

GCE

Law

H418/02: Law making and the law of tort

A Level

Mark Scheme for June 2024

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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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SUBJECT–SPECIFIC MARKING INSTRUCTIONS

Introduction

Your first task as an Examiner is to become thoroughly familiar with the material on which the examination depends. You should ensure that you have copies of these materials:

- the specification, especially the assessment objectives
- the question paper and its rubrics
- the mark scheme.

You should ensure also that you are familiar with the administrative procedures related to the marking process. These are set out in the OCR booklet **Instructions for Examiners**. If you are examining for the first time, please read carefully **Appendix 5 Introduction to Script Marking: Notes for New Examiners**. Please ask for help or guidance whenever you need it. Your first point of contact is your Team Leader.

Information and instructions for examiners

The co-ordination scripts provide you with *examples* of the standard of each band. The marks awarded for these scripts will have been agreed by the Team Leaders and will be discussed fully at the Examiners' Co-ordination Meeting.

The specific task-related indicative content for each question will help you to understand how the band descriptors may be applied. However, this indicative content **does not** constitute the mark scheme: it is material that candidates **might** use, grouped according to each assessment objective tested by the question. It is hoped that candidates will respond to questions in a variety of ways. Rigid demands for 'what must be a good answer' would lead to a distorted assessment. Candidates' answers must be relevant to the question. Beware of prepared answers that do not show the candidate's thought and which have not been adapted to the thrust of the question. Beware also of answers where candidates attempt to reproduce interpretations and concepts that they have been taught but have only partially understood.

Using the Mark Scheme

Please study this Mark Scheme carefully. The Mark Scheme is an integral part of the process that begins with the setting of the question paper and ends with the awarding of grades. Question papers and Mark Schemes are developed in association with each other so that issues of differentiation and positive achievement can be addressed from the very start.

This Mark Scheme is a working document; it is not exhaustive; it does not provide 'correct' answers. The Mark Scheme can only provide 'best guesses' about how the question will work out, and it is subject to revision after we have looked at a wide range of scripts.

The Examiners' Standardisation Meeting will ensure that the Mark Scheme covers the range of candidates' responses to the questions, and that all Examiners understand and apply the Mark Scheme in the same way. The Mark Scheme will be discussed and amended at the meeting, and administrative procedures will be confirmed. Co-ordination scripts will be issued at the meeting to exemplify aspects of candidates' responses and achievements; the co-ordination scripts then become part of this Mark Scheme.

Before the Standardisation Meeting, you should read and mark in pencil a number of scripts, in order to gain an impression of the range of responses and achievement that may be expected.

Please read carefully all the scripts in your allocation and make every effort to look positively for achievement throughout the ability range. Always be prepared to use the full range of marks.

Assessment Objectives

Three Assessment Objectives are being assessed across the questions: **AO1**: Demonstrate knowledge and understanding of the English legal system and legal rules and principles, **AO2**: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology, **AO3**: Analyse and evaluate legal rules, principles, concepts and issues.

For **AO2**, there are two elements to the assessment objective:

- Apply legal rules and principles to given scenarios
- Present a legal argument using appropriate legal terminology

These two elements should have equal weighting and be awarded jointly according to the guidance given in the level descriptors and indicative content. For example, to achieve level 4, an answer should include excellent application of legal rules and principles and excellent presentation of legal argument. Further guidance will be given in the standardisation meeting when there is an uneven performance across the elements.

Levels of Response

Questions in this paper are marked using a levels of response grid. When using this grid, examiners must use a **best-fit** approach. Where there are both strengths and weaknesses in a particular response, particularly imbalanced responses in terms of the assessment objectives, examiners must carefully consider which level is the best fit for the performance. Note that candidates can achieve different levels in each assessment objective, for example a Level 3 for AO1, and a Level 2 for AO2.

To use these grids:

Determine the level: start at the highest level and work down until you reach the level that matches the answer.

Determine the mark within the level: consider the following:

When there are 2 marks per level

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

When there are 3 marks per level

Descriptor	Award mark
On the borderline of this level and the one below	At bottom of level
Meets the criteria but with some slight inconsistency	Middle of level
Consistently meets the criteria for this level	At top of level

ASSESSMENT OBJECTIVES: BREAKDOWN BY QUESTION**Section A**

Questions 1–2

Assessment Objectives:	AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 8 marks.
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Questions 3–4

Assessment Objectives:	AO3 1b: Analyse and evaluate legal concepts and issues. 12 marks.
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Section B

Questions 5, 6, 8 and 9

Assessment Objectives:	AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 8 marks. AO2 1a/1b: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. 12 marks.
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Questions 7* and 10*

Assessment Objectives:	AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 8 marks. AO3 1a: Analyse and evaluate legal rules and principles. 12 marks.
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Questions that have an asterisk (*) assess the quality of a candidate's extended response. Levels descriptors are identified in the AO3 column in italics.

Section A

	Answer	Marks	Guidance
1	<p><i>Describe the extrinsic aids which can be used by judges when interpreting statutes.</i></p> <p>Answers may include:</p> <p>Explain relevant examples of extrinsic aids such as:</p> <ul style="list-style-type: none"> • Dictionaries – especially relating to the relevant time e.g. DPP v Cheeseman • Hansard – a <i>verbatim</i> record of what is said in parliament; its use must follow the rules set out in Pepper v Hart • Law Commission Reports which led to the passing of an Act of Parliament can give judges an indication of the intention behind an Act • Reports of Royal Commissions or other law reform bodies – Black Clawson case • Relevant case law – judges can consider how the same or similar words have been interpreted in relevant cases • Previous Acts of Parliament on the same or similar area e.g. the Larceny Act 1916 when considering the Theft Act 1968 • The work of leading academics – e.g. in R v Collins the judge refers to Professor Smith's 'Law of Theft' when interpreting the meaning of 'entry as a trespasser' • The Interpretation Act 1978 – provides guidance on the construction of key common words, phrases and other terms • Explanatory notes – official published documents which explain the purpose of an Act • <i>Travaux préparatoires</i> – preparatory materials or explanatory notes which accompany international treaties • Reports of International Conventions e.g. Fothergill v Monarch Airlines • The historical setting in which an Act was passed e.g. RCN v DHS • The Human Rights Act 1998 – s.3(1) provides that legislation must be read and given effect in a way which is compatible with Convention rights <p>Credit any other relevant point(s).</p>	<p>8</p> <p>AO1</p>	<p>Use Levels of Response criteria</p> <p>Level 4 (7–8 marks)</p> <ul style="list-style-type: none"> • Excellent knowledge and understanding of the English legal system, rules and principles. • The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant statutes and case law. <p>Level 3 (5–6 marks)</p> <ul style="list-style-type: none"> • Good knowledge and understanding of the English legal system, rules and principles. • The response is detailed, but not fully developed in places. There will be good citation of mostly relevant statutes and case law. <p>Level 2 (3–4 marks)</p> <ul style="list-style-type: none"> • Basic knowledge and understanding of the English legal system, rules and principles. • The response may lack detail in places and is partially developed. There will be some reference to statutes and case law. <p>Level 1 (1–2 marks)</p> <ul style="list-style-type: none"> • Limited knowledge and understanding of the English legal system, rules and principles. • The response will have minimal detail. Citation of statutes and case law is limited. <p>Level 0 (0 marks)</p> <p>No response or no response worthy of credit.</p>

	Answer	Marks	Guidance
2	<p>Explain original and persuasive precedents using cases to illustrate each of them.</p> <p>Answers may include:</p> <p>Describe original precedent:</p> <ul style="list-style-type: none"> This arises in cases 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. Once declared it will create a new legal rule which will become both binding and original Original precedents are often driven by social and technological change Judges may employ the method of 'reasoning by analogy' in order to deal with a novel situation and produce an original precedent – Hunter v Canary Wharf (loss of TV reception) reasoned by analogy with Aldred's Case (loss of an aspect - <i>obiter</i>) Give an example of an original precedent – e.g. Re:S (adult: refusal of treatment), Donoghue v Stevenson, Rylands v Fletcher, R v Whitely, Central London Property Trust Ltd v High Trees, Fearn v Tate Gallery, Shaw v DPP, Hunter v Canary Wharf <p>Describe persuasive precedent:</p> <ul style="list-style-type: none"> A precedent which the judge is at liberty to consider. The judge may then decide that it is a correct principle and so be persuaded by it. Examples: <ul style="list-style-type: none"> Courts lower in the hierarchy - R v R the House of Lords agreed with the Court of Appeal in ruling that a man could be guilty of raping his wife Decisions of the Judicial Committee of the Privy Council - The Wagon Mound (No.1) <i>Obiter dicta</i> statements - the <i>obiter</i> comment in R v Howe was followed in R v Gotts and became binding A dissenting judgement - Rose & Frank Co v JR Crompton & Bros Ltd Courts of other (common law) jurisdictions – the Canadian case of Bazley v Curry was followed in Lister v Hesley Hall <p>Credit any other relevant point(s).</p>	<p>8</p> <p>AO1</p>	<p>Use Levels of Response criteria</p> <p>Level 4 (7–8 marks)</p> <ul style="list-style-type: none"> Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. <p>Level 3 (5–6 marks)</p> <ul style="list-style-type: none"> Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. <p>Level 2 (3–4 marks)</p> <ul style="list-style-type: none"> Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. <p>Level 1 (1–2 marks)</p> <ul style="list-style-type: none"> Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. <p>Level 0 (0 marks)</p> <p>No response or no response worthy of credit.</p>

	Answer	Marks	Guidance
3	<p><i>Discuss the advantages of the influences on law-making.</i></p> <p>Answers may include:</p> <ul style="list-style-type: none"> • Government Policy (also accept 'political influences') – have the advantage of having a 'mandate' since they have been democratically elected and are obliged to deliver their manifesto promises. However, there is a lack of parliamentary time and some matters (e.g. budgets and taxation) take priority • Private Members' Bills have the advantage of allowing individual MPs to raise issues on behalf of their constituents which supports participative democracy. They are also a useful way of legislating for apolitical or niche topics which have cross-party support. If unsuccessful, Private Members' Bills still raise the profile of issues • Public Inquiries – have the advantage of enjoying strong government and public support in recognition of tragic disasters. However, some reports are criticised as 'knee-jerk' reactions • Public Opinion - has the advantage of giving the public a voice on issues which matter to them. Can be sectional issues expressed through the media or protests (Sarah's Law, #MeToo or Black Lives Matter) or major issues (Brexit) expressed through a referendum. However, the media do not always give a balanced view and it can be difficult to reflect public opinion in a diverse pluralist society • Pressure Groups – have many of the same advantages as public opinion but often have the added advantage of research and expertise in the area they are campaigning for. Although some have limited success, they all have the advantage of raising the profile of issues which can lead to legislative change (e.g. Fathers for Justice). Other groups such as Stonewall have been more successful • Special interest groups – can have the benefit of expertise but can have undue influence because of funding relationships (e.g. Trades Unions, Big Business donations and lobbying) • The Law Commission – have the advantage of a high level of legal expertise – they produce detailed well researched and well considered reports. Although they are well regarded by parliament and had some early success, they have had problems with a lack of political will to devote legislative time to all their proposals • Others: Emergency situations – provide a fast legislative response but may lead to poor legislation if not properly considered; Royal Commissions – offer flexibility and expertise but can be costly and time-consuming; Judicial decisions – offer legal expertise and a response to faulty legislation but can undermine separation of powers <p>Credit any other relevant point(s).</p>	<p>12 AO3 1b</p>	<p>Use Levels of Response criteria</p> <p>Level 4 (10–12 marks)</p> <ul style="list-style-type: none"> • Excellent analysis and evaluation of a wide range of legal concepts and issues. • The response is wide ranging and has a well sustained focus on the question. • The key points are fully discussed and fully developed. <p>Level 3 (7–9 marks)</p> <ul style="list-style-type: none"> • Good analysis and evaluation of a range of legal concepts and issues. • The response has a mainly consistent focus on the question. • Most of the key points are well discussed and well developed. <p>Level 2 (4–6 marks)</p> <ul style="list-style-type: none"> • Basic analysis and evaluation of legal concepts and issues. • The response is partially focused on the question. • Some of the key points are discussed and partially developed. <p>Level 1 (1–3 marks)</p> <ul style="list-style-type: none"> • Limited analysis of legal concepts and/or issues. • The response has limited focus on the question. • Discussion of any key points is minimal. <p>Level 0 (0 marks) No response or no response worthy of credit.</p>

	Answer	Marks	Guidance
4	<p><i>Discuss the advantages of the literal rule of statutory interpretation.</i></p> <p>Answers may include:</p> <ul style="list-style-type: none"> • Discuss that the literal rule provides clarity, certainty and predictability which allows lawyers to confidently advise clients on the outcome of their cases and therefore reduce the need for unnecessary litigation • Reason that the literal rule also makes the law accessible and easier to understand for the common person as words can be taken at face value • Discuss that the rule respects the doctrine of Parliamentary Sovereignty - judges follow the words used rather than attempting to seek the 'intention of Parliament' • Discuss that the literal approach can 'punish' parliament for producing poor legislation and lead to revised legislation (e.g. Fisher v Bell and the Registration of Offensive Weapons Act 1961). This also helps to close loopholes in the law which might be exploited by an underhand litigant • Reason that the approach respects the doctrine of the Separation of Powers by recognising the constitutional role of the judge in relation to potential law-making • Reason that the literal rule provides no scope for judges to introduce their own biases, prejudices or personal opinions • Discuss that the literal rule provides fast decisions because other than a quick reference to a dictionary, it does not require the judge to research extrinsic aids in order to try and work out Parliament's intention • Contrast that alternative approaches to the literal rule might allow for unpredictable results which would undermine certainty in the law • Discuss that the literal rule encourages parliamentary draftsmen to be precise – legislation which is clear, precise and plainly written can be read, understood and determined by anyone who can read English • Discuss that the literal rule only relies on a dictionary as an extrinsic aid which minimises external influences and interpretations of parliament's intention and focuses solely on the words of the Act itself • Discuss any disadvantages of the literal rule but only in order to contextualise an advantage. These may include: that the strict application of the literal rule produces absurd, unjust and harsh outcomes, unpredictable results which undermine certainty in the law and that it is subject to the limitations of language <p>Credit any other relevant point(s).</p>	<p>12 AO3 1b</p>	<p>Use Levels of Response criteria</p> <p>Level 4 (10–12 marks)</p> <ul style="list-style-type: none"> • Excellent analysis and evaluation of a wide range of legal concepts and issues. • The response is wide ranging and has a well sustained focus on the question. • The key points are fully discussed and fully developed. <p>Level 3 (7–9 marks)</p> <ul style="list-style-type: none"> • Good analysis and evaluation of a range of legal concepts and issues. • The response has a mainly consistent focus on the question. • Most of the key points are well discussed and well developed. <p>Level 2 (4–6 marks)</p> <ul style="list-style-type: none"> • Basic analysis and evaluation of legal concepts and issues. • The response is partially focused on the question. • Some of the key points are discussed and partially developed. <p>Level 1 (1–3 marks)</p> <ul style="list-style-type: none"> • Limited analysis of legal concepts and/or issues. • The response has limited focus on the question. • Discussion of any key points is minimal. <p>Level 0 (0 marks)</p> <p>No response or no response worthy of credit.</p>

Section B

- 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.

Assessment Objectives	AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 8 marks. AO2: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. 12 marks.
Additional guidance	The 'indicative content' is an example of valid content. Any other valid content is acceptable and should be credited in line with the levels of response. It is not expected for candidates to cover all of the indicative content.

AO1 Indicative content

Answers may explain that:

- Liability for lawful visitors – Occupiers' Liability Act 1957 (OLA 57); definition of an occupier – s.1(2) OLA 57 – common law applies (*Wheat v Lacon*); definition of premises – s.1(3)(a) and associated case law (widely interpreted - *Wheeler v Copas*); dangers due to the state of the premises – s.1(1) OLA 57; scope of the duty – s.2(1) OLA 57 – '*An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise*'; standard of care – s.2(2) OLA 57 – '*The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there*'.
- Definition of a visitor – s.1(2) common law rules apply – see associated case law (*Lowery v Walker*) invitees with express licences or implied licences (such as a right conferred by law – e.g. police and fire)
- Standard of care owed to children – s.2(3)(a) OLA 57 a higher standard of care is owed to children – '*an occupier must be prepared for children to be less careful than adults*' – *Perry v Butlins Holiday World*, *Moloney v Lambeth LBC*
- Allurements – occupiers must not lead children into temptation and should guard against any kind of allurements which could place a child visitor at risk of harm (*Glasgow Corporation v Taylor*, *Jolley v Sutton London Borough Council*), although the existence of an allurements, of itself, is not definite proof of liability (*Liddle v Yorkshire (North Riding) CC*). Reasonably foreseeable harm – if the broad type of damage is foreseeable, there is still liability even where the exact type of damage caused (or the manner in which it is caused) is not foreseeable (*Jolley v Sutton London Borough Council*)
- Parental Responsibility – parents will be expected to be responsible for very young children (*Phipps v Rochester*) and to be aware of obvious risks on the child's behalf (*Bourne Leisure v Marsden*)

Credit any other relevant point(s).

AO2 Indicative content

Answers **may** reason that:

- In general:
 - Recognise that Boswin Farm is the occupier; recognise that the farm would fit the definition of premises under s1(3)(a) and case law (*Wheeler v Copas*); recognise that, as paying visitors, the Smith family has an express licence to be on the premises and are lawful visitors and, therefore, the 1957 Act applies; recognise the general scope of the OLA 57 duty
- In respect of Amari's broken leg:
 - Recognise that at 12, Amari is a child and is owed a higher duty of care - s.2(3)(a)
 - Recognise that a barn full of broken machinery and rubbish is capable of forming an allurement to a 12-year-old child - *Glasgow Corporation v Taylor* and the allurement can be relevant to establishing the foreseeability of the children's actions – *Jolley v Sutton*
 - Recognise that it is reasonably foreseeable that some damage might arise from a child playing with abandoned farm machinery and rubbish which is also foreseeable, even if the exact harm and the way it came about were not foreseeable - *Jolley v Sutton*
 - Conclude that Boswin Farm are likely to be liable for A's injuries or alternative outcome depending how reasonable foresight is interpreted
- In respect of Ben's head injuries:
 - Recognise that at three years old, Ben is a child and owed a higher duty of care (s.2(3)(a)); recognise also that in general, the younger the child, the higher the duty (*Phipps v Rochester*). At three-years-old, Ben would be too young to be aware of many dangers
 - Recognise, however, that at such a young age parents would be expected to take responsibility for those children and to be aware of obvious risks on the child's behalf (*Bourne Leisure v Marsden*) and, in this case, there would be many obvious risks on a farm (especially mud) and that Ben's parents should have been aware of this and taken the responsibility to guard against him wandering off
 - Conclude that Boswin Farm are unlikely to be liable for Ben's head injuries

Credit any other relevant point(s).

	AO1	Mark	AO2 1a/1b	Mark
Level 4	<ul style="list-style-type: none"> Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant case law. 	7–8	<ul style="list-style-type: none"> 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. 	10–12
Level 3	<ul style="list-style-type: none"> Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant case law. 	5–6	<ul style="list-style-type: none"> 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. 	7–9
Level 2	<ul style="list-style-type: none"> Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. There will be some reference to case law. 	3–4	<ul style="list-style-type: none"> 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. 	4–6
Level 1	<ul style="list-style-type: none"> Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of case law is limited. 	1–2	<ul style="list-style-type: none"> 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. 	1–3
Level 0	No response or no response worthy of credit.	0	No response or no response worthy of credit.	0

- 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.

Assessment Objectives	AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 8 marks. AO2: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. 12 marks.
Additional guidance	The 'indicative content' is an example of valid content. Any other valid content is acceptable and should be credited in line with the levels of response. It is not expected for candidates to cover all of the indicative content.

AO1 Indicative content

Answers may explain that:

- Vicarious liability (VL) is where one party (usually an employer) takes legal responsibility for the torts of another party (usually an employee). In VL the claimant (C) is the party that suffers the harm, the tortfeasor (TF) is the party that commits the tort and causes the harm and the defendant (D) is the third party being held liable for the TF's tort. A tort must be committed by the TF.
- There are two requirements for vicarious liability: Credit either the traditional 'Salmond' description: a) the TF must be an employee, and b) the tort must be committed in the course of employment or the modern approach: a) there must be a relationship between D and TF which makes it proper for the law to make D pay for the fault of TF, and b) a connection between that relationship and the TF's wrongdoing - Barclays Bank v Various Claimants
- Employees committing a negligent act were found to be acting in the course of employment where undertaking acts authorised by the employer but done in a negligent, careless or wrongful way – Century Insurance v Northern Ireland Transport Board. Employees committing a negligent act were found to be acting in the course of employment even where they were acting against orders where they were doing the job they were employed to do - Limpus v London General Omnibus – especially where it benefitted the employer - Rose v Plenty
- Employees committing a negligent act were not found to be acting in the course of employment when their torts were committed in circumstances which do not fall within the scope of their employment. An employer will only be liable where the employee was engaged, however misguided, in furthering the employer's business, and not in cases where the employee is engaged solely in pursuing his own interests or 'on a frolic of his own' – Hilton v Thomas Burton
- Under the close connection test, the court asks 'was the wrongful conduct of the employee so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment?' – WM Morrisons Supermarkets plc v Various Claimants approving Dubai Aluminium v Salaam. This approach takes account of established legal principles so the above principles and cases would still be valid if considering liability through the lens of the close connection test

Credit any other relevant point(s).

AO2 Indicative content

Answers **may** reason that:

Learners are told to consider whether Sellan will be liable for the **negligence** of all three tortfeasors so there is no need to establish the tort. They are also told not to discuss employment status as this is established.

- In respect of Darcie
 - Recognise that Darcie was performing an authorised act (driving) in an unauthorised way (driving too fast and being careless) – Century Insurance v Northern Ireland Transport
 - Even though this was a prohibited act (against the employer's orders to drive within the law), she was doing what she was employed to do and was therefore acting within the scope of her employment – Limpus v London General Omnibus
 - Conclude that Sellan Deliveries will be vicariously liable for the injuries to Ivan
- In respect of Emma
 - Recognise that Emma was performing an authorised act (making deliveries) in an unauthorised way (drives off too quickly causing injury to Jack) - Century Insurance v Northern Ireland Transport
 - Even though she was acting against employer's instruction not to use unauthorised help, she was doing what she was employed to do and was acting for the benefit of the employer – Rose v Plenty
 - Conclude that Sellan Deliveries will be vicariously liable for the injuries to Jack
- In respect of Heidi
 - Recognise that Heidi was acting outside the scope of her employment by doing something she was not employed to do (using the van for a private purpose)
 - She has also diverted away from her proper work (she is five miles away) and is on a frolic of her own with no benefit to the employer – Hilton v Thomas Burton
 - Conclude that Sellan Deliveries will not be vicariously liable for the damage done to Kareem's car

Credit any other relevant point(s).

	AO1	Mark	AO2 1a/1b	Mark
Level 4	<ul style="list-style-type: none"> Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant statutes and case law. 	7–8	<ul style="list-style-type: none"> 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. 	10–12
Level 3	<ul style="list-style-type: none"> Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant statutes and case law. 	5–6	<ul style="list-style-type: none"> 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. 	7–9
Level 2	<ul style="list-style-type: none"> Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. There will be some reference to statutes and case law. 	3–4	<ul style="list-style-type: none"> 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. 	4–6
Level 1	<ul style="list-style-type: none"> Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of statutes and case law is limited. 	1–2	<ul style="list-style-type: none"> 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. 	1–3
Level 0	No response or no response worthy of credit.	0	No response or no response worthy of credit.	0

7 & 10* Discuss the extent to which the rules on factual and legal causation in negligence are fair.

Assessment Objectives	AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 8 marks. AO3 1a: Analyse and evaluate legal rules and principles. 12 marks.
Additional guidance	The 'indicative content' is an example of valid content. Any other valid content is acceptable and should be credited in line with the levels of response. It is not expected for candidates to cover all of the indicative content.

AO1 Indicative content

Explain factual causation:

- Explain the so-called 'but for' test - Barnett v Chelsea & Kensington Hospital
- No credit for explanations of situations where the 'but for' test is not straightforward on the basis of multiple causes or defendants as these are not in the specification

Explain legal causation:

- Explain the concept of a *novus actus interveniens* although D is negligent and the 'but for' test is satisfied, the chain of causation can be broken by a subsequent, intervening act which can break the chain:
 - *Novus actus interveniens* by the claimant - Mc Kew v Holland
 - *Novus actus interveniens* by an act of nature - Carslogie Steamship Co v Royal Norwegian Government
 - *Novus actus interveniens* by the intervening act of a third party - Knightley v Johns
 - No *novus actus interveniens* where the intervening event is reasonable and foreseeable – Lord v Pacific Steam Navigation (*The Opressa*)
 - No *novus actus interveniens* where the defendant is under a duty to prevent the act/omission said to break the chain – Reeves v MPC
- Explain remoteness of damage – that C can only claim for a loss which is of a type that is reasonably foreseeable
 - Relies on reasonable foresight of harm (not direct consequences) - The Wagon Mound (No 1)
 - Type of harm foreseen, not the extent or manner of infliction - Bradford v Robinson Rentals, Hughes v Lord Advocate, Jolley v Sutton

Explain the egg-shell skull rule - Smith v Leech Brain

Credit any other relevant point(s).

AO3 Indicative content

Answers **may** discuss that:

- The burden and standard of proof are fair. C only has the burden of proving that the causation of damage was more likely than not. However, this does lead to an 'all or nothing' outcome where <50% = no liability at all and >50% = total liability – is this fair?
- The 'but for' test seems fair. As a question of fact, it means that all CC are treated the same way. The law is certain, simple and predictable which supports the rule of law – that law should be certain and ascertainable. However, the test is only appropriate when there is no causal uncertainty (e.g. only one D and one cause); the rule can also operate unfairly in cases where the C does not receive compensation despite a duty having been breached; and certainty has also been undermined and justice not served in cases where policy reasons have been used to avoid the 'but for' test (Chester v Afshar)
- The rules concerning *novus actus interveniens* seem fair as they remove liability where another cause intervenes. However, they are not always fair as they do not always seem to provide consistent outcomes. Judges making subjective decisions on a case-by-case basis undermine certainty and make it difficult for lawyers to advise clients
- The rules on remoteness of damage can be seen as fair as they limit the scope of D's potential liability. They also support the moral basis of negligence – that D should only be responsible and liable for causing reasonably foreseeable harm. However, the arbitrary and flexible approach taken by the courts in determining what type and extent of damage is foreseeable (as well as the manner of its infliction), may prove unfair to DD (Hughes, Jolley, Page) who could not foresee damage which is quite remote
- The egg-shell skull rule can be seen as fair as it protects vulnerable CC but can also be seen as unfair where C will be compensated for harm that D could not have contemplated
- The rules concerning legal causation can be subject to policy considerations – especially, for example, protecting the medical profession (or not) and considering the implications for the role of insurance, public policy and the compensation culture
- Where decisions on causation change the law or alter its scope, this can lead to allegations of judicial activism or judicial law-making with the associated implications for constitutional issues this might raise
- Credit any other relevant 'policy consideration' critical points which are related to fairness such as: the role of justice, the contribution of scientific advances, the role of deterrence, the role of fair loss distribution and socio-economic factors as long as they are linked to the rules on causation

Credit any other relevant point(s).

	AO1	Mark	AO3 1a	Mark
Level 4	<ul style="list-style-type: none"> Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant case law. 	7–8	<ul style="list-style-type: none"> 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. <p><i>There is a well-developed line of reasoning which is clear and logically structured. The information presented is relevant and substantiated.</i></p>	10–12
Level 3	<ul style="list-style-type: none"> Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant case law. 	5–6	<ul style="list-style-type: none"> 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. <p><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></p>	7–9
Level 2	<ul style="list-style-type: none"> Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. There will be some reference to case law. 	3–4	<ul style="list-style-type: none"> 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. <p><i>The information has some relevance and is presented with a basic structure. The information is supported by basic evidence.</i></p>	4–6
Level 1	<ul style="list-style-type: none"> Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of case law is limited. 	1–2	<ul style="list-style-type: none"> Limited analysis of legal rules and principles. The response has limited focus on the question. Discussion of any key points is minimal. <p><i>The information is limited and communicated in an unstructured way. The information is supported by limited evidence and the relationship to the evidence may not be clear.</i></p>	1–3
Level 0	No response or no response worthy of credit.	0	No response or no response worthy of credit.	0

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

Assessment Objectives	AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 8 marks. AO2: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. 12 marks.
Additional guidance	The 'indicative content' is an example of valid content. Any other valid content is acceptable and should be credited in line with the levels of response. It is not expected for candidates to cover all of the indicative content.

AO1 Indicative content

Answers may explain that:

Relevant defences may include:

- Statutory Authority
 - The general rule is that statutory authority will provide a defence to an otherwise actionable nuisance (Allen v Gulf Oil Refining Co Ltd). However, the defence may not be available where the nuisance is outside the scope of the authorised activity (Barr and others v Biffa Waste Services). Also, if a nuisance can be avoided by the use of reasonable care and skill, statutory authority will be no defence (Allen v Gulf Oil Refining Co Ltd)
- Prescription
 - The general rule is that D argues that they have acquired the right to commit a private nuisance through prescription (Sturges v Bridgman). However, the activity must have been carried on for at least 20 years and amounted to an actionable nuisance for at least that long (Coventry v Lawrence)

Irrelevant non-defences may include:

- Coming to the Nuisance
 - Attempts have been made by defendants to argue that where a nuisance existed when a claimant came to the land, this amounted to effectively consenting to the nuisance (hence 'coming to the nuisance'). However, it has been ruled that 'coming to the nuisance' is no defence (Miller v Jackson), although it may be considered when awarding remedies and deciding whether an injunction or damages are appropriate (Coventry v Lawrence)
- Social Utility (or public benefit)
 - Once a nuisance is established, attempts have been made by defendants to argue that an activity which provides a public benefit should be exempt from a claim in nuisance (Bellew v Cement Co Ltd). However, it has been ruled that 'public benefit' is not a defence (Miller v Jackson) but it may be a consideration when deciding appropriate remedies (Adams v Ursell)

Credit any other relevant point(s).

AO2 Indicative content

Answers **may** reason that:

- New Railz and the noise and vibrations
 - Noise and vibrations would appear to be well within the scope of the activities statutorily authorised by the National Rail Act passed by the Environment Agency
 - The legislation includes reference to tunnels, and it would appear to be the tunnelling which is causing the nuisance complained of. Using heavy machinery to tunnel is expressly within the scope of the authority
 - Conclude that New Railz are likely to have a valid defence in statutory authority for the noise and vibrations
- Forest Splatx and Jane's paint damage
 - Forest Splatx have been operating as a paint ball centre for over 20 years based on the dates provided
 - Although Jane has lived in the property since 2010, the nuisance only became actionable in 2019. Forest Splatx cannot establish that there has been an actionable nuisance for the entirety of the 20-year period required to establish a right by prescription to carry on the nuisance
 - Conclude Forest Splatx are unlikely to have a valid defence in prescription
- RMAC and the use and enjoyment of Layla's garden
 - RMAC might argue that Layla has 'come to the nuisance' since it is a new house built next to a field used for a known activity which would carry an obvious risk
 - RMAC might argue that they provide a public benefit or social utility in running a leisure activity at a popular local club
 - Conclude that RMAC have no defence in either 'coming to the nuisance' or in 'social utility' as they are not recognised defences to private nuisance although they may influence the award of remedies

Credit any other relevant point(s).

	AO1	Mark	AO2 1a/1b	Mark
Level 4	<ul style="list-style-type: none"> Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant statutes and case law. 	7–8	<ul style="list-style-type: none"> 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. 	10–12
Level 3	<ul style="list-style-type: none"> Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant statutes and case law. 	5–6	<ul style="list-style-type: none"> 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. 	7–9
Level 2	<ul style="list-style-type: none"> Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. There will be some reference to statutes and case law. 	3–4	<ul style="list-style-type: none"> 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. 	4–6
Level 1	<ul style="list-style-type: none"> Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of statutes and case law is limited. 	1–2	<ul style="list-style-type: none"> 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. 	1–3
Level 0	No response or no response worthy of credit.	0	No response or no response worthy of credit.	0

- 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.

Assessment Objectives	AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 8 marks. AO2: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. 12 marks.
Additional guidance	The 'indicative content' is an example of valid content. Any other valid content is acceptable and should be credited in line with the levels of response. It is not expected for candidates to cover all of the indicative content.

AO1 Indicative content

Answers may explain that:

- Parties: the defendant must own or occupy and have control over the land on which the material is stored; the claimant must have a legal interest in the affected land – *Hunter v Canary Wharf*
 - D must bring on and accumulate - *Giles v Walker*, *Ellison v MoD*, *Leakey v National Trust*, *Charring Cross v Hydraulic Power*, *Smeaton v Ilford Corporation*
 - Something likely to do mischief if it escapes (*Hale v Jennings*) and D must recognise or ought reasonably to recognise that, judged by the standards of the relevant time and place, there was an exceptionally high risk of danger should there be an escape - *Transco v Stockport*
 - D's use of their land must have been extraordinary and unusual having regard to all the circumstances of the time and place - *Transco v Stockport* or also credit that there must be a non-natural use of land - *Cambridge Water v ECL*
 - The thing itself must escape (*Read v Lyons*; *Hale v Jennings*) from land and circumstances which D controls to land controlled by C and cause reasonably foreseeable damage of a relevant kind to the rights and enjoyment of the claimant's land (*Rigby v Chief Constable Northants*; *Crown River Cruises v Kimbolton*). It must be the thing accumulated itself that must escape - *Stannard v Gore*
- An action in *Rylands v Fletcher* is a species of nuisance and damages can only be claimed in relation to rights and enjoyment of land not personal injury or death - *Transco v Stockport*

Credit any other relevant point(s).

AO2 Indicative content

Answers **may** reason that:

- Farmer Leo is the defendant as he owns and controls the land from which the harmful material (toxic varnish and fumes) escaped. Farmer Tom is the claimant as he has suffered harm and he has a legal interest and control of the affected land (the neighbouring land)
- Farmer Leo is bringing on and accumulating large quantities of marine varnish onto land he occupies and controls (his farmyard)
- The marine varnish is likely to do mischief (it is toxic to plants) if it escapes and Farmer Leo ought reasonably to have recognised that relevant to the time and place (a farmyard not a shipyard) that there was an exceptionally high risk of danger as products such as varnish carry clear warnings of dangers and using them in such large quantities would only heighten this risk. As a farmer he also ought to be aware of the danger of fluids such as chemicals seeping through the ground
- Farmer Leo's use of farmland to undertake a major yacht restoration involving large quantities of toxic varnish would represent an extraordinary and unusual use of land in the circumstances of the time and place (a working farmyard with plants and animals on his own and neighbouring land which would be vulnerable to toxic materials)
- The varnish itself (albeit in incremental drips – Cambridge Water v ECL) did escape from land under D's control to land under C's control and caused foreseeable damage (stated as toxic to plants – ruined strawberries) and this is actionable harm as it interferes with Farmer Tom's rights and enjoyment of his land. Conclude this is actionable harm under Rylands v Fletcher and it is submitted Farmer Leo would be liable
- Farmer Tom's migraine headache is not an actionable form of harm in Rylands v Fletcher (personal injury) and Farmer Leo would not be liable for this.

Credit any other relevant point(s).

	AO1	Mark	AO2 1a/1b	Mark
Level 4	<ul style="list-style-type: none"> Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant case law. 	7–8	<ul style="list-style-type: none"> 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. 	10–12
Level 3	<ul style="list-style-type: none"> Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant case law. 	5–6	<ul style="list-style-type: none"> 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. 	7–9
Level 2	<ul style="list-style-type: none"> Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. There will be some reference to case law. 	3–4	<ul style="list-style-type: none"> 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. 	4–6
Level 1	<ul style="list-style-type: none"> Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of case law is limited. 	1–2	<ul style="list-style-type: none"> 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. 	1–3
Level 0	No response or no response worthy of credit.	0	No response or no response worthy of credit.	0

10* SAME QUESTION AND MARK SCHEME AS QUESTION 7 ABOVE

Assessment Objectives Grid

Questions	AO1	AO2 1a/1b**	AO3 1a	AO3 1b	Total
1–2	8	0	0	0	8
3–4	0	0	0	12	12
5 or 8	8	12	0	0	20
6 or 9	8	12	0	0	20
7* or 10*	8	0	12	0	20
Total	32	24	12	12	80

**AO2 elements 1a and 1b will be awarded jointly

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