

GCE

Law

H018/02: Law making and the law of tort

AS Level

Mark Scheme for June 2022

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

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

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

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MARKING INSTRUCTIONS**PREPARATION FOR MARKING
RM ASSESSOR**

1. Make sure that you have accessed and completed the relevant training packages for on-screen marking: *RM Assessor Online Training*; *OCR Essential Guide to Marking*.
2. Make sure that you have read and understood the mark scheme and the question paper for this unit. These are posted on the RM Cambridge Assessment Support Portal <http://www.rm.com/support/ca>
3. Log-in to RM Assessor and mark the **required number** of practice responses (“scripts”) and the **number of required** standardisation responses.

YOU MUST MARK 10 PRACTICE AND 10 STANDARDISATION RESPONSES BEFORE YOU CAN BE APPROVED TO MARK LIVE SCRIPTS.

MARKING

1. Mark strictly to the mark scheme.
2. Marks awarded must relate directly to the marking criteria.
3. The schedule of dates is very important. It is essential that you meet the RM Assessor 50% and 100% (traditional 40% Batch 1 and 100% Batch 2) deadlines. If you experience problems, you must contact your Team Leader (Supervisor) without delay.
4. If you are in any doubt about applying the mark scheme, consult your Team Leader by telephone or the RM Assessor messaging system, or by email.
5. **Crossed Out Responses**
Where a candidate has crossed out a response and provided a clear alternative then the crossed out response is not marked. Where no alternative response has been provided, examiners may give candidates the benefit of the doubt and mark the crossed out response where legible.

Rubric Error Responses – Optional Questions

Where candidates have a choice of question across a whole paper or a whole section and have provided more answers than required, then all responses are marked and the highest mark allowable within the rubric is given. Enter a mark for each question answered into RM assessor, which will select the highest mark from those awarded. (The underlying assumption is that the candidate has penalised themselves by attempting more questions than necessary in the time allowed.)

Multiple Choice Question Responses

When a multiple choice question has only a single, correct response and a candidate provides two responses (even if one of these responses is correct), then no mark should be awarded (as it is not possible to determine which was the first response selected by the candidate).

When a question requires candidates to select more than one option/multiple options, then local marking arrangements need to ensure consistency of approach.

Contradictory Responses

When a candidate provides contradictory responses, then no mark should be awarded, even if one of the answers is correct.

Short Answer Questions (requiring only a list by way of a response, usually worth only one mark per response)

Where candidates are required to provide a set number of short answer responses then only the set number of responses should be marked. The response space should be marked from left to right on each line and then line by line until the required number of responses have been considered.

The remaining responses should not then be marked. Examiners will have to apply judgement as to whether a 'second response' on a line is a development of the 'first response', rather than a separate, discrete response. (The underlying assumption is that the candidate is attempting to hedge their bets and therefore getting undue benefit rather than engaging with the question and giving the most relevant/correct responses.)

Short Answer Questions (requiring a more developed response, worth two or more marks)

If the candidates are required to provide a description of, say, three items or factors and four items or factors are provided, then mark on a similar basis – that is downwards (as it is unlikely in this situation that a candidate will provide more than one response in each section of the response space.)

Longer Answer Questions (requiring a developed response)

Where candidates have provided two (or more) responses to a medium or high tariff question which only required a single (developed) response and not crossed out the first response, then only the first response should be marked. Examiners will need to apply professional judgement as to whether the second (or a subsequent) response is a 'new start' or simply a poorly expressed continuation of the first response.

6. Always check the pages (and additional objects if present) at the end of the response in case any answers have been continued there. If the candidate has continued an answer there then add a tick to confirm that the work has been seen.
7. Award No Response (NR) if there is nothing written in the answer space.
Award Zero '0' if anything is written in the answer space and is not worthy of credit (this includes text and symbols).
Team Leaders must confirm the correct use of the NR button with their markers before live marking commences and should check this when reviewing scripts.
8. The RM Assessor **comments box** is used by your team leader to explain the marking of the practice responses. Please refer to these comments when checking your practice responses. **Do not use the comments box for any other reason.**
If you have any questions or comments for your team leader, use the phone, the RM Assessor messaging system, or e-mail.
9. Assistant Examiners will send a brief report on the performance of candidates to their Team Leader (Supervisor) via email by the end of the marking period. The report should contain notes on particular strengths displayed as well as common errors or weaknesses. Constructive criticism of the question paper/mark scheme is also appreciated.
10. For answers marked by levels of response:
 - a. **To determine the level** – start at the highest level and work down until you reach the level that matches the answer
 - b. **To determine the mark within the level**, consider the following:

Descriptor	Award mark
On the borderline of this level and the one below	At bottom of level
Consistently meets the criteria for this level	At top of level

11. Annotations

Annotation	Meaning
	Not Relevant or no response or response achieves no credit
P	Point
DEV	Case development / Q4 & Q8 Developed point
E	Developed point extended
	Correct (for Q8, indicates conclusion)
	The highlight tool may also be used to draw attention to a word or phrase which means that the statement or reasoning is inaccurate
APP	Applied point
REP	Repeated point

	Answer	Marks	Guidance
1	Explain and illustrate the purposive approach to statutory interpretation. Answers may include the following: • Explain that the purposive approach seeks to give effect to the general intention and spirit of the statute as opposed to the literal meaning of its words • In <i>Maunsell v Ollins</i> (1975) Lord Simons suggested a two-tier test. The judge is to look to the purpose of the legislation and then must look at the words and interpret them according to the purpose • Identify that the purposive approach takes a broader approach than the mischief rule in that the court is not just looking to see what the gap was in the old law; the judges are deciding what they believe Parliament is trying to achieve – what is the purpose of the Act? • Explain that judges are required to consider the broader context in which the law was created – what were the concerns of government and Parliament at the time the Act was created? • Recognise the increased need for judges to refer to external aids • Describe how this rule has been increasingly used in recent years • Describe how this rule links to a more continental approach to interpretation and the increased use is associated with our membership of the EU and the way judges are expected to interpret EU legislation – for example, UK judges are obliged to interpret UK law in the light of EU law under the doctrine of indirect effect • Describe the perceived unconstitutional nature of the rule • Use any relevant case to illustrate its use – <i>Coltman v Bibby Tankers</i>, <i>Fitzpatrick v Sterling Housing Association</i>, <i>R v Registrar General ex p Smith</i>, <i>Jones v Tower Boot</i>, <i>Ghaidan v Mendoza</i>, <i>R v Secretary of State for Health ex parte Quintavalle</i>, <i>IRC v McGuckian</i>, <i>Pickstone v Freemans plc</i>, <i>Pepper v Hart</i>	8 AO1	Use Levels of Response criteria Level 4 (7–8 marks) • Excellent knowledge and understanding of the English legal system, rules and principles. • The response is accurate, fully developed and detailed. Level 3 (5–6 marks) • Good knowledge and understanding of the English legal system, rules and principles. • The response is detailed, but not fully developed in places. Level 2 (3–4 marks) • Basic knowledge and understanding of the English legal system, rules and principles. • The response may lack detail in places and is partially developed. Level 1 (1–2 marks) • Limited knowledge and understanding of the English legal system, rules and principles. • The response will have minimal detail. Level 0 (0 marks) No response or no response worthy of credit.

	Credit any other relevant point(s).		
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	Answer	Marks	Guidance
2	Explain and illustrate how persuasive precedent works in relation to cases from the Judicial Committee of the Privy Council, courts in foreign jurisdictions and judges' <i>obiter dicta</i> statements. Answers may include the following: Describe persuasive precedent - a precedent which is not binding, but courts can choose to follow it if they wish. Persuasive precedent is dependent on the system of court hierarchy Describe the different types of persuasive precedent referred to in the question: Judgments made by the Judicial Committee of the Privy Council e.g. • In <i>R v James (2006)</i> the Court of Appeal preferred the Privy Council's decision in <i>Attorney General for Jersey v Holley (2005)</i> to the House of Lord's decision in <i>R v Smith (Morgan) (2004)</i> • In <i>Doughty v Turner Manufacturing Company (1964)</i> the Court of Appeal preferred the Privy Council's decision in <i>Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound) (No. 1) (1961)</i> to its own previous decision in <i>Re Polemis (1921)</i> • But note the UK Supreme Court decision in <i>Willers v Joyce & another (2016)</i> which qualifies this practice Decisions of courts in other countries e.g. • <i>R v Bentham (2003)</i> where the court referred to the Canadian case of <i>R v Sloan (1974)</i> • <i>Lister v Hesley Hall Ltd (2001)</i> where the court was persuaded by the Canadian case of <i>Bazley v Curry (1999)</i> • <i>Orchard v Lee (2009)</i> where the court considered the Australian case of <i>McHale v Watson (1966)</i>	8 AO1	Use Levels of Response criteria Level 4 (7–8 marks) • Excellent knowledge and understanding of the English legal system, rules and principles. • The response is accurate, fully developed and detailed. Level 3 (5–6 marks) • Good knowledge and understanding of the English legal system, rules and principles. • The response is detailed, but not fully developed in places. Level 2 (3–4 marks) • Basic knowledge and understanding of the English legal system, rules and principles. • The response may lack detail in places and is partially developed. Level 1 (1–2 marks) • Limited knowledge and understanding of the English legal system, rules and principles. • The response will have minimal detail. Level 0 (0 marks) No response or no response worthy of credit.

	Statements of judges made <i>obiter dicta</i> e.g. • The doctrine of promissory estoppel was affirmed by the House of Lords in <i>Tool Metal Manufacturing v Tungsten (1955)</i> having formerly been an obiter statement by Denning J in the High Court in <i>Central London Property Trust Ltd v High Trees House Ltd (1947)</i> • The extent to which duress might provide a defence in murder cases was extended to attempted murder in <i>R v Gotts (1992)</i> where the court followed the obiter in <i>R v Howe (1987)</i> Credit any other relevant point(s).		
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	Answer	Marks	Guidance
3	Describe the controls exercised over delegated legislation by the courts. Answers may include the following: • Explain the main judicial control is through the doctrine of <i>ultra vires</i> and the process of judicial review • The court has no power to declare an Act of Parliament invalid but delegated legislation can be declared invalid if it is <i>ultra vires</i> (outside the power) • This is a prerogative power exercised by a special Administrative Court within the Divisional Court of the Queen's Bench Division of the High Court • There are three so-called heads of judicial review as set out in the <i>GCHQ case (1985)</i> as illegality, procedural impropriety and <i>Wednesbury</i> unreasonableness. Also referred to as: ○ Substantive <i>ultra vires</i> – where power is exercised beyond that which was delegated in the parent Act ○ Procedural <i>ultra vires</i> – where correct/just procedures were not followed in the creation of the delegated legislation ○ Substantive <i>ultra vires</i> for unreasonableness – where a decision-maker makes a decision which no reasonable decision-maker in a similar situation would make as determined by the <i>Wednesbury</i> test • Any relevant case law e.g. Substantive <i>ultra vires</i> - <i>Agricultural Training Board v Aylesbury Mushrooms</i>, Procedural <i>ultra vires</i> - <i>R v Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants</i>, Substantive <i>ultra vires</i> for unreasonableness - <i>Associated Picture Houses v Wednesbury Corporation</i> • Judicial control is also exercised where there is conflict with rights protected under the Human Rights Act 1998. This affects delegated legislation in two ways: ○ Firstly, section 6 makes it unlawful for a public authority to act in a way which is incompatible with ECHR	8 AO1	Use Levels of Response criteria Level 4 (7–8 marks) • Excellent knowledge and understanding of the English legal system, rules and principles. • The response is accurate, fully developed and detailed. Level 3 (5–6 marks) • Good knowledge and understanding of the English legal system, rules and principles. • The response is detailed, but not fully developed in places. Level 2 (3–4 marks) • Basic knowledge and understanding of the English legal system, rules and principles. • The response may lack detail in places and is partially developed. Level 1 (1–2 marks) • Limited knowledge and understanding of the English legal system, rules and principles. • The response will have minimal detail. Level 0 (0 marks) No response or no response worthy of credit.

	○ Secondly, sections 2 & 3 give the courts the power to declare laws (including delegated legislation) that are incompatible with the rights protected by the Act as invalid ● Conflict with EU Law. Credit any other relevant point(s).		
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	Answer	Marks	Guidance
4	Discuss the disadvantages of delegated legislation. Candidates may include the following points: • Lack of scrutiny: Parliament does not have time to properly scrutinise delegated legislation based on the volume and lack of resources. The negative resolution procedure acts as a virtual rubber stamp and the positive resolution procedure is rarely invoked. This may lead to incomplete or imperfect delegated legislation passing into law • Sub-delegation: Many Government Ministers pass their law-making powers on to their civil servants which raises issues of competence and accountability • Volume: The enormous volume (3481 in 2014) causes complexity - it is impossible for anyone to keep abreast of all delegated legislation and it encourages mistakes as well as avoiding scrutiny • Lack of debate & publicity: Unlike primary legislation, delegated legislation is not well publicised which would subject it to greater scrutiny and discourage mistakes and oversights. Furthermore, delegated legislation does not get debated in Parliament which also exposes it to scrutiny not only by Parliament itself but the media and the public as well (who are often unaware of it) • Undemocratic: It is undemocratic as some forms are made by civil servants, some are made by the Privy Council or local authorities and some by public corporations. Not all of these bodies are democratically accountable which undermines their authority and is unconstitutional • Language & interpretation: Delegated legislation suffers from many of the same problems as primary legislation. The language used is often technical, obscure, legalistic and open to different interpretations. Hence, all the criticisms that can be levelled at primary legislation and its interpretation would apply equally to delegated legislation • Wide discretion: An enabling Act may be so brief that it enables a Minister to potentially legislate not just on detail but on policy, which should be the concern of Parliament	8 AO3 1b	Use Levels of Response criteria Level 4 (7–8 marks) ▪ Excellent analysis and evaluation of a wide range of legal concepts. ▪ The response is wide ranging and has a well sustained focus on the question. ▪ The key points are fully discussed and fully developed. Level 3 (5–6 marks) ▪ Good analysis and evaluation of a range of legal concepts. ▪ The response has a mainly consistent focus on the question. ▪ Most of the key points are well discussed and well developed. Level 2 (3–4 marks) ▪ Basic analysis and evaluation of legal concepts. ▪ The response is partially focused on the question. ▪ Some of the key points are discussed and partially developed. Level 1 (1–2 marks) ▪ Limited analysis of legal concepts. ▪ The response has limited focus on the question. Discussion of any key points is minimal. Level 0 (0 marks) No response or no response worthy of credit.

	• Lack of control: Scrutiny through judicial review depends on an individual bringing a case forward in the first place and there are legal (locus standii) and financial (no legal aid) barriers to doing this. Those individuals affected may lack the legal interest or financial means to bring an action. Credit any other relevant point(s).		
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	Answer	Marks	Guidance
5	Explain the way in which it is proved that the damage was caused by the defendant in a negligence claim. Answers may include the following: The third part of a negligence claim is for the claimant to prove that their damage was caused by the breach of the defendant's duty of care towards them Factual causation: • The claimant needs to show the defendant is the factual cause of the damage • 'But for' test – but for the defendant's action, the claimant's injury would not have occurred • <i>Barnett v Chelsea and Kensington Hospital Management Committee</i> Legal causation: • Intervening acts – are there events which would break the chain of causation? • <i>Knightley v Johns; McKew v Holland</i> Remoteness of damage: • The damage must not too be remote from the defendant's negligence • <i>The Wagon Mound (No 1)</i> • Reasonable foresight of the type of damage is required • <i>Bradford v Robinson Rentals</i> Eggshell/Thin Skull rule: • The defendant must take their victim as they find them • The defendant is liable for subsequent consequences • <i>Smith v Leech Brain and Co</i> Credit any other relevant point(s).	8 AO1	Use Levels of Response criteria Level 4 (7–8 marks) • Excellent knowledge and understanding of the English legal system, rules and principles. • The response is accurate, fully developed and detailed. Level 3 (5–6 marks) • Good knowledge and understanding of the English legal system, rules and principles. • The response is detailed, but not fully developed in places. Level 2 (3–4 marks) • Basic knowledge and understanding of the English legal system, rules and principles. • The response may lack detail in places and is partially developed. Level 1 (1–2 marks) • Limited knowledge and understanding of the English legal system, rules and principles. • The response will have minimal detail. Level 0 (0 marks) No response or no response worthy of credit.

	Answer	Marks	Guidance
6	Advise Kareem whether he will succeed in a claim of negligence against Eve. Answers may include the following: Duty of Care: • There is existing precedent illustrating an established duty of care between a motorist and other road users • There is also a statutory duty of care between motorists and other road users • This is not a novel situation • Eve will owe Kareem a duty of care Breach of Duty: • Eve will be judged against the standard of the reasonably competent driver • This is an objective test and no account will be taken of her young age or inexperience • Eve has breached her duty of care Damage/Causation: • 'But for' Eve not looking at the roundabout, Kareem's injury would not have occurred • The damage suffered by Kareem is not too remote • Eve is both the factual and legal cause of Kareem's injuries Kareem will succeed in a claim of negligence against Eve. Credit any other relevant point(s).	8 AO2 1a/1b	Use Levels of Response criteria Level 4 (7-8 marks) • Excellent application of legal rules to a given scenario. • Excellent presentation of a legal argument which is accurate, fully developed and detailed. Fully appropriate legal terminology is used. Level 3 (5-6 marks) • Good application of legal rules to a given scenario. • Good presentation of a legal argument which is detailed but not fully developed in places. Appropriate legal terminology is used. Level 2 (3-4 marks) • Basic application of legal rules to a given scenario. • Basic presentation of a legal argument which may lack detail in places and is partially developed. Some appropriate legal terminology is used. Level 1 (1–2 marks) • Limited application of legal rules to a given scenario. • Limited presentation of a legal argument which has minimal detail and is unstructured and/or unclear. Minimal legal terminology is used. Level 0 (0 marks) No response or no response worthy of credit.

	Answer	Marks	Guidance
7	Advise Kareem what remedies he would expect if he is successful in his negligence claim. Answers may include the following: • Kareem has suffered pecuniary losses and will seek special damages to cover pre-trial expenses, for example: ○ Out of pocket expenses ○ Loss of wages ○ Medical expenses • Kareem has suffered non-pecuniary losses and will seek general damages to cover, for example: ○ Loss of amenity – he can no longer play any sports ○ Future medical care ○ Future loss of earnings ○ Pain and depression • Kareem would receive any award of damages as a lump sum (one-off) payment • Mitigating of loss ○ Kareem is under a duty to keep losses to a reasonable amount ○ Kareem may not be awarded the full amount as he appears to be making matters worse by not taking his medication and attending physiotherapy sessions. Credit any other relevant point(s).	8 AO2 1a/1b	Use Levels of Response criteria Level 4 (7-8 marks) • Excellent application of legal rules to a given scenario. • Excellent presentation of a legal argument which is accurate, fully developed and detailed. Fully appropriate legal terminology is used. Level 3 (5-6 marks) • Good application of legal rules to a given scenario. • Good presentation of a legal argument which is detailed but not fully developed in places. Appropriate legal terminology is used. Level 2 (3-4 marks) • Basic application of legal rules to a given scenario. • Basic presentation of a legal argument which may lack detail in places and is partially developed. Some appropriate legal terminology is used. Level 1 (1–2 marks) • Limited application of legal rules to a given scenario. • Limited presentation of a legal argument which has minimal detail and is unstructured and/or unclear. Minimal legal terminology is used. Level 0 (0 marks) No response or no response worthy of credit.

	Answer	Marks	Guidance
8*	Discuss the extent to which the Occupiers' Liability Act 1984 provides justice for occupiers. Candidates may include the following points: • The Act provides justice for occupiers as the claimant is only able to claim against them for personal injury. There is no claim available for damage to property • The Act allows for occupiers to treat a visitor, who strays outside the licence given, as a trespasser, limiting their duty and liability • The Act provides justice for occupiers as the duty is not as burdensome as that of the 1957 Act. The duty under the 1984 Act is to take such care as is reasonable in the circumstances. This is an objective test which means that if there is little risk of trespassers, the precautions needed will not be overly onerous • The Act allows the occupiers to discharge their duty by warning trespassers of the potential danger(s) • The Act provides justice for occupiers as they will only be liable if the claim arises out of the dangerous state of the premises. They will not be liable if the claim is as a result of the dangerous activities of the claimant – <i>Tomlinson v Congleton BC</i>, <i>Keown v Coventry NHS Trust</i> • The Act provides justice as the occupier will not be liable if the trespasser is injured by an obvious danger - <i>Donoghue v Folkestone Properties</i> • The Act provides justice to occupiers as if the claimant cannot satisfy the three s1(3) conditions, then the occupier will not owe a duty of care and the claim will fail • There is no requirement that the occupier goes to great expense to make sure their premises or trespassers are safe, this includes in respect of child trespassers • The Act provides justice for occupiers as they will not be liable if they were not aware of the danger and had no reason to suspect the danger existed • The courts appear to take a reasonable/common sense approach to claims. They are prepared to take a range of factors into	8 AO3 1a	Use Levels of Response criteria Level 4 (7-8 marks) • Excellent analysis and evaluation of a wide range of legal rules and principles. • The response is wide ranging and has a well sustained focus on the question. • The key points are fully discussed and fully developed to reach a valid conclusion. <i>There is a well-developed line of reasoning which is clear and logically structured. The information presented is relevant and substantiated.</i> Level 3 (5-6 marks) • Good analysis and evaluation of a range of legal rules and principles. • The response has a mainly consistent focus on the question. • Most of the key points are well discussed and well developed to reach a valid conclusion. <i>There is a line of reasoning presented with some structure. The information presented is in the most-part relevant and supported by some evidence.</i> Level 2 (3-4 marks) • Basic analysis and evaluation of legal rules and principles. • The response is partially focused on the question. • Some of the key points are discussed and partially developed to reach a basic conclusion. <i>The information has some relevance and is presented with a basic structure. The information is supported by basic evidence.</i> Level 1 (1-2 marks) • Limited analysis of legal rules and/or principles. • The response has limited focus on the question. • Discussion of any key points is minimal. <i>The information is limited and communicated in an unstructured way. The information is supported by limited</i>

	account when addressing liability including, for example, the fact that an occupier should not have to guard against an irresponsible minority • If found liable, the occupier may claim that the claimant contributed to their own injuries or, where appropriate, that they consented to their injuries. Credit any other relevant point(s).		<i>evidence and the relationship to the evidence may not be clear.</i> Level 0 (0 marks) No response or no response worthy of credit.
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