

**GCE**

**Law**

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

Advanced GCE

**Mark Scheme for Autumn 2021**

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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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## 1. 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

**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. <b>10 marks</b>
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Question **3-4**

Assessment Objective:	AO3 1b: Analyse and evaluate legal issues. <b>15 marks</b>
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**Section B**Question **5,6,8 and 9**

Assessment Objective:	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>

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

Assessment Objective:	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>

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

## Subject Specific Marking Instructions

## Section A

	Answer	Marks	Guidance
1	<p><i>Describe the purposive approach to statutory interpretation using cases to illustrate your answer.</i></p> <p>Answers <b>may</b> include:</p> <ul style="list-style-type: none"> <li>• Explain that the purposive approach seeks to give effect to the general intention and spirit of the statute as opposed to the literal meaning of the word(s)</li> <li>• In <i>Maunsell v Ollins</i> (1975) Lord Simons suggested a two-tier test: the judge is to look to the purpose of the legislation and then must look at the words and interpret them according to the purpose</li> <li>• Identify that the purposive approach takes a broader approach than the mischief rule in that the court is not just looking to see what the gap was in the old law, the judges are deciding what they believe Parliament is trying to achieve – what is the purpose of the Act?</li> <li>• Explain that judges are required to consider the broader context in which the law was created – what were the concerns of government and Parliament at the time the Act was created?</li> <li>• Recognise the need for judges to refer to external aids such as Hansard – <i>Pepper v Hart</i></li> <li>• Describe how this rule has been used increasingly in recent years as a result of its links to a more continental approach to interpretation associated with the EU and the ECHR</li> <li>• Describe the perceived unconstitutional nature of the rule</li> <li>• Use any relevant cases to illustrate its use – <i>Coltman v Bibby Tankers</i>, <i>Fitzpatrick v Sterling Housing Association</i>, <i>R v Registrar General ex parte Smith</i>, <i>Jones v Tower Boot</i>, <i>Ghaidan v Mendoza</i>, <i>R v Secretary of State for Health ex parte Quintavalle</i>, <i>Pickstone v Freemans plc</i></li> </ul> <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>

<p><b>2</b></p>	<p><i>Describe the legislative process in the House of Commons for a Bill which commences there.</i></p> <p>Answers <b>may</b> include:</p> <p>Describe the stages of the legislative process following introduction of the Bill:</p> <ul style="list-style-type: none"> <li>• First Reading - a formality – the short title of the Bill is read out and an order for the Bill to be printed</li> <li>• Second Reading - this represents the main debate on the Bill. The Minister or MP responsible describes the aims of the Bill and will field questions. There is a formal debate conducted <i>via</i> the Speaker. At the end of the debate a vote will be taken, and a majority will be required in order for the Bill to proceed</li> <li>• Committee Stage - this stage allows for the detailed scrutiny of the Bill. Most Bills are considered by small Committees of between 15 to 60 MPs known as Public Bill Committees. Membership of these committees is always roughly in proportion to the number of seats a Party holds in the Commons. Members will often be chosen because of expertise or interest in a particular field. A separate committee is formed for the consideration of each individual Bill. The committee are entitled to scrutinise every detail and make any amendments necessary for the Bill to reflect the intention discussed in second reading</li> <li>• Report Stage - after scrutiny by the Committee they will 'report' back to Parliament - to inform the House of any amendments (if there are no amendments at Committee Stage the Bill can go straight to the next stage). Amendments will be debated and voted on and either accepted or rejected. Further amendments may also be suggested from the House</li> <li>• Third Reading - if approved, the Bill will get its Third Reading. This gives the House a final chance to look at the Bill again as a whole, with all its amendments, and decide whether they want it to go further. The Bill cannot be changed substantially at this stage as it is, more or less, a formality</li> </ul> <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>
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<p><b>3</b></p>	<p><i>Discuss the advantages of the purposive approach to statutory interpretation.</i> Answers <b>may</b> include:</p> <ul style="list-style-type: none"> <li>• The purposive approach (PA) allows judges to apply common sense and avoid the harsh (<i>LNER v Berriman</i>), absurd (<i>Whitely v Chappell</i>) or unjust outcomes (<i>Fisher v Bell</i>) produced by using the literal rule</li> <li>• The PA avoids the harsh and destructive analysis of language but does assume there is an intention to be found behind every statutory provision</li> <li>• When determining parliament's intentions, the purposive approach makes use of extrinsic aids to interpretation which gives the security of context and certainty where the literal rule will resort to little more than a dictionary</li> <li>• Some PA judges would argue that they are giving effect to parliament's true intentions rather than using a rule like the literal rule which may produce an obviously unintended outcome – contrast <i>Cheeseman v DPP</i> with <i>Jones v Tower Boot</i></li> <li>• The PA has its origins in EU law and is therefore well suited to the interpretation of EU and Human Rights law which often only provide a broad legal framework</li> <li>• The PA (unlike the literal rule), does not expect an impossible level of perfection in parliamentary draftsmanship</li> <li>• Discuss the different judicial attitudes towards trying to find parliamentary intent – credit any quotes or references such as the opposing views of Lord Denning and Lord Scarman</li> <li>• Credit disadvantages where used to contextualise an advantage (e.g. the PA allows judges too much freedom and can lead to judicial law-making as well as a lack of respect for the sovereignty of parliament)</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> <p>To attain <b>Levels 3 and 4</b> candidates need to discuss <b>both</b> advantages <b>and</b> disadvantages.</p>
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<p><b>4</b></p>	<p><i>Discuss the advantages of the legislative process.</i> Answers <u>may</u> include:</p> <ul style="list-style-type: none"> <li>• Thorough - the legislative process (LP) in the House of Commons is very thorough and provides ample opportunity for debate, challenge and scrutiny. The House of Lords then provide a very expert and thorough revising chamber</li> <li>• Democratic - the LP is a largely democratic process. The House of Commons is elected (at least) every 5 years and has the (eventual) upper-hand in any disputes with the House of Lords (Parliament Acts 1911 &amp; 1949). Furthermore, the role of the Monarch is now a ceremonial formality</li> <li>• Public involvement – as well as regular elections, the public can lobby their member of parliament and potentially influence the legislative programme</li> <li>• Quick - the LP can be fast and responsive as seen recently when the European Union (Withdrawal) (No. 2) Act 2019 (the <i>Benn Act</i>) passed all its stages in under a week</li> <li>• Flexible - the LP is flexible as it allows different kinds of Bill to be introduced meaning that individual MPs can influence the legislative agenda as well as the government (Private Member's Bills e.g. the Abortion Act 1967)</li> <li>• Mandate - the LP recognises the democratic mandate of the political party with a majority (i.e. the government) by allowing them control of the timetable</li> <li>• Expertise – many members of both the House of Commons and the House of Lords have extensive experience in areas outside politics</li> <li>• Effective – parliament can reform and consolidate many areas of law in a single Act (e.g. the Consumer Act 2015) as well as repealing numerous obsolete Acts by working with the Law Commission and other law reform bodies</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>
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## Section B

5 Advise Leo whether he will be successful if he sued EkoSkrewz as being vicariously liable for Amir's negligence.

<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:

Explain that one party (usually an employer) is liable for the torts of another party (usually the employee). Explain the main rules (Salmond test) for imposing liability in relation to unintentional torts:

- Tortfeasor commits a tort
- Tortfeasor must be an employee (or in a position akin to employment – *Armes v Notts CC*)
- Tort must occur in the course of employment as *per* the *Salmond Test* (or be closely connected to employment – *Armes v Notts CC*)

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

- 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 the circumstances where the tort falls within the course of employment:

- Expressly or impliedly authorised acts - *Poland v Parr*
- Acting in an unauthorised manner - *Limpus v London General Omnibus*
- Acting in a purely careless manner - *Century Insurance v Northern Ireland Transport Board*

Explain circumstances that are not within the course of employment:

- Activities not within the scope of employment - *Beard v London General Omnibus*
- A 'frolic of his own' - *Hilton v Thomas Burton*
- Giving unauthorised lifts - *Twine v Beans Express*

Credit any other relevant point(s)

**AO2 Indicative content**

Answers may:

Reason that:

In order for EkoSkrewz (ES) to be vicariously liable for Amir's negligence, three requirements will need to be satisfied. First, Amir must be in an employer/employee relationship with ES. Second, it must be established that Amir has committed a tort. The third requirement is that it must be shown that Amir's tort was committed whilst he was in the course of his employment with ES

The first requirement would appear to be met. Amir's situation is similar to the case of *Nethermere v Gardiner* and it would be most unlikely any tribunal would find Amir 'in business on his own account'. Indeed, any of the tests of employment are likely to find that Amir is under such a degree of control that he is, effectively, employed – even if he had a contract stating the opposite (*Ferguson v John Dawson*). Evidence: tax and NI position, exclusivity and mutuality of obligations and ES providing tools etc

The second requirement has been met as there is a clear statement in the question that Amir has been 'negligent'. He owes a duty of care (*Caparo*), he has, it is submitted, fallen below the standard of the reasonable corkscrew assembler (*Wells v Cooper*) and his negligence has led to foreseeable harm (*Wagon Mound*)

The third requirement has also been met as the tort has arisen 'in the course of employment'. This is because Amir is carrying out an authorised act in a negligent way as seen in the case of *Century Insurance*. This complies with the Salmond test which would be a conclusive test in a case like this involving an unintentional tort

Conclude that ES will be vicariously liable for Amir's negligence

Rational and reasoned application of the 'akin to employment' and 'close connection' approaches will be credited

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 Layla whether she would be successful if she sued Messyham 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**:

Occupier's liability:

- Explain basic duty owed to visitors under 1957 Occupier's Liability Act and the development made by *Herrington v BRB* to owe a duty of common humanity to non-visitors under the 1984 Occupier's Liability Act
- An occupier is the person with control of the premises (*Wheat v Lacon*)
- Premises are widely defined and include ladders (*Wheeler v Copas*), lifts (*Haseldine v Daw*) as well as houses, land and buildings

Explain OLA 1984

- Applies to unlawful visitors – usually a trespasser
- Based on the duty of common humanity – *Herrington, Addie v Dumbreck*
- Duty arises under section 1(3) when occupier: (a) is aware of the danger or have reasonable grounds to believe it exists; (b) they know or believe the trespasser is in the vicinity of the danger; and (c) the risk is one against which the occupier might be expected to offer some protection – *Tomlinson v Congleton BC, Swain v Natui Ram Puri*
- According to s.1(4), an occupier owes a duty to take such care as is reasonable in all the circumstances to prevent injury to the trespasser. The standard of care is objective but factors which may be taken into account include the nature of the premises - *Rhind v Astbury Water Park* and the practicality of precautions – *Tomlinson*

Furthermore

- An occupier is entitled to expect that a trespasser will not engage in a foolhardy escapade – *Donoghue v Folkestone Properties*
- Warning signs might be effective – section 1(5) *Westwood v PO*
- Defence of *volenti* s.1(6) *Ratcliffe v McConnell*
- Property damage is not recoverable s.1(8)

Credit any other relevant point(s)

**AO2 Indicative content**

Answers **may**:

Reason that:

Layla starts out as a lawful visitor as all members of the public have an express (or at least implied) licence to enter the park. As such she would be covered by the Occupiers' Liability Act 1957. However, once she ignores the sign, she becomes a trespasser (*The Calgarth, Tomlinson*). At this point she is covered by the Occupiers' Liability Act 1984 and the duty owed by Messyham Council is covered by s1(3)

Messyham Council will not owe a duty because, based on s. 1(3)(a) there is an obvious risk that Messyham Council are aware of as indicated by the signs and rangers etc.; (b) the Council are also clearly aware that people will come into the vicinity of the danger as testified (again) by the signs, but, under (c) the Council had done all they could reasonably do (signs, rangers and barriers) to offer protection. Also credit the line of argument that cases such as *Donoghue, Ratcliffe & Tomlinson* support the argument that there is no apparent duty for inherently dangerous activities undertaken by trespassers on the occupier's land (see also s. 1(6) below)

Messyham Council may also rely on s. 1(5) which says that any duty under the Act may be discharged by taking reasonable steps to warn of the danger (which they did). Furthermore, according to s. 1(6) no duty is owed in respect of risks willingly accepted by the claimant (also applicable here). It seems that Layla will be unable to recover for her injuries or the damage to her watch which would not be covered anyway (s. 1(8))

Conclude that Messyham Council are not liable

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 arguments for and against the requirement to prove fault in negligence.

<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**:

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: foresight - *Kent v Griffiths*, proximity - *Bourhill v Young*, and fair, just and reasonable - *Mitchell v Glasgow CC*

Explain possible factors relating to breach:

- The objective 'reasonable man' test - *Nettleship v Weston*, *Wells v Cooper*
- Risk factors affecting the standard of care: special characteristics/seriousness of harm - *Paris v Stepney*; risk/likelihood of harm - *Bolton v Stone*; adequate precautions/cost of prevention - *Latimer v AEC*; policy/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)*

Explain the areas where 'fault' is most relevant in negligence – the reasonable foresight in duty and causation of damage but especially the objective tests in establishing breach. On the other hand, concepts such as the egg-shell skull rule can be argued to undermine the role of fault

Credit any description of relevant defences such as contributory negligence or *volenti*

**AO3 Indicative content**

Answers may:

Arguments **for** a fault requirement

- Floodgates - proof of fault acts as a control on negligence actions which stops an overwhelming increase in litigation - *Cole v Davis-Gilbert*
- Compensation culture – argues that in a litigious society, provided you can simply find someone to blame you will have a case – proof of fault acts as a brake on this – *Tomlinson v Congleton BC*, *Harris v Perry*
- Laissez faire policy – negligence originates in a culture of minimal state intervention. There was no duty to actively look after one another, rather one should only make amends for harm where one is at fault
- Deterrence – knowing you may be liable for large amounts of compensation or even increased insurance premiums if at fault and found liable deters reckless and dangerous behaviour
- Loss allocation - wider liability would shift the burden – state-funded and/or no-fault systems shift the burden from the individual at fault to wider society which is unfair
- Accountability – in terms of moral and social justice, holding those at fault accountable for the losses they cause would be widely supported
- Alternatives that disregard fault, such as strict liability, can produce harsh and unfair results
- Protecting professionals – many professionals would be forced into defensive practice if they could not rely on an objective fault element - *Holt v Edge*

Arguments **against** a fault requirement

- Exceptions unfair – the effective exclusion of certain individuals/groups undermines the general requirement for fault – *Mulcahy v MoD*
- No fault or fault ‘cannot be proven’ – some accidents arise in circumstances where nobody is at fault or proof that the other party was at fault cannot be established – this leaves injured parties with no compensation (cf: no fault systems) – *Bolton v Stone*
- Public policy – in cases where the party is at fault but this is overlooked for public policy reasons, this leaves the injured party without justice or compensation and lacks any deterrent effect – *White v CC South Yorkshire*
- Negligence should compensate not punish – alternative systems would compensate (a function of the civil law) victims without ‘punishing’ (a function of the criminal law) the person at fault – especially where the level of fault is very low and where damages are disproportionate to the fault
- Unpredictability – decisions are usually made by individual judges and case law has produced some contradictory and unpredictable results with unjust and illogical distinctions. This undermines the role of both negligence and the law more widely – *Hunter v Canary Wharf*
- Objective standard – an objective standard is not always fair. This is especially the case where it fails to take individual circumstances into account – e.g. learners - *Nettleship v Weston*

Reform and alternatives

State-run benefit systems such as Canada and no-fault systems such as New Zealand. Consider the Pearson Commission and its recommendations as well as recent suggestions for using mediation and introducing statutory limits on PI claims

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 both Kareem and Sam whether they would be successful in any potential nuisance actions they may have against Tom.

<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 public nuisance: '*something which materially affects the reasonable comfort and convenience of a class of HM subjects*' – *Attorney General v PYA Quarries Ltd* or '*an unlawful act or omission which endangers the life, safety, health, property or comfort of the public*' - *Corby Group Litigation v Corby BC*

It must affect a neighbourhood or group. C needs no interest in land - *Castle v St Augustines Links* but must be able to prove they have suffered special damage over and above that which other members of the class have suffered - *Corby Group Litigation v Corby BC*. Nuisance can emanate from D's property and have its origins in the forces of nature – *Wandsworth LBC v Railtrack Plc*. PI (*Castle, Corby*), damage to property (*Halsey v Esso*) & economic loss (*Benjamin v Storr*) are all actionable. Possible defences include consent, contributory negligence and statutory authority

Define 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* – and that those lacking a proprietary interest cannot sue

Identify the type of indirect interference giving rise to liability: noise or vibrations – *Sturges v Bridgman*; Smoke and fumes – *St Helens Smelting v Tipping*; Smell – *Bliss v Hall*; Damage – *St Helens Smelting v Tipping*; Hot air – *Robinson v Kilvert*. Identify that there is a difference between a nuisance causing physical damage and one causing interference with comfort or the enjoyment of land - *Halsey v Esso*. The former is a *prima facie* nuisance (*St Helen's Smelting v Tipping*) and the latter will require proof of unlawfulness (see below)

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 – *Laws v Florinplace*; prescription - *Coventry v Lawrence*; duration – *De Keyser's Royal Hotel v Spicer Bros*; sensitivity – *Network Rail*; Human Rights Act – *Marcic v Thames Water*

Explain the possible defences: prescription - *Sturges v Bridgman* and unavailable defences: moving to the nuisance – *Coventry v Lawrence* and social utility - *Miller v Jackson*

Identify basic remedies: Damages – since *Coventry* courts now have wide discretion re; damages. Injunctions – prohibitory: *Kennaway v Thompson, Coventry*

Credit any other relevant point(s)

**AO2 Indicative content**

Answers may:

Advise Kareem (private nuisance)

Kareem is the claimant (C) and an occupier as he has suffered the harm and has a proprietary interest in the property since 'he owns the cottage'. Tom is the defendant as he is in control of the land from which the alleged nuisance emanates

In this case the harm takes the form of manure covering Kareem's property. As this is physical damage it is a *prima facie* nuisance and issues of locality are irrelevant. Although seasonal, the duration is certainly consistent enough and there is no prescription as the harm is due to a new spreader. Furthermore, there is no evidence that either Kareem or Tom is acting out of malice and Kareem is not making sensitive use of his property. There is insufficient evidence, but Tom does not appear to be able to use any of the defences. Credit could be given for suggesting that Tom might have an action under the Human Rights Act Article 8 (*Marcic v Thames Water & Hatton v UK*)

Advise Sam (public nuisance)

Sam is the claimant (C) as he has suffered the harm. There is no requirement for a proprietary interest in public nuisance so it is irrelevant that he has no proprietary interest in the cottage as he is living with his father. Once again, Tom is the defendant as he is in control of the land from which the alleged nuisance emanates

Tom's actions are affecting a 'class of HM subjects' – namely the whole village but they are affecting Sam above and beyond the rest of the class since his hay fever (personal injury) and his pollen filter (property damage) are both uniquely affected. Both types of harm are direct, substantial and consequential in that the rights Sam shares with the other villagers have been more appreciably affected by the nuisance from Tom's land and the damage caused to Sam is 'other' and different from any nuisance caused to the rest of the villagers. Tom does not appear to have any valid defences available to him

Conclude that both Kareem and Sam can sue Tom in Private and Public Nuisance respectively

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 Jane whether she would be successful in an action in *Rylands* against Zac.

<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**:

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 escaping causes damage - *Transco v Stockport MBC*
- The thing will be likely to cause mischief if it escapes – *Hale v Jennings Bros* although the thing itself need not be inherently dangerous – *Shiffman*
- 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 harm must be foreseeable – *Cambridge Water v Eastern Counties Leather, Transco v Stockport MBC*

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 that claims are unlikely to be permitted for personal injury – *Cambridge Water*

Explain the defences of an Act of God *Nicholls v Marsland*; *Volenti non fit injuria* – *Sams v Prince of Wales Theatre*; Act of a stranger – *Perry v Kendricks Transport*; Damage caused through claimant's fault – *Eastern & South African Telegraph v Cape Town*

Credit any other relevant point(s)

**AO2 Indicative content**

Answers may:

Reason that:

Zac is the defendant as he is in control of the land from which the danger has emanated (his domestic garage), and that Jane is the claimant as she has suffered harm in the form of damage to her car tyres. As next-door neighbours they both have the necessary proprietary interest in land. Zac has brought on to his land and accumulated (the battery acid) for his benefit (as he is selling it). The thing he brought on (battery acid) was something which would be likely to cause mischief if it escaped

Storing corrosive battery acid in large quantities in a domestic garage would constitute an extra-ordinary and unusual use of land (taking time and place into consideration – *Transco*). It is also necessary that any harm caused is foreseeable. In this case the thing itself (the acid) did escape (from the garage under Zac's control to the drive he shares with Jane) and did cause harm to both property (the tyres) and the person (Jane's foot) both of which were foreseeable. Jane may be able to sue for the property damage but not her personal injury (PI) as PI actions are not allowed in Ryland's (*Cambridge Water v ECL* and affirmed in *Transco v Stockport*)

However, Zac may be able to make use of a defence. Under the authority of *Perry v Kendricks* it is possible to claim the defence of 'Act of a Stranger'. Provided Zac can prove it, the defence would work here as a third party (Ben) was entirely responsible for the escape

Conclude that Jane will not be successful in her action under Rylands as Zac will have the defence of act of a stranger

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>

10\* As per question 7

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