A-LEVEL
LAW
LAW04 Criminal Law (Offences against Property) or Tort, and Concepts of Law
Report on the Examination

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General

As was the case with previous examinations, the 2015 version resulted in a range of responses in terms of quality, with many students performing competently and others displaying excellence based on thorough learning and careful preparation. The major deficiencies in the responses of weaker students seem to be constant, in particular, the tendency in responses to the substantive law questions to explain in detail rules which are irrelevant to the scenarios, resulting in time lost for addressing crucial points, and inaccurate explanations and analyses. In addition, students often fail to display a precise knowledge of the wording of relevant statutes.

Section A Criminal Law (Offences against Property)

Scenario 1

Question 01

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

(i) making off without payment
(ii) fraud by false representation
(iii) theft.

The making off without payment issues

Many students addressed these issues clearly with the result that high marks were achieved and, although the highest marks were awarded only to students who displayed a generally accurate knowledge of the terminology of s.3 Theft Act 1978, many did so. The relevant *actus reus* issues were that a service had been ‘done’, that payment for the meal was ‘required or expected’, and that Roz had made off from the ‘spot’ where payment was required or expected. The *mens rea* issues to consider were whether Roz knew that payment was required, whether she was dishonest under the Ghosh principles and whether she intended permanently to avoid payment (*Allen*). Students generally, and correctly, argued that Roz was guilty.

The fraud issues

As with making off, many students were able to explain and apply the elements of s.2 Fraud Act 2006 accurately and thus gained high marks. By lying to Nick that she had left the money for the meal on her table, Roz was making an express representation which was clearly false since she knew that it was ‘untrue or misleading’ (s.2(2)). She was also clearly dishonest under the Ghosh principles and she intended to make a gain for herself, or to cause a loss to Nick, by not paying for the meal. Better students were also able to explain the statutory provisions relating to the meaning of ‘gain’ and ‘loss’ in s.5. Some students considered Roz’s possible liability for the offence of obtaining services by a dishonest act under s.11 Fraud Act 2006, but such arguments merited no more than a ‘some’ classification as Roz did not obtain the service (the meal) by a dishonest act since she formed dishonest intent after she had finished the meal.

Note: One issue for centres to note is that some students are confusing the rules of making off, false representation and obtaining services dishonestly, for example, by incorrectly asserting that D is guilty of making off only if he/she intends to make a gain or cause a loss. Moreover, even students who do understand the differences between these offences often use the statutory
language of them interchangeably, for example, in stating that liability for obtaining services requires payment to be ‘required or expected’ (the language of making off) rather than that the services must be ‘made available on the basis that payment has been, is being or will be made’ for them.

The theft issues in relation to the umbrella

Most students were able to explain and apply the straightforward aspects of the question (appropriation and property) but only the better ones were able to explain and analyse the more crucial one, namely that of property ‘belonging to another’ and its implications for the further requirements of dishonesty and intention permanently to deprive. The umbrella had clearly been left in the café by its owner, and this required students to speculate whether the rules governing lost/mislaid property applied here, or whether, since the umbrella was ‘old and battered’, the owner had abandoned it. Students were allowed full marks for either approach. If the umbrella had been lost, rather than abandoned, it would remain property ‘belonging to another’ since the owner would have retained a ‘proprietary right or interest in it’ (s.5(1) Theft Act), but if it had been abandoned, it could be argued that it no longer belonged to anyone. Some students did consider this issue in some detail, but weaker ones failed to reflect on it and thereby failed to adequately discuss the implications for dishonesty and intention permanently to deprive.

In relation to the requirement of dishonesty, if Roz thought the umbrella had been abandoned, she would not be dishonest as she would believe it to be ownerless. If, on the other hand, Roz thought the umbrella had been lost, it was crucial for students to consider s.2(1)(c) Theft Act, which provides that D will not be dishonest if he/she believes that the person to whom property belongs cannot be traced by taking reasonable steps. It is arguable that Roz would realise, however, that the owner could be traced as he might return to the café to see if he had left it there. In relation to intention to permanently to deprive, if the umbrella had been lost or mislaid, Roz would possess this intention if she realised she was risking its loss by throwing it into the stream, as she would be thereby intend to treat it as her ‘own to dispose of regardless of the other’s rights’ (s.6(1) Theft Act). On the other hand, if Roz believed that the umbrella had been abandoned by the owner, it could be argued that Roz would not possess the intention to permanently to deprive as she would think the umbrella was ownerless.

Note: Some students argued that, whether the umbrella had been lost or abandoned by the owner, it would also ‘belong to’ Nick, the café owner, since it could be said to be in his possession or control for the purposes of s.5. This was a perfectly good point to make and was awarded full credit.

Question 02

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

(i) burglary
(ii) theft
(iii) the defence of duress.

The burglary issues

Students generally were able to provide competent explanations of most of the elements of burglary but responses often demonstrated confusion, especially in relation to the trespass aspect
and the relationship between s.9(1)(a) and (b) Theft Act. In relation to the scenario, Roz clearly entered a building when she first went into Dale’s kitchen, but, although she committed the actus reus of trespass, she did not possess the mens rea of trespass at that point as she thought it was her own house and thus did not know of the facts constituting the trespass (Collins). She only gained the mens rea of trespass when she realised, whilst in the kitchen, that the house was not hers. Therefore, when she entered Dale’s living room she thereby entered ‘part of a building’ as a trespasser. She was guilty of s.9(1)(a) burglary as, before entering the living room, she decided ‘to see whether there was anything worth stealing’ in there, thereby demonstrating a conditional intent to steal. She was also guilty of s.9(1)(b) burglary as, having entered the living room as a trespasser, she committed theft of the watch. Unfortunately, many students wrongly assumed that Roz did enter the kitchen as a trespasser, often by failing totally to discuss the mens rea of trespass issue. Better students did correctly spot that there was a mens rea issue in the problem relating to trespass and correctly explained that recklessness must be subjective, but some applied this point incorrectly by arguing that Roz was reckless in not checking whether it was her house on a foggy night. Unfortunately, students who argued that Roz entered the kitchen as a trespasser could not raise the issue of s.9(1)(a) burglary since, under that provision, Roz would have had to have formed the intention to steal before entering the kitchen, which, according to the scenario, she only formed after entry. On the other hand, many students correctly argued that Roz was guilty of s.9(1)(b) burglary in stealing Dale’s watch, for which they were awarded credit.

Note. As mentioned in earlier reports, students often fail to explain the distinctions between s.9(1)(a) and (b) sufficiently clearly. S.9(1)(a) requires D, before entering as a trespasser, to intend theft, GBH or criminal damage, whereas s.9(1)(b) requires the actual commission of theft or GBH, or the attempt to commit theft or GBH, after entry as a trespasser.

The theft issues in relation to the watch

Many students were able to provide competent explanations and application of the various elements.

The crucial issues were that the mere picking up of the watch by Roz constituted an appropriation and that she obviously intended to permanently deprive Dale of it at the moment she picked it up, it being irrelevant that she then put it back. Some students incorrectly argued that since Roz did not permanently retain the watch, she did not possess the intention to permanently deprive with the result that she was not liable for theft. Again, the fact that Roz replaced the watch was irrelevant to the requirement of dishonesty as what is required by the offence is dishonesty at the time of the appropriation, which she clearly satisfied.

The defence of duress

Many students accurately explained and applied the elements of duress extremely well and thus gained excellent marks, although some weak students confused duress and blackmail. Students generally argued, correctly, given Al’s violent history, that Roz would have believed that Al had threatened Roz’s ‘family’ with at least serious injury by threatening to make them ‘suffer’, and correctly stated that a threat to D or her immediate family falls within the ambit of the defence. A further important issue was whether the objective test was satisfied, ie would the threat have caused a person of reasonable firmness sharing the characteristics of D to act as Roz did? This was clearly arguable, given the situation. It was unclear on the facts whether there was a reasonable opportunity for Roz to enable her family to escape the consequences of the threat but many argued that, since the theft occurred on ‘the next day’ after the threat was made, she had the opportunity, for example, to go to the police. On the other hand, others suggested that since Al had
told Roz that he would be ‘watching her very carefully’, she might have believed that she could not escape the threat. It was also unclear on the facts whether Roz believed that Al would carry out the threat “immediately or almost immediately” (Hasan) and any reasoned argument on this point was credited. An issue which many students also addressed, and for which they received credit, was whether, since Roz had voluntarily associated with a violent criminal, she had disabled herself from relying on the defence. A further issue considered by many students was whether the theft committed by Roz fell within the words of Al’s threat to steal ‘valuables’.

Scenario 2

Question 03

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

(i) blackmail
(ii) burglary
(iii) theft/robbery

The blackmail issues

There were many competent responses, but few excellent ones, as many students struggled with the unwarranted aspect of the offence. The question required students to consider whether Dave made a “demand with menaces”, whether the demand was “unwarranted” and whether he had made the demand “with a view to gain for himself or another or with 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 £1,000 by Dave. 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 the threat was of physical violence. If this was the case, it would not matter that Tom himself did not seem influenced by the threat (clear), given that he told Dave to “Get lost!” According to s.21, D’s demand with menaces will be unwarranted unless he believed that he had reasonable grounds for making the demand and that the use of menaces was a proper means of reinforcing the demand. In the scenario, given that Dave felt that he had been cheated by Tom, it was clearly arguable that he might believe that he had such reasonable grounds, and many students argued as such. In order to decide whether Dave believed that the use of the menaces was proper, it had to be asked whether he believed that his threat of violence to Tom was morally or socially acceptable according to the general standards of society. In this connection, most responses were fairly weak, especially because students often incorrectly referred to “reasonable”, as distinct from, “proper”, means of enforcing the demand. Students should note that it was decided in Harvey that if D knows or suspects that what is being threatened is unlawful, he cannot successfully argue that he believed the menaces to be proper. On this basis, Dave’s demand with menaces was unwarranted, given that he threatened to “beat up” Tom. 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” and were awarded appropriate credit.

Note: As has been pointed out in previous reports, some students incorrectly state that, in order for the demand with menaces to be warranted, D must have reasonable grounds for making the demand and that the use of menaces are a proper means of enforcing the demand - what matters is whether D believes that these circumstances are correct.
The burglary issues

Many students provided competent responses to this aspect of the question and there were many excellent ones. There was obviously an entry into a building by Dave, and, since he knew that he did not have permission to enter Tom’s shop, Dave possessed both the actus reus and mens rea of trespass. Dave was clearly guilty of s.9(1)(a) Theft Act as he had conditional intent to steal money from Tom’s shop before he entered. He was also guilty of s.9(1)(b) as, having entered the shop, he then stole the bracelet.

The theft/robbery issues in relation to the bracelet

This was another aspect of the question which resulted in many excellent responses. There was an appropriation of the bracelet by Dave, as he took possession of it, and the bracelet was clearly (personal) property within the definition in s.4 Theft Act. Moreover, Dave was dishonest under the Ghosh test and, since he “decided to keep” the bracelet, he possessed the intention permanently to deprive. An issue arose as to whether the bracelet was property belonging to Tom, but many students correctly argued that, under s.5(1) Theft Act, property belongs to any person “having possession or control” of the property, which Tom clearly had, as his friend had handed it over to him to value. Dave’s threat to Ahmed raised the issue of Dave’s possible liability for robbery under s.8 Theft Act. Students were required to explain that D must “put any person in fear of force”, that the threat of force has to be made “immediately before or at the time of” the theft, and “in order to” steal. Dave clearly threatened Ahmed with force by brandishing a “long knife” at him accompanied by the words “Stay put or else”. Since Dave stole the bracelet only a “few moments” after the threat, it was arguable that the threat occurred “immediately before” the theft, and the purpose of the threat was, without doubt, to enable Dave to steal.

Question 04

Students were required to address three areas:

(i) Dave’s possible liability for fraud by false representation
(ii) for obtaining services dishonestly
(iii) Wendy’s possible liability for basic and aggravated criminal damage and her possible defence of intoxication.

The fraud issues in relation to Dave’s promise to Wendy

Many students were able to explain and apply the elements of the Fraud Act 2006 accurately and thus gained good marks. By promising to pay £1,000 to Wendy, Dave was making an implied representation as to his “state of mind” (s.2(3) Fraud Act) ie that he intended to keep his promise and, since he had no intention of keeping it, the representation was ‘false’ as he knew that it was ‘untrue or misleading’ (s.2(2) Fraud Act). In relation to the requirement of dishonesty under the Ghosh principles, he was probably dishonest as he had no intention to honour his promise to Wendy, although it could be argued that he was not, since an honest person might regard Dave’s conduct as justified in view of the way that Wendy’s friend, Tom, had cheated him. Dave certainly intended to make a gain for himself by intending to keep part of the agreed payment to Wendy for himself. He also intended to cause loss to Wendy by intending not to pay Wendy part of what was agreed.

The obtaining of services by a dishonest act issues

The essential elements of the offence of obtaining services by a dishonest act under s.11 Fraud
Act 2006, are that:

(i) services are obtained by a dishonest act
(ii) they are made available on the basis that they will be paid for
(iii) D obtains them without payment or without payment in full
(iv) when he obtains them, he knows that they are (or might be) being made available on the basis of payment, but intends that payment will not be made or will not be made in full.

Students generally were able to identify and apply the main elements of the offence, but many responses demonstrated two main weaknesses. Firstly, few students possessed a generally accurate understanding of the actual wording of s.11, and many often referred to the wording of the offence of making off without payment. Secondly, although most students correctly explained that the offence requires dishonesty, they displayed a failure to appreciate the requirement that the services must be obtained by a dishonest act. In other words, D must commit a dishonest act at the time he obtains the services, and not at a later point. This requirement was, however, present in the scenario since Dave’s dishonest act which led to his obtaining the reduced-price service from Wendy was his making of the promise to pay Wendy £1,000 for her work, knowing that he would not honour it.

The criminal damage issues in relation to the scaffolding

The question required students to consider whether Wendy 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 referred to the various judicial authorities as to the meaning of “destroy” and “damage”, but the key meaning of damage in this scenario was reducing the value or usefulness of property (see Morphitis v Salmon). Some students argued that Wendy’s unscrewing of the bolts constituted physical damage since it would cost time and money to re-screw them, but the better argument was that Wendy did not physically damage the scaffolding but reduced its usefulness by rendering it unstable. Students correctly explained the mens rea requirement of intention or recklessness as to the damage and that, since Wendy loosened the bolts to give Dave ‘a bit of a scare’, the damage was intentional.

There was also an issue of aggravated criminal damage under s.1(2) CDA, and students generally pointed this out. Many of the students who did identify the aggravated offence correctly stated that such liability would be established only if Wendy 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) and not merely by the act which caused the damage. The highest marks were therefore gained by those students who argued that it was the unstable condition of the scaffolding which created a risk to life by rendering the scaffolding at risk of collapse. In relation to the mens rea of aggravated criminal damage, it was arguable that Wendy intended to endanger life but, even if this was not the case, since she deliberately wanted to ‘scare’ Dave, she was aware of the risk of endangering life, and was therefore reckless under the Crown v G test.

The defence of intoxication

The fact that Wendy drank a “large amount of whisky” before damaging the scaffolding raised the issue of the defence of voluntary intoxication in relation to the offence of criminal damage. In order
to achieve top marks, it was necessary to explain that voluntary intoxication is a defence only to crimes of specific, and not basic, intent. Many students did so, and also correctly identified criminal damage as an offence of basic intent, with the result that Wendy would be unable to rely on intoxication as a defence. Unfortunately, however, very few students explained the test for distinguishing specific and basic intent offences and thereby failed to gain the highest marks.

Section B (Tort)

Scenario 3

Question 05

This question involved three areas of Cheryl’s possible liability:

(i) to Mario under the Occupiers’ Liability Act 1957
(ii) to Omer in the tort of negligence
(iii) to Serena for psychiatric harm.

Cheryl’s possible liability to Mario - the OLA 1957 issues

Responses to this question were generally competent but rarely outstanding as most students devoted excessive attention to explaining the straightforward issues of ‘occupier’, ‘visitor’ and ‘premises’, while explaining and analysing the central issues of s.2(3)(b) and s.2(4)(b) in insufficient depth. Given that the question stated that the rock feature was built by a garden designer engaged by Cheryl, it was relevant to consider 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 in any detail. 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 would clearly be reasonable for Cheryl to engage a specialist to design and build a rock garden, but would it have been within her competence to check the placing of the rocks?

Many students also considered the possible application of s.2(3)(b) OLA, which provides that the occupier is entitled to expect that a person in the exercise of a calling will appreciate and guard against any risk ordinarily incident to it, but only better students questioned whether the risk of falling garden rocks was one ‘ordinarily incident’ to the ‘calling’ of a ‘handyman’. It was possible to answer the question using general negligence rules rather than those under the OLA, but most responses that did this were not able to deal adequately with Mario’s position as a handyman or the role of the garden designer. Some responses suggested, for example, that Mario should simply sue the garden designer instead of Cheryl!

Cheryl’s possible liability to Omer

Many students achieved good marks by explaining and applying general principles of negligence. It is obvious that a motorist owes a duty of care to other road users and others in the vicinity, and it
was sufficient to explain the criteria of a duty of care (eg foreseeability of harm) in outline. Many students, on the other hand, explained in detail the principles of foreseeability and proximity, and the rule that it must be just and reasonable to impose a duty, and some marks were awarded for this. It was, however, particularly important to decide whether Cheryl 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 Cheryl’s poor driving and the gravity of likely harm etc. Many students adopted this approach, often referring to such authorities as Paris v Stepney and Bolton v Stone etc. Most students also examined causation and remoteness issues, and identified damages as the remedy, for which they received credit. It could also be argued that Omer was contributorily negligent, resulting in a reduction in the damages awarded, but the courts have stressed that a young child will rarely be held guilty of contributory negligence as he/she is less aware of dangers which adults normally appreciate.

Cheryl’s possible liability to Serena

This question raised the issue of Cheryl’s possible liability in the tort of negligence for psychiatric injury suffered by Serena, producing many competent responses and some excellent ones. In determining whether Cheryl owed a duty of care to Serena, it was necessary to distinguish primary and secondary victims. Many students correctly explained that the former is one who reasonably fears for their own safety from the incident involving D’s negligence, and the latter one who is an involuntary witness to that incident but not in danger of physical harm themselves. On this basis, it was obvious that Serena was a secondary victim. Students in general 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. On the facts of the scenario, Serena might be able to show “a close tie of love and affection” with Omer. Some students merely assumed that a sufficiently close tie would be present but more perceptive students correctly pointed out that it would depend on the facts whether such a relationship in fact existed.

It was arguable that Serena had witnessed the “aftermath” of the incident with her own unaided senses and it could also be argued that, assuming that her ‘panic attacks’ amounted to recognised psychiatric injury, they were the result of a “horrifying” event at the hospital.

Question 06

This tort question involved two areas of Phil’s possible liability:

(i) to Lucy for negligent misstatement
(ii) to Ann under the Occupiers’ Liability Act 1984.

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, and stated that one of the main exceptions is a claim for pure economic loss caused by a negligent misstatement or advice. The central feature of the problem was whether Phil owed a duty of care to Lucy in relation to his giving advice under the principles as originally established in Hedley Byrne v Heller, and as developed in later authorities, in particular Caparo v Dickman. Although most students displayed a basic understanding of these principles, many responses failed to analyse and apply the principles in any
depth. According to relevant authorities, D owes a duty of care to 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:

(i) the maker of the statement, D, possesses some special skill relating to the statement
(ii) D knows that it is highly likely that the claimant, C, will rely on the statement
(iii) C does rely on it and thereby incurs financial loss
(iv) it is reasonable for C to rely on it.

As regards element (i), students correctly argued that Phil, as an estate agent, might be considered an expert in relation to giving advice about the purchase of properties, although only the more perceptive questioned whether an estate agent specialising in house sales would be sufficiently expert regarding businesses. The decision in Chaudhry v Prabhakar, which suggested, inter alia, that advice given by a friend might give rise to a duty, provided he/she possessed relevant expertise, was also relevant to the scenario.

Requirement (ii) was clearly satisfied since Lucy had asked Phil specifically to give her advice regarding possible businesses she might buy. Moreover, the fact that Phil and Lucy were friends might be a relevant factor here. Lucy clearly relied on Phil’s advice since she bought the business he recommended. Whether it was reasonable for Lucy to rely on Phil’s advice would depend on all the circumstances. Many students correctly suggested that it would not normally be reasonable to rely on advice given in a purely social situation but better students correctly pointed out that the situation was not purely social since it involved a large sum of money. A further relevant factor which would suggest that it was unreasonable for Lucy to follow Phil’s advice was that he was a specialist in ‘house sales’ and not business property, and students who argued this gained credit.

Several students also correctly pointed out that some decisions (eg Hedley Byrne) stress 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. Given that the question informed students that Lucy lost £180,000 in buying the café business advised by Phil, students were required to discuss, at least briefly, Phil’s possible breach of duty and the standard of care required of a professional, but many failed to do so and thereby failed to achieve the highest marks. In relation to the remedy available, it was merely necessary for students to identify that Lucy could recover damages for her loss, although students who addressed the issue of measure of damages received credit.

The OLA 1984 issues

Students correctly explained that Ann was a trespasser in Phil’s grounds and that, in order for her to successfully claim against Phil for her injuries, she would have to establish that Phil owed her a duty of care under s.1(4) to see that she was not injured by a danger on the premises. As in previous examinations, 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 with total accuracy. First, it is clear from s.1(1) that the duty arises only where there is a danger due to the condition of 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, 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, it was relevant to consider whether the pond was in a dangerous condition and many
argued, or assumed, that it was, and were credited for this. On the other hand, some students, relying on authorities such as Tomlinson v Congleton, suggested that Ann was injured because of her own foolishness in diving into a pond rather than because of its dangerous condition and this type of argument was credited also.

Assuming that the pond was in a dangerous condition, it was unclear whether Phil knew or had reasonable grounds for knowing this, with the result that the duty might not arise under s.1(3). On the other hand, it was arguable that Phil had reasonable grounds to believe that trespassers might come into the vicinity of the danger since he knew that “young children had been getting in”. Assuming that the duty did arise, many students validly argued that Phil had complied with it by building the 6 feet high wall. On the other hand, others argued that more might be expected of Phil since the pond might be seen as an attraction to children and since the occupier should see children as not as careful as adults, and these types of argument were also given credit. Moreover, students who considered the possible application of contributory negligence or volenti on Ann’s part received some marks.

Note: As has been noted in previous examination reports, many students would achieve much higher marks on the OLA 1984 if they displayed an accurate knowledge of the relevant statutory provisions, especially, s.1(1), s.1(3) and s.1(4).

Scenario 4

Question 07

This question required students to consider:

(i) the possible liability of Numar to Robert in the tort of private nuisance
(ii) the possible liability of Robert to Numar under the Rule in Rylands v Fletcher
(iii) the possible claim of the motorists against Tom in public nuisance.

The nuisance claim

The majority of students attempting this question were able to provide at least competent responses with an accurate definition of the tort of private nuisance, and a consideration of the factors referred to in the scenario which were relevant in determining whether the noise and smells caused by Numar’s activities constituted an unreasonable interference with the use and enjoyment of Robert’s land. As many students successfully argued, the important features were locality, duration and malice. Better students analysed these factors in detail, citing relevant authorities such as Christie v Davey, Hollywood Silver Fox Farm v Emmett and Sturges v Bridgman. On the other hand, some responses did little more than list the relevant factors with little analysis, resulting in lower marks. Moreover, there was evidence of other deficiencies in some scripts. In particular, some students argued that, since Robert “bought the cottage next to Numar’s shop”, this provided Numar with a defence. This argument was incorrect since the courts have stressed in several authorities, such as Sturges v Bridgman and the more recent Lawrence v Fen Tigers, that “coming to the nuisance” is not a defence. In other words, it is no defence that the claimant chooses to live in a property near to the defendant when he knows of the latter’s ‘nuisance’ activities. A further error on the part of many students was in asserting that the social or other benefit of D’s activity provides a defence to liability. It does not, but social or public utility may, depending on the discretion of the court, affect the remedy awarded, by
persuading the court to award damages and to refuse the granting of an injunction restraining D’s activities (see, for example, *Miller v Jackson*, *Dennis v Ministry of Defence* and the recent decision of the Supreme Court in *Coventry v Lawrence*). Moreover, students often failed to address the issue of 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, for example, that it is a discretionary remedy, and can be used to restrain the continuance of the nuisance, either totally or partially (eg as in *Kennaway v Thompson*).

**The Rylands v Fletcher claim**

Students were generally able to provide some reference to the main elements of the tort, but all too many tended to write a list of these elements containing little explanation, application or reference to authority. In particular, although many students mentioned the central requirement of non-natural user of land, few were able to accurately explain its meaning, namely, a use of land which is “extraordinary and unusual” as distinct from a use of land which is domestic or normal (see *Transco v Stockport*). Unfortunately, many students lost marks by confusing this requirement with the totally separate one that the “thing liable to do mischief if it escapes” must be brought on to the land rather than being naturally there. Many students asserted that the accumulation of cans of lighter fuel for barbecues did constitute a non-natural use as they contained chemicals, and this argument gained credit, as did the opposite argument that they did not, as it was unlikely that they stored in bulk (an important aspect of the decision in *Cambridge Water*). Most students referred to the requirements of a “thing likely to do mischief”, an accumulation, escape, and remoteness of damage and were given appropriate credit.

**The public nuisance claim of the motorists**

The majority of students attempting this question were able to accurately define public nuisance as an act or state of affairs which materially interferes with the comfort and convenience of life of the public or a section of the public, and to correctly explain that a substantial obstruction of a public road, such as that created by Tom’s van, constituted such a nuisance on the basis that it substantially interfered with the motorists (a class of persons, or section of the public). Unfortunately, many students failed to accurately explain that an individual member of the public can claim an injunction or damages on the basis of a public nuisance only if he/she can prove “special damage” over and above that suffered by other members of the public, of which there was no evidence in the scenario. Some students, on the other hand, were awarded credit for correctly explaining that the Attorney-General might be prepared to seek an injunction on behalf of the motorists in a relator action.

**Question 08**

This question required students to consider:

(i) the possible liability of Dr Atkins to Sophia for medical negligence
(ii) the possible vicarious liability of the hospital to Sophia
(iii) the possible liability of Mobilia to Jonny under product liability.
The possible liability of Dr Atkins to Sophia

Most students were able to deal reasonably well with the potential negligence of Dr Atkins, though weaker responses tended to concentrate too much on the establishment on the duty of care, which was obviously owed, and to deal fairly superficially with the more important breach issues. The better answers discussed whether Dr Atkins was in breach of duty by considering the Bolam and Bolitho principles. Many students simply argued that Dr Atkins was not liable by virtue of acting in accordance with a recognised medical opinion (the Bolam principle). On the other hand, more perceptive students suggested that the recent research referred to in the scenario might cause that opinion to lack a ‘logical basis’ under the Bolitho principle, with the result that Atkins would be liable. Some responses argued that Chester v Afkar suggests that doctors have a duty to tell patients about side effects, and this was credited. Most students correctly considered causation and remoteness issues, but few considered the possibility that Sophia’s loss of business was recoverable as consequential economic loss under the principles in Spartan Steel v Martin.

The liability of the hospital to Sophia

Responses on vicarious liability varied in quality. On the facts there was little doubt that Dr Atkins was an employee and had acted in the course of employment, but the relevant rules still needed to be explained and applied. Unfortunately many of the responses were very basic and lacked detail.

The possible liability of Mobilia to Jonny

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 recognised that the issue with the wheelchair was one of product liability and there were some very good responses, particularly those that applied the Consumer Protection Act. Some weaker responses introduced a combination of CPA rules and common law negligence, often by outlining correctly the definitions in the Act of ‘defective’ and ‘product’, but then displaying total confusion by saying that the manufacturer would be liable if they were in breach of duty and discussing the various breach risk factors. A treatment on the basis of common law negligence 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 consumer or user of the product as in Donoghue v Stevenson. 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, but several good students correctly added that, in view of the difficulty which a claimant may face in proving negligence, the court may apply res ipsa loquitur ie infer from the nature of the defect itself that it could not have occurred without negligence (see eg Grant v Australian Knitting Mills). Most students seemed to argue that, as Mobilia had tested the new alloy with which the wheelchair was made, this demonstrated that they had exercised reasonable care, but few considered the possibility that the tests carried out might have been insufficiently stringent (in which case the tests would have been negligent), or that, since the alloy was new, scientific knowledge in the area might have been unable to detect the defect (in which case Mobilia would not be negligent – see Roe v Minister of Health).
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 good understanding of the relevant statutory terms ‘product’, ‘defective’, ‘damage’ and ‘producer’, and that the liability of the producer is strict. However, few students explained the nature and importance of the “development risks” defence in s.4, which to some extent qualifies the strict liability of the producer, and thereby failed to merit the highest marks. According to this defence, if a producer could not reasonably have known of the defect in the product due to the state of technical or scientific knowledge at the time, he will escape liability. This could have been relevant to Mobilia’s testing of the new alloy since, if the defect in it could not have been discovered at the time of the testing, Mobilia would not be liable.

Section C Concepts

Question 09

The question required students to briefly explain the meaning of ‘fault’, to discuss the extent to which legal liability is and should be based on fault. The vast majority were able to provide competent or better responses to the issue whether law is based on fault, referring to civil or criminal principles, or both, but it was noticeable that many students tended to devote insufficient attention to explaining the situations where the law is not based on fault and to the arguments as to why the law should be based on fault or not, and this resulted in the highest marks not being gained by them. Students generally adopted the correct approach of briefly providing possible definitions of fault, for example, blameworthiness, responsibility for wrongdoing etc and then proceeding to identify and analyse specific areas of law in order to demonstrate the areas which indicate the presence or absence of fault.

In relation to the actus reus of criminal law, many students discussed the requirement of voluntariness and the defence of automatism, the general rule that an omission does not give rise to criminal liability and the exceptions to that rule (for example, where D has assumed responsibility to act, or where the duty to act arises because he had created a situation of danger etc). Many students also discussed different aspects of causation and the circumstances where D can be argued to be, or not to be, at fault, in relation to intervening acts such as an act of the victim or of a third party. Good students also subjected the “thin skull” rule to criticism and correctly questioned whether decisions such as Blaue show sufficient fault for criminal liability.

Students also analysed mens rea issues and argued that the different categories of mens rea (direct intent, oblique intent, subjective recklessness etc) show different grades of blameworthiness which generally result in different sentences. Some students also contrasted subjective and objective recklessness, raising the question whether the latter (together with gross negligence) denoted sufficient fault to merit criminal liability. In this context, better students referred to the justifications for the overruling of Caldwell by the Supreme Court in R v G.

Many students also analysed the various defences to criminal liability in order to demonstrate the total or partial absence of fault. Some students also questioned whether “constructive liability”, where there is lack of correspondence between actus reus and mens rea (for example, in relation to s.47 and s.20 Offences Against the Person Act 1861 and constructive manslaughter), fails to demonstrate sufficient fault to warrant criminal conviction of a serious offence. In the civil law context, students analysed relevant areas such as the various aspects of the tort of negligence and occupiers’ liability, emphasising the importance of reasonable foreseeablebility and the duty to act with reasonable care. The defences of contributory negligence and volenti non fit injuria were also
considered in order to demonstrate the extent to which fault on the part of the claimant can wholly or partly affect his claim.

Students were also expected to provide examples from the criminal law and/or the civil law contexts of no-fault liability. In relation to criminal liability, students correctly referred to examples of strict liability (eg Storkwain, Alphacell, Shah, etc) and often also discussed the idea of absolute liability as illustrated by “state of affairs” cases such as Larsonneur and Winzar. In the civil law context, students discussed relevant examples of no-fault liability such as the Consumer Protection Act 1987, vicarious liability and Rylands v Fletcher, often pointing out that the decision in Cambridge Water v Eastern Counties Leather can be said to have injected an element of fault into the Rule. Some students also considered the tort of private nuisance and correctly explained that, in general, liability is strict (since the fact that the defendant exercised reasonable care will not provide a defence), but cleverly argued that liability can sometimes be argued to be fault-based, for example, where the defendant is malicious (as in Christie v Davey).

The extent to which liability should be fault-based required students to consider the possible arguments which may justify fault and no-fault liability. The main arguments (correctly) relied on by students to justify strict liability in criminal law were that such liability is for the protection of the public, that strict liability offences generally are “not truly criminal” and do not result in social stigma etc. On the other hand, most students also sought to put forward the standard arguments to justify fault liability, for example, that liability without fault is not morally blameworthy, that strict liability offences do not necessarily protect the public and that they attempt to require people to attain an impossible standard etc. Students who based their response on the civil law argued that no-fault liability was often beneficial, for example, that no-fault manufacturers’ liability enables a consumer to establish a claim without the difficulty of proving negligence in complex cases and that it avoids many of the practical problems involved in litigation (eg delay and expense). Many students further argued forcefully that, in view of such litigation problems, no-fault compensation schemes which by-pass the tort system should be adopted, either financed by the state (like the New Zealand model) or based on insurance or social security schemes.

**Question 10**

Students were asked to discuss the meaning of ‘justice’ and the extent to which the law succeeds in achieving justice. Many students were able to display a competent knowledge of the different views on the meaning of justice and there were many excellent answers. The ideas of justice which students referred to included justice as basic fairness, equality of treatment (treating like cases alike) and the distinction between different aspects of justice (for example, distributive/corrective, substantive/procedural, formal/concrete justice etc.). Many students also explained some of the important philosophical theories of justice, 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’. 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, the utilitarians’ lack of concern for the individual, as opposed to society.

The second part of the question required students to discuss whether English law achieves or does not achieve justice, and, although there were many excellent responses on this aspect of the question, responses were often relatively weak. As was pointed out in previous reports, students should remember that they will achieve high marks on this aspect only if they attempt to analyse
selected examples in terms of a particular idea or ideas of justice (for example, utilitarianism), but not if they merely argue that a particular example shows that the law is unsatisfactory. Many students, for example, sought to criticise particular instances of actual or alleged miscarriage of justice (e.g., the Guildford Four and Stephen Lawrence) 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 natural justice, or that a particular trial was unfair, or that evidence relied on was unsatisfactory. In this connection, some students gained good marks by pointing out that, ultimately, a system of more effective corrective justice was achieved by the establishment of the Criminal Cases Review Commission.

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 opportunity 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 (e.g., appeals and judicial review, the significance of the Criminal Cases Review Commission etc). Students often referred to aspects of the substantive law in order to show success or failure in seeking to achieve justice, for example, the mandatory life sentence for murder, arguably unjust in treating all murderers, regardless of circumstances, in the same way. 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. Some students, in examining the relationship between law and justice, considered whether and why the law should seek to achieve justice, for example, by considering the importance of a just system in order to create a cooperative society, the avoidance of civil disobedience etc. Such arguments were well rewarded.

**Question 11**

The question required students to analyse the extent to which judges have the power to develop law through the operation of judicial precedent and in the interpretation of statutory rules, and to discuss whether judges should have this power. In relation to the precedent aspect of the question, there were many competent, and some excellent, responses. In order to achieve the highest marks, it was necessary for students to explain the essential features of the doctrine of precedent (the judicial hierarchy, the distinction between *ratio* and *obiter* etc) and the features which offer flexibility and the opportunity for creativity (e.g., distinguishing, the Practice Statement in relation to the Supreme Court, the exceptions to Young v Bristol Aeroplane in relation to the Court of Appeal, overruling etc). Better students also concluded, quite correctly, that the Supreme Court has much greater scope for creativity than lower courts. Most students illustrated various aspects of their discussion, for example, by reference to Herrington v BRB and Crown v G in relation to the Practice Statement, Balfour v Balfour and Merritt v Merritt in relation to distinguishing, although often these were not fully explained.

Whereas the responses on the precedent aspect of the question were competent or better, those relating to statutory interpretation were generally poor. The explanations of the various “rules” of statutory interpretation were generally adequate, but many answers contained no or little illustration and others contained illustrative examples from the case law with insufficient detail in 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, some students failed to discuss 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. In relation to the issue whether judges should have the power to be creative, there were many competent responses and many excellent ones, many referring to the problems with judicial creativity of judges being unelected, the retrospective nature of judicial decisions, the haphazard nature of judge-made law, constitutional issues, etc. Many students also referred to the suggested benefits of judicial creativity, such as the need to fill in gaps in the law and problems facing parliamentary lawmakers such as time constraints.

Mark Ranges and Award of Grades

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