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Exemplar Candidate Work

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H415
For first teaching in 2015

H415/02 Summer 2019 examination series

Version 1

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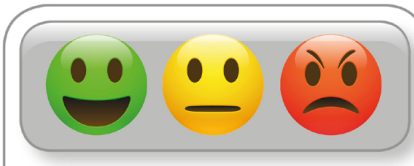

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Introduction

These exemplar answers have been chosen from the summer 2019 examination series.

OCR is open to a wide variety of approaches and all answers are considered on their merits. These exemplars, therefore, should not be seen as the only way to answer questions but they do illustrate how the mark scheme has been applied.

Please always refer to the specification https://www.ocr.org.uk/Images/315216-specification-accredited-a-level-gce-law-h415.pdf for full details of the assessment for this qualification. These exemplar answers should also be read in conjunction with the sample assessment materials and the June 2019 Examiners' report or Report to Centres available from Interchange https://interchange.ocr.org.uk/.

The question paper, mark scheme and any resource booklet(s) will be available on the OCR website from summer 2020. Until then, they are available on OCR Interchange (school exams officers will have a login for this and are able to set up teachers with specific logins – see the following link for further information http://www.ocr.org.uk/administration/support-and-tools/interchange/managing-user-accounts/).

It is important to note that approaches to question setting and marking will remain consistent. At the same time OCR reviews all its qualifications annually and may make small adjustments to improve the performance of its assessments. We will let you know of any substantive changes.

Section A

Note: For all questions the mark scheme refers to Levels 1 to 4 which are characterised by the descriptors excellent, good, limited and basic. The only guidance given to markers is to suggest what an excellent/good/limited or basic response might typically contain.

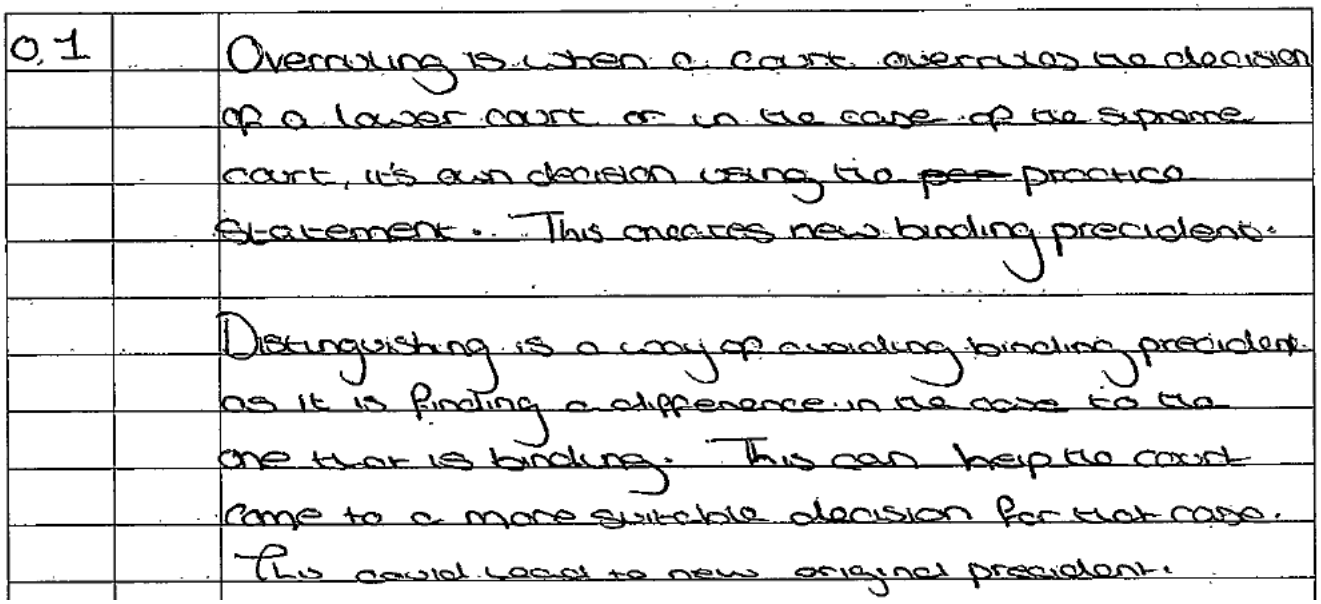
For Questions 1 and 2 the mark scheme guidance suggests that an excellent (Level 4) response would be a 'complete' response to the question and that incomplete responses will be placed in lower levels based on the degree of completeness.

For Questions 3 and 4 the mark scheme anticipates a range of critical points with some increase in the level of development at each level (fully, well, partial etc).

Question 1

1 Explain overruling and distinguishing. [10]

Exemplar 1 3 marks



0 1

Overruling is when a court overrules the decision of a lower court or in the case of the Supreme court, it's own decision using the ~~pre~~ practice statement. This creates new binding precident.

Distinguishing is a way of avoiding binding precident as it is finding a difference in the case to the one that is binding. This can help the court come to a more suitable decision for that case. This could lead to new original precident.

Examiner commentary

This is a Level 2 response that could reach Level 4 if it included an explanation of both terms with appropriate supporting case law for each. Here we have no supporting authorities for either term and although we have a definition of overruling, the candidate is only making progress towards a definition of distinguishing.

The candidate understands that distinguishing involves a difference between cases, but without recognising that it involves a difference in the material facts, it cannot score higher marks. Features such as understanding that distinguishing is a method of avoiding an otherwise binding precedent and that the outcome may result in an original precedent might influence where a score lies within a particular level, but the basic elements of the question (definitions and supporting authorities) are the requirements which determine the appropriate level.

Exemplar 2

10 marks

1 Overruling is where a court overrules a past decision and this may be done by a higher court overruling its own decision or a higher court overruling a decision of a lower court. For example, the Supreme Court used the Practice Statement 1966 to overrule the decision of Caldwell in the case of R v G and R. They decided the ruling in Caldwell that a person can be convicted of criminal damage despite them personally not seeing a risk to be wrong and set a new precedent requiring the risk to be known to the defendant.

Distinguishing is where a judge finds the material facts of a case he is dealing with to be sufficiently different from the case holding precedent allowing him to make a distinction and avoid following it. For example in Balfour v Balfour and Merritt v Merritt both cases involved a husband making a claim for breach of contract by her husband but Balfour failed after it was held to be an oral domestic arrangement (without requirements) by husband and wife, but Merritt was successful as they'd signed a written contract making it legally enforceable

Examiner commentary

This is a Level 4 response. Here we have a complete response with a definition of overruling with two examples and appropriate supporting authorities taken from the operation of the Practice Statement (probably the best source of examples of overruling). The candidate has given the overruling case and the case overruled. We then have a good definition of distinguishing with the important reference to material facts and an appropriate pair of cases as supporting authorities. The whole response scored full marks and took a couple of paragraphs, very much quality over quantity.

Question 2

2 Explain the Golden Rule of statutory interpretation. **[10]**

Exemplar 1 — 1 mark

2 The golden rule of statutory interpretation is a form of interpreting statutes when the literal rule cannot be used as the statue may appear to be more ambiguous, in other words it cannot be interpreted in its literal 'book definition' meaning thus the golden rule takes a different approach where the meaning can be interpreted slightly in a different manner by choosing a different definition that is less literal. The golden rule of statutory interpretation is used in many cases when the literal definition may appear to be irrelevant to the case or is too harsh regarding the incident, or cannot be understood. Thus the golden rule allows the judge / interpretor a little more freedom when interpreting statutes as not all 'literal meanings' of statutes can be appropriate.

Examiner commentary

This is a Level 1 response. Level 4 would require a definition of both the narrow and wide versions of the rule, as well as appropriate supporting authorities for each. Here the candidate is offering an over-arching definition 'choosing a different definition that is less literal'. Again, the comments about giving judges a little more freedom or being used when the case is too harsh might influence where the score should be placed within a level, but without an accurate definition of each version and supporting authorities, the response cannot access the higher levels.

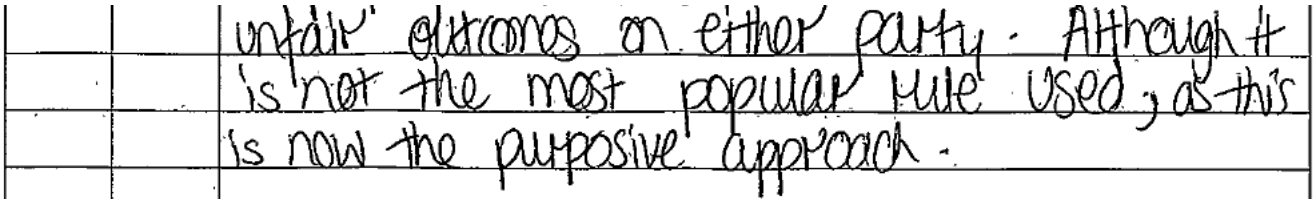
Exemplar 2

10 marks

2 The golden rule is used as a method in statutory interpretation. It is described as a softened version of the literal rule, as it gives judges some discretion in applying the strict legal rules in order to achieve a fairer result, whereas in the literal rule, judges are required to apply the exact words of an act only.

There are 2 methods a judge can pick from. The narrow version is where a word has two possible meaning. The judge looks at both meanings of the word and picks the meaning which will lead to the fairest result for both the defendant and the claimant. This happened in Adler V George, where the judge chose to change 'in the vicinity ~~of~~ to in or 'in the vicinity of a prohibited place', meaning that the defendant was guilty for being inside the prohibited place. If this rule hadn't been used he would have got away with it.
The wider version is used where there is only one meaning of the word, but using this would lead to an unfair outcome, so the judges changes the word to have another meaning which leads to a more fair result. This happened in Re: Sigsworth, where the defendant would have inherited his mother's money despite murdering her if the judge hadn't changed the meaning of 'issue'.

This shows the golden rule is used where applying the literal rule would lead to


unfair outcomes on either party. Although it is not the most popular rule used, as this is now the purposive approach.

Examiner commentary

This is a Level 4 response. This response is complete because there are accurate definitions of both the narrow and wide versions of the golden rule as well as relevant supporting case law. The narrow rule is well illustrated by drawing attention to the 'choice' between two alternate meanings, which is the essence of the narrow rule, and although the wide rule doesn't refer to a 'repugnant' outcome, 'unfair' outcome is close enough and conveys the essence of the rule. Again, the response scored full marks in two paragraphs (the third and final paragraph was unnecessary).

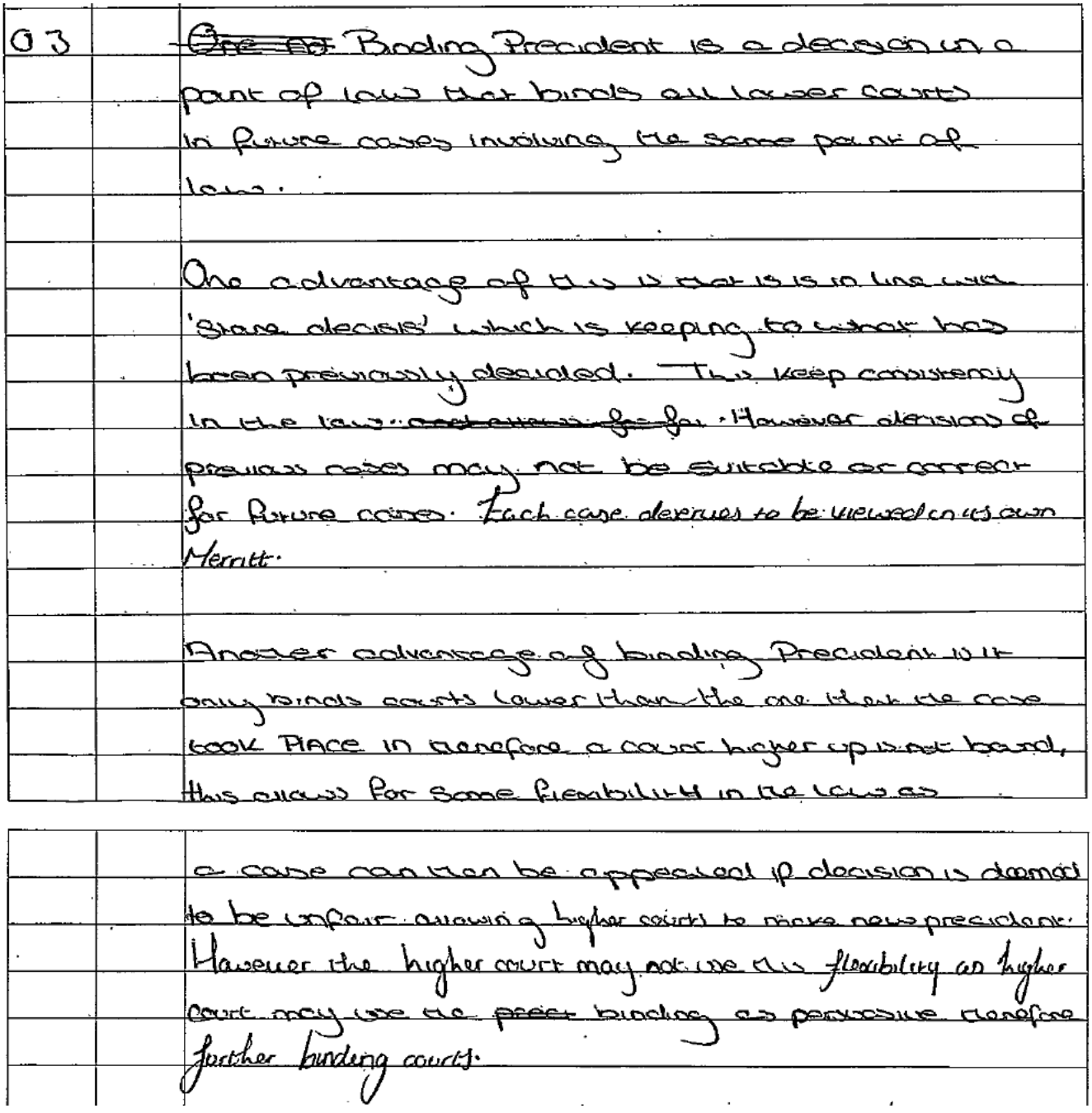
For the benefit of centres new to OCR, for this session the case of Adler v George (1964) 2 QB 7 has been credited as both a narrow and wide golden rule case as it seems to have been treated differently by different exam boards. For the record, OCR has always regarded Adler v George as a narrow rule case. The essence of any narrow rule case involves a choice between two alternate meanings, one of which will give a just or sensible outcome and the other an absurd or unjust one. The wide rule involves words with only one meaning but that meaning would lead to a repugnant outcome.

In Adler v George, Lord Parker considers that the literal meaning of the term 'vicinity' is 'being near in space', which would have meant a successful appeal. He considered that an alternative meaning of 'in or in the vicinity of' would do no violence to the meaning and provide for an outcome more consistent with Parliament's intention under the Act (s.3 Official Secrets Act (1920)). Hence, he chose between two alternatives: 'being near in space' and 'in or in the vicinity of' making this, it is submitted, a narrow rule case. We recognise that other interpretations are possible and will credit the case under both rules.

Question 3

3 Discuss the advantages of binding precedent. [15]

Exemplar 1 3 marks



Q3 Binding Precedent is a decision on a point of law that binds all lower courts in future cases involving the same point of law.

One advantage of this is that is is in line with 'Stare decisis' which is keeping to what has been previously decided. This keep consistency in the law. However decisions of previous cases may not be suitable or correct for future cases. Each case deserves to be viewed on its own Merrit.

Another advantage of binding Precedent is it only binds courts lower than the one that the case took PLACE in therefore a court higher up is not bound, this allows for some flexibility in the law as a case can then be appealed if decision is deemed to be unfair allowing higher courts to make new precedent. However the higher court may not use this flexibility as higher court may use the prior binding as persuasive therefore further binding courts.

Examiner commentary

This is a Level 1/2 response. Although there is some evidence of development, there is too little content to access the higher levels. The candidate offers some AO1 in the first paragraph and the first sentence of the second paragraph (no credit). The remainder of paragraph two offers a point (consistency) developed through a counter-point (previous decisions might not always be suitable). This underscores the point that a disadvantage can gain credit in a question predicated on advantages where it is used to contextualise an advantage, as is the case here. The third paragraph starts with some more AO1 (no credit) but goes on to make a point about flexibility. However, the attempt to develop the point is confused and unclear.

Exemplar 2

5 marks

3 One advantage of binding precedent is certainty. Any similar cases will have the same outcome as binding precedent, or ratio decidendi, means that each similar case must follow suit. This means that claimants are able to workout if their claim will be a success before they go to court. However, judges of some courts have power to overturn previous rulings so because its easy ~~the~~ to avoid precedent this becomes less certain.

Another advantage is that it upholds stare decisis. This is where alike cases are treated alike. This means that all cases are treated equally and that the binding precedent will give a fair ~~result~~ verdict. However, the judges ability to avoid precedent would mean that alike cases are often not treated alike.

An advantage to binding precedent is that it is made by law experts. This means there is often legal accuracy and judges are aware of what is missing in the law so are able to identify issues so it can be changed or formed. However, judges are unelected and it is undemocratic for them to be making laws.

Examiner commentary

This is an extract from a wider response chosen as an illustration of how to write a well-developed point – a skill which provides candidates with access to the higher marks. The response starts with the advantage that binding precedent provides certainty. This is then developed by providing a 'consequence' – that it allows claimants to plan their affairs. It then uses a counter-point that this is undermined by the fact that some judges have the power to overturn previous rulings leading to less certainty. The extract also illustrates that disadvantages can be creditworthy where they are used to contextualise an advantage, but this would not be the case if disadvantages were presented as stand-alone disadvantages.

Question 4

4 Discuss the advantages of the Golden Rule of statutory interpretation. [15]

Exemplar 1 3 marks

4 One benefit of the Golden rule being used in statutory interpretation would be it ~~allows~~ prevents an absurd result occuring from following the literal rule.

In whitley v chapell ~~a~~ the Defendant (D) was not convicted for impersonating a dead person, even though it is an 'offence to impersonate any person entitled to vote' as a dead person is not seen as entitled to vote, this is one case when judges followed the literal rule and the result was an absurd one. Another case from the ~~literal~~ courts following the literal rule what led to an absurd result would be North London Eastern Railway Co. v Berriman. A window was not allowed to claim compensation for the death of her husband as he was maintaining a train track rather than 'relayering or repairing it' the courts said that compensation would not be given as a 'look out' does not need to be provided for someone maintaining the tracks, clearly the literal ~~mean~~ rule led to an absurd result. If the Golden rule was used in any of these cases it would have prevented the absurd result and allowed the court to instead look at what parliament intended.

~~It~~ On the other hand a disadvantage

of the Golden rule would be it allows for too much discretion.

Judges using the golden rule which is a modification of the literal rule to prevent an absurd result, are given too much discretion and power as they look to what they believe parliament intended meaning the statutes interpreted in a subjective way, this gives judges too much discretion over the law and can cause inconsistency as different judges may interpret different beliefs on the law potentially leading to judicial law making, even though parliament makes (laws) statutes and judiciary (judges) enforce them.

Another disadvantage would be it is impossible for ~~[illegible]~~ lawyers to advise clients.

If the Golden rule is used in Statutory Interpretation it is nearly impossible for lawyers to reasonably advise their clients on the likely outcome of the case as the Golden rule is subjective and mainly down to the interpretation of the judiciary.

Overall In Conclusion, judges may cause inconsistency in the law through using the Golden rule, the Golden rule in statutory interpretation may prevent lawyers advising their clients as judges are given too much discretion.

However the Golden rule prevents

absurd results ~~and~~ by being a modification of the literal rule ~~for~~ Judges to interpret what parliament intended when making the statute, instead of just following the literal rule in Statutory Interpretation.

Examiner commentary

This is a Level 1/2 response. The opening paragraph asserts that the golden rule prevents absurd outcomes. The second paragraph offers some development as it contextualises the point by offering an illustration of the kind of absurd outcome produced by a strict application of the literal rule. It should be noted that the candidate gains no extra marks for citing multiple examples that all make the same point. The second paragraph is finished with the third point that the golden rule allows judges to look at what parliament intended. These first two paragraphs represent a well-developed point but the candidate then launches into two paragraphs specifically cited as disadvantages when the question is about advantages.

Disadvantages in an advantages question can only gain marks where they are used to contextualise an advantage. Explicit stand-alone disadvantages such as these are not creditworthy. In the final paragraph, the candidate offers a conclusion. There is no need to conclude in a 15 mark AO3 question although credit may be given where appropriate. However, in this instance the conclusion is clearly expressed in the context of a disadvantage and not creditworthy. The final paragraph of the conclusion is not creditworthy as it simply repeats what has already been said.

Exemplar 2 14 marks

4 One advantage of the golden rule is that it avoids the worst problems of the literal rule. It allows the judge to choose an alternate meaning or change the meaning of a word to achieve the fairest result, e.g. in Adler v George, the judge change the meaning to be in or in the vicinity of so that the defendant could be guilty of being inside a prohibited place. This can't be done with the literal rule, as the literal words have to be applied. However, this could lead to judicial law making, where a judge could interpret a word differently to how parliament intended, which is undemocratic.

Another advantage is that it still upholds parliamentary sovereignty. This is as it still follows the words of parliament, and that by changing the meaning to lead to a fairer

result it actually helps to achieve what parliament had intended when it passed the act, therefore it still respects the powers of parliament. However, a literal judge would argue that the best way to uphold the wishes of parliament is to use the literal rule, and apply the actual words, so it doesn't support parliament as much as the literal rule does.

Another advantage is that it gives judge more discretion to choose the most appropriate meaning without risk of too much judicial law making. In Re: Sigsworth, using this rule allowed the judge to change the meaning of the word 'issue' so that a son didn't get his mother's inheritance after murdering her. Using the wider rule here gave the judge the discretion to reach the best possible outcome. However the golden rule is limited in it's use, only being allowed where a word has two meanings of a possible alternate meaning, so is not used that often.

A final advantage is that it still promotes certainty to an extent. It still follows the words of an act, only changing the meaning. Lawyers should be able to predict which meaning a judge may use and how it will affect the outcome, so they should be able to advise their client properly. However, there may be a lack of certainty in the wider rule as version if the judges goes too far beyond the normal meaning.

Examiner commentary

This is a Level 4 response. Taking the example above for Question 3, this serves as an example of a response that provides well-developed points at a sustained level. Paragraphs 1 and 3 both contain a well-developed point followed by a counter-point and paragraphs 2 and 4 both consist of well-developed points. Note that four modest paragraphs without a conclusion can still score the highest marks.

Section B

For Questions 5, 6, 8 & 9 the mark scheme guidance anticipates the same kind of approach to AO1 as laid out above for Questions 1 & 2 (i.e. credit based on degree of completeness with some supporting authority). The AO2 marks for application very much follow the AO1 by offering credit for the completeness of the client advice based on applying the appropriate legal principles to the given facts. The key here is about tying the relevant legal principles to the facts. It will not always be necessary to reach the 'right' outcome as some questions may lend themselves to different outcomes based on justifiable alternative lines of reasoning. Thus, it is possible to score full marks with a different outcome to the one anticipated in the mark scheme where this has been reasoned appropriately.

Question 5

Alice runs a small business from home. She has adapted a garden shed into a workshop where she makes tie-dye T-shirts to sell at summer music festivals. The dyes are kept in large plastic vats. Alice does not know that one of the vats is worn out and is slowly leaking. Dye is soaking down through the shed floor to the ground underneath and has spread to the neighbouring property. Bob lives next door to Alice and grows prize winning marrows which have all been ruined by the dye.

5 Advise whether Bob would be successful in an action in *Rylands v Fletcher* against Alice. **[25]**

Exemplar 1 — 11 marks

5 1

In Rylands vs fletcher strict liability was discovered. In the case of Rylands v ~~Fl~~ Fletcher it was held that if a non natural Materia escaped onto another property ~~Here~~ e.g a neighbouring Property then the defendent who had ~~caused~~ or owned the materials would be liable for the damaged caused under strict liability.

If the non natural meterials cause damage to th claiment then the defendent is liable for the damage under strict liability A case for this is Rylands vs fletcher in which flooding ~~was~~ caused damage to ~~neighbour~~ neighbouring Property.

In the case scenario ~~the~~ the ~~item~~ thing that caused damage was non-natural material as the dyes that were left in large plastic vats where non-natural materials.

Risk and foreseeability are part of finding the defendant liable. Was the defendant aware that there is risk of damage? ~~in keeping the non-natural materials? If yes then they~~ Also, was the outcome foreseeable? It could be argued that Alice did not foresee the damage as she was not aware of the fact that one of the vats was worn out. Therefore she did not know the risk of damage that the non-natural substance ~~materials~~ would cost.

The non-~~material~~ natural substance ~~material~~ spreading to the neighbours property in the case of Ryland vs Fletcher meant that the defendant was liable as the non-natural substance had caused damage to the claimants land and had interfered with his peace and enjoyment of the land.

In the case scenario, the dye slowly leaking and then spreading into Bobs property shows the element of escaping into neighbouring property. The fact

That the dye was a non-natural substance could mean that Alice is liable. Also, the non-natural substance caused damage ~~harm~~ to Bobs narrows and was ruined by the die.

In conclusion Bob may be succesfull in an action in Rylands V Fletcher against Alice. As there was damage caused by an ~~a~~ non-natural substance which had spread to the neighbouring property in similarity to Rylands V fletcher.

Examiner commentary

This is a Level 2 response. The candidate is confused between non-natural use of land and non-natural substances and carries this confusion forwards throughout the response. However, there are some AO1 marks for recognising the need for an escape, the strict liability nature of the tort, and the need to cause damage and foresight (although there is some confusion between damage and outcome). There is no over-arching definition, which would have helped the candidate with the missing parts (i.e. bringing on and accumulating, dangerousness and mischief if escapes) and there is no supporting case law offered. There is some limited application on escape and causing damage although the foresight point is slightly confused (knowledge of the state of the vats is not a prerequisite of foresight of harm) as is the 'peace and enjoyment' point. The candidate draws a correct conclusion, although not fully supported. Overall, it needs more completeness, case authorities and detailed application to access higher levels.

Exemplar 2 25 marks

5 Alice is potentially liable for an offence under Rylands v Fletcher. The claimant must have an interest in the land to make a claim as seen in Hunter v Canary Wharf. There are four main elements to Rylands v Fletcher which are 1) Collecting and keeping on land, 2) Non-natural use of land, 3) The thing is likely to cause mischief if it escapes and 4) The thing does escape and causes damage. The ~~occupier~~ Defendant (D) must be an occupier of land (Tetley v Chitty).

For Collecting and Keeping on land, the dependent must be an accumulator or occupier of the land accumulated on (Read v Lyons). There is no liability if the the thing naturally accumulated on the land (Giles v Walker).

The use of land must be non-natural. There are different examples for when the use of land is non-natural, such as: A potentially dangerous activity (Cambridge Water v Eastern Counties leather), A resvoir is also deemed a non-natural use of land (Rylands v Fletcher). A truly domestic use of land is a natural one. If there is a public benefit that derives from the use of land, then courts are likely to deem it natural (British Celanese v Hunt). If the thing is stored in large quantities then the use of land is unnatural (Mason v levy autoparts) and the deciding whether the thing is deemed dangerous or non-natural depends on the circumstances as it takes into consideration the circumstances surrounding time and the practise of mankind (Read v Lyons), for example in Transco, the use of land for water pipes is now deemed as a natural one.

In regards to the thing is likely to cause mischief if it escapes, the thing collected and kept on D's land does not need to be dangerous in itself but it does need to be likely to cause some harm if it escapes (Shiffman)

And Finally for the last element, the thing does escape and causes damage it is suggested that in previous cases a claimant (C) could claim for personal injury in Rylands v Fletcher, however since the Cambridge Water case only damage to property and damage to the interests of property can be claimed for. Pure economical loss as seen in Weller v Foot and Mouth disease research institute can also not be

claimed for. The ~~tg~~ damage done also needs to be foreseeable (Cambridge water case).

The defences that could potentially be used in Rylands v Fletcher include: Volenti non fit injuria (Peters v prince of wales theatre), Benefit gained (Dunne v Northwest gas board), Act of God (Nicholls v Marsland, Act of a Stranger (Perry v Kendricks transport) and Contributory negligence (Eastern and south. African telegram v Cape town tramways).

In relation to the scenario Bob is an occupier of ~~the~~ his land as it states he 'lives next door' which also means he has an interest in the land. Alice is also an occupier of her land as it states she 'runs a small business from home'. This sets the basis for which the claim can continue. Alice is both the accumulator of the dyes as it is for her business and the occupier of the land accumulated on. In relation to her use of land being non-natural, she has stored large quantities of the dye as it is stored in 'large plastic vats' (Mason v Levy autoparts) and she cannot argue a public benefit as for the purpose of 'summer music festivals'. This is enough to determine her use of land as non-natural. ~~S~~ Even though she may try to argue that in this day and age it is the practise of mankind to run business' from home the fact her business includes large quantities of dye overrules this. The dye is likely to cause harm / mischief if it escapes because it in itself can be seen as dangerous if ingested or if it gets into eyes, and it's purpose is to change the physical looks of things by changing the colour of them. The dye does escape from Alices' property as it 'spreads to the neighbouring' property which is Bobs. It causes damage to Bob's property by ~~fitting~~ ruining his 'prize winning marrows'. The point

		in question is whether the harm caused was foreseeable as Alice was unaware that the vats were worn out and slowly leaked dye. This is similar to the cambridge water case as small drops of chemicals polluted water over time so it could be argued that the type of harm was unforeseeable. However in the scenario it states that the vat is 'worn out' this is an indication that it has been used many times by Alice and is fair to expect that Alice would have seen the deterioration in the vats state over time so it is fair that Alice should have been checking her vats for any signs of them being worn out and spills / leakages of a large quantity of a substances can be expected so therefore the type of harm was foreseeable. Alice can not use any defence as Bob did not consent, gain or contribute to the damage and an unforeseeable natural event or third party did not cause the escape.
		There In conclusion Bob would have a successful claim in Rylands v Fletcher (RvF) against Alice because she has satisfied all the elements of RvF and as She does not have a valid defence and the dye would have no where to escape to other then the ground which connects the neighbouring properties. he she However he could only claim for the cost of the flowers and not anything to due with them being 'prize-winning' as you can not claim for pure economical loss.

Examiner commentary

This is a Level 4 response. A complete response to this question needed to cover the AO1 and AO2 of the essential elements of Rylands ([bringing on and accumulating for own benefit], [dangerous if escapes, escapes & causes reasonably foreseeable harm to neighbouring land] and [non-natural (or extra-ordinary) use of land]). There was no need to cover areas not 'pointed to' by the given facts, so parties, defences or remedies were not required although they could be credited at Level 1 where given. This script has covered all the key AO1 requirements first with generous use of supporting authorities including recent authoritative cases such as Transco (note there is no need to go through the case facts for full credit).

The response then tackles the AO2 application. The script is a good example of a candidate making good intelligent links between the given facts and the law. For example, "The dye is likely to cause harm/mischief if it escapes (law) because it in itself can be seen as dangerous [...] and its purpose is to change the physical looks of things by changing the colour of them (application)." The application based on the similarity between the scenario and Cambridge Water is also handled well. The script finishes with a reasoned and justified conclusion. The AO1 content could have been cut down – in particular, there was no need to cover defences when none were apparent.

Note here the approach of setting out all the AO1 (law) first and then dealing with the AO2 (application) second. Full marks can be achieved whether the AO1 and AO2 are merged or kept separate, as seen here.

Question 6

Charlie has recently bought a camera drone as he wants to start a business taking aerial photographs. On one of his first assignments Charlie is flying his drone over a large housing estate when his mobile phone rings. Charlie knows he should not answer while he is flying the drone but he is worried he might miss out on a new job so he tries to fly the drone with one hand and answer his phone with the other. He loses control of the drone which flies into a power cable causing a power cut. The power company, Elektrix, now wish to sue Charlie. They have been advised that this is a novel case for which the courts have no existing precedent.

6 Advise whether Elektrix would be successful in an action in negligence against Charlie. **[25]**

Exemplar 1 — 9 marks

6. Negligence can be broken down into three parts: duty of care, breach of duty and causation

Negligence was first established in Donoghue v Stevenson, where a drinks company were held liable for the damages their drink caused on someone despite there being no contract as she wasn't the individual that bought the drink. Negligence has since been developed regarding duty of care - in cases such as Caparo v Dickman, where a three part test was established: a) b) is there sufficient proximity? and c) is it fair, just and reasonable to impose a duty of care? In this scenario, there is sufficient proximity between Elektrix and Charlie as Charlie has caused damage to Elektrix's power cable, causing a power cut. It is hence fair, just and reasonable to impose this duty as such a power cut would cause Elektrix to lose sufficient amounts of money, plus the price to fix the damages would further cost money, so it is reasonable for Charlie to be held liable in respects of duty of care.

Next is breach of duty. It is clear in this scenario

that Charlie has breached his duty of care towards Elektrix as his recklessness in handling the drone led to the destruction of their property.

Regarding causation, for negligence to be satisfied they must be the sole operating and substantial cause. In this scenario, Charlie's failure to control the drone was the operating and substantial cause of the power cut.

To conclude, Elektrix would be successful in an action in negligence against Charlie as all three elements of negligence are satisfied → Charlie had a duty of care towards them, he breached that duty and he was the cause of the damage.

Examiner commentary

This is a mid-Level 2 response. As might be expected, a Level 4 (complete) response would require an explanation of duty, breach and causation (along with some supporting authority) and application of the same. This candidate has limited AO1 credit. Like many other candidates, this candidate starts with an over-arching definition of negligence and a reference to its historic origins in Donoghue v Stevenson (which might be relevant in an essay question on negligence but could have been omitted here). The AO1 is restricted to a two-thirds definition of the Caparo test (reasonable foresight is missing) and there is no authority beyond Donoghue and Caparo. There is nothing credit worthy offered in terms of AO1 on breach or causation. The application is also limited to a brief analysis.

The proximity is reasoned on causation of damage rather than being close in time and space and the fair, just and reasonable test is reasoned on the claimant's financial loss being unreasonable rather than the policy reasons supporting the imposition of a duty in the circumstances. There is some vaguely relevant application on breach where the criminal notion of recklessness is used to express the defendant's lack of care (although this is not clearly expressed). Finally, there is an attempt at both the AO1 and AO2 of causation but this is mistakenly based on principles borrowed from criminal law. The conclusion is thus unsupported.

Exemplar 2 24 marks

6 I am discussing negligence.
~~Negligence comes from~~
In a negligence claim there are three key elements to be met in order to be successful.

first, there must be a duty of care, this comes from the case

of Donoghue v Stevenson which established the neighbour principle. However this was overruled by Caparo v Dickman.
The Caparo test has three parts.
The first states that it must be reasonably foreseeable, which was seen in the case of Hunt v Griffiths. Herein, It was reasonably foreseeable that a duty of care was present and harm would occur if not followed (Confidence late to asthma attack).
Secondly there must be sufficient proximity between the claimant and defendant. This can be in terms of time and space or relationship as seen in Mcloughlin v O'Brein.

finally, it must be fair, just and reasonable to impose a duty.
This was seen in Hill v Cheif Constable of West Yorkshire when a Yorkshire Ripper victims mother attempted an action of negligence, as however he CC stated the victim was at no greater risk than the rest of the population therefore wasn't fair, just and reasonable to impose a duty.
// Here, it is reasonably foreseable that Charlie flying the drone without his full attention could

result in harm. There is sufficient proximity between Charlie and Eleanor in terms of time and space when his drone "flies into a power cable". It is also fair, just and reasonable to impose a duty onto Charlie as he is choosing to fly the drone around a 'large housing estate' distracted.

There next must be a breach of duty. This is decided using the reasonable man test from the case of Bolam where a breach is commited if D acts in a way that the reasonable man would do or wouldn't do. This was used in the case of Mullins v Richards where two 15 year old girls were fighting with a ruler which snapped penetrating C's eye. Here, they compared a 15 year old girl to another 15 year old girl as the reasonable man.

Here, Charlie would be compared to another camera drone flyer in this instance, the reasonable man wouldn't attempt to answer the phone and fly the drone "with one

hand" in "one of their first assignments" like Charlie did. Therefore Charlie has breached the duty.

Damages is then looked at. These are established firstly with factual causation which in civil law comes from the case of Barnett v Chelsea Hensington Hospital Management Committee, which is the 'but for test'. Here but for Charlie not answering his phone and attempting to fly one handed, he wouldn't of crashed the drone into the power cable, causing the power cut. under damages is also remoteness as seen in the case of Wagon Mound. Here, the power cut was not too remote from Charles's actions as him crashing into the power cable was the direct cause of the power cut. The thin skull rule also comes under damages as seen in Smith v Leech Brain, where you must take your victim as you find them. This does not apply in Charles's case.

There are also Risk Factors under negligence, which includes the

Size of the risk (Bolton v Stone) which considering Charlie was fairly new at flying drones, decided to do it one-handed and over a large housing estate, the risk was large and reasonably foreseeable.
There are no Special Characteristics (Paris v Stepney Borough Council) and no practical precautions were took (Latimer v AEC).

Therefore, Electrix would be successful in an action of negligence against Charlie as all elements are satisfied.
They will pursue their attempt of "wanting to sue Charlie" however due to there being no existing precedent, it may be a long, costly process and may not recieve the desired result.

Examiner commentary

This is a Level 4 response. There is no doubt that this was the most popular and well-answered question. Many of the Level 4 responses ran to several pages with well in excess of 20 cases. This script has been included as an example of the fact that candidates can access full marks without excessive content or cases. In fact, this script could have left out the penultimate paragraph on risk factors and still scored exactly the same mark.

For AO1, firstly the script sets out duty of care - the three limbs of the Caparo test are given with an appropriate supporting case for each. Had duty been considered 'in the light of Robinson', the conclusion would have been to apply Caparo anyway so there was no problem with its omission. However, if there was a hypothetical future exam question involving someone suffering an upset stomach after drinking some fizzy drink with a decomposing insect in it, candidates who insist on applying Caparo when there is a clear precedent to follow would not score full marks.

Secondly, it sets out breach correctly based on the reasonable man and although it uses Bolam (experts) and Mullins (children) rather than something like Vaughan or Blyth it is accurate enough. Had the response not gone on to consider risk factors it would still have been enough for full marks. The actual breach here is so obvious (Charlie falls below the standard of the reasonable drone flyer by flying it with one hand whilst answering his phone) – in the circumstances there's really no need to look for any factors that might alter the standard of care. Many candidates speculated one of two things. Charlie was new to flying a drone and should be considered in the light of Nettleship or that he was a professional drone flyer and should be considered as an expert in the light of Bolam/Montgomery – both points were creditworthy but weren't really needed and candidates should be discouraged from speculating too widely. This was a 25 mark/30 minute question and some candidates spent too long on this question to the detriment of other questions, especially Question 7.

Thirdly, it sets out causation based on factual causation supported by Barnett and remoteness based on Wagon Mound. Again, this was such a straightforward scenario that candidates could have scored full marks by just offering factual causation with a case and a comment to the effect that the damage was not too remote. There was certainly no need to consider the thin skull rule as this script did or, as some candidates did, res ipsa loquitur, loss of a chance and multiple causes.

Each section of AO1 was followed by a brief but well considered and accurate piece of AO2 application that made good links between the legal principles and the facts given. A straightforward conclusion gave this script everything it needed for high Level 4. As stated above, the risk factors and the thin skull rule could have been left out and this would have made no difference to the final mark. Excessive explanations of irrelevant aspects of the law, excessive citation of cases and idle speculation outside the facts given do not gain extra marks and can often detract from a balanced approach to the overall paper.

Questions 7 and 10

These are, in effect, the same question. Here, both the AO1 and the AO3 marking was based on the same principles as discussed above in relation to Questions 1 to 4 with the additional requirement (under the AO3) of a conclusion. For AO1, a Level 4 (complete) response would include an account of both limbs of the Salmond test ('is D an employee?' and 'did the tort take place in the course of employment'?) as well as some reference to recent changes relating to the akin to employment and/or close connection tests.

Question 7

Essay question on the law of tort

7* Discuss the extent to which vicarious liability is effective in achieving the aims of fairness, deterrence and apportionment of blame. **[25]**

Exemplar 1 — 8 marks

07

Vicarious liability is when an employee commits a tort during the course of their employment and their employer then has to pay out for damages.

To some extent it could be said that this area of law does not achieve fairness. This is because despite the employee being the one who committed the tort the employer is the one paying for it. However this can be disputed as many employers have insurance that covers such incidents. As well as this they're likely to be more financially well off than their employee. Therefore these two factors may indicate that whilst it may be unfair on the employer it may be more fair on the claimant as the employer is more able to pay therefore they will get their damages quicker.

To some extent vicarious liability does not achieve deterrance as it protects the employee therefore they're unlikely to be deterred from acting negligently. However it only protects them to some extent as the tort has to be committed 'during the course

of employment' therefore they're not protected if they're on a 'frolic of their own' therefore if they're somewhere they shouldn't be they're not protected and they will have to pay. This provides fairness and deterrance. Deterrance as they won't become careless as they're, in some circumstances still accountable. It also provides fairness as when they're on a 'frolic of their own' it's not something their employer told them to do therefore it is fair that the employee is then accountable. However when it comes to acting against orders it is decided on the circumstances as on the case of Rose v Plenty. A milkman was using child helpers even though his employer told him not to. One of the children got hurt and the employer was still held accountable as it was a benefit to him. This could be considered unfair because it may have benefitted him but he did not choose to use them. A reform for this may be to introduce a test that looks for the level of blame based on employer actions to prevents the employee acting against their orders.

Overall the law of vicarious liability is fair to some extent as it achieves the best outcome for the claimant by allowing them to claim from the employer who may be in a better position to pay damages. However whether this is fair on the employer can be argued as they're not the one that committed the tort.

To ammend the level of fairness a test may need introducing that looks for blame

Examiner commentary

This is a Level 2 response. This script is an example of a significant minority of responses that failed to provide any AO1. There is a very brief overall definition in a small opening paragraph. The second paragraph has a good well-developed point, which asserts that vicarious liability is unfair but qualifies this by pointing out that employers may be best placed to pay out and then reflecting on the positive impact this would have for the claimant. Paragraph three is a similarly good well developed critical point which focuses

on the lack of a deterrent effect, which is tempered by pointing out the limitation to this provided by the provision that this is not the case when employees are on a frolic of their own.

Towards the end of the third paragraph, the candidate offers a suggestion for reform – there is no need to do this. Unless there is a specific reform agenda, it is not necessary for candidates to create their own case for reform in this way. Although there is a case (Rose v Plenty) provided, there is no wider AO1 context. There is a conclusion in the final paragraph but it doesn't offer anything beyond what's already been written. For all essay questions, in order to score in Level 4 candidates must offer an AO1 explanation of the area of law being assessed as well as the evaluation and a reasoned and justified conclusion.

Question 10

Essay question on the law of tort

10* Discuss the extent to which vicarious liability is effective in achieving the aims of fairness, deterrence and apportionment of blame. **[25]**

Exemplar 1 — 25 marks

10

Vicarious liability is where an employer is liable for the torts of their employee but not of an independent contracter.

To determine employee status there is the control test which states if the employer dictates how and when the work is to be done, the person carrying out that work is an employee eg Mersey Docks where despite ~~the Integration~~ lending out a crane driver the employer was still liable as there was no evidence of a transfer of responsibility for the employee.

Integration test states if the persons work is fully integrated into the business he is an employee if it is merely 'accessory' he is an independent contractor eg Steven, Jordand and Hamson

The final test looks at contract between parties. A contract of service indicates employee status eg Ready Mix concrete which stated this exists where the person agrees in regards of

a wage he is under the other persons control and provides his own work eg

For the employer to be liable the tort must occur during the course of employment but will not be if the employee goes against orders eg Rose v Plenty where a milkman ignored orders not to use child helpers but the employer was still liable as they benefitted from this work.

If the employee provides an unauthorised lift, the employer is not liable eg Twine v Beans Express nor will he be if the employee causes injury outside work time eg B London v Beard. However they will be if they do a job badly resulting in injury eg Century Insurance. If employee commits a criminal act the employer is still liable if it occurs during work hours and there is a "close connection" between his act and job eg Morrisons but will not be if the employee acts on a 'frolic' of his own eg Smith v Stages where D crashed his car but employer were still liable because he was travelling to work within work hours.

Vicarious liability is effective in achieving fairness because it provides a practical remedy to injured people because employers are more likely to be in a financial position to pay out compensation which

is fair because they should be liable for the actions of their employees during work hours. However the whole essence of the rule goes against fault based liability because if the employer takes the time to recruit and train workers, thereby taking all precautions why should they still be liable if a worker commits a tort? is this fair?

The fact there are so many tests is criticised for causing confusion, instead there should be one making it obvious to employers on how to determine employee status and take precautions against being liable, thereby offering a much fairer alternative. However, Mersey Docks highlighted that a 'one size fits all approach is not sufficient as there are many variations of employment. Similarly, the principle of acting on a 'frolic' seems to be fair because why should employers be liable for actions caused by people not during work time but with new ways of working eg from home makes it harder to determine "work hours" and so should employers be able to escape liability on a ~~technicality~~ technicality? However, the essence of the rule of vicarious liability encourages employers to be more cautious when taking on staff to ensure they will not participate in dangerous criminal activity and provide adequate training yet on a 'frolic' causes confusion over accidents eg in Thomas v Burton a woman

could not claim compensation through vicarious liability after a driver killed her husband because the men in question were not in their working ~~time~~ hours & yet in smith v stages

the driver was liable for the road accident despite not actually being in work or carrying out work duties because he was driving to work during which time he was receiving payment but this seems illogical ~~to~~ because why should ~~a~~ employer escape paying out compensation in a serious circumstance such as where death has occured simply because the employee wasn't in work time? surely if the people in question work for them and occurs in a vehicle connected to the employer a certain degree of fault/liability is warranted if for the justice of the deceased and their family if for nothing else.

In conclusion, vicarious liability is effective in achieving fairness because when successful compensation is awarded and justice is achieved but it is such a confusing process identifying working hours and an employees status that ~~it~~ it may not be completely fair as technicalities such as 'on a frolic' can mean the employer escapes liability and if the employee has no way of

paying out compensation what justice is gained for the victim of the tort? Blame can be confusing because employees are rational people who can weigh up their actions so surely their employer shouldn't have to take all the blame.

It does however effectively achieve deterrence as the costs of paying out and damage to profit and reputation can mean employers take more care to employ competent individuals and it seems fair employers take responsibility for who they hire.

→ It has been suggested that to increase the amount of justice achieved through ~~her~~ vicarous liability that there be no need to prove working hours allowing compensation to people who've been injured / harmed by any person who works for the employer however, this would be unpopular because it holds the risk of opening the floodgates to hundreds of claims thus undermining fairness and blameworthiness because how can it be proven the employer is paying out in genuine cases? Furthermore, in regards to independent contractors what will happen if they can't pay out compensation? many feel it is not fair as it leads to injustice for victims of wrong doing.

Examiner commentary

This is a Level 4 response. The AO1 is complete because it starts with a definition and then moves on to look at some tests of employment supported by appropriate case law. It would have been nice to see some reference to recent developments like the 'akin to employment' test (The Christian Brothers and affirmed in Armes) and the fact that employers can be liable for independent contractors in some circumstances (Various Claimants v Barclays). However, the traditional material offered is acceptable and appropriate. The script then considers the second limb of the Salmond test - in the course of employment – again, supported by appropriate case law. Towards the end of the AO1 the candidate shows some up-to-date knowledge by explaining the 'close connection' test in relation to intentional torts supported by Mohamud v Morrisons. Therefore, the AO1 requirement is fulfilled –

both limbs of the Salmond test and something that demonstrates up-to-date knowledge in relation to changes in the approach to intentional torts.

The AO1 is followed by a sustained passage of AO3 that demonstrates range, sustained development, a focus on the wording of the question and some thoughtful use of supporting authorities. The script finishes with a conclusion that, although it repeats some preceding content, addresses the question.

Question 8

During an especially cold winter in Newtown village the local lake froze over. This had happened in previous years and there had been a number of accidents. Consequently, Newtown Council had erected signs stating 'Access to the Lake Strictly Prohibited – No Skating Allowed – Extreme Danger When Frozen'. Davina had been given a new pair of ice skates at Christmas as she has been training to skate for the County Skating Championships. Davina ignores the signs and starts skating on the frozen lake. A thin patch of ice breaks, Davina falls through the hole and she suffers serious injuries as a result of hypothermia.

8 Advise whether Davina would be successful in an action against Newtown Council in occupier's liability. **[25]**

Exemplar 1 — 6 marks

8

Occupiers liability is an offence in which the occupier of the land has a duty to protect all visitors and tresspassers. An occupier of land has different duties dependent on whether they're visitors "must keep visitors safe from harm" but a lower duty for tresspassers as they must "keep safe from death".

~~Premises covers roads/buildings/vehicles/etc vessels~~

Tresspassers are anyone who doesn't have permission to be on the land and any visitor that goes beyond their permission.

In this case, Davina is a tresspasser as she doesn't have permission to be there.

In order to protect a tresspasser from the danger and have a duty the defendent must know of the danger and take reasonable precautions to protect against that danger.

Newton Council know of the danger as there's been a number of accidents in previous years.

They have also put up signs warning people to not skate on the ice and stated that it is dangerous.

This arguably fulfills this element as they evidently are aware and have taken reasonable precautions.

Tresspassers can only claim for personal damages, not damage to property.

In this case, Davina could claim because she has "suffered serious injuries due to hypothermia."

Examiner commentary

This is a Level 1/2 response. The AO1 needs more detail in order to reach higher marks. There is no reference to the overall Act, any of its statutory provisions or relevant case law. The candidate has a basic sense of a difference in the duty owed to visitors and non-visitors (although the precise nature of the duty owed to the latter is confused). They then go on to define and apply the trespasser status before tackling two of the limbs of the s.1(3) OLA 1984 test. However, these are anecdotally expressed and uncited.

The AO2 is similarly basic and includes the classification of Davina as a trespasser and a narrative observation that there is a warning sign which may make out two of the three requirements of s.1(3). The point about property harm and personal injury is irrelevant as no property harm is mentioned. The conclusion is as good as unsupported since the reasoning it is based on (she is able to claim simply because she has injuries) is not properly reasoned.

Exemplar 2 — 25 marks

8 Occupier's liability is a branch of tort law that deals with injuries due to the state of a premises. Davina may have a successful action against Newton Council for her hypothermia.

-Wheat v Lacon

In order to bring a claim, the defendant must be an occupier of the land, who is defined as 'someone with sufficient control over the premises'. In Davina's case, Newton Council would be an occupier as they have control over the lake. The Claimant can either be a trespasser or a lawful visitor. A trespasser is somebody with no authority to be on the premises, and lawful visitors include licensees, invitees etc. In Davina's case, she would use the 1984 act, as she would be considered a trespasser, as she had no authority to be on the lake. There must also be a premises, which is defined under s1(3) of the 1957 act as any fixed or movable structure, including any vessle, vehicle or aircraft. In Davina's case, a lake would be the premises, as it is a fixed structure.

Under section 1(1a) of the 1984 act,

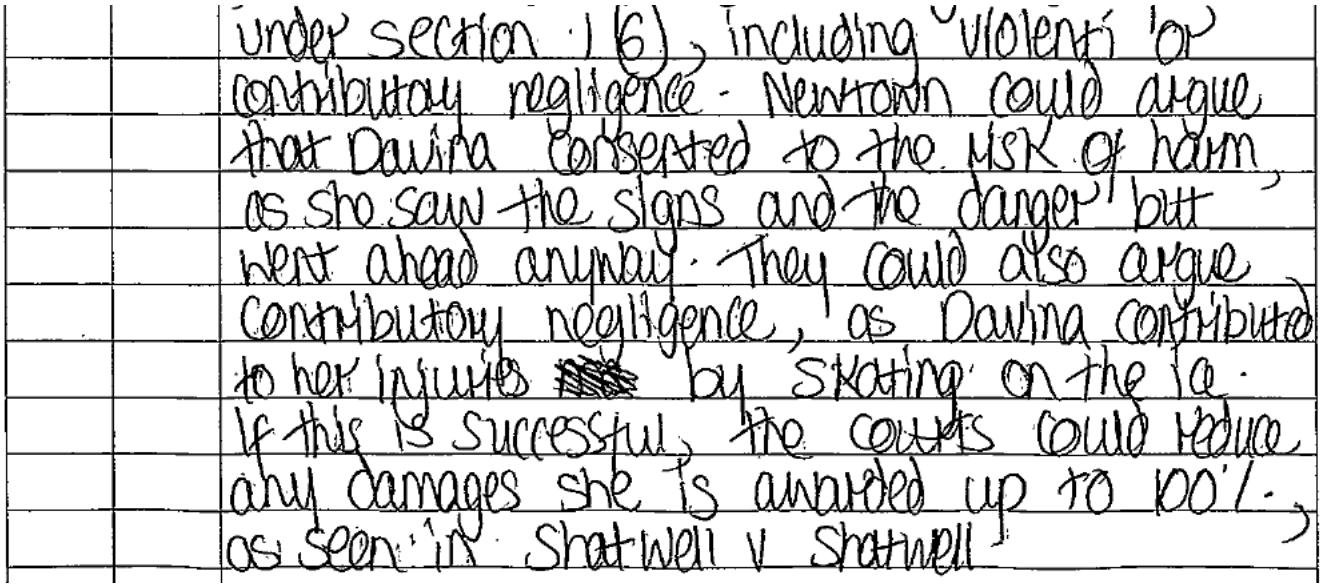
Newton Council may owe a duty of care to any trespasser. The duty of care comes under S1(4) and is 'to take such care as is reasonable in the circumstances to see that the trespasser is not injured by reason of the danger'. So Newton Council only have to take reasonable care in protection of the lake.

In order for a duty to be owed, the courts look at 2 subjective tests and 1 objective test under S1(3) of the 1984 act. S1(3)a) states that an occupier must know or have reasonable grounds to know the danger exists. This is seen in Rhind v Astbury, where the occupier didn't know of a dangerous container under the surface of the water so wasn't guilty. In this case, the lake has frozen over before in previous years and caused many accidents, therefore the council will know or should know of the danger of the frozen lake to the public. So this element is satisfied. Under S1(3)b) the occupier must know or have reasonable grounds to believe that trespassers might be in the vicinity of the danger. In Higgs v Foster, the occupier couldn't have anticipated the police officer's presence on her premises so wasn't guilty. In this case, the lake has caused 'a number of accidents' before, so Newton Council should be aware of the possibility of trespassers coming onto the lake and hurting themselves, so this element is satisfied. Under S1(3)c), the danger must be the type of danger which the occupier could reasonably provide against. In Tomlinson v Congleton, the council weren't guilty as it wasn't

the sort of danger they should have to spend lots of money providing against. Here, it is likely that Newton council could have put up a fence around the lake to seal it off, due to the numerous accidents that have happened before, doing this seems reasonable. But it could be argued that the trespasser chose to run the risk, so they shouldn't have to protect against it. But it is likely that this element will be satisfied, as putting up a fence isn't too costly.

Under section 1(5) the occupier can avoid liability if they put up a sign, but this sign must be reasonable, and enough to keep trespassers safe. In Westwood v Post Office, the sign saying 'only the permitted attendant authorised to enter' was sufficient. In this case, Newtown council may be able to avoid liability. If they have put up more than one sign, and the sign is clear in stating the danger this will be sufficient. They have put up 'signs' which states skating isn't allowed, and explains there is 'extreme danger'. Therefore the courts are likely to rule that this was sufficient, as under the 1984 act, this is generally enough. However, the courts may consider Davina's age, and if Davina is particularly young, they may hold that more protection was needed.

In conclusion, it is likely that Davina's claims would fail, due to the use of signs explaining the risk and the obvious danger of the lake. If Davina did succeed in her claim, the newtown council could argue a defence


under section 1(6), including 'violent' or contributory negligence - Newtown could argue that Davina consented to the risk of harm, as she saw the signs and the danger but went ahead anyway. They could also argue contributory negligence, as Davina contributed to her injuries by skating on the ice. If this is successful, the courts could reduce any damages she is awarded up to 100%, as seen in Shatwell v Shatwell

Examiner commentary

This is a Level 4 response. Well-balanced and thoughtful, the response scored full marks. It correctly sets out the key areas of OLA 1984 and applies each one accurately. It starts by setting out what constitutes a trespasser and then applies this to Davina and uses this to correctly conclude that the 1984 Act therefore applies. It then sets out the nature of the duty owed under the 1984 Act, in particular, the three limbs of s.1(3)(a-c).

In questions based on a statute, the sections cited count as cases but this script is supported by relevant case law as well. Accurate and thoughtful application follows each element of AO1 – again with good links to the given facts. Finally, the status of the warning sign as a defence is considered. This could have been considered under case law such as Tomlinson or, as in this case, under s.1(6). Finally, an accurate conclusion is drawn based on all the evidence considered. Unlike the other questions, this question had multiple potential outcomes depending on the interpretation of the given facts as applied to the relevant legal principles. The mark scheme allowed for this. Accordingly, this candidate speculated on the possibility of consent and contributory negligence being applicable should an alternative outcome prevail.

Question 9

During the summer months the lake is used by Newtown Jet Ski Club who have been holding weekend competitions there for the last fifteen years. They had planning permission from Newtown Council for these events. Last year Erica purchased a lovely old house about half a mile from the lake. She was aware of the activities of the Jet Ski Club when she moved in but recently the club has added mid-week speedboat racing and Erica cannot stand the constant noise.

9 Advise whether Erica would be successful in an action against Newtown Jet Ski Club in private nuisance. **[25]**

Exemplar 1

4 marks

9	2	Private nuisance is the interferance of the claimants reasonable enjoyment of the land under the Queens peace. In the case of Erica, we understand from the scenario that the house she bought was in the vicinity of the Newtown Jet Ski Club. Under private nuisance, ~~four~~ four factors within the nuisance are taken into consideration. The first is locality. In the case of Erica,
		the house she bought is local to the Newtown Jet Ski club, which ~~may~~ ~~bea~~ could mean she would be successful in an action against Newtown council. This is portrayed through the case of where it was found that the claimant was unsuccessful in their claim against the defendant ~~that~~ as the noise came before the claimant moved within the vicinity. In relation to the case of Erica, the ~~set~~ scenario also states that 'she was aware of

the activities of the Jet Ski club when she moved in. Therefore, Erica would not be able to make a successful claim against Newtown Jet Ski club.

However, the scenario also states that 'recently the club has added mid-week speedboat racing'. This may allow Erica to make a successful claim against Newtown Jet Ski club as the noise came after she had moved in.

Also, the second factor of Private nuisance is any damages. The damages must be reasonably foreseeable. In the case of Erica, there are no damages to Erica's land caused by Newtown Jet Ski club and therefore she would not be able to make a successful case in terms of damages. This is portrayed through the case of St. Helens Smelting Co where it was held that the damages were a direct cause of the factories therefore the defendants were held to be liable.

Finally, another factor in private nuisance is sensitivity. If the claimant is sensitive to noise etc of the private nuisance then they will not be able to

make a successful claim. In the case of Erica, the scenario does not state that she is sensitive to the noise, therefore she would not be able to make a successful claim.

Overall, Erica would not be able to make a claim under private nuisance.

Examiner commentary

This is a Level 1 response. The script starts with a definition that shows some confusion with public nuisance. There is little creditworthy AO1 – there is a bald statement that locality is relevant and that foresight of harm is required. Neither point is properly explained or supported with appropriate authority. In application, the locality point is misunderstood (C would be successful because she is local to the Jet Ski Club rather than looking at the nature of the locality) and this flows into an attempt to use an uncited case which confuses both the law on 'coming to the nuisance' and its application here. The wrong defendant is also cited as Newtown Council rather than the Jet Ski Club. Consequently, this leads to an incorrect interim conclusion. The reasonable foresight point was merged into St Helens Smelting, confusing the point on direct harm. Lastly, there is some incorrect and misunderstood discussion of sensitivity, which is not relevant here. The final conclusion is both incorrect and unsupported.

Exemplar 2 25 marks

9 Private nuisance concerns an unreasonable use of land which causes an unreasonable interference in C's use or enjoyment of their land.

Several interferences have been accepted as nuisances, including flooding (Sedleigh-Denfield), smells (Wheeler), tree branches (Lemmon v Webb) and noise (Kennaway).

However, according to Hunter, interference with TV signal is not a nuisance. This case also held that C must have a legal interest in the land and not just be a licensee.

D can be someone who authorises the nuisance, such as in Tetley v Chitty, but the authorisation must relate to the nuisance. D will not be liable merely for allowing the occupation of the nuisance creator (Smith v Scott). D can also be someone who adopts or continues a nuisance (Sedleigh-Denfield).

The nuisance must constitute an unreasonable interference in itself, not like in Southwark v Mills, D can be

liable for naturally occurring nuisances (Leakey v Nat. Trust, Goldman v Hargrave) but will only be expected to rectify these if they have the resources (Holbeck). Several factors will be taken into account, such as locality. (In Sturges v Bridgman it was held that what would be a nuisance in Belgrave Square may not be such in Bermondsey. Hirose Electrical confirmed more of an nuisance may be accepted in industrial areas, but if it causes physical damage locality is irrelevant (St Helen's Smelting Co.).

If C is unduly sensitive, such as in Network Rail v Morris, they will have to prove that there would be an interference to someone with an ordinary use. However, if they can prove this they can claim damages for the sensitive use (McKinnon).

Generally, longer nuisances will be more likely to cause liability but temporary interferences (De Keyser's Royal Hotel) and even single acts (such as a firework display in Kimbolton Fireworks v Crown River Cruises) may be accepted as nuisances.

A defendant who acts in malice, such as in Christie v Davey or Emmett will be more likely to be liable.

Public benefit is not a defence but may be considered (Miller v Jackson). Other defences include prescriptive right to continue (Sturges, Cooting v Laurence), statutory authority (Allen, Marcic) and planning permission, such as was successful in Medway.

Erica is C, and Newtown Jet Ski Club is D.

It is clear from Kennaway v Thompson that noise will be accepted as a nuisance, which was also a case about an aquatic sports club.

C "purchased" the house and so has a legal interest

is it and may claim - D is a Jet Ski Club that puts on events so they are the creator of the nuisance and so may be liable.
The lake is only used "during the summer months" but de Keyser's Royal Hotels v Spicer Bros suggests that temporary interferences will be enough to constitute a nuisance. C's land use is simply the enjoyment of her home and so is not sensitive like in Network Rail v Morris. However, D's actions are not so malicious and so this lessens the likelihood of liability.
Indeed, in Miller v Jackson C complained about an interference from cricket balls, but there was no liability because of the public benefit from the cricket ground. D may argue that the Jet Ski Club offers a community benefit, especially as they have been racing for the last 15 years. However, in the case of Kennaway it was increased racing which caused the claim, and the claimant was successful in their action, which suggests Erin may be successful.
However, a number of defenses may be raised: If the defendant has carried something out for 20 years they may have a prescriptive right to continue. However, this will not succeed because the Club has only held competitions for 15 years, and Coventry v Lawrence confirmed it is the nuisance, not the activity, which must have happened for 20 years - the nuisance only started recently with the mid-week racing.
Planning permission may be successful if it changes the character of the neighbourhood. Whilst D has this, it is questionable whether holding racing on a lake is sufficient to change the character.
Consent will also likely fail because she only consented to D's activities before mid-week racing.
Therefore, Erin's action will probably be successful.

Examiner commentary

This is a Level 4 response. A complete response required candidates to consider the status of the parties, the relevant factors that might make this particular interference unlawful or unreasonable and any applicable defences. Once again, the key to these problem questions is to only focus on what is relevant as dictated by the given facts. This candidate has set out the law first and then dealt with the application. The AO1 is brief in places and may fall short of full marks for lack of explanation but all the relevant law is set out with supporting authorities and is sufficient for Level 4.

The relevant parties are set out first. Supporting authority is offered, including Hunter v Canary Wharf, which has particular importance here in terms of the claimant needing to have a proprietary interest. This is followed by some discussion of what constitutes an unreasonable interference, some of which could have been omitted. For example, naturally occurring nuisances have no relevance to the given facts so were not needed in an answer. Sensitivity and malice also have no relevance based on the facts. However, the script does cover duration, locality and public benefit all of which might be relevant. There is comprehensive supporting authority. Finally, possible defences are raised including the two most likely defences of prescription and planning permission – again supported by relevant authorities.

Note: Too many candidates are running through exhaustive and comprehensive checklists of every aspect of a particular tort when half of it is irrelevant. This has the effect of diminishing the quality of the application and the balance of time spent on each question. This question produced many responses that were rather typical of that approach. Furthermore, many of these scripts were using rather dated case law. It was rare to see references to new and important case law developments such as Coventry v Lawrence and Network Rail v Morris.

The AO2 is thoughtful and starts with a consideration of the status of the parties. It then considers the duration issue, some irrelevant consideration of sensitivity and malice, the public benefit issue and an incisive comparison to Kennaway v Thompson, which the question is based on. The candidate draws an early but justifiable conclusion (end of paragraph 1) based the comparison. Lastly, it considers the possibility of prescription and planning permission as possible defences (correctly citing Coventry v Lawrence as the new leading authority on both points). Although the conclusion appears brief, equivocal and unjustified it should be read in the context of the response as a whole where, as stated above, an earlier determination of liability had been set out based on astute reasoning by analogy with Kennaway.

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