

# Mark Scheme (Results)

Summer 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

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- 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

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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**

<b>Assessment focus</b>	<b>Band 0</b>	<b>Band 1</b>	<b>Band 2</b>	<b>Band 3</b>	<b>Band 4</b>
<b>To be used with both Activity 1 and Activity 2</b>					
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"> <li>• Selection of some basic legal principles.</li> <li>• Little understanding of the law relevant to the context.</li> <li>• Limited use of relevant authorities in the context of the scenario.</li> </ul>	<ul style="list-style-type: none"> <li>• Selection of some appropriate legal principles.</li> <li>• Some understanding of the law relevant to the context.</li> <li>• Uses some relevant authorities in the context of the scenario.</li> </ul>	<ul style="list-style-type: none"> <li>• Selection of appropriate legal principles.</li> <li>• Clear understanding and linkage to the law and context.</li> <li>• Uses a variety of appropriate authorities in the context of the scenario.</li> </ul>	<ul style="list-style-type: none"> <li>• Selection of appropriate legal principles.</li> <li>• Thorough understanding relevant to the context, showing a detailed knowledge and understanding of the relevant law.</li> <li>• Uses a wide variety of appropriate authorities in the context of the scenario.</li> </ul>

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<b>To be used with both Activity 1 and Activity 2</b>					
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"> <li>• Demonstrates limited application of the relevant law to the scenario.</li> <li>• Limited use of precedents/authorities in context, drawing on research.</li> </ul>	<ul style="list-style-type: none"> <li>• Demonstrates some application of the relevant law to the scenario.</li> <li>• Selects and applies some relevant precedents/authorities in context, drawing on research.</li> </ul>	<ul style="list-style-type: none"> <li>• Demonstrates application of the relevant law to the scenario.</li> <li>• Selects and applies relevant precedents/authorities in context, drawing on research.</li> </ul>	<ul style="list-style-type: none"> <li>• Demonstrates detailed and thorough application of the relevant law to the scenario.</li> <li>• Selects and applies relevant precedents/authorities throughout in context, drawing on research.</li> </ul>

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

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

## Activity 1 - Indicative Content

### Demonstrate an understanding of the legal principles relating to negligence:

- Duty of care
- Breach of that duty
- Causation of foreseeable damage.

### Recognise relevant legal authorities:

Duty: *Donoghue v Stevenson*, *Caparo v Dickman*, *Robinson v CC West Yorkshire*

- Post *Robinson* approach:
  - No single definitive test to assess the existence of a duty of care
  - Develop the law incrementally and by analogy with existing precedents
  - No need to resort to *Caparo* unless being invited to depart from previous authority
- *Caparo* Test:
  - Foresight: *Kent v Griffiths*, *Donoghue v Stevenson* & *Caparo Industries plc v Dickman*
  - Proximity: *Bourhill v Young*
  - Policy issues: *Hill v Chief Constable of West Yorkshire*
- Also credit reference to either road traffic legislation: s.28-32 Road Traffic Act 1988; Rule 64 of the Highway Code, Public Space Protection Orders (PSPOs) or local byelaws as sources of a statutory/quasi-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*, *Corkery v Carpenter* & *Taylor v Goodwin*).

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 (No 1)*.

### Apply the law to Rhiannon

**Rhiannon is likely to be owed a duty of care by Branwen:**

#### Possible outcomes following *Robinson* guidance:

- Skateboards are likely to be seen as analogous to bicycles (*Burridge v Airwork Ltd*, *Corkery v Carpenter* & *Taylor v Goodwin*, *Williams v Ellis*, *Cannan v Earl of Abbingdon*, *Smith v Kynnersley*, *Burns v Currell*, *DPP v Saddington*), and this is likely to make them subject to the same provisions as other road users in relation to pedestrians
- Sections 28 & 29 of the Road Traffic Act 1988 create the offences of dangerous, careless and inconsiderate cycling, multiple provisions in Rules 103 to 158 of the Highway Code would also be likely to create a duty of care on all road users in this situation
- Local authority byelaws such as section 235 of the Local Government Act 1972 provide "No skating in such a manner as to cause danger or nuisance or give reasonable grounds for annoyance to other persons in any area covered by the prohibitive bye-laws"



- The fact that many local authorities control the use of skateboards (parks only) and that some have been the subject of PSPOs confirms that they pose a potential danger when used in close proximity to pedestrians
- There are likely to be existing precedents in relation to bicycles that would fix a duty of care: *Burridge v Airwork Limited*, *Corkery v Carpenter*,

**On an application of the neighbour principle or *Caparo* test:**

- Branwen should foresee that her acts and/or omissions could affect others (especially those in close proximity)
- Branwen is not a child and it is reasonable to assume that she would know that her 'neighbours' are those closely affected by her acts/omissions and that the act of skateboarding fast on a pavement could affect pedestrians
- There is 'physical' proximity in time and space between Branwen (as a skateboarder) and Rhiannon (as a pedestrian) using the same physical space
- There are powerful public policy reasons to uphold a duty of care as this is pre-eminently behaviour that public authorities would wish to dissuade and which they have an obligation to enforce. Furthermore, there is little social utility in allowing skateboarders to use pavements.

**Branwen is likely to have breached the duty owed:**

- Branwen is likely to have breached her duty of care to Rhiannon by virtue of:
  - The fact that Branwen is breaching the rule that skateboarding on the pavement is not allowed
  - The fact that Branwen is speeding (s.81 Road Traffic Regulation Act 1984 as referred to in Rule 124 Highway Code) and/or
  - The (probably) analogous precedent from *Burridge v Airwork Limited* and/or
  - That she has fallen below the standard of the reasonable skateboarder who would a) not use the skateboard on the pavement in the first place, and b) not go so fast if they did.

**Branwen has caused foreseeable harm:**

- Rhiannon has suffered a broken arm that 'but for' Branwen's actions, she would not have sustained. Therefore, Branwen is the factual cause of Rhiannon's injuries
- Having time off work due to an injury such as a broken arm is also a foreseeable consequence of the injury
- Rhiannon's broken arm (and the consequential loss of wages due to time off work) are not too remote from Branwen's breach as some form of personal injury is foreseen
- There are no intervening acts or other legal causation issues so it is submitted that the breach has caused foreseeable harm.

**Likely outcome for Rhiannon :**

- Branwen is highly likely to be liable to Rhiannon in negligence
- She owed her a clear duty of care based on both precedent, statute or an application of the *Caparo* test
- She breached that duty by falling below the standard of the reasonable skateboarder and she caused reasonably foreseeable harm in the general form of personal injury as well as the consequential economic loss of earnings.

**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.



## 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:

- Civil actions can be expensive - lawyers' fees, lengthy, complex proceedings, costs

#### Alternatives to the civil courts:

- Tribunals
- Negotiation
- Mediation
- Conciliation
- Arbitration.

#### Alternative sources of help:

- Conditional Fee Arrangements: An arrangement where:
  - a lawyer takes on a case on the understanding that he/she does not get paid if they lose the case
  - they get a pre-agreed fixed fee if they win the case as well as a negotiated uplift (or success) fee
  - special insurance called ATE (after the event) insurance covers the winning side's costs if you lose the case
  - some lawyers and claims management companies will take care of the cost of ATE but may take a larger uplift fee
  - Conditions relating to success fees: s.44 Legal Aid, Sentencing and Punishment of Offenders Act 2012.
- 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 ('the internet')
- 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 Rhiannon:**

- 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.

**Damages:**

- Rhiannon can claim special damages (for her pecuniary losses) of:
  - Assuming her broken arm has healed by the trial date, the £10,000 value she has been advised to claim for the injury
  - Lost earnings of £1800 (six weeks at £300 per week)
  - Any expenses incurred with hospital visits and medical appointments in connection with her injuries
  - Other medical costs such as drugs and fees for therapists
- Rhiannon could claim general damages (for her 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, although these seem unlikely
  - Damages for future loss of earnings - in Rhiannon's case she may have long-term effects from a broken arm that affect her capacity as a mechanic, but there is no evidence to support this in the information given
  - Future medical costs - again, these are a possibility but seem unlikely based on given information
- Rhiannon should expect her damages in a lump sum. Given the circumstances she may need the money quickly as her lost earnings will have left her 'out of pocket'.

**Contributory negligence:**

- Rhiannon's damages are unlikely to be reduced for wearing earphones as they are unlikely to have made a difference to the outcome given the circumstances and Rhiannon was using the pavement 'lawfully'
- Credit alternative lines of reasoning.

**Likely court:**

- Given the fairly predictable and modest amount of money involved in Rhiannon's case (£10,000 [for injuries sustained] + £1800 [loss of earnings] = <£,12,000), the most likely court to deal with a claim of this value would be the local county court
- Explain to Rhiannon that these are local courts although not necessarily in every town
- Explain to Rhiannon that the county court is fairly formal compared to the small claims track but less formal than the High Court
- Explain that the case will most likely be heard by a circuit judge.

**Likely track:**

- Explain to Rhiannon that based on the value of her claim, the protocols that will have to be followed and the certainty and enforceability of a judge, the case is almost certain to be allocated to the fast track

- Explain that this is a quick and efficient process controlled by the judges throughout. However, you should explain to Rhiannon that the judges will encourage an out of court settlement - quite possibly by encouraging the use of ADR
- Explain any of the relevant features of this track such as fixed advocacy costs, a short trial (probably one day) with most issues resolved before the trial, the likely limits on the use of competing expert witnesses and that the trial and judgement could take up to a year.

**Potential affordability issues:**

- Rhiannon is not a wealthy litigant and, as such, she cannot afford to instruct private lawyers
- This is compounded by the fact that legal aid is not available for personal injury cases
- Even if personal injury cases were funded, she would be unlikely to meet the eligibility criteria for full legal aid as a working person earning £300 a week
- Explain to Rhiannon that the overwhelming majority of personal injury cases are dealt with through a conditional fee arrangement (CFA) - describe any of the key features of a CFA to Rhiannon including the funding of 'after the event' insurance
- Explain that Branwen is well-paid and will be in a position to defend the action through use of private lawyers and this may give her the advantage of being better resourced.

**Potential fear of the system issues:**

- Explain to Rhiannon that a one-day county court trial with professional lawyers is unlikely to pose any threats to either party. There is the possibility of some publicity - if this is something relevant to either party
- Explain that the fact Branwen is very likely to have the financial means to settle the claim through her own private means suggests that it is worthwhile pursuing the claim in spite of any reservations
- Explain that Branwen's reputation as a high earning graphic designer might mean she is wary of bad publicity and this may act in Rhiannon's favour and encourage an early out-of-court settlement
- Explain the alternatives available to Rhiannon such as online dispute resolution and mediation and discuss their relative advantages and disadvantages compared to formal action.

**Likely overall outcome:**

Rhiannon will succeed and receive appropriate damages - most likely in the form of a lump sum with no deductions for contributory negligence. Her case will be heard on the fast track in the county court. She can no longer expect to receive legal aid for a personal injury case but, given Branwen's overt negligence, she will not have any trouble finding a lawyer to take her case on through a CFA. In fact, she has the exact kind of case the conditional fee arrangements were introduced for. An out-of-court settlement is quite possible but Rhiannon should take professional advice about whether this is appropriate/enough. ADR (alternative forms of dispute resolution) could be considered but 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.



Llywodraeth Cynulliad Cymru  
Welsh Assembly Government



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