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# A-Level **LAW**

7162/2 Paper 2 (Tort Law)  
Report on the Examination

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## Introduction

Given the problems caused by the global pandemic, for most schools and colleges this was only the second sitting of this paper, following on from the exam series in June 2019.

We received a number of queries relating to the Advance Information for this paper. There had been an expectation that we would provide advance information for all the higher tariff questions, particularly questions 10 and 11. It was clear from a number of student responses that they had not revised all topics on the specification to the same degree. Students found this paper – and question 10 in particular – more challenging than the others. Accordingly, the grade boundaries for this paper have accommodated this.

One common thread to many of the comments below is a lack of development of the elements of a particular liability, whether private nuisance, the rule in *Rylands v Fletcher*, the nature of the special relationship in the case of a negligent misstatement or the tests that establish whether someone is an employee for the purposes of vicarious liability. Some students had a tendency simply to identify the different elements without defining or explaining those elements and without applying them to the facts of the scenario.

Nevertheless, there were very many examples of strong responses where students were able to demonstrate their knowledge across the whole range of the paper, and were able confidently to deploy their skills of explanation and analysis.

## Question 1

The correct answer was C, which about half of students identified.

Students answering incorrectly most commonly chose B.

## Question 2

The correct answer was A, which just over 75% of students identified.

Clearly, students were able to identify the key characteristics of a secondary victim. Most of those who answered wrongly, chose B.

## Question 3

The correct answer was B, which just under two thirds of students identified.

By far, the most common wrong answer was A.

## Question 4

The correct answer was A, which just over 35% of students identified.

The most commonly chosen answer was C, with almost 20% opting for B. This suggests that students were unfamiliar with the roles of the two Houses of Parliament, and the relationship between them.

### **Question 5**

The correct answer was D, which just over half of students identified.

The most common wrong answer was A. Students are frequently unfamiliar with the requirements and availability of civil legal aid.

### **Question 6**

The question required students to identify and explain three separate functions of a High Court Judge hearing a negligence case.

Broadly, students adopted one of two approaches:

- Some concentrated on the general functions of a HCJ in running a court case, for instance case management, evaluation of witnesses and deciding liability
- Others focused on a HCJ's functions specifically in a negligence case, for instance establishing whether a duty of care was owed and deciding whether any duty had been breached.

Either approach was credited (as was an approach which perhaps dealt with elements from each).

There were many good answers where students were able, successfully, to identify three functions and to explain them.

Common weaknesses included:

- Not including three different functions (it might be noted that students would do well explicitly to separate out three functions: markers often had to read answers carefully to establish if a student actually had identified three functions)
- Lack of explanation: some answers were effectively just lists, and this made it difficult for markers to award higher marks even where there were three clear functions
- Basic inaccuracies for instance that HCJs always sit in panels of three
- Confusion with the criminal justice system: while it is true that a HCJ will sometimes sit in the Crown Court, perhaps to take a murder trial, the question did ask students to consider a negligence case. There were many students who talked about matters such as summing up a case for a jury, handing down prison sentences or convicting defendants.

### **Question 7**

The question asked students why, given the rules governing occupiers' liability, Harun owed a duty to Izzy, a guest in his hotel.

A good answer, therefore, required a student to explain:

- what an occupier is, and to apply that explanation to Harun to conclude that he was an occupier
- who is a lawful visitor, and to apply that to Izzy to conclude that she was such a visitor
- the definition of premises, and to apply that to the scenario to conclude that the hotel was premises
- that, given the requirements of s.2 Occupiers' Liability Act 1957, Harun, as occupier, owed Izzy, as a lawful visitor, a duty of care, in respect of the hotel.

A clear majority of the students identified what was expected of them, and there were many good answers which confidently and accurately explained and applied the relevant material.

However, a significant number of students lost marks through weak explanations. For instance, it was not enough to say that Harun was the occupier simply because he owned the hotel, or to say that Izzy was a lawful visitor simply because she was a guest. The third element, premises, was often missing altogether.

Another issue is that many students did not confine themselves to the question, which was simply whether a duty of care existed, but instead discussed the nature of the duty and even what Harun should do to discharge that duty. A five mark question is always going to be limited in scope, and students should remember this.

## Question 8

This question concerned liability in negligence for physical injury.

A good answer therefore needed:

- To establish that Kandy owed Jake a duty of care, to discuss whether she broke that duty and, if she did, whether she was the cause of Jake's injury
- To consider the issue of contributory negligence and briefly to consider Jake's remedy.

There were a large number of students who were able to identify the issues, and to discuss each of the elements of the tort of negligence. There many very good, detailed responses demonstrating both explanation and application of the law across the range of the question.

In relation to whether Kandy owed a duty of care to Jake, following the decision of the Supreme Court in *Robinson v Chief Constable of West Yorkshire*, students could have dealt with this issue relatively concisely:

- It must be reasonably foreseeable that Kandy's behaviour might cause loss to another road user (although, given that this is a situation in which a standard duty of care exists, there is unlikely to be an issue as to whether reasonable foreseeability can be established), and
- This is a situation (one road user to another) where precedent has established that there is a standard duty of care (eg *Nettleship v Weston* and *Froom v Butcher*). Consequently, there is no need to discuss issues such as proximity as the existence of proximity in such situations will have been confirmed when the precedent was established. Full credit was available for this approach.

The Supreme Court in *Robinson v Chief Constable of West Yorkshire* was clear that where a precedent establishes that a standard duty of care exists in a particular type of case, the court should follow that precedent. In these circumstances, a court need not (and should not) apply the three-part test set out in *Caparo v Dickman*. Consequently, students could have dealt with the

question of a duty of care as above and without reference to *Caparo*. Where students did discuss *Caparo* (often in some detail), full credit was given, but such a discussion made for some very long answers and it would have been advisable at the very least to have omitted any discussion as to the fair just and reasonable requirement.

In relation to the issue of whether Kandy breached her duty of care, students needed to recognise that the applicable standard was that of the reasonable motorist. Such a person is an ordinary adult, and not a professional. Good answers contained a discussion of relevant factors such as the idea that not paying attention to the road could easily lead to an accident, any accident is likely to be serious given that it involved a large object (a car) being driven at speed and the fact that Kandy could have taken a simple precaution to minimise the risk by not looking at her 'phone.

Given that Jake did not have lights on his bicycle, there was a clear argument for contributory negligence. Good answers explained that Jake, too, did not behave as the reasonable person would, and that this contributed to the accident. Jake's remedy would be for compensatory damages for his injury, but his damages would be reduced (not eliminated). A few students showed some confusion on the issue of contributory negligence, treating Kandy as the claimant and concluding that she would be able to claim damages from Jake.

## Question 9

Question 9 covered two aspects: the relationship between law and morality (worth 10 marks) and the question whether the Occupiers' Liability Act 1984 reflects the rules of morality (worth 5 marks). Almost all students remembered to address both aspects. However, some students perhaps did not remember the mark split and therefore wrote more for the second aspect than the first.

With respect to the first aspect, a wide range of material was credited. A typical answer might have included:

- A definition of legal rules and moral rules
- A discussion of the similarities and differences between the two, perhaps in terms of overlap (for instance murder is both immoral and illegal) or perhaps in terms of a comparison (for instance legal rules originate with organs of the state, are enforceable by courts and can be changed instantaneously)
- A discussion whether law should be based on morality, perhaps in terms of the difference between natural law and positivism or perhaps in terms of the Hart/Devlin debate
- Examples drawn from any area of the law illustrating the relationship (or lack of a relationship) between law and morality.

There were many good responses on the relationship between moral and legal rules, with answers outlining definitions and commenting on similarities and differences before exploring some areas of law where there is convergence or divergence. Many responses referred to theories or to the Hart/Devlin debate, but occasionally this was at the expense of actual examples. The best responses had a balance of definitions, theory and illustrations or examples.

Some answers would have scored more highly if examples had been explained. For instance, in relation to the decision in *R v R*, some students simply asserted that the case demonstrates that there is a moral dimension to the law. They did not explain why or how this might be so.

With respect to the second aspect, again a range of different approaches were credited. Many responses made only vague or generalised references to morality, or made the basic point that an

occupier should not be liable to someone who is breaking the civil law. Better answers were able to identify those aspects of the Act which have a connection with moral rules. For example, the idea of a common duty of humanity and the recognition that it was right to protect trespassers from dangers that could cause injury, or the additional moral duty to see that children were protected. Alternatively, some argued that, although the Act went against moral rules by protecting those who had no right to be there, s. 1(3) of the Act lays down requirements that have to be met before the occupier becomes liable and that any occupier who meets those requirements should be liable given their level of knowledge and fault.

### Question 10

Question 10 concerned Ozzy's liability in private nuisance in relation to Sam, and his liability under the rule in *Rylands v Fletcher* in relation to the incident involving Paula. These two aspects were given equal weighting in terms of marks.

With respect to the liability in private nuisance, a good answer might include:

- An explanation and application of the nature of private nuisance including the identity of the claimant and the defendant, the notion of indirect interference (specifically a loss of amenity on Sam's part) and a recognition that whether there has been an unlawful interference with Sam's rights depends a consideration of several factors
- An explanation and application of factors relevant to the scenario such as locality, malice, duration and social utility (public benefit)
- A brief explanation and discussion of remedies, including the possibility of an injunction (either total or partial).

This part of the answer produced a large number of successful responses where students had dealt competently with, in particular, the different factors governing unlawful interference. Better answers often explored the idea that malice made it much more likely that a particular activity was a nuisance. Such answers also contrasted the factors suggesting that Ozzy's activities did amount to a private nuisance with the factor of public benefit (Ozzy is keeping himself in work and is meeting a local demand). This account then provided a sensible foundation for a discussion as to whether a partial injunction might be the way forward.

In contrast, a number of students would have scored more highly if they had developed their discussion of the factors. An answer that simply identifies, for instance, malice or social utility, or which simply asserts that because malice is present it must be a nuisance, will not attract higher marks. These students needed to explain what is meant by these factors, and then to relate them specifically to the facts of the scenario to show why they might be relevant to any decision by the court. A small number of students were clearly aware of the different factors, but effectively just rewrote the scenario itself as if that made it clear why Ozzy might be liable in private nuisance. Defences to private nuisance were often misunderstood or slightly jumbled: it is not a defence that the claimant has come to the nuisance, and nor is it a defence that the local council had somehow bestowed statutory authority by awarding a contract to cut wood.

With respect to the liability under *Rylands v Fletcher*, a good answer might include:

- A definition of the rule in *Rylands v Fletcher* and its nature as a tort of strict liability
- An explanation and application of the elements required to establish liability under the rule
- An explanation and application of the defence of "act of God" and the possible remedy of compensatory damages.

Again, there were a large number of successful answers in which students were able to explain and apply the different elements required by the rule and to explore briefly the strict liability nature of the rule. Almost all students were able to at least identify the defence of act of God: there is clearly something about it which makes it very easy to remember.

One common weakness was a failure to separate out the different elements of the rule. A significant number of students for instance ran together the elements of a “dangerous thing” and an “unnatural use of the land”. A second weakness was a failure, having identified an element, to explain (accurately or at all) what it meant or to apply it to the scenario.

A small number of students chose to answer this part of the question using common law negligence rather than *Rylands*. This approach was given full credit. However, very few of these answers used the principles of negligence to address the facts of the scenario in a convincing manner.

### Question 11

This question concerned firstly Nickie’s liability in negligent misstatement for the financial loss caused to Leroy, secondly the possible vicarious liability of Movers for Nickie’s negligence and thirdly an identification and assessment of the different methods of dispute resolution relevant to the issue between Leroy and Movers. The first two elements together were worth 23 marks (and were given equal weighting within this allocation) and the third element was worth 7 marks.

In relation to the negligent misstatement, a good answer might have included:

- An explanation of consequential and pure economic loss, and an application to the facts of the scenario to conclude that Leroy had sustained a pure economic loss
- An explanation that a duty of care does not normally exist in relation to a pure economic loss caused by a negligent act (*Spartan Steel v Martin*), but that a duty might exist in respect of a pure economic loss caused by a negligent misstatement provided a “special relationship” existed between the claimant and defendant (*Hedley Byrne v Heller*)
- An explanation of the different elements required to establish a “special relationship” and an application to the facts of the scenario to explore whether such a relationship existed between Nickie and Leroy
- A brief explanation and application of the rules governing breach of duty, causation and the remedy of compensatory damages.

Most students were able to identify the nature of the issue between Nickie and Leroy, and there were a large number of answers which successfully explained that Leroy had sustained a pure economic loss and which identified and discussed the elements of a special relationship.

One common fault was to start straight in with the idea of a special relationship without first explaining the nature of Leroy’s loss and why a special relationship might therefore be relevant. A second common fault was to identify elements of the special relationship, but then to fail to explain those elements or to discuss why they might be present on the facts of the scenario. One example is the idea that it must be reasonable for Leroy to rely on Nickie’s advice. Stronger students explained that it might be reasonable for Leroy to rely on the advice as, for instance, Nickie was a professional from a firm of auctioneers, it was not a social setting and Nickie had chosen to give advice without in any way qualifying it. Alternatively, some students suggested that it was not reasonable for Leroy to rely on the advice as he had asked something which Nickie was not there



to address, particularly given that Leroy had not asked Nickie whether she was happy to talk about the necklace. Credit was given for any reasonable discussion.

A separate issue with some of the negligent misstatement responses was the inclusion of unnecessary material such as the three-part test in *Caparo*. This is not needed in answers to questions where students are asked to analyse liability for pure economic loss caused by negligent misstatement. Such liability is primarily governed by the line of cases originating in *Hedley Byrne v Heller* which established the requirement of a special relationship. (The special relationship satisfies the requirement for proximity in this particular duty situation.) Students should therefore focus this part of their answer on an explanation, analysis and application of the elements of the special relationship.

Equally, some students, having established that Nickie did owe a duty of care, then proceeded to give a comprehensive account of the rules governing breach and causation in negligence. Although a student should acknowledge that a claimant needs to show breach and causation, the student should then only deal with those parts of the rules where the facts of the scenario make it obvious that there is an issue. One possible example in this scenario is the standard of care that might be expected of a professional valuer of furniture.

With respect to vicarious liability, a good answer would have included:

- A recognition that the worker (Nickie) had committed a tort
- An explanation of the difference between an employee and an independent contractor (and why that is relevant to the question of vicarious liability), together with a discussion and application of the various tests designed to establish the status of a worker
- An explanation and application of the requirement that the tort must be committed in the course of employment.

There were many strong responses which dealt successfully with the demands of the scenario. In some of these strong responses, the tests as to who is an employee were first identified, then these tests were briefly discussed in the light of the facts presented in the scenario (for instance, Nickie is described as being “part-time”, she has a contract, the contract places restrictions on her and she is frequently asked by Movers to advise clients). Such answers then explored the nature of “in the course of employment” with reference to notions such as authorised and unauthorised acts, whether Nickie was acting for the benefit of the employer or was on a “frolic” of her own and the idea that her acts might be sufficiently closely connected to her work that it was fair to impose vicarious liability.

Some responses included one or more of the following:

- the misconception that Leroy’s contract was with Nickie and that therefore Movers had no liability
- the assumption that, just because Nickie was part-time, this meant that she had no relevant skills and could not be an integral part of Movers’ business
- a narrow approach to the question of whether Nickie was an employee, perhaps referring only to the control test
- a slightly odd overall structure to the answer in that vicarious liability was dealt with before the tort had been established against Nickie.

In respect to the final part of the question, a good answer would have included:

- a brief description of court proceedings, mediation and negotiation as methods of resolving the dispute between Leroy and Movers

- A brief assessment of the merits or otherwise of each of those methods.

Clearly, there is a limit to what a student can write for a question worth 7 marks. Nevertheless, the best answers were able to give concise answers that dealt successfully with both explanation and assessment. Common faults included:

- Not assessing the different methods
- Not dealing with the court alternative at all
- Including (often in some detail) material on tribunals. Although tribunals are a form of ADR, they are unlikely to be relevant to Leroy's claim and credit was not given for such material
- Not dealing with this part of the question at all. Given that this was fairly common, even in scripts that were otherwise strong, the suspicion must be that students simply overlooked this part to the question or forgot to deal with it.

### **Mark Ranges and Award of Grades**

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