

**MARK SCHEME for the November 2005 question paper**

**9084 LAW**

**9084/04**

**Paper 4**

**maximum raw mark 75**

This mark scheme is published as an aid to teachers and students, to indicate the requirements of the examination. It shows the basis on which Examiners were initially instructed to award marks. It does not indicate the details of the discussions that took place at an Examiners' meeting before marking began. Any substantial changes to the mark scheme that arose from these discussions will be recorded in the published *Report on the Examination*.

All Examiners are instructed that alternative correct answers and unexpected approaches in candidates' scripts must be given marks that fairly reflect the relevant knowledge and skills demonstrated.

Mark schemes must be read in conjunction with the question papers and the *Report on the Examination*.

The minimum marks in these components needed for various grades were previously published with these mark schemes, but are now instead included in the *Report on the Examination* for this session.

- CIE will not enter into discussion or correspondence in connection with these mark schemes.

CIE is publishing the mark schemes for the November 2005 question papers for most IGCSE and GCE Advanced Level and Advanced Subsidiary Level syllabuses and some Ordinary Level syllabuses.



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### **Mark Bands**

The mark bands and descriptors applicable to all questions on the paper are as follows. Maximum mark allocations are indicated in the table at the foot of the page.

Indicative content for each of the questions follows overleaf.

#### **Band 1:**

The answer contains no relevant material.

#### **Band 2:**

The candidate introduces fragments of information or unexplained examples from which no coherent explanation or analysis can emerge

OR

The candidate attempts to introduce an explanation and/or analysis but it is so fundamentally undermined by error and confusion that it remains substantially incoherent.

#### **Band 3:**

The candidate begins to indicate some capacity for explanation and analysis by introducing some of the issues, but explanations are limited and superficial

OR

The candidate adopts an approach in which there is concentration on explanation in terms of facts presented rather than through the development and explanation of legal principles and rules

OR

The candidate attempts to introduce material across the range of potential content, but it is weak or confused so that no real explanation or conclusion emerges.

#### **Band 4:**

Where there is more than one issue, including candidate demonstrates a clear understanding of one of the main issues of the question giving explanations and using illustrations so that a full and detailed picture is presented of this issue

OR

The candidate presents a more limited explanation of all parts of the answer but there is some lack of detail or superficiality in respect of either or both so that the answer is not rounded.

#### **Band 5:**

The candidate presents a detailed explanation and discussion of all areas of relevant law and while, there may be some minor inaccuracies and/or imbalance, a coherent explanation emerges.

Maximum Mark Allocations:

|          |    |    |    |    |    |    |
|----------|----|----|----|----|----|----|
| Question | 1  | 2  | 3  | 4  | 5  | 6  |
| Band 1   | 0  | 0  | 0  | 0  | 0  | 0  |
| Band 2   | 6  | 6  | 6  | 6  | 6  | 6  |
| Band 3   | 12 | 12 | 12 | 12 | 12 | 12 |
| Band 4   | 19 | 19 | 19 | 19 | 19 | 19 |
| Band 5   | 25 | 25 | 25 | 25 | 25 | 25 |

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## Section A

### Question 1

**'The tort in Rylands v Fletcher continues to fill necessary gaps in other torts.'**  
**Critically assess the validity of this statement today.**

Responses should be set in context with a brief outline of the case and a definition of the tort. Candidates should then focus on the reason for its relationship with the torts of nuisance, negligence and trespass.

Rylands has its origins in nuisance, but requires an accumulation of substances whose escape is likely to cause damage and such accumulation must amount to a non-natural use of the land on which it takes place. In many cases, it would seem, however, that claimants would succeed equally well in Rylands or nuisance.

Negligence requires a degree of care to be taken by a defendant if liability is to be avoided; in Rylands, liability continues to be strict.

In comparison with trespass, it is a question of the nature of the interference. In trespass, the interference is direct, whereas in most Rylands cases, any damage has been caused indirectly.

The use of the tort in RvF has been restricted through the years. Many would argue that it could be abolished and reliance placed on nuisance and negligence. Others would argue that it is still required to cover hazardous activity where claimants are unable to seek either statutory or negligence-based recompense. Whilst judges often dislike the idea of strict liability, injustice, as in *Read v Lyons*, needs to be avoided.

Candidates should track the rule's application through case law, such as *Read v Lyons*, *Cambridge Water v Eastern Counties Leather*, *Mason v Levy Auto Parts of England Ltd* and *Transco plc v Stockport Metropolitan Borough*, consider proposals for reform, such as The Royal Commission on Civil Liability and Compensation for Personal Injury and draw conclusions as to its continued usefulness.

### Question 2

**'The rules of causation and remoteness of damage aim to compensate claimants for loss and injury arising from a defendant's negligence.'**  
**Using case law examples to support your views, analyse the extent to which this aim is met in England and Wales.**

Candidates should acknowledge that these rules affect all torts and not merely negligence, even if tests of remoteness do vary. The focus of this question is, however, the tort of negligence.

The law aims to strike a balance: it has to compensate victims whilst not imposing draconian burdens on defendants. Hence, not every loss or injury factually caused by a defendant will automatically result in compensation being payable to a claimant.

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Compensation will not be granted in the majority of cases if the defendant did not cause the loss sustained by the claimant. The classic example is the 'but for' test in negligence: would the damage have occurred but for the defendant's act or omission (*Barnett v Chelsea & Kensington Hospital Management Committee*)? However, it is not always clear what would or would not have happened as a result of an act or omission and it is, therefore, far from satisfactory as it can result in very different outcomes for otherwise apparently similar circumstances (*Chester v Afshar*). The problem is further exacerbated by the issue of potentially multiple causes where the courts have taken successively different approaches over the years (*McGhee v National Coal Board*, *Hotson v East Health Authority*, *Wisher v Essex Area Health Authority* and *Stovold v Barlows*) thus questioning whether the rules of causation meet their supposed aim in all cases.

The issue of remoteness should also be addressed. It is a legal test, not a factual one and forms one of the ways in which some damage can be compensated in law while other cannot be. As a consequence, whilst a defendant may be proved to have caused damage or loss in fact, the law may consider that there is no requirement to compensate for it. The case of *Re Polemis* essentially imposed liability for all direct, physical consequences of a defendant's actions – the direct consequence test. This proved a rather harsh test on defendants, so a new test was laid down in *The Wagon Mound* - the test of reasonable foresight. Candidates should examine cases in which the test has since been applied (such as *Doughty v Turner Manufacturing Co*, *Hughes v Lord Advocate*, *Margereson v J W Roberts Ltd* and *Brown v Lewisham & North Southwark Health Authority*) and draw conclusions regarding whether the aim is met.

It is imperative that the candidates produce a clear, compelling conclusion as to whether or not the existing rules do promote compensation.

### Question 3

**'Vicarious liability conflicts with the basic principle in tort that wrongdoers should be liable for their own actions.'**  
**Evaluate the reasons why such liability is imposed.**

Candidates should define vicarious liability – liability for torts committed by others. It should then be explained that liability is not removed from the tortfeasor, but rather that liability becomes joint and that the claimant is free to sue either party. It is a situation which most commonly arises during the course of employment: employers can be held vicariously liable for the action of their employees whilst at work.

One reason for imposing such liability is that employers control the acts of employees and should be liable for them. This may have been true in the past, but to what extent is this true today? For example, what actual control can hospitals exercise in respect of highly skilled, specialist surgeons? However, if targets and work-loads are set, such that even specialist work cannot be done properly.....?

Also, in the majority of cases, it will be the employer who will be in the best financial position to meet a claim, either because of resources or insurance cover. Inevitably, such losses get passed on to consumers through higher prices for goods or services. Does this argument thus hold water?

Some evidence suggests that imposition of liability encourages employers to check that their employees do their work carefully. Would this happen if such liability did not exist and costs had to be reduced?

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## Section B

### Question 4

**Advise Jessica of her potential liability in negligence for the losses suffered, (a) by the twin' mother and (b) by Marvin.**

Candidates should set the question within the context of negligence by providing a definition followed by an outline of the three key elements: duty of care, breach of duty and resultant loss.

The focus of responses to this question must be on the issue of duty of care and the need for defendant-claimant proximity and of liability for resultant psychiatric injury.

In order for any claim in negligence to succeed, a duty of care owed by defendant to each claimant must be proven. *Donoghue v Stevenson* and the neighbour test need to be outlined and implications discussed. Were the twins' mother and Marvin sufficiently proximate to Jessica to amount to her neighbours? As the one was the mother of children left in her care and Marvin worked on the farm on which she was driving, it would appear so. Hence a duty of care was owed to both of them.

A breach of duty can be assumed here and requires no more than brief discussion.

The principal issue surrounds her liability for the apparent nervous shock suffered by both claimants as they are both secondary victims of the defendant's actions. In *White and Others* it was established that relatives of victims and those voluntarily giving assistance to people in danger are also to be treated by the rules developed in *McLoughlin v O'Brien*, and *Alcock v Chief Constable of Yorkshire*, but claims for psychiatric injury are to be strictly limited. The decision in *White and Others* confirmed that secondary victims must prove that psychiatric injury to secondary victims was a reasonably foreseeable consequence of a defendant's actions; however this will only be the case if a bystander of reasonable fortitude would be likely to suffer psychiatric injury. In addition to reasonable foresight, the loss must amount to a recognised psychiatric illness caused by sudden shock (*Sion v Hampstead Health Authority*), it must be suffered by someone with a sufficiently proximate relationship to the victim (including bystanders and rescuers), and the claimant must witness the event itself or its immediate aftermath or seen or heard it on TV or radio.

As the mother was not at the scene of the accident, does she satisfy the proximity requirement? Is her suffering simply that likely to be suffered by any grieving parent? Did Marvin voluntarily consent to the risk of injury or loss by acting as a rescuer and could this be raised as a defence against him?

The principles must be applied to the scenario and clear, compelling conclusions drawn.

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### Question 5

**Identify what general defences in tort that might be raised by Al Shakfeh Engineering Company in each of these incidents and, with reference to decided cases, discuss their likely success or failure.**

General defences are those that can be raised in respect of more than one tort as opposed to specific defences peculiar to individual torts.

In the first instance, there has been an apparent negligent act as power supply cables are severed and the power supply to a neighbouring factory is cut. A duty of care, breach of that duty and resultant loss would need to be established before liability in negligence can result. On the face of it, the facts would appear to speak for themselves (*res ipsa loquitur*). However, the engineering company could plead inevitable accident as a defence to the tyre company's claim. By definition, an accident is deemed inevitable if, in all the circumstances of the case, it was one that the defendant could not have avoided however much care they took. This would appear applicable here as maps had been obtained, but the cables were not shown on those available for reference.

The second incident raises the issue of the defence of consent or *volenti non fit injuria*. Claims will fail if defendants can prove that claimants voluntarily assumed risks which resulted in losses suffered. As an employee, did Mustafa volunteer or did he merely accept the risk for fear of action against him by his employer if he refused (*Bowater v Rowley Regis Corporation*)?

In the last instance, private nuisance would appear to be at issue. Was there an unreasonable indirect interference with a person's use or enjoyment of land in their possession? Apparently so. The engineering company may well try to use the defence of necessity in this case. However this defence is only available to those situations where the tort is inflicted out of necessity in the sense that it saves greater loss to the claimant than would otherwise be suffered. In this case, it would appear that the loss being saved is not the claimants but the defendant's, and hence such a defence is destined to fail (*Andrae v Selfridge*).

The principles must be applied to the scenarios and clear, compelling conclusions drawn.

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## Question 6

**Using case law to support your views, assess the possible liability in the tort of trespass of Anastasia, Nikita and Elena.**

Candidates should set their response in context by explaining that the tort of trespass has three forms: to land, to the person and to goods. This problem concerns trespass to the person, which also takes three forms: assault, battery and false imprisonment. Candidates should offer clear, concise definitions and brief explanations of each.

Candidates should then address the four potential issues arising from the facts of the scenario.

Could Anastasia's verbal abuse and threats amount to an assault? In general, words alone will not amount to an assault unless accompanied by threatening actions as they should not create reasonable fear that a battery is imminent (*Thomas v National Union of Mineworkers*).

Does Anastasia's hitting tennis balls at Elena amount to a battery? It would appear that any intentional, unlawful infliction of physical force amounts to a battery (*Wilson v Pringle*).

What about Elena's act of retaliation? This too would appear to amount to a battery; it was not done in any form of self defence, it would appear.

Did Nikita falsely imprison Elena, when he attempted to lock her in the toilet? This would appear to have been his intent, but as there was an open window and she was able to effect an escape by reasonable means, it would appear that any action against him would fail.

The principles must be applied to the scenario and clear, compelling conclusions drawn.