

**MARK SCHEME for the October/November 2009 question paper
for the guidance of teachers**

9084 LAW

9084/41

Paper 41 (Law of Tort), maximum raw mark 75

This mark scheme is published as an aid to teachers and candidates, to indicate the requirements of the examination. It shows the basis on which Examiners were instructed to award marks. It does not indicate the details of the discussions that took place at an Examiners' meeting before marking began, which would have considered the acceptability of alternative answers.

Mark schemes must be read in conjunction with the question papers and the report on the examination.

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

CIE is publishing the mark schemes for the October/November 2009 question papers for most IGCSE, GCE Advanced Level and Advanced Subsidiary Level syllabuses and some Ordinary Level syllabuses.

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Assessment Objectives

Candidates are expected to demonstrate:

Knowledge and Understanding

- recall, select, use and develop knowledge and understanding of legal principles and rules by means of example and citation

Analysis, Evaluation and Application

- analyse and evaluate legal materials, situations and issues and accurately apply appropriate principles and rules

Communication and Presentation

- use appropriate legal terminology to present logical and coherent argument and to communicate relevant material in a clear and concise manner.

Specification Grid

The relationship between the Assessment Objectives and this individual component is detailed below. The objectives are weighted to give an indication of their relative importance, rather than to provide a precise statement of the percentage mark allocation to particular assessment objectives.

Assessment Objective	Paper 1	Paper 2	Paper 3	Paper 4	Advanced Level
Knowledge/Understanding	50	50	50	50	50
Analysis/Evaluation/Application	40	40	40	40	40
Communication/Presentation	10	10	10	10	10

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Mark Bands

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

Indicative content for each of the questions follows overleaf.

Band 1

The answer contains no relevant material.

Band 2

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

OR

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

Band 3

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

OR

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

OR

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

Band 4

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

OR

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

Band 5

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

Maximum Mark Allocations

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

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Section A

- 1 The Law Commission has argued that the present rules on the compensation of secondary victims for nervous shock are too restrictive and should be eased. Analyse the rules and critically assess whether or not you agree with this view.**

The concepts of secondary victims and nervous shock should be explained and contextualised.

Candidates should demonstrate an awareness of the LC's report published in 1998 in which the rules were considered:

The requirement that the psychiatric injury be caused by a sudden shock should be explained and an opinion expressed on the LC report's view that the requirement be abolished.

The closeness of relationship rule should be explained and its operational effects illustrated by reference to case law such as *Alcock v Chief Constable of South Yorkshire*. Candidates should explain that the LC report considered this a justified and necessary requirement and then express their own opinion.

The Proximity requirement must also be explained and its operational effects illustrated by reference to case law such as *Alcock, McLoughlin v O'Brien, Sion v Hampstead Health Authority etc.* Candidates should explain that the LC report considered this as unjustified and that it should be abolished. Again, candidates are expected to express their own opinion.

Candidates must analyse the rules with a critical eye and express a clear, concise opinion. Responses that are limited to factual recall, however detailed, will be restricted to band 3 marks.

- 2 'The basic principle in tort is that wrongdoers should be liable for their own actions.' Consider the extent to which the concept of vicarious liability conflicts with this principle and evaluate the reasons why such liability is imposed.**

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

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

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

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

Candidates must evaluate the rules and express clear, concise opinions. Responses that are limited to factual recall, however detailed, will be restricted to band 3 marks.

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- 3 The burden of proof in negligence cases generally rests with the claimant, but in certain circumstances when the maxim of *res ipsa loquitur* (the facts speak for themselves) is said to apply and the burden is relaxed. Analyse the conditions under which this maxim operates and explain the implications of its operation for both claimant and defendant.

Candidates might introduce their response by explaining briefly what a considerable obstacle it can be to prove a defendant's negligence and then explain that the application of principle of *res ipsa loquitur* can relieve this burden.

Candidates should explain that the principle applies when there appears to be no other reasonable explanation for the loss suffered other than the defendant's negligence (ie the facts seem to speak for themselves). Illustrative cases should be used (eg *Mahon v Osborne*, *Scott v London & St Katherine's Docks*)

Explanation should then ensue that the presumption of negligence is rebuttable and that two conditions apply: the events must be under the defendant's or his employee's control and there must be no direct evidence of negligence.

The conditions should be examined by reference to case law such as *Gee v Metropolitan Railway*, *Easson v LNE Railway*, *Barkway v South Wales Transport Co Ltd* etc.

Candidates must then explore how the inference of negligence might be rebutted (reasonable care taken, reasonable other explanation of events) and what happens next, i.e. burden of proof reverting to claimant.

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Section B

4 Consider the potential liability of Buster and the thieves for Ibrahim's injuries and discuss the likely success of any defences that might be raised.

This question raises the issues of negligence and the potential partial defence of contributory negligence. In particular the issue of requisite standard of care should be addressed.

As a policeman, Ibrahim was duty bound to give chase to Buster and his fellow bank robbers. Buster knew that he was being chased by a police car and thus it could be argued that he owed a duty of care not to put the police driver and any passengers in risk of harm by driving recklessly or negligently.

Candidates should consider whether Ibrahim consented to such risks or not when he decided to give chase and whether he contributed to injury by not wearing a seat belt.

Appropriate case law should be considered in some detail (*eg Baker v Willoughby etc*).

The principles must be applied to the scenario and whatever conclusions are reached they should be clear, compelling and fully supported.

5 Consider Mildred's potential liability for George's losses and the likely success of any defences that might be raised.

All candidates should identify and define the tort of private nuisance – unlawful indirect interference with another's use or enjoyment of land in his possession. The definition should be analysed and key elements explained. What sort of interference could constitute a private nuisance – noise, smoke, smell, vibration etc. When does it become unlawful, given our personal freedoms – duration, location, sensitivity etc.

Does the fact that Mildred has lived in the house for 20 years make any difference? (ref Prescription Act). When did the nuisance actually commence as far as he is concerned? Only when the room/laboratory was finished? Does the fact that the nuisance may have existed prior to her arrival on the scene make any difference? Does the duration and timing make Mildred's actions unlawful or is George being over-sensitive?

With regard to the damage caused by the explosion, candidates ought to consider whether an action in *Rylands v Fletcher* might be more appropriate as liability would be strict.

The principles must be applied to the scenario and whatever conclusions are reached they should be clear, compelling and fully supported.

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6 Discuss the potential liability in negligence of the mine owners for Miguel's illness and the likely success of any defences that might be raised.

Focus of candidate attention should be on liability in negligence and in particular for nervous shock.

Liability in negligence results from the existence of a duty of care owed to the claimant, a breach of that duty and consequential loss or damage to the claimant. Candidates expected to give a brief discussion and illustration of these elements.

The trauma, which he suffers and which prevents him working, might be described as a case of nervous shock. He has sustained psychiatric injury as defined by *Lord Bridge in McLoughlin v O'Brien*.

The harm that Miguel has suffered is sustained as a direct result of the act of negligence of the refinery owners. Would Miguel be described as a primary or a secondary victim? As he was not actually at work when the explosion occurred and thus not in imminent danger, he would be classed a secondary victim.

A duty of care is only owed to secondary victims if very strict conditions are satisfied. The decisions in *White, McLoughlin and Alcock* need to be discussed and the tests of the nature of the injury, class of person and claimant proximity need to be applied.

The principles must be applied to the scenario and whatever conclusions are reached they should be clear, compelling and fully supported.