



AS Law

7161/2 - Paper 2

Mark Scheme

7161

June 2018

Version/Stage: 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

Level of response marking instructions

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

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

Step 1 Determine a level

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

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

Step 2 Determine a mark

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

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

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

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

01 In relation to the tort of negligence, which **one** of the following does **not** owe a duty of care?

[1 mark]

Marks for this question: AO1 = 1

D A policeman, to members of the community to catch a criminal

02 In relation to the tort of negligence, which test is used to establish 'causation in fact'?

[1 mark]

Marks for this question: AO1 = 1

B The 'but for' test

03 In a negligence case, the claimant is under a duty to mitigate loss. Select **one** of the following that accurately describes that duty.

[1 mark]

Marks for this question: AO1 = 1

D To take reasonable steps to minimise losses

04 In relation to causation when making a claim in negligence, a claimant must prove which **one** of the following?

[1 mark]

Marks for this question: AO1 = 1

A Both factual causation and legal causation

05 The Occupiers' Liability Act 1957 has special rules for particular categories of visitors. Identify which **one** of the following is subject to special rules.

[1 mark]

Marks for this question: AO1 = 1

C Specialist visitors in the exercise of their calling

06 For the purposes of statutory interpretation, which of the following is **not** an extrinsic/external aid?

[1 mark]

Marks for this question: AO1 = 1

C A schedule at the end of an Act of Parliament

07 Which **one** of the following would you normally associate with the work of the Law Commission?

[1 mark]

Marks for this question: AO1 = 1

B The proposal of reforms to the law

08 Select the court that would normally hear the trial of a case allocated to the fast track.

[1 mark]

Marks for this question: AO1 = 1

A County Court

09 In the trial of a civil claim, which **one** of the following is not part of the role of the judge?

[1 mark]

Marks for this question: AO1 = 1

B Deciding whether any appeal should succeed

10 The Supreme Court is most likely to give permission for an appeal involving which **one** of the following?

[1 mark]

Marks for this question: AO1 = 1

C A point of law of general public importance

11 Explain, using an example, what is meant by a 'by-law'.

[3 marks]

Marks for this question: AO1 = 3

Indicative content

- Explanation that a by-law is a form of delegated legislation (1).
- Explanation that a by-law is the type of delegated legislation normally made by local authorities or certain public bodies. (1).
- Example of a by-law from either a local authority or a public body (1).

Credit any other relevant point(s).

12 Assuming that Alma owed a duty of care to Baz, suggest why a court may decide that she did not breach that duty of care.

[3 marks]

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

Indicative content

AO1

- Explanation that the standard of care expected, when assessing whether there has been a breach of duty, is objective, stated in terms either of the reasonable person or the reasonable child of the defendant's age (1).

AO2

- Application to Alma to suggest that the court will use the standard of care of a reasonable 11 year old or application to Alma in terms of risk factors (1).
- Application to Alma to suggest that she has reached the standard of a reasonable 11-year-old in that her activity was a normal activity for a reasonable 11-year-old, and that she was carrying it out in the way that a reasonable 11-year-old would do (1).

Max 2 marks if a response does not acknowledge the relevance of Alma's age.

Credit any other relevant point(s).

Credit alternative application, provided the analysis is tenable.

13	<ul style="list-style-type: none"> • Advise Delia as to her rights against Colin under the Occupiers' Liability Act 1957. • Assess the different methods of dispute resolution open to Delia to resolve any claim she might have against Colin. 	[12 marks]
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Marks for this question: AO1 = 3, AO2 = 6 and AO3 = 3

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

Distribution of marks for substantive and non-substantive law:

Substantive	Non-substantive	Total Marks
6	6	12

Indicative content

AO1

- Explanation of the provisions of the **Occupiers' Liability Act 1957**: premises, occupier, visitor and dangers due to the state of the premises or to things done or omitted to be done on them.
- Explanation of the duty imposed by the 1957 Act on occupiers to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupiers to be there.
- Identification and outline explanation of methods of dispute resolution: litigation leading to a trial in a civil court; negotiation and mediation.

AO2

- Application to argue that the garden and patio were premises for the purposes of the Act, that Delia was a visitor, that Colin is the occupier and that there was a danger due to the state of the premises (uneven stones presenting a trip hazard).
- Application to suggest that Colin should have been prepared for children to take less care than adults: **s2(3)(a) Occupiers' Liability Act 1957**.
- Application to suggest that Colin is entitled to expect that children will be appropriately supervised: possible case authority such as **Phipps v Rochester**.
- Application to conclude that Colin should have ensured some sort of supervision for Delia even in circumstances where he would not have taken precautions for an adult visitor (an adult would have noticed the uneven patio).
- Application to suggest that Delia may bring proceedings in court, and that her claim would probably be allocated to the fast-track.
- Application to suggest that Delia may instead pursue an alternative form of dispute resolution, in particular a negotiated settlement.
- Application to conclude that e.g. informality, time and cost suggest a negotiated settlement (or alternative suggestion as to court)

AO3

- Analysis and evaluation of the meaning of breach of duty with particular reference to the care needed in respect of children (an adult would probably not have acted in the way that Delia did). Reference to supporting case authority such as **Jolley v Sutton LBC**.
- Analysis and evaluation of the alternative routes to resolve the dispute.

Credit any other relevant point(s).

14	<ul style="list-style-type: none"> • Assuming that Flora was a trespasser at the time of the accident, advise Flora whether Ed owes her a duty under the Occupiers Liability Act 1984. • Assess the alternative methods of funding open to Flora to pay for any court case she might bring against Ed. 	[12 marks]
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Marks for this question: AO1 = 3, AO2 = 6 and AO3 = 3

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

Distribution of marks for substantive and non-substantive law:

Substantive	Non-substantive	Total Marks
6	6	12

Indicative content

AO1

- Identification of the basic elements relevant to the existence of a duty under the **Occupiers' Liability Act 1984**: occupier, premises, conditions necessary for a duty to arise under s1(3) of the Act.
- Identification of the alternative methods of funding civil litigation: private resources, insurance, a conditional fee agreement.

AO2

- Application to argue that Ed was the occupier of the barn, and that the accident occurred because of the state of the premises (the barn) rather than the actions of Flora. The fall to the ground floor was caused not by Flora's actions in walking across the hayloft, but by the state of the planking in the floor of the loft.
- Application to consider whether the requirements of s1(3) existed and whether a duty under the 1984 Act existed: (1) whether Ed was aware of the danger (the dangerous flooring) or had reasonable grounds to believe that it existed (the barn belonged to Ed); (2) whether Ed knew or had reasonable grounds to believe that another (Flora) would come into the vicinity of the danger or that she may come into the vicinity of the danger (Ed knew that nightclub customers visited the barn); (3) whether the danger is one against which, in all the circumstances of the case, Ed may reasonably be expected to offer another some protection (dangerous drop not clearly visible in the poor lighting).
- Application to conclude that a duty exists under the 1984 Act. Alternatively, a conclusion that a duty does not exist.
- Application to suggest that Flora may use a conditional fee agreement as it offers a means to fund a civil action as, in the event that the claim fails, Flora's responsibility for her own legal costs will be limited.
- Application to suggest that Flora can use legal expenses insurance or private resources, but only if these are available to her. Possible reference to the fact that state funding is unavailable given the nature of the claim.
- Application to conclude that Flora is likely to pursue a conditional fee arrangement in the absence of any alternative.

AO3

- Analysis and evaluation as to the existence of the duty of care with reference to matters such as Ed's knowledge as to the frequency of trespassers, whether common humanity suggests he should have taken precautions and whether the danger is obvious. Reference to supporting case authority such as **Keown v Coventry NHS Trust** and **Donoghue v Folkstone Properties**.
- Analysis and evaluation of conditional fee agreements: upfront insurance costs will have to be paid; a claimant may still be responsible for some legal costs in the event that the claim fails, and may have to pay over some of the compensation to legal costs if the claim succeeds. Evaluation of conditional fee arrangements which demonstrates an understanding that a CFA may be difficult to obtain in a 'marginal' case.

Credit any other relevant point(s).

Fully credit an application/analysis which arrives at either conclusion (that Flora's claim may succeed or otherwise).

15 Consider the rights and remedies of Hamid against Gina in relation to the injury he suffered to his lungs from inhaling the chemicals.

[20 marks]

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

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

Distribution of marks for substantive and non-substantive law:

Substantive	Non-substantive	Total Marks
20	0	20

Indicative content**AO1**

- Identification of the tort of negligence and the elements required for liability: duty of care, breach of duty and damage. Identification of the remedy: damages (financial compensation).
- Explanation of the first element of liability: the duty of care in terms of the neighbour test in **Donoghue v Stevenson** and the three-part test in **Caparo v Dickman**.
- Explanation of the second element of liability: breach of the duty of care and the objective test.
- Explanation of the third element of liability: causation in fact and causation in law.
- Explanation of the remedy of damages in the form of a lump sum payment or a structured settlement.
- Reference to supporting case authorities, for example **Donoghue v Stevenson**, **Caparo v Dickman**, **Nettleship v Weston**, **Bolton v Stone**, **Barnett v Chelsea and Kensington Hospital**, **The Wagon Mound (No. 1)** and **Smith v Leech Brain**.

AO2

- Application to suggest that Gina owed a duty of care to Hamid, eg it was reasonably foreseeable that a failure to secure the lid could cause injury to another, there was a relationship of sufficient proximity with Hamid in that Gina controlled something that could affect Hamid, and that is reasonable to impose a duty in these circumstances as it would help prevent an accident while not deterring desirable activities.
- Application to suggest that Gina owed a duty to act to the standard of the reasonable laboratory technician (rather than the reasonable amateur).
- Application to argue that Gina breached the duty in terms of the risk factors, eg she did not take proper precautions and she did not pay proper attention given that she was dealing with something that could cause harm.
- Application to suggest that Gina's actions were the cause of Hamid's injury as a matter of fact.
- Application to argue that Gina's actions were the cause of Hamid's injury as a matter of law given that some harm was reasonably foreseeable.
- Application to conclude that Hamid may be able to bring a claim in negligence and to recover damages, probably to be paid as a lump sum given that he made a full recovery relatively quickly.

AO3

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

Credit any other relevant point(s).

16	Explain the literal rule in statutory interpretation, and discuss the advantages and disadvantages of the literal rule.	[20 marks]
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Marks for this question: AO1 = 10, AO2 = 0 and AO3 = 10

Levels of response mark scheme 20 marks – AO1 (10), AO2 (0) and AO3 (10).	
Mark range	Description
17-20 Band 5	Knowledge is excellent and demonstrates an excellent understanding of the Nature of Law and/or English Legal System. Excellent selection and use of relevant examples. Excellent analysis and evaluation of legal concepts. A logical, sustained and well-developed line of reasoning is maintained leading to a valid, relevant and substantiated conclusion.
13-16 Band 4	Knowledge is good and demonstrates a good understanding of the Nature of Law and/or English Legal System. Good selection and use of relevant examples. Good analysis and evaluation of legal concepts. A sustained and, but not yet fully, developed line of reasoning is established leading to a partially justified conclusion.
9-12 Band 3	Knowledge is satisfactory and demonstrates a satisfactory understanding of the Nature of Law and/or English Legal System. Satisfactory selection and use of relevant examples. Satisfactory analysis and evaluation of legal concepts. A chain of reasoning starts to develop which leads to a partially justified conclusion.
5-8 Band 2	Knowledge is limited and demonstrates a limited understanding of the Nature of Law and/or English Legal System. Limited selection and use of relevant examples. Limited analysis and evaluation of legal concepts. Some reasoning is attempted which leads to a limited conclusion.
1-4 Band 1	Knowledge is minimal and demonstrates a minimal understanding of the Nature of law and/or English Legal System. Minimal selection and use of relevant examples. Minimal analysis and evaluation of legal concepts. No chain of reasoning is attempted.
0	Nothing worthy of credit

Distribution of marks for substantive and non-substantive law:

Substantive	Non-substantive	Total Marks
0	20	20

Indicative content

AO1

- Brief explanation as to the need for statutory interpretation: provisions within a statute may not be free from doubt as to their meaning and the intention of Parliament may not be clear.
- Explanation of the literal rule: the intention of Parliament can be discovered by giving each word or phrase its ordinary and natural meaning even if the result is unfair or undesirable. Possible reference to interpretation of older statutes (using the dictionary of the times) and consistency of interpretation across the statute.
- Reference to illustrative case(s) for instance **Whiteley v Chappell** and **Fisher v Bell**.

AO3

- Analysis and evaluation of arguments to support the use of the literal rule, eg respects Parliamentary supremacy, judges are unelected and should not make law, makes judicial decisions easier to predict thus saving litigation.
- Analysis and evaluation of arguments against the use of the literal rule, eg can lead to unfair or undesirable results, some words are ambiguous, cannot be used when an Act doesn't cover a situation rather than being unclear.
- Use of supporting case authorities (development of cases cited above together with further cases relating to the arguments for and against the use of the literal rule).
- A reasoned conclusion.

Credit any other relevant point(s).

Assessment Objectives Grid

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

Distribution of marks for substantive and non-substantive law

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