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OCR
Oxford Cambridge and RSA

A LEVEL

Examiners' report

LAW

H418

For first teaching in 2020

H418/02 Summer 2024 series

Version 1

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Contents

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.

Paper 2 series overview

This paper is the second of three compulsory terminal papers taken by candidates after two years studying OCR GCE A Level Law. The paper assesses two key themes – law making and the law of torts. Further details can be found on the OCR website including the specification, illumination in a teacher's guide, specimen assessment materials, past papers and mark schemes and regularly updated training materials. This series was another buoyant session with very similar candidate entries and outcomes to 2023. As is always the case, some questions performed slightly lower than last year and some slightly higher but across the paper as a whole, performances were strikingly similar demonstrating a secure grasp of the specification content and its assessment.

The paper has three assessment foci and, in order to do well, 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). The AO1 subject knowledge was secure but many candidates are still reproducing exhaustive accounts of AO1 which includes a lot of irrelevant material. AO2 was variable and depended (understandably) on how secure and relevant the AO1 was. The AO3 performance was confident in Section A but less focused in the essay question in Section B. The overall performance of the cohort was very positive and, as you would expect, there were areas of strength and good practice as well as areas needing improvement, some of which are highlighted below.

OCR support

Please refer to the OCR website and the Teach Cambridge websites to locate the key up-to-date resources mentioned above.

Candidates who did well on this paper generally:	Candidates who did less well on this paper generally:
• read the question carefully and answered in a specific and targeted manner	• did not read the question and wasted time covering irrelevant content and issues
• produced selective AO1 including only relevant and up-to-date AO1	• reproduced pre-learned, exhaustive AO1 which included irrelevant content
• made good use of the scaffolding in the question scenarios to link with relevant legal principles and draw an appropriate conclusion	• offered a narrative commentary on the scenario which was often rooted in anecdote or common sense rather than legal application
• showed the ability to think on their feet and produce thoughtful evaluation based around secure subject knowledge and the demands of an unseen question	• demonstrated a rigid approach to evaluation which relied overwhelmingly on pre-learned generic material which they were unable to adapt to an unseen question
• cited relevant and accurate authorities consistent with those set out in the planner	• cited obscure and inappropriate authorities which sometimes turned out to be irrelevant
• demonstrated a clear understanding of the distinction between civil and criminal law	• showed limited capacity to distinguish between civil and criminal law
• managed their time well and answered all questions in a proportionately balanced way	• managed their time poorly and answered questions in a negatively disproportionate way

Assessment for learning

Teachers should caution candidates about the danger of using resources and authorities they find on the internet. As the range of sites and social media platforms grow, resources are increasingly written and shared which have dubious provenance or, in some cases, are plain wrong. The planner provided by OCR includes up-to-date and relevant authorities and teachers should advise candidates of the dangers of relying on more informal sources.

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).

In the AO1 section (Questions 1 and 2), approximately two-thirds of candidates chose the extrinsic aids question with around a third attempting the precedent question. Despite its apparent popularity the extrinsic aids question was one of the lowest performing questions on the paper whereas the precedent question performed very well. In the AO3 section (Questions 3 and 4) there was much more balance with an almost 50:50 split and both questions performed almost identically. As in previous sessions, there was a lot of evidence of candidates having left these questions until last and consequently rushing them and under-performing. Some candidates omitted one or even both questions.

Question 1

1 Describe the extrinsic aids which can be used by judges when interpreting statutes. **[8]**

The question was looking for aids to be 'described' so there was limited credit for baldly stated aids. The question also refers to aids (plural) so higher-level credit required more than one aid. More successful responses tended to focus on dictionaries, Hansard and Law Commission Reports with good explanations of how they would prove useful, case examples (where appropriate) and relevant features. Less successful responses were generally due to lack of breadth or explanations. Some candidates misunderstood the question and described 'rules' of interpretation or intrinsic aids.

Question 2

2 Explain original and persuasive precedents using cases to illustrate each of them. **[8]**

The question was looking for explanations of **both** original **and** persuasive precedents with cases to illustrate **both**. Given the range of sources of persuasive precedents it was anticipated that responses would be weighted in favour of persuasive precedent but it would be an incomplete response not to address both limbs of the question. More successful responses gave accurate explanations of original precedent and more than one type of persuasive precedent with appropriate cases to illustrate each. Less successful responses gave bald or inaccurate definitions and commonly used inappropriate cases.

Misconception

A significant minority of candidates seem to think that any case which leads to a change in the law is an original precedent. This is not the case. As a result, many of these candidates cited inappropriate cases as examples. There are many situations where a settled legal principle is overruled or reversed and this leads to a change in the law but this is not an original precedent. An original precedent arises where there is no existing precedent on the point of law concerned, often because the facts have not arisen before so the legal point has never been decided before. If in doubt, teachers would be wise to stick to the cases provided in the planner or mark schemes.

Exemplar 1

Q2		~~Origg~~ Original precedent is precedent which is set when a case has never been seen before. The facts of the case are materially different such that there is no similar case in which precendent has already been established. This means the judge has to use reasoning by analogy which is where the look at cases with similar facts in order to come to a decision. This is seen in Hunter v Canary Wharf which set precedent that tv reception isn't protected under nuisance. The decision the judge ~~makes~~ is legally binding for all courts on the same level or below.

This is a partial extract from a candidate's response to Question 2. It features an explanation of original precedent. It has been included as it is a well-crafted response which also addresses the issue in the misconception box above. The candidate has given a good 'explained' definition which shows an understanding that an original precedent is set in a case involving novel circumstances for which there is no existing precedent and this obliges the judge to set a new legal principle. The candidate has given a relevant example featuring the practice of 'reasoning by analogy' and finishes with the point that an original precedent becomes binding once set. The candidate goes on to cover persuasive precedent equally well and scores full marks but this extract has more than enough marks to gain full credit for the original precedent element (an explained definition, a relevant case and two features).

Question 3

3 Discuss the advantages of the influences on law-making. **[12]**

Generally, well answered with some interesting and varied examples. There was a tendency in responses at all levels to include unnecessary AO1 describing influences rather than evaluating their advantages. More successful responses gave a range of influences each with its own unique advantage(s) and built well-developed points often linked to themes of democratic participation and bringing about legislative responses to marginal causes. Less successful responses tended to focus too much on the AO1 and often relied on implied or bald and undeveloped advantages. Some candidates misunderstood the question and discussed the advantages of the law making process itself.

Question 4

4 Discuss the advantages of the literal rule of statutory interpretation. **[12]**

Another well answered question with some confident articulate responses. Common themes included links to key constitutional doctrines as well as pragmatic advantages based around certainty and predictability. More successful responses set out a range of advantages often developed by being linked to relevant case illustrations or counter arguments such as harsh, absurd and unjust outcomes. Less successful responses tended to lack breadth, development or both. At this level there was also evidence of some confusion about the distinction between doctrines such as separation of powers and supremacy of parliament and how judges fit into them. There was also some repetition or overlapping with concepts such as consistency and predictability.

Misconception

Questions 3 and 4 do not require a conclusion and although they would be checked for any additional critical points, the conclusions themselves are not creditworthy and should be discouraged.

Assessment for learning

Please advise candidates to keep a sense of proportion on Questions 3 and 4. Four well-developed points would gain Level 4 credit. Some candidates' responses ran to several pages with an excessive range of critical points. Such responses gain no additional credit and often undermine timings and performance in other parts of the paper.

Section B overview

Two-thirds of candidates opted for Part I and a third for Part II. In Part I, Questions 5 and 6 both performed very similarly. In Part II, Question 8 performed less well but Question 9 performed very well. On balance, candidates had highly similar outcomes whether they chose Part I or Part II. The narrower focus of Question 6 (second part of vicarious liability only) and Question 8 (defences to nuisance only) was balanced by having to apply three mini scenarios each. This had little effect on the AO1 but the AO2 on Question 6 performed well where the AO2 on Question 8 performed poorly but was mitigated by the strong performance of Question 9.

Assessment for learning

There are three issues in this section which have been noted before but seem to be persisting. All three involve the content or scope of the specification. The first issue is that some candidates appear to have been taught content which is not on the specification. The second issue is that some candidates are being taught out-of-date law. The third issue is that some candidates are being taught to apply areas of the specification from one area to another area where it is not required. The key here is the teacher guide. If it's not in the teacher guide, it won't be assessed and topics should not be moved from one part of the specification to another.

Question 5

5 Advise Boswin Farm Holidays of their potential liability for the injuries to both Amari **and** Ben under the Occupiers' Liability Act 1957. Do **not** discuss any defences or remedies. **[20]**

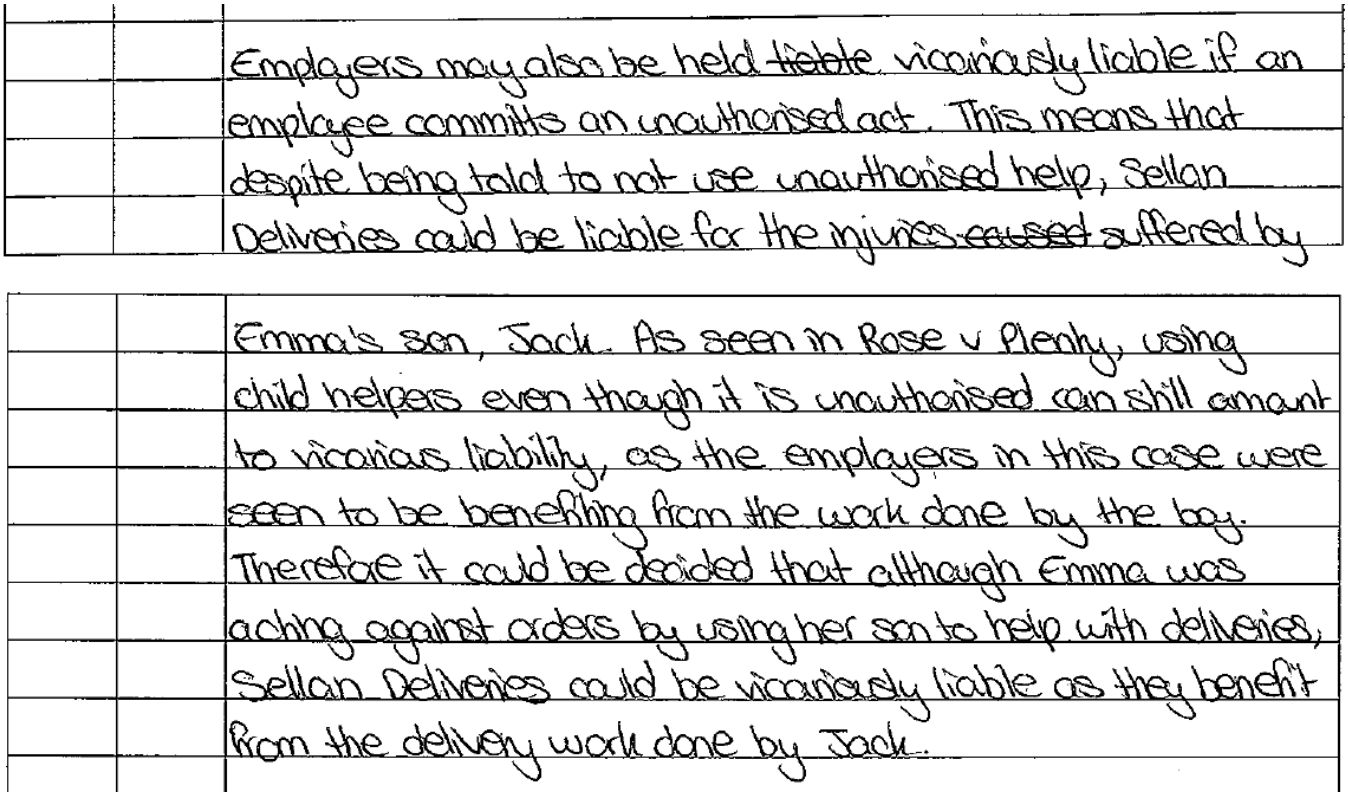
This question required candidates to recognise the status of Amari and Ben as lawful visitors who were owed a higher duty of care because of their status as children. In respect of Amari, the core issue was based on recognising the potential allurement issue and that the effect of this would be to oblige the occupier to mitigate any associated reasonably foreseeable risks (Jolley v Sutton). The mark scheme also allowed for alternative reasoning such as Amari's actions not being foreseeable. In respect of Ben, the core issue was based on recognising the issue of the reasonable expectation of parental supervision (Phipps v Rochester or Bourne v Marsden) which would alleviate the occupiers of their duty. More successful responses were impressively accurate and set out the relevant AO1 showing a clear understanding of the law. There were many responses which went into too much detail on irrelevant content such as skilled visitors and independent contractors or speculated about unsupported issues such as non-existent warnings. This wasted valuable time. The AO2 application was sometimes concise and to the point but sometimes formed part of a wider range of application which covered unnecessary issues such as those mentioned above. Less successful responses either missed fundamental issues (such as failing to deal with Amari and Ben as children or missing/misunderstanding the Jolley/Phipps points), gave anecdotal 'common sense' application based on little or no law or gave the defendants unsolicited advice on what they should have done (usually involving warning signs). Overall, the question worked well and elicited some reassuringly competent responses.

Question 6

6 Advise Sellan Deliveries whether they will be vicariously liable for the negligence of Darcie, Emma **and** Heidi. Do **not** discuss employment status, defences or remedies. **[20]**

This question also performed well and produced many reassuringly accurate responses, despite this area of law having been subject to much recent change. Unfortunately, many responses at all levels did not read the question properly and covered employment status which meant they wasted a lot of time, but thankfully this was not at the expense of covering the required content. The question required candidates to explain the basis of vicarious liability; set out the two-part test which determines vicarious liability; and explain the relevant principles relating to the second limb of the test when considering claims of negligence including, importantly, the rule relating to being 'on a frolic'. Candidates were then required to apply these principles to the three tortfeasors to determine whether Sellan Deliveries would be liable. The majority of candidates at all levels covered the appropriate AO1 to varying degrees of detail and understood what AO2 was required even if they mistakenly went through employment status as well. More successful candidates recognised the similarity of each scenario to leading cases. This enabled them to make links between the scaffolding in the scenarios and the relevant legal principles in order to draw appropriate conclusions for each tortfeasor. Less successful responses varied. Some made correct assertions that a tortfeasor was or was not acting in the course of employment but based on anecdotal logic rather than established legal principle. Some reasoned purely on their own common sense and some ignored the question which stated that we were dealing with liability for 'negligence' and created non-existent 'crimes'. A small minority ran each tortfeasor through every aspect of vicarious liability they could think of (including establishing each tort – duty, breach and causation) wasting a great deal of time and effort. However, on the whole, the candidates did well and it was reassuring to see such clarity.

Exemplar 2


Employers may also be held ~~liable~~ vicariously liable if an employee commits an unauthorised act. This means that despite being told to not use unauthorised help, Sellan Deliveries could be liable for the injuries ~~caused~~ suffered by Emma's son, Jack. As seen in Rose v Plenty, using child helpers even though it is unauthorised can still amount to vicarious liability, as the employers in this case were seen to be benefiting from the work done by the boy. Therefore it could be decided that although Emma was acting against orders by using her son to help with deliveries, Sellan Deliveries could be vicariously liable as they benefit from the delivery work done by Jack.

This exemplar has been included to illustrate how to approach the skill of application. It would be better if the candidate used less equivocal language (i.e. 'would' rather than 'could') but it doesn't detract too much from what is still a well-worked piece of application. The examiners are looking for a correct outcome, a reference to the relevant legal principle(s) and a link to the scaffolding in the scenario. This response is a measured and thoughtful answer demonstrating all three. Outcome: Sellan Deliveries would (or 'could') be liable; legal principle: there can be liability for unauthorised acts, in particular, where they benefit the employer (Rose v Plenty); link to scenario: Emma is using Jack and Sellan are benefitting from his work.

Question 7* and Question 10*

7* Discuss the extent to which the rules on factual and legal causation in negligence are fair. **[20]**

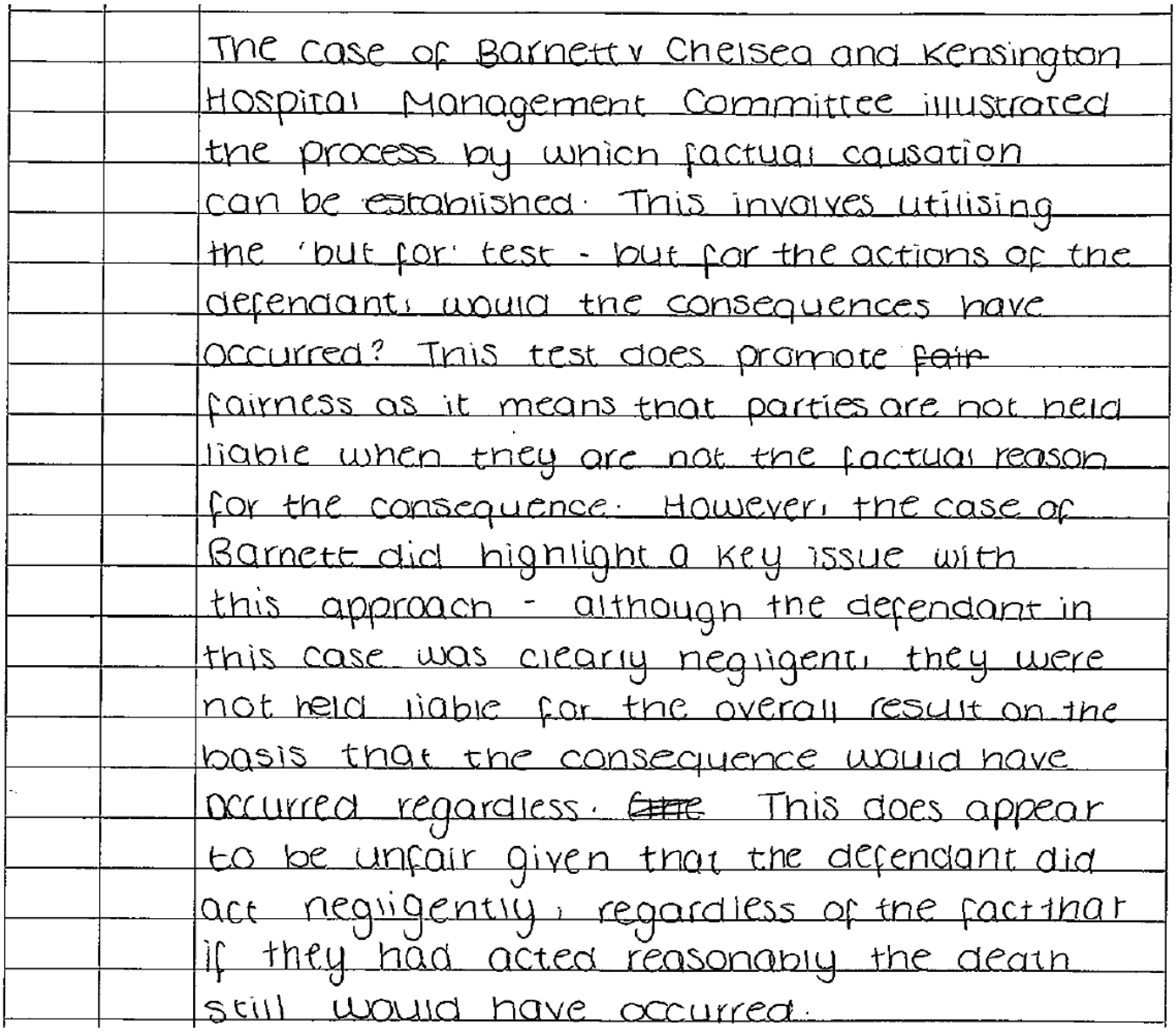
With a very similar performance to Questions 1 and 8, this question was at the lower end of the performance range. The question required candidates to explain factual and legal causation. Specifically, the so-called 'but for' test, *novus actus interveniens*, remoteness and the eggshell skull principle. Candidates then needed to evaluate the fairness of these rules.

More successful candidates were clearly well-prepared for such a question and produced confident, articulate responses showing good understanding. Their AO1 responses explained all four key areas with appropriate supporting authorities. The best responses explained the three types of intervening acts with case illustrations and expanded on remoteness by explaining that only the type of harm, but not its extent (or the manner of its infliction), need be foreseen. Their AO3 ranged from thoughtful evaluation of fairness based on analysis of the leading cases (see exemplar) to more abstract, discursive and principled evaluation.

Less successful responses varied: some candidates were clearly prepared for a general 'catch-all' essay on negligence and were able to partially adapt; some candidates had a prepared general 'catch-all' essay on negligence and were unable to adapt it, but wrote it anyway; some candidates produced a response based entirely on criminal causation; and lastly, a significant minority seemed unprepared for any kind of negligence essay and had nothing whatsoever to offer or adapt. It is surprising that this last part of the cohort had nothing whatsoever to offer on what is one-third of such an important topic. By simply explaining the four areas of causation which should be a standard part of revision on negligence, candidates should have been able to access up to 8 AO1 marks and yet a considerable number of candidates scored 0 to 4 marks. The AO3 evaluation followed a similar pattern but there were some particular non-creditworthy practices worth noting:

- evaluation based on the cases and principles of criminal causation;
- generic evaluation of negligence in general (especially breach) with an awkward and irrelevant link to factual and legal causation;
- evaluation which makes a cursory reference to 'rules of factual and legal causation' with no context, explanation or specific detail (i.e. which particular rule) to flex into irrelevant generic evaluation;
- evaluation of constitutional principles such as judicial law making with no relevant link to the question;
- evaluation which doesn't answer the question (i.e. doesn't look at the rules or their fairness);
- evaluation of general procedural civil law matters with no link or an inappropriate link to the question and
- fundamental misunderstandings of the topic (e.g. that the purpose of causation is to apportion fault).

Exemplar 3


The case of Barnett v Chelsea and Kensington Hospital Management Committee illustrated the process by which factual causation can be established. This involves utilising the 'but for' test - but for the actions of the defendant, would the consequences have occurred? This test does promote ~~fair~~ fairness as it means that parties are not held liable when they are not the factual reason for the consequence. However, the case of Barnett did highlight a key issue with this approach - although the defendant in this case was clearly negligent, they were not held liable for the overall result on the basis that the consequence would have occurred regardless. ~~Eeee~~ This does appear to be unfair given that the defendant did act negligently, regardless of the fact that if they had acted reasonably the death still would have occurred.

This exemplar and exemplar 4 below are two separate paragraphs taken from the same candidate's response. The candidate scored high Level 4 marks for their overall response and these two paragraphs represent half those marks in two well executed paragraphs. They have been included in order to demonstrate how effective and accessible a case-based approach to evaluation can be. In this extract the candidate sets out the AO1 of factual causation with a simple but articulate explanation and a relevant supporting civil case. This is followed with a neat well-developed point which explains how the rule promotes fairness, then counters this with a practical issue that undermines the approach, and then offers a justified conclusion addressing the spin of the question.

Exemplar 4

The thin skull rule was introduced to tort in the case of Smith v Leech Brain, and ruled that the defendant must take their claimant as they find them. This means that if a claimant has any characteristics that may leave them more vulnerable to harm than any other person, this will not restrict the defendant's liability for the level of harm sustained by the victim. Although some may argue that this is unfair on the defendant as it holds them liable for something/a level of harm they likely had no reason to anticipate or expect, this does effectively promote justice by not blaming the ~~cl~~ claimant for something outside of their control that rendered them at greater risk of harm. This also arguably encourages defendants to take greater care generally, in order to minimise the risk of this happening.

In this paragraph the candidate sets out the AO1 of the eggshell or thin skull rule with a relevant supporting civil case. Rather than simply stating 'you must take your victim as you find them', the candidate has explained in accurate but accessible terms, what this means. This is followed with a nicely worked well-developed point which starts by addressing the question with the assertion that the rule is unfair because it leads to liability for unforeseen harm but counters this point by explaining that the approach promotes justice by not disadvantaging the claimant for something outside their control. The candidate then finishes with the arguable benefit that the rule encourages defendants to take greater care thus addressing a key aim of tort law – to act as a deterrent and promote social responsibility.

Question 8

8 Advise New Railz, Forest Splatz and RMAC whether they have any defences available to them in respect of the private nuisance claims which have been established against them. **[20]**

This problem question performed least well in this section. It was not so much the AO1 but the AO2 which seemed to under-perform. This is because some candidates (in all section B questions) do not set out their AO1 discretely, but express it through their AO2, an under-performance on AO2 can therefore undermine overall performance more dramatically. The question required candidates to identify two relevant defences (statutory authority and prescription) and two non-defences (coming to the nuisance and social utility) and apply them accurately to the three scenarios. More successful responses accurately identified at least three of the four relevant points and supported them with appropriate cases with social utility being the most commonly missed point. Application was accurate and appropriate on at least the first two defendants with many candidates recognising the relevance of one of the possible arguments in the third scenario. Less successful responses either intentionally missed the AO1 or lacked breadth or detail. Some candidates included inappropriate AO1 on irrelevant defences such as planning permission, consent or contributory negligence, none of which were supported by the scaffolding. However, the main area of under-performance was the AO2. Generally, for three common reasons: applying planning permission to the first scenario instead of statutory authority; not applying prescription correctly (often despite describing it accurately for AO1) as there was no 'actionable nuisance' for 20 years, and generally not seeing the similarity between the third scenario and Miller v Jackson as a trigger to consider either coming to the nuisance and/or social utility. To add to this, many candidates who did pick up on the potential arguments in the third scenario did not seem to be aware that these are not available defences.

Question 9

9 Advise Farmer Tom whether he would be successful in suing Farmer Leo in Rylands v Fletcher for both the ruined strawberries and his headaches. Do **not** consider any defences or remedies. **[20]**

This was the highest performing question on the entire paper. Candidates seem confident and secure in their knowledge and application with many achieving full marks. For the AO1, the question required candidates to identify the key elements of Rylands v Fletcher and, for full marks, to also identify the corollary issue that claimants cannot recover for personal injury in Rylands. The AO2 mirrored the AO1 and required candidates to make relevant links to the scaffolding as supporting evidence that the elements of Rylands were present. More successful responses had clear, accurate and thorough understanding and applied it confidently making thoughtful use of the source material. Most of them also picked up on the personal injury point although many only picked it up in the AO2 not AO1. Less successful responses were still of a reasonable standard, but commonly had a missing element or confused an element or merged elements together inappropriately. Areas of misunderstanding included 'things naturally occurring on land' (confused with non-natural use of land) and 'reasonable foreseeability of harm' (best dealt with alongside the actual escape not the risk of danger if there should be an escape). Less successful responses were also more likely to miss the personal injury issue. However, on the whole a successful and well answered question all round.

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