

Mark Scheme for June 2011

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Section A

- 1* Discuss the extent to which the rules for proving a breach of a duty of care are both consistent and just. [50]

Mark Levels	AO1	AO2
Level 5	21-25	17-20
Level 4	16-20	13-16
Level 3	11-15	9-12
Level 2	6-10	5-8
Level 1	1-5	1-4

Mark Levels	AO3
Level 4	5
Level 3	4
Level 2	3
Level 1	1-2

Potential answers **MAY**:

Assessment Objective 1 - Knowledge and understanding

[25]

Define the basic elements for a successful claim in negligence: the existence of a duty of care owed by the claimant to the defendant, breach of the duty of care, damage caused by the defendant's breach which is foreseeable

Identify that the particular element in question here is breach of duty

Explain how breach is established:

- a falling below the standard of care appropriate to the specific duty owed
- it is based on the standard of the 'reasonable man' *Blyth v Birmingham Waterworks* – an objective standard *Glasgow Corporation v Muir* eg the reasonable motorist *Nettleship v Weston*
- and there is no lowering of the standard for those who lack experience *Wilsher v Essex AHA*
- but there can be some variation with regard to groups such as children *Mullins*.

Explain the factors that may be taken into account to determine whether there has been a breach of the duty of care:

- the foreseeability of the risk of harm *Roe v Minister of Health*
- the magnitude of harm *Bolton v Stone*, *Haley v London Electricity Board*
- the effects of the 'thin skull' rule *Paris v Stepney BC*, *Page v Smith*
- the practicability of any possible precautions *Latimer v AEC*, *Bolton v Stone*
- the possible effect of common practice *Brown v Rolls Royce*, *Re Herald of Free Enterprise*
- the social usefulness of the defendant's actions – eg the extent to which the defendant acted in an emergency *Watt v Hertfordshire CC*.

Identify that there is a completely different method of measuring the breach in the case of professionals

- that of 'a competent body of professional opinion' *Bolam v Friern Hospital Management Committee* (doctors) –
- so that the doctor must have acted in a way that is reasonable and responsible assessed against that competent body of opinion *Bolitho v Hackney HA*
- but there could be as few as 11 in one thousand who would have acted as the doctor did *Defreitas v O'Brien*
- the test is sometimes applied to other professionals.

Assessment Objective 2 - Analysis, evaluation and application**[20]**

Discuss whether there is consistency:

- the reasonable man test uses an objective standard so it is simply measured
- it is not dependent on the characteristics of the defendant so eg inexperience will not excuse – the same standard is expected of everyone
- however, is it possible to have a purely objective standard or will breach just be down to what a judge decides in a particular case?
- the ‘thin skull rule’ is an obvious complication
- as is ‘common practice’
- however, the standard is measured differently for professionals – so this is not consistent.

Discuss whether the rules are just:

- an objective standard means that every defendant is equally treated – but this can be harsh as well as just
- and the tests of foreseeability and reasonable precautions means a defendant is only fixed with liability for damage he is at fault for
- but again the test is different for professionals
- so it allows them in effect to set their own standards which may mean that claims are easier to defeat
- it also may mean that practices that could be considered marginal or experimental could still be accepted
- and there is always a danger of professionals ‘closing ranks’
- it is also harder to determine what ‘a competent body of professional opinion’ actually is until it is tested
- professionals are able to rely on practices accepted by their colleagues
- however, there is potential unfairness in expecting the same of an inexperienced defendant
- the ‘thin skull’ rule also carries potential injustice *Page v Smith*.

Make any other relevant comment.

Reach any sensible conclusion.

Candidates are unlikely to satisfy the descriptor for Level 5 AO2 without a discussion that focuses on both consistency and justice. Stretch and challenge and synoptic consideration can be demonstrated by candidates whose discussion also has the role of judges, the objective use of precedent and the justice of their decision making as a context.

Assessment Objective 3 - Communication and presentation**[5]**

Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, punctuation and spelling.

- 2* 'Judges have imposed strict limitations on those who can recover for nervous shock (psychiatric damage) ignoring the basic rules of negligence. This is because they are aware that disasters can lead to so many genuine claims by those suffering foreseeable harm.'

Discuss the accuracy of the above statement.

[50]

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Potential answers **MAY**:

Assessment Objective 1 - Knowledge and understanding

[25]

Define nervous shock – a recognised psychiatric injury caused by a single traumatic event
Calascione v Dixon

Define primary victim:

- Someone present at the scene and at risk of foreseeable injury *Page v Smith*; or
- Someone present at the scene and suffering injury *Dulieu v White*.

Define secondary victim and the *Alcock* criteria:

- A person with a close tie of love and affection to the person injured in the accident
- With sufficient proximity in time and space to the event or its immediate aftermath
McLoughlin v O'Brien
- Who also saw or heard the accident or its immediate aftermath with their own unaided senses *Alcock*.

Identify those who cannot claim:

- People not suffering a recognisable injury *Reilly v Merseyside HA*
- People not within the area of impact *King v Phillips*
- People not within the area of shock *Bourhill v Young*
- Bystanders *McFarlane v E E Caledonia*
- People without close ties to a primary victim *Duncan v British Coal*
- People falling outside of the event or its immediate aftermath *McLoughlin v O'Brien*
- People who are told of the event rather than witnessing it *Alcock*
- Slow burn victims *Sion v Hampstead*.

Use any relevant cases.

Assessment Objective 2- Analysis, evaluation and application**[20]****Discuss any of the following:**

- the question concerns the limitations on who can claim for nervous shock so that it is important to distinguish between different classes of victim eg primary, secondary, bystanders and rescuers
- the origins of liability were with primary victims only *Dulieu v White*
- the breadth of liability to primary victims – according to *Page v Smith* providing there is a recognised psychiatric injury suffered that is causally connected to the defendant's negligence then the claimant need only show that injury was foreseeable, it does not have to be specifically psychiatric injury – and the 'thin skull rule' applies – so liability reflects the neighbour principle without further controls or limitations
- the fact that the development of liability towards secondary victims was restricted to those within the zone of impact to avoid 'floodgates' *King v Phillips*

Discuss any of the limitations imposed on secondary victims eg:

- narrowness with which the close tie of love and affection is interpreted *Alcock*
- Fact that close friends or colleagues cannot bring themselves within the definition *Duncan v British Coal*, and *Robertson and Rough v Forth Road Bridge Joint Board* – but see the different approach in *Dooley v Camel Laird Shipbuilders*
- restrictive definition of 'immediate aftermath' as applied in *Alcock* (credit any comparison with *N E Glamorgan NHS Trust v Walters* – or with *W v Essex CC*)
- secondary victim must show that psychiatric injury would foreseeably have been suffered by a person of reasonable phlegm and fortitude, so secondary victim already suffering a psychiatric illness has no claim, whereas there is no such restriction on primary victims, only 'injury' need be foreseeable *Page v Smith*
- comment on the discussion on TV Broadcasts in *Alcock*.

Discuss the limitation on claims by 'bystanders' even though they may suffer psychiatric harm *McFarlane v E E Caledonia*:

- before *White* professional rescuers were treated more liberally than amateurs – compare *Frost* (later *White* in HL) with *McFarlane v EE Caledonia*
- the limits of accepted injury or illness eg not claustrophobia *Reilly v Merseyside HA*, no account paid to excessive grief even though this may be long lasting *Tredget v Bexley* but has included 'pathological grief' *Vernon v Boseley*
- the narrow application of principles of causation *Sion v Hampstead HA* and *Calascione v Dixon*, and the refusal to merely accept a test of foreseeability
- inconsistent cases *Attia v British Gas*, *Owen v Liverpool Corporation*
- the significance of policy and the 'floodgates' argument as the only justifications for the limitations – in other words judges are aware that genuine claims are possible in excess of the limitations that they impose for recovery
- the Law Commission has proposed a much less restrictive definition.

Candidates are unlikely to satisfy the descriptor for Level 5 AO2 without a discussion that focuses on the development of limitations in this area of law. Stretch and challenge and synoptic consideration can be demonstrated by candidates whose discussion demonstrates that the area is one with no statutory intervention, and including comment on the consistency of application of principles of negligence within the area and the justice of the outcome of the rules

Assessment Objective 3 - Communication and presentation**[5]**

Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, punctuation and spelling.

- 3* Discuss the argument that in the tort of *Rylands v Fletcher* judges have created so many separate requirements and so many defences that there is little chance of pursuing a successful claim. [50]

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Potential answers **MAY**:

Assessment Objective 1 - Knowledge and understanding [25]

Define the tort:

- A bringing onto and accumulation on the defendant's land *The Charing Cross Case* – (no 'accumulation' if the thing is already naturally there *Giles v Walker*)
 - Of a thing likely to cause 'mischief' if it escapes *Rylands v Fletcher* – (although the thing need not be inherently dangerous *Shiffman v Order of the Hospital of St John of Jerusalem*)
 - An actual escape – although there is contrary law on whether this should be from land over which the defendant has control *Read v Lyons* or from circumstances over which the defendant has control *Hale v Jennings* and *British Celanese v AH Hunt* even after *Transco v Stockport*
 - The thing escaping causes damage
- (these were the elements originally identified by Blackburn J in the case)
- When case was heard in HL Lord Cairns added non-natural use of land (things stored in large quantities are commonly non-natural *Mason v Levy Autoparts* – while truly domestic use is not *Rickards v Lothian* and some things are always so *Cambridge Water v Eastern Counties Leather*)
 - Lord Goff in *Cambridge Water* added foreseeability of harm (approved in *Transco plc v Stockport MBC*)
 - Lord MacMillan narrowed the concept of escape in *Read v Lyons*.

Identify the available defences:

- *Volenti non fit injuria* – *Peters v Prince of Wales Theatre*
- Common benefit *Dunne v North West Gas Board*
- Act of God *Nicholls v Marsland*
- Act of a stranger *Perry v Kendrick's Transport*
- Statutory authority *Green v Chelsea Waterworks*
- Damage caused through the fault of the claimant himself *Eastern & South African Telegraph v Cape Town Tramways*
- Contributory negligence under the Law Reform (Contributory Negligence) Act 1945 which reduces damages.

Assessment Objective 2- Analysis, evaluation and application**[20]****Discuss any of the following:**

- the style of liability apparently envisaged by Blackburn J in the original case was for a general head of liability for accumulations of hazardous things that then did damage
- however, the tort has developed in such a way that this is not possible
- Blackburn's view of liability was in effect, as the tort has always been described, strict liability on the person who brings dangerous things onto his premises
- even without later developments and limitations, the fact that Lord Cairns in HL straightaway limited the effectiveness of the tort by the addition of a requirement of non-natural use of land
- the difficulties of showing non-natural use in a technological age (although see Lord Goff's comments in *Cambridge Water*)
- the shifting nature of non-natural use *Musgrove v Pandelis*
- the meaning given to accumulation – not unlike fault liability
- the limitation on the meaning of escape in *Read v Lyons* (but contrary tests in both *Hale v Jennings* and *British Celanese v A H Hunt*)
- the unusually wide range of defences available limiting the scope of the tort still further
- whether the requirement of foreseeability in *Cambridge Water* and in *Transco* differs from negligence, which in any case is probably easier to claim under negligence
- the argument made by many judges that the tort is a more specific type of nuisance – but again an action is harder to bring than one under nuisance
- the tort has more in common with fault liability than with strict liability – and therefore negligence may be a better option
- there are very few modern actions under the tort
- that there are very few successful actions
- how other common law jurisdictions have done away with the tort or subsumed it within negligence.

Candidates are unlikely to satisfy the descriptor for Level 5 AO2 without a discussion that focuses on the difficulties of bringing a successful claim based on the restrictions the judges have developed. Stretch and challenge and synoptic consideration can be demonstrated by candidates whose discussion demonstrates that the area is one with no statutory intervention, but having created the tort judges have limited and limited its application, and consider the justice of this.

Assessment Objective 3 - Communication and presentation**[5]**

Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, punctuation and spelling.

Section B

- 4* During a professional boxing match between them, Ali lands a punch on Bruce's nose stunning Bruce momentarily. The round ends and Bruce shouts to Ali "You're dead, pal".

At the start of the next round Bruce charges wildly at Ali. Ali fears that Bruce is going to carry out his threat so he head butts Bruce. This knocks Bruce unconscious.

While still unconscious Bruce is taken to the local hospital. X-rays of Bruce's head reveal a fractured skull and bleeding. Doctor Crop performs an emergency operation to secure the fracture and stop the bleeding.

The next day Ali visits Bruce to apologise. Bruce shouts "If I was not in so much pain I would kill you". Doctor Crop, frightened that Bruce might turn violent, locks him in his hospital room until the next day.

Consider whether any successful actions could be brought in trespass to the person in relation to the events above. [50]

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Potential answers **MAY**:

Assessment Objective 1 - Knowledge and understanding

[25]

Identify the relevant tort as trespass to the person

Identify that there are three types of trespass to the person: assault, battery, false imprisonment

Define assault – intentionally and directly causing the other to reasonably apprehend imminent battery

Explain the essential elements of the tort:

- Intention concerns the effect produced in the claimant *Blake v Barnard*
- And it is sufficient that the claimant has reasonable belief that the threat is real *Stephens v Myers*
- Traditionally assault required an active threat *Read v Coker*
- Words alone were insufficient *Tuberville v Savage* (but see *R v Ireland*, *R v Burstow* – criminal cases which may be persuasive)
- But if conditional words can also negate what might otherwise appear to be an assault *Tuberville v Savage*
- There can be no assault if the threat cannot be carried out *Thomas v NUM*.

Define battery – intentionally and directly inflicting unlawful force on the other

Explain the essential elements of battery:

- Must involve intention not carelessness *Letang v Cooper*
- And requires direct contact – though the definition of direct has been broadly interpreted *Scott v Shepherd*
- Requirement of hostility – probably merely means unlawful and in any case cannot apply to medical battery – compare *Wilson v Pringle* with *Re F*
- May include unwanted touching *Pursell v Horn* and *Nash v Sheen* but not the ordinary brushes of life.

Explain possible defences in a sporting context – *volenti Simms v Leigh RFC* and *Condon v Basi*, inevitable accident *Stanley v Powell*, self defence if reasonable force is used *Lane v Holloway*

Explain the importance of consent in a medical context – and that emergencies are an exception with doctors having more leeway to act in the interests of the patient so that consent can be implied

Define false imprisonment – unlawful bodily restraint

Explain the elements of false imprisonment:

- Requires total restraint *Bird v Jones*
- Can be for a short period *White v WP Brown*.

Possible defences – lawful arrest/detention *Tims v John Lewis*, *White v WP Brown*

Use any other relevant cases.

Assessment Objective 2 - Analysis, evaluation and application

[20]

Discuss the possibilities of actions for assault, battery and false imprisonment as follows:

In relation to **Ali punching Bruce** on the nose:

- This may technically be a battery
- It is direct and intentional application of force by Ali on Bruce
- But it is in a sporting context and within the rules of the sport – so Bruce would have consented to the risk of harm.

In relation to **Bruce shouting ‘You’re dead, pal’ to Ali:**

- This may technically be an assault
- Bruce is intentionally and directly causing Ali to fear an imminent battery
- The issue is whether Bruce’s words on their own are sufficient to constitute an assault – the traditional view was that accompanying physical gestures were needed – but if *Ireland; Burstow* (criminal appeals so only persuasive) is followed then the words may be sufficient if Ali does apprehend that the physical threat will be carried out
- Alternatively there may not be an assault on the basis that words of this kind are used so frequently in a sporting context as to be accepted

In relation to **Ali head butting Bruce:**

- This is almost certainly a battery
- It is intentional direct application of force
- Consent is also not possible since head butting is well outside of the rules of the sport
- There is also an issue of whether Ali acts in self-defence – but it is unlikely that this would be considered reasonable force.

In relation to **Doctor Crop operating on Bruce’s skull:**

- Technically this would be a battery
- There is intentional direct force applied by doctor Crop
- However, it is an emergency operation so consent would be implied or the defence of necessity.

In relation to **Bruce shouting at Ali**:

- Technically the threat appears to be an assault (if words alone count)
- It is direct and intended for Ali to apprehend imminent battery
- However, it is conditional and actually negates any assault.

In relation to **Doctor Crop locking Bruce** in his room:

- If there is no safe means of escape then the restraint is total
- And there is unlikely to be lawful authority because of the time factor.

Reach any sensible conclusions.

Candidates are unlikely to satisfy the descriptor for Level 5 AO2 without considering all possible claims. Stretch and challenge and synoptic consideration can be demonstrated by candidates who apply principles of law appropriately and comment on the potential outcomes.

Assessment Objective 3 - Communication and presentation

[5]

Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, punctuation and spelling.

- 5* Colin, his wife, Daisy, and their four-year-old son, Ethan, are staying in a family room at the Superviews Hotel on a seaside holiday. At 10.00 pm on their first night Colin decides to go to the hotel gym. Although the door is not locked, a sign on the gym door reads 'No admittance between 8.00 pm and 8.00 am. Equipment is dangerous when used without proper supervision'. Colin ignores the sign and enters the gym. Colin is crushed whilst using faulty weightlifting equipment and suffers personal injuries as well as damage to his expensive watch.

While Colin is at the gym, Daisy takes a shower. Daisy is electrocuted when she turns on the shower which has recently been repaired by Pressure Plumbing.

With his father out of the room and his mother in the shower, Ethan leaves the room. Ethan is badly injured when he slides down the banister of the staircase and falls three floors.

Discuss the possibility of Colin, Daisy and Ethan making successful claims in occupiers' liability.

[50]

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Potential answers **MAY**:

Assessment Objective 1 - Knowledge and understanding

[25]

Identify the appropriate area as occupiers' liability which concerns damage arising from the state of the premises:

- State that liability comes from two Acts: Occupiers' Liability Act 1957, in the case of lawful visitors; Occupiers' Liability Act 1984, in the case of trespassers
- Explain the term occupier – one who is in control of premises *Wheat v Lacon*
- Explain that premises has a fairly broad definition section 1(3) and *Wheeler v Copas*
- For the 1957 Act explain that a lawful visitor can be an invitee, a licensee, or someone with a contractual or legal right to enter
- Identify the common duty of care
- Identify the scope of the duty – to keep the visitor safe for the purposes for which he is invited to enter
- Identify also that the occupier can exclude or modify the duty but consider the effect of UCTA section 2(1)
- Explain that an occupier can be relieved of liability under section 2(4) if an independent contractor is at fault for the damage – but it must be reasonable to hire one *Haseldine v Daw*; a competent contractor must be chosen *Ferguson v Welsh*; and the work inspected if it is possible *Haseldine v Daw*, *Woodward v Mayor of Hastings*

- Identify that a visitor going beyond the terms of his entry may become a trespasser *The Calgarth* – so may then be subject to the 1984 Act
- Explain that a lesser duty is owed under the 1984 Act – covers injury but not property *Tomlinson v Congleton BC* (credit any reference to *B R Board v Herrington*)
- Explain the basis of liability under section 1(3) – has reason to believe there may be trespasser, is aware of danger, and ought reasonably to offer some protection
- Identify the effects of warnings as a defence under section 1(5) *Westwood v Post Office*
- Identify the possibility of *volenti* under section 1(6) *Ratcliffe v McConnell*
- Explain the higher standard of care owed to a child – it is accepted that children are less cautious than adults *Moloney v Lambeth LBC*
- Explain that an occupier must protect children from any allurement *Glasgow Corporation v Taylor*
- Explain that an occupier might expect a parent to take responsibility for young children *Phipps v Rochester Corporation*
- Explain that an occupier is liable for foreseeable harm even if the precise damage or the precise circumstances in which the harm occurs is not foreseeable *Jolley v London Borough of Sutton*.

Assessment Objective 2 - Analysis, evaluation and application

[20]

In the case of **Colin**:

- Identify that Colin entered the hotel as a lawful visitor but becomes a trespasser because he has exceeded his permission by entering an unauthorised place, or at least entering the gymnasium at a time when entry is prohibited – so it is likely that Colin will have no claim under the 1957 Act but may have a claim under the 1984 Act
- Discuss whether or not the sign on the door amounts to a warning since a warning may be effective in the case of an adult trespasser – the sign on the door does actually warn of the specific danger
- Apply the three aspects of section 1(3) – by leaving the door unlocked Superviews ought to be aware of the possibility of a trespass, the sign shows awareness of the danger, and locking the door could have prevented the risk of harm
- Discuss whether Superviews can claim contributory negligence and discuss the effect of the Law Reform (Contributory Negligence) Act 1945 on any claim by Colin – he has failed to take care of his own safety by ignoring the sign – so is partly at fault for his injuries and damages may be reduced
- Identify that *volenti* is unlikely to apply in the circumstances since Colin cannot be said to have understood and accepted the precise risks
- Identify that compensation is only possible for injury so he cannot recover for the watch.

In the case of **Daisy**:

- Identify Daisy as a lawful visitor – she has a contractual right to enter the hotel and to use the shower
- Discuss whether Superviews Hotel has control and is therefore identifiable as an occupier
- Identify that, if it is, then it owes a duty to keep Daisy safe for the purpose of her visit which would include showering
- Discuss whether or not Superviews Hotel can avoid liability under section 2(4)(b) if Daisy's injury is the fault of Pressure Plumbing – it is reasonable to hire contractors for such a skilled task – the question is whether competent contractors have been hired and whether it was reasonable to inspect their work – hotel staff could at least have switched on the shower beforehand if only to test if it worked – so an action against the hotel may be possible – and if not an action in negligence against Pressure Plumbing may be possible.

In the case of **Ethan**:

- Identify that Ethan is a lawful visitor and discuss the higher duty owed to a child under section 2(3)
- Discuss the fact that the ornamental railing may represent an allurements – and is likely to present a danger to a small child where it would not be a danger to an adult
- Consider whether Supervises Hotel is able to rely on parental supervision in order to avoid liability for Ethan's injuries – Ethan is only four so it is likely that he should have been supervised by his parents at all times in the hotel.

Reach any sensible conclusions.

Candidates are unlikely to satisfy the descriptor for Level 5 AO2 without considering all three claims in depth. Stretch and challenge and synoptic consideration can be demonstrated by candidates who apply principles of law appropriately and comment on the potential outcomes.

Assessment Objective 3 - Communication and presentation

[5]

Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, punctuation and spelling.

- 6* Gurdeep and Harinder own adjoining semi-detached houses. Gurdeep has planning permission to build a conservatory on a brick base at the rear of his house. Harinder gives Gurdeep permission to take down the fence between the two properties and for the builders to walk on his back garden to do the work. The builders erect the brick base to the conservatory right on the boundary between the two properties. They dig a trench and put in foundations which extend thirty centimetres under Harinder's garden.

Whilst doing this work the builders throw fencing panels onto Harinder's garden, killing some expensive plants. The builders also walk over Harinder's garden placing building materials there until they are used. Harinder complains about this to Gurdeep. He also complains about a large sign advertising the builders' name that has been put in Gurdeep's front garden but which overhangs the fence into Harinder's front garden. Gurdeep ignores these complaints.

Advise Harinder of any claims that he may have against Gurdeep.

[50]

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Potential answers **MAY**:

Assessment Objective 1 - Knowledge and understanding

[25]

Define the tort of trespass to land – an intentional and direct entry onto land in another person's possession

Recognise that the tort is actionable *per se* (without proof of damage)

Explain the ways in which the tort can be committed:

- Entering land voluntarily and intentionally *League Against Cruel Sports v Scott*
- Remaining on the land after permission is withdrawn *Holmes v Wilson*
- Placing things on the land *Smith v Stone*
- Taking things away from the land *Basely v Clarkson*

Explain that even the merest contact with the land can amount to a trespass *Westripp v Baldock*

Explain how land is defined for liability under the tort:

- Covers the land itself and anything on the land such as buildings
- Extends to the airspace above *Kelsen v Imperial Tobacco, Bernstein v Skyways*, Civil Aviation Act 1982
- And to the subsoil below *Hickman v Maisey, Harrison v The Duke of Rutland*

Distinguish between lawful entry and unlawful entry eg express and implied consent, statutory right to enter under PACEA

Identify the defences of permission, and of necessity *Cope v Sharp*

Explain the concept of trespass *ab initio* where a lawful visitor abuses the proper limits on their right to enter *Cinnamond v British Airport Authority*

Identify the need to show an interest in land to claim *Hunter v Canary Wharf*
Explain that a claimant must show a superior right of possession to the defendant *Delaney v TP Smith, White v Bayley*.

Outline the possible remedies:

- Damages – but only if some damage to the land – and mesne profits possible
- Injunctions – the usual remedy – but see *Anchor Brewhouse v Berkley House*
- Removal of trespasser by reasonable force *Hemmings v Stoke Pogis Golf*.

Assessment Objective 2 - Analysis, evaluation and application

[20]

Identify that the problem involves the tort of trespass to land

Identify that Harinder is in possession of the land next to Gurdeep's so does have a proprietary interest and may have a right to claim for trespass to land

Discuss the fact that Harinder has given Gurdeep permission for the fence to be taken down and for the builders to walk on his land to do the work – so neither of these would amount to trespass.

In relation to the **foundations for the brick base** to the conservatory:

- Identify that Gurdeep's builders had permission to enter Harinder's land for the building work but not to dig it up
- Identify that the foundations would be a trespass into Harinder's subsoil (there would not have been planning permission given for this – and the rights to subsoil extend to a reasonable limit as here)
- Possible remedy would have been injunction if Harinder had acted soon enough – but damages are possible

Credit any accurate reference to the Party Walls Etc Act 1996.

In relation to the **fencing thrown onto Harinder's garden** destroying his expensive plants:

- Identify that even something left on the land can be a trespass – and that permission did not extend to this
- Identify that Harinder has also complained to Gurdeep
- Identify damages as a possible remedy.

In relation to the **building materials left on Harinder's land**:

- Identify that even something left on the land can be a trespass – and that with Harinder complaining there is no permission
- Remedy includes damages and possibly mesne profits.

In relation to the **builder's sign overhanging Harinder's garden**:

- Identify that Harinder's rights extend to the air space above up to a reasonable height
- Consider that there are clear precedents to make this a trespass
- Consider also that Harinder has complained to Gurdeep so there is no permission for this
- Remedy includes an injunction.

Discuss whether or not trespass *ab initio* applies and whether Harinder could eject the builders.

Reach any logical conclusion.

Assessment Objective 3 - Communication and presentation

[5]

Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, punctuation and spelling.

Section C

- 7 Josie intends to buy a house and pays Kieran, a local, qualified surveyor, for a survey. The survey report states that there are no structural problems so Josie buys the house. After Josie moves in, large cracks appear in the ceilings and damp on ground floor walls. A building expert then identifies that the faults are due to the house having been built on a landfill site, a fact that should have been known to all local surveyors.

Evaluate the accuracy of each of the four statements A, B, C and D individually, as they apply to the facts in the above scenario.

- Statement A:** Josie cannot sue Kieran because the situation involves pure economic loss.
- Statement B:** There is no special relationship between Josie and Kieran so a claim for negligent misstatement is impossible.
- Statement C:** Josie can claim from Kieran even if there was no reason for her to rely on the advice given by Kieran.
- Statement D:** Josie can claim for Kieran's negligent advice under the normal rules on negligence from *Donoghue v Stevenson*.

[20]

Mark Levels	AO2
Level 5	17-20
Level 4	13-16
Level 3	9-12
Level 2	5-8
Level 1	1-4

Potential answers **MAY**:

Assessment Objective 2 - Analysis, evaluation and application

[20]

Statement A: Josie cannot sue Kieran because the situation involves pure economic loss.

P1 Reason that there is generally no liability for pure economic loss

P2 Reason though that the law distinguishes between pure economic loss caused by a negligent act and economic loss caused by a negligent misstatement

P3 Reason that the facts indicate that the loss here is as a result of a negligently prepared report

P4 Reason that Josie will be able to sue Kieran because there has been a negligent misstatement

P5 Conclude that the statement is inaccurate.

Statement B: There is no special relationship between Josie and Kieran so a claim for negligent misstatement is impossible.

P1 Reason that Kieran is a qualified surveyor making him a professional

P2 Reason that Josie paying Kieran makes it reasonable for her to rely on his advice and there is a special relationship

P3 Reason that Kieran receiving money and being asked to do the survey suggests that he knows Josie would rely on his advice

P4 Reason that Kieran's local knowledge and the reason for the survey suggests that he accepted responsibility for his advice

P5 Conclude that the statement is inaccurate.

Statement C: Josie can claim from Kieran even if there was no reason for her to rely on the advice given by Kieran.

P1 Reason that if Josie does not rely on Kieran's advice an action will be impossible

P2 Reason that Josie's intention to buy a house suggests that she will rely on Kieran's advice.

P3 Reason that paying a qualified and local surveyor suggests that Josie values Kieran's expertise and creates a special relationship

P4 Reason that because of this his report will influence her decision.

P5 Conclude that the statement is inaccurate.

Statement D: Josie can claim for Kieran's negligent advice under the normal rules on negligence from *Donoghue v Stevenson*.

P1 Reason that harm must be a reasonably foreseeable consequence (the neighbour principle) of Kieran's act or omission and his inadequate advice exposes Josie to such a risk

P2 Reason that the payment of money by Josie to Kieran and her request for a survey creates proximity between the parties

P3 Reason that the payment and the later damage suggest that it is fair and reasonable to impose a duty on Kieran

P4 Reason that the extra controls for negligent misstatement are not met

P5 Conclude that the statement is accurate.

- 8 Louis is employed as a delivery driver by Monster Haulage. Louis smokes in the van despite being prohibited from doing so. Louis throws a lighted cigarette out of the van and burns a passer-by, Norah. After making a delivery Louis returns to his van and sees a youth, Owen, stealing from the van. Louis punches Owen in the face breaking Owen's nose.

Evaluate the accuracy of each of the four statements A, B, C and D individually, as they apply to the facts in the above scenario.

- Statement A:** Norah cannot claim against Monster Haulage for her burns because it was Louis' fault.
- Statement B:** Monster Haulage can claim any damages payable to Norah from Louis.
- Statement C:** Monster Haulage will not be liable to Owen because, by hitting Owen, Louis is not acting in the course of his employment.
- Statement D:** Owen cannot claim against Monster Haulage because Louis hitting Owen was a criminal act.

[20]

Mark Levels	AO2
Level 5	17-20
Level 4	13-16
Level 3	9-12
Level 2	5-8
Level 1	1-4

Potential answers **MAY**:

Assessment Objective 2 - Analysis, evaluation and application [20]

- Statement A:** Norah cannot claim against Monster Haulage for her burns because it was Louis' fault.

P1 Reason that Monster Haulage will only be liable if Louis was acting in the course of his employment when he committed the wrong

P2 Reason that doing a prohibited act can still lead to vicarious liability although generally will not unless the employer gains a benefit from it

P3 Reason that Louis is doing his job but doing it improperly

P4 Reason that this means Monster Haulage could still be liable

P5 Conclude that the statement is inaccurate.

- Statement B:** Monster Haulage can claim any damages payable to Norah from Louis.

P1 Reason that Louis is the tortfeasor

P2 Reason that an employer is entitled to rights of subrogation

P3 Reason that despite such rights it is unlikely that Monster Haulage will be able to claim any damages payable to Norah from Louis

P4 Reason that this is because it is unlikely Louis will have sufficient money

P5 Conclude that the statement is accurate.

Statement C: Monster Haulage will not be liable to Owen because, by hitting Owen, Louis is not acting in the course of his employment.

P1 Reason that Louis would be responsible for the safety of the goods on the van

P2 Reason that he is therefore doing an authorised act in protecting them

P3 Reason that Louis is merely acting in the course of his employment with an excess of zeal

P4 Reason that this means Monster Haulage could be liable

P5 Conclude that the statement is inaccurate.

Statement D: Owen cannot claim against Monster Haulage because Louis hitting Owen was a criminal act.

P1 Reason that Louis' actions may amount to a criminal act

P2 Reason that Monster Haulage would only be liable for Louis' criminal act if it was closely connected to his employment

P3 Reason that Louis hitting Owen was in self defence of himself and the property

P4 Reason that Monster Haulage could have guarded against Louis' actions

P5 Reason that the statement is inaccurate.

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 (includes QWC)
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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