General

Many students performed competently on this Unit and there were many excellent responses, demonstrative of thorough learning and careful preparation. As has been highlighted in earlier reports, the major deficiencies in the responses of weaker students to the substantive law questions, were the devotion of excessive time and detail to aspects which were not in issue in the problems set and the failure to adequately read and/or reflect on the facts of the problems, leading to inaccurate explanations and analyses. In addition, many students often failed to display a precise knowledge of the wording of relevant statutes, especially in relation to the Theft Act 1968, the Fraud Act 2006 and the Occupiers’ Liability Act 1984.

Section A Criminal Law (Offences against Property)

Scenario 1

Question 01

Students were required to address three areas in relation to Harry’s possible criminal liability for property offences in relation to Tom:

(i) blackmail
(ii) theft
(iii) burglary.

The blackmail issues

This question required students to consider whether Harry made a ‘demand with menaces’, whether the demand was ‘unwarranted’ and whether he had made the demand ‘with a view to gain for himself or another or with the intent to cause loss to another’, s.21 (1) Theft Act 1968. Most students were able to address the issues of ‘demand’ and ‘menaces’, although only better ones were able to address the meaning of ‘unwarranted’ reasonably successfully. There was clearly a demand by Harry that Tom give him ‘his job back’, the demand was made with menaces as Harry’s threat was to do something unpleasant or detrimental to Tom (to inform the police of Tom’s ‘violent criminal past’) and the reasonable man ‘of normal stability and courage’ would be likely to be influenced by this threat. If this was the case, it would not matter that Tom himself did not appear to give in to the threat. The area in respect of which most students appeared confused, was in relation to the meaning of ‘unwarranted’. According to s.21, a defendant’s (D’s) demand with menaces will be unwarranted unless he believed that he had reasonable grounds for making the demand and that the use of menaces was a proper means of reinforcing the demand. In the scenario, given that Harry felt ‘outraged’ at Tim sacking him, it could be argued that he might believe he had such reasonable grounds, and many students argued as such, although many concluded that since Harry had been justifiably sacked, reasonable grounds did not exist. In order to decide whether Harry believed that the use of menaces was proper, it had to be asked whether he believed that his threat of informing the police of Tom’s ‘violent criminal past’ was morally or socially acceptable according to the general standards of society. In this connection, it is arguable that Harry might well believe that it is morally right to report criminal behaviour, in which case the demand would not be ‘unwarranted’. Many students were able to correctly explain the requirement of s.21, that the demand must be made with ‘a view to gain for himself or another’ and that the gain
or loss must be in ‘money or other property’. Many students also correctly argued that, since Harry was demanding what presumably was paid employment, this requirement was satisfied.

**The theft issues**

Obviously, students were required to explain and apply the elements of theft, both in terms of *actus reus* (appropriation, property, belonging to another) and *mens rea* (intention to permanently deprive and dishonesty). Clearly, Harry appropriated the papers by taking them and the papers obviously constituted ‘property’ within s.4 of the Theft Act 1968. Many students also accurately explained and applied the principle in *Oxford v Moss*, that the ‘information’ contained in the papers (the plans) was not ‘property’ for the purposes of the law of theft and therefore could not be stolen. The papers constituted property ‘belonging to another’, as Tom had a proprietary interest in them (and also had possession or control of them) and the vast majority of students successfully addressed this aspect. In relation to the *mens rea* aspects, Harry was obviously dishonest according to the *Ghosh* rules and, since Harry ‘decided to keep’ the papers, he possessed the intention to permanently deprive.

**Note:** Some students considered the possibility that Harry committed robbery when he pushed Tom. This obviously amounted to use of ‘force’ by Harry, but his liability for robbery was doubtful as there was no evidence in the scenario that Harry contemplated stealing when he pushed Tom, with the result that he did not use force ‘in order to steal’. Nonetheless, credit was given to students who discussed robbery; although maximum credit was only awarded to students who concluded that there was no liability.

**The burglary issues**

Generally, students were able to provide competent responses to this aspect of the question and there were many good ones. It was obviously necessary to explain the requirements of ‘entry’, ‘trespasser’, and ‘building or part of a building’. In relation to the requirement of entry ‘as a trespasser’, since Harry had been told by Tom ‘never to come back to the office’, he possessed the *actus reus* of trespass and, since he must have known that he was trespassing, he also possessed the *mens rea*. Some students who addressed the above issue then correctly argued that Harry was guilty of burglary on the basis of s.9(1)(b) since, having entered as a trespasser, he committed theft of the papers and possibly GBH. It was also arguable that, since Harry was ‘outraged and furious’ with Tom for having sacked him, he intended to cause GBH to Tom before he entered the office, with the result that Harry was guilty of burglary under s.9(1)(a) Theft Act.

When theft was involved, students tended to explain and apply the elements of burglary more accurately (where theft is involved) when they first discuss theft, before proceeding to burglary. Explanations often tended to be rushed and confused where students had to interrupt the discussion of burglary by a discussion of theft. Also, it should be noted that discussions of burglary tended to be more accurate where they began with a clear explanation of both s.9(1)(a) and (b) Theft Act. Many students failed to explain the crucial distinction between s. 9(1)(a) and (b) that, insofar as the former only requires intention regarding the ulterior offences, whilst the latter requires a committed or an attempted offence (theft or GBH).
Question 02

Students were required to address the following areas:

(i) the possible liability of Harry for fraud by false representation and the possible defence of intoxication
(ii) the possible liability of Harry for theft of the £20,000
(iii) the possible liability of Tom and Dan for criminal damage.

The fraud issues

Many students were able to explain and apply the elements of the Fraud Act 2006 accurately and thus gained high marks. Students were required to address the requirements that D must make a ‘representation’, that it must be ‘false’ and that D intends thereby to ‘make a gain for himself or another’, or to cause ‘a loss to another’ or ‘expose another to a risk of loss’. Harry made three representations to Anna: the express statement that the plans were his own; the implied statement in his agreement with Anna to develop the software; that he had the intention to do so and; his promise to pay Anna half of the profits. These representations were false as Harry knew that they were ‘untrue or misleading’ s.2(2) Fraud Act. In relation to the requirement of dishonesty under the Ghosh principles, it was necessary to distinguish the representations, since as Harry had decided after he had taken the plans that he was entitled to ‘use’ them, his representation that they were his own might not be dishonest. On the other hand, Harry’s representations that he intended to develop the software and to pay money to Anna were dishonest as his intentions were otherwise. As most students pointed out, Harry intended to ‘make a gain for himself or another’ or to ‘cause loss to another or to expose another to a risk of loss’. Better students were also able to explain the statutory provisions relating to the meaning of ‘gain’ and ‘loss’ ie. that these relate to ‘gain’ and ‘loss’ only ‘in money or other property’ s.5(2) and that ‘gain’ includes ‘getting what one does not have’ and that ‘loss’ includes ‘parting with what one had’, namely the £20,000 which Anna pays to Harry.

As pointed out in previous reports, students can only achieve the highest marks if they provide explanations and definitions which closely mirror the wording of the Fraud Act and this year there was clear evidence that many students have taken this point on board.

The defence of intoxication

The fact that Harry drank ‘several large classes of whisky’ before his dealings with Anna raised the issue of the defence of voluntary intoxication in relation to the offence of fraud. In order to achieve top marks, it was necessary to explain that the defence applies only to an offence of specific intent and not to an offence of basic intent. According to some of the judgements in Majewski, one criterion of the distinction between offences of specific and basic intent is that if an offence only requires intention or knowledge as the mens rea, it is one of specific intent, whereas, if the offence can be committed recklessly, it is one of basic intent. On this basis, it is arguable that fraud is an offence of specific intent as liability requires an intention to make a gain or cause a loss and knowledge that the representation is untrue or misleading. On the other hand, voluntary intoxication will operate as a defence to a crime of specific intent only if the intoxication in fact is such that it prevents the defendant from forming the required mens rea; it is clear that this was not the case with Harry, as he was able to put into operation his plan for getting money from Anna. The defence would therefore not be operative.
The theft issues in relation to the £20,000

Many students were able to provide competent explanation and application of the various elements, although many failed to discuss it altogether. There was clearly an appropriation of the money by Harry, as Anna paid it to him with result that he thereby assumed ‘the rights of an owner’ s.3 Theft Act 1968. It was also necessary for students to explain that, according to the decision in Gomez, there is still an ‘appropriation’ despite the owner consenting to it, as Anna did by voluntarily handing over the money to Harry. The money clearly constituted ‘property’ under s.5 Theft Act and the money was ‘property belonging to another’ at the time of the dishonest appropriation, as Anna had a ‘proprietary right or interest in it’. In relation to the mens rea elements, Harry was dishonest under the Ghosh rules as he had no intention of honouring his agreement with Anna to develop the software and he possessed intention to permanently deprive as his later purchase of the car probably suggested.

Some students argued that the defence of intoxication applied to the theft as well as to the fraud. This was inaccurate as Anna paid the £20,000 to Harry the day after he drank the whisky with the result that he was probably not drunk when the appropriation took place.

The criminal damage issues in relation to the window and furniture

This question required students to consider whether Tom was liable for basic and aggravated criminal damage.

Generally, students were able to explain and apply the elements of basic criminal damage contained in s.1(1) Criminal Damage Act 1971. Many students provided good explanations of ‘destroys’ and ‘damages’ by referring to the various judicial authorities (for example, A v R, Morphitis v Salmon etc) and pointed out that Harry’s window and furniture was obviously damaged. Many students also identified correctly the damage to the furniture as arson s.1(3) CDA. Generally, students also explained correctly the mens rea requirement of intention or recklessness as to the damage and that, since Tom deliberately threw the petrol bomb though Harry’s window, the damage to the window was intentional. Regarding the damage to the furniture, Tom was at least subjectively reckless as he would have realised the risk of a petrol bomb setting fire to furniture. Indeed it could be argued that this was intended, given that a petrol bomb is intended to set things alight. The further issue was whether Harry was liable for aggravated criminal damage under s.1(2) CDA and generally students pointed this out. Many of the students who did identify correctly the aggravated offence, stated that such liability would be established only if Tom possessed intention or recklessness as to the endangering of life of another, but strong students also explained that the risk of danger to life must be caused by the criminal damage itself (Steer) and not merely by the act which caused the damage. The highest marks were gained by those students who argued that it was the setting fire to Harry’s furniture, rather than the broken window, which created a risk to life created by the danger of the fire spreading throughout the house and who argued that Tom was certainly subjectively reckless as to the endangering of life. It was also irrelevant that Harry was not in the house at the time, as there need be no danger to life in actuality (Dudley).

The criminal damage issues in relation to the coat

There were many good responses to this aspect of the question. Dan clearly committed basic criminal damage to Harry’s coat and, although his intention was to put the fire out rather than to damage the coat he was clearly reckless in respect of the damage. In relation to the meaning of ‘damage’, students were allowed to rely on explanations given in relation to the window and the
furniture. A further issue arose as to whether Dan could establish a defence of ‘lawful excuse’ under s.5(2) CDA. In relation to lawful excuse, either s.5(2)(a) or s.5(2)(b) were arguable. S.5(2)(a) provides that a defendant can establish lawful excuse if he believed at the time of the damage that the person entitled to consent to the damage would have consented. Dan would probably be able to evidence this belief, as clearly he was acting in Harry’s best interests and the two were ‘best mates’. S.5(2)(b) provides that a person who commits the damage is not liable if he causes it to protect other property belonging to himself or another, provided that he believed that the other property was in immediate need of protection and that the means of protection were reasonable. As Dan found the furniture when it was already alight, he could argue that he believed that it was in immediate need of protection and that the coat was a reasonable means of putting the fire out.

As an alternative to the defence of lawful excuse, students were awarded full marks who argued that Dan would be able to successfully rely on the defence of duress of circumstances. This defence will apply where a defendant finds himself in a situation which, on reasonable grounds, he believes poses an imminent danger of death or serious injury to himself or someone for whom he feels responsible, provided that a person of ordinary stability would have acted in the same way as the defendant. The defence of lawful excuse is thus similar to that of duress by threats, except that, in the former instance, the danger is created by a situation rather than by a human being. Dan would probably be able to rely on this defence, given that he believed that Harry was asleep upstairs and therefore in danger of the fire spreading and, if it was late at night, this would be a reasonable belief. Moreover, since Dan and Harry were ‘best mates’, Harry would be someone for whom Dan would reasonably feel responsible.

Scenario 2

Question 03

Students were required to address three areas in relation to Serge’s possible criminal liability, namely:

(i) theft/robbery
(ii) burglary
(iii) the possible application of the defence of duress.

The theft/robbery issues in relation to the money and the wallet

Many students were able to provide at least competent explanations and application of the various elements and there were some excellent attempts. In relation to the money, there was clearly an appropriation by Serge as he took possession of it and it was clearly personal property within the definition of ‘property’ in s.4 Theft Act. Moreover, Serge was clearly dishonest under the Ghosh test and, since he left Arfan’s house with the money, this suggests that he had possessed the intention permanently to deprive Arfan at the time of the appropriation. An issue arose in relation to whether the money was property ‘belonging to’ Arfan, given that Arfan has stolen it from someone else, but, generally, students were correct in arguing that under s.5(1) Theft Act, property belongs to any person ‘having possession or control’ of it; which Arfan clearly had, with the result that Serge committed theft of the money. There was a further issue as to whether Serge committed theft of the wallet and correctly, many students argued that he had not, as he possessed only conditional intent to steal (Easom). Students were also required to consider whether Serge committed robbery. The crucial issues were the meaning of ‘force’ and the requirements that force must be used ‘immediately before or at the time of the theft’ and ‘in order to’ steal. Many students
correctly argued that Serge used force on Fatima by running into her and ‘causing her to lose her balance slightly’. It was arguable that the force was used ‘at the time of’ the theft on the basis of the ‘continuing appropriation’ principle (Hale) and this was pointed out by better students. Many students also argued that Serge used force ‘in order to steal’, although it could be said that the force was used to enable Serge to escape rather than to steal.

The burglary issues

Generally, students were able to provide competent responses to this aspect of the question and there were many good ones. It was obviously necessary to explain the requirements of ‘entry’, ‘trespasser’ and ‘building or part of a building’. In relation to the requirement of entry ‘as a trespasser’, although Serge entered Arfan’s house with his permission, Serge entered ‘part of a building’ (the ‘private study’) as a trespasser, as Arfan had told him not to go there. Serge obviously possessed the mens rea of trespass as he knew he was not permitted to enter the study. Generally, students who addressed the above issues correctly argued that Serge was guilty of burglary on the basis of both s.9(1)(a) Theft Act 1968, since he possessed conditional intent to commit theft and s.9(1)(b) since, having entered as a trespasser, he committed theft of the money.

The defence of duress

Many students accurately explained and applied the elements of duress extremely well and thus gained good marks. Generally, students said it was arguable that Serge would have believed, on reasonable grounds, that Dave had threatened to cause Serge at least serious injury by saying he would give him ‘a serious going over’. A further important issue was whether the threat would have caused a person of reasonable firmness sharing the characteristics of D to act as Serge did and many students considered that this was arguable, taking into account Dave’s reputation for violence. It was also reasonably clear on the facts that Serge would have believed on reasonable grounds that Dave would carry out the threat ‘immediately or almost immediately’ (Hasan); as he wanted Serge to steal the money ‘very soon’. The related issue was whether Serge had a reasonable opportunity to escape the consequences of the theft, for example, by going to the police. Some students argued that, since the theft occurred the day following the threat, Serge would have had an opportunity to contact the police. On the other hand, it might have been reasonable for Serge to think otherwise as Dave knew where Serge lived and Dave’s later text message suggested that he was carefully tracking Serge. An aspect of duress which was addressed by many students and for which they received credit, was that, since Serge had voluntarily associated himself with a violent leader of a gang, he was disabled from relying on the defence.

Question 04

Students were required to address three areas:

(i) the possible liability of Serge for theft of the £50 and the club membership card
(ii) his possible liability for fraud by false representation
(iii) his liability for obtaining services dishonestly.

The theft issues

In relation to the £50, Serge appropriated it by taking possession of it and it was obviously property ‘belonging to another’, as Ken has a ‘proprietary right or interest’ in it, s.5(1) Theft Act. The main issues were whether Serge intended to permanently deprive Ken of the money and whether he
appropriated it dishonestly. Relying on the decision in Velumyl, many students accurately argued that Serge did possess the relevant intention as, despite his intention to replace the money later, he would not be able to replace the original money. In dealing with the Ghosh tests of dishonesty, the vast majority of students concluded that the reasonable man would regard Serge’s conduct as dishonest. This conclusion was given credit, but it was equally arguable that many reasonably honest people would not regard Serge’s conduct as dishonest, given his intention to replace the money at a later stage. In relation to Serge’s ‘borrowing’ of Ken’s club membership card, most students correctly identified the element of intention to permanently deprive as one of the key issues in determining Serge’s liability for theft. S.6(1) Theft Act 1968 provides that, even if the defendant does not intend for the victim to permanently lose the property in question, he is still deemed to possess the intention to permanently deprive if he borrows the property ‘for a period and in circumstances making it equivalent to an outright taking or disposal’. Many students gained credit by correctly pointing out that the court in Lloyd interpreted this provision as meaning that the defendant will possess the intention to permanently deprive the victim of property he has borrowed if, when he returns it, he has used up the ‘goodness and virtue’ in the property. On the other hand, few students considered whether Serge knew that Ken’s card was about to expire. It could have been argued that Serge’s appropriation and use of the card was dishonest, but only if he knew that it would have expired by the time he returned it.

The fraud by false representation issues

The majority of students were able to explain and apply the main elements of the offence arising under s.2 Fraud Act 2006 ie the meaning of ‘representation’, ‘false’, ‘dishonesty’ and ‘the intention to make a gain for himself or another or to cause a loss to another or to expose another to a risk of loss’. The issues requiring specific attention were that, by reason of his conduct, Serge made an ‘implied’ representation that the club membership card was his and that he was entitled to use it to gain entry to the club; this representation was ‘false’ under s.2(2) as it was untrue and Serge knew this. The representation was also made dishonestly under the Ghosh rules and Serge intended by the representation to make a gain for himself or cause a loss to another. Better students were able to explain the meaning of ‘gain’ as a gain in terms of ‘money or other property’ s.5 and that ‘gain’ includes ‘keeping what one has’ s.5(2) ie the price of admission to the club.

The obtaining services issues

The essential elements of the offence of obtaining services by a dishonest act, arising under s.11 Fraud Act 2006, are that: (i) services are obtained by a dishonest act; (ii) they are made available on the basis of being paid for; (iii) D obtains them without payment or without payment in full and; (iv) when he obtains them, he knows that they are (or might me) being made available on the basis of payment, but he intends that payment will not be made or will not be made in full. Generally, students were able to identify the main elements of the offence, although only a few possessed a generally accurate understanding of the actual wording of s.11; often with many students referring to the wording of the offence of making off without payment. On the facts of the scenario, Serge obtained services (the club entertainment) by a dishonest act (using the card to gain entry to the club when he was not entitled to use it). Moreover, the services were made available on the basis of payment, Serge knew this and Serge intentionally obtained the services without payment being made by him personally.
Section B (Tort)

Scenario 3

Question 05

This tort question involved three areas:

(i) the possible liability of Reesh to Jenny for negligent misstatement
(ii) the possible liability of Jenny to Carlos in the tort of negligence
(iii) the possible liability of Jenny to Lisa for psychiatric harm.

The negligent misstatement issues

Correctly, many students began by explaining the generally restrictive approach of the law to allowing claims for economic loss in the tort of negligence; stating that one of the main exceptions to this is to claim for pure economic loss caused by a negligent misstatement or advice. The central feature of the problem was whether Reesh owed a duty of care to Jenny in relation to his giving of advice under the principles as originally established in *Hedley Byrne v Heller* and as developed in later authorities, in particular *Caparo v Dickman*. Although most students displayed a reasonable understanding of these principles, only a few responses analysed and applied the principles in any depth. According to *Hedley Byrne* and later authorities, in the absence of a contract, D owes a duty of care to C in the making of a statement, only if there is a ‘special relationship’ between them, or, according to *Caparo v Dickman*, only if there is a ‘relationship of proximity’ (which has similar meaning to that of a ‘special relationship’). The main features of a special relationship/proximity are that: (i) the maker of the statement, D, possesses some special skill relating to the statement; (ii) D knows that it is highly likely that the claimant, C, will rely on the statement; (iii) C does rely on it and thereby incurs financial loss and; (iv) it is reasonable for C to rely on it. As regards element (i), students argued correctly that, as a surveyor, Reesh could be considered an expert in relation to giving advice about the physical condition of land. The decision in *Chaudhry v Prabhakar*, which suggested that advice given by a friend can give rise to a duty, provided he/she possessed relevant expertise, was also relevant to the scenario. Clearly, requirement (ii) was satisfied, since Jenny had specifically asked Reesh to give her advice as to whether the land would be suitable for building. Moreover, the fact that Phil and Lucy were friends might be a relevant factor. Clearly, Jenny relied on Reesh’s advice since she bought the land in question. Whether it was reasonable for Jenny to rely on Reesh’s advice would depend on all of the circumstances. Many students suggested correctly that it would not normally be reasonable to rely on advice given in a purely social situation; but better students correctly pointed out that the situation was not purely social, as it involved a large sum of money and that Jenny had requested a written report which would suggest that the parties were regarding the situation as a business one. Quite correctly, several students also pointed out that some decisions (eg *Hedley Byrne*, *White v Jones* etc) hold that, if the maker of the statement voluntarily assumes responsibility regarding the making of the statement, rather than staying silent, this supports the existence of a duty of care, and credit was given for this. In relation to the possible liability of Reesh, students were required to discuss also the standard of care required of a professional. In this connection, students needed to explain that Reesh was required to display the care, skill and expertise that would have been displayed by a reasonably competent surveyor and to consider whether he had met that standard in the circumstances; eg the question of whether or not a reasonably competent surveyor would have been expected to discover a chemical contamination. In relation to the remedy available, it was merely necessary for students to identify that Jenny could recover
damages for her loss and that this is one of the areas where economic loss can be recovered in tort; although students who addressed the issue of measure of damages received credit.

**The possible liability of Jenny to Carlos**

Many students achieved good to excellent marks by explaining and applying general principles of negligence. It is obvious that a motorist owes a duty of care (eg foreseeability of harm) in outline, although many students explained in detail the principles of foreseeability and proximity and the rule that it must be just and reasonable to impose a duty and some marks were awarded for this. It was, however, particularly important to decide whether Jenny was in breach of duty by reference to the 'reasonably careful and skilled driver' principle and to possible 'risk factors' such as the degree of likelihood that harm would be caused by Jenny’s failure to properly focus on her driving while texting and the gravity of likely harm etc. Many students adopted this approach, often referring to authorities such as *Paris v Stepney* and *Bolton v Stone* etc. Most students also examined causation and remoteness issues and identified damages as the remedy, for which they received credit. In relation to remoteness, some students gained high marks by explaining that only the type of damage needs to be foreseen and not the precise events whereby the damage is caused (*Hughes v Lord Advocate*).

**The possible liability of Jenny to Lisa**

This question raised the issue of Jenny’s possible liability in the tort of negligence for psychiatric injury suffered by Lisa, producing many competent responses and some excellent ones. In determining whether Jenny owed a duty of care to Lisa, it was necessary to explain that Lisa was a secondary victim as she was an involuntary witness to that incident but not in danger of physical harm herself. Generally, students then went on to accurately explain the various ‘control factors’ laid down in authorities such as *Alcock v Chief Constable* which a secondary claimant needs to satisfy in order to succeed in a claim for psychiatric harm. On the facts of the scenario, Lisa might be able to show ‘a close tie of love and affection’ with Carlos and that she witnessed the ‘aftermath’ of the incident with her own unaided senses. It could also be argued that, assuming that her ‘psychological distress’ amounted to recognised psychiatric injury, as they were the result of a ‘horrifying’ event.

**Question 06**

This tort question concerned:

(i) the possible liability of Tina to Hamid and his friend regarding the smell and the noise and the possible liability of Hamid to Tina regarding the loud music and

(ii) the possible liability of Tina to Hamid regarding the poisoned fish.

**The possible liability of Tina to Hamid and his friend regarding the noise and the smell**

In relation to Hamid’s claim, the majority of students attempting this question were able to provide an accurate definition of the tort of private nuisance and to identify factors referred to in the facts of the problem; which were relevant in determining whether the noise and smells constituted unreasonable interferences with the use and enjoyment of land. In relation to the noise, the locality factor and the duration were important, in that the location was a ‘quiet village’ and that the noise had been continuing for five months. In relation to the smell from the fertiliser, the crucial factor would be whether it was excessive and it is likely that it was, given that it was ‘disgusting’. Unfortunately, some students failed to analyse these factors in detail and tended merely to list
them, but good students provided more detail. As had been pointed out in earlier reports, in relation to nuisance, it is important to address the remedies available. Damages for loss of enjoyment can always be recovered but of particular importance is the remedy of injunction, in that it directs the defendant to cease the offending activity. Students should provide some explanation of this remedy; for example, that it can be used to restrain the continuation of the nuisance, either totally or partially, as in *Kennaway v Thompson*. The injunction is a discretionary remedy, in that the court examines all the circumstances in determining whether to grant it. Although the public benefit of the activity constituting the nuisance is not a defence to liability, it should be noted that, generally, the court will refuse to grant an injunction on the ground of public benefit (see *Adams v Ursell* and *Miller v Jackson*). On the facts of the scenario, it might be arguable that the court would refuse to grant an injunction, or limit it in some way, since Tina committed the nuisance in manufacturing ‘health products’. In relation to Hamid’s friend, it seems unlikely that he would have an interest in Hamid’s house and grounds, with the result that he would be unable to bring a claim in private nuisance (*Hunter v Canary Wharf*) and many student gained marks by explaining this rule.

**The possible liability of Hamid for the loud music**

In relation to Hamid’s playing of the loud music, many students correctly argued that Tina would have a very good chance of succeeding in a claim for private nuisance, as there was clear evidence of malice on Hamid’s part; which in itself indicates an unreasonable interference (*Christie v Davey* and *Hollywood Silver Fox Farm v Emmett*) and this approach resulted in high marks. Moreover, Tina would almost certainly be granted an injunction to stop the loud music.

**The possible liability of Tina to Hamid regarding the poisoned fish**

Generally, students were able to provide some reference to the main elements of the rule in *Rylands v Fletcher*, but too many tended to write a list of these elements which contained little explanation, application or reference to authority. In particular, although many students appreciated the significance of the requirement of non-natural user of land since the *Cambridge Water* and *Transco decisions*, few were able to accurately explain and apply it. It is now clear that a non-natural use is one which is ‘extraordinary and unusual’, as distinct from a use of land which is domestic or normal. On this basis, it was arguably that the accumulation of barrels of fertiliser might be non-natural but probably only if large quantities were involved. On the other hand, most students referred to the requirements of a ‘thing likely to do mischief’, an accumulation, escape and remoteness of damage and were given appropriate credit.

**Question 07**

Students were required to consider:

(i) the possible liability of Jack to Sam under the Occupiers’ Liability Act 1984  
(ii) the possible liability of Jack to Leo and Ruben under the Occupiers’ Liability Act 1957.

**The Occupiers’ Liability Act 1984 issues**

Students correctly explained that Sam was a trespasser in Jack’s house and that, in order for him to successfully claim against Jack for his injuries, he would have to establish that Jack owed him a duty of care under the Occupiers’ liability Act 1984 and that he had failed to observe that duty. Most students had an approximate idea of the conditions which must be satisfied in order for the duty to arise, but very few students were able to state them fully and accurately. First, it is clear
from s.1(1) that the duty arises only where the trespasser is injured by danger due to the state of the premises and not where he is injured by dangerous or foolish activities on the premises, a point which was only appreciated by better students. Moreover, the effect of s.1(3) is that the duty will arise only: if the occupier knows of, or has reasonable grounds to, believe that the danger exists; that he knows or has reasonable grounds to believe, that a trespasser is or might be in vicinity of the danger and; that it is reasonable to expect the occupier to protect the trespasser against the danger. On the facts of the question, it was clearly arguable that the first two conditions were established, as Jack had boarded up the windows and doors and placed prominent ‘danger’ signs outside the house in order ‘to stop local youths getting in in the evenings’. It was also reasonably clear that there was a danger due to the state of the premises, as the staircase was made of ‘rotting wood’ and was probably not an obvious risk, especially to a 14 year-old boy. In relation to the third aspect of s.1(3), it would probably be reasonable to expect an occupier to protect a child trespasser, because buildings such as old, uninhabited houses clearly constitute an allurement to young teenagers. In relation to breach of duty, better students described correctly the duty owed by the occupier to the trespasser ‘to take reasonable care’ ‘to see that he does not suffer injury on the premises by reason of the danger’ s.1(4) OLA, but those who merely referred to a ‘duty of care’ were given some credit. Many students were credited for suggesting that Jack performed his duty to Sam by putting up ‘danger’ signs, but this depended on whether they referred to the danger of the rotting staircase. Many students gained marks by considering whether Sam was contributorily negligent by ‘fooling around’ on the staircase, but this was probably unlikely unless the staircase posed an obvious danger.

The liability of Jack to Leo and Ruben – the OLA 1957

Many students were able to score high marks for this question by explaining the meaning of ‘occupier’, ‘visitor’, ‘the common duty of care’ and by proceeding to consider the application of the common duty of care in relation to Leo and Ruben. Students were able to explain that both claimants were visitors by virtue of an express licence from Jack and that s.2(3)(b) OLA was applicable to Leo and that s.2(4)(b) was applicable to Ruben. In relation to Leo, s.2(3)(b) OLA provides that an occupier may expect that a person in the exercise of a calling will ‘appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so’. It was obvious that Leo was required to exercise the calling of an electrician and the main issue was whether the risk of a ‘rusty nail’ on a skirting board was one which an electrician could reasonably expect in the course of his work; on this point, a reasoned argument either way was credited. In relation to Ruben, given that the question stated that roof guttering fell on him due to poor work by an ‘expert roofer engaged by Jack’, it was relevant to consider s.2(4)(b), which provides that if the visitor suffers damage caused by faulty work of an independent contractor engaged by the occupier, the occupier will not be liable to the visitor provided that he acted reasonably in engaging the contractor, provided that he used reasonable care in selecting the contractor and in checking that the contractor’s work was properly carried out. Most students made at least some reference to this provision, although few were able to explain and apply it in any detail. In particular, only the best students considered whether it is necessary under this provision for the occupier to check the contractor’s work himself and correctly explained that, if the work is not complex, the occupier should do so himself (Woodward v Mayor of Hastings), but not if the work is complex (Haseldine v Daw). Clearly, it would be reasonable for Jack to engage a specialist to erect roof guttering, but the question was whether or not it would have been within her competence to check the completed work.
Question 08

Students were required to consider:

(i) the possible liability of Glossy PLC’s to Jack
(ii) the possible liability of Dr Tan to Jack
(iii) the possible liability of the hospital to Jack.

The liability of Glossy PLC in product liability

Students were able to achieve full marks by addressing product liability on the basis either of common law tortious negligence or the Consumer Protection Act 1987. Obviously, treatment on the basis of common law principles required students to explain elements of the duty of care in relation to defective products and breach of duty. Clearly, the duty is obviously owed by the manufacturer of the product (as in Dongohue v Stevenson and Grant v Australian Knitting Mills) on the basis of the principle of reasonable foreseeability and the duty is to take reasonable care in the manufacturing process. The duty is owed to anyone who is foreseeable likely to be physically injured or suffer damage to property as a result of the manufacturer’s negligence eg a purchaser of the product (Grant v Australian Knitting Mills), a consumer or user of the product (Donoghue v Stevenson) or any other person who foreseeably incurs damage (eg a member of the public who is hit by a defective wheel which breaks loose from a car). On the facts of the problem, it was obvious that a duty of care was owed as it was reasonably foreseeable that paint which contained a dangerous substance causing it to give off toxic fumes would cause injury/damage to its ultimate user. In relation to breach of duty, it was necessary for students to consider the standard of care required and the meaning of reasonable care and skill. Several good students correctly added that, in view of the difficulty which a claimant may face in proving negligence, the court may apply res ipsa loquitur; that is to say, to infer from the nature of the defect itself that it could not have occurred without negligence (eg Grant v Australian Knitting Mills). Also, the majority of students addressed the requirement of physical damage caused by the defective paint (Jack’s breathing difficulties and the damage to his carpet which was caused by the defect) and correctly pointed out that, although Jack could recover damages for the damage caused by the product, he could not recover the cost of the defective paint itself, since this constituted pure economic loss (see Muirhead v Industrial Tank Specialities). Many students chose to deal with product liability on the basis of the principles in the Consumer Protection Act 1987. In general, answers showed a competent understanding of the meaning of the relevant statutory terms ‘product’, ‘defective’ and ‘producer’. However, as in earlier examinations, some students made the major error of stating that the producer must be negligent in order to be liable under the Act. The fundamental principle of the CPA is that it is based on strict liability, with the result that it is unnecessary to establish negligence; many, although not all, students explained this. Some students explained the nature and importance of the ‘development risks’ defence and were credited for this. When writing answers on the CPA, it is also important to remember to state that the defective product must cause ‘damage’, which is defined in the Act as including death or personal injury of the claimant or damage to his property, but excluding damage to the defective product itself (s.5) and many students correctly considered this aspect. Furthermore, many students correctly referred to the rule restricting claims for damage to property to those above £275.

Students will only achieve the highest marks for a discussion of the CPA 1987 if they show a generally accurate knowledge of the terminology of the Act. Moreover, students who discuss product liability on the basis of the tort of negligence will only gain the highest marks if they display at least some knowledge of authorities which relate to product liability eg Grant v Australian Knitting Mills, Muirhead v Industrial Tank Specialities, Fisher v Harrods etc.
The liability of Dr Tan to Jack

Students were required to explain and apply the main principles relating to medical negligence. It was relatively straightforward to establish that Dr Tan owed a duty of care to Jack, his patient, on the basis of the Donoghue v Stevenson principle of reasonable foreseeability of harm. Thus, the main thrust of the question centred on breach of duty by medical professionals. It was possible to produce a competent answer by applying general negligence principles but higher marks could only be gained by referring to various rules specifically dealing with medical negligence and many students had a sound knowledge of these. In particular, many students explained and applied the ‘Bolam principles’ of the standard of the reasonably competent member of the profession and the general rule that if a doctor acts in accordance with a practice which is followed by the profession, he will not be considered to have acted negligently (even if some doctors follow a different practice). However, fewer students were able to explain the Bolitho qualification on the general and approved practice principle ie that such a practice will only absolve a doctor from liability for negligence if the practice can be said to be reasonable, respectable and to have a logical basis.

Another important aspect of Dr Tan’s potential liability was that he ‘had qualified only a month earlier’ and, quite correctly, many students considered whether inexperience is relevant to the standard of care to be reasonably expected. Many students used Nettleship v Western as authority for the rule that Dr Tan’s inexperience was no defence and this argument was credited. Some students also gained credit by referring to the principle put forward by one of the judges in Wilsher v Essex AHA, that the standard of care to be expected from a doctor depends on the post he or she occupies, with the result that a lower standard of care is expected from a doctor holding a junior post than a consultant. Many students also gained credit by briefly explaining and applying the ‘but-for’ test of causation in relation to Dr Tan.

In relation to remoteness, most students correctly explained that, even though Dr Tan did not know of Jack’s ‘rare health problem’, which caused Jack’s injury to be more severe than would otherwise have been the case, he was liable for the full extent of his injuries due to the ‘thin skull’ principle.

The liability of the hospital to Jack

Clearly, students were required to explain and apply the principles of vicarious liability in relation to the hospital. It was fairly obvious that Dr Tan was an employee, as distinct from an independent contractor (if only because of the control which the hospital placed on him in doing his job), but many students referenced the factors to which the courts commonly refer on this issue. The second main issue was whether Dr Tan committed negligence whilst acting in the course of employment, or whether he was acting ‘on a frolic of his own’; in relation to this issue many responses lacked detail in terms of explanation and analysis. The key issue was whether an employee acts in the course of employment when he fails to observe an instruction from the employer, but many students failed to explain the rules on this point and thereby failed to achieve the highest marks. The key principle is that, if the employee is doing what he is employed to do, despite his disobedience, he is acting in the course of employment (eg Limpus v London General Omnibus, Rose v Plenty etc). Some students correctly pointed out that if the employee is doing something which is closely linked to the job, as Dr Tan was, he is acting within the course of employment; such students gained good marks.
Section C (Concepts)

Most centres have now had several years’ experience in dealing with these questions and many students were well prepared, thereby gaining high marks; with even weaker students managing to present competent responses.

Question 09

This (very popular) question required students to discuss the relationship between legal rules and moral principles and to analyse the extent to which the law should be based on moral principles. The majority correctly began by proffering possible definitions of law (eg those of Salmond, Austin, Kelsen etc) and morality (eg that of Phil Harris) and proceeded to compare the respective characteristics of the two. For example, in this respect, most students contrasted the ways in which law and morality arise or are changed, the compulsory nature of law, the voluntary nature of morality and the ways in which law and morality are enforced. Better students raised more sophisticated contrasts, for example, in relation to how disputes of law and morality are settled. The other aspect of the relationship between law and morals which required discussion concerned the extent to which the law does or does not reflect morality. In this connection, many students were able to provide illustration of the proximity of law and morality (eg offences against the person and property, conspiracy to corrupt public morals, outraging public decency, marital rape, the limitations on the scope of consent to offences against the person etc) and the divergence of the two (eg traffic offences, swearing, adultery etc). Better students carefully analysed the moral issues involved in the selected illustrations, although weaker students merely identified them. Better students also referred to the difficulty which the law often faces in taking a moral stance, given the differing moral views in a pluralistic society and the fact that the law often bases rules on principles rather than morality, for example, utilitarianism, or the prevention of harm etc. In this connection, students referred to problematic areas such as those raised by Gillick, abortion and gender issues. The second aspect of the question required students to consider whether the law should be based on moral principles. In response, most students correctly centred upon the conflict between natural law and positivism and the Hart-Devlin debate, although other students referred to philosophers such as Mill, Stephen and Fuller. Good students were able to explain and distinguish these theories in detail, but weaker students often provided confused explanations and/or little detail. Natural lawyers believe that a principle can have legal status only if consistent with a ‘natural law’ idea eg divine law (Aquinas), whereas positivists (eg Austin, Hart etc) believe that a rule which results from the legal process of the state constitutes ‘law’, even if it lacks moral content. Devlin and Stephen were ‘legal moralists’ ie they believed that the basis on which acts should be rendered unlawful is immorality. Devlin’s justification for this was that a society has a ‘shared morality’ and, if this breaks down, society will disintegrate. Mill and Hart can be described as ‘libertarians’, who argued that people should be free to pursue their own idea of the ‘good life’, that the only basis on which acts should be criminalised is the ‘prevention of harm’ and that the enforcement of morality, in general, is not a ground for legal intervention; Hart arguing that the enforcement of morality is generally harmful and unnecessary. Students also provided examples of the conflict between legal moralism and libertarianism/the prevention of harm, for example, in relation to ‘death’ (assisted suicide, cessation of medical treatment), birth (abortion, assisted reproduction), gender (discrimination, civil partnerships, the Bull litigation etc) and other issues, better students demonstrated clear analysis of the moral and other dimensions.
Question 10

This question required students to explain what is meant by ‘balancing conflicting interests’, to discuss the extent to which the law does balance conflicting interests and to briefly discuss why it should seek to do so. As has been pointed out in earlier reports, the key features of gaining marks on this topic are clear and detailed analyses of the scenarios and rules selected for discussion and carefully structured responses. Although this was not a popular question, there were some very good answers. Many students began their discussion by referring to the ‘balancing’ theorists, such as Bentham, Von Ihering and Pound; such material was credited, although it was important to include in this theoretical discussion the reason(s) why these writers regarded the balancing of interests as important. For example, Pound’s view was that the aim of balancing conflicting interests is to build as efficient a structure of society as possible via the process of ‘social engineering’, whereas Bentham saw balancing as an aspect of utilitarianism, in seeking to achieve maximum happiness through the securing of the common good, rather than purely the selfish desires of individuals. Another view of the balancing of interests is the idea that it results in a more just society. Such a theoretical discussion should also have included a brief attempt to define the terms ‘interest’ and ‘balancing’. For example, an ‘interest’ may be defined as a claim or expectation, whereas ‘balancing’ can include a compromise between conflicting interests or allowing one interest to override another. What students correctly proceeded to do was to select various legal scenarios in order to illustrate how conflicting issues are (or are not) balanced. Popular examples utilised by students included private nuisance (eg Miller v Jackson, Kennaway v Thompson, Dennis v MOD etc), the criminal process (eg issues of bail, treatment of suspects by police, the criminal trial etc), issues relating to the automatic disclosure of criminal convictions, cautions etc relating to job applications, terrorism issues (eg A v Z, the GCHQ case, the Abu Qatada scenario etc); and substantive law issues such as the defences of consent and intoxication and the legislative process. What is crucial is that students explained clearly the salient features involved in the selected scenario, the precise nature of the conflicting interests and the rule/process/doctrine which seeks to achieve the relevant balance. For example, a discussion of Miller v Jackson (a very popular scenario), should explain that C was seeking an injunction against a cricket club for private nuisance, that the court had a total discretion as to whether or not it granted one and that, in the view of Denning M.R., the court should refuse to grant it on the ground that the individual interest of C to live free from interference should be overridden by the public interest in protecting recreation and sports. Many students often failed to gain the highest marks by failing to explain the precise interests involved (eg by merely referring to the ‘public interest’ and the ‘private interest’ without explanation) and/or by failing to explain the relevant rule, which allowed the court to engineer the balance; for example, in Miller v Jackson, the discretion which the court has in relation to the grant of injunctions. Another scenario selected by some students was the defence of intoxication, where students were able to explain the balance achieved by the rules in Majewski, but not the precise competing interests involved (namely the public interest in protecting innocent members of the public from drunken criminals and the individual interest or expectation that a person should not be deemed guilty of an offence when his intoxication prevents him from forming the relevant mens rea.) The balance resulting from Majewski is, of course, that, in the case of a crime of specific intent, the private interest prevails and the defence applies, whereas, in the case of a crime of basic intent, the public interest prevails and the defence does not operate. The rules governing the grant or refusal of bail provide another very good example of balancing. The competing interests are the private interest of the suspect/accused that he should enjoy freedom when he has not been convicted of an offence and the public interest, that the suspect/accused should not be released if there is a risk that he will commit another offence or tamper with evidence etc. The way in which the interests are balanced is that, if D is not a danger to the public, he will be granted bail, but, if he is a danger, bail will be refused.
Question 11

This question required students to discuss how far judges are able to develop law through the operation of judicial precedent and statutory interpretation and to discuss the arguments for and against whether judges should have this ability. In relation to the precedent aspect of the question, there were many competent (and some excellent) responses. In order to achieve the highest marks, it was necessary for students to explain the essential features of the doctrine of precedent (the judicial hierarchy, the distinction between \textit{ratio} and \textit{obiter} etc) and the features which offer flexibility and the opportunity for creativity (e.g., distinguishing, the Practice Statement in relation to the Supreme Court, the exceptions to \textit{Young v Bristol Aeroplane} in relation to the Court of Appeal, appeal court decisions with multiple \textit{ratios}, overruling etc). Better students also concluded, quite correctly, that the Supreme Court has much greater scope for creativity than lower courts. Unfortunately, some students failed to achieve the very highest marks by failing to provide sufficient illustration of the operation of creativity (for example, \textit{Herrington v BRB} and \textit{Crown v G} in relation to the Practice Statement, \textit{Balfour v Balfour} and \textit{Merritt v Merritt} in relation to distinguishing and so on). Most students provided some examples but with insufficient explanation and detail. In relation to the question whether judges should be able to display creativity in the operation of precedent, many students correctly referred to the various arguments against judicial law-making; for example, the retrospective effect of judicial decisions, the need for relevant cases to arise, judges’ lack of training as reformers, etc., and the arguments in favour, such as the need for justice. Many students also raised the various constitutional issues; such as the problem that judges are unelected. Many students also gained marks by referring to the various arguments raised by judges and academics in relation to creativity.

Whereas the responses on the precedent aspect of the question were generally good, those responses relating to statutory interpretation were generally poor. The explanations of the various ‘rules’ of statutory interpretation were reasonable, but many answers contained no or little illustration and others contained illustrative examples from the case law with insufficient detail in terms of failing to highlight the relevant word or phrase in the particular statute. For example, students seeking to explain \textit{Fisher v Bell} in order to exemplify the literal rule should state that the statute in that case uses the words ‘offer for sale’ and explanations of \textit{Smith v Hughes}, as an example of the mischief rule, should stress that the statute in that case refers to prostitutes soliciting ‘in the street’. Moreover, few students discussed the extent to which the ‘rules’ of interpretation allow judges to be creative; although better responses correctly pointed out that the purposive approach and the mischief rule give judges scope to consider legislative policy. Some students also made the valid point that the rules of interpretation are not binding, with the result that judges have considerable choice as to how to approach the interpretation of statutes. In relation to the issue of whether judges should be creative in their interpretation of statutes, students often referred to arguments used to justify or criticise creativity in terms of precedent and such arguments were credited.
Mark Ranges and Award of Grades

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