

**A LEVEL**

**Examiners' report**

**LAW**

**H418**

For first teaching in 2020

**H418/02 Summer 2022 series**

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## Introduction

Our examiners' reports are produced to offer constructive feedback on candidates' performance in the examinations. They provide useful guidance for future candidates.

The reports will include a general commentary on candidates' performance, identify technical aspects examined in the questions and highlight good performance and where performance could be improved. A selection of candidate answers is also provided. The reports will also explain aspects which caused difficulty and why the difficulties arose, whether through a lack of knowledge, poor examination technique, or any other identifiable and explainable reason.

Where overall performance on a question/question part was considered good, with no particular areas to highlight, these questions have not been included in the report.

A full copy of the question paper and the mark scheme can be downloaded from OCR.

### Advance Information for Summer 2022 assessments

To support student revision, advance information was published about the focus of exams for Summer 2022 assessments. Advance information was available for most GCSE, AS and A Level subjects, Core Maths, FSMQ, and Cambridge Nationals Information Technologies. You can find more information on our [website](#).

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## Paper 2 series overview

This was the inaugural session and the first cohort to be assessed under the updated H418 specification as opposed to the previous H415 specification. H418 has slightly reduced content, a smaller range of evaluation and a lower mark value at 80 total marks compared with 100 previously. For further information on the detailed differences, please refer to the [OCR website](#).

This paper assessed component 2 which has two key themes – law-making and the law of torts.

The paper has three assessment foci and, candidates will need to demonstrate knowledge and understanding of the relevant law (AO1), be able to apply the law to given factual scenarios in order to construct liability (AO2) and be able to analyse and evaluate the law (AO3).

In AO1 there were clear indications of out-of-date subject knowledge and candidates not deploying AO1 selectively. AO2 was variable and depended (understandably) on how secure the AO1 was. The AO3 performance seemed reasonably confident but there was evidence of misunderstandings of fundamental ideas and concepts.

There were fewer handwriting issues than previous sessions but this may be explained by the fact that nearly 10% of the cohort were atypical scripts – many of which are typed.

Candidates who did well on this paper generally did the following:	Candidates who did less well on this paper generally did the following:
<ul style="list-style-type: none"> <li>• demonstrated up-to-date subject knowledge</li> <li>• used AO1 appropriately and selectively</li> <li>• applied the law accurately by making thoughtful links between the facts in the given scenarios and the relevant legal principles, leading to reasoned conclusions</li> <li>• showed a clear understanding of key concepts and used them to offer developed critical evaluation</li> <li>• explained the law rather than stating it</li> <li>• had a good understanding of the key issues within a topic</li> <li>• managed their timing well.</li> </ul>	<ul style="list-style-type: none"> <li>• adhered to a pre-learned template response which gained credit for relevant content but wasted time detailing irrelevant material</li> <li>• filtered defendants through every single area of law whether appropriate or not</li> <li>• struggled with fundamental misunderstandings and misconceptions when trying to make otherwise sensible arguments</li> <li>• were more likely to demonstrate merged ideas and concepts such as mixing criminal law and concepts in with tort and mixing law and doctrines from one tort to another</li> <li>• mis-managed timing.</li> </ul>

## Section A overview

Section A assesses the 'law-making' component of the specification. Although it is a mandatory section, candidates can choose either Question 1 or 2 (8 marks AO1) and either Question 3 or 4 (12 marks AO3). Responses for this series favoured the delegated legislation pair (Questions 1 and 3). A few candidates mixed and matched but most did either 1 and 3 or 2 and 4 as a pair. Candidates generally did well on the AO1 questions (Questions 1 and 2) and less well on the AO3 questions (Questions 3 and 4) as might be expected. There was some evidence of candidates having left these questions to last culminating in them being rushed and leading to possible under-performing, some candidates omitted them altogether.

### Question 1

- 1 Describe the controls over delegated legislation exercised by Parliament. [8]

Many candidates gained full marks. High marks could be achieved by explaining a range of controls. Some responses demonstrated a misunderstanding of the question and focused on the types of delegated legislation. A few candidates wrote about judicial controls as well as or instead of. The most common reason for not scoring higher marks was lack of breadth (too few controls) or only stating the controls and not explaining them. Most responses focused on the same controls – the Enabling Act, affirmative and negative resolutions (credited separately) and scrutiny committees.

### Question 2

- 2 Describe the use of the mischief rule to interpret statutes. [8]

This was a rule of statutory interpretation question. It was generally done less well than Question 1 but still elicited some good responses. To achieve high marks, candidates needed to give a definition of the rule, provide appropriate supporting case(s) and/or offer any relevant features. The definition was differentiated as basic, adequate or good based on criteria explained in the exemplar (below). The cases gained credit based on their ability to focus on the relevant 'mischief'. Features included content such as the rule's reliance on intrinsic and extrinsic aids, its similarity and differences to other rules and its historic origins.

## Exemplar 1

2	<p>The mischief rule is a form of statutory interpretation where judges look at the gap in the previous law that the law was intended to cover. Heydon's case (1584) says the questions that must be asked are - what was the common law before the Act? What was the mischief that the law intended to cover, or, the remedy which Parliament hath resolved to cure the disease of the commonwealth? By asking these, the gap in the law may be identified, and interpreted so as to cover the gap.</p>
	<p>The mischief rule was used in <i>Smith v Hughes</i>, where the statute in question made soliciting 'in a street or public place' a crime. In the case of <i>Smith v Hughes</i>, the woman was soliciting in a window. While the specific wording did not cover this, it was decided that the mischief the Act intended to cover was prostitution in public, and therefore in the case, the window could be interpreted to mean the same, thus covering the mischief of public soliciting.</p>
	<p>Another case example is the <del>Abortion</del> <i>Royal College of Nursing v DHSS</i>, where the wording of the Abortion Act 1967 specified that abortions must be done by a <sup>(qualified medical professional)</sup> doctor. As medical practices had developed, abortions were now partly done by nurses. It was held the mischief the Act intended to cover was illegal abortions, so for the purposes of the Act, nurses could be included, as this was in line with covering the gap in the previous common law.</p>

This exemplar is an example of a high scoring response.

In terms of the definition, at entry level, the response needs some sense that either the rule looks to the intention of the Act or that it is focused on the gap in the law which the Act was looking to address. At the mid-range the response should show recognition of both elements. For top marks the response should express the rule in the broader terms set out in Heydon's case.

Secondly, with the cases responses should include citation of a relevant case at the basic level and identification of the relevant mischief for high marks.

Thirdly, as well as definitions and cases valid features of the mischief rule as explained above were credited.

In this exemplar, the definition is not cited perfectly but it's a good effort at the rule as set out in Heydon's case and gains full credit for the definition and citing Heydon's case itself. The first case, *Smith v Hughes*, is again, not perfect but gains full credit for its explicit recognition of the relevant mischief 'public soliciting' in the final sentence. The second case, *RCN v DHSS* is perhaps less well explained in terms of the facts and why the meaning of a 'registered medical practitioner' was key, but, again, it has an explicit reference to the mischief and how the application of the rule operated. The candidate hasn't given a feature but doesn't need one. A high-quality definition and case plus two explained cases gives this candidate top marks.

### Question 3

3 Discuss the disadvantages of delegated legislation.

[12]

High scoring responses were uncommon but most candidates managed to get some credit. For high marks, candidates needed to demonstrate both breadth and depth with a range of critical points and evidence of the ability to make a sustained and developed argument. As usual, although the question was framed around disadvantages, advantages could be used to contextualise a disadvantage. Some candidates ignored the rubric and gave a pre-learned set of equally weighted advantages and disadvantages and lost marks on the former. The most common barriers to scoring high marks were either a straightforward lack of breadth and/or depth or missing marks due to misunderstandings.

Some of these related to misunderstanding constitutional principles such as democracy, separation of powers, supremacy of parliament and the rule of law and some related to the mechanics of delegated legislation.

#### Primary and secondary legislation

It was not uncommon to see primary and secondary legislation mixed up. This was noticeable when it came to citing examples of problems with secondary legislation but the candidate was quoting examples of primary legislation.

## Question 4

4 Discuss the advantages of the mischief rule.

[12]

High scoring responses were rare but most candidates managed to get some credit. For high marks, candidates needed to demonstrate both breadth and depth with a range of critical points and evidence of the ability to make a sustained and developed argument. As usual, although the question was framed around advantages, disadvantages could be used to contextualise an advantage.

The most common reason for not scoring high marks was lack of breadth and/or depth but there were also some common misunderstandings. The most common example was to confuse the rule with another rule – usually the golden rule but sometimes the purposive approach. Critique also revolved around the wrong cases sometimes (again, often golden rule or purposive approach cases). Better responses had some good analysis of issues such as judicial law-making and the narrow but critical distinction between the mischief rule and the purposive approach.



## Section B overview

Part 1 was overwhelmingly the most popular option. Candidates engaged with all the questions at a broadly similar level with the exception of Question 9 which was generally poorly answered.

General advice – all problem questions:

- Relevance – only the relevant law (AO1) needs to be covered and explained. There is no credit for redundant AO1 content. Candidates only need to offer AO1 which is relevant to the particular question rather than setting out in 'essay-style' the whole of the law on a given topic.
- Stating and explaining – candidates need to 'explain' points of law rather than just stating them.
- Application skills – the technique which gains the highest credit is where the candidate makes links between relevant legal principles and the facts given in the scenario in order to draw reasoned conclusions about liability. Only the relevant application needs to be covered.
- Cases – it is rarely necessary to recite the facts of cases. The main exception would be a situation where there is a parallel between the facts of the case and the scenario and, for that reason, the same legal principle might apply. Candidates need to be aware of the most up-to-date law.
- Criminal law – some candidates had overlap issues with criminal law. This often came up in the form of inappropriate cases and associated principles such as *R v White & Carter* used for the 'but for' test, *R v Walkington* to establish becoming a trespasser for OLA and sections of the Offences Against the Person Act and *R v Chan Fook* used for the 'criminal' assaults in Question 9.

## Question 5

- 5 Advise Beth whether she will be successful in suing Amir in negligence and, if so, which remedies she would be most likely to be awarded. [20]

Most candidates did well although there were two common issues.

The majority of candidates, approached the question as a negligence essay with some application attached. There was irrelevant AO1 content which was not creditworthy. Some of the most common unnecessary material included: introductions with over-arching definitions of negligence, detailed accounts of *Donoghue v Stevenson* and the neighbour principle, setting out the standard of care for children and professionals (both irrelevant here – yet we had some accounts of *Mullins*, *Orchard*, *Bolam* and *Montgomery* that took up a side of A4), all the risk factors that may alter the standard of care, multiple and successive causes, intervening acts, *res ipsa loquitur*, the thin/egg-shell skull rule, contributory negligence and mitigation of loss – some of which is not on the specification. There is no negative marking for including irrelevant law, the main issue is the time which the candidate wastes in writing about it.

Many candidates applied the *Caparo* three-part test as the standard way to establish a duty of care when this is no longer the case. Candidates should be using the *Robinson* approach (Exemplar 2 demonstrates how this should be done). Outside the two issues above, this was an accessible question where most candidates did reasonably well. To gain high marks, candidates needed to explain the law (AO1) and apply it (AO2) in the four key areas of the question – duty of care, breach of duty, causation of damage and remedies. Both the AO1 and the AO2 were weighted and distributed equally across the four areas.

### Duty of care

The AO1 required reference to *Robinson* and an explanation of the principle. The AO2 required a legal principle, a link to the scenario and a conclusion that a duty was owed. Candidates who correctly adopted the *Robinson* approach generally cited *Nettleship v Weston* as their authority, some used the Road Traffic Act and some cited the Highway Code.

### Breach

The AO1 required some reference to falling below an objective standard and/or the *Nettleship* context that there is no variation in the standard for a learner/newly qualified driver such that the standard is that of the reasonably competent and experienced driver. The question was deliberately written to be accessible and there were no facts to suggest the standard of care should be altered for children or professionals or any of the so-called risk factors. The AO2 followed the same pattern – a legal principle, a link to the facts and a conclusion that there was a breach.

### Causation

The AO1 required some basic explanation of factual and legal causation or a good explanation of one - although most candidates covered both. The AO2 required application of either or both as above. This area was generally done competently although there was a lot of extra but irrelevant content (most commonly intervening acts).

Remedies

This was the most commonly missed area of the question. The AO1 was frequently absent altogether although some attempt at the application was reasonably common. Where the AO1 was included it was often done very well with good understanding and detail. Where the AO2 was offered without the support of any AO1, it was usually anecdotal in nature. The AO1 required some reference to either special and/or general damages or pecuniary and/or non-pecuniary losses. Discussion of individual heads of damage such as loss of amenity would also be creditworthy as were references to lump sums and structured settlements. The AO2 required application of any of the above AO1 linking law to advice.

Misconception



The standard approach to establishing a duty of care under the so-called three-stage Caparo test no longer applies. See Lord Reed's judgement in the UK Supreme Court's decision on Robinson v Chief Constable of West Yorkshire Police 2018 UKSC 4

Exemplar 2

		Firstly, it must be shown that there is a duty of care between the claimant and <del>the</del> defendant. Analogy can be drawn from existing precedent or statute in order to prove that a duty exists (Robinson v Chief Constable of West Yorkshire). Here, it is clear that Amir owes a duty of care to Beth as a duty between a driver and pedestrian has been established by the Road Traffic Act.
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The correct approach to establishing a duty of care is based on the Robinson approach. Here is an extract in which the candidate has gained full marks (both AO1 and AO2) for duty of care in one short paragraph. The AO1 is not perfect as it should simply refer to applying an existing precedent rather than an 'analogy being drawn'. However, the candidate clearly understands the principle that you apply an existing precedent or statute and has correctly attributed that method of establishing a duty of care to the case of Robinson. The AO2 is done very well. It has (1) the legal basis of the application (the Road Traffic Act), (2) a link to the facts '... between Amir (a driver) and Beth (a pedestrian) ...' and (3) draws the correct conclusion that Amir owes Beth a duty of care.

## Question 6

- 6 Advise **both** Eve and Layla whether they would be likely to succeed in a claim against Jack under the Occupiers' Liability Act 1957. [20]

Probably the most well-answered question on the paper. Almost all candidates were able to access some aspect of the question and the most successful responses showed a sophisticated appreciation of Occupier's Liability. For high marks there were three key areas, firstly the law (AO1) as it applies (AO2) to Eve, secondly, the law (AO1) as it applies (AO2) to Layla, and, thirdly, whether Jack might shift liability to Kareem (AO1 & AO2).

There was less irrelevant content than Question 5 but the most common areas were children and allurements and warning signs despite none of them having any relevance to the scenario. The main barriers to scoring high marks were generally lack of breadth or depth or, among less successful responses, speculation over irrelevant points such as Eve's claim depending on who provided the cleaning materials. The more successful responses were able to offer incisive application of s.2(3)(b) and the three precise elements of s.2(4)(b).

## Question 7\*

- 7\* Discuss the extent to which the Occupiers' Liability Act 1984 is fair on occupiers. [20]

Like Questions 5 and 6, the essay question was generally well-answered. However, one reasonably widespread issue which undermined performance for many candidates was what appeared to be a deliberate lack of AO1. The issue is that a large proportion of candidates are treating the essay as a purely discursive task which does not require any AO1.

To score high marks the AO1 needed to show a broad understanding of the key elements of the 1984 Act. In particular, the scope and nature of the duty under ss.1(3) & (4) as well as the defences and limitations on liability. The AO3 required analysis that was focused on the theme of question (fairness on occupiers) and needed to demonstrate both breadth and depth with a range of critical points and evidence of the ability to offer sustained and developed arguments. Like advantages and disadvantages, unfairness could be balanced against fairness to contextualise.

Less successful responses typically provided pre-learned generic evaluation of Occupier's Liability without any reference to the issue of fairness. It seemed that a number of candidates re-purposed the essay title to their own version of 'compare and contrast the 57 and 84 Acts' to better suit the response they had learned. There was, more generally, occasional overlap in understanding between the two Acts especially in the area of children and allurements. However, the more successful responses provided articulate and sophisticated evaluation which showed very good understanding.

## Question 8

- 8 Advise Leo whether he would be successful in suing Wizzaround in private nuisance and, if so, the likely remedies he would be awarded. [20]

Generally answered well and, like Question 6, most candidates were able to access the question at some level. Understanding of the law was reasonably secure although, like Question 5, there were a lot of 'shot-gun' responses which covered irrelevant issues such as adopting a nuisance, sensitivity, malice, and statutory authority.

To score high marks, for both AO1 and AO2, candidates needed to establish an actionable nuisance and the parties involved, determine the factors of reasonableness that would make it unlawful and consider any relevant defences and remedies. Less successful responses lost marks through lack of breadth and/or depth and, in particular, AO1 marks were lost due to issues such as location and duration being baldly stated rather than explained and AO2 marks were lost where application lacked confidence, noticeably when considering locality. There was also some confusion with *Rylands v Fletcher*. However, more successful responses clearly understood the law well and applied it accurately in most areas especially planning permission and remedies which were well understood and thoughtfully applied.

## Question 9

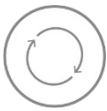
- 9 Advise Tom and Zac whether they would be successful in suing Klear Path School as being vicariously liable for the actions of the monks. [20]

This question proved challenging for most candidates. The key issue seems to be that very few candidates were aware of any other approach to vicarious liability other than the traditional Salmond tests. This would be fine for a typical case involving an unintentional tort where these tests would prove conclusive. However, when dealing with non-traditional employment situations where the traditional tests fall short, the analogous (or akin) to employment test is required and, when dealing with intentional torts which would not be considered to have taken place 'in the course of employment', the close connection test is required.

In this question candidates had specific information which should have pointed them in the right direction. The monks did not directly work for the school and the monastery no longer exists. On this basis, candidates should have moved directly to the akin to employment test for the first part of the test. The fact that the monks had committed intentional torts should also have directed candidates directly to the close connection test.

Most candidates only approached the question within the Salmond test framework and received limited credit for both law and application on the basis that this might establish that the monks were not employees or acting in the course of employment before moving on to consider the akin to employment and close connection tests. High marks required explanation and application of the akin to employment and close connection tests. Some candidates did this to a very high standard drawing on all or some of the five criteria (or 'incidents') from the *Catholic Brothers* case for the akin to employment test and making comparisons to analogous assault cases for the close connection test.

**Assessment for learning**



Going forwards, the Barclays and Morrisons cases should be the starting point for vicarious liability. Firstly, the overall test for vicarious liability is expressed in its modern form in Lady Hale's judgement in the Barclays case. Secondly, the approach to testing employment status is also set out in Barclays. Thirdly, the general test for a close connection is in Morrisons.

**Exemplar 3**

		As we have establish the monks <del>was</del> were
		employees and a tort has been
		committed we will need to establish
		if the tort committed happened in the
		course of employment. To do this we
		must establish if this is an intentional
		or non-intentional tort. As the monks
		inflicted harm towards Tom and Zac
		this is an intentional tort. Therefore,
		we will use the closely connected
		test: is the tortfeasor's (monks) tort

This short extract shows the kind of clarity of reasoning which should have been used by candidates as the rationale to use the close connection test. It may be a minor point but it was the missing piece of logic in many scripts on the second part of the test.

**Question 10\***

10\* Discuss the extent to which the Occupiers' Liability Act 1984 is fair on occupiers.

**[20]**

See Question 7\* commentary.

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