A-LEVEL LAW

LAW04 - Unit 4 Criminal Law (Offences against Property) or Tort, AND Concepts of Law

Mark scheme

2160

June 2018

Version/Stage: 1.0 Final
Mark schemes are prepared by the Lead Assessment Writer and considered, together with the relevant questions, by a panel of subject teachers. This mark scheme includes any amendments made at the standardisation events which all associates participate in and is the scheme which was used by them in this examination. The standardisation process ensures that the mark scheme covers the students’ responses to questions and that every associate understands and applies it in the same correct way. As preparation for standardisation each associate analyses a number of students’ scripts. Alternative answers not already covered by the mark scheme are discussed and legislated for. If, after the standardisation process, associates encounter unusual answers which have not been raised they are required to refer these to the Lead Assessment Writer.

It must be stressed that a mark scheme is a working document, in many cases further developed and expanded on the basis of students’ reactions to a particular paper. Assumptions about future mark schemes on the basis of one year’s document should be avoided; whilst the guiding principles of assessment remain constant, details will change, depending on the content of a particular examination paper.

Further copies of this mark scheme are available from aqa.org.uk
Assessment Objectives One and Two

General Marking Guidance

You should remember that your marking standards should reflect the levels of performance of students, mainly 18 years old, writing under examination conditions. The Potential Content given in each case is the most likely correct response to the question set. However, this material is neither exhaustive nor prescriptive and alternative, valid responses should be given credit within the framework of the mark bands.

Positive Marking

You should be positive in your marking, giving credit for what is there rather than being too conscious of what is not. Do not deduct marks for irrelevant or incorrect answers, as students penalise themselves in terms of the time they have spent.

Mark Range

You should use the whole mark range available in the mark scheme. Where the student’s response to a question is such that the mark scheme permits full marks to be awarded, full marks must be given. A perfect answer is not required. Conversely, if the student’s answer does not deserve credit, then no marks should be given.

Levels of Response for Essay Marking

When reading an essay, you must annotate your recognition of the achievement of a response level. This will help the Team Leader follow your thought processes. Levels of response marking relies on recognition of the highest level achieved by the student. When you have finished reading the essay, therefore, think top-down, rather than bottom-up. In other words, has the student’s overall answer met the requirements for the top level? If not, the next level?

Citation of Authority

Students will have been urged to use cases and statutes whenever appropriate. Even where no specific reference is made to these in the mark scheme, please remember that their use considerably enhances the quality of an answer.
Assessment Objective Three

QUALITY OF WRITTEN COMMUNICATION

<table>
<thead>
<tr>
<th>Level</th>
<th>Description</th>
<th>Marks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Level 3</td>
<td>Moderately complex ideas are expressed clearly and reasonably fluently, through well-linked sentences and paragraphs. Arguments are generally relevant and well structured. There may be occasional errors of grammar, punctuation and spelling.</td>
<td>4-5 marks</td>
</tr>
<tr>
<td>Level 2</td>
<td>Straightforward ideas are expressed clearly, if not always fluently. Sentences and paragraphs may not always be well connected. Arguments may sometimes stray from the point or be weakly presented. There may be some errors of grammar, punctuation and spelling, but not such as to detract from communication of meaning.</td>
<td>2-3 marks</td>
</tr>
<tr>
<td>Level 1</td>
<td>Simple ideas are expressed clearly, but arguments may be of doubtful relevance or be obscurely presented. Errors in grammar, punctuation and spelling may be noticeable and intrusive, sufficient to detract from communication of meaning.</td>
<td>1 mark</td>
</tr>
<tr>
<td>Level 0</td>
<td>Ideas are expressed poorly and sentences and paragraphs are not connected. There are errors of grammar, punctuation and spelling, such as to severely impair communication of meaning.</td>
<td>0 marks</td>
</tr>
</tbody>
</table>
Maxima for Substantive Law questions

Mark bands (3 potential content) – list of maximum marks

25  two sound, one clear
23  two sound, one some or one sound, two clear
21  two sound or one sound, one clear, one some or three clear
19  one sound, one clear or one sound, two some or two clear, one some
17  one sound, one some or two clear or one clear, two some
14  one sound or one clear, one some or three some
13  two sound explanation only
11  one clear or two some
09  one sound explanation only or two clear explanation only or three some explanation only
07  one some or one clear explanation only or two some explanation only
05  one some explanation only
04  fragments or substantial error/incoherence
00  completely irrelevant

Mark bands (2 potential content) – list of maximum marks

25  two sound
23  one sound, one clear
20  one sound, one some or two clear
17  one sound or one clear, one some
13  one clear or two some or two sound explanation only
11  one sound explanation only or two clear explanation only
08  one some or one clear explanation only or two some explanation only
06  one some explanation only
05  fragments or substantial error/incoherence
00  completely irrelevant

Note:
In substantive law questions, the two components are explanation and application. The references above to explanation only are to be understood as explanation without application. The quality of treatment of these two components, in combination, determines whether the treatment overall for that PC element is sound, clear or some. In determining the overall quality of treatment, descriptions of the quality of treatment of the individual components should be combined as follows:

sound/sound  - sound
sound/clear   - weak sound
sound/some   - clear
clear/clear   - clear
clear/some   - weak clear
some/some    - some
### Descriptors for Substantive Law questions

<table>
<thead>
<tr>
<th>Level</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sound</td>
<td>Accurate and comprehensive explanation and application, so that the answer reveals strong knowledge and understanding of the correct (or sustainable) analysis, leading to satisfactory conclusions. There may be some omission, error, or confusion but it will be insufficient to undermine the basic characteristics of the answer.</td>
</tr>
<tr>
<td>Clear</td>
<td>Broadly accurate and relatively comprehensive explanation and application, though a little superficial in either or both and with some error and/or confusion that begins to affect the quality of the analysis. Or Accurate explanation and application over a narrower area, omitting some significant aspect(s) of the analysis, so that an answer emerges which reveals knowledge and understanding of the broad framework of the analysis, or of some of its detailed aspect(s).</td>
</tr>
<tr>
<td>Some</td>
<td>Explanation and/or application in relation to relevant aspects but characterised by significant omissions and/or errors and/or confusion. Or Explanation (including definitions of relevant offences/defences) and/or application which is generally accurate but confined to a limited aspect, so that, at best, a very superficial or partial analysis emerges.</td>
</tr>
<tr>
<td>Fragments</td>
<td>Isolated words or phrases, including case names and statutes, which have potential relevance but remain entirely undeveloped. Or Mere identification of relevant offences/defences.</td>
</tr>
</tbody>
</table>

### Use of case authority

1. It is usually sufficient to associate a relevant case with an explained/applied rule. Further explanation of cases is required only where necessary to elucidate the rule or its application.

2. An answer in relation to any PC should not be described as ‘sound’ unless some relevant authority appears, where appropriate. However, where there is appropriate use of authority in relation to the other PC(s) in the mark scheme for the question, an answer in relation to a PC where no authority appears may be given a ‘lower’ sound (the student will have demonstrated ability to use appropriate authority at some point in the answer to the question, albeit not in the element at issue).
Discuss the possible criminal liability of:

- Al for any **property** offences arising out of his dealings with Belle
- Chas for any **property** offence arising out of his text to Al.

[25 marks]

**Potential content**

(A) Discussion of fraud by false representation issues – representation, falsity, dishonesty (based on either Ghosh or Ivey), intention to make a gain/cause a loss, the meaning of ‘gain’/’loss’.

*Note* – ‘sound’ requires a *generally accurate knowledge of the terminology of the Fraud Act 2006*

*Note* – Al makes a representation as to his state of mind/intention (that he would use the money to buy a car for Belle and that he would repay her the money) and as to the fact that the car was ‘no longer available’. Candidates should be credited for a treatment of fraud in relation to *any* of these representations.

(B) Discussion of theft issues – appropriation (despite consent), property, belonging to another, intention permanently to deprive, dishonesty (based on either Ghosh or Ivey).

*Note* – *in relation to ‘belonging to another’*, s.5(1) and/or s.5(3) *is/are applicable*

(C) Discussion of blackmail issues – demand, menaces (importance of the objective test), with a view to gain/intent to cause loss, the meaning of ‘gain’/’loss’, the meaning of ‘unwarranted’.

Discussion of the defence of intoxication – recognition of voluntary intoxication, distinction between crimes of specific/basic intent, explanation that blackmail is a crime of specific intent (requires intention to make a demand with menaces/to make a gain), are the mental elements negated?

*Note* – Blackmail only (no intoxication) – **MAX CLEAR**

[AO1 = 10; AO2 = 15]
Discuss the possible criminal liability of Chas for any property offences in connection with his activities at Al’s showroom.

[25 marks]

Potential content

(A) Discussion of theft issues – appropriation, property, belonging to another, intention permanently to deprive, dishonesty (possible argument that he is not dishonest as he considers that ‘Belle deserves this’ on the basis of either s.2(1)(a) Theft Act or Ghosh)

Answers can rely on explanations used in relation to PC(B) Question 01, but there must be application to the specific theft issues raised by the possible theft of the money.

Discussion of robbery issues – force, was forced used ‘in order to steal’, and at the time of the appropriation (arguable because of a continuing appropriation).

Note – D must intend to use force, and recklessness in relation to force is not enough, as the force must be used ‘in order to steal’ which implies purpose. But candidates should not be penalised for referring to recklessness.

Note – Theft only (no robbery) – MAX CLEAR

(B) Discussion of burglary issues – entry, building, trespass.

Consideration of s.9(1)(a) in relation to the showroom – entry, building, trespass (Chas knowingly exceeding the implied permission to enter), possible intention before entry to commit GBH.

Consideration of s.9(1)(a) in relation to Al’s office – part of a building, trespass, conditional intent to steal.

Consideration of s.9(1)(b) in relation to Al’s office – theft, possible GBH, (credit possible self-defence).

Max sound – s.9(1)(a) (the showroom and the office) + s.9(1)(b) (theft and GBH)

Max weak sound – s.9(1)(b)(theft and GBH)+ s.9(1)(a) either office or showroom

Max clear – s.9(1)(b) only (including theft and GBH)

Max weak clear – s.9(1)(b) only (theft or GBH only)

Max weak clear – s.9(1)(a) only

Note – where candidate addresses s.9(1)(b), discussion of self-defence can enhance any of the above, including raising beyond the above maxima (except where sound is merited without self-defence)

[AO1 = 10; AO2 = 15]
Discuss the possible criminal liability of Mike for any property offences arising from his meeting with Norm.

[25 marks]

Potential content

(A) Discussion of fraud by false representation issues – representation, falsity, dishonesty (based on either Ghosh or Ivey), intention to make a gain/cause a loss, the meaning of 'gain'/loss'.

Note – ‘sound’ requires a generally accurate knowledge of the terminology of the Fraud Act 2006

(B) Discussion of theft issues – appropriation (give full credit to either appropriation despite consent or by acceptance of a gift), property, belonging to another, intention permanently to deprive, dishonesty (based on either Ghosh or Ivey).

(C) Discussion of the defence of duress – the nature of the threat (death, serious injury?). Threat of immediate harm, opportunity to avoid the threat. The objective element. Voluntary association of Mike with a violent man.

[AO1 = 10; AO2 = 15]

Discuss the possible criminal liability of Pete for any property offences in connection with:

- the cafe meal and
- his taking the sandwiches and
- his smashing the traffic lights.

[25 marks]

Potential content

(A) Discussion of making off without payment issues – making off, the spot, goods supplied/service done, payment required or expected. Intention to permanently avoid payment, knowledge that payment was required, dishonesty (based on either Ghosh or Ivey).

Note – possible credit for fraud by false representation. When Pete orders the meal, he makes an implied representation that he will pay for it but at that point the representation is not false nor made dishonestly. Liability can only be established on the basis that the representation continued throughout the meal and became false/dishonest when Pete decided not to pay the bill

Note – possible credit for obtaining services dishonestly (the meal) – should conclude there is no liability as the services were not obtained by a dishonest act

Note – making off only – MAX SOUND

- fraud only – MAX SOUND (assuming the continuing representation argument is raised) – MAX WEAK CLEAR if the continuing representation point is not raised
– obtaining services only – **MAX SOME** (where the candidate arrives at the above conclusion)

– any combinations of making off/fraud/obtaining services – **MAX SOUND** (where a less detailed coverage of any of them)

**B** Discussion of theft issues – appropriation, property, belonging to another, intention permanently to deprive, dishonesty (based on either Ghosh or Ivey).

Answers can rely on explanations used in relation to PC(B) Question 03, but there must be application to the specific theft issues raised by Pete’s activities in relation to the sandwiches.

**Note** – the facts suggest three possibilities – either (a) that Ron had abandoned the sandwiches or (b) that, since Ron had thrown them into the skip owned by the council, the sandwiches belonged to them or (c) that, since Ron intended the skip to be collected by the council, the sandwiches were not abandoned, but continued to belong to Ron until the council collected the skip.

**Max sound** can be achieved by a consideration of the elements of theft as they apply to any one or combination of these three possibilities.

On the assumption that the sandwiches were abandoned by Ron – belonging to another (if abandoned they would be ownerless). Intention permanently to deprive and dishonesty (if Pete believed the sandwiches were abandoned and ownerless he would not possess the intention permanently to deprive nor be dishonest).

If the sandwiches belonged to the council or Ron, Pete would be guilty of theft if he realised/believed that they belonged to the council or Ron (there would be intention permanently to deprive and dishonesty), but if Pete believed that they had been abandoned, he would not possess the mens rea.

**C** Discussion of criminal damage issues – basic criminal damage, meaning of ‘damage’, mens rea (given that Pete meant the damage as a ‘for a laugh’, is the mens rea present). Aggravated criminal damage arising from the traffic lights being disabled, mens rea.

**MAX SOUND** – requires a discussion of basic + aggravated CD, with a clear understanding re aggravated damage that the endangering of life must arise from the intentional/reckless damage

**MAX WEAK SOUND** – basic + aggravated CD, but without the above ‘clear understanding’

**MAX CLEAR** – basic CD only

[AO1 = 10; AO2 = 15]
Discuss the rights and remedies, if any, of:

- Cal against Albie
- Doug against Albie.

[25 marks]

Potential content

(A) In relation to Albie’s possible liability to Cal – possible claim under the Occupiers’ Liability Act 1957 – elements of the Act.

Consideration of s.2(4)(b).

Possible reference to damages (credit a consideration of the different categories of damages, e.g., loss of future earnings, pain and suffering, etc).

(B) In relation to Albie’s possible liability to Doug – possible claim under the Occupiers’ Liability Act 1984 – is there a danger due to the state of the premises [s.1(1)] – requirements for the duty to arise [s.1(3)]. The nature of the duty [s.1(4)]. Has Albie fulfilled the duty [s.1(5)] by the ‘Keep out’ signs? Special issues relevant to children. Possible contributory negligence/volenti. Possible reference to damages.

Note – possible alternative claim under the OLA 1957 on the basis that garden parties with live music might constitute an allurement to a child and that Doug was thus an implied licensee and a visitor.

Note – OLA 1957 only – MAX WEAK SOUND (if combined with a detailed explanation and application of the OLA 57)

– OLA 1984 + OLA 1957 – MAX SOUND

– OLA 1984 only – MAX SOUND

[AO1 = 10; AO2 = 15]
Discuss the rights and remedies, if any, of:

- Albie against Fred
- Greg against Fred
- Jane against Fred.

[25 marks]

Potential content

(A) In relation to Fred’s possible liability to Albie – possible claim for negligent misstatement – the need for a special relationship/proximity, the issue of Fred’s expertise (should a builder know about legal/conservation area issues?), should he have foreseen reliance by Albie, was that reliance reasonable?

Breach of duty and standard of care (in outline), damage, possible reference to damages.

*Note – Duty only (no breach) – MAX WEAK SOUND*

(B) In relation to Fred’s possible liability to Greg – possible claim in the tort of negligence – duty of care (in outline), breach of duty and consideration of factors relevant to breach (in particular, the high likelihood of serious harm), causation, remoteness of damage (distinction between the kind of damage and the precise events which lead to damage). Consideration of possible contributory negligence on the part of Greg (no helmet). Possible reference to damages.

Credit a consideration of the different categories of damages eg loss of future earnings, pain and suffering etc.

(C) In relation to Fred’s possible liability to Jane – possible claim in the tort of negligence for psychiatric injury – need for recognised psychiatric injury, explanation that Jane is a secondary victim, explanation and application of the control factors, with particular reference to proximity of relationship, a traumatic event and the ‘immediate aftermath’. Possible reference to damages.

[AO1 = 10; AO2 = 15]
Discuss the rights and remedies, if any, of:

- Carl against Den
- Den against Ed.

[25 marks]

Potential content

(A) In relation to Den’s possible liability to Carl – possible claim in the tort of private nuisance – the need for an unreasonable interference with the use and enjoyment of land. Consideration of unreasonableness factors, especially locality (relatively noisy area), duration. Possible remedies – issue of possible ‘public benefit’ of Den’s printing for charities will not affect liability, but could affect the remedy (ie no injunction). Issues of intention/malice in relation to the more extensive noise (more likely to be liability here).

(B) In relation to Ed’s possible liability to Den – possible claim under the Rule in Rylands v Fletcher – explanation and application of the elements, in particular, non-natural/extraordinary use of land (creation of a lake suggests the accumulation of a large amount of water). Strict liability (credit an argument that Ed will be liable for the escape and damage even though it was caused by a natural event, unless it amounts to Act of God). Remoteness. Reference to damages.

Possible alternative in negligence – explanation and application of duty of care, breach of duty (eg should Ed have anticipated and guarded against the storm and the escape), remoteness. Reference to damages.

[AO1 = 10; AO2 = 15]
Discuss the rights and remedies, if any, of:

- Ed against GoodBuy in connection with his head injury and the damage to his car
- Ed against Dr Field in connection with his dislocated shoulder
- Ed against the hospital in connection with his dislocated shoulder.

[25 marks]

Potential content

(A) In relation to GoodBuy’s liability to Ed for the head injury and damage to the car, possible claim under the Consumer Protection Act 1987 – damage, defective product, strict liability. Possible reference to damages.

Alternative claim in the tort of negligence – duty, breach, damage, remoteness. Possible reference to damages.

Note – either or both of the above approaches can achieve sound (with an obviously more limited treatment where both elements are considered)

(B) In relation to Dr Field’s liability to Ed in connection with his shoulder injury – elements of the tort of negligence in the context of the medical profession – duty of care (in outline), breach of duty issues (with particular reference to the standard of care expected from junior doctors and the issue of differences of opinion within the medical profession), causation, remoteness and damage. Possible reference to damages.

(C) In relation to the hospital’s possible liability to Ed – discussion of vicarious liability – brief explanation and application of the factors determining the existence of the employment relationship, a more detailed consideration of ‘in the course of employment’.

[AO1 = 10; AO2 = 15]
## Section C Concepts

### Descriptors for Concepts of Law questions (Section C)

<table>
<thead>
<tr>
<th>Level</th>
<th>Explanation</th>
<th>Analysis/Evaluation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>sound</strong></td>
<td>The answer presents a strong explanatory framework, correctly identifying and accurately and comprehensively explaining, say, relevant rules, procedures, institutions and theories in the central aspects of the potential content. Where appropriate, the explanations are supported by relevant examples and illustration (which is adequately developed where necessary to further elucidate the explanations). Where there are more marginal aspects of the potential content, there may be some minor omissions or inaccuracies in the explanation and/or in the treatment of the supporting examples and illustration.</td>
<td>Arguments are developed perceptively and coherently, making careful use of framework explanations, examples and illustration, and are directly related to the thrust of the question. Summaries and conclusions are sustainable, and demonstrably emerge from the supporting explanations and arguments.</td>
</tr>
<tr>
<td><strong>clear</strong></td>
<td>The answer presents an explanatory framework, correctly identifying and accurately explaining significant parts of, say, relevant rules, procedures, institutions, and theory in the central aspects of the potential content, though there are omissions in the explanations of some parts of the rules, procedures, institutions and theory or errors or some confusion in the explanation, in those central aspects. There may be a little overemphasis on marginal aspects at the expense of some of the more central aspects. In the higher part of the level, relevant examples and illustration are used but there may be a little confusion and error in selection and/or explanation or the explanation may be limited. At the lower end of the level, there may be little evidence of relevant examples and illustration or more evident inaccuracies.</td>
<td>Appropriate arguments are introduced but may not be fully developed, or may be restricted in range. Alternatively, the arguments suffer from a little inaccuracy or confusion. The arguments make use of framework explanations (including any relevant examples and illustration) but do not always succeed in incorporating them in a fully coherent way or in demonstrating their full relevance. Summaries and conclusions may be a little tentative and may not fully address the thrust of the question. Though broadly based on the supporting explanations and arguments, summaries and conclusions may not be closely and carefully related to them in the discussion.</td>
</tr>
</tbody>
</table>
The answer presents an explanatory framework which correctly identifies and accurately explains a very limited part of, say, relevant rules, procedures, institutions, and theory in the central aspects of the potential content. There may be a very evident imbalance between explanation of central and of more marginal aspects of the potential content. Alternatively, the answer attempts explanation across a much broader range of relevant rules, procedures, institutions and theory in the central aspects of the potential content but the explanations suffer from significant omission, error or confusion. Explanations may emerge only out of attempts to introduce relevant examples and illustration. If introduced at all, examples and illustration may be of marginal relevance or their treatment may be highly superficial or subject to significant inaccuracies or not properly used to support the explanation of the relevant rules, procedures, institutions and theory.

There are relevant arguments but they are undeveloped and may tend to consist of simple assertions or assumptions. Alternatively, arguments may be characterised by evident confusion which significantly impedes coherence. Very limited use is made of framework explanations and illustration. Summaries and conclusions may be absent. Where present, they may barely address the thrust of the question, and be only imprecisely related to any supporting explanations and arguments.

Maxima for LAW04 Concepts essay questions

The student deals with (A) and (B) as follows:

Max 30: two sound

Max 27: one sound, one clear

Max 23: one sound, one some or two clear

Max 19: one sound or one clear, one some

Max 15: one clear or two some

Max 10: one some

Max 5: fragments or substantial error or incoherence

0: No relevant information
Consider what is meant by ‘justice’. Discuss whether English law fully achieves justice.

REMEMBER TO ALLOCATE MARKS FOR AO3 SEPARATELY

Potential content

(A) **Consideration of what is meant by ‘justice’. Credit any of the following:**

- justice in terms of equality of treatment/fairness
- categories of justice eg distributive/corrective justice, substantive/procedural justice, concrete/formal justice, etc
- utilitarianism
- Rawls
- Marx
- Nozick
- notions of natural law/positivism.

*Note* – credit any other arguable notion of justice

*Note* – credit appropriate illustration and/or criticism of any definition/theory

(B) **Discussion of whether English law fully achieves justice**

Students should:

- refer to appropriate examples from the substantive law (criminal or civil), and/or the legal system/legal process, and
- discuss whether justice is or is not (as the case may be) achieved in the examples selected.

‘Appropriate examples’ include:

- issues of discrimination/inequality of treatment
- the treatment of suspects
- does English law ensure a fair trial for accused persons?
- natural justice
- sentencing and proportionality
- the jury
- the correcting of miscarriages of justice, eg the Criminal Cases Review Commission and corrective justice generally, eg appeals and judicial review
- precedent
- access to justice issues, eg cost/funding in relation to the provision of advice and representation, the problem of lack of understanding of the legal process, etc
- relevant examples from the substantive law.

*Note* – credit any other valid examples
Note – SOUND PC(B) requires students, in relation to all or a majority of the examples which they refer to, to expressly link the examples to a particular notion of justice/injustice. For example, a response discussing factors (eg lack of funding) which can lead to access to justice issues should be awarded sound only if the nature of the injustice is explained, eg like cases not being treated alike, the failure of the legal system to provide a ‘level playing field’, lack of natural justice, or a mere lack of ‘fairness’, etc. Similarly, responses discussing examples of ‘miscarriage of justice’ should refer to the nature of the injustice involved, eg the failure of the legal system to ensure a fair trial and/or to remedy any miscarriage (in this connection a reference to the reform through the creation of the Criminal Cases Review Commission would be highly creditworthy). The point here is that a discussion of an example which concludes with a mere assertion, such as, ‘is this justice?’, fails to fully address the issue as to whether justice is or is not being achieved.

Note – a response which demonstrates some ability to link an example or examples to a particular notion of justice/injustice but not in relation to all or a majority of examples selected – MAX WEAK SOUND

Note – a response which demonstrates no ability to link an example or examples to a particular notion of justice/injustice – MAX CLEAR

Note – examples should only be treated as falling within PC (B) where the student has made it clear that they relate to the issue of whether the law achieves justice

Note – any illustration of theories/ideas of justice in the context of the discussion of the meaning of justice should be credited in PC(A)

[AO1 = 15; AO2 = 15; AO3 = 5]
Discuss the extent to which judges are able to display creativity in the operation of judicial precedent and in the interpretation of statutes. Discuss whether judges should have this ability.

[30 marks + 5 marks for AO3]

REMEMBER TO ALLOCATE MARKS FOR AO3 SEPARATELY

Potential content

(A) **Discussion of how far judges are able to display creativity in the operation of judicial precedent**

- Framework explanation of the doctrine of precedent (the judicial hierarchy, the distinction between ratio and obiter, binding and persuasive precedents, etc).
- Analysis of the characteristics of flexibility which provide the potential for legal development, eg distinguishing, flexibility available to the Supreme Court (House of Lords) due to the Practice Statement, flexibility available to the Court of Appeal (Civil Division) arising from the decision in *Young v Bristol Aeroplane Co*, additional flexibility available to the Court of Appeal (Criminal Division), vagueness of a ratio leading to different interpretations in later cases, overruling/not following, etc.
- Identification and analysis of relevant examples and case law illustrating judicial creativity in practice. Possible examples include those illustrating distinguishing, the use of the Practice Statement and the exceptions to *Young v Bristol Aeroplane*, development of the mens rea of murder, the duty of care in the tort of negligence eg regarding misstatements, psychiatric harm, etc, judicial development of assault/ABH/GBH, etc.

*Note* – credit any other relevant illustration

**Discussion of whether judges should have this ability**

- Possible arguments in favour of judicial development of law include the need for the courts to deal with omissions in the law, the fact that judges are not constrained by problems in the way of new legislation, eg party politics, time constraints etc, the argument that new case law can be produced more speedily than legislation.
- Possible arguments against judicial development of law include the haphazardness of the judicial process and the need for relevant cases and issues to arise, constitutional issues, eg judges are unelected, inappropriateness of the courts as a forum for law reform, eg lack of relevant research material available to judges, issues of justice, eg the problem of retroactivity of judicial decisions, the (declaratory) theory that judges merely state the law, etc.

*Note* – credit any relevant argument and any references to the views of writers and judge on the desirability or otherwise of judicial law-making.

**Sound** the three elements of (a) framework explanation of precedent and flexibility features + (b) illustration of judicial development + (c) discussion of the arguments for and against judicial development

**Weak sound** the above without arguments for judicial development

**Weak sound** the above without arguments against judicial development

**Clear** any two of the above elements

**Some** any one of the above elements
(B) **Discussion of how far judges are able to display creativity in the interpretation of statutes**

- Explanation of the various approaches to statutory interpretation, eg the literal, Golden and mischief ‘rules’, and the increasing importance of the purposive/contextual approach, etc.
- Analysis of the flexibility available to judges in interpreting statutes with particular reference to a comparison of the relative rigidity of the literal and golden ‘rules’ of interpretation with the relative flexibility of the mischief ‘rule’ and the purposive approach. Flexibility also illustrated by a comparison of the constraints of the intrinsic aids and the relative flexibility of extrinsic aids to interpretation.
- Identification and analysis of relevant examples/case law.

**Discussion of arguments for and against whether judges should have this ability**

Many of the arguments identified above in relation to precedent can be validly used by students in the context of statutory interpretation, eg constitutional issues, the need to remedy omissions in the law, etc.

**Note** – credit any relevant argument and any references to the views of writers and judges on the desirability or otherwise of judicial law-making

**Sound**

the three elements of an (a) explanation of the ‘rules’ of interpretation/flexibility available to judges + (b) relevant illustration + (c) discussion of the arguments for and against judicial development

**Weak sound**

the above without arguments for judicial development

**Weak sound**

the above without arguments against judicial development

**Clear**

any two of the above elements

**Some**

any one of the above elements

[AO1 = 15; AO2 = 15; AO3 = 5]
Consider the view that there is a close relationship between law and morality. Examine the debate as to whether law should reflect moral principles.

[30 marks + 5 marks for AO3]

REMEMBER TO ALLOCATE MARKS FOR AO3 SEPARATELY

Potential content

(A) Consideration of the view that there is a close relationship between law and morality

- **Explanation of the meaning of law and morality**: credit any arguable definitions of law (eg Salmond, Austin, Kelsen) and morality (eg customary practices, social manners, rules based on religion, what is ethically good, etc).
- **Discussion of the extent to which the law does seek to uphold moral principles**: use of appropriate case law/examples to illustrate areas of overlap and divergence.
- **Possible areas of overlap between law and morality**: examples from the substantive law (eg offences against the person and property, corruption of public morals, outraging public decency, consent and other defences to criminal liability, marital rape, the ‘neighbour principle’ in the tort of negligence, the duty to honour contracts, the contract rules which seek to protect the weaker party, etc). Examples of the way in which public morality may be influenced by law reform (eg discrimination, drink-driving, etc) and vice-versa (eg the campaign to abolish capital punishment).
- **Possible examples of divergence between law and morality**: speeding and parking offences, adultery, swearing, etc. Credit a consideration of the difficulty in taking a moral position which the law often faces owing to the existence of conflicting moral views in a pluralistic society. Possible examples of the above ‘difficulty’ include the Gillick principle, abortion, adult homosexuality, assisted reproduction and embryo research, assisted killing and withholding medical treatment, etc.

**Sound**

explanation of the meaning of law and morality + developed discussion of overlap and divergence

**Weak sound**

discussion of overlap and divergence – no explanation of ‘meaning’

**Clear**

less developed discussion, with or without explanation of ‘meaning’

**Some**

explanation of the meaning of law and morality only and/or very limited discussion of overlap/divergence

(B) Examination of the debate as to whether law should reflect moral principles.

- **Students should consider the arguments for and against law being based on moral principles, and refer to relevant academic debates eg Hart-Devlin, Hart-Fuller.** Possible arguments in favour of legal moralism are the importance of common values and the need for a cohesive society, and the natural law theories. Possible arguments against legal moralism are those in favour of libertarianism, eg the autonomy of the individual and the ‘harm principle’, and the various possible problems with legal moralism eg enforcing morality in a pluralistic society. Credit answers which recognise that even libertarians acknowledge the need for some morality as the basis of law (eg Hart’s ‘minimum content of natural law’). Answers should also be given credit for linking the positivism/natural law debate to the relationship between law and morality.
- **Students should also provide relevant examples which highlight the significance of the conflict between the above views.** Possible examples include issues relating to
conception and death, but any relevant example should be credited.

**Sound** consideration of relevant arguments for and against law being based on moral principles + developed illustrations.

**Clear** consideration of arguments with no, or limited, illustration

**Weak Clear** illustrations which are discussed and developed but set against a weaker framework of arguments

**Some** generally very limited in terms of either arguments and/or illustration

[AO1 = 15; AO2 = 15; AO3 = 5]
### Assessment Objective coverage

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