



AS

LAW

7161/2

Paper 2

Mark scheme

June 2019

Version: 1.0 Final

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

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

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Level of response marking instructions

Level of response mark schemes are broken down into levels, each of which has a descriptor. The descriptor for the level shows the average performance for the level. There are marks in each level.

Before you apply the mark scheme to a student's answer read through the answer and annotate it (as instructed) to show the qualities that are being looked for. You can then apply the mark scheme.

Step 1 Determine a level

Start at the lowest level of the mark scheme and use it as a ladder to see whether the answer meets the descriptor for that level. The descriptor for the level indicates the different qualities that might be seen in the student's answer for that level. If it meets the lowest level then go to the next one and decide if it meets this level, and so on, until you have a match between the level descriptor and the answer. With practice and familiarity you will find that for better answers you will be able to quickly skip through the lower levels of the mark scheme.

When assigning a level you should look at the overall quality of the answer and not look to pick holes in small and specific parts of the answer where the student has not performed quite as well as the rest. If the answer covers different aspects of different levels of the mark scheme you should use a best fit approach for defining the level and then use the variability of the response to help decide the mark within the level, i.e. if the response is predominantly level 3 with a small amount of level 4 material it would be placed in level 3 but be awarded a mark near the top of the level because of the level 4 content.

Step 2 Determine a mark

Once you have assigned a level you need to decide on the mark. The descriptors on how to allocate marks can help with this. The exemplar materials used during standardisation will help. There will be an answer in the standardising materials which will correspond with each level of the mark scheme. This answer will have been awarded a mark by the Lead Examiner. You can compare the student's answer with the example to determine if it is the same standard, better or worse than the example. You can then use this to allocate a mark for the answer based on the Lead Examiner's mark on the example.

You may well need to read back through the answer as you apply the mark scheme to clarify points and assure yourself that the level and the mark are appropriate.

Indicative content in the mark scheme is provided as a guide for examiners. It is not intended to be exhaustive and you must credit other valid points. Students do not have to cover all of the points mentioned in the Indicative content to reach the highest level of the mark scheme.

An answer which contains nothing of relevance to the question must be awarded no marks.

01 Which **one** of the following factors will **increase** the standard of care owed in relation to breach of duty?

[1 mark]

Marks for this question: AO1 = 1

D The claimant is a child.

02 Which **one** of the following best describes the test for remoteness of damage?

[1 mark]

Marks for this question: AO1 = 1

D Was the type of damage reasonably foreseeable at the time of the breach of duty?

03 Which **one** of the following would **not** be categorised as general damages?

[1 mark]

Marks for this question: AO1 = 1

D Pre-trial loss of earnings

04 When considering the reasonable man (person) test in relation to breach of duty, which **one** of the following would describe the standard expected of a person putting up a heavy shelf in their kitchen?

[1 mark]

Marks for this question: AO1 = 1

B To reach the standard of a competent ordinary person.

05 Which **one** of the following best describes the duty an occupier owes to a trespasser under the Occupiers' Liability Act 1984?

[1 mark]

Marks for this question: AO1 = 1

D To take reasonable care to see that the trespasser does not suffer injury on the premises by reason of the danger.

06 In the House of Commons, which stage of the formal process of law making comes immediately before the Report stage? **[1 mark]**

Marks for this question: AO1 = 1

A Committee stage

07 Which external aid is most likely to be used by a judge when applying the literal rule in statutory interpretation? **[1 mark]**

Marks for this question: AO1 = 1

A Dictionary

08 Assuming that a case has been appealed using the leapfrog procedure, which court will hear the appeal? **[1 mark]**

Marks for this question: AO1 = 1

D Supreme Court

09 Which type of delegated legislation would be used by a local authority seeking to ban alcohol in a park? **[1 mark]**

Marks for this question: AO1 = 1

A By-law

10 Which **one** of the following correctly describes the difference between an EU directive and an EU regulation? **[1 mark]**

Marks for this question: AO1 = 1

B Directives require implementation by Member States, whereas regulations do not.

11 In the context of parliamentary law making, explain the meaning of Green and White Papers and the difference between them.

[3 marks]

Marks for this question: AO1 = 3

Indicative content

- Explanation of Green Paper as outline of government proposals aimed to stimulate discussion (1).
- Explanation of White Paper as statements of policy setting out proposals for legislative changes (1).
- Explanation of the difference, e.g. Green Papers precede White Papers, or White Papers contain more formalised proposals (1).

Credit any other relevant point(s).

12 Suggest why Ahmed would not be in breach of his duty of care to Barry under the Occupiers' Liability Act 1957.

[3 marks]

Marks for this question: AO1 = 1 and AO2 = 2

Indicative content

AO1

- Explanation of principle that occupier may expect a person acting in the exercise of his calling to guard against any special risks ordinarily incident to it. This can be achieved without identification of the specific subsection (1).

AO2

- Application to Ahmed to suggest that Barry was engaged as a specialist and therefore was acting in the exercise of his calling (1).
- Application to Ahmed to suggest that loose wiring is a special risk ordinarily incident to the role and tasks of an electrician (1).

Credit any other relevant point(s).

| | | |
|-----------|---|-------------------|
| 13 | <ul style="list-style-type: none"> • Advise Carla as to whether she is likely to be in breach of her duty of care to Dean. • Assess two possible funding options available to both Carla and Dean if the case cannot be settled out of court. | [12 marks] |
|-----------|---|-------------------|

Marks for this question: AO1 = 3, AO2 = 6 and AO3 = 3

| Levels of response mark scheme 12 marks – AO1 (3), AO2 (6) and AO3 (3). | |
|--|--|
| Mark range | Description |
| 10-12 Band 4 | <p>Excellent analysis of legal rules and principles leading to excellent application of the correct rules and principles to the scenario. Excellent use and explanation of relevant authority to support the application. An excellent legal argument is presented using appropriate terminology to support advice. Excellent drawing together of knowledge and understanding of substantive and non-substantive law from across the course of study.</p> |
| 7-9 Band 3 | <p>Good analysis of legal rules and principles leading to good application of the correct rules and principles to the scenario. Good use and explanation of relevant authority to support the application. A good legal argument is presented using some appropriate terminology to support advice. Good drawing together of knowledge and understanding of substantive and non-substantive law from across the course of study.</p> |
| 4-6 Band 2 | <p>Limited analysis of legal rules and principles to the scenario leading to limited application of the correct rules and principles to the scenario. Limited use and selection of relevant authority. Limited drawing together of knowledge and understanding of substantive and non-substantive law from across the course of study.</p> |
| 1-3 Band 1 | <p>Knowledge is minimal and demonstrates a minimal understanding of legal rules and principles and of the English legal system. Minimal use and selection of relevant authority.</p> |
| 0 | Nothing worthy of credit |

Distribution of marks for substantive and non-substantive law:

| Substantive | Non-substantive | Total marks |
|--------------------|------------------------|--------------------|
| 6 | 6 | 12 |

Indicative content

AO1

- Explanation of breach of duty with reference to the objective test.
- Explanation of standard of care expected of drivers on public roads.
- Identification and outline explanation of any two funding options such as insurance, conditional fee arrangements and private finance.

AO2

- Application of the standard of a reasonably competent driver to Carla.
- Application of risk factors to facts of the scenario, e.g. higher risk in wet conditions; reasonable precaution would have been to slow down; late braking indicates failure to take reasonable precaution.
- Application to conclude Carla is likely to be in breach of her duty of care.
- Application to suggest that Carla may find it difficult to obtain a conditional fee arrangement as this seems an obvious case of negligence and therefore her chances of success are low, but that she may have legal expenses cover under her car insurance policy or may finance the case privately.
- Application to suggest that Dean would have a good chance of obtaining a conditional fee arrangement as his claim is likely to succeed and that this would be preferable to private finance.
- Application to conclude that Dean is likely to fund his case using a conditional fee arrangement.

AO3

- Analysis and evaluation of the meaning of breach of duty with particular reference to the objective standard of competence required of a driver on a public road (e.g. *Nettleship v Weston*) and the relevant risk factors (e.g. increased risk in wet conditions).
- Analysis and evaluation of the possible funding options available to a claimant and a defendant in a civil dispute.
- Analysis and evaluation of the possible limitations and difficulties in obtaining conditional fee arrangement relative to considered chances of success.

Credit any other relevant point(s)

| | | |
|-----------|--|-------------------|
| 14 | <ul style="list-style-type: none"> • Advise Fred as to whether he is likely to owe a duty of care to Eli under the Occupiers' Liability Act 1984. • Assuming this case went to trial, assess the possible routes of appeal if either party were dissatisfied with the outcome. | [12 marks] |
|-----------|--|-------------------|

Marks for this question: AO1 = 3, AO2 = 6, AO3 = 3

| Levels of response mark scheme 12 marks – AO1 (3), AO2 (6) and AO3 (3). | |
|--|---|
| Mark range | Description |
| 10–12 Band 4 | Excellent analysis of legal rules and principles leading to excellent application of the correct rules and principles to the scenario. Excellent use and explanation of relevant authority to support the application. An excellent legal argument is presented using appropriate terminology to support advice. Excellent drawing together of knowledge and understanding of substantive and non-substantive law from across the course of study. |
| 7–9 Band 3 | Good analysis of legal rules and principles leading to good application of the correct rules and principles to the scenario. Good use and explanation of relevant authority to support the application. A good legal argument is presented using some appropriate terminology to support advice. Good drawing together of knowledge and understanding of substantive and non-substantive law from across the course of study. |
| 4–6 Band 2 | Limited analysis of legal rules and principles to the scenario leading to limited application of the correct rules and principles to the scenario. Limited use and selection of relevant authority. Limited drawing together of knowledge and understanding of substantive and non-substantive law from across the course of study. |
| 1–3 Band 1 | Knowledge is minimal and demonstrates a minimal understanding of legal rules and principles and of the English legal system. Minimal use and selection of relevant authority. |
| 0 | Nothing worthy of credit |

Distribution of marks for substantive and non-substantive law:

| Substantive | Non-substantive | Total marks |
|--------------------|------------------------|--------------------|
| 6 | 6 | 12 |

Indicative content

AO1

- Identification and outline explanation of the basic elements of the obligations imposed by the Occupiers' Liability Act 1984: occupier, non-visitor (trespasser), dangers due to the state of the premises or things done/omitted to be done thereon.
- Explanation of the three requirements in s1(3): the occupier is aware of the danger or has reasonable grounds to believe that it exists, the occupier knows or has reasonable grounds to believe that the other is in the vicinity of the danger or that he may come into the vicinity of the danger; the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer the other some protection.
- Identification and outline explanation of appeal routes following a trial in County Court.

AO2

- Application to argue that Eli is a trespasser.
- Application to argue Eli is likely to be owed a duty of care due to Fred's knowledge of danger, and of past trespassing activity by children, and the risk possibly being one that is easy to guard against.
- Application to suggest that initial trial would be in county court (fast track) and the appeal route would depend on the status of Judge hearing the trial. This could be within the County Court (from a District Judge to a Circuit Judge) or to the High Court (from a Circuit Judge in County Court) dependent on leave/permission being granted.
- Application to suggest that appeal could be from High Court to the Court of Appeal (Civil Division) dependent on leave/permission being granted.

AO3

- Analysis and evaluation of the requirements for a trespasser to be owed a duty of care with particular consideration of the foreseeability of entry. Reference to supporting case authority, e.g. Tomlinson v Congleton BC, Donoghue v Folkestone Properties, Herrington v. BRB, Keown v Coventry Healthcare Trust, Ratcliff v McConnell.
- Analysis and evaluation of potential trial venue and status of Judge in order to assess possible appeal routes.
- Analysis and evaluation of the possible appeal routes dependent on initial trial venue and status of Judge.

Credit any other relevant point(s).

15 Consider the rights and remedies of Holly in the tort of negligence in respect of a claim brought against Graham.

[20 marks]

Marks for this question: AO1 = 7, AO2 = 7, AO3 = 6

| Levels of response mark scheme 20 marks – AO1 (7), AO2 (7) and AO3 (6). | |
|---|---|
| Mark range | Description |
| 17–20 Band 5 | Knowledge is excellent and demonstrates an excellent understanding of relevant legal rules and principles. Excellent selection and use of relevant legal authority. There is excellent analysis and evaluation of legal rules and principles leading to excellent application of the correct rules and principles to the scenario. An excellent legal argument is presented using appropriate terminology. A logical, sustained and well-developed line of reasoning is maintained leading to a valid, relevant and substantiated conclusion. |
| 13–16 Band 4 | Knowledge is good and demonstrates a good understanding of relevant legal rules and principles. Good selection and use of relevant legal authority. There is good analysis and evaluation of legal rules and principles leading to good application of the correct rules and principles to the scenario. A good legal argument is presented using appropriate terminology. A sustained and, but not yet fully, developed line of reasoning is established leading to a partially justified conclusion. |
| 9–12 Band 3 | Knowledge is satisfactory and demonstrates a satisfactory understanding of relevant legal rules and principles. Satisfactory selection and use of relevant legal authority. There is satisfactory analysis and evaluation of legal rules and principles leading to satisfactory application of the correct rules and principles to the scenario. A satisfactory legal argument is presented using some appropriate terminology. A chain of reasoning starts to develop which leads to a partially justified conclusion. |
| 5–8 Band 2 | Knowledge is limited and demonstrates a limited understanding of relevant legal rules and principles. Limited selection and use of relevant legal authority. There is limited analysis and evaluation of legal rules and principles which may lead to limited application of the correct rules and principles to the scenario. A limited legal argument is presented using little appropriate terminology. Some reasoning is attempted which leads to a limited conclusion. |
| 1–4 Band 1 | Knowledge is minimal and demonstrates minimal understanding of legal rules and principles. Minimal selection and use of legal authority. There is minimal analysis and evaluation of legal rules and principles which may lead to minimal application of the correct rules and principles to the scenario. A fragmented legal argument is attempted. No chain of reasoning is attempted. |
| 0 | Nothing worthy of credit |

Distribution of marks for substantive and non-substantive law:

| Substantive | Non-substantive | Total marks |
|-------------|-----------------|-------------|
| 20 | 0 | 20 |

Indicative content**AO1**

- Identification of the elements of negligence required for liability: duty of care, breach of duty, and damage. Identification of the remedy: damages (financial compensation).
- Explanation of the first element of liability: the duty of care in negligence.
- Explanation of the second element of liability: breach of the duty of care and the objective test.
- Explanation of the third element of liability: causation in fact and causation in law.
- Explanation of the remedy of damages: aim, method, distinction between special and general damages, pecuniary/non pecuniary and duty to mitigate losses.
- Reference to supporting case authorities, e.g. *Donoghue v Stevenson*, *Caparo v Dickman*, *Nettleship v Weston*, *Bolton v Stone*, *Barnett v Chelsea and Kensington Hospital*, *The Wagon Mound (No. 1)* and *Smith v Leech Brain*, *Hughes v Lord Advocate*.

AO2

- Application to suggest that Graham owed a duty of care to Holly, e.g. it was reasonably foreseeable that a failure to secure the spotlight could cause injury to a member of the audience; there was a relationship of sufficient proximity with Holly in that Graham controlled something that could affect Holly and/or she was in close physical proximity; and it is reasonable to impose a duty in these circumstances as there are no obvious policy issues regarding Graham.
- Application to suggest that Graham owed a duty to act to the standard of the reasonable lighting rigger and that Graham breached the duty in terms of the risk factors, e.g. he did not take proper precautions and did not pay proper attention given that he was dealing with something that could cause harm.
- Application to suggest that Graham's actions were the cause of Holly's injury as a matter of fact.
- Application to argue that Graham's actions were the cause of Holly's injury as a matter of law, given that damage of this type (physical injury) was reasonably foreseeable, even if the way in which it happened wasn't.
- Application to argue that Graham will be responsible for all of Holly's injuries with reference to the thin-skull rule.
- Application to conclude that Holly might be able to bring a claim in negligence and to recover damages - the amount being hard to calculate due to the extent of the injuries and possible impact on Holly in terms of future earnings, possible future medical care and loss of amenity.

AO3

- Analysis and evaluation of the duty of care requirements as to a relationship of sufficient proximity and as to whether it is fair, just and reasonable to impose a duty of care.
- Analysis and evaluation of the risk factors to query whether Graham breached the duty of care: level of precautions taken and degree of attention paid balanced against the harm that might be caused.
- Analysis and evaluation of causation in law in terms of the nature and type of injury that might be suffered and the thin-skull rule.
- Use of supporting case authorities (development of cases cited above together with further cases relating to the risk factors and to causation in law).

Credit any other relevant point(s).

16 In the context of delegated legislation, explain Statutory Instruments and Orders in Council and discuss the value of delegated legislation as a form of law making.

[20 marks]

Marks for this question: AO1 = 10, AO3 = 10

| Levels of response mark scheme 20 marks – AO1 (10) and AO3 (10). | |
|---|---|
| Mark range | Description |
| 17–20 Band 5 | Knowledge is excellent and demonstrates an excellent understanding of relevant legal rules and principles. Excellent selection and use of relevant legal authority. There is excellent analysis and evaluation of legal rules and principles leading to excellent application of the correct rules and principles to the scenario. An excellent legal argument is presented using appropriate terminology. A logical, sustained and well-developed line of reasoning is maintained leading to a valid, relevant and substantiated conclusion. |
| 13–16 Band 4 | Knowledge is good and demonstrates a good understanding of relevant legal rules and principles. Good selection and use of relevant legal authority. There is good analysis and evaluation of legal rules and principles leading to good application of the correct rules and principles to the scenario. A good legal argument is presented using appropriate terminology. A sustained and, but not yet fully, developed line of reasoning is established leading to a partially justified conclusion. |
| 9–12 Band 3 | Knowledge is satisfactory and demonstrates a satisfactory understanding of relevant legal rules and principles. Satisfactory selection and use of relevant legal authority. There is satisfactory analysis and evaluation of legal rules and principles leading to satisfactory application of the correct rules and principles to the scenario. A satisfactory legal argument is presented using some appropriate terminology. A chain of reasoning starts to develop which leads to a partially justified conclusion. |
| 5–8 Band 2 | Knowledge is limited and demonstrates a limited understanding of relevant legal rules and principles. Limited selection and use of relevant legal authority. There is limited analysis and evaluation of legal rules and principles which may lead to limited application of the correct rules and principles to the scenario. A limited legal argument is presented using little appropriate terminology. Some reasoning is attempted which leads to a limited conclusion. |
| 1–4 Band 1 | Knowledge is minimal and demonstrates minimal understanding of legal rules and principles. Minimal selection and use of legal authority. There is minimal analysis and evaluation of legal rules and principles which may lead to minimal application of the correct rules and principles to the scenario. A fragmented legal argument is attempted. No chain of reasoning is attempted. |
| 0 | Nothing worthy of credit |

Distribution of marks for substantive and non-substantive law:

| Substantive | Non-substantive | Total marks |
|-------------|-----------------|-------------|
| 0 | 20 | 20 |

Indicative content**AO1**

- Explanation of statutory instruments with reference to authority given to government ministers to make delegated legislation.
- Explanation of orders in council for example emergency powers given to the Privy Council.
- Appropriate illustrative examples of both types of delegated legislation explained.
- Outline explanation of advantages of delegated legislation, e.g. time saving for Parliament, specialist/local knowledge, flexibility, speed.
- Outline explanation of disadvantages of delegated legislation, e.g. less democratic, accountability, volume, lack of publicity.

AO3

- Analysis and evaluation of delegated legislation in terms of benefits, e.g. speed, use of specialist knowledge, use of local knowledge, flexibility to create laws specific to different situations, need to react in a crisis.
- Analysis and evaluation of delegated legislation in terms of drawbacks, e.g. the lack of direct democratic accountability, possible problems with awareness, lack of consultation and opportunity to challenge.
- A conclusion which draws together the analysis and evaluation to propose some judgment, however qualified, about the value of delegated legislation and which is clearly grounded in that analysis and evaluation.

Credit any other relevant points, e.g. evaluation applied to specific types of delegated legislation.

Assessment Objectives Grid

| | AO1 | AO2 | AO3 | Total |
|--------------------|------------|------------|------------|--------------|
| 1 | 1 | | | 1 |
| 2 | 1 | | | 1 |
| 3 | 1 | | | 1 |
| 4 | 1 | | | 1 |
| 5 | 1 | | | 1 |
| 6 | 1 | | | 1 |
| 7 | 1 | | | 1 |
| 8 | 1 | | | 1 |
| 9 | 1 | | | 1 |
| 10 | 1 | | | 1 |
| 11 | 3 | | | 3 |
| 12 | 1 | 2 | | 3 |
| 13 | 3 | 6 | 3 | 12 |
| 14 | 3 | 6 | 3 | 12 |
| 15 | 7 | 7 | 6 | 20 |
| 16 | 10 | | 10 | 20 |
| Paper Total | 37 | 21 | 22 | 80 |

Distribution of marks for substantive and non-substantive law

| Question | Substantive | Non-substantive | Total Marks |
|-----------------|--------------------|------------------------|--------------------|
| 1–5 | 1 x 5 | | 5 |
| 6–10 | | 1 x 5 | 5 |
| 11 | | 3 | 3 |
| 12 | 3 | | 3 |
| 13 | 6 | 6 | 12 |
| 14 | 6 | 6 | 12 |
| 15 | 20 | | 20 |
| 16 | | 20 | 20 |
| Total | 40 | 40 | 80 |
| Total % | 50 | 50 | 100 |