

GCE

Law

H418/02: Law making and the law of tort

A Level

Mark Scheme for June 2022

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















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

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

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MARKING INSTRUCTIONS

Annotations

Annotation	Meaning
	Very well developed point (WDP)
	Unclear
	Applied point
	Developed point (DP)
	Well developed point (WDP)
	Not answered question
	Not Relevant
	Point
	Repetition
	Sort of
	Point has been noted, but no credit has been given / blank page has been checked for response
	Correct
	Applied
	Spare 1

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 and concepts.

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:

Descriptor	Award mark
On the borderline of this level and the one below	At the bottom level
Just enough achievement on balance for this level	Above bottom and either below middle or at middle of level (depending on number of marks available)
Meets the criteria but with some slight inconsistency	Above middle and either below top of level or at middle of level (depending on number of marks available)
Consistently meets the criteria for this level	At top of level

ASSESSMENT OBJECTIVES: BREAKDOWN BY QUESTION**Section A**Questions **1-2**

Assessment Objective:	AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 8 marks
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Question **3-4**

Assessment Objective:	AO3 1b: Analyse and evaluate legal issues. 12 marks
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Section BQuestion **5,6,8 and 9**

Assessment Objective:	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 Objective:	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. Level descriptors are identified in the AO3 column in italics.

Answer	Marks	Guidance
<p>1 <i>Describe the controls over delegated legislation exercised by Parliament.</i></p> <p>Answers may include:</p> <ul style="list-style-type: none"> • Enabling Acts lay down the nature and scope of the delegated powers and may be repealed or amended at any time • Publication of all SIs is required under the Statutory Instruments Act 1946 • Consultation with those with relevant expertise and questions asked in Parliament • Resolution Procedures: <ul style="list-style-type: none"> • Describe the 'negative resolution' procedure that allows any MP to put down a motion to annul the delegated legislation within a specific time period (usually 40 days) • Describe the 'affirmative resolution' where Parliament is required to vote its approval of the delegated legislation by a motion approving it within a specified time (usually 28 or 40 days) • Describe the 'super-affirmative resolution' under the Legislative and Regulatory Reform Act 2006 which gives Ministers power to make any provision by order if it will remove or reduce a legislative burden. • Scrutiny Committees. Parliament has a number of committees that scrutinise delegated legislation such as: <ul style="list-style-type: none"> • The Joint Committee on Statutory Instruments • The House of Lords Delegated Powers Scrutiny Committee • The House of Lords Merits of Statutory Instruments Committee <p>Credit any other relevant point(s).</p>	<p>8 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) No response or no response worthy of credit.</p>

Answer	Marks	Guidance
<p>2 Describe the use of the mischief rule to interpret statutes.</p> <p>Answers may include:</p> <p>The mischief rule has its origins in Heydon’s case (1584): “Four things are to be discussed and considered:</p> <ul style="list-style-type: none"> • What was the common law before making the Act? • What was the mischief and defect for which the common law did not provide? • What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth? • What is the true reason for the remedy? Judges shall make such construction as shall suppress the mischief and advance the remedy” <p>Put simply, the mischief rule is where words are interpreted so as to give effect to the intention of Parliament in the light of some pre-existing problem (or gap in the law) for which the common law did not provide a solution</p> <p>Explain that the mischief rule is similar to the purposive approach except that it does require identification of a problem or ‘mischief’ before it can be used.</p> <p>Explain that the mischief rule may often rely on the use of extrinsic aids to help discern the intention of Parliament and/or the mischief that preceded the Act</p> <p>Use any relevant case in illustration: Smith v Hughes; Royal College of Nurses v DHSS; DPP v Bull; Corkery v Carpenter; Gardiner v Sevenoaks; Elliott v Grey; Alphacell v Woodward; R v Chief Constable of Kent (<i>ex parte</i> the Police Federation)</p> <p>Credit any other relevant point(s).</p>	<p>8 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) No response or no response worthy of credit.</p>

Answer		Marks	Guidance
3	<p><i>Discuss the disadvantages of delegated legislation.</i></p> <p>Answers may include:</p> <ul style="list-style-type: none"> • Lack of scrutiny: Parliament does not have time to properly scrutinise delegated legislation based on the volume and lack of resources. The negative resolution procedure is a mere rubber stamp and positive resolutions are rarely invoked • Sub-delegation: Many Government Ministers pass their law-making powers on to their civil servants which raises issues of accountability • Volume: The large number of SIs causes complexity - it is impossible for anyone to keep abreast of all delegated legislation and it encourages mistakes as well as avoiding scrutiny • Lack of debates & publicity: unlike primary legislation, delegated legislation is not well publicised or debated in Parliament which would subject it to greater scrutiny and discourage mistakes and oversights • Undemocratic: It is undemocratic as some forms are made by civil servants, some are made by the Privy Council or by public corporations. Not all of these bodies are democratically accountable which is unconstitutional • Language & interpretation: The language used is often technical, obscure, legalistic and open to different interpretations • Wide discretion: An enabling Act may be so brief that it enables a Minister to potentially legislate not just on detail but on policy, which should be the concern of Parliament • Lack of control: some aspects of the lack of scrutiny and control over delegated legislation can undermine its effectiveness <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 mischief rule.</i></p> <p>Answers may include:</p> <ul style="list-style-type: none"> • The rule helps to avoid the absurdity and injustices associated with more literal approaches and ‘repairs’ bad laws quickly • The rule promotes ‘flexibility’ and allows judges to put into effect the remedy Parliament chose (i.e. their true intention) ... thus also saving Parliament time in not having to legislate afresh • Leads to reforming and improving law as each case is interpreted to try and prevent the specific mischief which allows the law to develop and adapt to changing economic, social and physical conditions (RCN v DHSS) • Blackstone justified his support for the mischief rule by stating that <i>‘[T]he fairest and most rational method to interpret the will of the legislator is by exploring his intention at the time the law was made’</i> • The rule offers an alternative to the literal and golden rules but one which is narrower than the purposive approach allowing judges to show more respect for parliamentary sovereignty and separation of powers • The rule has been approved by the Law Commission • There are a variety of extrinsic aids available to help judges make a decision <p>Credit disadvantages only where used to contextualise an advantage. Similarly, credit contrasts with other rules only where used to contextualise an advantage</p> <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>

Mark scheme continued on page 11.

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.

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 include:

Duty:

- According to Robinson v CC West Yorkshire, if there is an existing duty, then the court should apply it
- Credit reference to Road Traffic legislation as a source of a possible statutory duty of care
- Credit reference to relevant similar case law which would establish a duty of care: Nettleship v Weston
- No credit for establishing duty through the Caparo three-stage test

Breach:

- The objective 'reasonable man' test: Vaughan v Menlove
- No adjustment for a learner or lack of experience - Nettleship v Weston

Damage:

- Factual causation: Barnett v Chelsea and Kensington Hospital Management Committee
- Remoteness of damage: The Wagon Mound

Explain the law relating to damages:

- Calculating losses: pecuniary loss – losses that can easily be calculated in financial terms (loss of earnings, car repairs) and non-pecuniary loss - a loss that is not rooted in financial loss (pain, grief, suffering)
- Special damages – consequential pecuniary losses calculated specifically up to the date of the settlement and general damages – direct result non-pecuniary losses calculated from the trial date

Credit any other relevant point(s)

AO2 Indicative content

Answers **may**:

Reason that:

- Amir will owe a duty of care by virtue of his obligations under statutory provisions such as Road Traffic legislation or, alternatively, on an application of an obvious precedent such as *Nettleship v Weston*. No credit for applying the *Caparo* three-stage test
- Amir has breached his duty of care on an application of the reasonable man test because the reasonable driver would have braked sooner and more firmly. Note that it will not make any difference that Amir is an inexperienced driver as the measure is an objective one as confirmed in *Nettleship v Weston*
- Amir's breach has caused reasonably foreseeable harm. Braking too late and too hard was the 'but for' or factual cause of Beth's injuries and there were no legal causation issues to consider
- Beth can expect special damages for the pecuniary losses consequential to her injury such as loss of earnings relating to time off work up until the trial date as well as general damages for her non-pecuniary losses relating to her primary injury (the broken arm) and loss of amenity/pain & suffering (having developed a fear of going outdoors)

Reach any sensible conclusion supported by appropriate reasoning - it is likely that Amir will be liable in negligence

Credit any other relevant point(s).

	AO1	Mark	AO2	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 **both** Eve **and** Layla whether they would be likely to succeed in a claim against Jack under the Occupiers' Liability Act 1957.

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 OLA 1957:

- Definitions of premises, lawful visitors and occupiers
- Section 2(1) common duty of care owed to all lawful visitors
- Scope is to keep visitor reasonably safe for the purpose for which he is invited to be there under section 2(2)
- Explain that an occupier can expect that a person who enters in the exercise of their calling will appreciate and guard against any special risks ordinarily incident to it under s.2(3)(b) (General Cleaning Contractors v Christmas, Roles v Nathan)
- Occupier can prevent breach of the duty under section 2(4)(b) if an independent contractor can be blamed instead. Occupier must show:
 - It was reasonable to hire a contractor - Haseldine v Daw
 - Reasonable precautions have been taken to ensure the contractor is competent - Bottomley v Todmorden Cricket Club
 - Reasonable checks to inspect the work have been taken - Woodward v Mayor of Hastings

Credit any other relevant point(s)

AO2 Indicative content

Answers **may** include:

In respect of Eve:

- Reason that Jack is the occupier since he is the owner (as he is in possession and control of The Dancing Rat), that the Dancing Rat would easily qualify as premises as this has been interpreted widely - Wheeler v Copas and that Eve is a lawful visitor with a contractual licence to be on the premises by virtue of undertaking work for the occupier
- Reason that, according to s.2(3)(b) and Roles v Nathan, Eve should have appreciated and guarded against the risk of chemical burns as these would be directly incidental to her work/calling, and that the injury is not due to the state of the premises
- Conclude that Jack would have no liability under the Occupiers' Liability Act 1957

In respect of Layla:

- Reason that Jack is the occupier since he is the owner (as he is in possession and control of The Dancing Rat), that the Dancing Rat would easily qualify as premises as this has been interpreted widely - Wheeler v Copas and that Layla is a lawful visitor as she would be seen as having at least an implied licence to use the premises as a customer
- Reason that Layla is owed a duty under s.2(1) as she is a lawful visitor and he has a duty to keep her safe for the purpose of her visit (s.2(2))
- Reason that Jack can avoid liability to Layla if he can 'blame' Kareem depending on the application of s.2(4)(b):
 - Was it reasonable to hire a contractor? Yes, given the nature of the work
 - Were reasonable precautions taken to ensure Kareem was competent? No, Jack did not check any of Kareem's qualifications
 - Were reasonable checks made to inspect the work? No, it does not require any technical expertise to make sure a light is working
- Conclude that Jack will not be able to rely on s.2(4)(b) to shift the blame to Kareem and will be liable to Layla under the Occupiers' Liability Act 1957

Credit any other relevant point(s).

	AO1	Mark	AO2	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 Occupiers' Liability Act 1984 is fair on occupiers.

Assessment Objectives	AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 8 marks. AO3: 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

Answers may include:

Occupier's liability:

- Explain that under the 1984 Act a trespasser is not defined and the common law definition is used: 'a trespasser is someone who goes on land without any sort of permission & whose presence is unknown to the occupier or, if known, is objected to' (Addie v Dumbreck) and that a lawful visitor under the 1957 Act can become a trespasser when they go beyond their permission – The Calgarth

Explain OLA 1984

- Applies to unlawful visitors – usually a trespasser and based on the duty of common humanity – Herrington v BRB, Addie v Dumbreck
- Duty arises under section **s.1(3)** when an occupier: (a) is aware of the danger or has reasonable grounds to believe it exists; (b) knows or believes the trespasser is in the vicinity of the danger; and (c) the risk is one against which they might be expected to offer some protection – Tomlinson v Congleton BC, Swain v Natui Ram Puri
- According to **s.1(4)** the duty is to 'take such care as is reasonable in all the circumstances' to prevent injury to trespassers 'by reason of the danger concerned'. The standard of care is objective but factors which may be taken into account include: the nature of the premises - Rhind v Astbury Water Park; practicality of precautions – Tomlinson; degree of danger and age of trespasser – Keown
- Identify that an occupier is also entitled to expect that a trespasser will not engage in obviously foolhardy pursuits or ones which the claimant's expertise or training should make them aware of - Donoghue v Folkestone
- State that an occupier may also limit the scope of his duty through the use of effective warnings under s1(5) (Westwood v Post Office), contributory negligence or *volenti* under s.1(6) (Ratcliffe v McConnell)

AO3 Indicative content

Answers **may** include:

The 84 Act is fair on occupiers

- The 84 Act mitigates some of the harshness of the 57 Act, reflects a reasonable response to increased industrialisation and raises standards of society
- A lower 'duty of common humanity' is owed and, under s.1(3), the occupier will need to be aware of the danger, have reasonable grounds to believe C is in the vicinity and would only be required to offer 'some' protection – all of which reduces the scope of liability
- A properly run business would have insurance to mitigate potential costs
- Occupiers of premises that are attractive to children have a moral obligation to offer some legal protection and the law before the 84 Act was considered inhumane – Addie v Dumbreck
- The law in the 84 Act represents a fair settlement as the law before the Act was over-zealous in its preoccupation with the sanctity of real property rights over the value of human life
- It is fair that liability is potentially excluded/limited by genuine accidents (Baldacchino), obvious dangers (Tomlinson), warnings (Westwood), *volenti* (Ratcliffe) and the claimant's own foolhardiness (Donoghue).
- Furthermore, the limitation to liability for personal injury and not property damage seems to be a limitation of liability which is fair to occupiers in the circumstances

The 84 Act is unfair on occupiers

- The wide definitions of both occupier and premises broaden the scope of liability and potential defendants unfairly.
- Similarly, a trespasser can be anything from a burglar or squatter to a person who innocently and unwittingly strays onto private land, yet the occupier is potentially liable to them all
- Against the backdrop of a rising compensation culture, liberal decisions have opened the floodgates and encouraged more litigious and vexatious behaviour and the increased potential for liability can lead to a reduction in otherwise socially and commercially useful activity
- The expense associated with such broad liability is a disincentive to business and can involve a prohibitive potential cost for insurance premiums. Society arguably does not benefit when increased litigation results in increased insurance costs which are passed on to customers
- The level of day-to-day control or supervision of premises required may prove an unfair burden on some occupiers
- Some would argue that intentional trespassers should take personal responsibility and accept the consequences of their choices/actions* and that the 84 Act represents an unjust form of loss distribution. *This was expressed as a key consideration in The Law Commission Report (Law Com No 75)
- Consider any arguments relating to the origins and interpretation of the 1984 Act. In the light of the Herrington case, would it have been better to allow the common law to develop and adjust for the inadequacies of the 57 Act? Do any cases cast doubt on the role of judges? Are judges interpreting Parliament's intentions correctly?

Reach any justified and reasonable conclusion

Credit any other relevant point(s).

	AO1	Mark	AO3	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 Leo whether he would be successful in suing Wizzaround in private nuisance and, if so, the likely remedies he would be awarded.

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:

Demonstrate an understanding of the legal principles relating to the tort of private nuisance – an unlawful, indirect interference with another person's use or enjoyment of land or rights over it

- Explain that for a claimant to sue he must be able to show an interest in the land affected by the nuisance - Hunter v Canary Wharf
- Explain that, unlike the claimant, the defendant (the person who causes the nuisance), need not have an interest in the land on which the activity takes place – Thomas v NUM
- Identify that there is a difference between nuisance causing physical damage and one causing interference with comfort or the enjoyment of land but a nuisance must be indirect and unreasonable - Halsey v Esso Petroleum
- Issues which may affect reasonableness include: locality (Coventry v Lawrence) and duration (De Keyser's Royal Hotel Ltd v Spicer Bros)
- Explain the possible relevant defences: prescription (Coventry v Lawrence); local authority planning permission (Coventry v Lawrence) and the position regarding coming to the nuisance and social utility
- Factors relevant to remedies including: moving to the nuisance (Coventry v Lawrence); the effect of public policy/social utility (Miller v Jackson)
- Identify the basic remedies: Damages – since Coventry v Lawrence courts now have wider discretion relating to the award of damages; Injunctions – prohibitory injunctions - Kennaway v Thompson, Coventry v Lawrence, Shelfer v City of London Electric Lighting Co

Credit any other relevant point(s).

AO2 Indicative content

Answers may:

- Reason that Wizzaround is an occupier as they own, occupy and control the go-kart track and that Leo has an interest in the affected land since he owns the bungalow - Hunter v Canary Wharf
- There is no *prima facie* nuisance (no physical damage) but there is an indirect interference with Leo's reasonable use and enjoyment of his land (Halsey v Esso) so any nuisance will be determined based on reasonableness:
 - Locality - according to Coventry v Lawrence, activities like this are only part of the locality to the extent that they do not form a nuisance
 - Duration - the nuisance is continuous and ongoing and goes beyond any permission originally granted due to the extended hours
- Are there any possible defences:
 - Prescription - Wizzaround have not met the twenty-year requirement for them to claim a prescriptive right and, according to Coventry v Lawrence, it is the nuisance complained of (not the activity generally) that must be considered – Wizzaround have not been causing the activity which has become a nuisance for 2 years let alone 20
 - Planning permission - this would be no defence. Firstly, the activity complained of is not part of the planning permission and, secondly, according to Coventry v Lawrence, planning permission does not 'trump' an actionable nuisance which is a question of fact for the court, regardless of any planning permission
 - Coming to the nuisance - this is not a defence in nuisance (but may have relevance to remedies) – Miller v Jackson, Coventry v Lawrence
 - Public benefit/social utility - again, this is no defence in nuisance but may affect remedies – Coventry v Lawrence
- Conclude that Leo is likely to have an actionable case against Wizzaround
- In terms of remedies, Wizzaround could be liable in both:
 - damages (for the harm already suffered or, following Coventry v Lawrence, to 'compensate' against an ongoing nuisance), and/or
 - an injunction (to limit the future activity at Wizzaround's go-kart track)

Credit any other relevant point(s)

	AO1	Mark	AO2	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

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

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**:

Requirements: First, there must be a relationship between the two persons which makes it proper for the law to make one pay for the fault of the other. Second, there must be a connection between that relationship and the tortfeasor's wrongdoing (Barclays Bank plc v Various Claimants (2020))

Regarding the first element (Barclays):

1 – apply the conventional distinction between a contract of employment and a contract of services. If this produces a clear classification of the tortfeasor as either an employee or an independent contractor, then this is conclusive either way. If it does not:

2 – Is the relationship between the tortfeasor and the defendant functionally analogous to an employment relationship? Consider, for example, the details of the relationship such as the tortfeasor's accountability to the defendant, integration into its structure and performance of duties aimed at pursuing its aims and objectives on its behalf.

3 – In doubtful cases the five criteria from the Christian Brothers case may be helpful: a) The employer is more likely to have the means to compensate the victim and can be expected to have insured against that liability; b) The act will have been committed as a result of activity being taken by the employee on behalf of the employer; c) The employee's activity is likely to be part of the business activity of the employer; d) The employer by employing the employee to carry out on the activity will have created the risk of the act being committed by the employee; e) The employee will to a greater or a lesser degree have been under the control of the employer.

When applying this approach, it will be important to consider relationships that have previously held as 'akin to employment': Barclays Bank plc v Various Claimants; Armes v Notts CC; Cox v Ministry of Justice; Woodland v Swimming Teachers Association; Christian Brothers; E v English Province of Our Lady of Charity; Viasystems v Thermal Transfer; Lister v Hesley Hall; Bazely v Curry

Regarding the second element:

The general approach as set out in WM Morrisons Supermarkets plc v Various Claimants (2020) is "*whether the wrongful conduct of the employee was 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.*" (Dubai Aluminium v Salaam approved in Morrisons). This principle must be applied with regard to the circumstances of the case and the assistance provided by previous court decisions. In cases involving the abuse of children, the courts have emphasised the importance of criteria particularly relevant to that form of wrongdoing found in relevant

cases, such as the employer's conferral of authority on the employee over the victims they abused. Relevant assault cases: Mohamud v Morrisons; Lister v Hesley Hall; Bazely v Curry; Mattis v Pollock; Gravit v Carroll; Bellman v Northampton Recruitment; Brown v Robinson

Credit any other relevant point(s)

AO2 Indicative content

Answers may:

First test - employment status:

Based on the given information the monks are clearly not 'independent contractors'. Given that they are not employed directly by the school, their integration and accountability is unclear and, it is therefore submitted that their position is doubtful. So, deciding their status will be assisted by considering the CBC five criteria:

- The school is more likely to be in a position to compensate Tom and Zac since they will be insured and the monastery no longer exists
- The assaults only happened because of the monks undertaking this work for the school
- RE lessons were clearly part of the school's 'business' activity and the monks were furthering that business
- By using the monks to deliver these lessons the school created the risk of the tort being committed
- The monks would, to some extent, have been under the control of the school (lessons days/times and following a curriculum)

The case is also factually similar to a number of leading cases in which the status of similar tortfeasors was held to be 'employed'. Given the applicability of the CBC criteria and the precedents of similar cases it is highly likely that the monks will be considered to be employees

Second test - was the tort sufficiently closely connected to the employment?

- The abuse was connected to the process of learning (memorising holy writings) and therefore very closely connected to acts they were authorised to do (teaching/religious instruction). It also appears that the monk's authority over Tom and Zac was conferred on them by Klear Path School as they have been given the authority to teach them
- Other criteria considered significant in similar cases include the facts that: the school must take responsibility for the fact that it put Tom and Zac in a position of risk by creating the proximity and opportunity for the abuse to happen; the school appears to have given the monks freedom to work autonomously and either not checked their methods or tolerated them; there is a close connection between the employer's objectives (education) and the use of the monks (based on their presumed knowledge) and without this the relationship would not have existed. Also, given the trust placed in people working in circumstances like this, there would be a strong social justice justification in holding the school liable for the monks' actions since they are under a strong duty of care to protect children in their care
- In other leading assault cases the general approach is that the employee's acts were closely connected if their intention (however wrongly) was to further the employer's business or assert their employer's authority but not if, for example, it was an act of personal vengeance or 'horseplay' between employees. Here, the assaults would be viewed as furthering the employer's business
- It would be fair to consider the abuse carried out by the monks as being so closely connected to the acts they were authorised to do that they should be considered to have taken place in the course of employment and so Klear Path School will be vicariously liable for the abuse

Reach any sensible and justified conclusion. Credit any other relevant point(s).

	AO1	Mark	AO2	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

10* As per question 7

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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