



Oxford Cambridge and RSA

GCE

Law

H418/02: Law making and the law of tort

A Level

Mark Scheme for June 2023

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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 B

Question 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.

Section A

Answer	Marks	Guidance
<p>1 Describe the literal rule of statutory interpretation. Give case examples to illustrate its use.</p> <p>Answers may:</p> <p>Define the rule:</p> <ul style="list-style-type: none"> • Giving words their ‘plain, ordinary, grammatical and literal meaning’ • Lord Esher in <i>R v Judge</i> stated in 1892 that “if the words of an act are clear, you must follow them, even though they lead to manifest absurdity” <p>Features of the rule:</p> <ul style="list-style-type: none"> • Explain that the rule can rely on the use of a dictionary – especially one which is relevant to the time of the Act – <i>Cheeseman v DPP</i> • Describe the historical origins in the 19th century and its position as the main rule before the purposive approach • Identify that the rule can lead to harsh, absurd, unjust and repugnant outcomes – use relevant cases to illustrate • Explain that the rule respects the doctrine of parliamentary supremacy • Explain that the rule respects separation of powers • Explain that the rule avoids judicial law-making • Describe the way that the application of the rule can lead to beneficial amending legislation - <i>Fisher v Bell</i> <p>Cases which illustrate the rule: <i>Fisher v Bell, Whiteley v Chappell, LNER v Berriman, Cutter v Eagle Star, Cheeseman v DPP, R v Bentham, IRC v Hinchey, R v Harris, R v Munks, R v Goodwin, R v Maginnis, Bromley LBC v GLC, Vacher v London Society of Compositors</i></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
2	<p><i>Describe Treaties, Regulations and Directives as sources of EU Law.</i></p> <p>Answers may describe:</p> <p>Treaties are the primary sources of EU law. They include: the ‘founding treaties’ that created the EU (e.g. the Treaty of Rome (1957)); ‘accession treaties’ that enlarge the EU to include new member states (MS) and ‘amending treaties’ that extended the scope of the EU (e.g. the Lisbon Treaty (2007))</p> <p>By signing a Treaty, MS agree to create new laws, which meet the principles and aims laid down in the Treaties</p> <p>Treaties are divided into Articles which are directly applicable (take effect in MS without further action) and, if they contain rights on which individuals can rely, they also have both vertical and horizontal direct effect - <i>Van Gend en Loos</i>, <i>Marshall v Southampton</i></p> <p>Regulations are a secondary source made by the Council, Commission and Parliament acting together under Article 288</p> <p>Regulations are also ‘directly applicable’ in all MS</p> <p>Regulations seek to achieve uniformity of laws across all MS and are ‘binding in their entirety’ meaning MS cannot pick and choose which elements to follow and, if there is a conflict between MS law and a Regulation, the Regulation has primacy - <i>Re Tachographs</i></p> <p>Regulations can have both horizontal and vertical direct effect – <i>Politi</i></p> <p>Directives are secondary sources made by the Council, Commission and Parliament acting together under the authority of Article 288</p> <p>Directives are harmonising measures which seek to create legislative uniformity across EU member states. They offer flexibility in that they can be addressed to all MS, a selection, or an individual MS</p> <p>The form a Directive takes is left to the MS. When the UK was a MS we used both primary and secondary legislation e.g. the Working Time Regulations (1998) enacted Council Directive 93/104/EC</p> <p>Directives are ‘binding as to the result to be achieved’ and they are always vertically directly effective but not always horizontally</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)</p> <p>No response or no response worthy of credit.</p>

Answer	Marks	Guidance
<p>3 <i>Discuss the disadvantages of the literal rule of statutory interpretation.</i></p> <p>Answers may discuss:</p> <ul style="list-style-type: none"> • The way the rule can produce absurd (<i>Whitely v Chappel</i>), harsh and unjust (<i>LNER v Berriman</i>) outcomes • The point that outcomes sometimes undermine Parliament's intentions rather than furthering them - <i>Cheeseman v DPP</i> • Cases that cannot be delivering Parliament's true intentions where Parliament ends up having to pass amending legislation (<i>Fisher v Bell</i>) at great cost and inconvenience • The pedantic nature of the rule and fact that it ignores the realistic limitations of language • The fact that the rule has its origins in the 19th century and is better suited to the type of legislation which started becoming ubiquitous in the industrial revolution of the past rather than the more complex, technical, and detailed, modern-day legislation • The rule places unrealistic limitations on the ability of judges to interpret in a broader context – discuss any constitutional implications? • The way the rule demands an unrealistic level of accuracy in legislative draftsmanship – the Law Commission's Report of 1969 said of the rule: "to place undue emphasis on the literal meaning of the words of a provision is to assume an unattainable perfection in draftsmanship." • Negative academic attitudes to the rule: Professor Glanville Williams wrote: "The literal rule is a rule against using intelligence in understanding language. Anyone who in ordinary life interpreted words literally, being indifferent to what the speaker or writer meant, would be regarded as a pedant, a mischief-maker or an idiot." Professor Michael Zander has denounced the literal rule as: "being mechanical and divorced from the realities of the use 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) No response or no response worthy of credit.</p>

Answer		Marks	Guidance
4	<p><i>Discuss the reasons that make the use of delegated legislation a benefit</i></p> <p>Answers may discuss:</p> <p>Delegated legislation is beneficial because:</p> <ul style="list-style-type: none"> • It saves Parliamentary time. Parliament only has time to pass 30 - 50 Acts of Parliament each year. By contrast, in excess of 3,000 statutory instruments can be passed in a year. Parliament would clearly not have time to pass primary legislation in the quantity necessary • It meets the need for detailed and technical rules and regulations necessary in a modern society. Parliament is able to take advantage of technical and expert knowledge to produce effective legislation • Where local matters are concerned, bylaws allow for the use of local knowledge to produce relevant and effective legislation. Parliament cannot have the breadth and depth of local knowledge to legislate effectively • Orders in Council allow for a fast legislative response to an emergency situation. In the event of a crisis like the outbreak of a contagious disease, Orders in Council could be passed in a matter of hours • It provides greater flexibility to amend or revoke legislation than an Act of Parliament. Enabling Acts can allow ministers the power and discretion to revoke or amend secondary legislation in line with changing trends and conditions which allows for future needs to be met • It provides for consultation. In order for legislation to be effective and realistic it is sometimes necessary to consult with bodies that will be affected by the new rules to ensure they will be workable. For example, road traffic laws will benefit from consulting the police (who will have to enforce the rules) and motoring organisations who can reflect the views of motorists <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>

Section B

5 Advise Ben whether he will be successful if he sues Amir in *Rylands v Fletcher*. 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:

The following cases are relevant: *Rylands v Fletcher*, *Transco v Stockport MBC*, *Cambridge Water v Eastern Counties Leather*, *Hale v Jennings Bros*, *Giles v Walker*

- The defendant must be in control and possession of land (*Rylands*) onto which he/she brings and accumulates (*Giles*), something
- The thing would cause mischief if it escaped and it does escape from land in the control and possession of the defendant to land in the control and possession of the claimant (*Hale*) and causes reasonably foreseeable harm (*Cambridge*)
- The defendant's use of land must be extraordinary and unusual in the time and place (*Transco*) and ...
- The harm must be of a type which is actionable - property harm but not personal injury (*Transco*)

Additional points may be relevant such as:

- Using the term 'non-natural' use of land, especially where based on cases
- The thing needs to cause mischief if it escapes but need not be inherently dangerous of itself

Credit any other relevant point(s).

AO2 Indicative content

Answers **may** reason that:

- Amir is in control and possession of the land from which the thing escapes in the form of his back garden and Ben is in control and possession of the neighbouring land where the harm is caused in the form of his back garden. Amir has caused the harm and is the defendant and Ben has suffered the harm and is the claimant
- Amir's actions in collecting hundreds of containers of used cooking oil meets the definition of 'bringing on and accumulating'
- Used oil (especially in large quantities) would cause mischief if it escaped.
- The oil did escape from land which was in Amir's control and possession to land which was not in his control and possession and caused reasonably foreseeable harm
- Amir's use of a domestic back garden as a storage site for huge quantities of used oil is certainly 'extraordinary and unusual in the time and place' given the potential for fire, environmental damage and land contamination
- The harm to Ben's roses is an actionable form of harm in *Rylands* but the broken ankle (a personal injury) is not actionable in *Rylands*

Conclude that it seems as though Ben would be successful in an action for the damage to his roses (but not the personal injury) against Amir in *Rylands*

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 Emma whether she will be successful if she sues Darcie in negligence. It is accepted that Darcie owes Emma a duty of care. 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:

- Breach is established based on the (objective) standard of the reasonable man (or woman) in the defendant's position – *Blyth v Birmingham Waterworks*, *Vaughan v Menlove*. In cases involving skilled defendants the standard would be that of a reasonable person skilled in that particular trade or calling (*Vowles v Evans*, *Wells v Cooper*)
- The standard of care may be varied because of:
 - Special characteristics of the victim – *Paris v Stepney*
 - The size (or magnitude) of the risk – *Bolton v Stone*
 - The cost (or convenience) of precautions – *Latimer v AEC*
 - Any social utility of the defendant's actions – *Watt v Hertfordshire Council*
- Causation
 - Factual causation establishes that harm has been caused by D's act or omission using the but for test - *Barnett v Chelsea and Kensington Hospital Management Committee*
 - Remoteness - damage cannot be too remote – it must be reasonably foreseeable - *The Wagon Mound*

Credit any other relevant point(s).

AO2 Indicative content

Answers may reason that:

We are told that a duty of care is established and this is not disputed so there is no credit for this.

- Darcie has breached her duty of care by falling below the standard of the reasonable person ... or the reasonable swimming instructor, who would not:
 - in general - leave vulnerable clients (including Emma) unattended in a potentially hazardous situation
 - specifically - fail to give Emma assistance getting out of the pool knowing she was vulnerable
- The standard of care may be varied in Emma's favour because:
 - the characteristics of the claimant - Emma is elderly and vulnerable so she is more susceptible to harm
 - the cost or convenience of taking precautions – the cost or inconvenience would have been low (Darcie staying until everyone was safely out of the pool and offering particular help to Emma) especially when weighed against the potential harm
 - the size of the risk – the risk of leaving elderly clients unattended is greater than leaving younger clients unattended
 - the social utility – Darcie could not argue that there is any social utility in her running the risk when she leaves early as it is done purely for her own benefit
 - any variation in the standard of care would not be in Darcie's favour
- Darcie is the factual cause of Emma's injury since 'but for' her leaving early, she would have been there to assist Emma who would not have fallen and been harmed as a consequence
- The harm was foreseeable (not too remote) as Darcie knew Emma struggles and is vulnerable with low levels of fitness, so the type of harm was foreseeable if she was left unattended

In conclusion, Emma is likely to be successful if she sues Darcie 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 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 whether vicarious liability is unfair on employers.

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 explain that:

Vicarious liability is where one party (usually an employer) is held liable for the torts of another party (usually an employee) referred to as the tortfeasor.

Contemporary approach – two 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*)

- Element 1 (*Barclays v Various Claimants*) – apply the conventional distinction between a contract of employment and a contract of services using traditional tests of employment (e.g. control, integration, economic reality) where necessary. 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) Eer more likely to have means to compensate V and be insured; b) tort committed as a result of activity being taken by the Eee on behalf of the Eer; c) Eee's activity likely to be part of the business activity of Eer; d) Eer, by employing Eee to carry out the activity, will have created the risk of the act being committed by Eee; e) Eee will, to a greater or a lesser degree, have been under the control of the Eer. When applying this approach, it will be important to consider relationships previously held as 'akin to employment'. However, there is no liability for the torts of a true independent contractor.
- Element 2 (*Morrison v Various Claimants*) - the general approach 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 course of his employment." (*Dubai Aluminium v Salaam*). This principle must be applied with regard to the circumstances of the case and the assistance provided by previous court decisions and this would include cases decided under the Salmond test where applicable. The court affirmed the continuing importance of recognising where an employee is on a frolic of their own and stressed the importance of considering the motive of the employee in this regard.

- Relevant cases: *Lister v Hesley Hall*; *Dubai Aluminium v Salaam*; *Majrowski v Guy's and St Thomas'*; *Christian Brothers*; *Cox v Ministry of Justice*; *Mohamud v Morrisons*; *Armes v Notts CC*; *Barclays Bank plc v Various Claimants*; *Morrisons v Various Claimants*; *Barry Congregation of Jehovah's Witnesses v BXB*

Traditional approach – the 'Salmond test' – there must be a tort, the tortfeasor must be an employee and the tort must be committed in the course of employment

- Test for employee status: Control test (*Mersey Docks & Harbour Board v Coggins & Griffiths*); Integration test (*Stevenson, Jordan & Harrison v Macdonald & Evans*); Economic reality (multiple) test (*Ready Mixed Concrete v MPNI*)
- In the course of employment - expressly or impliedly authorised acts (*Poland v Parr*); acting in an unauthorised manner (*Limpus v London General Omnibus*); acting in a purely careless manner (*Century Insurance v NI Transport*). Not within the course of employment: activities not within the scope of employment (*Beard v London General*); on a 'frolic of his own' (*Hilton v Thomas Burton*); giving unauthorised lifts (*Twine v Beans Express*)

Credit any other relevant point(s).

AO3 Indicative content

Answers **may** reason that:

Unfair on employers

- Vicarious liability contradicts the tortious principle of fault-based liability because the person held liable is not the person at fault and this is unfair
- It is unfair that an employer can end up liable even though they have done all they could and/or have expressly prohibited certain practices
- Vicarious liability sometimes operates inconsistently or arbitrarily when seemingly similar cases have been decided differently – for example, contrast *Smith v Stages* and *Hilton v Thomas* and this can operate unfairly on employers
- It is unfair to hold employers liable for the unpredictable and criminal acts of rogue employees which they would clearly never condone
- It is unfair that an employer should be liable when they have been diligent, recruited carefully, done all the requisite training, and an employee acts recklessly nonetheless
- It is unfair for employers to be held liable when the tort happens before they have realised the employee needs discipline or training
- It is unfair to expect employers to be liable for the work of highly skilled employees such as surgeons as there is negligible control

Fair on employers (only credited to contextualise 'unfairness')

- Employers have control over their employees and it is therefore fair for them to take responsibility for their work-related torts
- Employers benefit financially from the work of their employees so it is only fair that they should carry financial responsibility for any torts resulting from work-based activity
- Employers are responsible for the selection, supervision and training of their employees so it is fair that they should take responsibility for the standard of work of those employees
- It is fair to hold employers liable for risks associated with their business as they are better resourced financially to pay any compensation and they are usually required to be insured by law. These costs are usually passed on to the customers in higher prices so it is not an unfair burden

- The alternative arrangement of suing the tortfeasor would leave many without compensation and would be unfair on employees if they were, for example, taking risks to meet the employers' targets – it is, in this instance, fair to place the burden on the party creating the risk
- There is a public policy expectation that employers should maintain high standards and promote best working practices for the safety and wellbeing of the public, customers and employees alike. Vicarious liability promotes this aim by encouraging practices that minimise risks and discouraging employers from bad practice, risk-taking and turning a blind eye. This is fair since it ultimately saves the employer from potential and costly litigation.

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. 	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. 	1-3

	<ul style="list-style-type: none"> The response will have minimal detail. Citation of case law is limited. 		<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>	
Level 0	No response or no response worthy of credit.	0	No response or no response worthy of credit.	0

8 Advise Henry whether he will owe Felix a duty under the Occupiers' Liability Act 1984. Do **not** consider Henry's status as an occupier or Felix's status as a trespasser as these are not disputed. 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:

- The liability of occupiers of premises towards non-visitors is governed by the Occupiers' Liability Act 1984
- Premises are widely defined – *Wheeler v Copas*
- Section 1(1)(a) says the Act covers '*injuries suffered by reason of any danger due to the state of the premises*'
- Section 1(4) sets out the scope of the duty '*to take such care as is reasonable in all the circumstances of the case to see that the trespasser does not suffer injury on the premises by reason of the danger concerned*'
- Section 1(3) says the duty under the Act is owed by an occupier if:
 - (a) he is aware of the danger or has reasonable grounds to believe that it exists (*Rhind v Astbury Water Park*);
 - (b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned (*Donoghue v Folkestone, Swain v Natui Ram Pur*); and
 - (c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection (*Tomlinson v Congleton BC, Simonds v Isle of Wight Council*)
- Considerations relevant to s.1(3)(c)

- The wording of s.1(3)(c) can allow courts to distinguish between different classes of trespasser. For example, an occupier is entitled to expect that a trespasser will not engage in obviously foolhardy pursuits or ones which his expertise or training should make him aware of - *Donoghue v Folkestone*
- Obvious risks: even in the absence of a warning, a trespasser who took a risk that should have been obvious to him cannot complain that the occupier did not take sufficient steps to discourage his own risk-taking - *Tomlinson, Donoghue v Folkestone, Young v Kent County Council*

The following additional cases may be relevant: *Keown v Coventry, Siddorn v Patel, The Calgarth, Higgs v Foster, Scott v Associated British Ports, Staples v West Dorset District Council, Ratcliff v Mc Connell, Darby v National Trust*

Credit any other relevant point(s).

AO2 Indicative content

Answers **may** reason that:

The fact that Henry is occupier and defendant and Felix is trespasser and claimant are undisputed. The farm in general and the woods in particular would meet the definition of premises.

Does s.1(3) apply?

- 1(3)(a) Henry is aware of the danger as evidenced by a) his knowledge of the activity through social media, b) the fact that he makes routine patrols, and c) the scenario implies that he has considered 'fencing off' before deciding it would be impractical
- 1(3)(b) Henry is aware that potential trespassers are in the vicinity as evidenced by a) his routine patrols, b) his awareness of social media and c) his knowledge of past activity
- 1(3)(c) Henry could not reasonably be expected to offer protection because: a) it would not be reasonable to expect him to fence off an entire woodland, or b) make every single tree impossible to climb, and c) there is nothing inherently wrong with the 'state of the premises' which are not 'dangerous' in and of themselves (*Jolley v Sutton, Siddorn v Patel*)
- Furthermore, it is not reasonable to expect Henry to offer protection from an obvious risk (*Tomlinson v Congleton*) and Felix took what was clearly an obvious and dangerous risk by climbing a tree in the dark. We are also told that Felix is a bird egg collector so we can assume he might have some expertise of climbing trees to retrieve eggs. If so, his expertise would be another relevant consideration (*Donoghue v Folkestone*)

Although Henry appears to meet the requirements of ss1(3)(a) & (b), there are a comprehensive range of factors that mean he does not meet the requirements of s.1(3)(c)

Conclude, therefore, that Henry will not owe a duty under s.1(3)

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 Jamila whether the interference she is suffering is sufficiently unreasonable to constitute a private nuisance. 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:

- Private nuisance is: ‘*an unlawful, indirect interference with another person’s use or enjoyment of land or rights over it*’. Identify that a potential defendant is an occupier of land and that this includes those in control and possession as well as owners - *Tetley v Chitty*. 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*
- The type of interference must be indirect to give rise to liability. Examples include noise or vibrations (*Sturges v Bridgman*), smoke and fumes (*St Helens Smelting v Tipping*) and smells (*Bliss v Hall*). Identify that there is a difference between a nuisance causing physical damage and one which causes solely an interference with the claimant’s use and enjoyment of their land - *Halsey v Esso*. The former is a *prima facie* nuisance (*St Helens*) and the latter will require proof of unreasonableness
- Issues which are commonly considered as aspects that affect reasonableness include:
 - Locality - *Coventry v Lawrence, affirmed in*
 - Duration - *De Keyser’s Royal Hotel Ltd v Spicer Bros, Crown River Cruises v Kimbolton Fireworks*
 - Sensitivity – *Robinson v Kilvert, Mc Kinnon Industries v Walker, Network Rail Infrastructure Ltd (formerly Railtrack plc) v CJ Morris, Fearn & Others v Tate Gallery*
- Credit alternative definitions and principles as set out in *Fearn & Others v Tate Gallery* where relevant

Credit any other relevant point(s)

AO2 Indicative content

Answers **may** reason that:

- As owners of their respective properties both Jamila and Ivan are occupiers and Ivan is causing the harm and is the defendant whereas Jamila is suffering the harm and is the claimant
- There is actionable interference with Jamila’s use and enjoyment of her property in the form of lost sleep and the dead fish
- Smoke and noxious fumes are an actionable form of ‘indirect’ interference
- Since there is no physical harm, there is no *prima facie* nuisance (*Halsey v Esso*), meaning that Jamila will need to establish unreasonableness to establish that the nuisance is unlawful
- The interference is unreasonable because:
 - Locality – as a residential housing estate, the locality is not industrial or commercial in nature. So, there would be no expectation that the presence of smoke and fumes are an accepted part of the nature of the locality. It is also submitted that the fact that this is happening

overnight would probably be unreasonable even in an industrial locality but is almost certainly outside the scope of what is reasonable in a residential locality

- Duration – although it has only started recently, we are told this is happening regularly (each evening) and therefore this meets the required standard for a continuous state of affairs
- Sensitivity – the loss of sleep due to noxious fumes and smoke would be a normal consequence and not subject to consideration in the context of sensitivity. In respect of the rare fish, there is authority to suggest that where C is making an abnormally sensitive use of their land, D will not be liable. Such situations have, more recently, been subjected to a general test of foreseeability. Credit any reasoned argument based on the principles set out in either *Robinson v Kilvert* (was C's use of land 'particularly sensitive?'), *McKinnon Industries v Walker* (where D is liable for an actionable nuisance, C can recover damages in respect of harm in spite of its sensitive nature) or *Network Rail v Morris* (was the harm reasonably foreseeable?)

- Conclude – the interference Jamila is suffering is unreasonable and would constitute a private nuisance

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. 	1-2	<ul style="list-style-type: none"> ● Limited application of legal rules to a given scenario. 	1-3

	<ul style="list-style-type: none"> Citation of statutes and case law is limited. 		<ul style="list-style-type: none"> Limited presentation of a legal argument which has minimal detail and is unstructured and/or unclear. Minimal legal terminology is used. 	
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
1–4	8	0	0	0	8
5–8	0	0	12	0	12
9 or 12	8	12	0	0	20
10 or 13	8	12	0	0	20
11* or 14*	8	0	0	12	20
Total	32	24	12	12	80

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

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