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

Report on the Examination

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

General

Many candidates performed well on this Unit and there was evidence of thorough learning and careful preparation. Candidates, in general, managed to devote sufficient time to both the substantive law and concepts sections, although some, having attempted the law/morality question first, spent far too much time on it and failed to complete the paper. Common deficiencies in weaker responses to the substantive law questions were devoting too much time and detail to aspects which were not in issue in the problems set, and failing adequately to read and/or reflect on the problem facts, leading to inaccurate explanations and analyses. This was particularly the case with several of the criminal law questions.

SECTION A (OFFENCES AGAINST PROPERTY)

Scenario 1

Question 1

Candidates were required to address three areas in relation to Eddie's possible criminal liability for property offences, (i) theft and robbery in relation to the wallet, (ii) fraud by false representation in relation to the vending machine and (iii) burglary.

The theft issues Many candidates were able to provide a competent explanation and application of the various elements, and many responses were excellent. The crucial points were that Eddie's momentary possession of the wallet, prior to his replacing it, constituted an appropriation through his assuming the rights of an owner, and that he had clearly formed the intention permanently to deprive, despite the fact that he then changed his mind. Weaker students, however, wrongly argued that, since Eddie replaced the wallet, the intention could not be present since he had only 'borrowed' it. Many candidates accurately explained and applied the various robbery issues, ie whether Eddie used force (by tripping up Dan) immediately before or at the time of the theft and in order to steal. There was clearly an argument that the force was used immediately before the theft, but it was more debatable whether it was used in order to steal, since it could be argued that Eddie tripped up Dan merely to further his purpose of causing violence to the away supporters. Although good candidates addressed the latter point, many did not.

The fraud issues Many candidates were able to explain and apply the elements of the Fraud Act 2006 very accurately and thus gained high marks. By attempting to buy the chocolate from the machine with a foreign coin, Eddie was making implied representations that he intended to pay for it and that he had the means of paying for it, and these representations were clearly false since he knew that they were 'untrue or misleading' [*s.2(2) Fraud Act 2006*], assuming that he realised that he was using the foreign coin. He was clearly dishonest under the ***Ghosh*** principles: he intended 'to make a gain for himself or another' and it was irrelevant that the machine rejected the coin since the offence does not require that the fraud is successful (a point missed by weaker students). Better candidates were also able to explain that, by virtue of *s.2(5)*, a representation can be regarded as made if it is submitted to a machine, for example a vending machine. As pointed out in the 2010 Report, candidates achieving the highest marks were able to provide explanations and definitions which closely mirrored the wording of the *Fraud Act*. Some candidates, instead of arguing fraud in relation to the vending machine, suggested that Eddie could be charged with

fraud by 'pretending to help' Dan and such responses achieved top marks if convincingly argued and explained. Other candidates failed to spot the relevance of fraud, opting instead to argue incorrectly that Eddie was guilty of obtaining services dishonestly, even though it was obvious that he had failed to obtain the chocolate. Others argued that Eddie was guilty of theft, even though there was obviously no appropriation. Such unconvincing arguments seemed to indicate a failure to read and/or reflect accurately on the facts of the problem.

The burglary issues It was disappointing that some candidates failed to address the possible liability of Eddie for burglary, even though the problem stated that the stadium was made of brick with a metal roof and thus gave a strong clue that it was a 'building'. Presumably such candidates assumed that, since Eddie bought a ticket for the match, he could not be a trespasser. This assumption, however, failed to recognise the principle in decisions such as ***Jones and Smith*** that, even if D has permission from the owner to enter a building (in this instance, by buying a ticket to view a spectacle), he will nonetheless enter it as a trespasser if he intends to exceed the scope of the permission, in Eddie's case, by his intention to use violence on supporters. An important issue, referred to above, was whether the stadium constituted a 'building', but since the question stated that it was 'made of brick with a metal roof', this was arguable since it was obviously a permanent structure and human habitation is not required. Candidates who addressed the above issues then correctly argued that Eddie could be charged with burglary on the basis of both *s.9(1)(a)* and *s.9(1)(b)*, the former since it could be argued that he intended, before entering the stadium, to commit GBH, and the latter since he committed theft of the wallet after entry and, possibly, GBH. Credit was also awarded to candidates who argued that Eddie was guilty of *s.9(1)(b)* on the basis of attempted theft by his use of the foreign coin in the vending machine.

Note – as pointed out in the 2010 Report, candidates who deal with theft issues separately from and prior to burglary tend to produce more detailed, and, therefore, better, responses on theft than those who deal with theft in the course of addressing burglary.

Question 2

Candidates were required to address three areas in relation to Colin's possible criminal liability: (i) making off without payment, (ii) criminal damage, and (iii) the defence of intoxication.

The making off without payment issues Many candidates addressed these issues in detail and thus achieved high marks. The *actus reus* elements were that a service had been 'done', that payment for the meal was 'required or expected', and that Colin had made off from the 'spot' where payment was required or expected. The relevant *mens rea* issues were whether Colin knew that payment was required, whether he was dishonest under the ***Ghosh*** rules and whether he intended permanently to avoid payment (***Allen***). Candidates generally correctly argued that Colin was guilty. Many candidates adopted an alternative approach in suggesting that Colin might be guilty of fraud by false representation, under *s.2 Fraud Act 2006*, on the basis that, when Colin ordered the meal, he was representing himself as an honest paying customer, and that, since he later decided not to pay for the meal, the representation became false. Few candidates, however, scored the highest marks on the basis of the fraud argument since most failed to state that the representation must be false when it is made and that, since it was not false when Colin ordered the meal, he could be liable only on the basis of the argument that the representation continued to be 'made' for the whole duration of the meal, so that, when he ultimately decided not to pay, it then became false (see, for example, the pre-Fraud Act authority of ***DPP v Ray***). Some candidates argued both making off and fraud, and were therefore given appropriate credit. Several candidates argued that Colin was guilty of obtaining services dishonestly under *s.11 Fraud Act 2006*, but such candidates, although awarded some credit, did not achieve the highest marks since it was clear that Colin did not obtain the meal *by* a dishonest act, given that,

when he ordered the meal, his intention was to pay for it. Some candidates incorrectly submitted that Colin was guilty of theft, failing to recognise that he formed dishonest intent *after* he had eaten the meal and, therefore, when it was no longer property 'belonging to another'.

The criminal damage issues The question expected candidates to consider whether Colin was liable for basic and aggravated criminal damage. 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). Candidates generally argued, on the basis of ***Morphitis v Salmon***, that the possible scratching of the wheel bolt would not constitute 'damage', since it would not affect its value, but that the consequent reduction in the 'usefulness' of the wheel would be. 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***, recklessness must be subjective. On the facts of the problem, Colin was at least knowingly reckless in relation to impairing the usefulness of the wheel. Indeed, many candidates convincingly argued that, since Colin wanted to 'get his own back' on the owner of the van, he had intention to commit damage. There was also an issue of aggravated criminal damage under *s.1(2) Criminal Damage Act*, although many candidates failed to recognise this. Many of the candidates who did identify the aggravated offence correctly stated that such liability would be established only if Colin possessed the intention or recklessness as to the endangering of the life of another, but few explained that the risk of danger to life must be caused by the criminal damage itself (***Steer***). Better candidates correctly argued that Colin could be so liable since, by loosening the wheel, he presumably would have realised that the van might be unsafe to drive, and that the driver could lose control of the vehicle and be involved in a collision, although the actual endangering of life is unnecessary (***Dudley***).

Note – some candidates wrongly thought that the offence of criminal damage requires dishonesty.

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 only to the former. Unfortunately, candidates often failed to explain that an offence of basic intent is one which includes recklessness within the *mens rea*, whereas one of specific intent does not. On the other hand, many were able to identify the offences of making off and fraud as offences of specific intent, and criminal damage as one of basic intent (without explaining why this is so), and that intoxication only provides a defence to crimes of specific intent where it prevents the formation of *mens rea*. On the facts of the problem, it was arguable that Colin would have been able to form the *mens rea* of making off and fraud since, despite drinking "several glasses of wine", he was able to appreciate that he had no money to pay the restaurant bill. Many students, however, failed to analyse the facts and merely concluded, without explanation, that Colin did, or did not, possess the *mens rea*.

Scenario 2

Question 3

Candidates were required to address three areas: (i) theft and robbery in relation to the mobile phone, (ii) the defence of duress, and (iii) criminal damage in relation to the car windscreen.

The theft and robbery issues Many candidates were able to provide detailed and accurate explanations of the *actus reus* and *mens rea* elements of theft and robbery. The crucial issues, on the facts of the problem, were whether Tom possessed the intention to permanently deprive and whether the phone was 'property belonging to another'. Many students argued that he possessed the intention to permanently deprive on the basis that, by throwing the phone away, he intended to treat it as 'his own to dispose of regardless of the other's rights' for the purpose of *s.6(1) Theft Act 1968*, while others argued that he intended that Luke would never be able to find and recover the phone, and these arguments were credited. Some even suggested that Eddie possessed 'conditional intent' and was thus not liable on the authority of Eassom. Some students, however, did not bother to analyse the facts of the problem at all on this point and merely concluded, with no explanation, that Tom did possess intention, thus scoring lower marks. Better candidates correctly argued that, on the basis of authorities such as ***Turner (No 2)*** and Kelly, the phone belonged to Luke since he had 'possession or control' of it for the purposes of *s.5(1) Theft Act 1968*, and that it was irrelevant that he was not the owner. Weaker candidates, however, incorrectly stated that, since Luke was not the owner of the phone, it could not belong to him. The robbery issues were generally accurately addressed and many candidates correctly reasoned that Tom was guilty since he used 'force', 'immediately before or at the time of the theft' and 'in order to' steal.

The defence of duress Many candidates accurately explained and applied the elements of duress extremely well and thus gained good marks. Students generally argued, correctly, that Tom believed that Fez had threatened him with serious injury by telling him that he would 'end up in hospital' unless he stole from Luke and that, since Fez 'had a reputation for violent conduct', Tom had reasonable grounds for this belief. A further important issue was whether the threat would have caused a person of reasonable firmness to act as Tom did. Authorities such as ***Bowen*** make it clear that the defendant's age and sex must be attributed to the person of reasonable firmness, with the result that it could be argued that a 'reasonable boy aged 17' would have acted as Tom did (or, given Fez's violent reputation, even a reasonably robust adult!). It was unclear on the facts whether there was a reasonable opportunity for Tom to escape the consequences of the threat and whether Tom reasonably believed that Fez would carry out the threat 'immediately or almost immediately' (***Hasan***). An issue which few candidates seemed to address was whether, since Tom worked for Fez, he had voluntarily associated with an obviously violent man and thus disabled himself from relying on the defence.

Note - candidates who discussed the possible liability of Fez for blackmail gained no marks since the question clearly required candidates to discuss the liability of **Tom** and **not Fez** in relation to the mobile phone.

The criminal damage issues The question raised issues of both basic and aggravated criminal damage. In relation to basic criminal damage, many candidates correctly argued that throwing paint on a car windscreen could constitute 'damage', on the basis either that Luke would have to pay money to remove it or that it would reduce the usefulness of the car, and that Fez clearly intended to cause damage. Many candidates failed to identify the possible relevance of aggravated criminal damage, even though it was clearly arguable that Fez was, at least, subjectively reckless as to endangering the life of another, because an obscured windscreen in a crowded street would pose an obvious risk to life. Few candidates, however, explained the rules that there must be intention or recklessness as to the creation of that danger 'thereby', ie by virtue of the damage, but that actual danger to life is not required.

Question 4

Candidates were required to address three areas: (i) theft by Luke in relation to the £300, (ii) fraud by false representation by Luke, and (iii) blackmail by Pierre.

The theft issues 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 Luke formed dishonest intent and, therefore, when the offence of theft was committed. Very few students did so, and this prevented them from explaining and applying the elements with accuracy. The most likely interpretation of the facts was that Luke had formed the dishonest intent at the time that Pierre handed the money over to him, since Luke had already been told by his 'contact' that tickets for the concert were no longer available. If this was the correct interpretation, Luke appropriated the £300 by assuming the rights of an owner by taking possession of it. Many candidates adopted this analysis, and many students gained credit by pointing out that Pierre's consent to handing the money over to Luke did not prevent appropriation taking place (***Gomez, Lawrence***). Many candidates also pointed out that the money was 'property belonging to another' since, immediately before he handed it over to Luke, Pierre had a 'proprietary right or interest' in it [*s. 5(1) Theft Act*]. The second possible, but less likely, interpretation of the scenario was that Luke was initially honest and only formed dishonest intent at some later point, for example when he used the money to pay for a holiday. In order for candidates to score the highest marks on the basis of this analysis, it was necessary for them to explain why they did not consider that Luke was initially dishonest. Better candidates suggested that this was the case on the basis that Luke might have initially honestly thought that he could get tickets from someone other than his 'contact' but later realised that he could not, and then decided to use the money on a holiday. Weaker students, however, merely assumed, without any analysis of the problem, that the theft occurred when Luke used the money to pay for the holiday and thus scored lower marks. A further requirement for students who relied on the argument that theft of the money occurred at the later stage was to explain that the money was 'property belonging to another' only if *s.5(3)* applied, ie if Pierre had handed it over to Luke on the basis that he would be under a legal obligation to use it to 'get the tickets', and many candidates argued this. Unfortunately, many candidates were confused as to the relationship between *s.5(1) and s.5(3)*. In particular, many assumed that Luke was dishonest when Pierre initially handed the money over to him but then proceeded to argue that the money was property 'belonging to' Pierre by virtue of *s.5(3)* and without any reference to *s.5(1)*. On the other hand, some candidates assumed that theft occurred when Luke used the money to pay for the holiday, but asserted that the money was property 'belonging to' Pierre by virtue of *s.5(1)* even though, at that point, he would no longer have a proprietary right in it nor possession nor control. Candidates should remember that if, at the time that D dishonestly appropriates the property in question, it is **either** in the possession or control of V, **or** V has a proprietary right or interest in it, the property belongs to V by virtue of *s.5(1)*, in which case, it is unnecessary to consider *s.5(3)*. On the other hand, if, at the time that D makes a dishonest appropriation**,** V no longer has possession of the property in question nor a proprietary right or interest in it because V had previously handed it over to D, *s.5(1)* cannot apply. Nonetheless, in such a case, even though technically the property is now owned by D, it is fictitiously deemed to belong to V for the purposes of the law of theft if the requirements of *s.5(3)* can be established, with the result that D can be charged with theft.

The fraud by false representation issue Many candidates explained and applied the elements of fraud accurately and in detail, with the result that many candidates scored high marks. Luke clearly made an express 'representation' in assuring Pierre that he would get tickets from his 'contact', and this seemed to be 'false' in that the 'contact' had already told Luke that tickets were no longer available. The representation was therefore 'untrue or misleading' and Luke knew this. Luke was also dishonest on the application of the ***Ghosh*** principles, and he obviously intended to make a gain 'for himself or another', or 'to cause loss

to another or to expose another to a risk of loss', 'gain' and 'loss' meaning 'gain or loss in money or other property' [*s.5(2) Fraud Act*].

The blackmail issues This was the first occasion on which blackmail appeared in the examination, and candidates seemed to produce competent or better responses. The question required candidates to consider whether Pierre had 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', although only stronger candidates addressed the meaning of 'unwarranted'. There was clearly a demand for repayment of the £300 by Pierre. 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 he would probably not want his marital relationship ruined. The central issue was whether Pierre's demand with menaces was 'unwarranted', which it would be only if Pierre made the demand in the belief either that he did not have reasonable grounds for making the demand and/or that the menaces were not a proper means of reinforcing the demand. The test here is what was Pierre's **actual belief** – did he believe that he had reasonable grounds for making the demand, and did he believe that the use of menaces was proper? Given that Pierre had been "ripped off" by Luke, the former would clearly believe that he had reasonable grounds for making the demand. A more difficult issue was whether it could be said that Pierre acted in the belief that the threat was a proper means of reinforcing the demand. The question to ask is whether D in fact believed that what he threatened to do was morally or socially acceptable according to the general standards of society (see for example, ***Harvey***). This was obviously a question of fact.

SECTION B (TORT)

Scenario 3

Question 5

This tort question involved two areas: (i) the possible liability of Galid to Fred, and of Fred to Galid and his guests, in the tort of private nuisance and (ii) the possible liability of Galid to Will under the rule in ***Rylands v Fletcher***.

The nuisance claim The majority of students attempting this question were able to define accurately the tort of private nuisance as 'the unreasonable interference with the use and enjoyment of land' and to identify the various factors referred to in the facts of the problem which were relevant in determining whether the noise generated by Galid's late-night parties constituted an unreasonable interference with Fred's use and enjoyment of his land. As many candidates successfully argued, the important features were the locality factor (Fred's house was in 'a quiet village') and frequency (the parties were held every Saturday), although only the best candidates were able to explain that the test of annoyance and unreasonableness is an objective one – would the hypothetical ordinary, sober and sensible person consider the defendant's activities excessive? – see, for example, ***Heath v Mayor of Brighton***. Moreover, candidates generally failed to explain that, in applying the 'unreasonableness factors', the court has to balance the conflicting interests of neighbouring owners, namely the right of a landowner to use his land as he pleases, as opposed to the right of his neighbour not to have his use and enjoyment interfered with (although many better candidates **did** explain this important point). So far as Fred's possible liability for the fires and smoke was concerned, his malice and deliberate intent to cause significant annoyance was a very strong factor in pointing to his liability, especially since Fred lit fires whenever Galid held his parties. Many candidates correctly referred to ***Christie v Davey*** and ***Hollywood Silver Fox Farm v Emmett*** as authorities regarding the significance of malice (these authorities are also important in showing that malice alone can convert an otherwise lawful act into a private nuisance – candidates might also wish to consider that the unfortunate defendants were liable even though it was the claimant who 'started it'!). Unfortunately, many candidates failed to consider whether the guests at Galid's parties could bring a private nuisance claim against Fred for the fires and smoke (they could not, since a claim in private nuisance can be brought only by a person with a proprietary interest in land, which a guest does not have – see ***Hunter v Canary Wharf***). Many candidates, however, correctly considered whether Fred might be liable to Galid and the guests in public nuisance, on the basis that they might constitute a section of the public and that they might have suffered 'special damage' over and above other members of the public, eg in the form of health problems caused by the smoke. Such responses were credited. Many candidates also considered the possible remedies available. Damages for loss of value of the land are recoverable, but, where the nuisance involves a continuing interference with amenity, the court will often grant an injunction restraining the interference. Many candidates were able to explain that the grant of an injunction is based on the court's discretion and is a flexible remedy. For example, the court may grant an injunction preventing all of the defendant's nuisance activities, or merely some of them (see, for example, ***Kennaway v Thompson***).

The *Rylands v Fletcher* claim Candidates were generally able to explain and apply the main elements of the tort (a 'thing likely to do mischief if it escapes', accumulation, escape and non-natural user), but few candidates were able to provide these explanations in any depth, and many responses resembled a list. In particular, many students did not understand the vital requirement of non-natural user, often confusing it with the wholly distinct requirement that the Rule will not apply to a 'thing' which is naturally on the land and which has not been brought onto it. The essence of non-natural user involves the taking of an excessive and unreasonable risk, for example, the storing water in large quantities, as in

Rylands v Fletcher itself, or the accumulation of large quantities of combustible materials (see, for example, ***Transco v Stockport***, in which Lord Bingham said that a non-natural use of land is one which is 'extraordinary and unusual'). Many candidates correctly explained that damage caused by an escape must be reasonably foreseeable, otherwise it will be too remote and irrecoverable (the ***Cambridge Water*** case).

Question 6

Candidates were required by this question to address two areas: (i) the possible liability of Abbass to Galid for negligent misstatement, and (ii) the possible liability of Electrofix to Galid for product liability.

The negligent misstatement issues Many students correctly began by explaining the generally restrictive approach of the law to allowing claims for economic loss in the tort of negligence, one of the main exceptions being a claim for pure economic loss caused by a negligent misstatement. A central feature of the problem was whether Abbass owed a duty of care to Galid in the giving of his advice under the principles as originally established in ***Hedley Byrne v Heller***, and as developed in later authorities, in particular ***Caparo v Dickman***. Most candidates displayed a competent understanding of these principles and many responses were excellent. According to ***Hedley Byrne*** and later authorities, D owes a duty of care to C in the making of a statement (assuming there is no contract between them) 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, and (iv) it was reasonable for C to rely on it. As regards element (i), candidates correctly considered whether a 'retired builder' could be considered an expert and also whether the fact that Abbass was not a professional advisor was of relevance. On the latter point, some candidates also correctly explained that, according to ***Lennon v Metropolitan Police***, the maker of the statement does not have to be in the business of giving advice (in Lennon, for example, the giver of the advice was a personnel officer). Some students also considered the scenario in ***Chaudhry v Prabhakar***, which suggested that advice given by a friend might give rise to a duty. Requirement (ii) was clearly satisfied since Galid had asked Abbass to advise him specifically about the damp problem and, moreover, Abbass must have realised that Galid would follow whatever advice he gave. Whether it was reasonable for Galid to rely on Abbass's advice would depend on all the circumstances. Many responses correctly suggested that it would not normally be reasonable to rely on advice given in a purely social situation but it could be argued that, although the question tells us that the parties were friends, the advice was given in a business context, given the expense involved. Several candidates correctly pointed out that some decisions (eg ***White v Jones***) hold that the maker of the statement must assume responsibility for the accuracy of his statement and credit was given for this. In addition to addressing the issue of whether a duty of care arose, candidates were expected to explain the standard of care required of Abbass and whether in the circumstances it was likely or not that he had met that standard, eg would the standard of care expected be affected by the fact that Abbass was a 'retired' builder? In relation to the remedy available, it was merely necessary for candidates to identify that Galid could recover damages for his loss, and that this is one of the areas where economic loss can be recovered in tort, although candidates who addressed the issue of measure of damages received credit.

The product liability issues 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*. 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. Many candidates showed a good understanding of the principles governing the duty owed by the manufacturer of the product (reasonable foreseeability, proximity, etc) and the scope of persons to whom the duty is owed, for example, a purchaser of the product (eg ***Grant v Australian Knitting Mills***), a consumer or user of the product (eg ***Donoghue v Stevenson***) or any other person who foreseeably incurs damage (eg a member of the public who is hit by a defective wheel which breaks loose from a car). Candidates were also able to show a competent or better understanding of the general negligence principles governing breach of duty (eg magnitude of the risk, likelihood of harm, etc). Many candidates also referred to the difficulty which a claimant may face in proving negligence on the part of the manufacturer, and the importance of the doctrine of *res ipsa loquitur* which may lead the court to 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, Galid could obviously establish personal injury.

Many candidates chose to deal with product liability on the basis of the principles in the *Consumer Protection Act 1987*. In general, answers showed at least a competent understanding of the elements of the statutory claim ('product', 'defective', and 'producer'), and some candidates were able to provide a very detailed knowledge of the provisions. Candidates also generally recognised that the defective product must cause 'damage', which is defined in the Act to include the death or personal injury of the claimant or damage to his property, but excluding damage to the defective product itself [see *s.5(1)* and *s.5(2)*]. Some candidates referred to the "development risks" defence and were rewarded for this. So far as the remedy available to Galid was concerned, it was sufficient for candidates to identify damages, but without any elaboration as to measure of damages. Candidates were rewarded for referring to relevant authorities on the Act. Unfortunately, many candidates failed to realise that liability under the Act is strict and not based on negligence, although others did appreciate this important point.

Scenario 4

Question 7

The question required a consideration (i) of the *Occupiers' Liability Act 1957* (and/or general negligence principles) in relation to the possible liability of Karl to Yvonne and (ii) of the *Occupiers' Liability Act 1984* in relation to Karl's possible liability to Matt.

The OLA 1957 issues Answers to this question were generally disappointingly weak**.** Most candidates were able to explain the meaning of 'occupier', 'visitor' and 'the common duty of care', but few were sufficiently able to consider the application of the common duty of care in relation to Yvonne. Given that the premises (the club and its facilities, ie the exercise bike), were clearly not reasonably safe for the purposes for which visitors were invited to be on the premises (ie using the bike for exercise), it was necessary to consider whether Karl, as occupier, had used reasonable care to see that the premises were reasonably safe. Since the faulty fixed exercise bike had recently been "installed and checked by a specialist firm engaged by Karl", it was necessary 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 did consider this provision and some went on to examine whether the occupier would be negligent if he

had failed to check whether the contractor's work had been carried out properly, citing authorities such as ***Woodward v Mayor of Hastings*** and ***Haseldine v Daw***. Many candidates, however, failed to deal with this aspect of the Act. Some candidates, having recognised the relevance of the *OLA 1957*, considered whether Karl would be liable on the basis of general negligence principles (eg the degree of risk involved, practicability of precautions, etc), and such responses were credited. Some students, considered whether the independent contractors might be liable to Yvonne in product liability, but such responses were not credited since the question clearly required candidates to consider the liability of Karl, and not the contractors.

The OLA 1984 issues Unfortunately, some candidates assumed that, since Matt was a club member, he was a visitor when he entered the swimming pool area, and thus took the view that the scenario was governed by the *OLA 1957*. Since, however, Karl's sign on the door to the swimming pool stated "No entry", Matt was a trespasser in that he clearly did not have Karl's permission to enter. Matt's position was thus governed by the *OLA 1984* and not by the 1957 Act. Unfortunately, candidates who did recognise that the *OLA 1984* was relevant were often unable to show more than a vague knowledge of its provisions. Candidates attempting questions on the *OLA 1984* should have an accurate knowledge of when the duty of the occupier arises and the nature of the duty. First, it is clear from *s.1(1)* that the duty arises only where the trespasser is injured 'by a danger due to the state of the premises' with the result that, if a trespasser is injured, not by a danger due to the state of the premises, but due to his own foolishness, the duty will not arise. Moreover, the effect of *s.1(3)* is that the duty will arise only if the occupier knows 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. By virtue of *s.1(4)*, the duty owed by the occupier is to take reasonable care to see that the trespasser does not suffer injury on the premises because of the danger. On the facts of the question, there was clearly a danger due to the state of the premises, since the support structure of the diving board was defective, leading to its collapse. The vast majority of candidates relying on the Act then correctly reasoned that Karl had reasonable grounds to believe that the diving board was defective (since members had complained about it), although it was questionable whether Karl had reasonable grounds to believe that a member of the club would ignore the warning on the door. Many candidates argued correctly that, in any event, Karl could be considered to have discharged his duty under the Act by taking reasonable steps to give warning of the danger or by discouraging persons from incurring the risk *(s.1(5)*. Some candidates argued, in any event, that Matt could be said to be contributorily negligent and credit was given for this. By way of a final comment, candidates displayed little evidence of relevant authority on this area (see, for example, ***Scott v Associated British Ports***, ***Tomlinson v Congleton BC***, ***Keown v Coventry NHS Trust*** and ***Platt v Liverpool Council***).

Question 8

This question raised two areas: (i) the possible liability of Dr Casey to Karl on the basis of medical negligence, and (ii) the possible liability of Dr Casey to Becca and Liz for psychiatric injury.

The liability of Dr Casey to Karl Candidates were obviously required to explain and apply principles of negligence, with particular reference to medical professionals. A hospital doctor's duty of care to a patient can be established on the basis of the ***Donoghue v Stevenson*** principle of reasonable foreseeability of harm. In relation to breach of duty and the relevant standard of care, 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, it was necessary to examine the rules in ***Bolam v Friern***

Hospital Management Committee, and although many candidates were able to explain the relevance of the standard of the hypothetical 'ordinarily competent' member of the medical profession, very few went on to consider a further aspect of Bolam, that if a doctor acts in accordance with a practice which is approved by doctors or some of them, it is unlikely that the court will find him negligent, even if a different practice is followed by other doctors. Many candidates also failed to refer to the principle in ***Bolitho*** that, if an established medical practice does not have a 'logical basis' and involves unreasonable risk, the court may find a doctor who observes that practice negligent. On the facts of the problem, it would seem that Dr Casey, in failing to stitch Karl's wound properly, would be held to be negligent. Some candidates referred to the importance of *res ipsa loquitur* in this context, and this was credited. Candidates were expected to explain and apply the 'but-for' test of causation in relation to Dr Casey and to explain that the harm to Karl was not too remote on the basis of the ***Wagon Mound*** test. Regarding the remedy available, it was sufficient merely to identify damages although candidates who discussed measure of damages were given credit.

Note - some candidates discussed whether the hospital which employed Dr Casey would be liable to Karl on the basis of vicarious liability. Such a discussion received no credit since the question clearly required candidates to consider the liability of Dr Casey himself and not the hospital. This highlights the principle that candidates should read the questions carefully.

The liability of Dr Casey to Becca and Liz Many candidates achieved high marks in answering this question, which raised the issue of Dr Casey's possible liability in the tort of negligence for the possible psychiatric injury suffered by Becca and Liz. The first issue was whether Becca and/or Liz were primary or secondary victims. Most candidates correctly argued that Becca was a secondary and not a primary victim, since she would not have reasonably feared for her own safety, given that she was not at risk of physical harm herself and was merely a witness to the incident involving Karl. Several candidates, however, displayed a confused understanding of this distinction. For example, some incorrectly argued that she was a primary victim since she was 'directly involved in the incident', or since she was 'at risk of suffering **psychiatric** injury', thus failing to recognise that a primary victim is one at risk of reasonably foreseeable **physical** harm. Having identified Becca as a secondary victim, it was then necessary to explain that, in order to establish the duty of care, she would have to prove the various 'control factors' as established in ***McCloughlin v O'Brian*** and developed in ***Alcock v Chief Constable of South Yorkshire***. To begin with, she would have to show that they had suffered a 'recognised psychiatric illness' (eg post-traumatic stress disorder) and not merely anxiety or grief, that this illness was caused by a traumatic event or an 'assault on the senses' (***Sion v Hampstead Health Authority***) and that it was reasonably foreseeable that the person of 'normal fortitude' would suffer shock . The nature of her illness would obviously depend on the circumstances but it was at least arguable that the incident in the hospital would have been sufficiently traumatic to the person of normal fortitude. It would also be necessary for Becca to prove the various aspects of 'proximity'. It is arguable that, as Karl's fiancée, she was in a close loving relationship with him (although this would depend on the evidence), and it was clear that she witnessed the traumatic event itself and not merely its aftermath, and that she witnessed it with her own 'unaided senses'. It was therefore arguable that Becca's claim would succeed, as many candidates reasoned. The difficulty which Liz would face in seeking to establish a claim is that, since she learned of the incident involving Karl by Becca's telephone call, she would not be able to show that she had suffered injury by seeing or hearing the traumatic event or its immediate aftermath. As Lord Ackner said in ***Alcock***, the illness must be caused by 'sudden appreciation by sight or sound of a horrifying event which violently agitated the mind'.

Note - it was strictly necessary for candidates to consider whether Dr Casey had committed a breach of duty in relation to Becca, but candidates generally argued that, if the doctor was negligent in relation to Karl, he was also negligent in relation to Becca, and this approach

was acceptable. As pointed out above, in dealing with the remedies available to Becca, it was sufficient to identify damages without elaboration.

SECTION C (CONCEPTS)

Question 9

Candidates were asked to discuss the meaning of justice, to analyse critically the extent to which the law is successful in achieving justice and to discuss the difficulties which it faces in seeking to do so. Many candidates were able to display a good 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 and 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. Better candidates showed excellent understanding of their selected ideas of justice by illustration and/or evaluation of them, although weaker candidates produced very basic and undeveloped arguments.

The second part of the question required candidates to discuss the extent to which the law is successful in achieving justice, and, although there were many excellent responses on this aspect of the question, responses were often weak. Candidates 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, 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, Anthony 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. Many candidates 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. Many candidates also referred 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). 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 in the same way) 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. Nor did examples which showed a lack of morality rather than injustice.

The final part of the question required candidates to discuss the difficulties which the law faces in seeking to achieve justice and, although good candidates addressed this issue,

many did not and thus failed to achieve the highest marks. The best candidates referred, for example, to the problems in providing access to justice (in particular, cost and legal aid issues), and the difficulty in educating the public on the existence of schemes which may help them to gain legal advice, etc. A failure to provide access to justice for all, of course, is a significant injustice in failing to provide equality of opportunity. A further problem is that it is often difficult for the law to provide justice to everyone. In particular, a law based on a utilitarian approach may provide justice for the majority, but may fail to provide it to individuals, for example, in the case of anti-terrorism laws.

Question 10

Candidates were required to consider the view that there is a close relationship between law and morality, to examine the debate as to whether the law **should** reflect moral values and to discuss issues which show the continuing importance of that debate. Candidates generally attempted the first aspect of the question by considering the possible meanings of law and morality and by referring to relevant examples/authorities to illustrate areas of overlap and divergence, and there were many good answers on this aspect. Examples of overlap referred to included murder, offences of dishonesty, conspiracy to corrupt public morals, the principle that contracts should be observed, the ***Donoghue v Stevenson*** 'neighbour principle', the influence of the campaigns in changing public opinion on the repeal of the capital punishment laws, and the influence of laws on altering moral views (eg anti-discrimination legislation), etc. Good candidates also discussed the problems of legislators in identifying a clear moral view in many situations, due to the extremely pluralistic nature of modern society, with the result that many laws seem to be based on principles other than morality, in particular, utilitarianism, the idea of individual autonomy and the harm principle. In this context, able students often used examples such as ***Gillick***, ***Bland*** and ***Re A*** as showing that the autonomy of the individual often takes priority over moral principles. On the other hand, weaker students often produced less convincing arguments by failing to identify the moral principles involved in their discussion.

The second part of the question required candidates to examine the debate as to whether the law **should** reflect moral values. Most candidates were aware of the various views which contributed to this debate, in particular the recommendations of the Wolfenden Report and the opposing views of the 'legal moralists', in particular, Devlin (in 'The Enforcement of Morals') on the one hand, and those of the 'liberal individualists' on the other, in particular, Hart and Mill (in this context, candidates should not confuse the theorist John Stuart Mill with the late film actor, Sir John Mills!) However, many candidates failed to examine these arguments in any depth, often stating merely that Devlin thought that law should reflect morality and that Hart and Mill took the opposite view, thus scoring low marks. On the other hand, students who were better prepared discussed the arguments in greater detail.

Candidates were also required to discuss issues which show the "continuing importance" of the debate as to whether law should reflect morality. Many candidates attempted to address this aspect of the question by referring to issues such as assisted suicide, euthanasia, the defence of consent, eg ***Brown***, withholding medical treatment (eg ***Bland***), medical processes and research (eg the 'saviour sibling' issues), etc, but many responses were very superficial and only the best candidates were able to provide developed arguments which clearly analysed the competing issues involved, for example, the sanctity of life and the autonomy of the individual, and related these to the law-morality debate. Some candidates were able to refer to very topical examples such as ***Black and Morgan***, the gay couple turned away by Christian owners of a guest house, or ***Eunice and Owen Johns***, the Christian couple banned from being foster parents because of their views on homosexuality, and to relate these examples to the broader debate. Many candidates also discussed the relevance of the conflict between natural lawyers and positivists, and were awarded credit for this.

Question 11

Candidates were required to analyse critically the extent to which judges are able to develop the law through the operation of the doctrine of judicial precedent and in the interpretation of statutes. 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 judicial development (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 developing the law than lower courts. Candidates should note that they should provide illustration of judicial development in action (for example, Herrington v BRB and G 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.

Whereas the responses on the precedent aspect of the question were good, those relating to statutory interpretation were generally poor, containing little detail, illustration or evaluation.

The second aspect of the question required candidates to consider whether judges **should** be able to develop the law and many candidates 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 and that the traditional role of judges is merely to 'declare' the law. Many candidates also cited the views of judges on this issue (for example, Lord Reid, Lord Devlin and Lord Denning) and those of academic writers (for example, Dworkin), and discussions of this nature were credited. Some weaker responses ignored the first part of the question altogether and merely considered whether judges should develop the law, and others talked very narrowly about judges being creative through sentencing in criminal cases. Neither approach merited high marks.

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.

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