



Mark Scheme (Pre-standardisation)

January 2020

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					
	0	1-2	3-4	5-6	7-8
Selection and understanding of legal principles relevant to context	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 No rewardable material.	1-2 <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. 	3-4 <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. 	5-6 <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. 	7-8 <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
 - *Orchard v Lee* [2009] EWCA Civ 295
 - *Mullin v Richards* [1998] 1 All ER 920
- *Caparo* test:
 - Foresight: *Kent v Griffiths*
 - Proximity: *Bourhill v Young*
 - Policy issues: *Hill v Chief Constable of West Yorkshire*

Breach: The objective 'reasonable man' test: *Blyth v Birmingham Waterworks Company*

- Standard as applied to:
 - Children
 - Professionals
 - Learners
- 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 breach and the standard of care in relation to children:

- *Orchard v Lee* [2009] EWCA Civ 295
- *Mullin v Richards* [1998] 1 All ER 920
- *McHale v Watson* [1966] 115 CLR 199
- *Blake v Galloway* [2004] EWCA Civ 814

Apply the law to Gregor and Pawel

Pawel is likely to be owed a duty of care

- The case has a strong similarity to existing precedents such as *Orchard v Lee* and *Mullins v Richards* and these would, under the principle restated in *Robinson*, be likely:
 - precedents for the existence of a duty of care, or
 - starting points for incremental development through reasoning by analogy
- Some candidates may argue that the case is 'novel' as there are no apparent precedents and therefore reason (again under the principle restated in *Robinson*), that the *Caparo* test should be applied
- On an application of the *Caparo* test: the possibility of harm is foreseeable (common sense, warnings at school, warnings with the spinner and warnings by Pawel and other party guests), 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 careful use of dangerous 'toys' by and amongst a vulnerable section of society).

Gregor is likely to have breached the duty owed

- Based on the precedents from *Orchard v Lee* and *Mullins v Richards*
- Gregor has fallen below the standard of the reasonable child defendant, which, according to *Mullins v Richards*, is 'whether the child has fallen below the standard that should objectively be expected of a child of that age' – Gregor was behaving below the standard of his contemporaries as evidenced by their warning him that there would be an accident
- According to *Orchard v Lee* ... 'for a child to be held culpable the conduct must be careless to a very high degree' – given the various warnings and the ban at school, Gregor is old enough to reasonably foresee both the potential harm and its extent. It could easily be argued that Gregor's behaviour was 'reckless' and this would certainly qualify as 'careless to a very high degree'

Gregor has caused foreseeable harm

- Pawel has a physical injury that 'but for' Gregor's action, he would not have sustained. Therefore, Gregor is the factual cause of Pawel's injuries
- Pawel's injury is not too remote from Gregor's breach as it is reasonably foreseeable – hence the warnings and the ban

Likely outcome for Pawel

- Gregor is likely to be liable to Pawel in negligence:
 - He owed him a duty of care based on both precedent and/or an application of the *Caparo* test
 - He breached that duty by falling below the standard of the reasonable child based on both *Mullins* and *Orchard*
 - He caused reasonably foreseeable harm based on a straightforward application of the 'but for' and remoteness tests

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
- Determining the appropriate standard of care for children can be difficult as maturity can vary a great deal
- Determining what amounts to 'careless to a very high degree' requires a judge to make a subjective assessment of a variable objective standard

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
- Mitigation of loss - *Marcroft v Scruttons* [1954]

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
- Civil legal aid is not available for PI (personal injury) cases but candidates will be credited for recognising this

Alternatives to the civil courts

- Negotiation
- Mediation
- Conciliation

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
- Lawyers' *pro bono* schemes
- Online advice sources – the internet
- Insurance policies

Sources of funding

- Own resources
- Insurance
- Conditional Fees
- Trades Union Membership
- Citizens Advice Bureau
- *Pro bono* schemes

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 - civil actions can be expensive - lawyers' fees, lengthy, complex proceedings, costs
- If no legal aid, cost 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 Pawel

Damages

- Pawel can claim **special** damages (for his pecuniary losses) of:
 - Long and short-term medical costs such as doctor and optician fees, glasses, other visual aids, therapy and medicines
 - Any lost earnings from his part-time work as a football referee
 - Any travel expenses incurred with hospital visits and medical appointments in connection with his injury
 - Equipment such as day-to-day aids to living with reduced vision
- Pawel 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 injury
 - Damages for future losses - these will be significant in Pawel's case given that he is so young and may lose out on his work as a referee, his hobbies and other future losses such as not being able to drive a car because of impaired vision
 - Future medical costs - again, these may be ongoing given the nature of Pawel's injury

Mitigation of loss

- This is the principle that a party who has suffered loss from a tort cannot recover damages for any loss that could have been avoided by taking reasonable steps
- Pawel's damages for his blurred vision in the other eye may be affected by his not taking his medicine or not attending therapy

Likely court

- Given the significant amount of money involved in Pawel's case (the facts in Part B estimate the eye loss at £40/50,000 alone) and the complexity of calculating the various aspects of different damages for such a young claimant, his case will almost certainly have to be heard in the High Court
- Explain to Pawel that this is a court based in London but it does have regional centres so he will not have to worry about access and travel given his visual impairment
- Explain to Pawel that he will benefit from the expertise of a High Court judge given the complexity/issues in his case

Likely track

- Explain to Pawel that based on the value of his claim (>£50,000), 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 Pawel that the judges will also try to encourage an out-of-court settlement - quite possibly by suggesting the use of a conditional fee arrangement (CFA) or Alternative Dispute Resolution (ADR)
- 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 (PI cases have to follow pre-action protocols) and that the trial itself will be a significant process, including use of expert medical witnesses

Use of ADR

- Explain that Pawel might consider using ADR to resolve his case instead of using the court system
- Explain how the different forms work and which might be most suitable

Potential affordability issues

- Even though Pawel is on a low/no income as a schoolboy, there is no legal aid for PI cases even though he would be likely to meet the eligibility criteria for legal aid
- However, it should be noted that personal injury cases such as this are commonly funded *via* a CFA, which is the most likely form of funding the case - explain to him how a CFA would work
- Explain to Pawel that there are a number of alternative means of obtaining advice for his case

Potential fear of the system issues

- Child defendants, whilst unusual, are allowed for in tort law
- Even though Gregor is a minor (child) with limited resources, it is worth Pawel pursuing the case as Gregor's parents have legal insurance, which would cover his damages if he wins
- Explain the reasons why Pawel should not worry about going to court by explaining the benefits of a civil court adjudication
- Explain the alternatives available to Pawel and discuss their relative advantages and disadvantages compared to formal action

Likely overall outcome

Based on the law and evidence reviewed, Pawel will succeed and receive significant damages – with possible loss of further damages for his blurred vision due to his failure to mitigate his losses. 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 Pawel 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.



Llywodraeth Cynullad Cymru
Welsh Assembly Government



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