

OCR GCE Law special study units (G154/6/8)

Skills pointer guide – for use with January and June 2013 resource material

This skills pointer guide has been developed to assist teachers of OCR GCE Law in the delivery of the A2 special study units (G154/6/8). The themes and resource materials for the three units will change annually and the skills pointer guide will be updated and released to accompany each new theme.

General Skills

There are three critical generic skills appropriate to the special study exam which may differ in some ways from the other exams:

1 Time management is different to exams where all questions carry the same marks. In the special study exam mark distribution is:

- Question 1 = 16 marks (12 AO2 and 4 AO3)
- Question 2 = 34 marks (16 AO1, 14 AO2 and 4 AO3) and
- Question 3 = 30 marks (10 AO1 and 20 AO2) or 10 marks for each part.

Candidates should aim to apportion their time in the exam according to the marks that are available for each question. So, approximately:

- Question 1 = 15 minutes
- Question 2 = 37 ½ minutes and
- Question 3 = 37 ½ minutes (or 12 ½ minutes for each part).

2 The weightings for the three assessment objectives are very different from those in the other option papers. In the Special Study:

- Only 32.5% of the marks are available for AO1. This is because the area of study is very narrow and also because of the amount of support that candidates are given in the resource material booklet
- AO2 is worth 57.5% of the marks for the paper
- The remaining 10% is for AO3.

So, while knowledge is still important, it is what candidates do with it in this exam that counts. They cannot hope to pass merely by repeating knowledge, and they must be able to:

- Appreciate the significance of the overarching theme in developing the particular area of criminal law, contract law and tort law being studied
- Understand the significance of individual cases, and
- Do both in the context of the current substantive theme, which for January and June 2013 are:

Insanity and Automatism* (Criminal Law)
Restraint of Trade* (Law of Contract)
Vicarious Liability* (Law of Torts)

*to avoid excessive overlap between the content of the Special Study papers (G154/6/8) and the Option papers (G153/5/7), any questions on the Option papers which relate to the special study theme for the same academic year will be limited as far as possible to Section C.

Candidates should be able to do all of the above in a critical way and in the context of the role of judges and the development of the law. Candidates should also be able to apply the legal principles accurately and efficiently.

3 Reading skills. The Special Study is a source based exam. Candidates are given a booklet of materials at an appropriate point during the year, decided by the teacher, before sitting the Special Study exam. The whole purpose of source based exam papers is that candidates should:

- Make full use of the information and arguments contained in the source materials
- Respond to the information and arguments by discussing them in the context of the questions set and the overarching theme.

Candidates need to understand that the source material is there to help them – so it is poor exam practice if they ignore them and treat the exam as a pure memory test. The materials support candidates in two ways:

- Firstly, they have the Resource Material booklet during the year to support them in learning the law in the current themes. They could, for instance, make themselves completely proficient in the case of question 1 by researching all of the cases in the materials and preparing for an answer on each
- Secondly, they are given a clean copy of the materials to use in the exam itself so they always have the opportunity to refer to them for additional support and also to use them in their answers. It is acceptable in the Special Study exam to use information or points of discussion from the materials in their own discussions by citing the appropriate source and lines (eg Source x, lines x-x).

When using information from the sources candidates should not merely copy the information. They should use aspects of the information there to support their own discussions. If, for instance, candidates think that something that a judge or an author in the materials has said is relevant to their answer and could not be stated any better in their own words, or if they are trying to make optimum use of their time, then it is perfectly appropriate for them to refer to the specific lines of the source. By referring to the specific lines of the source an examiner can see that they are sensibly selecting and citing valid information. This is an important legal skill in itself and, if relevant, will be rewarded. Mere general references to the source as a whole are unlikely to gain any credit.

Candidates should remember for all questions:

- to read each question thoroughly so that they are absolutely sure what it is about
- to always refer back to the appropriate source for further information
- to plan their answers briefly at the start of the exam to ensure that:
 - they only use relevant information
 - they do not miss any information that is relevant
- to always use law, whether cases or statute, in support of both their arguments for essays and in their application for the problem questions
- to avoid excessive use of the facts of the cases – it is the principle that is important
- to make sure that they answer the actual question set
- to make sure that their time management is good – they are having to answer in much shorter time scales than for the option papers.

Question Specific Skills

The three Special Study papers (Unit G154 Criminal Law; Unit G156 Law of Contract; and G158 Law of Torts) all consist of three questions and candidates have to answer each one. There are no choices of question in the Special Study exam.

Each question examines a different skill and in ways that are possibly different from other papers.

Question 1

Question 1 is worth 16 marks; 12 AO2 marks plus 4 marks for AO3. There are no AO1 marks available.

This question is an invitation to provide an analysis of the contribution of one of the cases mentioned in the sources to the development of the law in that area. Normally, there will be only 8 cases directly referred to in the resource material. For question 1, candidates are required to have a full understanding of the significance or contribution of the case referred to in the question in the context of the overarching theme.

The January and June 2013 themes are:

Insanity and Automatism (Criminal Law)
Restraint of Trade (Law of Contract)
Vicarious Liability (Law of Torts)

Criminal Law:

- *R v Quick* [1973] QB 910
- *R v Sullivan* [1984] AC 156
- *R v Hennessy* [1989] 1 WLR 287
- *M'Naghten's Case* (1843) 10 CI & F 200
- *R v Burgess* [1991] 2 QB 92
- *Bratty v Attorney-General for Northern Ireland* [1963] AC 386
- *R v Kemp* [1957] 1 QB 399
- *R v T* [1990] Crim LR 256

Law of Contract:

- *Esso Petroleum v Harper's Garage (Stourport) Ltd* [1968] AC 269
- *Nordenfelt v Maxim Nordenfelt* [1894] AC 535 HL
- *Mason v Provident Clothing & Supply Co Ltd* [1913] AC 724 HL
- *Lyne-Pirkis v Jones* [1969] 1 WLR 1293
- *Home Counties Dairies Ltd v Skilton* [1970] 1 WLR 526
- *Watson v Prager* [1991] 1 WLR 726
- *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173
- *A Schroeder Music Publishing Co Ltd v Macauley* [1974] 3 All ER 616 HL

Law of Torts:

- *Beard v London General Omnibus Company* [1900] 2 QB 530
- *Limpus v London General Omnibus Co Ltd* (1862) 1 H & C 526
- *Bazley v Curry*, [1999] 2 S.C.R. 534
- *Mattis v Pollock (trading as Flamingos Nightclub)* [2003] IWL 2158
- *Dubai Aluminium Company Ltd v Salaam* [2002] 3 WLR 1913; [2003] 1 All ER 97
- *Lister v Hesley Hall Ltd* [2001] UKHL 22
- *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256
- *Trotman v North Yorkshire County Council* [1999] LGR 584

Candidates should be able to learn the significant points of all eight cases comfortably. In any case, a lot of the necessary detail for many of the cases is given in the materials. Three of the sources are extracts from the judgments of cases or statutes, and there is varying degrees of detail on others. Candidates must be able to show in the exam that they have a full understanding through their discussion of the significance of each case to the development of the law in that area. This should also involve citing other cases in their answers since 'development' demands that they either know where the law developed from or where it developed to.

High marks can be obtained by:

- Discussing in detail the critical point of the case in the context of the question and of the overarching theme
- Discussing in the same depth and detail at least two other analytical points about the case in context
- Showing development by relating to an appropriate linked case
- Answering the question in light of the command word eg 'significance', 'importance' etc...

Example Criminal Law – *R v Sullivan* [1984] AC 156 – High marks can be gained, for example, with the following:

- The significance of this case was that Lord Diplock, in the House of Lords, reiterated that part of satisfying the disease of the mind test under the M'Naghten Rules was to establish that the condition affecting the defendant had to have a reoccurrence of danger. He stated this was in order to protect society from such dangers of violence and that this was at the heart of the defence of insanity (Source 2, lines 13-16)
- The defendant had been charged with GBH. While admitting the act he argued the defence of automatism, stating that it was done during an epileptic fit. The trial judge, unfortunately for the defendant, refused to accept automatism and ruled that it amounted to a plea of insanity. In a tactical move the defendant changed his plea to guilty of ABH to avoid being labelled insane and appealed against the decision. However, while The House of Lords sympathised with his epilepsy, it upheld the trial judge's decision and his conviction. However, the sentencing relies very much on the discretion of the judge (Source 4, lines 8-10)
- Lord Diplock stated that even though the attack was as a result of a temporary suspension of the defendant's mental faculties at the time of his act, the temporary nature was not relevant to the M'Naghten Rules. Instead the temporary nature was a factor in how he was to be dealt with after being found not guilty by reason of insanity
- Lord Diplock was not willing to alter the common law and its previous decisions on this matter. He stated that Parliament had opportunities to amend the law but had not done so. In 2012 the Law Commission's scoping paper felt that the decision in Sullivan and the reoccurrence of danger theory was based mainly on the ease of application and policy rather than any sound principles or any definitions used by the medical profession

- *Sullivan* followed the earlier authority in *Bratty*. Here Lord Denning had upheld the trial judge's decision that when the defendant had killed the victim during an epileptic seizure this amounted to a plea of insanity. In *Bratty* Lord Denning had stated that any mental disorder which manifests itself in violence and is prone to reoccur is a disease of the mind.

Example Law of Contract – *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173 – high marks could be gained, for example, with the following:

- *This* case concerned a 'Lease/Lease Back' agreement. Mr. Lobb's company owned a garage and had a contract with Total which included an 8 year tie to purchase petrol from them. Having got into financial difficulty, a Lease/Lease-Back arrangement was made between Mr. Lobb personally and Total through which Total provided an initial capital sum in return for Mr. Lobb paying monthly rent to lease back the petrol station. The Lease-Back included a 21 year tie to buy petrol from Total with exit points at 7 and 14 years. This was held to be an unreasonable but severable restraint of trade clause at first instance. Mr. Lobb appealed against its unreasonableness and Total appealed against its severability
- *The* fact that the Court of Appeal dismissed out of hand Total's technically correct argument that RoT could not apply demonstrates the courts' commitment to policing these clauses effectively
- *The* Court of Appeal placed considerable weight on *Esso* (Referred to by Peel in Source 5, line 13) as an authority for the idea that petrol ties should not last for more than 5 years unless the supplier can show why it is economically necessary. This shows the courts' efforts to maintain a consistent approach to these clauses
- Despite this, the Court of Appeal returned to Lord Macnaghten's speech in *Nordenfelt* (Source 2) highlighting the importance of consideration as a factor to be used in weighing reasonableness. This reflects the fact that the laissez faire approach evident in this nineteenth century case remains fundamental to this area of law today and that the 'rule of thumb' from *Esso* can be rebutted if the case merits it. There were a whole variety of ways in which Mr. Lobb had received full consideration for such a restraint (including, effectively, the whole value of his property) and therefore the clause was held to be not in restraint of trade – it was a fair bargain, reasonable in the interests of the parties
- *The* case is also an example of the courts' willingness to use the blue-pencil test: Dillon LJ made it clear, *obiter*, that had it been unreasonable, the clause was severable.

Example Law of Torts – *Bazley v Curry* [1999] 2 S.C.R. 534 - high marks could be gained, for example, with the following:

- The case of *Bazley v Curry* is a decision of the Canadian Supreme Court which has been very influential in the development of English case law on vicarious liability. The case involved a children's foundation operating residential care facilities for emotionally disturbed children. The foundation unwittingly employed a paedophile who sexually abused one of the children. The Canadian Supreme Court, based on clear policy concerns, formulated the 'close connection' test and developed guiding principles to determine whether an employer is vicariously liable for an employee's intentional wrong
- The case referred to the existence of a 'close connection' between the creation or enhancement of a risk and the wrong that arises from it. The original 'close connection' test set out by Salmond was constrained by the limitation that it only applied where the employee could be said to be doing an authorised act in an unauthorised manner as illustrated in the case of *Warren v Henlys*. The test proposed in *Bazley* suggests that there is liability where there is a close connection between conduct authorised by the

employer and the wrongful act to impose liability. The judgment went on to list some factors to be taken into account where the tort is intentional

- Prior to the decision in *Bazley*, the English Court of Appeal case of *ST v North Yorkshire County Council* (which involved similar facts) did not find vicarious liability. Thus, when *Lister* (another case involving abuse of children) was heard at first instance and on appeal, the Court of Appeal considered it was bound by the North Yorkshire County Council case. However, on reaching the House of Lords, the close connection test put forward in *Bazley* was adopted. In arriving at their decisions in both *Bazley* and *Lister* it is obvious that policy concerns, deterrence and loss adjustment were considered: “Where this is so, vicarious liability will serve the policy considerations of the provision of an adequate and just remedy and of deterrence.” (Source 3, lines 14-15)
- The court pointed out that if the choice is between which of two faultless parties should bear the loss — the party that created the risk that led to the wrongdoing or the victim - then the answer is obvious. Neither alternative is ideal but if a choice has to be made, it is fairer for the loss to fall on the party that introduced the risk and were in a position to control it.

Planning for Question 1

For the case digest (question 1) candidates should:

- Refer back to the source for the important information contained in it
- Remember to include the significant or critical point from the case (normally the *ratio decidendi*) and at least one other linked case to show development, and the key critical issues in terms of the place of the case in the development of the law
- Get used to looking at the other sources in the resource material booklet since they are likely to contain other information that is relevant to the development of the law.

It is important to note that no credit will be given for merely describing the narrative of the case; some sort of evaluative point must be made in order to achieve marks

Question 2

Question 2 is worth 34 marks, 16 AO1 marks, 14 AO2 marks plus 4 AO3 marks.

This is always an essay style question arising from a quote from one of the sources. It is on either insanity and automatism (Criminal); restraint of trade (Contract); and nuisance (Torts) in the context of the role of judges, precedent, application of statutory materials and the development of the law.

Question 2 is based on a quote from one of the sources and candidates are expected to engage in a critical discussion with a balanced argument and reasoned conclusion together with supporting legal rules and detailed authorities, all in the context of the development of the law.

- Candidates should make full use of both information (for AO1) and comment (for AO2) contained within the source materials
- Candidates should aim to go beyond the source materials in their responses to demonstrate their learning within the area of law being assessed
- They can do this by citing the appropriate information/comment by accurate line and source reference (mere vague references to the source will gain no credit – simply extracting the information without applying it to their own discussion will gain limited credit)
- Candidates gain AO1 marks for providing a range of relevant legal rules, clearly stated, with supporting authorities. Providing some minimal reference to the facts of an

authority shows accurate and detailed knowledge; mere case names alone will attract limited credit

- Question 2 requires high level analysis of the discussion indicated in the question. The quote from a source is there to help candidates identify the theme of the discussion
- Candidates should aim to maximise the AO2 mark – remembering that it is difficult to pass without reasonable AO2 marks, and impossible to gain a high grade without high AO2 marks
- Candidates wishing to practice writing answers may do so by locating possible essay titles in advance from examining the comment in the source materials for likely quotes to attach to a question.

Example Criminal Law:

Source 2 lines 1-2

The author states that “In the defence of insanity ... the accused was insane at the time of the offence but is fit to plead at the time of the trial. It is not often raised today”.

Example Law of Contract:

Source 2 lines 14-16

The author states that “In time, however, it was found that a rule so rigid and far-reaching must seriously interfere with transactions of every-day occurrence”.

Example Law of Torts:

Source 1 lines 25 to 27

The author states that “The adaptation of legal doctrines based on personal responsibility to a world dominated by impersonal organisations, and within which responsibility is dispersed, has been no easy task”.

In each case a specific question could be asked and the quote helps to direct the candidate into the appropriate AO2. They should also be able to find many examples of AO2 in the sources themselves. The quotes used in the questions are in fact examples.

For high level AO2 marks candidates need also to be discussing, in the context of the overarching theme, the role of judges, use of precedent or application of statutory materials and the development of law. Each individual theme obviously has its own individual aspects of this, for example:

Criminal Law - the law on insanity and automatism is based on the M’Naghten Rules 1843 and subsequent common law decisions. However, judges have had difficulty clarifying the definitions and have, at times, confused policy with the true interpretation of the defences and that understood by the medical profession.

Law of Contract - judges have had to balance a basic policy discouraging restraint on individual freedom against the competing interests of respecting individual choice and the fact that some restraints are actually in the interests of the market.

Law of Torts - the common law doctrine of vicarious liability is a constantly developing area of law. Judges have been active in refining tests which reflect the changing nature of the employer - employee relationship. The recent development of the so-called ‘close connection’ test illustrates the way that this can draw judges into controversial matters of social policy.

However, these discussions in any case fall into clear categories that candidates are able to consider in their research into the materials prior to the exam and then to contemplate in the exam:

- The extent to which the law is judge-created or statutory
- If statutory, the extent to which this has led to interpretation
- How effectively judges have interpreted statute law
- Whether judge made law has been consistent or has been subject to change
- If subject to change, the reasons for the change, whether to develop the law or because previous judges got it wrong
- The extent to which the law has been developed or have judges restricted its growth and natural application
- Whether the law is just and reasonable
- Whether the law has been consistently applied
- Whether the law has been made the subject of numerous exceptions meaning that it does not easily apply universally
- Whether the judges have referred to judicial policy
- Whether the law is sensible or in need of reform
- Whether judges have used mechanisms such as the Practice Statement
- Whether judges have failed to follow the rules on binding precedent
- Whether Parliament has been forced to reform law made by the judges.

The list is not necessarily exhaustive but candidates should try to engage in such discussions. This is when they show that they have a synoptic appreciation of the law and it is also where candidates are able to engage in 'stretch and challenge'.

Planning for Question 2

For the essay style question (question 2) candidates should:

- remember the importance of structuring their answer
- provide an introduction identifying what the point of the question is
- produce a balanced discussion in which they use a wide range of cases from within and beyond the source materials and legal principles generally in support of their answer
- produce a reasoned conclusion that arises from the discussion that they have engaged in.

Question 3

Question 3 is worth 30 marks, 10 marks each for the three separate scenarios. There are 10 AO1 marks, 20 AO2 marks and no AO3 marks.

This is always a problem question comprising of three parts. For the duration of the 2013 theme it involves legal problem solving on either:

Insanity and Automatism (Criminal Law)
 Restraint of Trade (Law of Contract)
 Vicarious Liability (Law of Torts)

Candidates are provided with three small factual scenarios and they will then have to identify the aspects of the law that could be used to resolve the various issues that arise from the scenarios.

Candidates should be able to identify at least three points of application (one of which is the Critical Point)* plus one case for each for high marks:

* In some scenarios there may be more than one 'critical point'. Where this is the case, any of critical points (indicated by 'CP' in the mark scheme) will fulfil the requirement for

candidates to identify the 'critical point' to achieve level 2 and above. The other 'critical points' can be credited as 'other' points of application.

Example - Criminal Law:

- When X hits Y with the metal bar he will be judged sane unless he can prove that he was insane at the time of committing the offence under the M'Naghten Rules 1843. It is up to X to prove this on a balance of probabilities
- X could argue that when he hit Y he was suffering from a defect of reason. He could argue that since his epilepsy had deprived him of his powers of reasoning this was a defect of reason
- When X had hit Y he was suffering from an epileptic seizure. In *Sullivan* this condition was judged to be a disease of the mind and fall under the M'Naghten Rules. Since epilepsy is an internal source causing X's action to hit Y and that it is prone to reoccur in violence like in *Bratty*, it is likely that X will satisfy this part of the Rules
- Finally, X must not have known what he was doing, or known what he was doing when he hit Y was wrong. Clearly when X says he cannot remember anything about the attack due to the seizure he must satisfy this part of the Rules. He clearly didn't know what he was doing was legally or otherwise wrong when he hit Y
- Therefore, in conclusion, X could successfully plead not guilty by reason of insanity to the attack.

Example - Law of Contract:

- A sold his business and its goodwill to B. This goodwill is therefore a legitimate interest that B is entitled to protect [*Faccenda Chicken*]
- The geographical scope of the restraint on A appears consistent with the practice of his old business, this is therefore likely to be found to be reasonable in the interests of the parties and the public [*Nordenfelt v Maxim Nordenfelt*]
- The temporal extent of the restraint on A also appears reasonable given the facts presented, this too is therefore likely to be found to be reasonable in the interests of the parties and the public
- However, the substantive scope of A's restraint seems to be too wide as it goes beyond the activities of his old business ; this is therefore likely to be found in restraint of trade
- Unfortunately for B, the unreasonable substantive coverage cannot be removed from the clause and still the leave the clause making sense so it cannot be 'blue-pencilled' [*Mason*]
- In conclusion, this clause is likely to be struck down for being in restraint of trade and B will not be able to prevent A from opening his new shop.

Example – Law of Torts:

- In order for Z Ltd to be liable to Y, Y will need to establish that X was an employee of Z Ltd, that he committed an actionable tort and that it took place in the course of employment
- Firstly, X satisfies the test of employment as the facts fulfil the tests laid down in *Ready Mixed Concrete (SE) Ltd v Minister of Pension*
- Secondly, X has also committed the tort of negligence as he owes Y a duty of care, breached that duty and caused reasonably foreseeable harm (*Caparo*)
- Thirdly, the tort has been committed 'in the course of employment'. This is because X was carrying out an authorised act in a negligent way (*Century Insurance*). This complies with the Salmond test which would be a conclusive test in a case like this involving an unintentional tort
- Therefore, Z Ltd will be vicariously liable for X's negligence.

Planning for Question 3

For the three scenarios in question 3 candidates should:

- structure their answer logically, apply the law sensibly to the facts
- identify for each individual aspect of the problem the key facts on which resolution of the problem is based
- define the appropriate law accurately; and then apply the law sensibly to the facts.
- reach sensible conclusions based on their application of the law
- use specific relevant Act sections or cases to support their definitions of the law (eg the M'Naghten Rules 1843 and the common law interpretations of this section; judicial definitions of legitimate interests and reasonableness in the area of restraint of trade; judicial interpretations of the tests of employment and whether a tort has occurred in the course of employment
- remember that they are dealing with small individual problem scenarios rather than a large problem, as is the case in the option papers, and therefore the structure is almost created by the question
- within their answer, in order to reach Level 5, discuss the relevant critical point(s), include at least one relevant case and provide sensible conclusions based on their application of the law stating what they think the most likely outcome would be for each scenario.