

Version 1.0



**General Certificate of Education  
June 2013**

**Law** **LAW04**  
**Criminal Law (Offences against Property) or  
Tort AND Concepts of Law**

**Unit 4**

**Final**

***Mark Scheme***

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

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## **LAW04**

### **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**

- 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 <b>or</b> one sound, two clear
21	two sound <b>or</b> one sound, one clear, one some <b>or</b> three clear
19	one sound, one clear <b>or</b> one sound, two some <b>or</b> two clear, one some
17	one sound, one some <b>or</b> two clear <b>or</b> one clear, two some
14	one sound <b>or</b> one clear, one some <b>or</b> three some
13	two sound explanation only
11	one clear <b>or</b> two some
09	one sound explanation only <b>or</b> two clear explanation only <b>or</b> three some explanation only
07	one some <b>or</b> one clear explanation only <b>or</b> 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 <b>or</b> two clear
17	one sound <b>or</b> one clear, one some
13	one clear <b>or</b> two some <b>or</b> two sound explanation only
11	one sound explanation only <b>or</b> two clear explanation only
08	one some <b>or</b> one clear explanation only <b>or</b> 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
<b>Sound</b>	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.
<b>Clear</b>	<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.</p> <p>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>
<b>Some</b>	<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.</p> <p>So that, at best, a very superficial or partial analysis emerges.</p>
<b>Fragments</b>	<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 in issue).

## Section A: Criminal Law (Offences against Property)

### Scenario 1

Total for this scenario: 50 marks

- |   |   |   |
|---|---|---|
| 0 | 1 | Discuss Tom's possible criminal liability for <b>property</b> offences arising out of his taking of the letter and what he said to Enrique. <span style="float: right;">(25 marks)</span> |
|---|---|---|

### Potential Content

- (A) **Theft issues in relation to the letter.** *Actus reus* – appropriation, property, belonging to another. *Mens rea* – intention to permanently deprive (s6/'intention to treat the thing as his own to dispose of ...'), dishonesty (**Ghosh**). In relation to the contents of the letters – no liability (**Oxford v Moss**). Consideration of the defence of intoxication. Recognition of voluntary intoxication. Distinction between specific/basic intent crimes. Is *mens rea* negated?

- (B) **Blackmail issues.** Demand, menaces, with a view to gain or intent to cause loss. Unwarranted demand – consideration of Tom's belief as to reasonable grounds for making the demand and that the use of menaces was a proper means of reinforcing it. Consideration of the defence of intoxication. Recognition of voluntary intoxication. Distinction between specific/basic intent crimes. Is *mens rea* negated?

**NB:** intoxication: material on intoxication should be allocated to **either** theft **or** blackmail, **but not both**. Where the discussion of one is weaker than the other, allocate the material on intoxication to the weaker element, even if the student is expressly applying it to the other. Where the treatment of the two appear equal in quality, use your discretion as to where to put the intoxication e.g. if the student is applying it to one particular element, allocate it to that element.

**NB:** No intoxication: ONE MAX SOUND, ONE MAX CLEAR (to reflect the absence of intoxication)

- |   |   |   |
|---|---|---|
| 0 | 2 | Discuss George's possible criminal liability for <b>property</b> offences arising out of his lie to Rosa and his actions in Rosa's kitchen. <span style="float: right;">(25 marks)</span> |
|---|---|---|

### Potential Content

- (A) **Fraud by false representation.** Representation, falsity. Dishonesty, intention to make a gain and/or cause a loss.
- (B) **Burglary issues.** Building. Trespass (invalid consent as entry specifically excluded. Credit possible argument that George's fraud would undermine Rosa's consent to entry and thereby give rise to a trespass). Consideration of s9(1)(b) on the basis of possible GBH.
- (C) **Criminal damage issues.** Basic criminal damage. The meaning of "damage". *Mens rea* issues. Possible aggravated criminal damage issues (damage, intention/recklessness as to any damage, intention/recklessness as to the endangering of life thereby). No requirement of danger to life in fact. (Dudley).

**NB:** There are two incidents of basic criminal damage which should be credited

(1) the initial cracking of the socket, although the fact that George “saw that he had cracked” it after the time of the cracking would suggest an absence of intention/recklessness as to that damage at the time it occurred.

(2) the second incident of basic damage is the further damage caused by the tapping with the hammer (the exposed wiring), and since George knows by now that the socket is cracked, he is arguably conscious that any tapping with the hammer might lead to further damage i.e. he is reckless. He is also arguably reckless at that point as to the endangering of life by the exposed wiring.

Treatment of the first incident only – MAX WEAK CLEAR (the initial damage would not be sufficient for the purposes of aggravated criminal damage since, at the time of that initial damage, George is not aware of the damage and, therefore, does not possess intention or recklessness as to the endangering of life by the damage).

Treatment of the second incident – MAX SOUND.

Treatment of either incident can be enhanced by treatment of the other.

## Scenario 2 Total for this scenario: 50 marks

0	3	Discuss the possible criminal liability of Stavros for <b>property</b> offences arising out of his activities in connection with the building society. <span style="float: right;">(25 marks)</span>
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### Potential Content

(A) **Burglary issues.** Building. Trespass (*actus reus, mens rea*, exceeding implied permission to enter). Consideration of s9(1)(a) on the basis of conditional intent to commit theft, and of s9(1)(b) on the basis of actual theft.

**NB:** S.9(1)(b) only – **max clear**

(B) **Theft issues.** *Actus reus* – appropriation (albeit temporary), property, belonging to another. *Mens rea* – intention to permanently deprive, dishonesty (Ghosh). Robbery issues. The meaning of force. Was force used in order to steal and at the time of the theft? Was there a continuing appropriation?

**NB:** Theft only – **max clear**

(C) **Consideration of the defence of duress.** The nature of the threat (death/serious personal injury?). Threat to a person for whom Stavros reasonably feels responsible. The scope of the threat (e.g. did it cover robbery?). The subjective element (threat of imminent harm/opportunity to avoid the harm?). The objective element. The effect of Stavros’s voluntary connection with a violent gang.



- |          |          |
|----------|----------|
| <b>0</b> | <b>4</b> |
|----------|----------|
- Discuss Dave’s possible criminal liability for **property** offences in connection with Errol’s wall and in his dealings with Jake. (25 marks)

**Potential content**

- (A) **Criminal damage in relation to Dave.** Basic criminal damage (either in the form of the breakage of the bricks and/or the damage to the wall as a whole). Mens rea issues. Consideration of the defence of lawful excuse under s.5(2)(b) in order to protect his car. Did Dave believe that the car was in “immediate need of protection” (e.g. did he believe that there was nowhere else to park his car?). Did Dave believe that the means adopted to protect the car were reasonable in the circumstances.

**Consideration of theft** (based on the arguments that breakage of bricks may well amount to appropriation by their destruction and that intentional damage amounts to intention to permanently deprive). Where answers expressly seek to rely on relevant explanations of theft provided in the answer to Question 03, full credit can be awarded but only if there is complete application to the specific issues raised by question 04.

**NB** Criminal damage with defence to criminal damage – **MAX SOUND** (requiring both “belief” aspects of s.5(2)(b) to be considered). A consideration of theft can enhance a weaker discussion of damage and/or the defence.

Criminal damage only [no defence and no theft] – **max clear**

Criminal damage (no defence) + theft – **max sound**

Theft only – **max clear**

- (B) **Dave’s possible criminal liability in relation to Jake.** Fraud by false representation. Implied representation, falsity. Dishonesty, intention to make a gain and/or cause a loss.
- (C) **Dave’s possible criminal liability in relation to Jake.** Obtaining services by a dishonest act – obtain, services, on the basis of payment, ‘by’ a dishonest act, failure to pay the full price. *Mens rea* issues – dishonesty, intention to avoid payment in full.

## Section B: Tort

### Scenario 3

**Total for this scenario: 50 marks**

<b>0</b>	<b>5</b>	Consider the rights and remedies, if any, of Rick and of the motorists against Andy. (25 marks)
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#### Potential content

- (A) **In relation to the noise and fumes.** Possible liability 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 quiet, rural location and duration. The importance of possible malice/intentional interference following Rick's complaint. Remedies of damages and injunction.
- (B) **In relation to the obstruction, 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 this on the facts).

**In relation to the damage to the fence and greenhouse.** Possible liability under the Rule in *Rylands v Fletcher*. The need for a 'thing liable to do mischief ....' accumulation, non-natural user, escape, damage, remoteness, remedy of damages. Strict liability.

**NB:** In relation to "escape", there are arguments both for and against this element being satisfied. Until very recently, if a thing was accumulated which was liable to catch fire and it did so, and the fire escaped, but not the "thing" itself, there would be liability, assuming that there was a non-natural use of the land and damage. Moreover, there have been decisions in which there was deemed to be a sufficient escape even though the precise "thing" accumulated did not escape e.g. where dynamite was brought onto land, and an explosion "escaped", or where fumes from a chemical "escaped". The argument that there is no escape in the scenario is based on the rule laid down by the CA in 2013 (*Gore v Stannard*) that liability cannot arise under *Rylands* if something is accumulated which catches fire, the fire escapes, but the thing accumulated does not.

Students are not required to be aware of this new development but, on the other hand, should be credited if they argue against liability on the basis that the oil has not escaped. Students who simply assume that the escape of the fire satisfies the escape requirement without any analysis of the issue that the oil itself has not escaped should be awarded full credit for this element, but credit should be awarded to students who do highlight this problem.

Possible alternative in negligence.

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

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

- Rick in connection with his injuries caused by falling from the ladder
  - Dr Jones and the hospital in connection with his stroke and partial paralysis.
- (25 marks)

- (A) **Rick's possible liability to Marco - relevant requirements of the *Occupiers' Liability Act 1957*.** Elements which must be proved to establish the duty, nature of the duty and breach of duty, with particular reference to s2(3)(b) (was the risk 'ordinarily incident' to Marco's calling?). Reference to damages.
- Potential alternative in common law negligence. Duty of care, breach of duty. Remoteness. Reference to damages. Possible reference to contributory negligence.
- (B) **In relation to Marco and Dr Jones - elements of the tort of negligence.** Duty of care. Breach of duty issues. General negligence principles having particular reference to medical professionals – the standard of the ordinarily competent medical practitioner, possible relevance of Dr Jones being recently qualified, 'general and approved practice.' Causation/remoteness. Reference to damages. Credit **any** explanation of the class of damages rewardable (e.g. loss of earnings, medical expenses, pain and suffering, etc.).
- (C) **The possible vicarious liability of the hospital for any tort committed by Dr Jones.** Identification of employer/employee relationship and discussion of 'in the course of employment'.

**Scenario 4****Total for this scenario: 50 marks**

0	7
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Consider the rights and remedies, if any, of Sergio against:

- Carlos in connection with the vase
- Drake in connection with the bicycle.

*(25 marks)***Potential Content**

(A) **In relation to Sergio and Carlos.** The tort of negligence in relation to misstatements. The need for a special relationship/proximity. The issue of Carlos's expertise, whether Carlos should have foreseen reliance by Sergio and whether reliance by Sergio was reasonable (eg the significance that the advice was given at a social occasion). The issue of breach of duty and standard of care in relation to statements. Carlos's likely lack of experience. Reference to damages.

(B) **In relation to Sergio and Drake.** Possible claim under the *Consumer Protection Act 1987* (damage, defective product, producer, strict liability, development risks defence, damage). Reference to damages.

Alternative claim in the tort of negligence (duty, breach, damage, remoteness).  
Reference to damages.

In relation to PC (B), either or both of the above approaches can achieve **sound** (with an obviously more limited treatment where both elements are considered).

0	8
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Consider the rights and remedies, if any, of Alan, of Pam and of Jane against Ben in connection with their injuries. *(25 marks)*

**Potential Content**

(A) **In relation to Ben's possible liability to Alan.** Relevant requirements of the *Occupiers' Liability Act 1984*. The need for a danger due to the state of the premises [s1(1)]. Requirements for the duty to arise [s1 (3)]. Nature of the duty [s1 (4)]. Was the placing of the notice a sufficient performance of the duty? Consideration of possible contributory negligence/*volenti*. 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). Reference to damages.

NB Alternative claim under the *OLA 1957* on the basis that the garage might constitute an allurement to a child and that Alan is therefore an implied licensee and visitor – **max weak sound** (if combined with a detailed explanation and application of the *OLA 1957*).

Candidates who consider both *OLA 1984* and *OLA 1957* approaches should be given appropriate credit.

(B) **In relation to Ben's possible liability to Pam and Jane.** 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 Pam and Jane and application of control factors, especially proximity of relationship and the aftermath doctrine. Effect of the phone call to Jane. Reference to damages.

### **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

### Descriptors for Concepts of Law questions (Section C)

Level	Explanation	Analysis/Evaluation
<b>sound</b>	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.	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.
<b>clear</b>	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.	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.
<b>some</b>	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.	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.

**Total for this question: 35 marks**

<b>0</b>	<b>9</b>
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Discuss the relationship between law and morals and consider whether the law **ought** to uphold moral values. *(30 marks + 5 marks for AO3)*

**Potential Content**

- (A) **Explanation of the relationship between law and morality.** References to possible definitions of law, e.g. definitions of Salmond, Austin, Hart, Kelsen, etc.). References to possible definitions of morality, e.g. the wide meaning in terms of customs and practice, principles based on religion, what is ethically good or sound, etc. Consideration of the characteristics of legal rules and moral principles – similarities (e.g. both seek to impose standards and involve a duty to obey rules etc.), distinctions (e.g. law is enforced by legal sanctions, morality is enforced by peer-pressure, law is obligatory, morality is voluntary, etc.)

**NB:** Credit any discussion of whether law and morality inevitably coincide, based on natural law theories (is an immoral law 'law'?), although students may refer to this in relation to whether the law **ought** to uphold moral values, in which case it can be credited in PC(B).

Use of pertinent case law/examples to illustrate areas of overlap and divergence. Possible examples of overlap. Examples from the substantive law (e.g. offences against the person and property, corruption of public morals, outraging public decency, consent and other defences to criminal liability, marital rape, the 'neighbour principle' in the tort of negligence, the duty to honour contracts, the contract rules which seek to protect the weaker party, etc.). Examples of the way in which public morality may be influenced by law reform (e.g. in relation to discrimination, drink-driving, etc.) and vice-versa (e.g. in relation to the campaign to abolish capital punishment).

Possible examples of divergence between law and morality, e.g. speeding and parking offences, adultery, swearing, etc. Credit a consideration of the difficulty in taking a moral position which the law often faces, owing to the existence of conflicting moral views in a pluralistic society, and where the law is often based on principles other than morality, e.g. freedom of choice, the prevention of harm etc. Possible examples of the above, 'difficulty' (e.g. the Gillick principle, abortion, adult homosexuality, assisted reproduction and embryo research, assisted killing and withholding medical treatment, etc.).

**NB:** Students will often discuss this difficulty in PC(B) as a basis for arguing that the law **should not enforce** morality, in which case it can be credited there. Whether such a discussion is credited in PC(A) or (B) does not matter, so long as it is credited somewhere.

**NB: Sound** requires an attempt to define law and morality, comparison of the characteristics of law and morality and developed illustration of overlap and divergence. Definitions and comparison without illustration – **max weak clear**  
Illustration only – **max clear**



- (B) **Consideration of whether the law ought to uphold moral values.** Reference to relevant academic debates, e.g. Hart-Devlin, Hart-Fuller. The possible arguments in favour of legal moralism, e.g. the importance of common values and the need for a cohesive society, natural law theories. The possible arguments in favour of libertarianism, e.g. the autonomy of the individual, the minimalist approach to criminalisation, the 'harm principle' and debates as to its meaning, and the various possible problems with legal moralism (e.g. pluralism). Credit students who recognise that even libertarians acknowledge the need for some morality as the basis of law (eg Hart's 'minimum content of natural law'). Students should also be given credit for linking the positivism/natural law debate to the relationship between law and morality.

Relevant examples which highlight the significance of the conflict between libertarians and legal moralists, eg issues relating to conception, death, etc.

NB **Sound** requires a consideration of relevant arguments for and against legal moralism and developed illustrations.

Consideration of arguments with no, or limited, illustration – **max clear**

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**Total for this question: 35 marks**

<b>1</b>	<b>0</b>
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Discuss the extent to which liability in English law **is** and **should** be fault-based.  
(30 marks + 5 marks for AO3)

### 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 (e.g. 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, defences, the relevance of blameworthiness to sentencing, etc.

**In the tort context**, relevant areas include aspects of the criteria of the duty of care (e.g. 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.

**NB:** 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.

- (B) **Explanation of liability without fault.** Discussion of either criminal and/or civil liability will be credited. Areas of strict liability in criminal law such as offences relating to food hygiene (e.g. *Smedleys v Breed*), pollution (e.g. *Alphacell v Woodward*), the protection of under-age children (e.g. *Harrow v Shah*), drug-related offences, etc. Situational liability (e.g. *Winzar, Larsonneur*). Use of case-law examples.

Areas of strict liability in the tort context (e.g. 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. In the contract context, there are several rules which suggest strict liability by appearing to penalise an innocent party, e.g. 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.

Consideration of arguments which are said to support fault-based liability in relation to criminal and/or civil law, e.g. in the criminal context, personal autonomy/freedom to choose, moral blameworthiness, the nature of criminal penalties, etc., and, in the civil context, the deterrent nature of tortious liability and the importance of corrective justice, etc.

Consideration of arguments which are said to support liability without fault, e.g. 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 (e.g. claimant more likely to obtain damages), etc.

**NB:** Explanation of no-fault liability with no consideration of "arguments" – **max weak clear**

**NB:** Consideration of "arguments" without explanation of no-fault liability – **max clear**

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**Total for this question: 35 marks**

1	1
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Critically analyse the extent to which judges **can** and **should** be creative in developing the law through the operation of the doctrine of judicial precedent and the interpretation of statutory rules. (30 marks + 5 marks)

### Potential Content

(A) **Analysis in relation to development through the operation of judicial precedent.**

**Can** judges be creative?

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 due to the possible vagueness of a *ratio*, overruling/not following, etc.

Identification and analysis of relevant examples and case law instances of 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, e.g. misstatements, psychiatric harm, etc., judicial development of assault/ABH/GBH, aspects of formation of contracts, etc).

**Should** judges be creative?

Examination of relevant arguments against judicial law-making (these can include such issues as the haphazardness of the judicial process/the need for relevant cases and issues to arise, constitutional issues (eg that 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 costs issue, etc).

Examination of arguments in favour of judicial law-making and development, eg the need for the courts to deal with omissions in the law, the fact that judges are not constrained by Parliamentary problems (e.g. party politics), speed.  
Views of writers and judges to be credited.

**Sound** requires a framework explanation of precedent/analysis of flexibility features, illustration of judicial creativity and a consideration of whether judges should be creative - any **two** of these – **max clear**

(B) **Analysis in relation to development through the interpretation of statutory rules.**

**Can** judges be creative?

Explanation of the 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 statutory interpretation (e.g. comparison of the 'rules' of interpretation in relation to flexibility/rigidity, are the 'rules' of interpretation binding? etc). Identification and analysis of relevant examples/case law.

**Should** judges be creative?

Many of the arguments identified above in relation to precedent can be validly used by candidates in the context of statutory interpretation, e.g. constitutional issues, the need to fill in omissions, etc.

**Sound** requires explanation of the 'rules' of interpretation/flexibility available to judges, relevant illustration and a consideration of whether judges **should** be creative - any **two** of these – **max clear**

**ASSESSMENT GRID****A Level Law (LAW04)****(One question from *either* Section A or Section B, *and* one question from Section C)**

<b>UNIT 4</b>	<b>AO1</b>	<b>AO2</b>	<b>AO3</b>
<b>Section A</b>			
Question 1	10	15	
Question 2	10	15	
Question 3	10	15	
Question 4	10	15	
<b>Section B</b>			
Question 5	10	15	
Question 6	10	15	
Question 7	10	15	
Question 8	10	15	
<b>Section C</b>			
Question 9	15	15	5
Question 10	15	15	5
Question 11	15	15	5
<b>QWC</b>			
<b>Total marks</b>	<b>35</b>	<b>45</b>	<b>5</b>