OCR GCE Law special study units (G154/6/8)

Updated 03/09/18

Skills pointer guide – for use with June 2019 resource material

This skills pointer guide has been developed to assist teachers of OCR GCE Law in the delivery of the A2 special study units (G154/6/8). The themes and resource materials for the three units will change annually and the skills pointer guide will be updated and released to accompany each new theme.

General Skills

There are three critical generic skills appropriate to the special study exam which may differ in some ways from the other exams:

1 Time management is different to exams where all questions carry the same marks. In the special study exam mark distribution is:

- Question 1 = 16 marks (12 AO2 and 4 AO3)
- Question 2 = 34 marks (16 AO1, 14 AO2 and 4 AO3) and
- Question 3 = 30 marks (10 AO1 and 20 AO2) or 10 marks for each part.

Candidates should aim to apportion their time in the exam according to the marks that are available for each question. So, approximately:

- Question 1 = 15 minutes
- Question 2 = 37 ½ minutes and
- Question 3 = 37 ½ minutes (or 12 ½ minutes for each part).

2 The weightings for the three assessment objectives are very different from those in the other Option papers. In the Special Study:

- Only 32.5% of the marks are available for AO1. This is because the area of study is very narrow and also because of the amount of support that candidates are given in the resource material booklet
- AO2 is worth 57.5% of the marks for the paper
- The remaining 10% is for AO3.
So, while knowledge is still important, it is what candidates do with it in this exam that counts. They cannot hope to pass merely by repeating knowledge, and they must be able to:

- Appreciate the significance of the overarching theme in developing the particular area of criminal law, contract law and tort law being studied
- Understand the significance of individual cases, and
- Do both in the context of the current substantive theme, which for June 2019 are:

  Attempt*
  Exemption clauses*
  Private Nuisance*

*to avoid overlap between the content of the Special Study papers (G154/6/8) and the Option papers (G153/5/7), questions on the Option papers will not relate to the special study theme for the same academic year.

Candidates should be able to do all of the above in a critical way and in the context of the role of judges and the development of the law. Candidates should also be able to apply the legal principles accurately and efficiently.

3 Reading skills. The Special Study is a source based exam. Candidates are given a booklet of materials at an appropriate point during the year, decided by the teacher, before sitting the Special Study exam. The whole purpose of source based exam papers is that candidates should:

- Make full use of the information and arguments contained in the source materials
- Respond to the information and arguments by discussing them in the context of the questions set and the overarching theme.

Candidates need to understand that the source material is there to help them – so it is poor exam practice if they ignore the materials and treat the exam as a pure memory test. The materials support candidates in two ways:

- Firstly, they have the Resource Material booklet during the year to support them in learning the law in the current themes. They could, for instance, make themselves completely proficient for Question 1 by researching all of the cases in the materials and preparing for an answer on each
- Secondly, they are given a clean copy of the materials to use in the exam itself so they always have the opportunity to refer to them for additional support and also to use them in their answers. It is good practice in the Special Study exam to use information or points of discussion from the materials in their own discussions by citing the appropriate source and lines (e.g. Source x, lines x-x).

When using information from the sources candidates should not merely copy the information. They should use aspects of the information there to support their own discussions. If, for instance, candidates think that something that a judge or an author in the materials has said is relevant to their answer and could not be stated any better in their own words, or if they are trying to make optimum use of their time, then it is good practice for them to refer to the specific lines of the source. By referring to the specific lines of the source an examiner can see that they are sensibly selecting and citing valid information. This is an important legal skill in itself and, if relevant, will be rewarded. Mere general references to the source as a whole are unlikely to gain any credit.
Candidates should remember for all questions:

- to read each question thoroughly so that they are absolutely sure what it is about
- to always refer back to the appropriate source for further information
- to plan their answers briefly at the start of the exam to ensure that:
  - they only use relevant information
  - they do not miss any information that is relevant
- to always use law, whether cases or statute, in support of both their arguments for essays and in their application for the problem questions
- to avoid excessive use of the facts of the cases – it is the principle that is important
- to make sure that they answer the actual question set
- to make sure that their time management is good – they are having to answer in much shorter time scales than for the Option papers.

Question specific skills

The three Special Study papers (Unit G154 Criminal Law; Unit G156 Law of Contract; and G158 Law of Torts) each contain three questions and candidates have to answer all questions. There are no choices of question in the Special Study exam.

Each question examines a different skill and in ways that are possibly different from other papers.

Question 1

Question 1 is worth 16 marks; 12 AO2 marks plus 4 marks for AO3. There are no AO1 marks available.

This question is an invitation to provide an analysis of the contribution of one of the cases mentioned in the sources to the development of the law in that area. Normally, there will be only eight cases directly referred to in the resource material. For Question 1, candidates are required to have a full understanding of the significance or contribution of the case referred to in the question in the context of the overarching theme.

For 2019 the cases are:

**Criminal Law:**
- *R v Gullefer* [1990] 3 All ER 882
- *R v Whybrow* (1951) 35 Cr App R 141
- *R v Attorney-General’s Reference (Nos 1 and 2 of 1979)* [1979] 3 All ER 143
- *R v Shivpuri* [1987] AC 1
- *Anderton v. Ryan* [1985] 1 All ER 138
Law of Contract:
- L’Estrange v Graucob [1934] 2 KB 394
- Olley v Marlborough Court Hotel [1949] 1 KB 532
- Chapelton v Barry UDC [1940] 1 KB 532
- Thornton v Shoe Lane Parking [1970] EWCA Civ 2
- Spurling v Bradshaw [1956] EWCA Civ 3
- Hollier v Rambler Motors [1971] EWCA Civ 12
- Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1987] EWCA Civ 6

Law of Torts:
- Cocking v Eacott [2016] EWCA Civ 14
- St Helens Smelting Co v Tipping [1865] 11 HLC 642,650
- Thompson-Schwab v Costaki [1956] 1 WLR 335
- Gillingham BC v Medway (Chatham) Dock Co [1992] QB 343
- Wheeler v Saunders [1995] 3 WLR 466
- Barr and others v Biffa Waste Services Limited (No 3) [2012] EWCA Civ 312
- Coventry v Lawrence [2014] EWCA Civ 26

Candidates should be able to learn the significant points of all eight cases comfortably. In any case, a lot of the necessary detail for many of the cases is given in the materials. Some of the sources are extracts from the judgements of cases or statutes, and there are varying degrees of detail on others. Candidates must be able to show in the exam that they have a full understanding through their discussion of the significance of each case to the development of the law in that area. This should also involve citing other cases in their answers since ‘development’ demands that they either know where the law developed from or where it developed to.

High marks can be obtained by:
- Discussing in detail the critical point of the case in the context of the question and of the overarching theme
- Discussing in the same depth and detail at least two other analytical points about the case in context
- Showing development by relating to an appropriate linked case
- Answering the question in light of the command word e.g. ‘significance’, ‘importance’ etc…

Example Criminal Law – R v Jones (Kenneth) (1990) 91 Cr.App.R.351 – high marks can be gained, for example, with the following:
- The Court of Appeal in Jones reiterated that it was for a jury to decide whether the act was capable of being ‘more than merely preparatory’. The question would be decided by a jury in looking at the ‘plain natural meaning’ of section 1. The trial judge had accordingly rightly left the charge of attempted murder to the jury and the Court of Appeal confirmed this decision.
- The defendant denied attempted murder because he said he had only intended to kill himself and, in any case, that there were at least three more acts to do before he could have killed anyone i.e. released the safety catch, put his finger on the trigger and pulled the trigger. The defendant was convicted of attempted murder.
- The Criminal Attempts Act 1981 does not define ‘more than merely preparatory’ but Jones assists in defining the phrase by reiterating section 4(3), that this is a
question of fact in each case. This position is supported by the Law Commission's 1980 report.

- The Court of Appeal, on the facts, distinguished between merely preparatory acts and those that a jury could consider as being acts more than merely preparatory: **Merely Preparatory** – obtaining the shotgun, shortening the barrel of the shotgun and going to the victim’s car; **More Than Merely Preparatory** – getting into the car, taking out the loaded shotgun and pointing it at the victim with the intent of killing him and saying ‘You are not going to like this!’

- Lord Taylor stated that a court must not try and fit pre-1981 actus reus tests into the words of the section. In particular, he rejected the defendant's argument that the last act test or other common law tests were embodied in section 1(1). For example, *Eagleton, Stonehouse, Robinson*.

- To consider any other relevant comment; for example, Lord Taylor's discussion on codifying Acts.

- Link to any relevant case e.g. White, Boyle and Boyle, Attorney-General's Reference (No1 of 1992), Dagnall, Gullefer, Geddes etc.

**Example Law of Contract** – *Spurling v Bradshaw* [1956] EWCA Civ 3 – high marks could be gained, for example, with the following:

- In this case Spurling regularly stored things in Bradshaw’s warehouse, each time signing an invoice containing an exclusion clause, following formation of the contract. On this occasion Bradshaw stored some barrels of orange juice which spoiled allegedly as a result of their negligence. Spurling successfully defended themselves by reference to an exemption clause.

- This case is a key authority for the idea that clauses can be incorporated into contracts through a previous course of dealing. The court was willing to allow the incorporation despite the fact that it happened after the contract was signed.

- This can be seen as just in the sense that both parties were fully aware that the exclusion clause had always been part of their agreement. If the court had rejected that argument then they would have been allowing Spurling to use a technicality to frustrate the true intentions of both parties, thus bringing the law into disrepute.

- The decision can be criticised, however, in that it appears to undermine the courts’ efforts in cases such as Olley v Marlborough Court or Parker v South Eastern Railway to make sure that exemption clauses are available before contracting and have reasonable notice drawn to them. This shows the tension between different cases as the courts attempt to find the right set of rules to both facilitate fair exemptions and also protect potentially weaker parties.

- The case is also notable for Lord Denning’s willingness to interpret the clause narrowly to allow for its incorporation. It demonstrated the courts’ commitment to enforcing reasonable exemption clauses.

- Perhaps most notable, however, was Denning’s famous reference to the ‘red hand’: “I quite agree that the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.” This shows clearly how he felt that the courts should actually engage in a substantive analysis of the term in question to inform their judgement on whether reasonable notice had been drawn (essentially a procedural question). This is a rare instance of substantive analysis and it foreshadows Parliament’s engagement through acts such as the Unfair Contract Terms Act and the Consumer Rights Act.
In Barr and others v Biffa Waste Services Limited (No.3) Mr Barr brought a “class action” on behalf of himself and 151 other householders who lived near the Westmill tip in Hertfordshire. For 5 years they complained about the smell from Biffa’s waste tipping operations. The High Court delivered a judgement dismissing the local residents’ case holding that Biffa had not acted negligently or in breach of its waste permit in its operation of the site and therefore the action in nuisance was bound to fail. The defendants appealed.

The Court of Appeal upheld the appeal stating that the law of private nuisance protects property owners against interference in the use and enjoyment of their property. It has always been a question of degree on the facts of the case whether that interference is sufficiently serious to constitute an actionable “private nuisance”. The character of the neighbourhood is relevant (but the housing estate was there before the tip). It must also be shown to be “real interference with the comfort or convenience of living, according to the standards of the average man” (Halsey v Esso). The public benefit of the offending activity is not a defence. Having statutory authority to carry out the activity is a defence, but only if the operator can persuade the Court that the authorised activity will inevitably involve a nuisance, even if every reasonable precaution is proven to have been taken. Biffa had not passed these tests and was guilty of the tort of private nuisance.

The Court of Appeal also reasserted the fundamental principle that a complainant in private nuisance does not need to prove negligence against the defendant, merely the fact of the offending activity and the adverse consequences for the landowner. Private nuisance is a tort based on strict liability.

The case can be linked to Hirose Electrical UK Ltd v Peak Ingredients Ltd [2011] where an activity (a food additive manufacturer emitting strong and pervasive smells, such as curry and garlic, from its commercial unit) was no doubt regarded as a ‘nuisance’ in common parlance but that was not sufficient to constitute an actionable nuisance at law.

Thus the Barr judgement has far-reaching consequences for all businesses that are subject to environmental regulation and is of particular significance to those in sectors such as waste, food and chemicals, where odour emissions are often problematic.

As more and more of our countryside is covered by housing, residential occupation is increasingly clashing with industrial and commercial activity. This activity in turn is more heavily regulated by the state than ever before. Business people understandably argue that if they comply with the regulatory regime, they should not have to worry about anything else. The Court of Appeal has firmly rejected this argument.
Planning for Question 1

For the case digest (Question 1) candidates should:

- refer back to the source for the important information contained in it
- remember to include the significant or critical point from the case (normally the ratio decidendi) and at least one other linked case to show development, and the key critical issues in terms of the place of the case in the development of the law
- get used to looking at the other sources in the resource material booklet since they are likely to contain other information that is relevant to the development of the law.

It is important to note that no credit will be given for merely describing the narrative of the case; some sort of evaluative point must be made in order to achieve marks.

Question 2

Question 2 is worth 34 marks, 16 AO1 marks, 14 AO2 marks plus 4 AO3 marks.

This is always an essay style question arising from a quote from one of the sources. It is on: attempts (Criminal); exemption clauses (Contract); or private nuisance (Torts) in the context of the role of judges, precedent, application of statutory materials and the development of the law.

Question 2 is based on a quote from one of the sources and candidates are expected to engage in a critical discussion with a balanced argument and reasoned conclusion together with supporting legal rules and detailed authorities, all in the context of the development of the law.

- Candidates should make full use of both information (for AO1) and comment (for AO2) contained within the source materials.
- Candidates should aim to go beyond the source materials in their responses to demonstrate their learning within the area of law being assessed.
- They can do this by citing the appropriate information/comment by accurate line and source reference (mere vague references to the source will gain no credit – simply extracting the information without applying it to their own discussion will gain limited credit).
- Candidates gain AO1 marks for providing a range of relevant legal rules, clearly stated, with supporting authorities. Providing some minimal reference to the facts of an authority shows accurate and detailed knowledge; mere case names alone will attract limited credit.
- Question 2 requires high level analysis of the discussion indicated in the question. The quote from a source is there to help candidates identify the theme of the discussion.
- Candidates should aim to maximise the AO2 mark – remembering that it is difficult to pass without reasonable AO2 marks, and impossible to gain a high grade without high AO2 marks.
- Candidates wishing to practise writing answers may do so by locating possible essay titles in advance from examining the comment in the source materials for likely quotes to attach to a question.

Please note that the following are examples of quotations and do not reflect what may or may not be the basis for the area(s) covered by the live assessment.

Example Criminal Law:
Source 1, lines 13-16
The author states that “If a person, in circumstances such as this, has not even gained the place where he could be in a position to carry out the offence, it is extremely unlikely that it could ever be said that he had performed an act which could be properly said to be an attempt.”

**Example Law of Contract:**
Source 1, lines 61-63
Peter Blood states that “At the end of the day, therefore, if incorporation is proved and the rules of interpretation are satisfied, an exemption clause will be valid at common law, however unfair the result might be.”

**Example Law of Torts:**
Source 5, lines 25-26
Carnwarth LJ states: "I continue to believe that the applicable law of nuisance is relatively straightforward, and that 19th century principles for the most part remain valid."

In each case a specific question could be asked and the quote helps to direct the candidate into the appropriate AO2. They should also be able to find many examples of AO2 in the sources themselves. The quotes used in the questions are in fact examples.

For high level AO2 marks candidates need also to be discussing, in the context of the overarching theme, the role of judges, use of precedent or application of statutory materials and the development of law. Each individual theme obviously has its own individual aspects of this, for example:

**Criminal Law** – The law on attempts was put on a statutory footing in 1981. This was due to problematic common law decisions which had provided a confusing set of rules allowing differing outcomes on similar case facts. However, despite the enactment of the Criminal Attempts Act 1981, the law appears to be no closer to defining perfectly what is, or what is not an attempted crime. Indeed, sometimes piece-meal, slow and unexplainable, decisions on the interpretation of the offence under section 1(1) of the Act have provided arguably more confusing rules of interpretation than those under the previous common law.

**Law of Contract** – exemption clauses have always caused the legal system difficulty as they bring into sharp focus the tension between the underlying philosophy of contract law (laissez faire, freedom of contract) and the need to protect weaker parties from unscrupulous exploitation. Exemption clauses have genuine value in that they allow for the negotiated allocation of risk between parties. Where there is no true negotiation such as through standard form contracts between businesses or consumer contracts, extra regulation becomes necessary. The courts have long steered clear of genuine substantive regulation of exemption clauses and left that to Parliament. Parliament has had mixed success however and the succession of attempts to incorporate the greater consumer protections required under EU law has led to rather clumsy and inconsistent legal rules. It is hoped that the reforms brought in through the Consumer Rights Act 2015 will produce a more stable and systematic legal regime.

**Law of Torts** - the goal of this land-based tort requires the courts to achieve a difficult balance between the conflicting interests of one individual’s right to make reasonable use and enjoyment of their land and their neighbour’s right to use their land lawfully. The law acknowledges that, in developed societies, there must be an element of ‘give and take’ between neighbouring occupiers of land and that a degree of interference must be tolerated for the benefit of society. Private nuisance has been referred to as an ‘impenetrable jungle’ as judges have had to develop rules which reflect the changing nature of the use of land brought about by industrialisation, increasing statutory intervention and the potential impact of the Human Rights Act. As well as these rules there
are a range of defences which are also open to judicial interpretation. The tort provides an excellent opportunity for candidates to demonstrate their synoptic appreciation of an area of law where the influence of judges has played a critical role.

In any case these discussions fall into clear categories that candidates are able to consider in their research into the materials prior to the exam and then to contemplate in the exam:

- The extent to which the law is judge-created or statutory.
- If statutory, the extent to which this has led to interpretation.
- How effectively judges have interpreted statute law.
- Whether judge made law has been consistent or has been subject to change.
- If subject to change, the reasons for the change, whether to develop the law or because previous judges got it wrong.
- The extent to which the law has been developed or have judges restricted its growth and natural application.
- Whether the law is just and reasonable.
- Whether the law has been consistently applied.
- Whether the law has been made the subject of numerous exceptions meaning that it does not easily apply universally.
- Whether the judges have referred to judicial policy.
- Whether the law is sensible or in need of reform.
- Whether judges have used mechanisms such as the Practice Statement.
- Whether judges have failed to follow the rules on binding precedent.
- Whether Parliament has been forced to reform law made by the judges.

The list is not necessarily exhaustive but candidates should try to engage in such discussions. This is when they show that they have a synoptic appreciation of the law and it is also where candidates are able to engage in ‘stretch and challenge’.

Planning for Question 2

For the essay style question (Question 2) candidates should:
- remember the importance of structuring their answer
- provide an introduction identifying what the point of the question is
- produce a balanced discussion in which they use a wide range of cases from within and beyond the source materials and legal principles generally in support of their answer
- refer to the source materials to support and develop their answer
- produce a reasoned conclusion that arises from the discussion that they have engaged in.
Question 3

Question 3 is worth 30 marks, 10 marks each for the three separate scenarios. There are 10 AO1 marks, 20 AO2 marks and no AO3 marks.

This is always a problem question comprising of three parts which involves legal problem solving on the theme for the year.

Candidates are provided with three small factual scenarios and they will then have to identify the aspects of the law that could be used to resolve the various issues that arise from the scenarios.

Candidates should be able to identify at least three points of application (one of which is the Critical Point)* plus one case for each for high marks:

* In some scenarios there may be more than one ‘critical point’. Where this is the case, any of critical points (indicated by ‘CP’ in the mark scheme) will fulfil the requirement for candidates to identify the ‘critical point’ to achieve Level 2 and above. Where a response contains more than one ‘critical point’ (as indicated by the mark scheme) credit will also be given to the alternative ‘critical point’, which will be flagged as ‘AP’ (analytical point).

Example - Criminal Law:

- An attempted crime is charged under s.1(1) Criminal Attempts Act 1981. The actus reus is defined as 'an act which is more than merely preparatory to the commission of the offence' which means that the defendant must have gone beyond purely preparatory acts and have ‘embarked on the crime proper’ as stated in Gullefer.
- When Niamh aimed a punch at Gareth by swinging her fist towards him, this would be considered ‘more than merely preparatory’. She had ‘embarked on the crime proper’ and was only prevented from hitting Gareth because he ducked out of the way. This is similar to the case of Jones where the defendant pointed a loaded gun at his intended victim and said, “You are not going to like this” but was prevented from shooting him when the victim grappled the gun from Jones and ran off. (CP)
- It is unlikely that Niamh’s acts were ‘merely preparatory’ as she went to punch Gareth. She walked right up to him and went to punch him. Niamh was not simply in a position where she “only got ready or put herself in a position or equipped herself to do so” as stated in Geddes.
- The mens rea of attempt is an ‘intent to commit an offence to which this section applies’. Clearly, Niamh’s intent was to commit the full offence, some type of serious non-fatal offence, as there was – "a proof of a decision to bring about the offence no matter whether the accused desired it or not" as defined in Mohan when she aimed the punch at Gareth. (CP)

Therefore, in conclusion, Niamh would be guilty of an attempted offence.

Example - Law of Contract:

- Recognise that contract here is between businesses and therefore UCTA applies. (CP)
- Show that the exemption clause 1 concerns personal injury caused by negligence. (CP)
- Show that any attempt to exempt liability for personal injury caused by negligence will always fail. (UCTA s2).
- Recognise that the contract has been concluded on standard terms of business and therefore UCTA s3 applies. (CP)
• Show that exemption clause 2 allowing the bakery to substitute any food that was convenient was an attempt to allow for substantially different performance (UCTA s3(2)(b(i))).
• Show that any attempt to do that is subject to the reasonableness test.
• Show that nothing in UCTA s11 or Schedule 2 would suggest that the clause is reasonable.
• Show that exemption clause 2 is therefore invalid.
• Conclude that Lucy will be able to sue the bakery for breach of contract and for her injuries.

Example – Law of Torts:
• Identify that Alice is an occupier as she has a proprietary interest in the land affected (Hunter v Canary Wharf)
• Identify Bob as the defendant as he has a proprietary interest in the neighbouring land and his activities show that he is the creator of the nuisance (Southport Corporation v Esso Petroleum)
• Comment that since there is no physical damage, the claim will be based on interference with comfort and enjoyment of land and this will involve establishing unreasonable use of land (St Helens Smelting Co v Tipping)
• Identify that the interference is indirect and continuous despite only starting recently (Crown River Cruises Ltd v Kimbolton Fireworks Ltd)
• Comment on the similarity to Halsey v Esso by noting that the change of practice may have created a level of unreasonableness in the potential nuisance (CP)
• Recognise that Bob’s claim that Alice ‘came to the nuisance’ is not valid without a change in use (Coventry v Lawrence)
• Conclude that based on Halsey v Esso, Alice may well have an actionable nuisance.

Planning for Question 3

For the three scenarios in Question 3 candidates should:
• structure their answer logically
• identify for each individual aspect of the problem the key facts on which resolution of the problem is based
• define the appropriate law accurately; and then apply the law sensibly to the facts
• reach sensible conclusions based on their application of the law
• use specific relevant Act sections or cases to support their definitions of the law
• remember that they are dealing with small individual problem scenarios rather than a large problem, as is the case in the Option papers, and therefore the structure is almost created by the question
• within their answer, in order to reach Level 5, discuss the relevant critical point(s), include at least one relevant case and provide sensible conclusions based on their application of the law stating what they think the most likely outcome would be for each scenario.