

A-LEVEL

Law

LAW04/Unit 4 Criminal Law (Offences against Property) or Tort,
AND Concepts of Law
Mark scheme

2160
June 2015

Version 1.0: Final

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

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

Further copies of this Mark Scheme are available from aqa.org.uk

Assessment Objectives One and Two

General Marking Guidance

You should remember that your marking standards should reflect the levels of performance of students, mainly 18 years old, writing under examination conditions. The Potential Content given in each case is the most likely correct response to the question set. However, this material is neither exhaustive nor prescriptive and alternative, valid responses should be given credit within the framework of the mark bands.

Positive Marking

You should be positive in your marking, giving credit for what is there rather than being too conscious of what is not. Do not deduct marks for irrelevant or incorrect answers, as students penalise themselves in terms of the time they have spent.

Mark Range

You should use the whole mark range available in the mark scheme. Where the student's response to a question is such that the mark scheme permits full marks to be awarded, full marks must be given. A perfect answer is not required. Conversely, if the student's answer does not deserve credit, then no marks should be given.

Citation of Authority

Students will have been urged to use cases and statutes whenever appropriate. Even where no specific reference is made to these in the mark scheme, please remember that their use considerably enhances the quality of an answer.

Assessment Objective Three

QUALITY OF WRITTEN COMMUNICATION

- Level 3** Moderately complex ideas are expressed clearly and reasonably fluently, through well-linked sentences and paragraphs. Arguments are generally relevant and well structured. There may be occasional errors of grammar, punctuation and spelling.
4-5 marks
- Level 2** Straightforward ideas are expressed clearly, if not always fluently. Sentences and paragraphs may not always be well connected. Arguments may sometimes stray from the point or be weakly presented. There may be some errors of grammar, punctuation and spelling, but not such as to detract from communication of meaning.
2-3 marks
- Level 1** Simple ideas are expressed clearly, but arguments may be of doubtful relevance or be obscurely presented. Errors in grammar, punctuation and spelling may be noticeable and intrusive, sufficient to detract from communication of meaning.
1 mark
- Level 0** Ideas are expressed poorly and sentences and paragraphs are not connected. There are errors of grammar, punctuation and spelling, such as to severely impair communication of meaning.
0 marks

Maxima for Substantive Law questions

Mark bands (3 potential content) – list of maximum marks

25	two sound, one clear
23	two sound, one some or one sound, two clear
21	two sound or one sound, one clear, one some or three clear
19	one sound, one clear or one sound, two some or two clear, one some
17	one sound, one some or two clear or one clear, two some
14	one sound or one clear, one some or three some
13	two sound explanation only
11	one clear or two some
09	one sound explanation only or two clear explanation only or three some explanation only
07	one some or one clear explanation only or two some explanation only
05	one some explanation only
04	fragments or substantial error/incoherence
00	completely irrelevant

Mark bands (2 potential content) – list of maximum marks

25	two sound
23	one sound, one clear
20	one sound, one some or two clear
17	one sound or one clear, one some
13	one clear or two some or two sound explanation only
11	one sound explanation only or two clear explanation only
08	one some or one clear explanation only or two some explanation only
06	one some explanation only
05	fragments or substantial error/incoherence
00	completely irrelevant

Note:

In substantive law questions, the two components are explanation and application. The references above to explanation only are to be understood as explanation without application. The quality of treatment of these two components, in combination, determines whether the treatment overall for that PC element is sound, clear or some. In determining the overall quality of treatment, descriptions of the quality of treatment of the individual components should be combined as follows:

sound/sound	- sound
sound/clear	- weak sound
sound/some	- clear
clear/clear	- clear
clear/some	- weak clear
some/some	- some

Descriptors for Substantive Law questions

Level	Description
Sound	Accurate and comprehensive explanation and application, so that the answer reveals strong knowledge and understanding of the correct (or sustainable) analysis, leading to satisfactory conclusions. There may be some omission, error, or confusion but it will be insufficient to undermine the basic characteristics of the answer.
Clear	<p>Broadly accurate and relatively comprehensive explanation and application, though a little superficial in either or both and with some error and/or confusion that begins to affect the quality of the analysis.</p> <p>Or</p> <p>Accurate explanation and application over a narrower area, omitting some significant aspect(s) of the analysis, so that an answer emerges which reveals knowledge and understanding of the broad framework of the analysis, or of some of its detailed aspect(s).</p>
Some	<p>Explanation and/or application in relation to relevant aspects but characterised by significant omissions and/or errors and/or confusion.</p> <p>Or</p> <p>Explanation (including definitions of relevant offences/defences) and/or application which is generally accurate but confined to a limited aspect, so that, at best, a very superficial or partial analysis emerges.</p>
Fragments	<p>Isolated words or phrases, including case names and statutes, which have potential relevance but remain entirely undeveloped.</p> <p>Or</p> <p>Mere identification of relevant offences/defences.</p>

Use of case authority

1. It is usually sufficient to associate a relevant case with an explained/applied rule. Further explanation of cases is required only where necessary to elucidate the rule or its application.
2. An answer in relation to any PC should not be described as 'sound' unless some relevant authority appears, where appropriate. However, where there is appropriate use of authority in relation to the other PC(s) in the mark scheme for the question, an answer in relation to a PC where no authority appears may be given a 'lower' sound (the student will have demonstrated ability to use appropriate authority at some point in the answer to the question, albeit not in the element at issue).

Section A Criminal Law (Offences against Property)

- | | |
|---|---|
| 0 | 1 |
|---|---|
- Discuss Roz's possible criminal liability for
- property**
- offences arising out of her dealings with Nick
- and**
- in connection with the umbrella.

[25 marks]

Potential Content

- (A) Discussion of making off without payment issues
- Making off (has she made off?), the spot, service done, payment required or expected.
 - Mens rea issues: intention to permanently avoid payment, knowledge that payment was required or expected, dishonesty.

Note **SOUND** requires a generally accurate knowledge of the terminology of s.3 Theft Act 1978

Note – theft of the meal only – **MAX SOME** (but should conclude that no liability). Can enhance a discussion of making off.

- (B) Discussion of fraud by false representation issues in relation to Roz's statement to Nick
- Representation – in this instance, either Roz's express representation that she had paid or her implied continuing representation as to payment
 - Falsity (statement must be untrue or misleading and D must know that it is or might be)
 - Dishonesty (Ghosh), intention to make a gain and/or cause a loss, the meaning of 'gain' and 'loss.'

Note SOUND requires a generally accurate knowledge of the terminology of the Fraud Act 2006

Note Dishonestly obtaining services issues (the meal) – should conclude that there is no liability because no dishonesty until after the services are obtained

Note Fraud only – **MAX SOUND**

Obtaining services only – **MAX SOME** (since the offence was obviously not committed, given that the service – the meal – was not obtained BY a dishonest act)
 Fraud and obtaining services – **MAX SOUND** (allow for a less detailed coverage of fraud than a response addressing fraud only, provided the obtaining of services offence is correctly concluded)

- (C) Discussion of theft issues in relation to the umbrella

The facts suggest two alternative possibilities - either that the owner of the umbrella had **lost/mislaid** it or that he had **abandoned** it as it was 'old and battered'

MAX SOUND can be achieved by a consideration of the elements as they apply to **EITHER** or **BOTH** of these two possibilities

On the assumption that the umbrella was lost/mislaid – appropriation, property, belonging to another (the owner would still retain a 'proprietary right or interest'.

Intention permanently to deprive (on the basis of Roz knowingly risking the loss of the umbrella), dishonesty (Roz would not be dishonest if she believed that the owner could not be traced by taking reasonable steps - s.2(1)© Theft Act)

On the assumption that the umbrella was abandoned by the owner - appropriation, property, belonging to another (students should be credited for arguing either that the property belonged to no one or that it belonged to Nick as being in his possession or control).

Intention permanently to deprive (if Roz believed the umbrella was abandoned and ownerless, she would not possess the intention), dishonesty (if Roz believed the umbrella as abandoned, she would not be dishonest under Ghosh).

Note- a discussion based on the umbrella 'belonging to' Nick, as being in his 'possession or control' can be awarded MAX SOUND

Note – discussion of basic criminal damage to the umbrella only resulting from Roz throwing it into the stream - MAX SOME.

Discussion of theft of the umbrella + criminal damage - MAX SOUND

(AO1 = 10; AO2 = 15)

0 2 Discuss Roz’s possible criminal liability for **property** offences in relation to Dale’s house and his watch.

[25 marks]

Potential Content

(A) Burglary issues

- (1) Discussion of entry as a trespasser into the kitchen/building’ (including accurate explanation and application of actus reus and mens rea of trespass)
- (2) Discussion of entry as a trespasser into the living room (part of a building)
- (3) S.9(1)a re the living room (conditional intent to steal)
- (4) S.9(1)(b) re the living room (actual theft)

SOUND – requires (1) – (4)

CLEAR – requires any THREE including (2)

WEAK CLEAR - requires a combination of (1) or (2) + (3) or (4) but In order to gain the MAX in connection with s.9(1)(a) , it has to be accurately related to (1) or (2) eg if trespass into the house is relied on, s.9(1)(a) cannot apply as Roz intended to steal only after entry into the kitchen.

(B) Theft issues in relation to the watch

- Actus reus: appropriation (based on touching), property, belonging to another
- Mens rea: intention to permanently deprive (sufficient that Roz possesses initial intent), dishonesty (Ghosh).

Note – answers can rely on explanations of elements of theft given in Question 01, but should specifically address the issues raised in relation to the watch.

(C) Consideration of the defence of duress

- The nature of the threat (death/serious personal injury? – the possible meaning of “suffer”)
- Threat to a person for whom Roz reasonably feels responsible (her family). The scope of the threat (what does “valuables” cover?)
- The subjective element (did Roz reasonably believe that there was a threat of death or serious injury and that it would be carried out immediately or almost immediately? – consideration of Al’s statement to Roz that he would be “watching her very carefully”)

- The objective element – would a sober person of reasonable firmness, sharing Roz’s characteristics, have been able to resist the threat?
- Did Roz have a reasonable opportunity to enable her family to avoid the harm?
- The effect of Roz’s previous voluntary association with AI arising from her purchase of drugs.

(AO1 = 10; AO2 = 15)

- 0 3** Discuss Dave's possible criminal liability for **property** offences arising out of his dealings with Tom **and** his activities in connection with Tom's shop.

[25 marks]

Potential Content

(A) Blackmail issues

- Demand
- Menaces (importance of the objective test)
- With a view to gain or with intent to cause loss; the meaning of 'gain' and 'loss'
- Unwarranted demand: consideration of Dave's belief as to reasonable grounds for making the demand (arguable since Dave believed he was entitled to a refund) and that the use of menaces was a proper means of reinforcing it (unlikely since Dave surely realised he was threatening a criminal act).

Note **SOUND** requires, in relation to 'unwarranted', a generally accurate reference to the terminology of s.21(1) Theft Act 1968 and a generally accurate explanation of the meaning of the terms 'reasonable grounds' and 'proper means' (eg a consideration of **Harvey**), together with arguable application.

(B) Burglary issues

- Entry
- Building
- Trespass (absence of permission to enter the shop and mens rea)
- Consideration of s.9(1)(a) Theft Act 1968 on the basis of conditional intention to steal
- Consideration of s.9(1)(b) Theft Act 1968 on the basis of actual theft.

Note s.9(1)(a) or s.9(1)(b) only – **MAX CLEAR**

(C) Theft issues in relation to the bracelet

- Actus reus: appropriation, property, belonging to another (possession or control of Tom sufficient).

Note credit a consideration of theft in relation to the owner of the bracelet.

- Mens rea: intention to permanently deprive, dishonesty (**Ghosh**).

Robbery issues

- Robbery issues in relation to Dave's threat to Ahmed. Threat of force 'then and there'.
- Was the threat made in order to steal and immediately before or at the theft (given that Dave spent 'a few moments' searching the shop)? [delete -Was there a continuing appropriation?]

Note Theft and robbery – **MAX SOUND**

Note Theft only – **MAX CLEAR**

(AO1 = 10; AO2 = 15)

- 0 4** Discuss Dave's possible criminal liability for **property** offences arising out of his dealings with Wendy **and** Wendy's possible criminal liability in connection with the scaffolding. **[25 marks]**

Potential Content

(A) Fraud by false representation issues in relation to Dave's promise to Wendy

- Representation and its different versions (express/implied, as to fact/law/state of mind – in this instance representation as to Dave's state of mind/intention to pay)
- Falsity (statement must be untrue or misleading and Dave must know that it is or might be)
- Dishonesty (**Ghosh**), intention to make a gain and/or cause a loss, the meaning of 'gain' and 'loss'.

Note In relation to dishonesty, credit the argument that Dave might think his conduct justified, in view of what he sees as unjust treatment by Wendy's friend, Tom.

Note **SOUND** requires a generally accurate knowledge of the terminology of the Fraud Act 2006.

(B) Obtaining services by a dishonest act

- Actus reus issues: obtain, services, made available on the basis of payment, 'by' a dishonest act (satisfied since Dave intends not to pay Wendy in full from the time of the agreement), failure to pay in full
- Mens rea issues: knowledge at the time of obtaining that services are made available on the basis of payment, intention that payment will not be made in full.

Note In relation to dishonesty, credit the argument that Dave might think his conduct justified, in view of what he sees as unjust treatment by Wendy's friend, Tom.

Note **SOUND** requires a generally accurate knowledge of the terminology of s.11 Fraud Act 2006.

(C) Criminal damage issues

- Basic criminal damage. The meaning of 'damage'.
- Mens rea issues (obvious intention on the facts)
- Possible aggravated criminal damage issues. Intention/recklessness to cause any damage and intention/recklessness to endanger life by such damage. No requirement that life should be in fact endangered.

Note In relation to aggravated criminal damage (where dealt with), the explanation and application should address the issue that there must be an intention or recklessness to endanger life by such damage, ie by virtue of the damage which was intended or as to which Wendy was reckless and not by virtue of the act which caused the damage.

- Consideration of the defence of intoxication
- Recognition of voluntary intoxication

- Distinction between specific/basic intent crimes, both in relation to the test for distinguishing them and the consequences of the distinction (voluntary intoxication only a defence to crimes of specific intent). Are the mental elements negated?

Note In relation to voluntary intoxication and the test for distinguishing offences of basic and specific intent, any of the various tests recognised by the authorities should be credited (eg the view that an offence of specific intent is one which is based on intention only and cannot be committed recklessly, and/or the view in *Heard* that an offence of specific intent is one of ulterior intent in that any part of the mens rea goes beyond the actus reus).

Note Basic and aggravated criminal damage and intoxication – **MAX SOUND**

Note Basic criminal damage and intoxication (no aggravated criminal damage) – **MAX CLEAR**

Note Basic and aggravated criminal damage (no intoxication) – **MAX CLEAR**

Note Basic criminal damage only – **MAX WEAK CLEAR**

(AO1 = 10; AO2 = 15)

Section B Tort

0 5 Consider the rights and remedies, if any, of:

- Mario against Cheryl
- Omer against Cheryl
- Serena against Cheryl.

[25 marks]

Potential Content

(A) In relation to Cheryl's possible liability to Mario using OLA 1957

- Explanation and application of the elements of the Occupiers' Liability Act 1957 (occupier, visitor, the common duty of care)
- Explanation and application of the elements of s.2(4)(b) – was it reasonable for Cheryl to entrust the garden design work to an independent contractor? Did Cheryl take reasonable steps to see that the garden designer was competent?
- Was Cheryl under a duty to see that the designer's work was properly done?
- Explanation and application of the elements of s.2(3)(b) - but is the risk of falling rocks 'ordinarily incident to' the 'calling' of a 'handyman'?
- Possible reference to damages (credit a consideration of the different categories of damages, eg loss of future earnings, pain and suffering, etc.)

Note SOUND requires a generally accurate knowledge of the terminology of the OLA 1957

Note Consideration of the above elements including s.2(4)(b) **and** s.2(3)(b) – **MAX SOUND**

Note Consideration of the above elements including s.2(4)(b) but **no s.2(3)(b)** – **MAX CLEAR**

Note Consideration of the above elements including s.2(3)(b) but **no s.2(4)(b)** – **MAX CLEAR**

In relation to Cheryl's **possible alternative liability to Mario in common law negligence**:

- Duty of care, consideration of whether Cheryl fulfilled her duty of care by engaging an apparently competent contractor to carry out the garden design work
- Breach of duty
- Remoteness
- Possible reference to damages (credit a consideration of the different categories of damages, eg loss of future earnings, pain and suffering, etc.)

- (B) In relation to Cheryl's possible liability to Omer
- Possible claim in the tort of negligence
 - Duty of care (outline explanation only – given that the existence of the duty is obvious)
 - Breach of duty – the test of the reasonably skilled motorist, consideration of factors determining the standard of care, in particular, the likelihood of serious harm, the high likelihood of harm, no cost to take adequate precautions
 - Causation and remoteness (in outline)
 - Possible contributory negligence of Omer (but courts are reluctant to find children contributorily negligent)
 - Possible reference to damages (credit a consideration of the different categories of damages, eg loss of future earnings, pain and suffering, etc.)

- (C) In relation to Cheryl's possible liability to Serena

Possible claim in the tort of negligence for psychiatric injury

- Need for recognised psychiatric injury
- Distinction between primary and secondary victims in terms of test(s) for distinction and in terms of control factors
- Application to Serena as a secondary victim. The requirements of reasonable foreseeability of psychiatric injury to a person of normal fortitude, caused by a traumatic event, proximity of relationship/time and space/perception
- Possible reference to damages (credit a consideration of the different categories of damages, eg loss of future earnings, pain and suffering, etc.)

(AO1 = 10; AO2 = 15)

0 6 Consider the rights and remedies, if any, of:

- Lucy against Phil
- Ann against Phil.

[25 marks]

Potential Content

(A) In relation to Lucy and Phil

- The tort of negligence in relation to misstatements
- The need for a special relationship/proximity
- The issue of Phil's expertise (should an expert in house sales know about businesses?), should Phil have foreseen reliance by Lucy, was that reliance reasonable (eg the significance that Phil and Lucy were friends and that Phil's expertise related to houses)?
- The issue of breach of duty and standard of care in relation to professionals
- Possible reference to damages, eg loss of future income.

(B) In relation to Ann

- The Occupiers' Liability Act 1984
- The need for a danger due to the state of the premises [s.1(1)] – was the injury to Ann due to her foolishness rather than a danger due to the state of the premises? (the 'foolishness' argument less convincing in the case of a young child than an adult, especially given the 'allurement' aspect of the pond)
- Requirements for the duty to arise [s.1 (3)] – did Phil know or have reasonable grounds to believe that a danger existed and that a trespasser might come into the vicinity of the danger? (both elements are arguable)
- The nature of the duty owed by the occupier [s.1(4)] – to take reasonable care to see that the trespasser does not suffer injury by reason of the danger
- Possible reference to 'special' rules in relation to children in the context of the OLA 1984 (eg the occupier should realise that children are less careful than adults, that they are more likely to 'come into the vicinity of the danger' where there is an attractive feature, etc)
- Was the building of the wall a sufficient performance of the duty [s.1(5)]?
- Consideration of possible contributory negligence/volenti
- Possible reference to damages.

Note **SOUND** requires a generally accurate knowledge of the terminology of the OLA 1984

Note No consideration of the elements of s.1(3) – **MAX CLEAR**

Note Credit a consideration of the different categories of damages, eg loss of future earnings, pain and suffering, etc.

Note Alternative claim under the OLA 1957 on the basis that a derelict house might constitute an allurement to a child and that Ann was therefore an implied licensee and a visitor – **MAX WEAK SOUND** (if combined with a detailed explanation and application of the OLA 1957)

Note Consideration of possible claims under both OLA 1984 and 1957 – **MAX SOUND** (with an obviously more limited treatment where both elements are considered).

(AO1 = 10; AO2 = 15)

0	7	Consider the rights and remedies, if any, of:
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- Robert against Numar in connection with the noise and the smells
- Numar against Robert in connection with the destruction of the plants **and** the motorists against Tom in connection with the obstruction.

[25 marks]**Potential Content**

(A) In connection with the noise and the smells

- Possible claim by Robert in the tort of private nuisance
- The need for an unreasonable interference with enjoyment of land and a consideration of possible relevant factors, especially the location, malice/intention and duration
- Would the noise be sufficiently substantial to affect a 'normal' claimant (no recovery for unduly sensitive claimants)
- 'Coming to the nuisance' not a defence
- The issue of possible 'public benefit' in supplying takeaway food (this was successfully argued in *Adams v Ursell*) – not a defence to liability, but might affect any possible injunction
- Remedies of damages and injunction.

(B) In relation to the destruction of Numar's plants

- Possible liability under the Rule in *Rylands v Fletcher*
- The need for a 'thing liable to do mischief....', accumulation, non-natural/extraordinary user, escape, damage
- Remedy of damages
- Strict liability
- The requirement of reasonable foreseeability of harm (was the destruction of Numar's plants reasonably foreseeable, given that they were delicate and rare?)

Possible alternative in negligence

- Duty
- Breach
- Damage
- Remoteness
- Possible reference to damages.

In relation to the obstruction of the motorists

- Consideration of public nuisance
- Definition, the need for unreasonable interference, section of the public
- Need for 'special damage' to support tort claim (no evidence of such damage on the facts) – but credit a suggestion that the Attorney-General might bring a claim for an injunction on behalf of the motorists in a relator action.

Note *Rylands v Fletcher* only (no public nuisance) – **MAX WEAK SOUND****Note** Public nuisance only (no *Rylands*) – **MAX WEAK CLEAR**

(AO1 = 10; AO2 = 15)

0 8 Consider the liability, if any, of the following:

- Dr Atkins to Sophia
- the hospital to Sophia
- Mobilia to Jonny.

[25 marks]

Potential Content

(A) In relation to Dr Atkins and Sophia

- Elements of the tort of negligence
- Duty of care (in outline)
- Breach of duty issues, general negligence principles and principles having particular reference to medical professionals – the standard of the ordinarily competent medical practitioner, possible relevance of Dr Atkins being a specialist, the relevance of ‘general and approved practice’, possible argument that the practice adopted by Dr Atkins was non-negligent despite the existence of another professional view (Bolam), or that the latest research rendered it negligent (Bolitho)
- Causation
- Remoteness
- Possible reference to damages
- In relation to the loss of income by Sophia, consideration of possible claim for consequential economic loss or a consideration of remoteness of damage.

Note SOUND requires an explanation of BOTH the Bolam and the Bolitho principles

Note Explanation of EITHER Bolam OR Bolitho – max weak sound

(B) In relation to the hospital and Sophia

- The possible vicarious liability of the hospital for any tort committed by Dr Atkins
- Explanation and application of possible tests to determine the existence of the employment relationship (importance of the ‘multiple test’, control, integral part of the business, payment of wages/tax, mutuality of obligation, provision of equipment, etc)
- Discussion of ‘in the course of employment’.

(C) In relation to Mobilia and Jonny

- Possible claim under the Consumer Protection Act 1987 (damage, defective product, producer, strict liability/the ‘development risks’ defence, damage, the £275 limit)
- Possible reference to damages.

Note If no consideration of the development risks defence – **MAX CLEAR**

Note **SOUND** requires a generally accurate knowledge of the terminology of

the CPA 1987

Alternative claim in the tort of negligence

- Duty
- Breach
- Damage
- Remoteness
- Possible reference to damages

Note Either or both of the above approaches (CPA and negligence) can achieve **SOUND** (with an obviously more limited treatment where both elements are considered)

(AO1 = 10; AO2 = 15)

Section C Concepts

Descriptors for Concepts of Law questions (Section C)

Level	Explanation	Analysis/Evaluation
sound	<p>The answer presents a strong explanatory framework, correctly identifying and accurately and comprehensively explaining, say, relevant rules, procedures, institutions and theories in the central aspects of the potential content. Where appropriate, the explanations are supported by relevant examples and illustration (which is adequately developed where necessary to further elucidate the explanations). Where there are more marginal aspects of the potential content, there may be some minor omissions or inaccuracies in the explanation and/or in the treatment of the supporting examples and illustration.</p>	<p>Arguments are developed perceptively and coherently, making careful use of framework explanations, examples and illustration, and are directly related to the thrust of the question. Summaries and conclusions are sustainable, and demonstrably emerge from the supporting explanations and arguments.</p>
clear	<p>The answer presents an explanatory framework, correctly identifying and accurately explaining significant parts of, say, relevant rules, procedures, institutions, and theory in the central aspects of the potential content, though there are omissions in the explanations of some parts of the rules, procedures, institutions and theory or errors or some confusion in the explanation, in those central aspects. There may be a little overemphasis on marginal aspects at the expense of some of the more central aspects. In the higher part of the level, relevant examples and illustration are used but there may be a little confusion and error in selection and/or explanation or the explanation may be limited. At the lower end of the level, there may be little evidence of relevant examples and illustration or more evident inaccuracies.</p>	<p>Appropriate arguments are introduced but may not be fully developed, or may be restricted in range. Alternatively, the arguments suffer from a little inaccuracy or confusion. The arguments make use of framework explanations (including any relevant examples and illustration) but do not always succeed in incorporating them in a fully coherent way or in demonstrating their full relevance. Summaries and conclusions may be a little tentative and may not fully address the thrust of the question. Though broadly based on the supporting explanations and arguments, summaries and conclusions may not be closely and carefully related to them in the discussion.</p>

<p>some</p>	<p>The answer presents an explanatory framework which correctly identifies and accurately explains a very limited part of, say, relevant rules, procedures, institutions, and theory in the central aspects of the potential content. There may be a very evident imbalance between explanation of central and of more marginal aspects of the potential content. Alternatively, the answer attempts explanation across a much broader range of relevant rules, procedures, institutions and theory in the central aspects of the potential content but the explanations suffer from significant omission, error or confusion. Explanations may emerge only out of attempts to introduce relevant examples and illustration. If introduced at all, examples and illustration may be of marginal relevance or their treatment may be highly superficial or subject to significant inaccuracies or not properly used to support the explanation of the relevant rules, procedures, institutions and theory.</p>	<p>There are relevant arguments but they are undeveloped and may tend to consist of simple assertions or assumptions. Alternatively, arguments may be characterised by evident confusion which significantly impedes coherence. Very limited use is made of framework explanations and any examples and illustration. Summaries and conclusions may be absent. Where present, they may barely address the thrust of the question, and be only imprecisely related to any supporting explanations and arguments.</p>
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Maxima for LAW04 Concepts essay questions

The student deals with (A) and (B) as follows:

Max 30: two sound

Max 27: one sound, one clear

Max 23: one sound, one some **or** two clear

Max 19: one sound **or** one clear, one some

Max 15: one clear **or** two some

Max 10: one some

Max 5: fragments **or** substantial error or incoherence

0: No relevant information

0 9 Briefly explain the meaning of ‘fault’. Discuss the extent to which legal liability **is** and **should be** based on fault.

[30 marks + 5 marks for AO3]

REMEMBER TO ALLOCATE MARKS FOR AO3 SEPARATELY

Potential Content

(A) **Brief explanation of possible definitions of fault** in the criminal and/or civil contexts (for example, blameworthiness, responsibility, wrongdoing, etc)

Discussion of specific areas of law in order to demonstrate how they indicate the presence or absence of fault (discussion of any relevant area of law will be credited).

- In the criminal law context, examples include actus reus issues (eg voluntariness, causation, omissions), mens rea issues (consideration of the presumption of mens rea, the distinction between intention and recklessness, whether negligence indicates sufficient fault, etc), the notion of hierarchy of fault, the relevance of blameworthiness to sentencing and defences, etc.
- In the tort context, relevant areas include aspects of the criteria of the duty of care (eg the importance of foreseeability and the requirement that it must be just and reasonable to impose a duty) and the importance of reasonableness and the ‘risk factors’ in relation to breach of duty and the standard of care. Issues of causation and remoteness. Defences to negligence, such as volenti and contributory negligence. The importance of unreasonableness in relation to liability in private nuisance.
- In the contract context, areas which arguably indicate the importance of fault include remoteness of damage (Hadley v Baxendale), the reduction in damages awarded due to a failure to mitigate losses, the distinction between conditions and warranties (the claimant can terminate the contract for breach of an important, but not a minor, term), the defence of frustration, etc.

Note There may be some imbalance in the treatment of the discussion of the chosen area(s), where students choose to incorporate both civil and criminal law.

Note Discussion of specific areas of law with no brief explanation of meaning of fault – **MAX WEAK SOUND**
Brief explanation of meaning of fault only – **MAX WEAK SOME**

(B) **Discussion of liability without fault**

Discussion of either criminal and/or civil liability will be credited.

- In the criminal law context, areas of strict liability in criminal law such as offences relating to food hygiene (eg Smedleys v Breed), pollution (eg Alphacell v Woodward), the protection of under-age children (eg Harrow v Shah), drug-related offences, etc. Situational liability (eg Winzar, Larsonneur). Use of case-law examples.

- In the tort context, areas of strict liability in the tort context (eg vicarious liability, the Consumer Protection Act, Rylands v Fletcher, etc), and possible discussion of no-fault accident compensation schemes as an alternative to tortious liability. Use of case-law examples.
- In the contract context, there are several rules which suggest strict liability by appearing to penalise an innocent party, eg the position of an offeror where the offeree accepts the offer by post, the liability of a seller/supplier for defective goods, etc, the distinction between impossibility/frustration and ‘mere difficulty’ in performing a contract. Use of case-law examples.

Discussion of arguments which are said to support fault-based liability

Discussion of arguments in relation to criminal and/or civil law will be credited.

- In the criminal context, personal autonomy/freedom to choose, moral blameworthiness, the nature of criminal penalties, etc.
- In the tort context, the deterrent nature of tortious liability and the importance of corrective justice, etc.
- In the contract context, the notion of moral blameworthiness.

Discussion of arguments which are said to support liability without fault

For example:

- Utilitarianism/protection of the public from harm
- The ‘not truly criminal’ nature of regulatory offences
- Procedural problems involved in civil negligence claims (delay, cost, etc)
- Possible benefits of the strict liability of manufacturers, employers (eg claimant more likely to obtain damages), etc
- The protection of consumers (eg sale of goods), the importance of contracts being performed (eg difficulty in performance not frustration) etc.

Note Discussion of no-fault liability with no discussion of ‘arguments’ – **MAX WEAK CLEAR**

Note Discussion of ‘arguments’ without discussion of no-fault liability – **MAX CLEAR**

(AO1 = 15; AO2 = 15; AO3 = 5)

- 1 0** Discuss the meaning of ‘justice’ **and** analyse the extent to which English law succeeds in achieving justice.

[30 marks + 5 marks for AO3]

REMEMBER TO ALLOCATE MARKS FOR AO3 SEPARATELY

Potential Content

(A) Discussion of possible meanings of ‘justice’

- justice in terms of equality of treatment/fairness
- categories of justice eg distributive/corrective justice, substantive/procedural justice, concrete/formal justice, etc
- utilitarianism
- Rawls
- Marx
- Nozick
- notions of natural law/positivism.

Note Credit any other arguable notion of justice

Note Credit appropriate illustration and/or criticism of any definition/theory

(B) Analysis of the extent to which English law succeeds in achieving justice

Students should:

- refer to appropriate examples from the substantive law (criminal or civil), and/or the legal system/legal process, and
- discuss whether justice is or is not (as the case may be) achieved in the examples selected.

‘Appropriate examples’ include:

- issues of discrimination/inequality of treatment
- the treatment of suspects
- does English law ensure a fair trial for accused persons?
- natural justice
- sentencing and proportionality
- the jury
- the correcting of miscarriages of justice, eg the Criminal Cases Review Commission and corrective justice generally, eg appeals and judicial review
- precedent
- access to justice issues, eg cost/funding in relation to the provision of advice and representation, the problem of lack of understanding of the legal process, etc.

Note Credit any other valid examples

Note **SOUND PC(B)** requires students, in relation to **all or a majority** of the examples which they refer to, to expressly link the examples to a particular notion of justice/injustice. For example, a response discussing factors (eg lack of funding) which can lead to access to justice issues should be awarded sound only if the nature of the injustice is explained, eg

like cases not being treated alike, the failure of the legal system to provide a 'level playing field', lack of natural justice, or a mere lack of 'fairness', etc. Similarly, responses discussing examples of 'miscarriage of justice' should refer to the nature of the injustice involved, eg the failure of the legal system to ensure a fair trial and/or to remedy any miscarriage (in this connection a reference to the reform through the creation of the Criminal Cases Review Commission would be highly creditworthy). The point here is that a discussion of an example which concludes with a mere assertion, such as, 'is this justice?', fails to fully address the issue as to whether justice is or is not being achieved.

Note A response which demonstrates some ability to link an example or examples to a particular notion of justice/injustice but **not in relation to all or a majority of examples selected – MAX WEAK SOUND**

Note A response which demonstrates **no ability** to link an example or examples to a particular notion of justice/injustice – **MAX CLEAR**

Note Examples should only be treated as falling within PC (B) where the student has made it clear that they relate to the issue of whether the law achieves justice

Note Any illustration of theories/ideas of justice in the context of the discussion of the meaning of justice should be credited in PC(A).

(AO1 = 15; AO2 = 15; AO3 = 5)

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|---|---|
- Analyse the extent to which judges have the power to develop law through the operation of judicial precedent **and** in the interpretation of statutory rules. Discuss whether judges should have this power.

[30 marks + 5 marks for AO3]

REMEMBER TO ALLOCATE MARKS FOR AO3 SEPARATELY

Potential Content

(A) **Analysis of the extent to which judges have the power to develop law through the operation of judicial precedent**

- Framework explanation of the doctrine of precedent (the judicial hierarchy, the distinction between ratio and obiter, binding and persuasive precedents, etc)
- Analysis of the characteristics of flexibility which provide the potential for legal development, eg distinguishing/issue of determining material facts, flexibility available to the Supreme Court (House of Lords) due to the Practice Statement, flexibility available to the Court of Appeal (Civil Division) arising from the decision in *Young v Bristol Aeroplane Co*, additional flexibility available to the Court of Appeal (Criminal Division), flexibility due to the possible vagueness of a ratio, overruling/not following, etc
- Identification and analysis of relevant examples and case law illustrating judicial creativity and development in practice (eg the mens rea of murder, the duty of care in the tort of negligence, either in general and/or in specific contexts, eg misstatements, psychiatric harm, etc, judicial development of assault/ABH/GBH, aspects of formation of contracts, etc).

Discussion of whether judges should have this power

Examination of relevant arguments **against** judicial development of law, for example:

- the haphazardness of the judicial process/the need for relevant cases and issues to arise
- constitutional issues, eg judges are unelected
- inappropriateness of the courts as a forum for law reform, eg lack of research material available to judges
- issues of justice, eg the problem of retroactivity of judicial decisions
- the declaratory theory of the judicial role.

Examination of relevant arguments **in favour of** judicial development of law, for example:

- the necessity for the courts to deal with omissions in the law
- the fact that judges are not constrained by problems in the way of new legislation, eg party politics, time constraints, etc
- the (debateable) argument that new case law can be produced more speedily than legislation.

Note Credit any relevant argument and any references to the views of writers and judges on the desirability or otherwise of judicial law making

In relation to PC(A), SOUND requires

- a framework explanation of precedent/flexibility features
- illustration of judicial development and

- a discussion of the arguments for and against judicial development (although very little material is required in relation to ‘arguments for’).

Note All three of the above, but **arguments for judicial development only – MAX WEAK SOUND**

All three of the above, but **arguments against judicial development only – MAX WEAK SOUND**

Note Any **TWO** of the above – **MAX CLEAR**
Any **ONE** of the above – **MAX SOME**

(B) **Analysis of the extent to which judges have the power to develop law in the interpretation of statutory rules**

- Explanation of the various approaches to statutory interpretation, eg the literal, golden and mischief ‘rules’, and the increasing importance of the purposive/contextual approach, etc
- Analysis of the flexibility available to judges in interpreting statutes, eg a comparison of the relative rigidity of the literal and golden ‘rules’ of interpretation with the relative flexibility of the mischief ‘rule’ and the purposive approach: are the ‘rules’ of interpretation binding?
- Explanation and analysis of the constraints of the intrinsic aids to interpretation and the relative flexibility afforded by the use of extrinsic aids to interpretation
- Identification and analysis of relevant examples/case law.

Discussion of whether judges should have this power

Examination of relevant arguments **for and against** judicial development of law in the interpretation of statutory rules.

Many of the arguments identified above in relation to precedent can be validly used by students in the context of statutory interpretation, eg constitutional issues, the need to remedy omissions in the law, etc.

Note Credit any relevant argument and any references to the views of writers and judges on the desirability or otherwise of judicial law making.

In relation to PC(B), SOUND requires

- an explanation of the ‘rules’ of interpretation/flexibility available to judges,
- relevant illustration, and
- a discussion of the arguments for and against judicial development.

Note All three of the above, but **arguments FOR judicial development only – MAX WEAK SOUND**

All three of the above, but **arguments AGAINST judicial development only – MAX WEAK SOUND**

Any **TWO** of the above – **MAX CLEAR**

Any **ONE** of the above – **MAX SOME**

(AO1 = 15; AO2 = 15; AO3 = 5)

Assessment Objective coverage

<u>UNIT 4</u>	<u>AO1</u>	<u>AO2</u>	<u>AO3</u>
Section A			
Question 01	10	15	
Question 02	10	15	
Question 03	10	15	
Question 04	10	15	
Section B			
Question 05	10	15	
Question 06	10	15	
Question 07	10	15	
Question 08	10	15	
Section C			
Question 09	15	15	5
Question 10	15	15	5
Question 11	15	15	5
Total marks	35	45	5