

Mark Scheme for January 2012

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

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

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

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Annotations

Annotation	Meaning
	AO1 (not attached to a case)
	AO2
	Critical Point (Q1 and Q3) / Developed case (Q2)
	First applied point (Q1) / Synopticism (Q2)
	Link to source
	Linked case (Q1) / Bald case (Q2) / Conclusion (Q3)
	Indicates point (Q3)
	Indicates point (Q3)
	Indicates point (Q3)
	Indicates point (Q3)
	Repetition

Question	Answer	Marks	Guidance												
1*	<p>Potential answers may:</p> <p>Assessment Objective 2 – Analysis, evaluation and application</p> <p>AP1 Identify the issue from the case: that Morris ran a recording studio close to a railway line and the interference from some newly installed electric train track circuits caused him loss of business and that the court had to decide whether D was an abnormally sensitive user of land</p> <p>AP2 Discuss the traditional view of the courts towards abnormally sensitive use of land: No action if abnormally sensitive use of land: <i>Robinson v Kilvert</i></p> <p>But where harm is done to land in ‘normal use’ and this includes abnormally sensitive use as well then there may be an action: <i>McKinnon Industries v Walker</i></p> <p>CP Identify the development represented by this case – that the courts are now more likely to apply the test of foreseeability in line with principles of negligence. In <i>Network Rail</i> the court held that it was not foreseeable that the circuits installed by Railtrack would interfere with the recording equipment</p> <p>AP3 Recognise the increasing overlap with principles associated with negligence as <i>per</i> Conor Gearty’s criticisms in source 5 and the potential conflict between the traditional strict liability view of nuisance and the idea that D cannot be liable for that which he cannot reasonably foresee (<i>Cambridge Water Co v Eastern Counties Leather</i>)</p> <p>AP4 Credit any other relevant analytical comment</p> <p>LC Link with any relevant case such as <i>Robinson</i> or <i>McKinnon</i> above or cases that also seem to exclude actions for interference with recreational activities (eg <i>Hunter v Canary Wharf</i> and <i>Bridlington Relay v Yorkshire Electricity Board</i>).</p>	12	<table border="1" data-bbox="1444 288 1800 499"> <thead> <tr> <th>AO2 Level</th> <th>AO2 marks</th> </tr> </thead> <tbody> <tr> <td>5</td> <td>11–12</td> </tr> <tr> <td>4</td> <td>9–10</td> </tr> <tr> <td>3</td> <td>7–8</td> </tr> <tr> <td>2</td> <td>4–6</td> </tr> <tr> <td>1</td> <td>1–3</td> </tr> </tbody> </table> <p>Marks should be awarded as follows:</p> <ul style="list-style-type: none"> • Max 3 marks for the Critical Point (CP) • Max 3 points for the first Applied Point (AP) • Max 3 points for a relevant Linked Case (LC) • Max 3 points for the second Applied Point (AP) <p>Level 5 Responses are unlikely to achieve level 5 without discussing the CP, without using a linked case for the purpose of showing development and without making 2 analytical points.</p> <p>Level 3 Responses are unlikely to achieve level 3 without discussing the CP.</p>	AO2 Level	AO2 marks	5	11–12	4	9–10	3	7–8	2	4–6	1	1–3
AO2 Level	AO2 marks														
5	11–12														
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	<p>Assessment Objective 3 – Communication and presentation</p> <p>Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology.</p>	4	<table border="1" data-bbox="1444 1219 1823 1394"> <thead> <tr> <th>AO2 marks</th> <th>AO3 mark</th> </tr> </thead> <tbody> <tr> <td>10-12</td> <td>4</td> </tr> <tr> <td>7-9</td> <td>3</td> </tr> <tr> <td>4-6</td> <td>2</td> </tr> <tr> <td>1-3</td> <td>1</td> </tr> </tbody> </table>	AO2 marks	AO3 mark	10-12	4	7-9	3	4-6	2	1-3	1		
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Question	Answer	Marks	Guidance												
2*	<p>Potential answers may:</p> <p>Assessment Objective 1 – Knowledge and understanding</p> <ul style="list-style-type: none"> • Definition - An unlawful (unreasonable) interference with a person’s use or enjoyment of land or some right over, or in connection with it • Who may claim? - C must have an interest in the land affected – <i>Hunter v Canary Wharf Ltd</i> • What may amount to a nuisance? <ul style="list-style-type: none"> ○ Smells: <i>Adams v Ursell</i> ○ Noise from neighbours: <i>Baxter v Camden London Borough Council (No 2)</i> ○ TV Reception: <i>Bridlington Relay Ltd v Yorkshire Electricity Board/Hunter v Canary Wharf</i> ○ General noise / dust / heat / light / vibrations: <i>Halsey v Esso Petroleum</i> ○ Cliff subsidence (sudden): <i>Holbeck Hall Hotel and Another v Scarborough Borough Council</i> ○ Sex Shop lowering tone & house values: <i>Laws v Florinplace Ltd</i>; Natural ‘accidents’: <i>Leakey v National Trust</i> ○ Blocked culverts: <i>Sedleigh-Denfield v O’Callaghan</i> ○ Noisy neighbours: <i>Southwark London BC v Mills</i> • What amounts to an unreasonable interference? <ul style="list-style-type: none"> ○ Duration: <i>Bolton v Stone</i>; <i>Crown River Cruises Ltd v Kimbolton Fireworks Ltd</i> ○ Sensitivity of plaintiff: <i>Robinson v Kilvert</i>; <i>Network Rail Infrastructure Ltd (formerly Railtrack PLC) v CJ Morris</i> ○ Locality: <i>Sturges v Bridgman</i>; <i>Wheeler v Saunders</i>; <i>Laws v Florinplace Ltd</i> ○ Utility of defendant’s conduct: <i>Adams v Ursell</i>; <i>Bellew v Cement Co</i> ○ Effect of Malice: <i>Christie v Davey</i>; <i>Bradford Corp v Pickles</i>; <i>Hollywood Silver Fox Farm v Emmett</i> ○ Seriousness of interference: <i>Miller v Jackson</i> ○ Effect on claimant’s human rights?: <i>Marcic v Thames Water</i>; <i>Hatton v UK</i>; <i>Dennis v MOD</i>; <i>McKenna v British Aluminium</i> 	16	<table border="1" data-bbox="1444 272 1821 504"> <thead> <tr> <th>AO1 Level</th> <th>AO1 marks</th> </tr> </thead> <tbody> <tr> <td>5</td> <td>14–16</td> </tr> <tr> <td>4</td> <td>11–13</td> </tr> <tr> <td>3</td> <td>8–10</td> </tr> <tr> <td>2</td> <td>5–7</td> </tr> <tr> <td>1</td> <td>1–4</td> </tr> </tbody> </table> <p>Level 5 Responses are unlikely to achieve level 5 without including 8 relevant cases / statutory provisions. Responses are likely to use material from both within and beyond the source/resource booklet. The discussion of cases / statutes should include a direct link to cited cases / statutory provision, including sufficient factual material only to ensure accuracy of citation and to support a discussion.</p> <p>Level 4 Responses are unlikely to achieve level 4 without including 6 relevant cases / statutory provisions</p> <p>Level 3 Responses are unlikely to achieve level 3 without including 4 relevant cases / statutory provisions.</p> <p>Level 2 Responses are unlikely to achieve level 2 without including 2 relevant cases / statutory provisions.</p>	AO1 Level	AO1 marks	5	14–16	4	11–13	3	8–10	2	5–7	1	1–4
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Question	Answer	Marks	Guidance												
	<ul style="list-style-type: none"> • Who may be sued? <ul style="list-style-type: none"> ○ Creator: <i>Bybrook Barn Garden Centre Ltd v Kent County Council</i>; <i>Southport Corporation v Esso Petroleum</i>. ○ Occupiers: <i>Leakey v National Trust</i>; <i>Marcic v Thames Water Utilities Ltd</i>; <i>Sedleigh-Denfield v O'Callaghan</i>; ○ Landlords: <i>Tetley v Chitty</i>; <i>Wringe v Cohen</i> • What defences are available? <ul style="list-style-type: none"> ○ Prescription: <i>Sturges v Bridgman</i> ○ Act of a stranger: <i>Sedleigh Denfield</i>; ○ Statutory authority: <i>Allen v Gulf Oil Refining Co Ltd</i>; <i>Gillingham Borough Council v Medway (Chatham) Dock Co Ltd</i>; <i>Wheeler v Saunders</i> • What defences are not available? <ul style="list-style-type: none"> ○ Claimant came to nuisance: <i>Miller v Jackson</i>; <i>Sturges v Bridgman</i>; <i>Kennaway v Thompson</i> ○ Usefulness of defendant's activity: <i>Adams v Ursell</i>; <i>Bellews v Cement Co</i> ○ D used all possible care/skill • What remedies might be available? <ul style="list-style-type: none"> ○ Injunctions: <i>Kennaway v Thompson</i>; <i>Miller v Jackson</i>; <i>Tetley v Chitty</i> ○ Abatement: <i>Lemon v Webb</i> ○ Damages: <i>Shelfer v City of London Electric Lighting Co</i>; <i>The Wagon Mound (No 2)</i> 														
	<p>Assessment Objective 2 – Analysis, evaluation and application</p> <ul style="list-style-type: none"> • Argue that nuisance could be replaced by negligence – better to determine fault and what is fair, just and reasonable than trying to balance competing interests based on inappropriate concepts • Comment on the growth of a wide range of statutory nuisances enhanced by EU legislation provide a more effective, cheaper and quicker means of resolving the most common nuisances • Discuss any of the restrictive definitions such as that of an 'occupier' from <i>Hunter</i> which undermines the availability and effectiveness of nuisance 	14	<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: center;">AO2 Level</th> <th style="text-align: center;">AO2 marks</th> </tr> </thead> <tbody> <tr> <td style="text-align: center;">5</td> <td style="text-align: center;">13–14</td> </tr> <tr> <td style="text-align: center;">4</td> <td style="text-align: center;">10–12</td> </tr> <tr> <td style="text-align: center;">3</td> <td style="text-align: center;">7–9</td> </tr> <tr> <td style="text-align: center;">2</td> <td style="text-align: center;">4–6</td> </tr> <tr> <td style="text-align: center;">1</td> <td style="text-align: center;">1–3</td> </tr> </tbody> </table>	AO2 Level	AO2 marks	5	13–14	4	10–12	3	7–9	2	4–6	1	1–3
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	<ul style="list-style-type: none"> • Comment on the effect of the introduction of the Human Rights Act and its potential impact • Discuss the potential use of ADR to avoid complex litigation and provide effective relief without loss of relationships • Comment that nuisance produces inconsistent results – eg compare the relative ease of proving nuisance where there is physical damage compared with the less clear concept of an interference with use and enjoyment of land • Argue that where competing interests are balanced – one party wins at the other’s expense (eg <i>Hunter v Canary Wharf</i>) which is unsatisfactory compared to an outcome in which both parties compromise and note that although (eg <i>Thompson v Kennaway</i>) demonstrates the courts achieving this through use of remedies it is not as satisfactory as ADR and is uncertain for litigants • Comment that decisions such as <i>Hunter v Canary Wharf</i> (re: loss of TV reception) are hard to justify and basing a decision on dubious reasoning by analogy lacks credibility with the public • Comment that decisions such as <i>Hunter v Canary Wharf</i> (re: need for an interest in land) are restrictive and unrealistic contributing to the ineffectiveness of the tort • Discuss the way that the rapid pace of changing nature of localities is not always recognized • Discuss the difficulties of giving appropriate weight to public policy • Discuss any aspect of the difficulty of establishing unreasonable use of land which contributes to ineffectiveness • Discuss the way that any of the limitations inherent in the defences also contribute to ineffectiveness – act of a stranger (prevents a claim unless D adopts); prescription (allows D to cause a nuisance ‘as of right’ without regard to what is fair, just or reasonable); statutory authority (can be difficult to counter and ignores local conditions and knowledge). 		<p>Level 5 Responses are unlikely to achieve level 5 without an analytical engagement with the question and a logical conclusion.</p>

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		<p>Assessment Objective 3 – Communication and presentation</p> <p>Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology.</p>	4	<table border="1"> <thead> <tr> <th>AO1 + AO2 marks</th> <th>AO3 mark</th> </tr> </thead> <tbody> <tr> <td>24–30</td> <td>4</td> </tr> <tr> <td>17–23</td> <td>3</td> </tr> <tr> <td>9–16</td> <td>2</td> </tr> <tr> <td>1–8</td> <td>1</td> </tr> </tbody> </table>	AO1 + AO2 marks	AO3 mark	24–30	4	17–23	3	9–16	2	1–8	1	
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3	<p>Potential answers may:</p> <p>Assessment Objective 1 – Knowledge and understanding</p> <p>Use any relevant cases as illustration when applying the law to the problems.</p> <p>Assessment Objective 2 – Analysis, evaluation and application</p> <p>In the case of (a):</p> <p>L1 Identify Alice as the occupier as she has an interest in the land as owner (<i>Hunter v Canary Wharf</i>)</p> <p>L2 Reason that since there is no physical damage, the nuisance is an interference with enjoyment of land and Alice will have to show unreasonable use of land (<i>St Helens Smelting Co v Tipping</i>) and identify that the interference is indirect and continuous despite only happening during the week (<i>Crown River Cruises Ltd v Kimbolton Fireworks Ltd</i>; <i>Halsey v Esso</i>)</p> <p>CP Consider the effect of locality – unless Alice can show that the locality has changed it is unlikely that a well established factory will be causing a nuisance to a new house on the edge of town without any adverse effect on the neighbourhood (<i>Laws v Florinplace</i>) – but this <i>is</i> possible (<i>Sturges v Bridgman</i>) or, alternatively, the reasonableness of the activity may have changed to become a nuisance (<i>Halsey v Esso</i>)</p> <p>L3 The factory may not claim the defence of ‘coming to the nuisance’ (<i>Sturges v Bridgman</i>; <i>Kennaway v Thompson</i>) although there is a public policy argument since the factory is a big local employer (<i>Adams v Ursell</i>; <i>Miller v Jackson</i>) and the defence of prescription would not work based on the principle in <i>Sturges v Bridgman</i> – there is unlikely to be any planning or statutory authority for a sweet factory</p> <p>Conclude that Alice is unlikely to have an action in nuisance (unless an exception has been well argued)</p>	<p>10</p> <p>20</p>	<table border="1" data-bbox="1444 247 1915 459"> <thead> <tr> <th>Level</th> <th>AO1 marks</th> <th>AO2 marks</th> </tr> </thead> <tbody> <tr> <td>5</td> <td>9–10</td> <td>17–20</td> </tr> <tr> <td>4</td> <td>7–8</td> <td>13–16</td> </tr> <tr> <td>3</td> <td>5–6</td> <td>9–12</td> </tr> <tr> <td>2</td> <td>3–4</td> <td>5–8</td> </tr> <tr> <td>1</td> <td>1–2</td> <td>1–4</td> </tr> </tbody> </table> <p>Marks should be awarded (per scenario) as follows:</p> <table border="1" data-bbox="1444 598 1780 810"> <thead> <tr> <th>Level</th> <th>(a), (b) or (c)</th> </tr> </thead> <tbody> <tr> <td>5</td> <td>9-10</td> </tr> <tr> <td>4</td> <td>7-8</td> </tr> <tr> <td>3</td> <td>5-6</td> </tr> <tr> <td>2</td> <td>3-4</td> </tr> <tr> <td>1</td> <td>1-2</td> </tr> </tbody> </table> <p>A maximum of 3 marks can be allocated for AO1 for each part question.</p> <ul data-bbox="1444 917 2072 1220" style="list-style-type: none"> • Max 3 marks for definitions of relevant rules • Max 3 marks for supporting authorities relevant to the scenario • Max 3 marks for the application of the law to the facts • Max 1 mark for a logical conclusion/assessment of the most likely outcome in terms of liability 	Level	AO1 marks	AO2 marks	5	9–10	17–20	4	7–8	13–16	3	5–6	9–12	2	3–4	5–8	1	1–2	1–4	Level	(a), (b) or (c)	5	9-10	4	7-8	3	5-6	2	3-4	1	1-2
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Question	Answer	Marks	Guidance
	<p>In the case of (b):</p> <p>L1 Identify Bob as the occupier as he has an interest in the land as owner (<i>Hunter v Canary Wharf</i>)</p> <p>L2 Consider the possibility of a <i>prima facie</i> nuisance based on the physical damage (<i>St Helens Smelting Co v Tipping</i>)</p> <p>CP1 Identify the similarity to other cases involving ‘naturally occurring nuisances’ (<i>Leakey v National Trust</i>) and that this would be actionable only if the wildlife reserve knew or had some sort of duty to take precautionary steps or, possibly, had ‘adopted’ the cause of the nuisance by, for example, feeding the birds (<i>Sedleigh-Denfield v O’Callaghan</i>)</p> <p>CP2 Discuss the possibility that if Bob did have an action he may be considered a sensitive user in respect of the rare African Lillies and apply either traditional or contemporary tests (<i>Robinson v Kilvert</i>; <i>Network Rail Infrastructure Ltd (formerly Railtrack PLC) v CJ Morris</i>) but that since there is damage to all of Bob’s garden, sensitivity would not be an issue (<i>McKinnon Industries v Walker</i>)</p> <p>L3 Consider possibility of public benefit (<i>Miller v Jackson</i>)</p> <p>Conclude that Bob is likely to have an action in nuisance</p> <p>In the case of (c):</p> <p>L1 Identify that Charley (especially aged seventeen) looks unlikely to have any proprietary interest in her parent’s home and under the <i>Hunter</i> rule will not be able to sue, although this may not be the case</p> <p>L2 Comment on the fact that there is no physical damage so Charley (if she were an occupier) would have to establish unreasonable use of land (<i>Halsey v Esso</i>)</p> <p>L3 Consider the possibility of Newtown Council having either planning permission and/or statutory authority (<i>Allen v Gulf Oil Refining Co Ltd</i>; <i>Gillingham Borough Council v Medway (Chatham) Dock Co Ltd</i>)</p> <p>CP Discuss the similarity with the case of <i>Hunter</i> and speculate on the likely comparison of loss of mobile phone signal with loss of TV reception or a view (<i>Hunter v Canary Wharf</i>; <i>Aldred’s case</i>; <i>Bridlington Relay Ltd v Yorkshire Electricity Board</i>)</p>		

Question	Answer	Marks	Guidance
	Conclude that, based on <i>Hunter</i> , an action in nuisance would be unlikely to find loss of mobile phone signal actionable (<i>Hunter v Canary Wharf</i>) or that an action in nuisance would be unlikely in view of Charley's age. Also credit responses which consider the possibility of actions under the Human Rights Act 1998.		

Advanced GCE Law Levels of Assessment

There are five levels of assessment of AOs 1 and 2 in the A2 units. The first four levels are very similar to the four levels for AS units. The addition of a fifth level reflects the expectation of higher achievement by candidates at the end of a two-year course of study. There are four levels of assessment of AO3 in the A2 units. The requirements and number of levels differ between AS and A2 units to reflect the expectation of higher achievement by candidates at the end of a two-year course of study.

Level	Assessment Objective 1	Assessment Objective 2	Assessment Objective 3 (<i>includes QWC</i>)
5	Wide ranging, accurate, detailed knowledge with a clear and confident understanding of relevant concepts and principles. Where appropriate candidates will be able to elaborate with wide citation of relevant statutes and case-law.	Ability to identify correctly the relevant and important points of criticism showing good understanding of current debate and proposals for reform or identify all of the relevant points of law in issue. A high level of ability to develop arguments or apply points of law accurately and pertinently to a given factual situation, and reach a cogent, logical and well-informed conclusion.	
4	Good, well-developed knowledge with a clear understanding of the relevant concepts and principles. Where appropriate candidates will be able to elaborate by good citation to relevant statutes and case-law.	Ability to identify and analyse issues central to the question showing some understanding of current debate and proposals for reform or identify most of the relevant points of law in issue. Ability to develop clear arguments or apply points of law clearly to a given factual situation, and reach a sensible and informed conclusion.	An accomplished presentation of logical and coherent arguments and communicates relevant material in a very clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.
3	Adequate knowledge showing reasonable understanding of the relevant concepts and principles. Where appropriate candidates will be able to elaborate with some citation of relevant statutes and case-law.	Ability to analyse most of the more obvious points central to the question or identify the main points of law in issue. Ability to develop arguments or apply points of law mechanically to a given factual situation, and reach a conclusion.	A good ability to present logical and coherent arguments and communicates relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.
2	Limited knowledge showing general understanding of the relevant concepts and principles. There will be some elaboration of the principles, and where appropriate with limited reference to relevant statutes and case-law.	Ability to explain some of the more obvious points central to the question or identify some of the points of law in issue. A limited ability to produce arguments based on their material or limited ability to apply points of law to a given factual situation but without a clear focus or conclusion.	An adequate ability to present logical and coherent arguments and communicates relevant material in a reasonably clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.
1	Very limited knowledge of the basic concepts and principles. There will be limited points of detail, but accurate citation of relevant statutes and case-law will not be expected.	Ability to explain at least one of the simpler points central to the question or identify at least one of the points of law in issue. The approach may be uncritical and/or unselective.	A limited attempt to present logical and coherent arguments and communicates relevant material in a limited manner using some appropriate legal terminology. Reward grammar, spelling and punctuation.

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