

Mark Scheme (Results)

January 2019

BTEC Level 3 Nationals in Applied Law

Unit 1: Dispute Solving in Civil Law



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Unit 1: Dispute Solving in Civil Law

General marking guidance

- All learners must receive the same treatment. Examiners must mark the first learner in exactly the same way as they mark the last.
- Mark grids should be applied positively. Learners must be rewarded for what they have shown they can do rather than be penalised for omissions.
- Examiners should mark according to the mark grid, not according to their perception of where the grade boundaries may lie.
- All marks on the mark grid should be used appropriately.
- All the marks on the mark grid are designed to be awarded. Examiners should always award full marks if deserved. Examiners should also be prepared to award zero marks, if the learner's response is not rewardable according to the mark grid.
- Where judgement is required, a mark grid will provide the principles by which marks will be awarded.
- When examiners are in doubt regarding the application of the mark grid to a learner's response, a senior examiner should be consulted.

Specific marking guidance

The mark grids have been designed to assess learners' work holistically.

Rows in the grids identify the assessment focus/outcome being targeted. When using a mark grid, the 'best fit' approach should be used.

- Examiners should first make a holistic judgement on which band most closely matches the learner's response and place it within that band. Learners will be placed in the band that best describes their answer.
- The mark awarded within the band will be decided based on the quality of the answer in response to the assessment focus/outcome and will be modified according to how securely all bullet points are displayed at that band.
- Marks will be awarded towards the top or bottom of that band depending on how they have evidenced each of the descriptor bullet points.

Mark GRID Applied Law Unit 1: Dispute Solving in Civil Law - marks 30 (x2)
Total Marks for external Task are 60

Assessment focus	Band 0	Band 1	Band 2	Band 3	Band 4
To be used with both Activity 1 and Activity 2					
Selection and understanding of legal principles relevant to context	0	1-2	3-4	5-6	7-8
	No rewardable material.	<ul style="list-style-type: none"> • Selection of some basic legal principles. • Little understanding of the law relevant to the context. • Limited use of relevant authorities in the context of the scenario. 	<ul style="list-style-type: none"> • Selection of some appropriate legal principles. • Some understanding of the law relevant to the context. • Use of some relevant authorities in the context of the scenario. 	<ul style="list-style-type: none"> • Selection of appropriate legal principles. • Clear understanding and linkage to the law and context. • Use of a variety of appropriate authorities in the context of the scenario. 	<ul style="list-style-type: none"> • Selection of appropriate legal principles. • Thorough understanding relevant to the context, showing a detailed knowledge and understanding of the relevant law. • Use of a wide variety of appropriate authorities in the context of the scenario.

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Assessment focus	Band 0	Band 1	Band 2	Band 3	Band 4
To be used with both Activity 1 and Activity 2					
Application of legal principles and research to data provided	0	1-2	3-4	5-6	7-8
	No rewardable material.	<ul style="list-style-type: none"> • Demonstrates limited application of the relevant law to the scenario. • Limited use of precedents/authorities in context, drawing on research. 	<ul style="list-style-type: none"> • Demonstrates some application of the relevant law to the scenario. • Selects and applies some relevant precedents/authorities in context, drawing on research. 	<ul style="list-style-type: none"> • Demonstrates application of the relevant law to the scenario. • Selects and applies relevant precedents/authorities in context, drawing on research. 	<ul style="list-style-type: none"> • Demonstrates detailed and thorough application of the relevant law to the scenario. • Selects and applies relevant precedents/authorities throughout in context, drawing on research.

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Assessment focus	Band 0	Band 1	Band 2	Band 3	Band 4
To be used with both Activity 1 and Activity 2					
	0	1-2	3-5	6-8	9-10
Analysis and evaluation of legal authorities, principles and concepts	No rewardable material.	<ul style="list-style-type: none"> • Analysis is limited. • Analysis lacks a grasp of the concepts in the context of the scenario. • Alternatives are stated but with no supporting evidence. 	<ul style="list-style-type: none"> • Some analysis. • Analysis demonstrates a basic grasp of the concepts and their relevance in this scenario. • Alternatives are stated with some supporting evidence. 	<ul style="list-style-type: none"> • Linked statements provide a logical analysis of the evidence in the scenario. • Analysis demonstrates a good grasp of the concepts and their relevance in this context. • Alternatives are detailed, and coherent judgements made as to their validity, making use of supporting evidence. 	<ul style="list-style-type: none"> • Detailed and coherent statements provide a clear and logical analysis of a wide range of relevant evidence in the scenario. • Analysis of evidence demonstrates a thorough grasp of the concepts and their relevance in this context. • Alternatives are considered in depth, and comprehensive judgements made as to their validity, using appropriate supporting evidence.

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Total Marks for external Task are 60

Assessment focus	Band 0	Band 1	Band 2	Band 3	Band 4
To be used with both Activity 1 and Activity 2					
Presentation and structure	0	1	2	3	4
	No rewardable material.	<ul style="list-style-type: none"> Lacks professional format and structure, leading to lack of clarity. Language is inappropriate for audience. 	<ul style="list-style-type: none"> Has a basic professional format and structure. Language is sometimes appropriate for audience. 	<ul style="list-style-type: none"> Has a logical structure and format that is generally clear and professional. Language is mostly appropriate for audience. 	<ul style="list-style-type: none"> Is well written, uses clear language, has a logical and professional format and structure. Language is appropriate for audience throughout.

Activity 1 - Indicative Content

Demonstrate an understanding of the legal principles relating to negligence:

- duty of care
- breach of that duty, and
- causation of foreseeable damage.

Recognise relevant legal authorities

Duty of care: *Donoghue v Stevenson*, *Caparo v Dickman*, *Robinson v Chief Constable of West Yorkshire Police*

- An incremental approach based on existing case law and principles: *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4
- *Caparo* test:
 - Foresight: *Kent v Grifiths*
 - Proximity: *Bourhill v Young*
 - Policy issues: *Hill v Chief Constable of West Yorkshire*.
- Also credit reference to either road traffic legislation: s.42 Road Traffic Act 1988 and/or Rule 239 of the Highway Code as sources of a statutory or fixed duty of care.
- Also credit any relevant similar case law that would establish a duty of care based on rules of precedent (*Burridge v Airwork Limited*, *Smith v Finch*, *Rickson v Bhakar*)

Breach: The objective 'reasonable man' test: *Nettleship v Weston*

- Risk factors:
 - Special characteristics: *Paris v Stepney*
 - Risk: *Bolton v Stone*, *Miller v Jackson*
 - Adequate precautions: *Latimer v AEC*
 - Policy: *Watt v Hertfordshire Council*.

Damage:

- Factual causation: *Barnett v Chelsea and Kensington Hospital Management Committee*
- Remoteness of damage: *The Wagon Mound*.

Recognise the special relevance of causation of damage to this question:

The rules relating to reasonable foresight of damage in general (*Wagon Mound (No 1)* as above).

The rules relating to the type of damage caused generally (*Bradford v Robinson Rentals*).

Use relevant case law to explore potential liability (i.e. the rules relating to the eggshell skull (or 'thin skull' rule) (*Smith v Leech Brain & Robinson v The Post Office*).

Explain any relevant defences

Contributory negligence:

- The Law Reform (Contributory Negligence) Act 1945
- *Smith v Finch* [2009] EWCH 53 (QB); *Rickson v Bhakar* [2017] EWHC 264 (QB); *Sayers v Harlow Urban District Council*
- Possibility of 100% contributory negligence: *Jayes v IMI (Kynoch) Ltd*.

Apply the law to Ahmed

Ahmed is likely to be owed a duty of care

- The Road Traffic Act/Highway Code would be likely to create a duty of care on all motorists/road users in this situation (see, for example, s.42 Road Traffic Act 1988 and/or Rule 239 Highway Code).
- There are likely to be existing precedents that would fix a duty of care: *Burridge v Airwork Limited*.

- On an application of the *Caparo* test: the possibility of harm is foreseeable (common sense and experience), there is proximity (physical in time and space) and there are no policy factors against the imposition of a duty (health and safety of the public, promoting considerate use of the highway with respect to all users: pedestrians, cyclists, moped/motorcycle drivers and other drivers).

Bilal is likely to have breached the duty owed

- Based on the precedent from *Burridge v Airwork Limited*; *Brown v Roberts*.
- Bilal has fallen below the standard of the reasonable driver who would check over his/her shoulder and/or check in mirrors before opening the door - note the increasing use of the Dutch method where drivers use their left hand to open the driver's door to encourage them to turn around in doing so.

Bilal has caused foreseeable harm

- Ahmed has physical injuries that 'but for' Bilal's action, he would not have sustained. Therefore, Bilal is the factual cause of Ahmed's injuries.
- Ahmed's additional injuries (the paralysis) are not too remote from Bilal's breach as a result of the application of the thin skull rule.
- If the damage done to your victim is greater than could be foreseen, due to some vulnerability or special circumstance of the victim, then you remain responsible for the full extent of the harm done.
- In this instance Ahmed's vulnerability (his previously unknown spinal condition) has to be brought within the thin skull rule.

Can Bilal rely on any defences?

- Bilal might try to apply the partial defence of contributory negligence.
- The basis of this would be the claim that Ahmed was not wearing a helmet.
- However, based on the authority of *Smith v Finch* [2009], there will be no contributory negligence where it can be shown that wearing a cyclist's helmet would not have made a difference.
- Credit reasoned arguments that there may be some contributory negligence.

Likely outcome for Ahmed

- Bilal is likely to be liable to Ahmed in negligence.
- He owed him a duty of care based on both precedent, statute and/or an application of the *Caparo* test.
- He breached that duty by falling below the standard of the reasonable car driver and he caused reasonably foreseeable harm based on a straightforward application of the thin skull rule.
- Ahmed is unlikely to be found contributorily negligent because wearing a cycle helmet would have made no difference based on *Smith v Finch*.

Credit any relevant evaluative comments

- Negligence can be difficult to establish as it is 'fault based' liability.
- Proving fault can involve problems of cost, delay, access to lawyers and adversarial dispute resolution.
- Breach cases involve a subjective assessment of an objective standard.
- Policy factors can sometimes unfairly militate against recovery for public policy reasons.

Credit any other alternative lines of reasoning

- Alternative outcomes where properly supported.
- Accept *R v Beiu*; *R v Aydogdu* as cases to support 'dooring' even though they are criminal cases

Activity 2- Indicative Content

Demonstrate understanding of the law relating to damages

- The aim of damages - to put the claimant back in the pre-negligence position.
- Pecuniary loss - a loss that can easily be calculated in financial terms (loss of earnings, car repairs).
- Non-pecuniary loss - a loss that is not rooted in financial loss (pain, grief, suffering).
- Special damages - pecuniary losses calculated specifically up to the date of the settlement.
- General damages - non-pecuniary losses calculated from the trial date.
- Lump sums and structured settlements.

Demonstrate understanding of the law relating to access to justice and the civil justice system

The cost of a civil action and legal aid

- Civil actions can be expensive - lawyers' fees, lengthy, complex proceedings, costs.
- Civil legal aid:
 - Criteria for entitlement (s.10(3) Legal Aid, Sentencing and Punishment of Offenders Act 2012)
 - Means and merits testing
 - Legal advice, representation and family mediation.

Alternatives to the Civil Courts

- Tribunals
- Negotiation
- Mediation
- Conciliation
- Arbitration

Alternative sources of help

- Conditional Fee Arrangements
- Civil Legal Advice (CLA) - government funded help by phone/online
- Citizens Advice Bureau
- Law Centres
- Trade unions
- Free Representation Units
- Lawyer's *pro bono* schemes
- Online advice sources
- Insurance policies

The Civil Courts

- Appellate courts (UK Supreme Court, Court of Appeal and Divisional Courts of the High Court)
- The Divisions of the High Court >£100,000 or >£50,000 for PI
- The Queen's Bench Division (Tort and Contract)
- The Family Division (Matrimonial and Parent and Child)
- The Chancery Division (Property)
- The County Court <£100,000 or <£50,000 for PI (including Small Claims <£10,000 or £1,000 for PI)
- The Magistrates' Court (including the Family Proceedings Court)

The three track system

- Small Claims (<£10,000 or <£1,000 PI) - informal, DIY, inquisitorial, no lawyers or legal aid

- Fast Track (£10,000 - £25,000) - fast allocation and hearing (30 weeks), one-day trial, strict court enforced timetables
- Multi Track (>£25,000) - encourages ADR, active case management, strict timetables, limited costs, case conferences

Trial process

- N1 Claim Forms
- Pre-action protocols
- Allocation to track
- Trial process
- Outcome and costs

Credit relevant evaluation

Advantages of the civil justice system

- Use of expertise
- Enforceable definitive outcome
- Possibility of legal aid
- Objective, fair system
- Possibility of appeals

Disadvantages of the civil justice system

- Expense - especially if no legal aid, can outweigh damages.
- Delays - can wait 30 weeks just for a Fast Track case.
- Uncertainty - no guarantee of winning with implications for costs.
- Complex and intimidating - the system is not consumer friendly and can put off the less well-informed.

Advantages of alternatives to the courts

- Quick - can be instant such as negotiation.
- Cheap - some schemes are free and most are cheaper than civil courts.
- Informal - can be very informal and conducted in private avoiding press attention.
- Expertise - can make use of technical expertise not available to the civil courts.

Disadvantages of alternatives to the courts

- Lack of funding - some legal aid assistance (family matters) but generally self-funded.
- Expense - although generally cheaper than the courts, formal types of ADR can become expensive.
- No appeal rights or enforcement - there are generally no appeals (except tribunals) or any way to enforce the award.
- Legal issues - points of law can arise that require judicial intervention.

Problems with access to justice

- Lack of funding - civil legal aid 'advice deserts'
- Unfairness of means testing and general eligibility criteria
- Issue of covering costs
- Equality of access - law unavailable to those most in need

Apply the law to Ahmed

Damages

- Ahmed can claim special damages (for his pecuniary losses) of:

- Any fees paid (up to the time of the trial) in relation to his university course, which he can no longer pursue
- Any lost earnings if he had a part-time job as well as studying
- Any travel expenses incurred with hospital visits and medical appointments in connection with his injuries
- Equipment such as wheelchairs required to provide mobility as well as other medical costs such as drugs and fees for physiotherapists.
- Ahmed can claim general damages (for his non-pecuniary losses) for an unspecified amount to be determined by the court. This is to cover things like:
 - Pain, suffering and loss of amenity due to the injuries
 - Damages for future loss of earnings - these will be significant in Ahmed's case given that he is so young and had a potentially lucrative career as a dancer
 - Future medical costs - again, these will be significant given the nature of Ahmed's injuries.
- Ahmed would be likely to benefit from a structured settlement given the circumstances of his injuries and the changing nature of future needs as his health deteriorates.

Contributory negligence

- Ahmed's damages are unlikely to be reduced because a helmet would not have made a difference.
- Credit alternative lines of reasoning.

Likely court

- Given the significant amount of money involved Ahmed's case and the complexity of calculating the various aspects of different damages, his case will almost certainly have to be heard in the High Court.
- Explain to Ahmed that this is a court based in London but it does have regional centres as well so he will not have to worry about access and travel given his disability.
- Explain to Ahmed that given the importance of the case and what is likely to be extensive and complex expert medical evidence, as well as the significant size and complexity of awarding his damages, this will mean that the case will require the expertise of a High Court judge.

Likely track

- Explain to Ahmed that based on the value of his claim, the complexity of the evidence and the complexity of assessing and awarding relevant damages, the case is almost certain to be allocated to the Multi Track.
- Explain that this is a thorough process controlled by the judges throughout. However, you should explain to Ahmed that the judges will encourage an out-of-court settlement - quite possibly by encouraging the use of ADR (Alternative Dispute Resolution).
- Explain that if an out of court settlement cannot be made, then the trial is likely to take six months or more to come to court with many tightly prescribed pre-trial processes and that the trial itself will be a significant process, including use of expert medical witnesses and fairly complex evidence.

Potential affordability issues

- Ahmed is on a low/no income as a student so this means it is more likely he will meet the eligibility criteria for legal aid.
- However, it should be noted that personal injury cases such as this one are rarely funded by legal aid and that a conditional fee arrangement (CFA) is the most likely form of funding the case - explain to him how a CFA would work.
- Explain to Ahmed that there are a number of alternative means of obtaining advice for his case.

Potential fear of the system issues

- Explain the reasons why Ahmed should not worry about going to court by explaining the benefits of a civil court adjudication.

- Explain that the fact that Mr Patel has the financial means to settle the claim through his own wealth and/or his insurance means it is worthwhile pursuing the claim.
- Explain that Mr Patel's anxiety about bad publicity will act in Ahmed's favour and encourage an early out-of-court settlement.
- Explain the alternatives available to Ahmed and discuss their relative advantages and disadvantages compared to formal action.

Likely overall outcome

Ahmed will succeed and receive significant damages - most likely in the form of a structured settlement with no deductions for contributory negligence. His case will be heard on the Multi Track in the High Court. He is not likely to receive legal aid for a personal injury case but has a very attractive case for a CFA. An out-of-court settlement is quite possible but Ahmed should take professional advice about whether this is appropriate/enough. ADR could be considered but, given the likely level of damages, it is submitted that these would lack the authority of a court-based outcome and award.

Credit any other alternative lines of reasoning.

- Alternative outcomes where properly supported.

Ofqual



Llywodraeth Cynulliad Cymru
Welsh Assembly Government



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