | 12–15 |
| Level 3 | 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. | 6–8 | 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. | 8–11 |
| Level 2 | 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. | 3–5 | 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. | 4–7 |
| Level 1 | 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. | 1–2 | 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. | 1–3 |
| Level 0 | No response or no response worthy of credit. | 0 | No response or no response worthy of credit. | 0 |

9 Advise whether Charlie would be successful in an action in Rylands against Bob.

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|------------------------------|--|
| Assessment Objectives | AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 10 marks. AO2: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. 15 marks. |
| Additional guidance | 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 v Stockport MBC (Transco)) and that a defendant needs to be either the accumulator or the occupier of the land where the dangerous things were accumulated (Read v Lyons)

Explain that a claim in Rylands v Fletcher, requires a claimant to show that:

- The thing was brought on and accumulated on the defendant's land – The Charing Cross Case, Giles v Walker
- The thing escaping causes damage and, in this instance, note the position regarding the escape of fire under Stannard v Gore
- The thing will be likely to cause mischief if it escapes – Hale v Jennings Bros, Stannard v Gore
- 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 – Transco, British Celanese v Hunt, Hale v Jennings
- The thing escaping must cause damage
- The harm must be foreseeable – Cambridge Water v Eastern Counties Leather, Transco

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

- A potentially dangerous activity – Cambridge Water v Eastern Counties Leather
- Things stored in large quantities – Mason v Levy Autoparts, Musgrove v Pandalis
- A truly domestic use is a natural use
- If the public derive a benefit from the use of land that is in question then the court may find the use to be natural – British Celanese v Hunt

Explain the particular relevance of the defences of an Act of God (Nicholls v Marsland) and the act of a stranger (Perry v Kendricks Transport)

Credit any other relevant point(s)

AO2 Indicative content

Answers may:

Reason that:

- Charlie is able to bring a claim as the occupier of the land affected and Bob is the defendant as he occupies the land from which the escape has originated (and where the tyres were accumulated)
- The tyres have been brought onto Bob's land and deliberately accumulated there
- Burning rubber tyres are things likely to cause mischief if they escape but note the position relating to 'escaping fire' under Stannard v Gore
- What actually escapes from Bob's land is fire from the tyres not the tyres themselves - it is submitted that this is analogous to Stannard v Gore
- The use of the land may be non-natural as the storage (in large quantities) of tyres would appear to be classically non-natural
- The fire damage to Charlie's garage is damage to property and is an actionable form of harm
- The damage is a foreseeable form of harm associated with burning rubber tyres (as indicated by the use of a cover)
- According to the case of Stannard v Gore escaping fire would not be counted as the thing itself escaping

In relation to any potential defences:

- Discuss the probability that the passing drunk who pulled the cover off the tyres would make the defence of 'an act of a stranger' available to Bob
- Alternatively, reason that the lightning bolt is an 'Act of God' - if the weather conditions were considered sufficiently extreme

Conclude that it is unlikely Bob will be liable in Rylands since it is the fire which escapes and he appears to have the option of two valid defences

Credit any other relevant point(s).

| | AO1 | Mark | AO2 | Mark |
|----------------|---|-------------|--|--------------|
| Level 4 | 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. | 9–10 | 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. | 12–15 |
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| Level 2 | 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. | 3–5 | 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. | 4–7 |
| Level 1 | Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of case law is limited. | 1–2 | 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. | 1–3 |
| Level 0 | No response or no response worthy of credit. | 0 | No response or no response worthy of credit. | 0 |

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