

Mark Scheme for June 2010

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Mark schemes should be read in conjunction with the published question papers and the Report on the Examination.

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The mark scheme must be read in conjunction with the matrix of levels of assessment.

The points made in the scheme are merely those which a well-prepared candidate would be likely to make. The cases cited in the scheme are not prescriptive and credit must be given for any relevant examples given. Similarly, candidates who make unexpected points, perhaps approaching the question from an unusual point of view, must be credited with all that is relevant. Candidates can score in the top bands without citing all the points suggested in the scheme.

Section A

- 1* 'The tort of private nuisance is ineffective and has little relevance in the modern law of torts.'

Discuss the tort of private nuisance in the light of the above statement. [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 (25)

Define the tort of private nuisance – an unlawful, indirect interference with another person's use or enjoyment of land in which they have an interest;
 Explain the need for the claimant to have an interest in the land affected by the nuisance *Malone v Laskey, Hunter v Canary Wharf*;
 Explain that on the other hand potential defendants are not restricted to the occupier of the land *Tetley v Chitty*, but can also include the creator of the nuisance *Southport Corporation v Esso Petroleum*, independent contractors and landlords;
 Explain that only indirect interference gives rise to liability eg noise *Sturges v Bridgman*, smoke and fumes *St Helens Smelting v Tipping*;
 Explain that there is a difference between a nuisance causing damage and one causing interference with comfort or the enjoyment of land *Halsey v Esso Petroleum, St Helens Smelting v Tipping*.

Explain that the interference must involve an unlawful (unreasonable) use of land – assessing unreasonable means taking into account:

- locality *Sturges v Bridgman, Kennaway v Thompson, Laws v Florinplace*;
- duration *Spicer v Smee, De Keyser's Royal Hotel v Spicer Bros*;
- abnormal sensitivity of the claimant *Robinson v Kilvert* – but see *Network Rail Infrastructure v Morris* which appears to replace the test with one of foreseeability
- the presence of malice *Christie v Davey, Hollywood Silver Fox Farm v Emmett*.
- explain the potential defences:
- 20 years prescription *Sturges v Bridgman*;
- statutory authority *Allen v Gulf Oil*;
- local authority planning permission *Gillingham BC v Medway Dock and Wheeler v Saunders*;
- consent (as when parties share premises) *Kiddle v City Business Properties*
- act of a stranger *Sedleigh Denfield v O'Callaghan*;
- and sometimes public policy *Adams v Ursell, Miller v Jackson*.

Credit any reference to the basic remedies – damages *Halsey*, injunctions *Kennaway v Thompson*, abatement.

Assessment Objective 2**(20)**

Identify that the tort in essence is about balancing the competing interests of neighbours so that compromise may result (limiting in some ways the effectiveness of the tort) or in any case one person's interests are protected at the expense of the other party;
Assess that there are difficulties in any case in establishing use of land as unreasonable – again possibly limiting the effectiveness of the tort;
Consider also that proving liability in nuisance is not as straightforward as proving negligence.

Comment on the limitations imposed by the definition given to potential claimants eg *Hunter v Canary Wharf*, *Malone v Laskey* which makes the tort ineffective;

Discuss the relative ease of proving nuisance where there is damage in comparison with interference with enjoyment of land – effective for one not for the other;

Discuss the limitation created by reasonableness being linked to locality and duration.

Comment on the effects of malice by either the claimant or defendant;

Discuss the limitations inherent in the defences and whether these make the tort ineffective:

- act of a stranger prevents a claim unless the defendant adopted it;
- prescription can become a blanket licence to create nuisance;
- problem of establishing when public policy applies;
- statutory authority and to a lesser extent local authority planning permission make claiming very difficult.

Discuss the fact that nuisance is fault based and so could easily be replaced by negligence which would be more relevant in a modern context;

Comment also that statutory nuisance is probably a more effective control of most modern nuisances.

Assessment Objective 3**(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* Discuss the extent to which the tort of trespass to the person is effective in protecting people from all unwanted personal interference. [50]

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Level 5	21-25	17-20
Level 4	16-20	13-16
Level 3	11-15	9-12
Level 2	6-10	5-8
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Mark Levels	AO3
Level 4	5
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Level 2	3
Level 1	1-2

Potential answers **MAY**:

Assessment Objective 1 (25)

Explain that there are three torts: assault, battery, and false imprisonment;
Define assault – directly and intentionally causing the claimant to apprehend an imminent battery:

- must involve threatening behaviour *Read v Coker*;
- the threat must be real and imminent *Thomas v NUM*;
- and create a feeling of being threatened in the claimant *Stephens v Myers*;
- words can negate the fear of assault *Tuberville v Savage*;
- but words alone were traditionally insufficient *Read v Coker*;
- however, silent telephone calls have now been accepted in criminal assault *R v Ireland*; *R v Burstow* – which may be persuasive on tort cases.

Define battery – directly and intentionally applying unwanted force:

- direct is given a broad interpretation *Scott v Shepherd*; *Nash v Sheen*;
- it does not include the careless or negligent application of force *Letang v Cooper*;
- or indirect but intentional force *Wilkinson v Downton*;
- hostility was identified as a requirement in *Wilson v Pringle* and *Cole v Turner* suggests that ‘the least touching of another in anger is battery’;
- but this conflicts with *Collins v Wilcock* – and hostile touching could not be a requirement in medical battery *F v West Berks HA*.

Explain that defences to assault and battery include statutory authority, lawful arrest, Mental Health Act 1983, consent *Re T*, necessity *F v West Berks HA*, parental authority *A v UK*, self-defence using reasonable force *Lane v Holloway*;

Define false imprisonment – a direct and intentional total bodily restraint:

- restraint must be total *Bird v Jones*;
- but need not be physical *Meering v Graham White Aviation*;
- and the claimant need not be aware of the restraint *Murray v MOD*;
- and the restraint may be justified by a contractual relationship *Robinson v Balmain Ferry*;
- or by the reasonable expectation of an employer *Herd v Weardale Steel*.

Defences include lawful arrest and detention under PACEA (as amended) (but note different rules for citizen’s arrest), Mental Health Act 1983, and consent.

Assessment Objective 2**(20)**

Consider that the tort is actionable *per se* so a remedy is available without proof of damage – meaning that the tort is quite effective in dealing with unwanted interference;
In relation to assault:

- consider the difficulties of assessing damages, making it less effective;
- discuss the difficulties associated with use of words – may limit the effectiveness;
- discuss the fact that the tort may be less effective as a means of dealing with the threat of future harm *Tuberville v Savage*;
- discuss the fact that the threat must be real and imminent and may limit the effectiveness of the tort as a means of preventing threatening behaviour *Thomas v NUM*.

In relation to battery:

- discuss the fact that there is no need for actual harm to be proved so that the tort is effective;
- discuss the broad view applied to 'direct' eg *Nash v Sheen* again making the tort more effective;
- discuss the limitations associated with the requirement of hostility in *Wilson v Pringle*
- discuss the fact that this cannot apply in medical cases – but that in any case negligence is more commonly used in this context as it is more effective;
- discuss the difficulties associated with consent in a sporting context – compare *Simms v Leigh RFC* and *Condon v Basi*;
- discuss the difficulties associated with consent in a medical context *Re T, Ms B, Chatterton v Gerson* and particularly the lack of informed consent *Sidaway v Governors of the Royal Maudsley and Bethlem Hospitals*.

In relation to false imprisonment:

- discuss the limitations of the requirement of total bodily restraint making the tort less effective;
- discuss the fact that there is even no need to know of the restraint making the tort more effective;
- discuss how the defences may limit the effectiveness, particularly in relation to complaints about the police.

Reach any sensible conclusion eg may not protect against ALL unwanted interference.

Assessment Objective 3**(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* 'Vicarious liability creates so much injustice to employers that it can never be justified.'

Discuss the way that the courts apply the rules of vicarious liability in the light of the above statement. [50]

Mark Levels	AO1	AO2
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Level 4	5
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Potential answers **MAY**:

Assessment Objective 1

(25)

Explain the basic principle of vicarious liability – one party (usually an employer) is fixed with liability for the torts (and sometimes the crimes) of another party (usually an employee);

Explain the main rules for imposing liability:

- tortfeasor must be an employee;
- tort must occur in the course of employment.

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

- control test *Mersey Docks & Harbour Board v Coggins & Griffiths*;
- integration test *Stevenson, Jordan & Harrison v Macdonald & Evans*;
- economic reality (multiple) test *Ready Mixed Concrete case*.

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

- authorised acts *Poland v Parr*;
- acting in an unauthorised manner *Limpus v London General Omnibus*;
- or in a purely careless manner *Century Insurance v Northern Ireland Transport Board*;
- where the employer benefits from the tort *Rose v Plenty*;
- paid travelling time *Smith v Stages*.

Explain circumstances that are not within the course of employment:

- activities not within the scope of employment *Beard v London General Omnibus*;
- a 'frolic on his own' *Hilton v Thomas Burton*;
- giving unauthorised lifts *Twine v Beans Express*.

Credit any reference to liability for the crimes of employees where these are:

- within the authorised scope of employment *Lloyd v Grace Smith*;
- have a close enough connection with the employment *Lister v Hesley Hall*.

Credit also any reference to the 'loaned car' cases *Morgans v Launchbury*.

Use any other relevant cases.

Assessment Objective 2**(20)**

Discuss the basic justifications for imposing vicarious liability:

- employer benefits from work so should be responsible;
- if employer responsible for work then should ensure that it is carried out safely;
- employer can more easily bear any loss than the employee;
- the rule thus ensures that the claimant can be compensated;
- employer in any case is subject to compulsory insurance – so pays only the premiums not the actual damages;
- increased premiums may act as a deterrent to poor employment practices;
- the employer is able to discipline employees for unsafe practices;
- the employee may in any case be a ‘man of straw’.

Discuss the ways in which imposing vicarious liability may be considered unfair to the employer:

- it is a contradiction of the basic fault principle;
- the employer may still be fixed with liability even though he has expressly prohibited the unsafe practice;
- the rule may operate inconsistently or arbitrarily eg compare *Rose v Plenty* with *Twine v Beans Express*;
- the tort will often have occurred before the employer realises that the employee behaves badly and should be disciplined;
- the employer may be liable even for mere carelessness on the employee’s part *Century Insurance*.

Credit any reference to the potential unfairness of the rule in *Lister v Hesley Hall*.

Reach any sensible conclusion on whether the quote is accurate.

Assessment Objective 3**(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* Kris works for Butch Builders as an industrial painter. Kris regularly asks for a protective hard hat and also complains to the managing director about work colleagues who play practical jokes and throw things down from the scaffolding above where Kris is working. Kris is merely told to 'act like a man and stop complaining'. One day a colleague throws a brick down which hits Kris on the head causing him to lose consciousness and to fall off the scaffolding so that he breaks both legs.

Kris is taken to Motley Hospital where a junior doctor diagnoses and treats Kris's broken legs but fails to examine Kris' head or to take X-rays. Kris suffers severe headaches for the next week and then suffers a cardiac arrest and cannot be revived. Doctors then carry out a post mortem which reveals that Kris had a fractured skull and a brain haemorrhage (internal bleeding). The tests also show that if his condition had been diagnosed at once he could have been treated and would not have died.

Discuss any liability in negligence of Butch Builders and Motley Hospital.
(do not discuss vicarious liability)

[50]

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Level 4	5
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Level 1	1-2

Potential answers **MAY**:

Assessment Objective 1**(25)**

Explain the basic elements of a negligence claim:

- existence of a duty of care owed by defendant to claimant *Donoghue v Stevenson*;
- breach of the duty (by falling below the appropriate standard of care – reasonable man test *Blyth v Birmingham Waterworks*);
- damage caused by the defendant (the ‘but for’ test *Cork v Kirby*);
- which is not too remote a consequence of the breach (ie damage that is reasonably foreseeable *The Wagon Mound*).

Explain the duty owed by schools to their pupils; and of doctors to their patients;

Explain that a duty can be owed for an omission to act where there is a duty to act:

- where there is a contractual duty *Stansbie v Troman*;
- where a special relationship exists *Airedale NHS Trust v Bland*.

Explain the different standard of care owed by professionals, particularly doctors – that measured against the standards of a reasonably competent body of medical opinion *Bolam v Friern Hospital Management Committee*;

Explain that there is no reduction in the standard for lack of experience *Wilsher v Essex AHA*.

Explain that a failure to examine will amount to a breach of the duty owed by a doctor *Barnett v Chelsea & Kensington HA*.

Explain the factors relevant to breach of duty:

- foreseeability of harm *Roe v Minister of Health*;
- likelihood or risk *Bolton v Stone*
- practicability of precautions *Latimer v AEC*.

Explain that failure to prevent bullying may be a cause of injury leading to liability *Bradford-Smart v West Sussex CC*;

Credit any explanation of an employer’s duty to provide safety equipment and to provide safe working colleagues;

Explain that it is the general type of damage not the specific damage that must be foreseen *Bradford v Robinson Rentals*;

Explain also that it is the general circumstances in which the damage occurs rather than the specific circumstances that must be foreseen *Jolley v Sutton LBC*;

Credit references to *Baker v Willoughby* and *Jobling v Associated Dairies*;

Credit any reference to *novus actus interveniens* by a third party.

Assessment Objective 2**(20)**

In the case of a claim against Butch Builders for Kris's broken legs and initial head injuries:

- consider that a duty of care exists between Butch Builders and Kris;
- consider that any negligence results from an omission: the failure to provide Kris with a hard hat and the failure to protect Kris from the unsafe activities of his work colleagues despite his complaints;
- discuss the fact that liability is possible because the employer has a contractual relationship and a duty to act;
- discuss the standard of care owed by Butch Builders – that of a reasonable building firm and of a reasonable employer;
- discuss the breach and consider that harm to Kris was foreseeable and the likelihood of injury was high and that reasonably practical precautions could have been taken to prevent Kris' injuries;
- discuss whether the omissions caused the injuries which were in any case foreseeable.

In the case of any claim against Motley Hospital:

- consider that Kris' death results from an omission: the failure to examine his head injury;
- discuss the fact that liability is possible because of the special relationship between doctor and patient and assumption of responsibility for Kris' care;
- consider whether a competent doctor would have failed to examine Kris;
- consider that there is no reduction for the omission being by a junior doctor – the same standard of care is expected;
- consider that the facts show that death would not have occurred but for the failure to examine;
- consider that some form of injury was foreseeable in the circumstances and probably even death.

Reach any sensible conclusion in both cases.

Assessment Objective 3**(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* Through the negligent maintenance of Bodgerbuses, a private bus company, the brakes fail on a bus driven by Sidney while going down a steep hill. The bus swerves off the road and crashes into a house. In the collision a passenger falls off the bus into the road and is badly injured. Tanya, who is walking on the opposite pavement, suffers post traumatic stress disorder as a result of seeing the passenger's dreadful injuries.

The petrol tank of the bus explodes setting fire to the bus and the house into which it crashes. Sidney quickly gets out of the burning bus. He is uninjured but suffers a recurrence of ME (chronic fatigue syndrome) as a result of the crash.

Vic, the only other passenger in the bus, is knocked unconscious in the crash and is in the bus as it burns. Unwin, one of the fire officers called to the scene, tries to get Vic out of the burning bus but is unsuccessful. As soon as he tries to get into the bus Unwin recognises that Vic is in fact his son. Unwin suffers severe clinical depression and can no longer work as a result of seeing his son burn to death.

Wanda, who lives alone in the house, returns from shopping and suffers post traumatic stress disorder after seeing her house burning down.

Advise Sidney, Tanya, Unwin and Wanda whether each of them will be able to bring successful claims for nervous shock (psychiatric damage) against Bodgerbuses.

[50]

Mark Levels	AO1	AO2
Level 5	21-25	17-20
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Mark Levels	AO3
Level 4	5
Level 3	4
Level 2	3
Level 1	1-2

Potential answers **MAY**:

Assessment Objective 1

(25)

Define nervous shock (psychiatric injury) – a recognised psychiatric injury caused by a sudden single traumatic event;

Identify that recognised psychiatric injuries include PTSD and severe depression may also count *Vernon v Boseley*, but that emotional reactions such as grief, and conditions such as claustrophobia and insomnia are not recognised *Reilly v Merseyside HA*;

Distinguish between primary victims and secondary victims:

- a primary victim is one present at the scene and at risk of injury *Dulieu v White*;
- a secondary victim is one witnessing a single shocking event causing risk of injury or injury to a related primary victim *Hambrook v Stokes*.

Define the requirements for a successful claim by a secondary victim *Alcock v Chief Constable of South Yorkshire*:

- close tie of love and affection to a primary victim *Hambrook v Stokes*;
- sufficient proximity in time and space to the event or its immediate aftermath *McLoughlin v O'Brien*;
- witnessed the traumatic event or its immediate aftermath with own unaided senses, either sight or hearing *Alcock*;
- injury sustained as a result of a single shocking event *Sion v Hampstead*.

Identify that the 'thin skull' rule applies to primary victims *Page v Smith* – and that only some injury needs to be foreseeable it does not have to be psychiatric injury;

Identify that for secondary victims psychiatric injury must be foreseen;

Explain the restrictive definition of 'immediate aftermath' as applied in *Alcock* (credit any comparison with *Taylor v Somerset, N E Glamorgan NHS Trust v Walters, W v Essex CC*);

Explain that a rescuer can only claim if a genuine primary victim *White v Chief Constable of South Yorkshire* or a genuine secondary victim *Greatorex v Greatorex*;

So a rescuer must be at risk to claim as a genuine primary victim or must fulfil the *Alcock* criteria to claim as a genuine secondary victim;

Explain the position of mere bystanders unable to claim because not in the zone of foreseeable harm and failing the first part of *Alcock* – *Bourhill v Young*;

Identify also the anomalous application of nervous shock in *Attia v British Gas*.

Use any other relevant cases.

Assessment Objective 2**(20)**

In the case of **Tanya**:

- identify that Tanya is not a primary victim, she is not at risk of foreseeable harm *Page v Smith*;
- identify that as a secondary victim according to the criteria in *Alcock* she satisfies the two criteria of proximity in time and space and witnessing or hearing the event with her own unaided senses – but would fail on close tie of love to the primary victim;
- consider that Tanya is a mere bystander *Bourhill v Young*;
- consider that even though she suffers from a recognised psychiatric illness, PTSD will be unable to claim.

In the case of **Sidney**:

- identify that Sidney is at risk of harm in the burning bus so he can claim as a primary victim;
- identify also the application of the thin skull rule to the recurrence of Sidney's ME *Page v Smith*;
- discuss how ME has been accepted as a recognised psychiatric injury *Page v Smith*
- conclude that Sidney will have a successful claim.

In the case of **Unwin**:

- identify Unwin as a professional rescuer;
- explain that, following *White* rescuers would now generally be classed as secondary victims but may still succeed if able to show that they are genuine primary victim ie at risk themselves – which appears to be the case here;
- identify that Unwin also fulfils all three *Alcock* criteria – so under *Greatorex* Unwin may claim in any case as a secondary victim;
- identify also that his injury, severe clinical depression, is a recognised psychiatric injury *Vernon v Boseley*;
- conclude that Unwin may succeed either as a primary victim or as a secondary victim.

In the case of **Wanda**:

- identify that Wanda is never at risk and so could not claim as a primary victim;
- discuss the fact that, if Wanda claims as a secondary victim she does not fulfil the first *Alcock* criteria – there is no close relative for whose safety she fears;
- However, consider the basis of a successful claim in *Attia v British Gas*;
- Consider that Wanda has suffered a recognised psychiatric injury, post traumatic stress disorder;
- Conclude that Wanda may have a successful claim.

Assessment Objective 3**(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* Alf walks into a pub with his pet horse, Bert. Alf goes to the bar with the horse and asks for a pint of beer for himself and a tray of water for Bert, the horse. Denis, the landlord, says: "You cannot bring a horse in here. He will have to go." Alf says: "There is no sign saying 'no horses.' So Bert stays." Denis comes around the bar to eject Alf and Bert. As Denis puts his hand on Alf's shoulder to escort him out Bert, the horse, rears up and kicks Denis causing Denis to fall over and break his wrist. Bert is a very placid horse and has never done this before.

Denis' ten-year-old daughter, Jenny, owns an American Eagle Owl, a bird of prey, called George. George is sitting on his perch behind the bar. When Denis falls over George flies up from his perch and attacks Alf clawing Alf's eye out of its socket.

Consider any possible claims that can be made under the Animals Act 1971 by Alf and Denis in the above situation. [50]

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Mark Levels	AO3
Level 4	5
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Potential answers **MAY**:

