A LEVEL LAW

Unit 4: Criminal Law (Offences against the Person) or Tort AND Concepts of Law
Report on the Examination

2160
June 2017

Version: 1.0
General comments

Students generally performed competently on this Unit and there were also many excellent responses, demonstrating thorough learning and careful preparation. The major deficiencies in the responses of weaker students in the substantive law questions were the devotion of excessive time and detail to aspects which were not in issue in the set problems, and the failure to adequately read and/or reflect on the facts of the problems, leading to inaccurate explanations and analyses. Moreover, students often failed to display a sufficiently precise knowledge of the wording of relevant statutes, especially the Theft Act 1968, the Occupiers’ Liability Acts 1957 and 1984 and the Consumer Protection Act 1987.

Section A (Offences against Property)

Scenario 1

Question 01

This question required students to address the following issues:

- Ben’s possible liability for fraud by false representation and theft and
- Carlo’s possible liability for blackmail.

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 is ‘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’. Ben’s representation to Anna was that he had been robbed of his savings. This was false as it was ‘untrue or misleading’ [s.2(2) Fraud Act] and Ben knew that it was. In relation to the requirement of dishonesty, candidates were required to explain the Ghosh principles. Many conclude that Ben was dishonest but better students considered the possibility that he might not be on the basis that he might have considered his cheating of Anna to be morally justified since she had abandoned him at birth. As most candidates pointed out, Ben clearly 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 has’, namely the £10 000 which Anna paid to Ben.

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

The theft issues. Candidates were obviously required to explain and apply the elements of theft, both in terms of actus reus (appropriation, property, belonging to another) and mens rea (intention permanently to deprive and dishonesty), and many students did so accurately and scored high marks. A particular issue was that of ‘appropriation’. Many students correctly defined this as ‘any assumption by a person of the rights of an owner’ (s.3 Theft Act 1968) but it was also important to
explain that an appropriation occurred by Ben receiving the money from Anna by way of gift and despite the fact that she had consented to the appropriation (Gomez, Hinks). The money obviously constituted ‘property’ under s.4, and the money was property ‘belonging to another’ (Anna) as she had a ‘proprietory right or interest’ in it [s.5(1)]. The majority of students correctly explained and applied Ghosh in relation to dishonesty, but few raised the issue that, because of Anna’s abandonment of Ben at birth, Ben might have genuinely believed that he had a legal right to Anna’s money under s. 2(1)(a) Theft Act, or a moral right to it under Ghosh. Since there was no suggestion in the problem that Ben intended to return the money to Anna, most students correctly concluded that Ben intended permanently to deprive her of the money.

The blackmail issues. The question required students to consider whether Carlo made a “demand with menaces”, whether the demand with menaces was “unwarranted” and whether he had made the demand “with a view to gain for himself or another or with intent to cause loss to another” [s.21(1) Theft Act 1968]. Most students were able to address the issues of “demand” and “menaces”, at least reasonably well, although only better ones were able to explain the meaning of “unwarranted” accurately. There was clearly a demand by Carlo that Ben give him £500 for a holiday, and the demand was (possibly) made with menaces as the threat was to do something unpleasant or detrimental to Ben (to inform Anna of Ben’s earlier dishonesty towards her). An important issue, however, was whether the reasonable man “of normal stability and courage” would be likely to be influenced by this threat (Clear), and that, If this was the case, then it would be irrelevant to Carlo’s liability that Ben was not himself affected by it. Unfortunately, although many students explained this objective test, others did not.

The area with which most students struggled – as in previous years – was whether the demand with menaces was “unwarranted”. According to s.21(1), 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 Carlo made the threat merely to get money for a holiday, it could be argued that it was unlikely that he might believe that he had such reasonable grounds, and many students argued as such. In order to decide whether Ben believed that the use of the menaces was proper, it had to be asked whether he believed that his threat of informing on Ben was morally or socially acceptable according to the general standards of society. In this connection, it was arguable that Carlo might well believe that it was morally right to report Ben’s criminal behaviour to Anna, in which case, the demand would not be ‘unwarranted’.

Many students were able to correctly explain the further requirement of s.21 that the demand must be made with “a view to gain for himself or another or with intent to cause loss to another”, and that the gain or loss must be ‘in money or other property’.

Note. Many students incorrectly stated that, in order for the demand with menaces to be warranted, D must have reasonable grounds for making the demand and that the use of menaces is a proper means of enforcing the demand – what matters is whether D believes that these circumstances are so. Many students also incorrectly referred to “reasonable”, as distinct from, “proper”, means of enforcing the demand.
Question 02

This question required students to address Ben’s possible liability for:

- theft/robbery
- burglary and
- basic and aggravated criminal damage together with the possible application of the defence of intoxication.

The theft/robbery issues. Most of the issues relating to Ben’s possible liability for theft of Anna’s photographs (appropriation, belonging to another, property, dishonesty) were relatively straightforward, and many scored good marks on these. Few students, however, accurately addressed the issue of Ben’s intention to permanently deprive, which centred on s.6(1) Theft Act. What s.6(1) provides is that, ever though D does not intend V to permanently lose the property in question, D will still be deemed to possess intention to permanently deprive if his intention is to treat the property as his own to dispose of regardless of the other’s rights. This clearly applied to Ben, as he intended to return the photographs to Anna by treating himself as owner ie by selling them to her (this aspect of s.6(1) is technically referred to as ‘the ransom principle’). Many students did indeed refer to s.6(1) in their responses but merely stated that ITPD will be present if D intends to treat the property as his own to dispose of without mentioning the words which precede this. As a result very few students scored high marks in relation to this aspect of theft. On the other hand, a few students gained credit by arguing that, by intending to sell the photographs back to Anna, Ben intended to treat them as his own to dispose of.

Since Ben pushed Anna in the scenario, this raised an issue of robbery, on which many students gained good marks. 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, on the basis of the principle of Dawson & James, that Ben’s push constituted ‘force’. It was also arguable the force was used ‘at the time of’ the theft on the basis of the “continuing appropriation” principle (Hale), and many students said this. Many students also argued that Ben used force “in order to steal”, although it could be said that the force was used to enable Ben to escape rather than to steal.

The burglary issues. Students generally were able to provide competent responses to this aspect of the question and there were many good ones. It was obviously necessary to mention the requirements of ‘entry’ into a ‘building’, but no more than this as these aspects were not in issue. The requirement of entry as a trespasser was more important. Ben was obviously trespassing in Anna’s house as she had ‘barred’ him from there and, since he must have known that he was trespassing, he possessed the mens rea of trespass also. Unfortunately, some students failed to notice the word ‘barred’ and incorrectly relied on the principle in Jones & Smith that Ben had exceeded the general permission granted by Anna to Ben to ‘come to her house at any time’ by intending to commit theft there. This argument was flawed as Anna had withdrawn this permission before Ben entered the house to steal.

Many students then correctly argued that Ben was guilty of burglary on the basis of s.9(1)(a) since he possessed conditional intent to steal ‘any valuables he could find’ in the house. Many also correctly considered Ben’s liability for burglary under s.9(1)(b) on the basis of his theft of Anna’s photographs and his commission of GBH by pushing Anna and causing her the serious head injury. It was also relevant to consider whether Ben could successfully rely on self-defence as a defence to the GBH element of burglary, which many students did, thereby gaining credit.
Note. In questions which raise s.9(1)(b) theft, students tend to explain and apply the elements of burglary more accurately when they discuss theft first before proceeding to burglary. Where students begin with a discussion of burglary and then interrupt this with a consideration of theft, explanations of theft tend to be rushed and confused. It is also worth noting that discussions of burglary tend to be more accurate where they begin with a clear summary of the elements of both s.9(1)(a) and (b) Theft Act. Without such a summary, students often fail to explain the crucial distinctions between s.9(1)(a) and s.9(1)(b) i.e.

- that the former requires intention only regarding the ulterior offences, whereas the latter requires a committed or an attempted offence (theft or GBH) and
- that the former requires intention prior to entry, whereas the latter requires the commission of theft and/or GBH, or an attempt to do so, after entry.

The criminal damage /intoxication issues. The question required students to consider whether Ben was liable for basic and aggravated criminal damage. Students were generally able to explain and apply the elements of basic criminal damage contained in s.1(1) Criminal Damage Act 1971 (CDA). Many students provided good explanations of “destroys” and “damages” by referring to the various judicial authorities (for example, A v R, Morphitis v Salmon). Most students argued that the bike was damaged as it would take time and money to repair. This was awarded some credit, although the better argument was that the damage consisted of the impairment of the function of the saddle by its being loosened. Students generally also correctly explained the mens rea requirement of intention or recklessness as to the damage and that, since Ben deliberately loosened the bolt of the saddle, the damage to the bike was intentional.

The further issue was whether Ben was liable for aggravated criminal damage under s.1(2) CDA and students generally considered this aspect well. Many of the students who did identify the aggravated offence correctly stated that such liability would be established only if Ben possessed intention or recklessness as to the endangering of the life of another but strong students also explained that the risk of danger to life must be caused by the criminal damage itself (Steer). The highest marks were, therefore, gained by those students who argued that Ben was at least reckless as to endangering Anna’s life by virtue of the risk that Anna might fall off the bike in traffic because of the loose saddle. Good marks were also gained by students who pointed out that there need be no danger in fact to life (Dudley).

A further issue raised by the scenario was whether, since Ben had drunk ‘a few whiskies’ before the bike incident, he could rely on the defence of intoxication. As many students correctly pointed out, Ben’s intoxication, if any, would be voluntary and, therefore, only a defence to an offence of specific, and not basic, intent. Good students correctly stated that basic and aggravated criminal damage, according to one view of this defence, are offences of basic intent with the result that the defence would not apply. Unfortunately, however, many students failed to gain full marks by not explaining that, according to one view in Majewski, an offence of specific intent is one which can only be committed with intention, whereas one of basic intent can be committed recklessly.

Note. Differing views were expressed by the Supreme Court in Majewski as to the test of an offence of specific intent. One view is the one referred to in the paragraph above which has always received support. Credit was, however, awarded to those students who argued that aggravated criminal damage can be viewed as an offence of specific intent on the basis of the view expressed by the Court of Appeal in Heard. According to this view – which has some support in Majewski – an offence is one of specific intent if the mens rea element of an offence contains an aspect which is not matched by the actus reus. On this basis, aggravated criminal damage is an offence of specific intent as there need only be intention or recklessness as to the endangering of life but
no endearing of life in fact.

Scenario 2

Question 03

This question required students to address the following issues:

- the possible criminal liability of Dave for theft of the £10 000 and of George’s credit card details
- the possible availability to Dave of the defence of duress by threats and
- the possible criminal liability of Dave for fraud by false representation.

The theft issues. Many students were able to provide competent explanations and application of some of the elements, although few were able to identify the more subtle aspects. In relation to the requirement of “appropriation”, some students argued that Dave appropriated the £10 000 when he received it from George by taking possession of it, but this approach was inaccurate as it failed to recognise that any appropriation for the purposes of theft must be dishonest. When Dave was given the money by George, he had not formed dishonest intent as, at that point, he intended to use it for Fred’s education. Ben possessed dishonest intent only after he had been threatened by Errol and when he decided to give it to Errol. As a result, the requirement of ‘appropriation’ was satisfied only when Dave handed the money over to Errol.

The requirement that any appropriation, in order to found liability for theft, must be a dishonest one was also relevant to the further requirement that there must be property ‘belonging to another’. S.5 Theft Act contains several provisions on this aspect, in particular, s.5(1) and s.5(3). S.5(1) provides that

- property belongs to any person having possession or control of it or any proprietary right or interest.

Many students argued in relation to the £10 000 that s.5(1) was relevant and that the money belonged to George as he had a proprietary right or interest in it. This argument was awarded some credit, but full credit was only awarded to students who relied on s.5(3). This provides that

- if D receives property ‘for or on account of another’ and is under an obligation to that other to deal with the property in a particular way, the property is deemed to belong to that other.

This provision was relevant to Dave as since George had given the money to Dave ‘for Fred’s education’, Dave was under an obligation to hold it ‘on account of’ George or ‘for’ Fred, with the result that it was deemed to belong to George and Fred. The point here is that the issue of ‘belonging to another’ has to be determined at the time of the dishonest appropriation which, in this scenario, occurred when Dave handed the money over to Errol (see above). S.5(1) would be relevant only if Dave had decided to steal the money when George handed it over to him in the first place, which was clearly not the case. Many students did indeed attempt to explain and apply s.5(3) and were therefore awarded credit, but few really understood its significance. Students should understand that where the owner of property, A, voluntarily hands over property to D with the intention to transfer ownership, ownership of the property technically passes to D, with the result that the property now belongs to D. Thus, when George handed over the money to Dave, it belonged to Dave. Without a provision like 5(3), therefore, a person in Dave’s position who later
decided to steal it could not be charged with theft as he cannot steal what would now be his property. S.5(3), however, allows the law to treat the property as still belonging to another so that D can be charged with theft of the property.

Students obviously had to address the issues of dishonesty and intention to permanently deprive, but these raised no unusual aspects and were generally dealt with accurately.

Students were also required to consider Dave’s possible liability for theft by copying George’s credit card details, which could be successfully answered merely by stating that this did not constitute theft as information cannot legally be stolen as is does not constitute ‘property’ for the purposes of the law of theft (Oxford v Moss).

The defence of duress. Many students addressed the issues relating to duress extremely well and thus gained good marks. It was clearly arguable that Dave reasonably believed that Errol had threatened death or serious personal injury on Fred (‘Fred will suffer’), a person for whom Dave obviously felt responsible. Many students also stated the important point made by the landmark decision in Hasan that this belief must be both honest and reasonable. Many students also correctly pointed out that, in order for the defence to succeed, a person of reasonable firmness would must feel compelled to comply with the threat and this was clearly arguable, given that Errol was ‘a violent man’.

The success of the defence would also depend on Dave not having a reasonable opportunity to enable Fred to escape the consequences of the threat. Many students accurately pointed out that the scenario was not entirely clear on this point, some arguing that, since Errol would be ‘closely following’ Dave, he did not have such an opportunity, while others said that, since the theft occurred the day after the threat was made, Dave had time to contact the police. Both of these arguments were credited.

Many students correctly argued that Dave’s voluntary association with a violent gang prevented him from relying on the defence (Sharp/Hasan). Some students also argued that Errol’s threat (‘get me my money quick’) did not direct Dave specifically to steal money, and this point was credited. The other crucial aspect of the defence is that it applies only when D believes on reasonable grounds that the threat will be carried out “immediately or almost immediately”. It was not entirely clear on the facts of the scenario whether this requirement was satisfied, as many students pointed out.

The fraud by false representation issues. Many students correctly explained and applied the elements of this offence (representation, falsity, dishonesty and intention to make a gain or cause a loss) and thereby gained at least some credit. Many students also addressed the following more subtle points and thereby gained high marks:

- Dave’s representation in point was that he had George’s authority to use his credit card which was implied by his conduct in using the card details
- A representation can be made to a machine designed to receive communications [s.2(5) Fraud Act 2006]
- The offence of fraud by false representation is committed by an intention to make a gain or cause a loss. Dave was therefore guilty even though Dave’s plan to defraud did not succeed
- It is sufficient for liability if D intends either to make a gain for himself or another, or to cause a loss to another or to expose another to a risk of loss. Therefore, Dave was liable either on the basis that he had intended that George would lose money or that Fred would
gain a tablet

- In relation to dishonesty, it was possibly arguable that Dave might not be dishonest on the basis that he might have thought that George, being his father, would have consented to Dave’s use of George’s credit card.

**Question 04**

Students were required to address

- the possible criminal liability of George for theft of his coat and his making off without payment from Hasan’s shop and
- the possible criminal liability of Imran for basic and aggravated criminal damage.

**The theft issues.** The elements of actus reus and mens rea were generally explained clearly. The need for appropriation and intention permanently to deprive were obviously satisfied on the facts, as students pointed out. One particular issue which required special consideration was whether George’s coat constituted “property belonging to another”, despite the fact that it was obviously owned by George. Students were generally able to point out that, under s.5(1) Theft Act, property belongs to a person having “possession or control” of it and that, under the authority of Turner (No 2), the coat belonged to Hasan.

A further issue was whether, since George was ‘disgusted’ with Hasan’s work, he could be considered to be honest on the ground that he believed that he had a “right in law” to take the jacket without paying (see s.2(1)(a) Theft Act). Unfortunately, very few students addressed this point and simply asserted without argument that Ken would be deemed to be dishonest under the Ghosh tests. (In this regard, students should remember that the accused’s belief under s.2(1)(a) does not have to be reasonable and all that matters is that he genuinely holds that belief).

**The making off issues.** Many students addressed these issues clearly with the result that high marks were achieved. The actus reus points to explain and apply were that

- a service had been ‘done’
- that payment for the work on George’s coat was ‘required or expected’, and
- George had made off from the ‘spot’ where payment was required or expected.

The mens rea issues to consider were

- whether George knew that payment was required
- whether he was dishonest under the Ghosh rules and
- whether he intended permanently to avoid payment (Allen).

Students generally, and correctly, argued that George was guilty. An important point to consider, however, was the fact that George refused to pay Hasan because he was ‘disgusted with the poor quality of Hasan’s work’ and, although good students did address this, many did not. The students who did consider this issue either argued that the ‘service’ provided by Hasan might not be ‘done’ and/or that George might not be dishonest. Either of these arguments gained credit, although neither argument would be likely to succeed.
Note. Students were awarded a little credit if they considered whether George was guilty of obtaining services by a dishonest act under s.11 Fraud Act 2006, provided that they concluded that the offence had not been committed. The important point was that there was no evidence in the scenario to suggest that George dishonestly intended not to pay for the work on his coat at the time when he booked Hasan to do the work. In other words, the service was not obtained ‘by a dishonest act’.

The criminal damage issues. The question required students to consider whether Imran was liable for basic and aggravated criminal damage. Students were generally able to accurately explain and apply the elements of basic and aggravated criminal damage contained in s.1(1) and (2) Criminal Damage Act 1971 (CDA) and, as a result there were many good marks.

Section B (Tort)

Scenario 3

Question 05

Students were required to consider the rights and remedies of

- Jack against Ken for private nuisance
- the motorists against Ken for public nuisance and
- Ken against Jack under the Rule in Rylands v Fletcher.

The nuisance 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 problem which were relevant in determining whether the noise and fumes generated by Ken’s business constituted an unreasonable interference with Jack’s use of his property. As many students successfully argued, the important features were the locality factor (Jack’s house was in “near to a village”), duration (‘months of this inconvenience’), and the malice/motive factor (following Jack’s complaint, the disturbance increased). Many students referred to relevant authorities eg Christie v Davey, Hollywood Silver Fox Farm v Emmett, Halsey v Esso, St Helen’s Smelting v Tipping, Sturges v Bridgeman etc, although few explained the important philosophy of balancing the conflicting interests of claimant and defendant.

On the other hand, many students explained, at least briefly, the important remedy of the injunction in nuisance to restrain the continuance of the nuisance either totally or partially. Some students also referred to relevant authorities regarding the grant or refusal of an injunction eg Kennaway v Thompson and Miller v Jackson. Some students gained marks by correctly stating that ‘coming to the nuisance’ is not a defence to liability and that any arguable public benefit of Ken’s business would not be a defence to liability but could be taken into account by the court in refusing an injunction and awarding damages in lieu.

The public nuisance claim of the motorists. The majority of students attempting this question were able to accurately define public nuisance as an act or state of affairs which materially interferes with the comfort and convenience of life of the public or a section of the public, and went on to explain that a substantial obstruction of a public road, such as that created by Ken’s trucks,
constituted such a nuisance on the basis that it substantially interfered with the motorists (a class of persons, or section of the public).

On the other hand, an individual member of the public can claim an injunction or damages on the basis of a public nuisance only if he/she can prove “special damage” over and above that suffered by other members of the public. Many students correctly concluded that there was no evidence of such “special damage” suffered by any of the motorists, with the result that no claim by an individual member of the public would succeed. On the other hand, many students also correctly argued that the Attorney-General could bring a relator action on behalf of the public, and this received credit.

**The Rylands v Fletcher claim.** Students were generally able to explain and apply the main elements of the tort (a “thing likely to do mischief if it escapes”, accumulation, escape, non-natural user and foreseeableability of damage). Some students tended to produce a list of the elements with little detail which gained modest marks but others produced fuller explanations which were rewarded appropriately. In particular, the responses this year clearly demonstrated that many students realised the emphasis placed by the Transco decision on the requirement of non-natural use of land, and many responses attempted a definition of this term, eg as a use which is “extraordinary and unusual” or as a ‘special use bringing increased danger to others’. It was arguable that the accumulation of chemicals, if in large quantities, would be such a use.

Many students correctly explained that damage caused by an escape must be reasonably foreseeable, otherwise it will be too remote and irrecoverable (the Cambridge Water case). It was also crucial to explain that the tort is one of strict liability with the result that, even though Jack ‘carefully stored’ the chemicals in metal containers, this would, in itself, be no defence to liability.

**Question 06**

This question involved the possible liability of
- Layla to Jack for negligent misstatement
- Nodirt to Layla for product liability
- Dr Omar to Layla for medical negligence.

**The negligent misstatement issues.** Many students correctly began by explaining the generally restrictive approach of the law to allowing claims for economic loss in the tort of negligence, one of the main exceptions being a claim for pure economic loss caused by a negligent misstatement. A central feature of the problem was whether Layla owed a duty of care to Jack in relation to her giving of advice to him. Most students displayed a competent understanding of these principles and many responses were excellent. According to Hedley Byrne and later authorities, the defendant, D, owes a duty of care to the claimant, C, in the making of a statement, in the absence of a contract, only if there is a “special relationship” or sufficient ‘proximity’ between them. The main features of 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 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 correctly raised the issue whether Layla was sufficiently skilled to advise on the investment of Jack’s money. Even though she had only ‘recently qualified as an accountant’, many argued that she was, although others raised the further point as to whether such
a qualification was adequate for investment advice. Many students also considered the scenario in Chaudhry v Prabhakar, which suggested that advice given by a friend might give rise to a duty.

Requirement (ii) was arguably satisfied since Jack had asked Layla to specifically advise him about investment.

Although Jack had clearly relied on Layla’s advice by investing as she suggested, it was important to consider whether it was reasonable for him to rely on it. Many responses correctly suggested that it would not normally be reasonable to rely on advice given in a purely social situation (a dinner party). Some students also questioned whether it was reasonable to rely on a recently qualified accountant and this was credited.

Several students also correctly 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 also.

In addition to addressing the issue of whether a duty of care arose, students were expected to explain the standard of care required of Layla (although few did so!) – did he display the care, skill and expertise that would have been displayed by a reasonably competent advisor on investment issues? Very few also addressed the issue of the standard of care to be expected from a newly qualified accountant

In relation to the remedy available, it was merely necessary for students to identify that Sergio could recover damages for his 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 product liability issues.** 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.

A treatment on the basis of common law principles obviously required students to explain elements of the duty of care in relation to defective products and breach of duty. The duty is obviously owed by the manufacturer of the product (as in Donoghue 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 foreseeably likely to be physically injured or suffer damage to property as a result of the manufacturer’s negligence. This includes a purchaser or user of the product eg Grant v Australian Knitting Mills, Donoghue v Stevenson who foreseeably incurs damage to the person or property. Nodirt clearly owed a duty of care to Layla on the ground that it was reasonably foreseeable that any user of a defective cleaning product would suffer injury.

In relation to breach of duty, it was necessary to consider whether Nodirt had exercised reasonable care and skill and many students correctly discussed the possible application of the various “risk factors” eg the magnitude and likelihood of risk of harm, the cost of taking precautions etc. Several students correctly added that, in view of the difficulty which a claimant may face in proving negligence, the court may be willing to infer from the nature of the defect itself that it could not have occurred without negligence (see eg Grant v Australian Knitting Mills).

Many students also correctly concluded that Nodirt’s negligence in failing to provide suitable instructions with the carpet cleaner was the cause of Layla’s injury and that the injury was not too remote. One area, however, which students generally fail to explain was the requirement of
‘damage’. The general rule is that a claim in the tort of negligence will succeed only if the claimant can show that he suffered physical damage as a result of the negligence, either in the form of personal injury (e.g., a broken arm), or damage to his property (e.g., a damaged car). On the facts of the problem, Layla could obviously recover damages for her personal injury.

Many students chose to deal with product liability on the basis of the principles in the Consumer Protection Act 1987. It is obviously crucial for students who aim for high marks to display a generally accurate understanding of the meaning of the main statutory terms, such as “product”, “defective”, “producer” and “damage”. Some students did so, although many demonstrated only a basic understanding of these elements and were thus awarded more modest marks. Unfortunately, students often omitted to point out the fundamental principle of the CPA ie that it is based on strict liability, with the result that it is unnecessary to establish negligence. In this connection, students gained credit by referring to the “development risks defence” in s.4(1)(e) of the Act, to the effect that the defendant will not be liable if “the state of scientific and technical knowledge was not such that [a producer of the type of product in question] might be expected to discover the defect…” Some students referred to causation and remoteness, for which they were credited. So far as the remedy available to Layla was concerned, it was sufficient for students to identify damages, but without any elaboration as to measure of damages.

The medical negligence issues. The possible claim for medical negligence of Layla against Dr Omar was relatively straightforward, but few students seemed more than basically competent in the area. It was relatively straightforward to establish that a Dr Omar owed a duty of care to Layla, 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 and the standard of care expected of them. It was possible to produce a competent answer by applying general negligence principles but higher marks could be gained only by referring to rules specifically dealing with medical negligence and only a few students had a sound knowledge of these. The keys to answering the question were the Bolam and Bolitho principles.

The rules established in Bolam are that

- the standard expected of a doctor is that of a reasonably competent medical practitioner
- a doctor will not be negligent if he acts in accordance with a practice accepted as proper by a responsible body of medical practitioners and
- the fact that there is a body of opinion that takes a contrary view does not indicate negligence.

According to Bolitho, however,

- a court will regard a medical practice as indicating the absence of negligence only when it is ‘responsible, reasonable and respectable’ and it must have a ‘logical basis.’ In particular, a doctor must consider whether the practice in question poses risks.

Many students considered causation and remoteness of damage in relation to Layla’s heart attack and were credited for this.
Scenario 4

Question 07

Students were required to consider the rights and remedies of
- Rodrigo against Patrick under the Occupiers’ Liability Act 1957
- Viggo against Theo for negligent driving and
- Viggo against Steve for vicarious liability.

The OLA 1957 issues. Most students were able to score at least competent marks for this question and there were some very good responses. It was necessary for students to explain the meaning of “occupier”, “visitor”, “the common duty of care”, and then proceed to consider whether Rodrigo had a claim against Patrick for breach of the common duty of care. Patrick as the owner of the property was clearly the occupier and Rodrigo was a visitor as he had been invited onto the property to replace windows. There were two provisions of the Act which were particularly relevant:

- s.2(3)(b) which 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’ and

- s.2(4)(b) which provides that if the visitor suffers damage caused by the 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 and provided that he used reasonable care in selecting the contractor and in checking that the contractor’s work was properly carried out.

In relation to s.2(3)(b), It was obvious that Rodrigo was required by Patrick to exercise the calling of someone who replaces windows, and the main issue was whether a ladder on scaffolding erected by an independent contractor which Rodrigo had to use was one which Rodrigo should have checked as linked to his calling. Some students failed to consider this provision but those who did expressed views either way on this point, but both approaches were rewarded.

In relation to s.2(4)(b), most students had at least some understanding of it, although few were able to explain and apply it with complete accuracy. It was arguable that Patrick would be able to rely on it as a defence to Rodrigo’s claim as it would have been reasonable for him to employ an independent contractor to erect scaffolding, including the positioning of ladders, as such work required expertise. There was no real evidence as to whether Patrick made reasonable checks as to the scaffolding contractor’s competence, but the other issue was whether it was necessary under this provision for the occupier to check the contractor’s work himself. Better students correctly explained that, if the work is not complex, the occupier should check the work himself (Woodward v Mayor of Hastings), but not if the work is complex (Haseldine v Daw). Thus, as scaffolding work, including the positioning of ladders, is complex, Patrick would not be expected to check the scaffolding contractor’s work. As a result, it was arguable that Patrick would not be liable to Rodrigo.
Note. A common error of students in explaining s.2(4)(b) is to say that the provision will provide a defence to the occupier if he **employs/engages** a competent contractor, and **checks** the contractor’s work. The correct explanation is that the provision applies if the occupier **took reasonable steps** to satisfy himself that the contractor was competent and that the work had been properly done.

**The negligent driving issues.** Many students achieved good marks by explaining and applying general principles of negligence. It is obvious that a motorist owes a duty of care to other road users and others in the vicinity, 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 Theo was in breach of duty by reference to the “reasonably careful and skilled driver” principle and to the possible “risk factors” such as the degree of likelihood that harm would be caused by Theo’s poor driving and the gravity of likely harm etc. Many students adopted this approach, often referring to such authorities 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.

Unfortunately, few discussed in any detail whether Viggo was entitled to recover his loss of business profits following the damage caused to his shop by Theo’s driving and the consequent need for Viggo to close the shop for repairs. Some students dealt with this issue by merely stating that Viggo could recover these losses as damages, but others gained good marks by arguing that the loss of profits was recoverable as consequential economic loss ie loss which was the result of damage to Viggo’s property (see Spartan steel v Martin).

**The vicarious liability issues.** Students were obviously required to consider whether Steve was vicariously liable to Viggo for Theo’s negligence, which would be the case only if, firstly, Theo was an employee of Steve, rather than an independent contractor, and, secondly, if Theo was acting in the course of employment.

In relation to the issue whether Theo was an employee of Steve, many students referred to the factors listed in the authorities such as Ready Mixed Concrete v Ministry of Pensions and thereby gained credit.

The majority of the marks were therefore awarded to discussions of whether Theo committed the tort while acting in the course of employment, or whether he was acting “on a frolic of his own”. Given that Steve had instructed Theo to ‘drive directly’ to Patrick’s house with the wine which Patrick had ordered, and given that Theo committed the tort during a detour to visit a friend, the issue was whether at that point Theo was doing what he was employed to do - in which case he would be outside the course of employment (‘on a frolic’) - or whether he was doing his job in an unauthorised way – in which case he would be within it. It was clearly arguable that Theo, in making the detour, was ‘acting on a frolic’ and many students argued this, thereby gaining marks. Some students who considered the authorities relating to the circumstances in which an employer is vicariously liable for a tort committed by an employee which also constitutes a criminal offence were awarded marks for this.
Question 08

Students were required to consider the rights and remedies of
- Will against Patrick under the Occupiers' Liability Act 1984 and
- Anton and Becca against Patrick for psychiatric harm.

The Occupiers' Liability Act 1984 issues. Students correctly argued that Will, together with Anton, was a trespasser in the children's play area on Patrick's land, as Patrick had placed the high fence and 'No entry' signs around it. Students also correctly argued that, in order for Will to successfully claim against Patrick for his injuries, he would have to establish that Patrick owed him a duty of care under the 1984 Act 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. The requirements for the duty to arise are that

- the trespasser suffers injury due to a danger due to the state of the premises [s.1(1)]
- the occupier knows of or has reasonable grounds to believe that the danger exits [s.1(3)]
- the occupier knows or has reasonable grounds to believe that a trespasser is or might be in the vicinity of the danger and
- it is reasonable to expect the occupier to protect the trespasser against the danger [s.1(3)]

On the facts of the question, there was arguably a danger due to the state of the premises (the "unstable climbing frame") and it was also clear Patrick, as occupier, knew or had reasonable grounds for knowing of this danger as several parents had complained to Patrick that this was so. It was more debateable, however, whether Patrick had reasonable grounds to believe that a trespasser was or might be in the vicinity of the danger. Some students merely stated that Patrick must have realised this, as the area was for children to play and that it would constitute an attraction for them, and this was credited. On the other hand, some argued that there had been no evidence of earlier trespass events with the result that Patrick did not have grounds to believe that there might be a trespasser near the climbing frame, and this was also credited. Weaker students merely asserted without justification that the duty applied.

Assuming that Patrick did owe Will a duty, it was necessary for students to explain the nature of the duty owed to take reasonable care to see that the trespasser does not suffer injury on the premises by reason of the danger [s.1(4)]. Only the well-informed students explained this, whereas many merely stated that the duty was a duty of care. Students were then required to consider whether Patrick had committed a breach of the duty. Many argued that Patrick had performed his duty by erecting the 'No entry' signs and the high fence, and credit was given to these students. Higher credit, however, was awarded to students who correctly understood the principle in s.1(5) OLA that the duty “may, in an appropriate cases” be discharged by virtue of the occupier having taken reasonable steps to provide a warning of the danger and who considered the possibility that a child trespasser could not necessarily be expected to take notice of such a sign and that Patrick should have taken greater steps to protect such a trespasser. In any event, many students considered the possibility that Alan could be said to be contributorily negligent or volens with the result that any damages would be reduced or that his claim would fail, and such an argument was credited.
NB Students often continue to state, as in responses in previous examinations, that the occupier must know that there is a danger and that he must know there is a trespasser on the land, without recognising that it is sufficient that he has “reasonable grounds to believe” that these circumstances exist. According to Swain v Natui Ram Puri, an occupier will have reasonable grounds for a belief if he has actual knowledge of facts which provide grounds for that belief.

The psychiatric harm issues. Students were required to consider Patrick’s possible liability in the tort of negligence for the possible psychiatric injury suffered by Anton, Will’s friend, and Becca, Will’s mother. The first issue to consider was whether the claimants were primary or secondary victims, and many students correctly explained that a primary victim reasonably fears for his own physical safety (or is within the zone of danger), whereas a secondary victim is an unwilling witness to the traumatic incident in question but is not personally in danger of physical harm. It was therefore clear that both Anton and Becca were secondary victims.

It then became necessary to explain that, in order for Patrick to owe them to a duty of care, both claimants had to show that they had suffered a “recognised psychiatric illness”, that this illness was caused by a traumatic event or an “assault on the senses” (Sion v Hampstead Health Authority) and that it was reasonably foreseeable that the person of “normal fortitude” would suffer psychiatric harm. The above points were arguable, but the crucial issues related to the various elements of “proximity.” In relation to Anton, although he clearly witnessed the traumatic event of Will being injured with his own “unaided senses”, it would be debateable whether his friendship with Will was sufficiently close to found a claim, although as many students indicated, the nature of their relationship in fact would be important. On the other hand, Becca, as Will’s mother, would clearly have a sufficiently close relationship with him and, arguably, witnessed the immediate aftermath of the incident when she saw him covered in blood and being lifted into an ambulance.

Note. Some students defined a secondary victim as one who satisfies the elements of proximity eg close ties of love and affection. This is clearly inaccurate, as such a victim is one who witnesses the physical harm suffered by the victim of D’s negligence, but is not in danger of physical harm himself. The various ‘control factors’ are the requirements which have to be established by a SV in order to make a successful claim for psychiatric harm, but these do not define what a SV is.
Section C (Concepts of Law)

General comments

Most centres have now had several years' experience in dealing with these questions and many students were well prepared. But centres and students should also be aware that the questions on the topics will not necessarily always be set in the precisely same format and students should ensure that they answer the questions as set. In particular, many students, in answering Question 09 on law and justice, were obviously determined to write out a pre-prepared answer and failed to clearly demarcate the two distinct elements of the question in their responses, namely, ‘the different possible meanings of justice’ and ‘the relationship between law and justice’. Not surprisingly perhaps, most students attempted the questions on law and justice and law and fault.

Question 09

Students were required

- to discuss the different possible meanings of "justice", and
- to analyse the relationship between law and justice.

Most students were able to display a reasonable knowledge of the different views on the meaning of justice and there were many excellent answers. The ideas of justice which students referred to included justice as basic fairness, equality of treatment (treating like cases alike) and the distinction between different aspects of justice (for example, distributive/corrective, substantive/procedural, formal/concrete justice etc.). Many students also explained some of the important philosophical theories of justice, with varying degrees of success, in particular, utilitarianism, Marx, Nozick’s theory of “entitlement” and economic ideas of justice eg Richard Posner. Many students also referred to natural law thinkers eg Aquinas. Many also referred and to Rawls’ ideas of “justice as fairness” and “the veil of ignorance”, but very few really understood the Rawls’ notion that a just society is one which possesses characteristics of fairness which people would theoretically agree to from behind this veil if they were asked.

Better students showed excellent understanding of their selected ideas of justice with appropriate illustration, although weaker students produced very basic and undeveloped arguments. Students were also rewarded for any attempt to evaluate any particular idea of justice. For example, well-prepared students often pointed out the problems with utilitarianism that it refuses to concern itself with lack of individual liberty and injustice and that it is very difficult to measure one person’s pleasure against another’s pain. Others referred to the various difficulties in determining what a just distribution of benefits and burdens might be, whether “to each according to” merit, rank, need etc.

The second part of the question required students to discuss the relationship between law and justice. Students interpreted this as meaning whether the law does or does not achieve justice, and this was regarded as an acceptable approach. But, as was pointed out in previous reports, students should remember that they will achieve high marks on this aspect only if they attempt to analyse selected examples in terms of a particular idea or ideas of justice (for example, utilitarianism, treating like cases alike etc), but not if they merely argue that a particular example shows that the law is unsatisfactory. Many students, for example, sought to criticise as unjust the
restrictive changes to the legal aid system. This is a valid criticism, but the precise nature of this injustice requires explanation eg that everyone should have equality of access to the legal process. Again, many students referred to particular instances of actual or alleged miscarriage of justice (eg the Guildford Four, Stephen Lawrence, Sally Clark etc) as showing a failure of the law to achieve justice. Such instances, however, will be fully rewarded only if they are analysed in terms of an idea or ideas of justice, for example, by showing that there was a denial of natural justice, or that a particular trial was unfair, or that evidence was gained by oppression, and so on.

Many students correctly referred to various aspects of the legal process in order to show that justice is, or is not, achieved, eg by explaining the significance of natural justice in preventing judicial bias (Pinochet) and allowing litigants an equal opportunity to present their case. Many students also referred to sentencing in relation to the issue whether an accused is treated consistently with his fault and to procedures which seek to achieve corrective justice (eg appeals and judicial review).

Students often referred to aspects of the substantive law in order to show success or failure of the law in seeking to achieve justice, and some of these were valid eg the common law of provocation in its failure to treat women differently from men (treating unlike cases in the same way) in the context of the “sudden loss of self-control”. But it should be remembered that a law is not unjust merely because it is ‘wrong’ or immoral, and students should select as examples of justice or injustice only those areas which can be clearly explained in terms of particular ideas of justice.

Question 10

The question required students to discuss

- the meaning of fault
- the relationship between law and fault, and
- the extent to which the law should be based on fault.

There were many very good responses to this question, using either criminal or civil law examples and often both. Students generally adopted the correct approach of briefly providing possible definitions of fault, for example, blameworthiness, responsibility for wrongdoing etc and then proceeding to identify and analyse specific areas of law in order to demonstrate how they indicated the presence or absence of fault.

In the context of the criminal law, many students analysed actus reus issues, in particular, the requirement of voluntariness and the defence of automatism. Many explained also the general rule that an omission does not give rise to criminal liability unless D is under a duty to act eg as in Miller and many also discussed different aspects of causation and the circumstances where D can be argued not to be at fault, for example, where there is a novus actus interveniens. Some students also discussed the “thin skull” rule and correctly questioned whether decisions such as Blaue show sufficient fault for criminal liability, being based, in effect, on a chance occurrence. Students also analysed mens rea issues and argued that the different categories of mens rea (direct intent, oblique intent, subjective recklessness etc) show different grades of blameworthiness which generally result in different sentences. It was disappointing, however, that only a few (perceptive) students considered the issue whether objective recklessness and negligence indicate sufficient fault to attract criminal liability (for example, was the decision in R v G correct in overruling Caldwell? Is gross negligence manslaughter sufficiently blameworthy for criminal, as distinct from
Many students also analysed the various defences to criminal liability in order to demonstrate the absence of fault, wholly or partly.

In the civil law context, students analysed relevant areas such as the various aspects of the tort of negligence and occupiers’ liability, emphasising the importance of reasonable foreseeability and the duty to act with reasonable care. The defences of contributory negligence and volenti non fit injuria were also considered in order to demonstrate the extent to which fault on the part of the claimant can wholly or partly affect his claim.

The second part of the question required students to discuss the extent to which law should be based on fault. In order to successfully do so, it was necessary to provide examples of no-fault liability and to evaluate the arguments for and against it.

Students provided examples from the criminal law and/or the civil law contexts. In relation to criminal liability, students correctly referred to examples of strict liability (e.g., Storkwain, Alphacell, Shah, etc.) and often also discussed the idea of absolute liability as illustrated by “state of affairs” cases such as Larsonneur and Winzar. In the civil law context, students discussed relevant examples of strict liability such as the Consumer Protection Act 1987, vicarious liability and Rylands v Fletcher. Some students also considered the tort of private nuisance and correctly explained that, in general, liability is strict (since the fact that the defendant exercised reasonable care will not provide a defence), but cleverly argued that liability can sometimes be argued to be fault-based, for example, where the defendant is malicious (as in Christie v Davey).

Evaluation of liability without fault required a discussion of the possible arguments which may justify no-fault liability, and students generally sought to explain these, to a greater or lesser degree. The main arguments relied on by students to justify criminal strict liability were that such liability is for the protection of the public, and that strict liability offences generally are “not truly criminal” and do not result in social stigma, loss of employment opportunities, etc. On the other hand, most students also sought to argue the problems with such offences, for example, that liability without fault is not morally blameworthy, that strict liability offences do not necessarily protect the public, and so on. Students who based their response on the civil law argued that no-fault liability was often beneficial, for example, that no-fault manufacturers’ liability enables a consumer to establish a claim without the difficulty of proving negligence in complex cases and that it avoids many of the practical problems involved in litigation (e.g., delay and expense). Many students further argued forcefully that, in view of such litigation problems, no-fault compensation schemes which by-pass the tort system should be adopted, either financed by the state (like the New Zealand model) or based on insurance or social security schemes.

Note. Students should remember that, in a two-part concepts question such as law and fault, both parts carry equal marks. Unfortunately, a large proportion of students who attempted this question answered the first part well, but possessed insufficient knowledge on the issue whether law should be fault based. In particular, students who relied solely on the criminal law generally were unable to provide sufficient illustrations of strict liability, and such students would get better marks by also referring to examples of strict liability in civil law, such as vicarious liability and the Consumer Protection Act.
Question 11

This question required students

- to explain the notion of "balancing conflicting interests" and
- to discuss the extent to which the law succeeds in balancing conflicting interests.

As has been pointed out in earlier reports, the key features to gaining high marks on this topic are clear and detailed analyses of the scenarios and rules selected for discussion and a carefully structured response, and, although this was not a popular question, there were some good answers.

Many students began their discussion by referring to the "balancing" theorists, such as Bentham, von Ihering and Pound, and also explained why these philosophers considered the balancing of interests important eg Pound’s view that the aim of balancing conflicting interests is to build as efficient a structure of society as possible via the process of “social engineering”. Most students also attempted to explain the process of balancing interests by defining ‘interest’ and ‘balancing’, but often regarded ‘balancing’ too narrowly by limiting it to the idea of compromise rather than, in addition, the idea of one interest overriding another.

What students then correctly proceeded to do was to select various legal scenarios in order to illustrate how conflicting interests 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 the police, the criminal trial etc), issues relating to the automatic disclosure of criminal convictions, cautions etc relating to job applications, terrorism issues (eg AvZ, the GCHQ case, the Abu Qatada scenario etc), substantive law issues such as the defences of consent and intoxication and the legislative process.

What is crucial is that students clearly explain 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 whether it granted one or not, 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 of interference should be overridden by the public interest in protecting recreation and sports. Many students often failed to gain the highest marks by not explaining 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 eg 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.
Mark Ranges and Award of Grades

Grade boundaries and cumulative percentage grades are available on the Results Statistics page of the AQA Website.

Converting Marks into UMS marks

Convert raw marks into Uniform Mark Scale (UMS) marks by using the link below.

UMS conversion calculator