

**MARK SCHEME for the May/June 2010 question paper
for the guidance of teachers**

9084 LAW

9084/43

Paper 43, maximum raw mark 75

This mark scheme is published as an aid to teachers and candidates, to indicate the requirements of the examination. It shows the basis on which Examiners were instructed to award marks. It does not indicate the details of the discussions that took place at an Examiners' meeting before marking began, which would have considered the acceptability of alternative answers.

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

- CIE will not enter into discussions or correspondence in connection with these mark schemes.

CIE is publishing the mark schemes for the May/June 2010 question papers for most IGCSE, GCE Advanced Level and Advanced Subsidiary Level syllabuses and some Ordinary Level syllabuses.

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Assessment Objectives

Candidates are expected to demonstrate:

Knowledge and Understanding

- recall, select, use and develop knowledge and understanding of legal principles and rules by means of example and citation

Analysis, Evaluation and Application

- analyse and evaluate legal materials, situations and issues and accurately apply appropriate principles and rules

Communication and Presentation

- use appropriate legal terminology to present logical and coherent argument and to communicate relevant material in a clear and concise manner.

Specification Grid

The relationship between the Assessment Objectives and this individual component is detailed below. The objectives are weighted to give an indication of their relative importance, rather than to provide a precise statement of the percentage mark allocation to particular assessment objectives.

Assessment Objective	Paper 1	Paper 2	Paper 3	Paper 4	Advanced Level
Knowledge/Understanding	50	50	50	50	50
Analysis/Evaluation/Application	40	40	40	40	40
Communication/Presentation	10	10	10	10	10

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Mark Bands

The mark bands and descriptors applicable to all questions on the paper are as follows. Maximum mark allocations are indicated in the table at the foot of the page.

Indicative content for each of the questions follows overleaf.

Band 1:

The answer contains no relevant material.

Band 2:

The candidate introduces fragments of information or unexplained examples from which no coherent explanation or analysis can emerge

OR

The candidate attempts to introduce an explanation and/or analysis but it is so fundamentally undermined by error and confusion that it remains substantially incoherent.

Band 3:

The candidate begins to indicate some capacity for explanation and analysis by introducing some of the issues, but explanations are limited and superficial

OR

The candidate adopts an approach in which there is concentration on explanation in terms of facts presented rather than through the development and explanation of legal principles and rules

OR

The candidate attempts to introduce material across the range of potential content, but it is weak or confused so that no real explanation or conclusion emerges.

Band 4:

Where there is more than one issue, the candidate demonstrates a clear understanding of one of the main issues of the question, giving explanations and using illustrations so that a full and detailed picture is presented of this issue

OR

The candidate presents a more limited explanation of all parts of the answer, but there is some lack of detail or superficiality in respect of either or both so that the answer is not fully rounded.

Band 5:

The candidate presents a detailed explanation and discussion of all areas of relevant law and, while there may be some minor inaccuracies and/or imbalance, a coherent explanation emerges.

Maximum Mark Allocations:

Question	1	2	3	4	5	6
Band 1	0	0	0	0	0	0
Band 2	6	6	6	6	6	6
Band 3	12	12	12	12	12	12
Band 4	19	19	19	19	19	19
Band 5	25	25	25	25	25	25

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Section A

1 Critically assess the role of policy in decision making in cases in the tort of negligence and explain why policy has been allowed to play such a role.

Candidates should contextualise the question by explaining that there have been numerous situations when a case of negligence has been established, but where the courts have decided to decline to make or to restrict an award of damages (in the interest of public policy). Whilst other examples might be used, it is most likely that candidates will explore the doctrine based on policy which appears to influence judges in order to avoid opening the floodgates to thousands of potential claims.

Specific examples must be explored such as nervous shock cases and secondary victims (e.g. *McLoughlin v O'Brien*, *Alcock v Chief Constable of South Yorkshire* etc.) or those involving negligent misstatement and pure economic loss (e.g. *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, *Henderson v Merrett Syndicates Ltd*).

Candidates should explore these special duty situations and assess whether the cautious approach of the courts can be justified simply for fear of inundating the courts with too many potential cases. Should justice be denied simply because of administrative consideration?

This question could be approached from various angles and appropriate credit should be awarded whichever angle it is tackled from. However, band 4 marks should only be awarded to candidates who make a critical assessment of appropriate policy decisions.

2 Tort plays a significant role in the protection of civil liberties. To what extent do you agree that the statement applies to trespass to the person, given the defences available to this tort?

The three strands of trespass to the person (assault, battery and false imprisonment) should be identified and briefly explained; candidates will not be significantly credited for lengthy descriptions of these; however candidates should be credited for saying how civil liberties might be protected generally by this tort.

The focus of responses should be on the defences available – consent, statutory authority and self-defence – and whether they have a negative impact on the tort vis a vis civil liberties.

Candidates might consider the statutory right to arrest under PACE 1984 and/or to detain under the Health Act 1983 and the impact on false imprisonment as a tort. Likewise, the impact of consent to being touched during sporting activity or whilst undergoing medical treatment should be considered on battery as a tort. The right to use reasonable and proportionate force to protect self and others (*Cockcroft v Smith*).

Responses limited to simple factual recall will receive marks in no higher than band 3.

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3 Critically assess the extent to which the torts of private nuisance and Rylands v Fletcher might potentially contribute to environmental protection.

On the face of it, it might seem that both the tort of nuisance and the tort in R v F have a potentially important role to play in dealing with environmental pollution; R v F should be outlined and briefly explained.

Candidates should realise, however, that the effectiveness of R v F (and nuisance for that matter) to deal with anything other than an individual, localised problem is questionable: the tort is concerned with damage or interference with rights to land rather than with the environment generally and this should be emphasised by the candidates.

Candidates should explain and illustrate that whilst activities and escapes complained of may have an environmental impact, that in itself does not give rise to liability in R v F – candidates should explore appropriate cases to support their views (e.g. *Cambridge Water Co v Eastern Counties Leather plc*, *Transco plc v Stockport Metropolitan Council* etc.).

The question asks for a critical assessment to be made, so answers limited to factual recall should receive marks no higher than band 3.

Section B

4 With reference to decided cases, discuss the potential liability for Nasir's injury that arises from these circumstances.

Candidates should identify Occupiers' Liability as the context of this scenario. The relevant provisions of the Occupier's Liability Act 1957 and 1984 should be stated, explained and applied.

Is Primrose an occupier in law (*Wheat v Lacon*)? If so, what duty does S2 of the 1957 Act impose on him as regards lawful visitors? What standard is applied to measure whether reasonable safety has been assured?

Is Primrose liable for the actions of independent contractors, such as Paddy? Has she chosen her contractor wisely? Has she taken sufficient steps to ensure that the work is done properly?

Nasir is a postman who visits private premises on a regular basis. Should he be more aware and take greater care for his own safety? Has he contributed to his own injuries?

In the light of the scenario, minor credit only will be given for any consideration of vicarious liability possibilities.

Legal principles must be discussed and directly applied to the scenario; whatever conclusions are reached they should be clear, compelling and fully supported.

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5 On the assumption that Kelvin's negligence can be established, assess his potential liability for the injuries suffered by Greta and Sam.

Focus of candidate attention should be on liability in negligence and in particular for nervous shock.

Liability in negligence results from the existence of a duty of care owed to the claimant, a breach of that duty and consequential loss or damage to the claimant. Candidates are expected to give a brief discussion and illustration of these elements.

The trauma, which Greta and Sam suffer and which causes their long-term mental distress, might be described as cases of nervous shock. He has sustained psychiatric injury as defined by Lord Bridge in *McLoughlin v O'Brien*.

The harm that both suffer is sustained as a direct result of the act of negligence of the heating engineer, Kelvin. Would they be described as primary or secondary victims? As Greta was in the house when it caught fire and thus directly affected by Kelvin's negligence, it is likely that she would be judged a primary victim and Kelvin's liability to her would depend on whether her 'loss' was a reasonably foreseeable consequence of his negligent act (e.g. *McLoughlin v O'Brien*, *Bourhill v Young*).

Sam's case is somewhat less clear. As a rescuer, any claim made by Sam could be seen either as one from a primary victim or as one from a secondary victim and in either event may well be countered by Kelvin by the general defence of consent, arguing that Sam voluntarily consented to the risk involved in the rescue. If it could be argued that as a rescuer he comes within the range of foreseeable physical injury then he would be classed as a primary victim too. However, if not, he would be classed a secondary victim. A duty of care is only owed to secondary victims if very strict conditions are satisfied. The decisions in *White*, *McLoughlin* and *Alcock* need to be discussed and the tests of the nature of the injury, class of person and claimant proximity need to be applied and conclusions drawn. Even if liability is potentially established, however, would a defence of consent enable Kelvin to escape liability for Sam's loss? The decisions in *White* and *Chadwick v British Transport Commission* would suggest otherwise.

The principles must be applied to the scenario and whatever conclusions are reached they should be clear, compelling and fully supported.

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6 Discuss the steps that the manager of the shopping mall and the shop owners themselves can take in the law of tort to deal with this problem and evaluate the likelihood of their success.

Candidates should identify the only real basis for action by either the manager of the shopping mall or the shop-owners as the tort of trespass as their acts are direct, forcible and without lawful purpose. Candidates need to explain that trespass is a tort against the possession of land which only gives the person in legal possession of that land a position to bring legal action against perpetrators of the tort. Thus if the manager represents an organisation that owns the mall or if the shopkeepers are tenants in law, then either would have the right to sue trespassers to land.

When shopping malls and shops within them open their doors for trade, they give members of the public the lawful justification to enter for the purpose of shopping and as long as people enter for that purpose they cannot be deemed trespassers. However, it seems that the gang in question has a different and illegal purpose – to steal and be a nuisance – when it enters the mall and its shops, its members are immediately guilty of intentional trespass to land ab initio, although intent to trespass is not a requirement of the tort.

So what of the remedies in tort? It is quite clear that the common law remedy of damages would be inappropriate in this instance and that abatement of the trespass is what would be sought by all concerned. The legal possessor of land has the right to eject the trespasser from premises, but would this be a sensible course of action? Alternatively, court action might be pursued for the equitable remedy of an injunction, asking for an order to ban the continuance of the trespass, but such remedies are only issued at the court's discretion.

All things considered, this issue is best put into the hands of the police and the sanctions of the criminal law, rather than pursued in tort. However candidates are expected to debate the issues fully and whatever conclusions are reached they should be clear and compelling.