

A LEVEL

Candidate Style Answers

LAW

H415

For first teaching in 2017

H415/02 Law making and the law of tort

Version 1

Contents

Introduction	3
Section A Question 1: Level 4 answer	4
Commentary	4
Section A Question 1: Level 3 answer	5
Commentary	5
Section A Question 2: Level 4 answer	6
Commentary	6
Section A Question 2: Level 3 answer	7
Commentary	7
Section A Question 3: Level 4 answer	8
Commentary	8
Section A Question 3: Level 3 answer	9
Commentary	9
Section A Question 4: Level 4 answer	10
Commentary	10
Section A Question 4: Level 3 answer	11
Commentary	11
Section B Question 5: Level 4 answer	12
Commentary	13
Section B Question 6: Level 4 answer	14
Commentary	15
Section B Question 7a and 10a: Level 4 answer	16
Commentary	17
Section B Question 8: Level 4 answer	19
Commentary	20
Section B Question 9: Level 4 answer	21
Commentary	22

Introduction

Please note that this resource is provided for advice and guidance only and does not in any way constitute an indication of grade boundaries or endorsed answers. Whilst a senior examiner has provided a possible level for each response, in a live series the mark a response would get depends on the whole process of standardisation, which considers the big picture of the year's scripts. Therefore the level awarded here should be considered to be only an estimation of what would be awarded. How levels and marks correspond to grade boundaries depends on the Awarding process that happens after all/most of the scripts are marked and depends on a number of factors, including candidate performance across the board. Details of this process can be found here: <http://ocr.org.uk/Images/142042-marking-and-grading-assuring-ocr-s-accuracy.pdf>

The sample assessment material used in this resource is here: <http://www.ocr.org.uk/Images/315218-unit-h415-02-law-making-and-the-law-of-tort-sample-assessment-material.pdf>

Section A Law making

Question 1

Explain the extrinsic aids used in statutory interpretation.

[10]

Level 4 answer

An aid to interpretation is something a judge can use to help interpret a word or words in a statute. An extrinsic aid is found outside the Act. One of the most common examples of an extrinsic aid is a dictionary. A dictionary gives a word its plain, ordinary meaning and would be especially useful to a judge who is using the literal rule of statutory interpretation. An example can be seen in the case of *DPP v Cheeseman* where judges used a dictionary from the time the Act was passed to interpret a word in an old Act from 1847. Decided cases which interpreted the same Act (or the same statutory word) in the past can be useful. Also, the Interpretation Act 1978 can be useful as it provides some generic guidance relating to interpreting statutory words.

Judges using more purposive approaches to interpreting a statute need to understand the purpose or intention behind an Act as this can help them decide the meaning of a word in a broader context. One important source of such information is Hansard. This is an official record of everything said in Parliament. By looking at the debates that took place in Parliament during the passage of a Bill, a judge can discern the intention behind an Act. This was done in the case of *Pepper v Hart* which was the first case to officially allow judges' access to Hansard. Reports of the Law Commission (a full-time, permanent law reform body) are another important source of information about the intentions behind an Act. In *Tomlinson v Congleton BC* the court referred to a report by the Law Commission which led to the Occupiers' Liability Act 1984.

Examiner commentary

This is a high-scoring response because it defines the terms of the question and provides a good range of examples which are developed by being supported with examples. Whilst not necessary for Level 4, the candidate has linked the usefulness of some aids to particular rules of interpretation. Given the limited time the candidate has been selective and chosen the most important extrinsic aids rather than getting drawn into a more wide ranging response with less depth. Few improvements within time constraints could be made here other than a little more range.

Section A Question 1

Explain the extrinsic aids used in statutory interpretation.

[10]

Level 3 answer

An extrinsic aid is something found outside the Act. The judge can use the extrinsic aid to help them understand what a word they are interpreting means. A well-known example of a simple extrinsic aid is a dictionary. In the Cheeseman case a man was caught exposing himself in a public lavatory. The court had to decide whether the policemen who caught him in the toilet were 'passengers' because the Act said he had to expose himself 'to the annoyance of passengers'. The judge got a dictionary from 1847 when the Act was passed to see what the word meant and it defined a passenger as a passer-by. Since the policemen were not passers-by, they were not passengers and the Act did not apply to Cheeseman who was not convicted. Another extrinsic aid is the Interpretation Act 1978 which says how general words should be interpreted. Information about the reasons behind an Act can be useful to judges so reports from law reform bodies can be an important extrinsic aid. The Law Commission is the biggest law reform body and their reports will show judges what their intentions were behind relevant Acts. Another important extrinsic aid is Hansard. This is a book which records everything said in Parliament when a Bill is being passed. This will show the intention behind the Act and the first judge to look at it was Lord Denning in a case called *Pepper v Hart*.

Examiner commentary

This is a mid-scoring response because it defines the terms of the question and provides a range of examples. The Cheeseman case is possibly over-developed at the expense of a wider range of examples which would have improved this response. Given the limited time the candidate has at least covered a reasonable range of examples and provided two examples (Cheeseman and *Pepper v Hart*). There is no link between extrinsic aids and the importance to the function of statutory interpretation which would be required at Level 4.

Section A Question 2

Describe the stages of the parliamentary law making process.

[10]

Level 4 answer

Every proposal for a new Act of Parliament must be agreed by the House of Commons, the House of Lords and the Crown before it becomes an Act of Parliament. This is known as the legislative process. It starts with a pre-legislative process where ideas are published as a Green Paper for consultation before being put forward as a set of firm proposals known as a White Paper or Bill. Once approved by Cabinet, a Bill can start out in either House. The first stage is known as the First Reading and is a mere formality where the Bill is introduced. Next is the Second Reading where the main debate on the Bill takes place followed by a vote. If approved the Bill moves to the Committee Stage where a specially selected committee will scrutinise the Bill line by line to make sure that it will achieve its aims. Any amendments must then be brought to the House's attention in the Report Stage. After this the Bill will move to the final stage in whichever House it commenced in called the Third Reading where the Bill has its final vote in its amended form.

All of these stages are then repeated in the 'other House'. A Bill can be returned to the original chamber for amendment and this can lead to a 'ping-pong' situation where a Bill is being passed back and forth between the two Houses. In this situation the House of Commons can use the Parliament Acts 1911 and 1949 to push a Bill through without the approval of the House of Lords. This is accepted because the Commons are elected (and answer for what they do to the electorate) whereas the Lords are appointed. Finally the Bill must be approved by the reigning monarch before becoming an Act of Parliament. This is just a formality nowadays and no monarch has withheld assent for over 300 years.

Examiner commentary

This question scores high marks because the candidate has shown the skill of placing the topic in context with a brief but accurate introduction as well as providing an accurate and wide ranging account of the process. Every stage is given some detail which explains the key importance of that stage as opposed to more general information. Whilst concise, every stage has been included and additional contextual information, where important, has been provided (e.g. the Parliament Acts). It might be argued that the pre-legislative aspects are not strictly required by the question and that the response could be improved by providing a little more detail on the strictly 'parliamentary' stages.

Section A Question 2

Describe the stages of the parliamentary law making process.

[10]

Level 3 answer

An Act of Parliament is produced when a Bill goes through the House of Commons, the House of Lords and gets approval from the Queen. The process starts with a Bill which can be introduced in either House for a first reading. The first reading is just a formality where the name of the Bill is announced and there is no vote at this stage. Next is the second reading which is the main debate and vote on the Bill. If the Bill passes the vote it will go to the Committee Stage. This is where the Bill is scrutinised line by line to make sure it will be effective. This process is done by special committees made up of MPs who are interested in the subject-matter of the Bill. After this there is a third reading where the House gets a chance to see the Bill in its final format. There is a vote but this is usually just a formality. Next the Bill has to go through the same process in the other House. Sometimes the other House will not agree and the Bill will have to go back and forth between the two Houses - this is called ping-pong. When they have reached agreement the Bill has to go to the Queen for the Royal Assent but this is just a formality.

Examiner commentary

This question scores mid-range marks because the candidate has given a confident and accurate overview of the legislative process. Although the candidate has everything in the right order, they have missed the Report Stage so the response lacks the accuracy required for Level 4. Each stage is explained in general terms but it also lacks the additional contextual information required at Level 4.

Section A Question 3

Discuss the advantages **and** disadvantages of the literal rule.

[15]

Level 4 answer

One of the main advantages of the literal rule is that it is said to uphold the theories of the Supremacy of Parliament and the Separation of Powers. Supremacy of Parliament asserts that Parliament is the supreme law making body and that nobody can undermine their legislative authority. Judges who adopt the literal rule give words their plain, ordinary meaning as written in the statute and, by doing so, they do not undermine Parliament's authority by inserting their own view of the word's meaning. However, adopting this approach can lead to absurd outcomes which cannot have been Parliament's intention. For example, in *DPP v Cheeseman* the defendant got away with exposing himself in public because of the literal interpretation of the word 'passengers' but Parliament cannot have intended this outcome. The theory of the Separation of Powers holds that Parliament (as the legislature) should make laws and the judges (as the judiciary) should apply and interpret those laws. These functions must be kept separate so that judges do not make law and Parliament does not end up interpreting its own laws. The literal rule observes the theory by avoiding judicial law making. In cases adopting a more purposive approach to interpretation, judges interpret words in line with what they believe Parliament's intentions were. This can lead to accusations of judicial law making. In *RCN v DHSS* judges, rather than Parliament, decided who should be authorised to oversee certain abortions. However, some judges such as Lord Denning were unapologetic about this approach, suggesting that there is nothing wrong with 'filling in the gaps' left by Parliament.

The main disadvantages of the literal rule are that it can lead to absurd and unjust results. In *Whitely v Chappel* the defendant got away with casting an extra vote in an election by imitating a dead person. The statute made an offence of impersonating any person entitled to vote and the court reasoned that since dead people can't vote, the defendant had not committed the offence. This is an example of the absurdity of the literal rule; a more purposive approach would have concluded that the defendant was doing what the Act intended to stop and found him guilty. The rule can also produce unjust outcomes. In *LNER v Berriman*, a widow was left without compensation after a court used the literal rule to decide that her husband had been killed whilst maintaining railway lines and thus did not amount to relaying or repairing the lines. This harsh and unjust decision is hard to defend but judges who adhere to the rule would argue that such outcomes draw Parliament's attention to faulty legislation and that the solution lies in amending legislation not judicial law making.

Examiner commentary

This response scores high marks because it provides the sort of development, range and sustained focus required at Level 4. The first paragraph demonstrates a candidate who understands and appreciates the theoretical underpinnings of the question. They have been able to take two key constitutional theories, explain them and apply them to the question with examples to illustrate each one. This is a sustained, well developed and focused piece of writing. In the second paragraph the candidate deals with more practical arguments which are demonstrated through illustrative cases. Taken as a whole, the response shows a sophisticated appreciation of the topic and an impressive ability to bring together appropriate synoptic support.

Section A Question 3

Discuss the advantages and disadvantages of the literal rule.

[15]

Level 3 answer

Advantages of the literal rule:

The literal rule offers certainty and predictability. Lawyers can confidently predict the outcome of a case and this gives confidence to clients. The literal rule also respects parliamentary sovereignty. This is because the judge using the literal rule sticks to the words Parliament used and doesn't put their own spin on them. This means they avoid making law and this is important because judges should only apply and interpret the law because they are not elected. Sometimes using the literal rule can point out faults in an Act of Parliament. In *Fisher v Bell* the Offensive Weapons Act had a mistake in it which was exposed by the case using the literal rule. The literal rule encourages the parliamentary draftsmen to be precise and take care with the wording they produce. If we didn't use the literal rule there would be unpredictable outcomes which would undermine certainty in the law.

Disadvantages of the literal rule:

The main disadvantage of the literal rule is that it can produce ridiculous outcomes which cannot have been Parliament's real intentions. An example of a case which produced a harsh outcome is *LNER v Berriman* where a widow was left without compensation when her husband died at work. This was because the court ruled that what he was doing was maintaining the railway lines and not relaying or repairing them which was what the Act required. The literal rule ignores the fact that language has its limitations. In the *Whitely v Chappel* case a man got away with an extra vote because he was impersonating a dead man and dead men can't vote. Not only is this an absurd outcome, it is hard to imagine how the parliamentary draftsmen could have anticipated this. A final disadvantage of the literal rule is that it is an inflexible rule which doesn't look at things in their wider context and this stops judges doing justice which is what they are supposed to do.

Examiner commentary

This response scores mid-range marks because it provides a good account of both sides of the argument. Some of the points are supported by examples which the candidate has attempted to explain in order to illustrate or contextualise their points. The response fails to reach Level 4 because there is insufficient evidence of producing sustained developed points. Some of the points lack context and the illustrations are awkwardly explained. There is, however, some evidence of producing developed points, illustrative cases and some synoptic context with discussion of the constitutional role of judges.

Section A Question 4

Discuss the advantages **and** disadvantages of creating law using Acts of Parliament.

[15]

Level 4 answer

The key strength of creating law through Acts of Parliament lies in its democratic authority. Democracy means everyone having a say. This can be seen in a number of ways. Firstly, the public are given the opportunity to be involved through lobbying their local MP, writing to Ministers, taking part in pressure groups or other forms of campaigning and by voting in general elections. This ensures that Parliament takes account of the public although sometimes unpopular legislation such as tax increases have to be passed in order for the state to function properly. Secondly, much legislation goes through a consultation process where the public and experts can have a say on new proposals. Thirdly, legislation is passed by the three parts of Parliament with the House of Commons having the biggest say. This is important because the House of Commons is made up of MPs from all parties representing all the voters in the UK. This means we all influence legislation through our elected representatives. However, some would argue that our 'first past the post' system doesn't produce proportionate representation for all voters. Another key advantage of the legislative process is the quality of debate and the level of scrutiny that legislation is subjected to. The legislative process is lengthy and exhaustive with many stages to pass before reaching final approval. As a result it is argued that legislation is well written, fit for purpose and error free. However, there are examples of legislation being rushed and producing poor quality law such as the Dangerous Dogs Act 1991.

The main disadvantages of creating law through Acts of Parliament are the practical issues that undermine it such as time and complexity. The legislative process is very slow. Although emergency legislation can occasionally be passed quickly (provided it has broad agreement), most Bills take months and, in some cases, years to become an Act. Some aspects of this slow process are welcome and necessary such as the detailed scrutiny legislation goes through. This is because it can improve the quality of the final product. However, some aspects such as the repetition and 'political' manipulation do not always serve the wider interests of the public but rather the individual interests of party politics. Many of the procedures involved in the legislative process are too complex. Even a simple vote at the second reading goes through an outdated process of MPs filing through divisions and being counted rather than simply using electronic voting pads.

Examiner commentary

This response scores high marks for two particular reasons. Firstly, the candidate shows the ability to take two key arguments (democratic mandate and time/complexity) and develop both of them in a sustained and focused manner. Both sides of the argument show the candidate's ability to construct well developed points and remain focused on the question. Secondly, the candidate shows a comprehensive and sophisticated understanding of the legislative process itself which underpins the evaluation. Reference to appropriate parts of the process and examples demonstrate this.

Section A Question 4

Discuss the advantages **and** disadvantages of creating law using Acts of Parliament.

[15]

Level 3 answer

Advantages of creating law using Acts of Parliament:

The main advantage of making law with Acts of Parliament is that it is democratic. Parliament is made up of people we elect and this is known as having a mandate. The winning party is elected based on a manifesto which they then have a democratic authority to deliver. Also, individual citizens can influence the legislative process through lobbying their MP. Another advantage is that the process itself is very thorough and it involves detailed scrutiny. This means that we generally get good quality legislation which is then effective and fit for purpose. The Dangerous Dogs Act 1991 shows what can happen when the process is rushed. The pre-legislative stages of the parliamentary law making process involves a lot of consultation. Consultation allows for two important advantages. Firstly, there is consultation with experts and their input can be crucial in ensuring legislation is effective. Secondly, there is consultation with the public and interest groups. Taking on board the views of the public gives further democratic legitimacy to the eventual Act of Parliament.

Disadvantages of creating law using Acts of Parliament:

The main counter-argument to the legislative process being democratic is to argue that it is, in fact, undemocratic. This argument is based on the fact that the House of Lords and the Queen are both unelected and therefore they have no democratic mandate. There is direct evidence that this is an issue. Firstly, the House of Commons has been trying to reform the composition of the House of Lords for many years. Secondly, the Parliament Acts of 1911 and 1949 have had to be used to overpower the House of Lords on some important legislation such as the Hunting Bill and the Act which made the age of homosexual consent the same as for heterosexuals. Lastly the legislative process is slow. Some Acts of Parliament can take well over a year to become law. Many argue that this is down to old fashioned and out-of-date procedures which could easily be modernised.

Examiner commentary

This response scores mid-range marks as it represents a solid and balanced account of both sides of the argument. Examples are provided and the candidate shows good synoptic awareness of the link to democracy and legitimacy. This is achieved through links to constitutional reform and the notion of electoral success providing democratic legitimacy. The response fails to achieve Level 4 as it lacks breadth and the sustained developed points required at that level.

Section B Law of tort

Choose **Part 1** or **Part 2**.

Part 1

Answer the **three** questions below.

The first two questions are based on the scenarios below. The scenarios are related.

Ahmed is mowing his lawn with a powerful petrol lawnmower. The mower has a sticker on it stating that goggles must be worn by anyone who gets close to the mower because it can throw up small stones. Ahmed's neighbour, Bilal, comes out of his house and leans on the fence to chat to Ahmed. Ahmed does not warn Bilal that he should wear goggles as he knows Bilal has a similar mower and assumes that he will be aware of the necessary precautions. Ahmed decides to show off by pushing the mower much too fast. The mower hits a stone which is thrown up and hits Bilal in the face causing him serious injuries.

Bilal decides to aid his recovery by paying for an overnight stay at the Lush Breakz Hotel. He awakes in the middle of the night unable to sleep and decides to go to the hotel swimming pool for a swim. A sign on the door reads: 'Pool Closed Overnight – No Entry To Guests During These Hours'. Bilal reads the sign but ignores it and goes in. The swimming pool is in darkness and Bilal cannot find the light so he dives in. Unfortunately the swimming pool has been emptied for maintenance and Bilal is badly injured.

- 5 Advise whether Bilal will be successful in a claim of negligence against Ahmed. [25]
- 6 Advise whether Bilal will be successful in a claim in occupier's liability against Lush Breakz Hotel. [25]

Essay question on the law of tort

- 7* Discuss the extent to which vicarious liability is fair on employers. [25]

Section B Question 5

Advise whether Bilal will be successful in a claim of negligence against Ahmed. [25]

Level 4 answer

In order to establish Ahmed's negligence it must be shown that there was a duty of care owed by the defendant to the claimant, that the defendant breached that duty of care and that the breach caused reasonably foreseeable damage.

Duty of Care:

A duty of care is established through the application of the Caparo test:

D must have reasonable foresight of the risk of harm as seen in *Donoghue v Stevenson*.

D must be in a relationship of 'proximity' with the claimant. This could mean that they are 'close to' the defendant in the physical sense (in time and space) as seen in *Bourhill v Young*, or it could be that proximity is created through a legal relationship as seen in *Caparo*.

It must be fair, just and reasonable to impose a duty of care. This will require the court to consider factors such as public policy when determining whether it would be just and reasonable in imposing a duty of care.

Breach of Duty:

D must breach their duty by falling below the standard of the reasonable man in the same situation. The standard is an objective one (*Nettleship v Weston*). However, a number of factors can be taken into account in determining where the standard should be set. These include the likelihood of harm, the seriousness of the harm, the cost of prevention and the social utility of the conduct.

Causation of damage:

D's act or omission must have caused the harm:

Factual causation is established where 'but for' the defendant's act/omission, the harm would not have arisen (*Barnett*).

The harm must not be too remote from the defendant's act/omission (*Wagon Mound (No 1)*); and

There must be no break in the chain of causation – i.e. no new intervening act.

Ahmed owes Bilal a duty of care because it was a reasonably foreseeable event as evidenced by both the warning that the mower can throw up small stones and the requirement that goggles are worn. There is proximity between Ahmed and Bilal in both the physical sense as well as the legal proximity created by Ahmed's awareness of the risk given on the sticker. Lastly, there are strong policy factors supporting the imposition of a duty as it is in the wider public interest to maintain high standards of safety.

Ahmed has breached his duty of care by falling below the standard of the reasonable man using a lawn mower. This is strongly evidenced by the fact that he is pushing the mower too fast in order to show off. None of the factors taken into consideration when setting the standard of care would mean there is no breach in the circumstances. The likelihood of harm was obvious and evidenced; the seriousness of the harm and the ease of prevention (wearing the goggles) were obvious. Furthermore, there were no public policy considerations which would alter the standard.

Ahmed's breach has caused reasonably foreseeable harm. 'But for' Ahmed mowing so recklessly, the injuries would not have happened. There were no intervening acts which might have broken the chain of causation and the harm done was not too remote from the breach as it is a reasonably foreseeable kind of harm to arise from the breach.

It seems that Ahmed's liability is made out as duty, breach and damage are all established on a balance of probabilities.

Ahmed may try to claim that Bilal was contributorily negligent by not wearing any protective goggles based on the fact that Bilal owns the same model of mower and should know that he needs to wear glasses. If accepted, there might be a small reduction in damages.

Finally, Ahmed might attempt to claim that Bilal was *volenti* since he has placed himself in a position of danger by chatting to Ahmed over the fence and, since he owns the same kind of mower, he knows the risks involved. However, Bilal would be unlikely to have consented to Ahmed's reckless showing off which caused the problem.

Examiner commentary

This response scores high marks because there is a good balance between the law (AO1) and its application (AO2) which reasonably reflects the 10:15 ratio of marks available. The law stated is accurate and well supported with relevant case law. The application is methodical, thorough and based on sound legal reasoning. The most important reflection of a detailed and developed argument lies in the meticulous use of evidence from the scenario to support the fulfilment of liability at each stage. Appropriate terminology is employed throughout. The use of sub-headings when setting out the AO1 helps to underscore the clarity of understanding of the elements of

negligence. The structure of setting out the relevant AO1 in a block at the outset and following this up with the evaluation demonstrates a clear and logical approach but candidates can equally blend their AO1 and AO2 together if preferred. Finally, although they are not required for Level 4, the candidate has demonstrated their breadth of knowledge by including possible defences (*volenti* and contributory negligence).

Section B Question 6

Advise whether Bilal will be successful in a claim in occupier's liability against Lush Breakz Hotel.

[25]

Level 4 answer

Occupiers' liability allows people to sue the occupiers of land for injuries sustained whilst on their premises. The rules are set out in two statutes: the Occupiers' Liability Act 1957 (OLA 57) covers lawful visitors and the Occupiers' Liability Act 1984 (OLA 84) covers liability to non-visitors.

Visitors are those with either express or implied permission to be on premises or those with a legal right of entry. A lawful visitor can become a trespasser when they go beyond their permission. Under s.1(3) OLA 57, an occupier owes a duty of care to all visitors. However, under s.1(3) OLA 84 the occupier will only owe a duty to a non-visitor if:

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

By s.1(4) the duty is to 'take such care as is reasonable in all the circumstances' to prevent injury to trespassers 'by reason of the danger concerned'.

An occupier can discharge his duty by giving warnings which allow the claimant to be safe but these are subject to the limitation that the sign is sufficient to adequately alert the claimant to the danger (*Westwood v Post Office*). Where a claimant ignores a sign they may be considered volenti (*Tomlinson*) and an occupier is not required to warn adult trespassers of the risk of injury against obvious dangers (*Ratcliff v McConnell*) or foolhardy pursuits (*Donoghue v Folkestone*).

The defence of volenti is provided under s.1(6) OLA 84 and it has been ruled that adult trespassers accept any risk they knew about when entering the land (*Ashdown v Samuel*).

It is also possible to be contributorily negligent (*Sayers v Harlow*) where the defendant was contributorily negligent when she attempted a dangerous escape.

Claimants can only recover damages for personal injury under the 84 Act but both personal injury and property damage can be claimed under the 57 Act.

Firstly we must establish who the parties are. Bilal is the claimant as he has suffered the harm. Lush Breakz Hotel (LBH) are the occupiers since they have control and possession of the premises and this makes them the defendants.

Bilal would start off as a lawful visitor since he has an express licence to be on the hotel premises as a paying guest. However, Bilal will have become a trespasser when he entered the swimming pool and ignored the sign saying 'no entry to guests' (*The Calgarth*).

This means that the OLA 84 will apply to Bilal. Furthermore, the hotel owes Bilal the duty of care subject to the s.1(3) OLA 84 provisions because all three sections are satisfied: (1) there is an obvious danger when a pool is empty and in darkness; (2) Lush Breakz could anticipate trespassers being in the vicinity of the danger if the door is unlocked; and (3) Lush Breakz could easily have offered some protection by locking the door.

However, Lush Breakz could discharge this duty through their warning but, under s.1(5), the warning must be sufficient to enable Bilal to be safe (*Westwood*).

Route 1: Lush Breakz cannot rely on the sign as it did not warn of the danger, it does not enable Bilal to be safe and it only serves to establish Bilal as a trespasser. In this situation Lush Breakz could still rely on precedents such as *Tomlinson* and suggest Ahmed was volenti or on *Ratcliff v McConnell* where it was held that an occupier is not required to warn adult trespassers against obvious dangers - it is submitted that diving into a pool in the dark without a light on is ignorance of an obvious danger.

Route 2: Lush Breakz can rely on the warning notice as a full defence since it was capable of making Bilal safe i.e. had he observed the sign he would have been alright – Tomlinson v Congleton BC.

Route 1 seems more likely and Lush Breakz will be liable under the OLA 84 for personal injuries only.

Examiner commentary

This is a high-scoring response because it has a good balance between AO1 and AO2. The AO1 is selective and accurate without being exhaustive. The candidate has accurately identified the main issue as the status of the sign and given a good range of relevant authorities to cover different outcomes. The AO2 is thoughtful, well considered and accurate. The candidate has established the basics (premises/parties etc.) before applying the relevant law. When it comes to the critical point, the candidate has recognised that there could be some argument over the status of the sign and has provided alternative outcomes with appropriate legal support in order to reach a reasoned and justified conclusion. In questions like this candidates would never be penalised for not pursuing dual routes. Provided a candidate has a well-argued and supported line of reasoning full marks will be available even though there may be an alternative line of reasoning. The question serves as a good example of what to do when a candidate is unsure and where it may be good practice to pursue dual approaches and offer alternative outcomes.

Section B Question 7a and 10a

Discuss the extent to which vicarious liability is fair on employers.

[25]

Level 4 answer

Vicarious liability arises when an employer can be sued for the acts or omissions of an employee where they amount to a tort. The doctrine is criticised for going against basic legal principles such as only imposing liability on parties who are not at fault or blameworthy. However, it is often justified by ensuring those best placed to meet the costs of legal action take responsibility for the acts or omissions of those for whom they are responsible. This essay will look at the basic rules of vicarious liability before considering whether they are fair on the employer.

In order to be vicariously liable for the acts/omissions of another it must be shown that the defendant and the tortfeasor are in a relationship of employment or 'akin to employment' and, if so, was the tort sufficiently closely connected with that employment (*Mohamud v Morrisons*)?

Traditional tests of employment such as the control and multiple tests have proved to be too narrow in recent cases and courts now adopt a more flexible approach to finding an employment relationship (*JGE v Trustees of the Portsmouth RCDT*). This may be viewed as unfair on employers by stretching the law to find liability in circumstances where employers have a less conventional relationship of control with the tortfeasor. However, others would argue the tortfeasors are working for the benefit of the employer who should take responsibility for their actions. The scope of liability by employers has also been broadened by recent changes in the law relating to the loan or sharing of employees meaning that more than one employer can be liable for the torts of a single employee (*Viasystems*). This carries the potential unfairness of leaving one employer liable in circumstances where they had little control or supervision although it does offer claimants the possibility of suing the party best placed to pay any damages due.

By convention the torts need to take place 'in the course of employment' (*Century Insurance v NI Road Transport*) and where an employee acts outside the directions of the employer or 'on a frolic of his own', the employer will not be liable (*Hilton v Thomas Burton*). However, recent developments in the law have produced a much broader test of liability than this conventional test. In a series of cases from *Lister v Heselley Hall*, through *Mohamud v Morrisons* to *Fletcher v Chancery Lane*, the courts have applied the so-called close connection test. This merely requires that a connection can be established between the acts/omissions of the tortfeasor and the employer. On one hand this can also be criticised as unfair on employers since they are being found liable in circumstances where the acts/omissions of their 'employees' fall well beyond what would be authorised and/or beyond anything they might reasonably expect an employee to do. However, many of the cases which have developed and established this test have involved the abuse of vulnerable children in care and acts of violence with serious consequences for the victims who must be offered some protection by the law.

The scope of the law on vicarious liability has changed a great deal in recent years. In a consistent line of reasoning culminating in *Armes v Notts CC* (approving *Cox & Mohamud*), the courts have established and refined the close or sufficient connection test. These cases illustrate the flexible and efficient operation of precedent within the English legal system which, in this instance has significantly extended the potential liability of employers - but is this fair?

Vicarious liability is unfair on employers when it goes against the basic fault principle in tort law, that a defendant should be blameworthy to be liable. However, many would argue that it is an acceptable compromise given that the employer benefits from the work and should therefore bear responsibility for its proper execution. It seems harsh to hold employers responsible where employees have acted in spite of an express prohibition of harmful practices but it is the employer who is ultimately responsible for the appropriate hiring, induction, training and supervision of his/her employees. It is fair to hold employers vicariously liable since they are best placed to bear any losses where the tortfeasor is a man of straw. Public policy would seem to underpin this with the legal requirement that all employers must have employer indemnity insurance. Lastly, it is also fair to impose vicarious liability on employers as this encourages and maintains high standards and discourages poor employment practices as well as unsafe and undesirable workplace practices. In conclusion, whilst the current breadth of vicarious liability may seem a little unfair, it is a price worth paying to ensure vulnerable victims have access to justice and that the highest workplace standards are maintained.

Examiner commentary

This response scores high marks for a number of reasons. The split between AO1 (10 marks) and AO3 (15 marks) has been accurately and proportionately reflected in the response. Whilst a basic outline of the law has been given (with supporting case law), the explanations are not too detailed or exhaustive and the cases do not require explanation since they are the appropriate cases to use for the points they support. This is an area which has seen a great deal of change in recent years with a number of cases reaching the Court of Appeal and the UK Supreme Court and this is reflected in the level of AO1. It will be noted that some of the new leading cases are not included in the mark scheme as they had not been decided at the time of writing. Candidates are never penalised for being unaware of changes in the law in the 12 months prior to the exam. Furthermore, the examiners take account of what is covered in leading textbooks and the reliance placed on materials which are not fully up-to-date especially by non-specialist teachers.

The AO3 is provided throughout the response. Initially it provides critical context to the law as it is explained but, at the end of the penultimate paragraph the candidate poses a rhetorical question - 'is this fair'? This provides a distinct link to the final paragraph with a more abstract assessment and a sustained focus on the question as well as some developed points. It should be noted that the mark scheme for AO3 refers to 'partially developed' (Level 2), 'well developed' (Level 3) and 'fully developed' (Level 4) and candidates at Level 4 will need to demonstrate the ability to engage with the critical point of the question in a sustained and focused manner. Also, without a reasoned and justified conclusion a response is unlikely to achieve Level 4.

Whilst it is not essential to a Level 4 response, there is a link in this response to the theoretical aims of tort (the fault principle and public policy) which, whilst not discretely assessed, will always be creditworthy. The more pragmatic evaluation such as analysis of individual cases is just as creditworthy, especially in an area like this where the effect of recent cases has broadened liability of employers quite considerably.

Section B Law of tort

Part 2

Answer the **three** questions below.

The first two questions are based on the scenarios below. The scenarios are not related.

Andy owns a house directly opposite Supa Skreenz who make computer screens and other technical equipment. Supa Skreenz is generally only busy in the daytime when Andy is at work. However, due to a recent business expansion, Supa Skreenz is increasing production and they are working all night. This means that there is noise from the production processes, factory lights shining brightly and fleets of delivery lorries coming and going throughout the night. As a result, Andy cannot sleep. His fifteen year old daughter, Becky, can no longer get a mobile phone signal because Supa Skreenz have also built an extension opposite her bedroom window which blocks out the signal.

Newtown Recycling owns a unit on an industrial estate where they operate a recycling centre. They have a tank, where people can dispose of old motor oil, and a used tyre dump. Clarissa owns a neighbouring allotment where she grows organic vegetables. One night during a terrible storm, the lid of the oil tank is blown off. Rainwater fills the oil tank which overflows, spreading used oil all over Clarissa's allotment, destroying her vegetables. A bolt of lightning strikes the pile of used tyres and sets them alight. The tyres burn rapidly and thick black smoke covers Clarissa's greenhouse with soot.

- 8 Advise whether Andy and Becky can make successful claims in private nuisance. [25]
- 9 Advise whether Clarissa will be successful in a claim in Rylands v Fletcher against Newtown Recycling. [25]

Essay question on the law of tort

- 10* Discuss the extent to which vicarious liability is fair on employers. [25]

Section B Question 8

Advise whether Andy and Becky can make successful claims in private nuisance.

[25]

Level 4 answer

Private nuisance is a tort which attempts to balance conflicting interests in the use of land. The claimants are the people suffering the harm. In this case this is Andy for his loss of sleep and Becky for her loss of phone signal. The defendants are those accused of causing the nuisance - in this case Supa Skreenz.

Private nuisance requires proof of an unlawful, indirect interference with a person's use and enjoyment of land (or rights over that land).

It will be necessary to establish that any potential defendant is an 'occupier' of the relevant land (*Tetley v Chitty*). Furthermore, the claimant will need to show that they have an interest in the land affected by the alleged nuisance (*Hunter v Canary Wharf*).

The law of nuisance accepts a wide range of indirect interference such as fumes, noise, smoke, smells and vibrations (*St Helens Smelting v Tipping*) and, where physical damage is indirectly caused (*Cambridge Water v ECL*), there will be a *prima facie* nuisance (*Halsey v Esso*).

Unlawful interference means unreasonable and in establishing unreasonableness the courts will take a number of factors into account such as locality (*Kennaway v Thompson*), duration (*Spicer v Smee*) and sensitivity (*Network Rail*). Recent cases have also considered reasonableness in the light of provisions of the Human Rights Act 1998 (particularly Art. 8 'respect for private and family life, home and correspondence').

There are defences available to potential defendants. In a situation like this one some sort of statutory authority or planning permission may be relevant and public policy can be a factor.

If successful, the claimant may be entitled to a remedy such as damages and/or an injunction (*Coventry v Lawrence*).

Firstly, in respect of Andy. He is an occupier of the affected land. The scenario states that he owns the house and this gives him a clear proprietary interest (*Hunter*). Since there is no physical damage to Andy's use and enjoyment of his land, he will have to establish that the nuisance he is suffering (loss of sleep) constitutes an 'unreasonable' interference (*Sturges v Bridgman*).

So, looking at the nuisance, the noise produced by the lorries and the light and production process, noises are both clearly indirect sources. Furthermore, since production is now happening night and day it would definitely be considered as continuous (*Crown River Cruises v Kimbolton*). The move to 24 hour production must have the potential to change the nature of the locality regardless of its current status and although this has only started recently, its duration would be long enough (*Crown River Cruises*). Computer screens, it is submitted, are not a product whose production would attract an argument of social utility although Supa Skreenz may be providing employment as a social benefit to the area.

Andy will need to check to see whether planning permission or statutory authority has been granted for the increased production but this seems unlikely given the product they are making. If there was statutory authority, Andy might have to use a statutory system of regulation instead of nuisance (*Marcic v Thames Water*). Andy's case has a similarity to the case of *Halsey v Esso* where the court found that filling petrol tankers was not a nuisance at 10am but was a nuisance at 10pm. Furthermore, recent cases such as *Marcic* have also opened the opportunity to invoke Art. 8 Human Rights Act as a cause of action. Overall, it seems highly likely that Andy will succeed based on the precedent from *Halsey* and the absence of any significant arguments in favour of the reasonableness of the nuisance. Andy can ask for the remedy of an injunction and/or damages (*Coventry v Lawrence*).

Secondly, Becky's claim. Here we face an immediate difficulty. Becky is only 15 years old and would not have a sufficient proprietary interest in the property to bring an action (*Hunter v Canary Wharf*). *McKenna v British Aluminium* gave some hope to child claimants with no interest in the land under Art. 8 Human Rights Act but this idea was dismissed by the Court of Appeal in *Dobson v Thames Water*.

Becky's best chance would be for Andy to bring an action himself since he must be similarly affected. Once again he would need to establish whether Supa Skreenz have some form of permission or authority or not which, on the facts, seems highly unlikely. However, he may not find it straightforward to establish the loss of a mobile phone signal as unreasonable. In *Hunter v Canary Wharf* the court ruled that loss of TV signal was not an actionable nuisance. Some courts may see this as a binding precedent and other courts may reach the same conclusion through reasoning by analogy.

Unless Andy could persuade the court to take a different view from *Hunter* regarding the value of a mobile phone signal in people's lives, it looks unlikely that he will succeed.

Examiner commentary

This response scores high marks because there is a good balance between AO1 (Law) and AO2 (Application) which reflects the 10:15 split in the mark scheme. It is a very comprehensive response. Without being exhaustive, the AO1 covers most of the relevant law and has thoughtfully missed out irrelevant elements such as sensitivity which do not come up in the question. There is plenty of supporting case law. Once again, it is worth noting the impact of new case law. The UK Supreme Court's decision in *Coventry v Lawrence* has had far-reaching implications for the law of private nuisance but the case had not been decided at the time that the SAMs were written, hence its absence from the mark scheme. Please note the comments made above regarding the inclusion of up-to-date case law. The application is well structured and coherent. It allows for some consideration of arguments for and against reasonableness before drawing a reasonable, justified and case supported conclusion. It is worth noting that the question is framed in terms of advising whether the claimants can make successful claims. Given this context candidates would not be penalised for failing to mention remedies although they are included on the mark scheme and creditworthy where included.

Section B Question 9

Advise whether Clarissa will be successful in a claim in *Rylands v Fletcher* against Newtown Recycling.

[25]

Level 4 answer

Providing Clarissa has an interest in the land affected, she may be able to claim for the harm done by the oil and the soot under the tort of *Rylands v Fletcher*. This tort covers situations where harm is done as a result of something dangerous escaping from neighbouring land in circumstances where the defendant has brought the dangerous material onto his or her premises and accumulated it there. It is supposed to be a strict liability tort but there is a requirement of foresight of harm and several defences, meaning that there are relatively few successful claims.

The land affected is Clarissa's allotment which, according to the scenario, she owns; so, she has an interest in the land affected. She is the claimant and she will be suing Newtown Recycling (NR) who are the occupiers since they own the unit on the industrial estate and they are in control of the operations taking place on the land. NR are, therefore, the defendants.

Based on the definition of this tort, Clarissa will need to prove that:

- * The thing that escaped was brought onto NR's land (*Giles v Walker*).
- * The thing that escaped caused the damage (*Transco v Stockport*).
- * The thing that escaped would have been likely to cause harm if it escaped (*Hale v Jennings*).
- * There was an escape from land which was under NR's control (*British Celanese v Hunt*).
- * There was harm done by the thing which escaped (*Stannard v Gore*).
- * The harm done must have been foreseeable (*Cambridge Water v ECL*).

An additional element of the tort added after *Rylands v Fletcher* itself is that the use of the land by NR will need to be non-natural (*Cambridge Water v ECL*). Where there is a potentially dangerous activity and/or where things are stored in large quantities (as in *Rylands* itself) there may be a prima facie non-natural use (*Mason v Levy Autoparts*). This element must now be considered in the light of *Transco v Stockport* which stated that an action in *Rylands* would only be available where the use of land was out of the ordinary, considering the time and place and whether they were activities from which the public derive a benefit was not relevant.

A number of defences may be available to NR to avoid liability. The most relevant of these is an Act of God such as freak weather conditions (*Nicholls v Marsland*).

Firstly the oil and the vegetables. It is obvious that oil was brought onto NR's land and accumulated there since this was one of the fundamental functions of the site as a recycling centre. The oil has escaped and has caused damage to Clarissa's vegetables. Oil is something which would be likely to cause harm if it escaped. Under *Cambridge Water*, storage of oil in large quantities (and the danger associated with its escape) would be a classic example of non-natural use of land. However, following *Transco*, it is submitted that a recycling centre on an industrial estate would not amount to an 'out of the ordinary considering time and place' (or non-natural) use of the land. If so, Clarissa has no claim. If it was viewed as non-natural then damage to soil is a foreseeable form of harm and Clarissa can probably claim for the vegetables. NR might try and claim the escape was due to an Act of God but the weather conditions were probably not extreme enough to qualify (*Greenock Corporation v Caledonian* where it was ruled that 'floods of extraordinary violence must be anticipated').

Secondly, the greenhouse and the smoke. Again, there is no doubt that NR brought onto the land and accumulated the tyres as this was part of the site's functions. Burning tyres would be likely to cause harm if they escaped but it was the smoke that escaped not the tyres. There are cases which involve the escape of fumes from chemicals and explosions from dynamite but, based on the recent decision in *Stannard v Gore*, it seems unlikely that smoke from tyres would be viewed any differently from fire from tyres. If so, there is no claim here for Clarissa. If it were accepted then Clarissa has to overcome the same 'non-natural use of land' arguments as above. Again, it is submitted that storing tyres in a recycling centre on an industrial estate would not be considered an out of the ordinary use of industrial land. If Clarissa could overcome both of these barriers, the damage to the greenhouse could be claimed for and would be a foreseeable form of harm. NR would be likely to claim an Act of God and a thunderbolt of lightning is more likely to succeed than heavy rain in a storm as above.

Examiner commentary

This response scores Level 4 because it deals well with a question which requires consideration of a number of issues some of which have been subject to recent changes in the appellate courts. There is excellent application of legal rules to the scenario. The balance of AO1 to AO2 is appropriate and accurate. Irrelevant points such as not being able to bring an action for personal injury and irrelevant defences are omitted. Based on the similarity between the scenario and Stannard it is most likely that the outcome would be the same. However, consistent with earlier advice on the OLA question, students would not be penalised for setting out any particular outcome which is supported with appropriate legal arguments. Although it does not provide a clear conclusion, it sets out the likely alternative outcomes with supporting reasoning and this is the correct path to follow when uncertain.



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