General

Many students performed well on this Unit and there were many very good responses, demonstrating thorough learning and careful preparation. Students generally devoted sufficient time to both the substantive law and concepts sections, although, as has been the case in earlier examinations, many, in attempting their Concepts question first, spent far too much time on it and failed to leave sufficient time for the rest of the paper. The major deficiencies in the responses of weaker students to the substantive law questions continued to be the devotion of excessive time and detail to aspects which were not in issue in the problems set, and the failure to adequately read and/or reflect on the facts of the problems, leading to inaccurate explanations and analyses. In addition, students often fail to display a precise knowledge of the wording of relevant statutes, especially in relation to the Theft Act 1968, the Fraud Act 2006 and the Occupiers’ Liability Act 1984.

Comments

SECTION A (OFFENCES AGAINST PROPERTY)

Scenario 1

Question 01

This question required students to address the following issues:

- Al’s possible liability for fraud by false representation and theft and
- Chas’s possible liability for blackmail, including the possible defence of intoxication.

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’. Al made various representations to Belle, in particular, that, if she paid him £1500, he would ‘use it to buy a suitable car for her’. This was false as it was ‘untrue or misleading’ [s.2(2) Fraud Act] and Al knew that it was. In relation to the requirement of dishonesty, students were required to explain either the Ghosh or Ivey v Genting Casino principles and, as the vast majority of students indicated, it was obvious that Al was dishonest as he had no intention of using Belle’s money to buy a car for her.

As most students pointed out, Al clearly intended to make a gain for himself or another or to cause loss to another. 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 £1500 which Belle paid to Al.

Note 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 many students were able to do so.
The theft issues. Most of the issues raised by this question were reasonably straightforward (appropriation, property, dishonesty, intention permanently to deprive) and many students scored high marks. Some students, however, displayed confusion when discussing the related issues of appropriation, dishonesty and belonging to another. It is important to bear in mind that theft does not require a mere appropriation but a dishonest appropriation. Therefore, given that Al had formed dishonest intent at the time that Belle handed the £1500 over to him – since he had no intention from the beginning of using the money to buy a car for her – the dishonest appropriation occurred as soon as Al took possession of the money (which amounted to the appropriation). Moreover, the money belonged to Belle at that point as she had a proprietary interest in it and/or it was in her possession or control (s.5(1). However, some students argued that the money belonged to Belle under s.5(3) on the basis that Al had received the money from Belle under an obligation to use it to buy a car for her. This argument was rather confused as s.5(3) is only necessary to establish liability for theft when D has not formed a dishonest intent at the time that he/she receives property from the owner, and this was not the case with the Belle scenario. However, such an argument was credited, but only gained the highest marks if the students argued that appropriation occurred after Belle handed over the money to Al, for example, when Al used the money to pay his debt to the drug dealer.

Note- some students raised the issue of duress of circumstances as a possible defence for Al to theft as the scenario stated that he ‘urgently needed £1500 to repay a debt to a drug dealer’, but this was not deemed creditworthy.

The blackmail issues. The question required students to consider whether Chas had 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. There was clearly a demand for payment of the £1500 by Chas, but, whether the demand was made with menaces would depend on whether the reasonable man of normal stability and courage would give in to the demand (Clear), and it was probably arguable that he would, given that Chas had a reputation for violence. On the other hand, it was irrelevant that Al ‘ignored’ Chas’s threat. The area in which many students struggled was the meaning of an ‘unwarranted’ demand with menaces, although some responses on this aspect were excellent. According to s.21, D’s demand with menaces will be unwarranted unless he believed that he had reasonable grounds for making the demand (the return of Belle’s £1500) and that the use of menaces was a proper means of reinforcing the demand (the threat). In the scenario, given that Al had defrauded Belle, Chas’s girlfriend, of £1500, it was clearly arguable that Chas did believe that he had reasonable grounds for demanding the return of this sum, and many students argued as such. In order to decide whether Chas believed that the use of the menaces was proper, it had to be asked whether he believed that his threat to Al to burn down Al’s car showroom was acceptable according to the general standards of society. It clearly was not since, according to Harvey, a threat to commit an act which D knows or believes is criminal is not proper.

Many students were able to explain and apply the requirement of s.21 that the demand is made with ‘a view to gain for himself or another or with intent to cause loss to another’. Many were also able to explain in some detail the meaning of ‘gain’ and ‘loss’. Some, however, incorrectly argued that Chas intended to cause a loss to Al by threatening to burn his showroom down, as this would
not be a loss resulting from the demand. Unfortunately some students also incorrectly argued that liability for blackmail required dishonesty, which obviously gained no marks.

**The defence of intoxication.** The fact that Chas drank ‘several pints of beer’ before he sent the text to Al raised the issue of the defence of intoxication in relation to the offence of blackmail. In order to achieve top marks, it was necessary to explain the distinctions between voluntary and involuntary intoxication and between crimes of specific and basic intent, and that voluntary intoxication is a defence to only crimes of specific intent. Unfortunately, very few students provided a definition of ‘specific’/‘basic intent’. On the other hand, many were able to identify the offence of blackmail as one of specific intent (without explaining why this is so), and that intoxication only provides a defence to such offences where it prevents the formation of mens rea, and such students gained high marks. On the facts of the problem, it was obvious that Chas would have been able to form the mens rea since, despite drinking the beer, he was able to clearly articulate his text to Al, but many students failed to analyse the facts on this aspect.

**Question 02**

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

- theft/robbery and
- burglary.

**The theft/robbery issues.** Most of the issues relating to Chas’s possible liability for theft of Al’s money (appropriation, belonging to another, property, dishonesty, intention permanently to deprive) were correctly argued and many scored good marks on these. The issue which some students missed but better students addressed was Chas’s belief that ‘Belle deserves this’ when he appropriated Al’s £500. This obviously raised an issue relating to dishonesty, which some students correctly addressed by arguing that Chas would not be dishonest by virtue of s.2(1)(a) Theft Act as he might believe that he had a legal right to the money on Belle’s behalf, given that Al had stolen her £1500. The same point could have been made by arguing that the honest and reasonable person for the purposes of Ghosh or Ivey would not regard Chas’s conduct as dishonest, but no student seemed to adopt this approach.

Since Chas ‘head-butted Eric’ in Al’s office, 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 Chas’s head-butt was more than enough to amount to ‘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 Chas used force “n order to steal”, and, although it could be said that the force was used to enable Chas to escape rather than to steal, some students argued that the appropriation was still continuing at the time of the head-butt, which was credited.

**The burglary issues.**

What responses to this question emphasised is 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), namely
The question raised both s.9(1)(a) and (b) issues. S.9(1)(a) was relevant in two situations. To begin with, Chas entered Al’s showroom with the intention to ‘rough him up’ and many students correctly argued that this might mean that Chas entered a building with the intent to commit GBH. Unfortunately few followed the burglary argument through since they did not identify the trespassory entry. Better students, however, succeeded in doing so by explaining that, although Chas had implied permission, as a member of the public, to go into a car showroom, he exceeded this permission by intending to use violence on Al (Jones & Smith). S. 9(1)(a) was also relevant when Chas decided to enter Al’s office (part of a building) to ‘see if there was anything worth stealing’, with the result that he possessed the conditional intention to steal before entry. He also entered as a trespasser as the ‘Private’ notice on the door clearly indicated that he did not have permission to enter even though the door was unlocked. Incidentally, some students argued that Chas possessed intent to commit GBH before entry into the office because he intended to ‘rough him [Al] up’ but this was inaccurate as it was clear that Chas knew, before he got to the office door, that Al was not at work.

S.9(1)(b) became relevant when Chas entered Al’s office as a trespasser, and committed both theft and GBH, and many students explained this.

**Note.** Previous reports have advised that, 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 discuss 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 was interesting this year that students seemed to take this point on board.

**Note.** Students who raised the issues of self defence in relation to burglary (GBH) or robbery (the use of force) were awarded credit.

**Scenario 2**

**Question 03**

This question required students to address the following issues:

- the possible criminal liability of Mike for the theft of Norm’s watch
- the possible availability to Mike of the defence of duress by threats and
- the possible criminal liability of Mike for fraud by false representation.

**The theft issues.** Many students were able to provide competent explanations and application of the elements and many responses were excellent. The particularly important issues were appropriation and dishonesty. In relation to the former, better students pointed out that, according to Hinks, the receipt of a voluntary gift qualifies as an appropriation for the purposes of s.3 of the Theft Act 1968. In relation to dishonesty, although most students argued that, according to Ghosh, Mike would be deemed dishonest by reasonable and honest people, some gained credit by
considering whether Mike could be considered honest on the basis of s.2(1)(b), that is, on the basis that Mike might have believed that Norm, as a good friend, would consent to the appropriation if he had known of Mike’s unfortunate circumstances.

The defence of duress. Many students accurately explained and applied the elements of duress extremely well and thus gained good marks. Students generally said it was arguable that Mike would have reasonably believed that Ollie had threatened to cause him at least serious injury by pointing the gun at him, telling him ‘or else’ and being a ‘violent moneylender’. Better students also pointed out that, since the major decision in Hasan, this belief must be reasonably held as well as genuine. A further important issue was whether the objective test was satisfied - would the threat have caused a person of reasonable firmness sharing the characteristics of Mike to act as he did, and many students considered that this was arguable, although very few referred to the important point that Mike was aged only 17. It was unclear on the facts whether there was a reasonable opportunity for Mike to escape the consequences of the threat but many argued that, since Ollie phoned Mike with another threatening message the next day, Mike might have believed that Ollie was ‘watching’ him. It was also unclear on the facts whether Mike reasonably believed that Ollie would carry out the threat “immediately or almost immediately” (Hasan). An issue which many students also addressed, and for which they received credit, was whether, since Mike had voluntarily associated with a ‘violent moneylender’, Ollie, he had disabled himself from relying on the defence. A further issue was whether the theft committed by Mike fell within the words of Ollie’s threat to steal ‘valuables’, and many argued that it did.

The fraud by false representation issues. The issues raised by this question were similar to those raised in question 01. The false representation made by Mike was that it was his birthday and he had received no birthday presents, which he knew was false. He was also dishonest and had the intention to make a gain for himself and Ollie, and a loss to Norm.

Question 04

This question required students to address the following issues:

- the possible criminal liability of Mike for making off without payment for the café meal
- the possible criminal liability of Pete for theft of the sandwiches and
- the possible criminal liability of Pete for criminal damage.

The making off without payment issues. Most students gained at least modest marks and many high marks were achieved. The actus reus issues to explain and apply were that a service had been ‘done’, that payment for the meal was required or expected, and that Pete had made off from the ‘spot’ where payment was required or expected. The mens rea issues to consider were whether Pete knew that payment was required, whether he was dishonest under the Ghosh principles and whether he intended permanently to avoid payment (Allen). Students generally, and correctly, argued that Pete was guilty.
Note. As has been pointed out in earlier examination reports, the highest marks are awarded only to students who display a generally accurate knowledge of the terminology of s.3 Theft Act 1978, but many responses reached this standard.

The theft issues. The issues in the scenario relating to appropriation and property were straightforward, but the elements which raised more subtle points were ‘belonging to another’ and ‘dishonesty’, with the result that students who dealt with these well tended to score high marks. In relation to ‘belonging to another’, it was not absolutely clear who, if anyone, had a proprietary right to the sandwiches after Ron threw them into the skip. There were three possibilities on this point:

(i) Ron abandoned them with the result that no one owned them, or
(ii) they belonged to the council since Ron had thrown them into a skip owned by the council or
(iii) since Ron intended the skip to be collected by the council, the sandwiches belonged to Ron until the council collected the skip.

Any one of these arguments received equal credit but, in order for students to score high marks, it was necessary for their arguments concerning dishonesty and intention permanently to deprive to match their views regarding ‘belonging to another’. If a student, for example, argued that Ron had abandoned the sandwiches, Pete could not be dishonest in taking them, nor possess intention permanently to deprive. On the other hand, Pete would be dishonest and possess intention permanently to deprive if the sandwiches belonged to Ron or the council and he knew or believed that they did. But, if Pete believed that Ron had abandoned them or that, since Ron did not want them, he would have consented to Pete taking them (s.2(1)(b) Theft Act), Pete would not possess the required mens rea.

The criminal damage issues. The question required students to consider whether Pete 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), and most students argued that the traffic lights were either damaged as they would take time and money to repair, or destroyed as being useless. Students generally also correctly explained the mens rea requirement of intention or recklessness as to the damage and that, since Pete smashed the lights ‘for a laugh’, the damage/destruction was intentional.

The further issue was whether Pete was liable for aggravated criminal damage under s.1(2) CDA and students generally considered this aspect at least on a basic level. Many of the students who did identify the aggravated offence correctly stated that such liability would be established only if Pete 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 Pete, through the smashing of the traffic light, was at least reckless as to endangering the lives of Ron and Ted by virtue of the risk that they might crash their cars. Good marks were also gained by students who pointed out that there need be no danger in fact to life (Dudley).
SECTION B TORT

Scenario 3

Question 05

This question required students to discuss the rights and remedies, if any, of

- Cal against Albie under the Occupiers’ Liability Act 1957 and
- Doug against Albie under the Occupiers’ Liability Act 1984.

The Occupiers’ Liability Act 1957 issues. Many students performed at least competently for this question by explaining the meaning of ‘occupier’, ‘visitor’ and ‘the common duty of care’, and by proceeding to consider the application of the common duty of care in relation to Cal and Albie, correctly explaining that the band invited by Albie to play at his party, in which Cal was a guitarist, were visitors. The question stated that ‘Albie paid Bob, a carpenter, to erect the stage for the band and that the stage collapsed because Bob had not used ‘strong enough supports’, causing Cal to fall and suffer personal injury. This obviously raised the issue of the possible relevance of 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. Most students made at least some reference to this provision, although very few were able to explain and apply it with complete accuracy. In particular, only the best students considered whether it is necessary under this provision for the occupier to check the work himself and correctly explained that, if the work is not complex, the occupier should do so himself (Woodward v Mayor of Hastings), but not if the work is complex (Haseldine v Daw). It was arguable that it was reasonable for Albie to engage a specialist to build a wooden stage, as many students suggested, but would it have been within his competence to check whether the supports for the stage were adequate?

NB Students who discussed Albie’s possible liability under general negligence principles rather than under the 1957 Act could gain full credit, but only if the aspects of duty, breach, damage and remoteness were specifically applied to the facts of the scenario eg by considering whether Albie performed his duty of care merely by appointing an apparently competent person to do the work.

The Occupiers’ Liability Act 1984 issues. Students correctly argued that Doug was a trespasser in Albie’s garden and that, in order for him to successfully claim against Albie for his injuries, he would have to establish that Albie 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. First, it is clear from s.1(1) that the duty arises only where there the trespasser is injured by a danger due to the state of the premises and not where he is injured by the trespasser’s dangerous activities on the premises. Moreover the effect of s.1(3) is that the duty will arise only if the occupier knows of or has reasonable grounds to believe that the danger exits, and that he knows or has reasonable grounds to believe that a trespasser is or might be in the vicinity of the danger and that it is reasonable to expect the occupier to protect the trespasser against the danger. On the facts of the question, there was arguably a danger due to the state of the premises (the crumbling steps) and it was also arguable that Albie knew or had reasonable grounds for
knowing of this danger (as the steps were ‘obviously crumbling’). It was also arguable that Albie had reasonable grounds to believe that trespassers might come into the vicinity of the danger since he had often seen boys climbing over the garden fence to get into garden parties. There also a good case for saying that it was reasonable to expect an occupier to protect a young boy against the danger. As a result, it was arguable that Albie owed Doug the statutory duty, although few students were able to explain the precise nature of the duty ie to take reasonable care to see that the trespasser does not suffer injury on the premises by reason of the danger [s.1(4)]. Students were then required to consider whether Ben had committed a breach of the duty. Some students correctly referred to the principle in s.1(5) of the Act to the effect that the duty ‘may, in an appropriate case’ be discharged by virtue of the occupier having taken reasonable steps to give warning of the danger or to discourage persons from incurring the risk. Some students argued that the ‘.Keep out’ signs which Albie had placed on his fence was a sufficient performance of the duty, for which some credit was awarded, but the highest marks were given to students who argued that the signs were not a warning of the danger at all and that a child trespasser could not necessarily be expected to take notice of such a sign and that Ben should have taken greater steps to protect such a trespasser. Many students considered the possibility that Doug could be said to be contributorily negligent with the result that his claim would fail and such an argument was credited, although the courts are reluctant to apply this principle to young children.

NB Students often continue to state, as in responses in previous examinations, that the occupier must know that there is a danger and that there is a likelihood of trespass, without recognising that it is sufficient that he has “reasonable grounds to believe” that these circumstances exist.

**Question 06**

This question required students to discuss the rights and remedies, if any, of

- Albie against Fred in relation to a possible negligent misstatement
- Greg against Fred under principles of general negligence and
- Jane against Fred in connection with her psychiatric injury.

**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 crucial issue of the problem was whether Fred owed a duty of care to Albie in relation to his giving of advice under the principles as originally established in Hedley Byrne v Heller, and as developed in later authorities, in particular Caparo v Dickman. Most students displayed at least a competent understanding of these principles.

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’ between them, or, according to Caparo v Dickman, only if there is a relationship of proximity’ (which has a similar meaning to that of a ‘special relationship’). The main features of special relationship/proximity are that

- the maker of the statement, D, possesses some special skill relating to the statement,  
- D knows that it is highly likely that C will rely on the statement,  
- C does rely on it and thereby incurs financial loss, and  
- it is reasonable for C to rely on it.
As regards element (i), students generally argued that Fred, as a local builder, was an expert in planning matters, although this was debateable (would a builder be skilled regarding legal issues?). Some 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 Albie had asked Fred to specifically advise him about the conservation area issue. Whether it was reasonable for Albie to rely on Fred’s advice would depend on all the circumstances, and some students correctly suggested that it would not normally be reasonable to rely on advice given in a purely social situation. Several students also correctly pointed out that some decisions (eg Hedley Byrne) hold that, if the maker of the statement voluntarily assumes responsibility regarding the making of the statement, rather than staying silent, this supports the existence of a duty of care, and credit was given for this. In addition to addressing the issue of whether a duty of care arose, students were expected to briefly explain the standard of care required of Fred (although few did so!) – did he display the care, skill and expertise that would have been displayed by a reasonably competent advisor? In relation to the remedy available, it was merely necessary for students to identify that Albie could recover damages for his loss, and that this is one of the areas where economic loss can be recovered in tort.

The general negligence issues. Many students achieved good marks by explaining and applying general principles of negligence. It is obvious, based on the reasonable foreseeability of harm principle, that the driver of a heavy truck owes a duty of care to other road users and others in the vicinity to see that the truck is safe for driving on a busy road. Many students, however, devoted too much time to explaining in detail the principles of proximity, and the rule that it must be just and reasonable to impose a duty, although some marks were awarded for this. It was, however, particularly important to decide whether Fred was in breach of duty by reference to the “reasonably careful and skilled driver” principle and to possible “risk factors” such as the degree of likelihood that harm would be caused by Fred’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 correctly pointed out that Greg was contributorily negligent through not wearing a helmet while riding his bicycle.

The psychiatric injury issues. In determining whether Fred was liable in the tort of negligence to Jane, Greg’s fiancée, many students correctly explained the test for distinguishing primary and secondary victims, namely that the former is one who reasonably fears for their own safety and the latter being a witness to the incident but not in danger of physical harm themselves. On this basis, it was obvious that Jane was a secondary victim. Students then went on to accurately explain the various “control factors” laid down in authorities such as Alcock V Chief Constable which a secondary victim needs to satisfy in order to succeed in a claim for psychiatric harm. It would be necessary for her to establish that she suffered from a recognised psychiatric illness (would ‘mental trauma’ amount to this?), and that it was foreseeable that a person of normal fortitude would suffer such harm (this was arguable). She would probably have no difficulty in showing that she witnessed the ‘aftermath’ of the incident with her own unaided senses and that it was a horrifying event. In order to show a ‘close tie of love and affection’ between herself and Greg, she would have to show that the relationship of fiancé/fiancée was a close type of relationship. Some students merely assumed that a sufficiently close type of relationship would be enough but more perceptive students correctly pointed out that it would depend on the evidence whether such a relationship in fact existed.

Note. Many students stated that, in order for Jane to successfully claim, she had to qualify as a person of normal fortitude, but the rule is that it has to be reasonably foreseeable that a
hypothetical person of normal fortitude would have suffered psychiatric injury in the circumstances.

Scenario 4

Question 07

This question required students to discuss the rights and remedies, if any, of

- Carl against Den under the tort of private nuisance and
- Den against Ed under the Rule in Rylands v Fletcher.

The nuisance issues The majority of students attempting this question were able to provide an accurate definition of the tort of private nuisance, and to identify factors referred to in the facts of the problem which were relevant in determining whether the noise generated by Den’s printing works amounted to an unreasonable interference with the use and enjoyment of land. As many students argued, the important features in relation to the noise were the factors of locality, duration and malice. Although some students failed to analyse these factors in detail and tended merely to list them, many students argued that, in relation to locality, considerable noise from a printing works was reasonable, given that there were ‘few houses in the street, but many shops and noisy traffic’. Better students argued, however, that, although daytime noise was reasonable, when Den increased his printing to include night work, it became unreasonable, especially since it went on ‘for the next six months’. A major factor was malice on Den’s part, when he increased his printing work in response to Carl’s complaint, as many students argued. A further point mentioned in the scenario was Carl’s ‘sensitive hearing’ which was, in fact irrelevant to Den’s liability since the legal test in determining whether there is an unreasonable interference in nuisance is whether it would affect the person with normal tolerance (see eg Heath v Mayor of Brighton). Many students scored good marks in discussing the above issues, but many failed to achieve the highest marks through a failure to discuss remedies in any detail. It is important in addressing the issue of private nuisance to identify damages for loss of enjoyment, although there is no need to elaborate on the precise measure. On the other hand, the remedy of injunction is very important in relation to nuisance claims and students should provide some explanation of this remedy, in particular, that it is a discretionary remedy, which allows the court to take into account all the circumstances. As a result, the court can impose an injunction which restrains the continuance of the nuisance wholly or partially (see, for example, Kennaway v Thompson) or, on the other hand, refuse an injunction and award damages only. It was important to consider this judicial discretion in relation to the fact that Den carried out printing for charities, as one factor the court may use to refuse an injunction is that of public benefit or utility (see, for example, Adams v Ursell and Dennis v MOD).

Note. Students were awarded credit for explaining that ‘coming to the nuisance’ is not a defence.

The Rylands v Fletcher issues. Students were generally able to provide some reference to the main elements of the tort, and many scored high marks by detailed explanation and application. On the other hand, there was a tendency on the part of some students to write a list of these elements which contained little explanation, application or reference to authority. In particular, although many students appreciated the significance of the requirement of non-natural user of land since the Cambridge Water and Transco decisions, few were able to accurately explain and apply it. It is now clear that a non-natural use is one which is “extraordinary and unusual” as distinct from a use of land which is domestic or normal. On this basis, it was arguable that the creation of a ‘lake’ to
sail model boats might be non-natural, but it would very much depend on whether it would require large quantities of water. As has been the case in previous papers, some students confused the requirement of non-natural use and the requirement of an accumulation onto land of something which is not naturally there. A further issue in the scenario related to the fact that water escaped onto Den's land because of a violent rainstorm. One way of addressing this was to argue that this might amount to an Act of God, with the result that Ed would not be liable, and this was credited (despite the uncertainty in the case law regarding the exact nature of this defence). Another possible argument might be to suggest that, even though the rainstorm was not Ed’s fault, he would be liable because Rylands v Fletcher is a tort of strict liability, although no student seemed to argue this. Students gained credit for discussing the requirement of damage and remoteness.

**Question 08**

This question required students to discuss the rights and remedies, if any, of

- Ed against GoodBuy under principles of product liability
- Ed against Dr Field for medical negligence and
- Ed against the hospital under principles of vicarious liability.

**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. Most students showed some knowledge of the area. 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 eg a purchaser of the product (eg Grant v Australian Knitting Mills), a consumer or user of the product (eg Donoghue v Stevenson) or any other person who foreseeably incurs damage (eg a member of the public who is hit by a defective wheel which breaks lose from a car). Having explained that, on the facts of the problem, GoodBuy owed a duty of care to Ed on the ground that it was reasonably foreseeable that defective adhesive would cause roof tiles to fall off the roof and cause personal injury or damage to property. In relation to breach of duty, it was necessary for students to consider the standard of care required and the meaning of reasonable care and skill, together with the various 'risk factors'. Some students also addressed the requirement of physical damage caused by the defective product and correctly pointed out that, although Ed could recover damages for his personal injury and the damage to his car, he could not recover for defective adhesive itself, since this constituted pure economic loss (see, for example, Muirhead v Industrial Tank Specialities).

Many students chose to deal with product liability on the basis of the principles in the Consumer Protection Act 1987. In general, answers showed a competent understanding of the meaning of the relevant statutory terms “product”, “defective”, and “producer.” Unfortunately, however, some students made the major error of stating that the producer must be negligent in order to be liable under the Act. The fundamental principle of the CPA is that it is based on strict liability, with the result that it is unnecessary to establish negligence and many students explained this. Some students also gained credit by explaining the ‘development risks’ defence which means that, if a producer could not reasonably have known of the defect due to the state of technical or scientific knowledge at the time, he will escape liability, thereby to a large extent qualifying the strict liability
of the producer. It is also important, when writing answers on the CPA, to state that the defective product cause damage, which is defined in the Act to include the death or personal injury of the claimant or damage to his property, but excluding damage to the defective product itself (see s.5), and many students correctly considered this aspect. Many students also correctly referred to the rule restricting claims for damage to property to those above £275.

**Note.** Students will achieve the highest marks for a discussion of the CPA 1987 only if they show a generally accurate knowledge of the terminology of the Act.

**Note.** Students who discuss product liability on the basis of the tort of negligence will gain good marks only if they display at least some knowledge of authorities which relate to product liability based on negligence eg Grant v Australian Knitting Mills, Muirhead v Industrial Tank Specialities, Fisher v Harrods etc.

The medical negligence issues. Although many students devoted considerable examination of the three Caparo v Dickman duty criteria, this was unnecessary as it is well established that a doctor owes a duty of care to his/her patient, and it was more important to devote attention to the issue of breach of duty by medical professional and the standard of care required of them. As was pointed out in last year’s examination report, students will secure high marks for a response in connection with medical negligence only if they focus on medical negligence authorities rather than those based in general negligence. Many students correctly explained the principle that the standard of care required of Dr Field was that of a reasonable competent qualified doctor, even though he was a junior doctor. It was then crucial to explain and apply the Bolam and Bolitho principles, which many students did, although often incompletely. The rules established in Bolam are that

- 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.**

The scenario involving Dr Field stated that, to stop Ed fitting, he injected him with a drug the dosage of which was ‘far stronger than most doctors would use’. This therefore implied that some doctors would use the stronger dose. Many students who referred to Bolam argued that Dr Field was negligent in using the stronger dose, whereas the second principle of Bolam suggested that it might not be. On the other hand, the principle in Bolitho might suggest that Dr Field was negligent. According to Bolitho

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

It was possible, therefore, that Dr Field was negligent on the basis that, although some doctors would have given the stronger dosage, he should have considered whether it posed a risk, and some students considered this possibility. Many students also gained credit by considering the basic rules of causation and remoteness.

The vicarious liability issues. The scenario raised fairly straightforward issues relating to vicarious liability and there were many good responses. Students were required to, briefly explain the tests for determining whether Dr Field was an employee of the hospital and whether his conduct was in the course of his employment. In relation to the latter, he clearly was acting in the
course of employment rather than ‘on a frolic of his own’ since what he did was closely linked to his job and was not an unauthorised act.

SECTION C (CONCEPTS OF LAW)

Question 09.

Students were required

- to consider what is meant by justice, and
- to discuss whether English law fully achieves justice.

Relatively few students attempted this question but many of the students who did attempt it were able to display a reasonable knowledge of the different views on the meaning of justice. 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, in particular, utilitarianism, Marx, and Nozick’s theory of ‘entitlement.’ Many students also referred to natural law thinkers eg Aquinas, Fuller etc and to Rawls’ ideas of ‘justice as fairness’ and ‘the veil of ignorance’ although few were able to explain his 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 by 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, better 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. The second part of the question required students to discuss the question whether English law fully achieves justice, and, as has been pointed out in previous reports, the achievement of the highest marks on this aspect requires students to analyse selected examples in terms of a particular idea or ideas of justice (for example, utilitarianism), rather than merely stating that the law is unsatisfactory. Many students, for example, sought to criticise particular instances of actual or alleged miscarriage of justice (eg the Guildford Four, Sally Clarke etc) as showing a failure of the law to achieve justice, but such instances 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 procedural or natural justice. Many students referred to various aspects of the legal process in order to show that justice is, or is not, achieved, for example, by explaining the significance of natural justice in preventing judicial bias, and allowing litigants an equal opportunity to present their case. Aspects of legal aid are also highly relevant to justice, given that they seek to provide ‘equality of treatment’ in relation to accessing the legal process. 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, the significance of the Criminal Cases Review Commission etc). On the other hand, many examples from the substantive law used by students merely proved that the law referred to was merely unsatisfactory rather than conflicting with a particular idea of justice. Such examples received little or no credit, nor did examples which showed a lack of morality rather than injustice.
Question 10

Students were required

• to discuss the extent to which judges are able to display creativity in the operation of judicial precedent and in the interpretation of statutes and
• to discuss whether judges should have this ability.

In relation to the precedent aspect of the question, there were many competent, and some excellent, responses. In order to achieve the highest marks, it was necessary for students to explain

(a) the essential features of the doctrine of precedent and the features which offer flexibility and the opportunity for creativity
(b) relevant illustration and
(c) the arguments for and against the ability of judges to be creative.

In relation to (a), good students explained and analysed the importance of the judicial hierarchy and of the distinction between ratio and obiter and, in relation to (b), the nature and importance of distinguishing, the Practice Statement in relation to the Supreme Court, the exceptions to Young v Bristol Aeroplane in relation to the Court of Appeal, overruling and original precedents and so on. Better students also concluded, quite correctly, that the Supreme Court has much greater scope for creativity than lower courts. Unfortunately, some students failed to achieve the very highest marks by failing to provide sufficient illustration of the operation of creativity, for example, Herrington v BRB and Crown v G in relation to the Practice Statement, Balfour v Balfour and Merritt v Merritt in relation to distinguishing and so on. Moreover, some students provided some examples but with insufficient explanation and detail. In relation to (c), most students were able to provide some evaluation and some responses were very good. In particular, many students correctly referred to the various arguments against judicial law-making (for example, the retrospective effect of judicial decisions and the fact that judges are not elected). Many also correctly quoted the opinions of various judges and academics on this topic.

Whereas the responses on the precedent aspect of the question were competent or better, those relating to statutory interpretation were generally weaker. The explanations of the various ‘rules’ of statutory interpretation were reasonable, but many answers contained no or little illustration and others contained illustrative examples from the case law with insufficient detail through failing to highlight the relevant word or phrase in the particular statute. For example, students seeking to explain Fisher v Bell as an example of the literal rule should state that the statute in that case used the words offer for sale’, and explanations of Smith v Hughes as an example of the mischief rule should stress that the statute in that case referred to prostitutes soliciting ‘in the street’. Moreover, few students discussed the extent to which the ‘rules’ of interpretation allow judges to be creative, although better responses correctly pointed out that the purposive approach and the mischief rule give judges scope to consider legislative policy. Some students also validly pointed out that the ‘rules’ of interpretation are not binding, with the result that judges have considerable choice as to how to approach the interpretation of statutes. In relation to the issue whether judges should be creative via interpretation of statutes, students often referred to arguments used to justify or criticise creativity via precedent and such arguments were credited.
**Question 11.**

Students were required

- to consider the view that there is a close relationship between law and morality and
- to examine the debate as to whether law should reflect moral principles.

The majority of students correctly began by explaining possible definitions of law (eg those of Salmond, Austin, Kelsen etc) and morality (eg that of Phil Harris) and proceeded to compare the respective characteristics of the two. In this respect, most students contrasted, for example, the ways in which law and morality arise or are changed, the compulsory nature of law and the voluntary nature of morality and the ways in which law and morality are enforced. Better students raised more sophisticated contrasts, for example, in relation to how disputes of law and morality are settled. The other aspect of the relationship between law and morals which required discussion concerned the extent to which law does or does not reflect morality. In this connection, most students were able to provide illustration of the convergence of law and morality (eg offences against the person and property, conspiracy to corrupt public morals, outraging public decency, marital rape and so on) and the divergence of the two (eg traffic offences, swearing, adultery etc). Better students carefully analysed the moral issues involved in the illustrations selected, but many responses suffered from the weakness of failing to distinguish between moral and other issues, especially the prevention of harm to the public and the importance of individual autonomy. Better students also referred to the difficulty which the law often faces in taking a moral stance, given the differing moral views in a pluralistic society and that the law often bases rules on principles other than morality, for example, utilitarianism. In this connection, students referred to problematic areas such as that raised by Gillick, abortion and gender issues. The second aspect of the question required students to examine whether the law should reflect moral principles. The majority correctly centred upon the conflict between natural law and positivism and the Hart-Devlin debate, although other students referred to philosophers such as Mill and Stephen. Natural lawyers believe that a principle can have legal status only if consistent with some ‘natural law’ idea eg divine law (Aquinas), whereas positivists (eg Austin, Kelsen etc) believe that a rule which results from the legal process of the state constitutes law, even if it lacks moral content. Devlin and Stephen were ‘legal moralists’ ie they believed that the basis on which acts should be rendered unlawful is immorality. Devlin’s justification for this was that a society has a ‘shared morality’ and, if this breaks down, society will disintegrate. Mill and Hart can be described as ‘libertarians’, who argued that people should be free to pursue their own idea of the ‘good life’, that the only basis on which acts should be criminalised is the ‘prevention of harm’ and that the enforcement of morality is, in general, not a ground for legal intervention, Hart arguing that the enforcement of morality is generally harmful and unnecessary. Good students were able to explain and distinguish these theories with accuracy and detail, but weaker students often provided confused explanations and/or little detail. In particular, many students incorrectly described Devlin as a natural lawyer with a view of morality based in religion whereas he was concerned with ‘conventional’ morality and its importance for society. Weaker students also gave examples which failed to illustrate clearly the contrasting views of, for example, Hart and Devlin, whereas those who achieved the highest marks provided examples highlighting the conflict between legal moralism and libertarianism/the prevention of harm, for example, in relation to ‘death’ (assisted suicide, cessation of medical treatment), birth (abortion), gender (discrimination, civil partnerships etc), and other issues, better students showing clear analysis of the moral and other dimensions.
Mark Ranges and Award of Grades

Grade boundaries and cumulative percentage grades are available on the [Results Statistics](#) page of the AQA Website.