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General Certificate of Education

Law 2161

Unit 4 (LAW04) Criminal Law (Offences against Property) *or* Tort, and Concepts of Law

Report on the Examination

2010 examination - June series

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Unit 4 (LAW04): Criminal Law (Offences against Property) or Tort, and Concepts of Law

General

In general, candidates performed well on this unit. There was much evidence of thorough learning and careful preparation. Although this was a new unit, combining, in effect, elements of the old units 5 and 6, the great majority of candidates seemed to cope effectively with the combination of problem solving and extended essay writing. Few candidates seemed to have difficulty with the time limit and it was pleasing to note that many Concepts answers were of an appropriate length and seemed to reflect the suggestion on the exam paper that candidates should devote an hour to this question.

Centres are thanked for preparing so thoroughly their candidates to work with the new numbering system and the new style answer book. The majority of candidates responded well to the changes to the June 2010 exams, but where difficulties were experienced, centres are asked to draw candidates' attention to the comprehensive range of guidance material that is available on this subject in order that they are confident about what is required of them in future examinations. Support available on this issue includes Guides for teachers and students, and specimen question papers and mark schemes showing the changes in action. All documents published in support of the changes to exams can be accessed via notices published on all qualification homepages, all subject notice boards, and on the parent and student area of the web.

SECTION A (OFFENCES AGAINST PROPERTY)

Scenario 1

Question 01

Candidates were required to address three areas in relation to Vladic's possible criminal liability for property offences: (i) theft of the £500; (ii) fraud by false representation; (iii) the defence of duress.

The theft issues Candidates were obviously required to explain and apply the elements of theft, both in terms of *actus reus* (appropriation, property, belonging to another) and *mens rea* (intention permanently to deprive and dishonesty). Most candidates were able to provide good explanations of the various elements. It was important, however, for candidates to identify the precise moment at which the offence of theft by Vladic was completed. Better students did so, but many did not, and this prevented them from explaining and applying the elements with accuracy. One possible interpretation of the facts was that Vladic had formed the dishonest intent at the time that Edna handed the money over to him, in which case he would have appropriated the £500 by assuming the rights of an owner by taking possession of it (s.3(1)). Many candidates suggested this, and better students gained further marks by pointing out that Edna's consent to the appropriation would be irrelevant (Gomez, Lawrence) and that the money would have been "property belonging to another" (Edna) since, at that moment, it was in her "possession and control" (s.5(1)).

The second possible interpretation of the scenario was that Vladic was originally honest and only formed dishonest intent at some later point, for example when he saw Luca and decided to hand the £500 over to him. Many students argued for this interpretation but few explained that

the second part of s.3(1) would apply, ie that, although Vladic would have initially acquired the money without stealing, appropriation would have taken place by Vladic's "later assumption of a right to" it by handing it over to Luca. Good candidates also explained that, since Vladic would have acquired ownership of the money by Edna's handing it over to him, it would still be property "belonging to another" if it could be argued that Vladic had received it under a legal obligation to pay it into Edna's bank account (s.5(3)). Many candidates sought to explain and apply s.5(3) but failed to understand its significance accurately. In particular, some suggested that Vladic was dishonest when Edna initially handed the money over to him but then proceeded to argue that the money belonged to Edna by virtue of s.5(3), when, at that point, it belonged to her by virtue of the fact that it was in her "possession and control". Candidates should understand that s.5(3) is a provision which deals with a scenario in which the ownership of property has technically been transferred from A to B but which allows the law to treat the property as still belonging to A so that B can be charged with theft of the property.

The fraud by false representation issues Candidates in general were able to explain and apply the elements of the Fraud Act 2006 very successfully and many gained high marks. The relevant representation in the problem was Vladic's assurance to Edna that he would pay the £500 into her bank account (a representation as to his state of mind) and it was clearly arguable that it was untrue or misleading and that he knew that it was or might be untrue. It was also clear that he intended to make a gain for Luca, or cause a loss to Edna, and that he was dishonest. Incidentally, candidates sometimes incorrectly stated that the defendant must actually make a gain or cause a loss, whereas an intention to do so is sufficient.

The duress issues Many candidates accurately explained and applied the elements of duress and gained good marks. Candidates generally argued that Luca's threat to "beat up" Edna constituted a threat of serious injury, and that, although the threat was directed at Edna and not Vladic, it was within the scope of the defence since, in view of his "close friendship" with her, she was a person for whom Vladic reasonably felt responsible (see for example Conway). Further important issues were whether the threat would have caused a person of reasonable firmness to act as Vladic did, which was clearly arguable, and whether Vladic reasonably believed that the threat would be carried out immediately or almost immediately, which was also arguable since Luca ordered Vladic to get money off Edna "quick". It was debatable whether there was a reasonable opportunity for Vladic to avoid the consequences of the threat (Hasan). Many candidates argued that Vladic's voluntary association with a violent gang prevented him from relying on the defence (Sharp/Hasan), although better candidates correctly pointed out that, since he seemed to have ceased to have contact with the gang before the threat was made, the defence might be applicable.

Unfortunately, a small number of candidates failed to read question 01 carefully and discussed the possible liability of Luca for blackmail. Such a treatment gained no marks since the question clearly required candidates to discuss the liability of *Vladic* and *not Luca*.

Question 02

Candidates were required to address three possible offences for which George might be liable: (i) theft of the chocolates; (ii) basic and aggravated criminal damage; (iii) burglary.

The theft issues The logical approach was to consider the theft before the burglary, but candidates often referred to theft only in passing as part of the burglary discussion and often failed to provide sufficient detail. Candidates were obviously required to explain and apply the elements of theft, both in terms of *actus reus* and *mens rea*. One of the particular issues raised by the question was whether George intended permanently to deprive Freda of her chocolates

since he intended to replace them later. Many candidates correctly argued, on the basis of Velumyl, that an intention to replace was irrelevant since George would not be able to replace the original chocolates after eating them. In dealing with the Ghosh tests of dishonesty, the vast majority of candidates concluded that the reasonable man would regard George's conduct as dishonest. This conclusion was given credit, but it was equally arguable that many reasonably honest people would not regard George's conduct as dishonest, given his intention to replace them later.

The criminal damage issues The question expected candidates to consider whether George was liable for basic criminal damage (arson) of the carpet and the cushion, whether he could rely on the defence of lawful excuse in relation to the damage to the cushion, and whether he was liable for aggravated criminal damage (arson) in relation to setting fire to the carpet. Candidates were generally able to explain the elements of basic criminal damage contained in s.1(1) Criminal Damage Act 1971. Many candidates provided good explanations of "destroys" and "damages" by referring to the various judicial authorities (for example, A v R, Morphitis v Salmon, etc). Many candidates also correctly explained the *mens rea* requirement of intention or recklessness as to the damage and that, on the basis of the authority of R v G, subjective recklessness must be present. On the facts of the problem, George obviously intended to damage the cushion, and many candidates argued that he was reckless in causing damage to the carpet by falling asleep with his cigarette still alight. Credit was given for this argument regarding recklessness, although it was not clear that George had consciously considered the risk involved, which is what subjective recklessness requires. Unfortunately, very few candidates considered the arguable possibility that George might be able to rely on the defence of lawful excuse in relation to the damage to the cushion (see s.5(2)(b) Criminal Damage Act) on the basis that the carpet was in immediate need of protection when alight and that he believed that using the cushion to extinguish the fire was reasonable in the circumstances. Moreover, very few candidates considered George's possible liability for aggravated criminal damage under s.1(2), on the basis that, by virtue of the carpet being set alight, he was reckless as to the endangering of life and that actual danger is not required (Dudley). On the other hand, those who did accurately deal with both basic and aggravated damage were rewarded with high marks.

The burglary issues Candidates were generally able to explain the elements of s.9(1)(a) and 9(1)(b) of the Theft Act 1968 accurately and in detail. In particular, the requirements of entry, "building" and "part of a building" were well explained. Better candidates accurately argued that it was unlikely on the facts that George would be liable under s.9(1)(a), since the question contained no suggestion that he intended to commit theft of the chocolates before he entered the living room. Most candidates explained and applied s.9(1)(b) well, but some failed to attract high marks by failing to explain clearly the differences between the two types of burglary. In particular, answers often failed to emphasise sufficiently that the *intention* to commit the ulterior offences under s.9(1)(a) must be formed *by the time of entry* into the building and that, for the purposes of s.9(1)(b), *the actual offence* of theft/attempted theft or GBH/attempted GBH must be committed *after entry*. Some candidates gave misleading answers in saying that an *intention to commit theft or GBH* after entry was sufficient for liability under s.9(1)(b).

Scenario 2

Question 03

It was necessary for candidates to address three main areas in relation to the possible criminal liability of Ken: (i) theft/robbery in relation to the jackets; (ii) making off without payment; (iii) burglary.

The theft issues The elements of *actus reus* and *mens rea* were generally explained clearly. The need for appropriation and intention permanently to deprive were obviously satisfied on the facts, as candidates pointed out. One particular issue which required special consideration was whether the jackets constituted "property belonging to another" (ie Norma), despite the fact that they were obviously owned by Ken. Candidates were generally able to point out that, under s.5(1) Theft Act 1968, property belongs to the person having "possession or control" of it and that, under the authority of Turner (No 2), the jackets belonged to Norma. A further issue was whether, since Ken believed that Norma had overcharged him for previous cleaning services, he could be considered to be honest on the ground that he believed that he had a "right in law" to take the jacket without paying (see s.2(1)(a) TA). Unfortunately, very few candidates addressed this point and argued that Ken would be deemed to be dishonest under the Ghosh tests. (In this regard, candidates should remember that the accused's belief under s.2(1)(a) does not have to be reasonable and all that matters is that he genuinely holds that belief.) The fact that Ken pushed Norma raised the possibility of robbery, a matter which was generally explained and applied with accuracy. In particular, many answers contained excellent discussions of the requirements that force be used in order to steal and immediately before or at the time of the theft, referring to authorities such as Hale and Locksley.

The making off without payment issues Many candidates addressed these issues clearly with the result that high marks were achieved. The *actus reus* points to explain and apply were that a service had been "done", that payment for the dry cleaning was required or expected, and that Ken had made off from the "spot" where payment was required or expected. The *mens rea* issues to consider were whether Ken knew that payment was required, whether he was dishonest under the Ghosh rules and whether he intended permanently to avoid payment (Allen). Candidates generally argued that Ken was guilty, although an issue which was rarely considered was whether the reasonable person referred to under the Ghosh test would consider Ken to be dishonest in view of the fact that he felt that he had been overcharged by Norma. Several candidates, instead of arguing making off without payment, suggested that Ken might be guilty of fraud by false representation under s.2 Fraud Act 2006, on the basis that, when Ken asked Norma for the return of his jackets, he was representing himself as an honest paying customer, whereas he clearly had no intention of paying. This was a perfectly valid argument which, if explained and applied fully and accurately, gained full marks. Some candidates argued both making off and fraud, and were therefore given appropriate credit. Several candidates argued that Ken was guilty of obtaining services dishonestly under s.11 Fraud Act 2006 on the basis that, when he originally asked Norma to carry out the cleaning, he was dishonest. Such discussions were not awarded any credit since the question made it clear that he decided not to pay for the dry cleaning only "when he was walking to Norma's to collect the cleaned jackets…" He had, therefore, not obtained the service by a dishonest act.

The burglary issues Some candidates failed to address the possible liability of Ken for burglary, although this was clearly arguable. The principle in Jones and Smith is that, even if D has permission from the owner to enter a building, he will nonetheless enter it as a trespasser if he intends to exceed the scope of the permission. Ken, as Norma's customer, possessed her implied permission to enter her shop to collect his dry cleaning, but he entered as a trespasser since he intended to exceed that permission by not paying for it. Candidates who established

Ken's status as a trespasser then correctly argued that he could be charged with burglary on the basis of both s.9(1)(a) and s.9(1)(b), the former since he intended before entering the shop to steal the jackets, and the latter since he committed theft of the jackets after entry. In addition to the above points, students were expected to explain the other elements of the offence (the meaning of "enters" and "building"), which many did very well.

Question 04

This question raised three areas: (i) Ken's possible liability for theft; (ii) his possible liability for fraud by false representation; (iii) the defence of intoxication.

The theft issues Many candidates correctly considered whether Ken was guilty of theft of Toby's bank card, arguing that he had clearly appropriated it by picking it up (Morris) but also arguing that it was unlikely that he possessed the intention permanently to deprive Toby of it since he handed it in to the owner of the bar. Many students also correctly explained that the card details which Ken memorised were incapable of being stolen since information does not constitute "property" for the purposes of theft (Oxford v Moss). It was disappointing, however, that although candidates also correctly suggested that Ken committed theft of the money in Toby's bank account, many were unable to explain the precise legal basis for this suggestion and thus failed to achieve top marks. If V has a bank balance in credit, the property which he owns is not the money, as such, but the legal right to it (a thing in action) and, if D dishonestly causes the balance to be reduced, he thereby appropriates that property for the purposes of the law of theft. Ken was also guilty of theft of the mobile phone since he dishonestly used the money in Toby's bank account to buy it, although this would obviously require an appropriation, which would occur when it was delivered to him. It should be noted that candidates could gain top marks for considering Ken's possible liability for theft of the card and the money in his account, even if they did not address the issue of theft of the phone.

The fraud by false representation issues In general, candidates were able to explain and apply in detail the elements of this offence and thus gain high marks. The particular points which arose were that Ken made a representation by conduct that he was authorised to use Toby's card details, which was obviously untrue or misleading and Ken knew this. He was also obviously dishonest on the Ghosh rules and he intended to make a gain for himself or cause a loss to Toby. One issue which very few candidates raised, however, was the effect of s.2(5) Fraud Act 2006 that a representation can be made to a machine [any "system or device" designed to "receive, convey or respond to communications (with or without human intervention")]. As an alternative, or in addition, to fraud by false representation, some candidates argued that Ken might be guilty of obtaining a service dishonestly under s.11 Fraud Act 2006. Such an argument was awarded credit, but only where the candidate suggested that Ken would be obtaining a "service" (for example, some form of phone package) and not merely the phone.

The defence of intoxication Answers regarding intoxication were generally disappointing, with very few candidates addressing all the relevant issues. In order to achieve top marks, it was necessary to explain the distinctions between voluntary and involuntary intoxication and between crimes of specific and basic intent, and that voluntary intoxication is a defence to only crimes of specific, and not basic, intent. Unfortunately, very few candidates provided a definition of "specific"/"basic intent." On the other hand, many were able to identify the offences of theft and fraud as offences of specific intent (without explaining why this is so), and that intoxication only provides a defence to such offences where it prevents the formation of *mens rea*. On the facts of the problem, it was obvious that Ken would have been able to form the

mens rea since, despite drinking “several lagers”, he was able to memorise the card details and enter the details on his computer, but some candidates failed to analyse the facts.

SECTION B (TORT)

Scenario 3

Question 05

This tort question involved two areas: (i) Eric's possible liability to Phil under the Occupiers' Liability Act 1957 and/or under the tort of negligence; (ii) Eric's possible liability in the tort of negligence to Amy and Nina for psychiatric injury.

Eric's liability to Phil Candidates were able to achieve maximum marks by discussing Eric's liability to Phil either on the basis of common law tortious negligence or a combination of the Occupiers' Liability Act 1957 (the OLA 1957) and common law negligence. Candidates who discussed Eric's liability solely under common law principles were expected to explain and apply the rules governing duty of care, breach of duty and damage. Those who achieved high marks firstly examined whether Eric owed a duty of care to Phil under the Donaghue v Stevenson/ Caparo v Dickman tests of reasonable foreseeability of harm, proximity and just and reasonableness, and correctly concluded that he did owe a duty, if only on the ground that it was reasonably foreseeable that a poor quality floor in the upper floor of an office could give way and lead to injury or damage. Better candidates also explained and applied various principles in order to decide whether Eric had committed a breach of duty: for example, the likelihood of harm (Bolton v Stone), the magnitude of the risk involved in not doing the work carefully (Paris v Stepney) and the possible cost of taking precautions (Latimer v AEC). It was also important to point out that a person carrying out work is merely required to show reasonable care and skill. Some candidates raised the question of whether the fact that Eric was obviously not a professional craftsman was relevant in this respect. Some used the authority of Nettleship v Western to show that Eric's possible inexperience in fitting floors would not be a defence to Phil's claim and this argument was given credit. Finally, good candidates explained that Phil's injury was caused by Eric's negligence (on the application of the "but-for" test) and not too remote a consequence (on the application of the Wagon Mound principle of reasonable foreseeability). Candidates who argued that Phil was able to claim damages from Eric under the OLA 1957 were expected to explain that Eric was the occupier of his office ("premises"), that Phil was a visitor (on the basis of being expressly invited into the office), and that Eric, as occupier, owed to Phil the "common duty of care" under s.2, ie a duty to use reasonable care to see that Phil would be reasonably safe in using the premises for the purpose of his visit. (Unfortunately, some candidates who correctly argued that Eric owed Phil a duty under the OLA 1957 went on to consider whether Eric, in addition, owed a duty of care to Phil under common law negligence. This was totally unnecessary – either a duty under the OLA or common law principles needs to be established but not both). Having established the existence of a duty under the OLA 1957, candidates then had to consider whether Eric had committed a breach of the common duty of care. As students of the OLA 1957 are aware, s.2 contains various rules in determining whether the occupier is in breach of duty (eg where the visitor is a child, or the occupier warns the visitor of the danger, etc), but none of these rules was relevant to Phil's claim. Candidates should remember that the rules which are laid down in s.2 are not a complete list and that it will often be necessary to refer to common law negligence principles in order to decide whether the occupier had complied with the common duty of care. Thus, in Phil's case, it was necessary for candidates who argued that Eric was liable under the OLA 1957 to consider the breach of duty principles referred to above (eg the likelihood of harm, the magnitude of risk etc). In fact, many candidates did so, and were awarded high marks. In dealing with the issue of the remedy of Phil, it was sufficient to identify damages without examining the precise measure.

Eric's possible liability to Amy and Nina Many candidates achieved high marks in answering this question, which raised the issue of Eric's possible liability in the tort of negligence for psychiatric injury suffered by Amy and Nina. In determining whether Eric owed a duty of care to them, the vast majority recognised that Amy was almost certainly a primary victim, as being in the zone of reasonably foreseeable physical harm, and that Nina was a secondary victim, as being a mere witness to the incident. All that was necessary for Amy to succeed in her claim, therefore, was that she had suffered recognised psychiatric illness and that physical injury to her was reasonably foreseeable but it was unnecessary for her to show that she was a person of "normal fortitude" or any of the other "control factors" established in Mcloughlin v O'Brian and Alcock v Chief Constable. On the other hand, a successful claim by Nina, being a secondary victim, did depend on her ability to satisfy these factors. Although it would be easy for her to show that she witnessed the incident with her own unaided senses, that it was a "horrifying" event, that she was present "at the scene" and so on, the real difficulty for Nina would be to establish "a close tie of love and affection" between herself, on the one hand, and Phil and Amy on the other. As many candidates correctly pointed out, it would depend on the facts whether she had a close friendship with either or both of Phil and Amy but, if they were only colleagues, Nina would be a mere bystander who would be unable to claim. As a final comment on this question, it was strictly necessary for candidates to consider whether Eric had committed a breach of duty in relation to Amy and Nina, but candidates generally argued that, if Eric was negligent in relation to Phil, he was also negligent in relation to Amy and Nina, and this approach was acceptable. As pointed out above, in dealing with the remedies available to Amy and Nina, it was sufficient to identify damages without elaboration.

Question 06

This question required candidates to consider Phil's possible claim (i) against Jules in the tort of private nuisance and (ii) against Whitegoods Ltd in product liability.

The nuisance claim The majority of students attempting this question were able to provide an accurate definition of the tort of private nuisance, and to identify factors referred to in the facts of the problem which were relevant in determining whether the noise generated by Jules's welding business constituted an unreasonable interference with Phil's use of his property. As many candidates successfully argued, the important features were the locality factor (Phil's house was in "a quiet residential area"), duration (the business was originally conducted at weekends, and later on Fridays also), and the malice/motive factor (following Phil's complaint, Jules increased his activities). Unfortunately, few candidates explained these factors in detail and tended merely to list them. For example, candidates generally failed to explain how Jules's increased activities following Phil's complaint showed the relevance of motive (ie as indicating retaliation). Again, few candidates fully explained the relevance of locality. It was particularly disappointing that few answers contained a detailed discussion of relevant authorities (eg Christie v Davey, Hollywood Silver Fox Farm v Emmett, Halsey v Esso, St Helen's Smelting v Tipping, Sturges v Bridgeman, Spicer v Smee, etc), which would significantly enhance responses on this subject. Many candidates also argued that, since a local estate agent had warned Phil of Jules' activities before Phil bought his house, he could not successfully claim for the nuisance. This argument was incorrect, since "coming to the nuisance" (the claimant choosing to live in a property near to the defendant and knowing of his activities) is not a defence (Sturges v Bridgeman). 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 candidates should provide some explanation of this remedy: for example, that it can be used to restrain the continuance of the nuisance, either totally or partially (eg as in Kennaway v Thompson). Some candidates correctly pointed out that the court has a discretion in deciding whether to grant an injunction.

For example, in Miller v Jackson, the court refused to grant an injunction restraining the playing of cricket in a village on the ground of its public value.

The product liability claim Candidates 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 candidates showed some knowledge of the area, although there were very few excellent answers, and many students seemed unprepared for a question on the topic. A treatment on the basis of common law principles obviously required candidates 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 Donaghue v Stevenson and Grant v Australian Knitting Mills) on the basis of the principle of reasonable foreseeability, and the duty is to take reasonable care in the manufacturing process. The duty is owed to anyone who is foreseeably likely to be physically injured or suffer damage to property as a result of the manufacturer's negligence, eg a purchaser of the product (eg Grant v Australian Knitting Mills), a consumer or user of the product (eg Donaghue v Stevenson) or any other person who foreseeably incurs damage (eg a member of the public who is hit by a defective wheel which breaks loose from a car). Having explained that, on the facts of the problem, Whitegoods owed a duty of care to Phil on the ground that it was reasonably foreseeable that any user of a defective washing machine would suffer harm, candidates then proceeded to consider whether Whitegoods had committed a breach of duty. This would obviously depend on general negligence principles (had they exercised reasonable care and skill?), but several good candidates correctly added that, in view of the difficulty which a claimant may face in proving negligence, the court may infer from the nature of the defect itself that it could not have occurred without negligence (see for example Grant v Australian Knitting Mills). One area, however, which candidates generally failed to address was the requirement of damage. The general rule is that a claim in the tort of negligence will succeed only if the claimant can show that he suffered physical damage as a result of the negligence, either in the form of personal injury (eg a broken arm), or damage to his property (eg a damaged car). On the facts of the problem, Phil could establish damage to property since his designer clothes were ruined by the fire in the washing machine. In this respect, some candidates incorrectly argued that Phil's claim failed since it was one for pure economic loss. It is true that, subject to limited exceptions, a successful claim cannot be made for pure economic loss in the tort of negligence. One consequence of this rule is that a claimant cannot recover compensation in the tort of negligence *for the cost of repairing a defective product* since this is a claim for economic loss (see eg Muirhead v Industrial Tank Specialities, Murphy v Brentwood DC, etc). On the basis of this rule, Phil would not have been able to recover the cost of repairing the defective washing machine, but this was not the issue raised by the question, which was whether he could claim for his "ruined designer clothes", which was a claim for damage to property.

Many candidates chose to deal with product liability on the basis of the principles in the Consumer Protection Act 1987. In general, answers showed a competent understanding of the meaning of the statutory terms "product", "defective" and "producer". Unfortunately, however, some candidates made the major error of stating that the producer must be negligent in order to be liable under the Act. The fundamental principle of the CPA is that it is based on strict liability, with the result that it is unnecessary to establish negligence. It is also important, when writing answers on the CPA, to state that the defective product must lead to damage, which is defined in the Act to include the death or personal injury of the claimant or damage to his property, but excluding damage to the defective product itself. Many candidates referred to the requirement of damage, but without any reference to the provisions of the Act. Some candidates referred to the "development risks" defence and were rewarded for this. So far as the remedy available to Phil was concerned, it was sufficient for candidates to identify damages, but without any elaboration as to measure of damages.

Scenario 4

Question 07

The question required a consideration of (i) the Occupiers' Liability Act 1957 in relation to the possible liability of Ali to Ben and Nathan and (ii) the Occupiers' Liability Act 1984 in relation to Ali's possible liability to Rob.

The OLA 1957 issues Many candidates were able to score high marks for this question by explaining the meaning of "occupier", "visitor", "the common duty of care" and by proceeding to consider the application of the common duty of care in relation to Ben and Nathan. So far as Ben was concerned, candidates generally explained the special provisions of the Act in relation to child visitors (s.2(3)(a)). Many candidates also validly considered the issue, raised by such decisions as Phipps v Rochester Corporation, of whether Ali could deny liability on the basis that he was entitled to assume that Ben would be properly supervised by Nathan. In Nathan's case, given that the question stated that the tiles had recently been laid by a builder engaged by Ali, it was relevant to consider s.2(4)(b), which provides that if the visitor suffers damage caused by the 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. Better candidates went on to consider whether the occupier should 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). Since the question stated that Nathan fell while running in the corridor, it was appropriate to discuss possible contributory negligence on the part of Nathan, which several candidates did, although since he was running to get help for Ben, he might not be considered to be negligent.

The OLA 1984 issues Candidates correctly explained that Rob was a trespasser in Ali's hotel and grounds and that, in order for him to successfully claim against Ali for his injuries, he would have to establish that Ali owed him a duty of care under the OLA 1984 and that he had failed to observe that duty. Most students had an approximate idea of the conditions which must be satisfied in order for the duty to arise, but very few students were able to state them accurately. First, it is clear from s.1(1) that the duty arises only where there the trespasser is injured by a danger due to the state of the premises and not where he is injured by the trespasser's dangerous activities on the premises. Moreover, the effect of s.1(3) is that the duty will arise only if the occupier knows of or has reasonable grounds to believe that the danger exists, 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 there was a danger due to the state of the premises – was the fire escape in a dangerous condition? For example, was it slippery? – or did Rob fall simply because he was fooling around? The latter was clearly arguable, and many candidates gained marks by arguing that Rob was in a similar position to the claimants in Keown v Coventry NHS, although the question did not state exactly what Rob was doing. Assuming that the fire escape was in a dangerous condition, it was unclear whether Ali knew or had reasonable grounds for knowing this, with the result that the duty might not arise under s.1(3). Many candidates argued that, in any event, Rob could be said to be contributorily negligent with the result that his claim would fail, and such an argument was credited.

Question 08

This question raised three areas: (i) the possible liability of Dr West to Rob for medical negligence; (ii) the possible liability of Dr West to Tariq for negligent driving; (iii) the possible liability of the hospital to Rob and Tariq on the basis of vicarious liability.

The liability of Dr West to Rob This was the first occasion on which a tort question has been set on medical negligence, but there were many excellent answers from candidates. It is easy to establish that a doctor owes a duty of care to his/her patient on the basis of the Donaghue v Stevenson principle of reasonable foreseeability of harm. Thus the main thrust of the question centred on breach of duty by medical professionals. It was possible to produce a competent answer by applying general negligence principles but higher marks could be gained only by referring to various rules specifically dealing with medical negligence and many students had a sound knowledge of these. In particular, many candidates explained and applied the "Bolam principle" of the relevance of the standard of the reasonably competent member of the profession and stressed the importance of general and approved practice within the medical profession (Bolam, as revised by Bolitho). The question also stated that Dr West was a "newly qualified" doctor, and many candidates considered whether inexperience is relevant to the standard of care to be reasonably expected. Many students used Nettleship v Western as authority for the rule that Dr West's inexperience was no defence, and this argument was credited. Good students also argued that different standards of care are applied to different medical posts, with the result that a junior doctor is not expected to display the same standard as a consultant. Candidates often relied on Phillips v Whiteley in support of this view, which received credit, although the point was specifically dealt with in relation to doctors by the Court of Appeal in Wilsher v Essex AHA. Many candidates gained credit by briefly explaining and applying the "but-for" test of causation in relation to Dr West and by explaining that the harm to Rob was not too remote.

The liability of Dr West to Tariq Many candidates achieved good marks by explaining and applying general principles of negligence relating to the duty of care and breach of duty. Better answers considered the possible relevance that Dr West was acting in an "emergency" situation and, therefore, for the public benefit, relying on decisions such as Watt v Hertfordshire CC. A further issue raised by the question was whether Tariq had broken the chain of causation in hurling himself on the pavement and good candidates correctly argued that he had not, since he acted reasonably to protect himself. It was also relevant to consider the rule that the defendant must take his victim as he finds him (since Tariq had a heart condition of which Dr West was presumably unaware), which the vast majority of students did.

The liability of the hospital to Rob and Tariq Candidates were obviously required to explain and apply the principles of vicarious liability to the situations of Rob and Tariq, and many students provided good answers. All students correctly concluded that Dr West was an employee, rather than an independent contractor, utilising tests established in authorities such as Ready Mix Concrete v Ministry of Pensions and Carmichael v National Power. Candidates also correctly concluded that Dr West was acting in the course of employment, and not acting "on a frolic of his own". This was obviously the case when he was treating Rob, but less obvious when he was driving between hospital sites. Nonetheless, candidates correctly argued that, since Dr West was ordered by a superior to drive to the other hospital site, he was "on hospital business" when he was doing so. There are several authorities governing vicarious liability when employees are negligent while driving (eg Storey v Ashton, Smith v Stages, etc) and candidates gained marks for referring to these, although more general authorities were credited (eg Beard v London General Omnibus).

SECTION C (CONCEPTS)

General

Most centres have now had several years' experience in dealing with these questions and most candidates were well prepared. But centres and candidates should also be aware that the questions on the topics will not necessarily always be set in the same format. In particular, candidates should be prepared to be confronted with at least a partial evaluative element in questions. In this respect, it was very noticeable that, in answering question 10 (which required candidates to discuss critically different possible meanings of justice), many candidates who provided excellent responses on the meaning of justice failed to offer any criticism of the various theories.

Question 09

In relation to the precedent aspect of the question, there were many good answers. In order to achieve the highest marks, it was necessary for candidates 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 (eg distinguishing, the Practice Statement in relation to the Supreme Court, the exceptions to Young v Bristol Aeroplane in relation to the CA, appeal court decisions with multiple *ratios*, overruling, etc). One important aspect of answering questions on this topic well is that it is important to state which features apply to which courts. For example, some candidates seemed to think that the Practice Statement applied to all courts, but failed to state that the doctrine of distinguishing does. Better candidates also concluded, quite correctly, that the Supreme Court has much greater scope for creativity than lower courts. Candidates should note that they should provide illustration of judicial creativity in action (such as Herrington v BRB and R v G and R in relation to the Practice Statement, Balfour v Balfour and Merritt v Merritt in relation to distinguishing, the development of oblique intent of murder, and so on). Most candidates provided some examples but with little explanation or detail. The question further required candidates to criticise/evaluate the extent to which judges are able to display creativity in the operation of precedent and the vast majority seemed well-prepared for this aspect of the question. Many candidates correctly referred to the various arguments against judicial law-making (for example, the retrospective effect of judicial decisions, the need for relevant cases to arise, judges' lack of training as reformers, etc). Many candidates also raised the various constitutional issues, for example, the problem that judges are unelected. Better students took this line of argument further by giving examples of instances where judges refused to change the law on the ground that it involved an issue of policy which should be left for Parliament to deal with, for example, Clegg (in relation to self-defence) and C v DPP (in relation to *doli incapax*).

Whereas the responses on the precedent aspect of the question were good, those relating to statutory interpretation were generally poor. The explanations of the various "rules" of statutory interpretation were reasonable, but many answers contained no or little illustration and others contained illustrative examples from the case law with insufficient detail, failing to highlight the relevant word or phrase in the particular statute. For example, candidates 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". Many answers failed to offer any evaluation, but some candidates did this effectively by seeking to explain that, although the literal rule offers no real opportunity for judges to be creative, it is otherwise with the mischief rule and the purposive approach, both of which give judges scope to consider legislative policy. Some candidates also validly pointed out that the "rules" of interpretation are not binding, with the result that judges have considerable choice as to how to approach the interpretation of statutes.

Question 10

The first part of the question required candidates to explain the different possible meanings of justice, together with some evaluation. Many candidates were able to display a good knowledge of the area and many answers were excellent. The ideas of justice which candidates referred to included justice as basic fairness, equality of treatment, the distinction between different aspects of justice (for example, distributive/corrective, substantive/procedural, formal/concrete justice, etc.) Many candidates also explained some of the important philosophical theories of justice, in particular, utilitarianism, Rawls' idea of "justice as fairness", Marx, Nozick and comparisons of natural law and positivism, etc. Unfortunately, many candidates merely described the various ideas of justice and failed to notice that the question said "critically discuss". As a result, they failed to achieve the highest marks (although excellent explanations of justice, without evaluation, could still gain high marks). Candidates were not required to provide particularly sophisticated, nor particularly extensive, evaluation of theories of justice, but merely to show that they had given at least some thought to what they had been taught. Some candidates validly pointed out the various difficulties associated with utilitarianism (for example, the problem in effectively measuring "happiness" and "pain", and its refusal to concern itself with injustice to the minority and interference with individual liberties, etc). Other candidates raised the problem with distributive justice of deciding what is a "just" distribution of benefit and burdens. A further fundamental problem is with the important idea of justice treating "like cases alike" and "unlike cases differently", namely, what the test of "likeness" to be adopted should be, and this depends on individual opinion (for example, is it just or unjust to discriminate on the ground of race, age, religion? etc).

The second part of the question required candidates to explore the relationship between law and justice. Candidates generally answered this by considering the extent to which the law does, or does not, seek to achieve justice in relation to particular aspects of procedural and/or substantive law and this was regarded as an appropriate interpretation of the question. Many candidates referred to various aspects of legal procedure in order to show that justice is achieved, for example, by explaining the significance of natural justice in preventing judicial bias, and allowing litigants an equal opportunity to present their case. Many candidates also referred to rules designed to protect suspects against oppression (eg PACE), to rules providing for consistent treatment (eg in relation to sentencing, precedent, etc), and procedures which seek to achieve corrective justice (eg appeals and judicial review, the significance of the Criminal Cases Review Commission, etc). Many candidates referred to problems of access to justice, in particular the problem of funding, and achieved high marks by explaining that such problems prevent the law achieving justice, for example by failing to provide equal opportunity. It is important, however, for candidates to remember that they will effectively consider the extent to which the law seeks to achieve justice only if they attempt to analyse selected examples in terms of a particular idea or ideas of justice (for example, equality of treatment), but not if they merely argue that a particular example shows that the law is unsatisfactory. Many candidates, for example, sought to criticise particular instances of actual or alleged miscarriage of justice (the Guildford Four, Tony Martin, etc) as showing a failure of the law to achieve justice, but such instances will be fully rewarded only if they are analysed in terms of an idea or ideas of justice, for instance, by showing that there was a denial of natural justice, or by showing that several of such cases highlighted the failure of the legal system to provide adequate corrective justice. In this connection, some candidates correctly pointed out that, ultimately, a system of more effective corrective justice was achieved by the establishment of the Criminal Cases Review Commission.

Candidates often referred to aspects of the substantive law in order to show a failure to achieve justice, although, generally, it is probably easier to demonstrate justice and injustice through procedures. Good examples of the substantive law are the common law of provocation in its failure to treat women differently from men (treating unlike cases the same) in the context of the

"sudden loss of self-control" rule and the mandatory life sentence for murder (in treating all murderers in the same way), and candidates often scored high marks in using examples of this type. On the other hand, many examples from the substantive law used by candidates merely proved that the law referred to was unsatisfactory rather than conflicting with a particular idea of justice. Such examples received little or no credit and nor did examples which showed a lack of morality rather than injustice. Some candidates, 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

There were many very good responses to this question, using either criminal or civil examples and often both. Candidates 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 how they indicated the presence or absence of fault. In the context of the criminal law, many candidates analysed *actus reus* issues, in particular 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 candidates also discussed different aspects of causation and the circumstances where D can be argued not to be at fault, for example, where there is a *novus actus interveniens*. Some candidates also discussed the "thin skull" rule and correctly questioned whether decisions such as Blaue show sufficient fault for criminal liability, being based, in effect, on a chance occurrence. Candidates 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. It was disappointing, however, that few candidates considered the issue of whether objective recklessness and negligence indicate sufficient fault to attract criminal liability (for example, was the decision in R v G correct in overruling Caldwell? Is gross negligence manslaughter sufficiently blameworthy for criminal, as distinct from civil, liability?). Many candidates also analysed the various defences to criminal liability in order to demonstrate the absence of fault, wholly or partly.

In the civil law context, candidates analysed relevant areas such as the various aspects of the tort of negligence and occupiers' liability, emphasising the importance of reasonable foreseeability 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.

In the second part of the question, candidates provided examples from the criminal law and/or the civil law contexts. 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, candidates discussed relevant examples such as the Consumer Protection Act 1987, vicarious liability and Rylands v Fletcher. Some candidates 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).

Evaluation of liability without fault required a discussion of the possible arguments which may justify no-fault liability, and candidates generally sought to explain these, to a greater or lesser degree. The main arguments relied on by candidates to justify criminal strict liability 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 candidates also sought to argue the problems with such offences: for example, that liability without fault is not morally blameworthy, that strict liability offences do not necessarily protect the public, and so on. Candidates 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 candidates 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.

Mark Ranges and Award of Grades

Grade boundaries and cumulative percentage grades are available on the Results Statistics page of the AQA Website: http://www.aqa.org.uk/over/stat.html.