

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

9084 LAW	
9084/42	Paper 42 (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 basic principle exists in tort that wrongdoers should be liable for their own actions. Analyse the reasons why vicarious liability is sometimes imposed on others.

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?

- 2 It has been said that although negligence involves liability to one's legal neighbours, it is the tort of private nuisance that deals with liability to one's physical neighbours. Compare and contrast the nature of liability for these two torts.

The question requires candidates to look at the similarities and differences between these two torts

Both torts must be defined by candidates and those definitions should be explained. Responses should entail consideration of the following as a starting point:

<u>Negligence</u>	<u>Private Nuisance</u>
Involves an act or omission which amounts to a breach of duty owed to our legal neighbours	Involves an indirect positive interference with the enjoyment or use of land in another's possession (physical neighbours)
Actionable on proof of duty, its breach and resultant loss	Only actionable on proof of actual loss
Isolated incidents suffice to give rise to a cause of action	Generally needs to be continuous state of affairs to give rise to a cause of action
The slightest breach gives rise to potential liability	Interference must be substantial to give rise to liability
Reasonableness of act of no consequence; even if in ignorance, liability arises if duty breached	Must be an unreasonable interference

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3 Harm suffered by the willing participant in any situation is not actionable in tort. Referring to case law, analyse the extent to which the defence of *volenti fit injuria* (*willing person no injury is done*) operates as a defence to actions brought in the torts of negligence and trespass to the person.

Candidates are expected to identify the crux of this question as the general defence in tort commonly known as consent. If it can be established that the complainant truly consented to the risk or situation which resulted in the act complained of, the defendant will not be liable.

Candidates should recognise the objective test established: was the outward behaviour of the complainant such that it is reasonable for the defendant to conclude that he consented to the risk that he undertook? Difficulty arises, however, because it is frequently clear that a person knows of a risk, but is not conclusive proof that consent was actually given.

Special cases such as sporting activity and rescue cases in the torts of negligence and trespass to the person might also be explored where the injuries sustained as a consequence of deliberate or negligent acts.

In negligence, cases such as *Smith v Baker*, *ICI v Shatwell*, and *Kirkham v Chief Constable of Greater Manchester* might be considered. In trespass, In the case of trespass to the person , *Herd v Weardale Steel Coke and Coal Co*, *Collins v Wilcock* and *Nash v Sheen* might be specifically referenced as examples.

Candidates must attempt an analysis of the statement. Responses limited to factual recall of principle will be restricted to maximum marks within band 3.

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Section B

- 4 With reference to case law, discuss any legal liability Penny Royal Sawmill Ltd might incur as occupier of the premises, for the damage to Alan's pick-up and for Peter's injuries.

Candidates should set the problem in context by stating that liability is imposed upon occupiers of land by the Occupiers Liability Acts 1957 and 1984.

Alan should be recognized as a lawful visitor to the site and candidates should state clearly that liability towards him would ordinarily be governed by the 1957 Act. Likewise, Peter should be identified as an unlawful visitor or trespasser and thus governed by the 1984 Act.

With regard to damage to Alan's vehicle, the duty of care imposed by the Occupiers liability Act 1957 to ensure the reasonable safety of lawful visitors should be discussed and whether frequent visits to the site and the warning notices should have prompted Alan to take additional care when entering as a visitor. As the injury was not caused by the state of the premises themselves, however, better prepared candidates will explain that any liability for Alan's injury will rest in the common law tort of negligence and not statute. Candidates might then discuss whether he was partly to blame or contributorily negligent and whether the warning notices absolve the depot owners from liability?

The Occupiers Liability Act 1984 imposes a duty towards Peter, even though he is a trespasser. Discussion of duty required and of whether Peter's presence was 'known', of whether the danger was one against which protection should have been afforded and of whether the posting of a warning sign was sufficient to discharge liability. Reference ought to be made to *British Railways Board v Herrington* and *Glasgow Corporation v Taylor* (or similar case law) to support statutory stance.

- 5 Consider whether Layla would be best advised to base any legal action in either the tort in *Rylands v Fletcher* or in the tort of negligence. If action is taken, discuss the theme park's potential liability for the damage caused.

The torts of negligence and *Rylands v Fletcher* should be defined and briefly explained by way of introduction. Candidates should then focus their response on the burden of proof imposed on claimants who base actions in either of these torts.

In negligence cases, the burden rests with the claimant to prove the essential elements of the tort (duty owed, breach of duty and resultant loss) whereas RvF is a tort of strict liability, so the only real proof required is of damage caused by an escape from land of something unnaturally kept there.

Candidates should explore the possibilities on either count. Could an action in RvF really be sustained in these circumstances? Or would negligence be easier to establish? In either event was the loss a reasonably foreseeable consequence of either a breach of legal duty (negligence) or escape (*Rylands v Fletcher*)?

The relationship between the two torts should be explored and the principles of both torts should be applied to the scenario and whatever conclusions are reached they should be clear, compelling and fully supported.

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6 Consider the potential liability in the tort of negligence of Mainline Trains Ltd and the success of any defences that might be raised against Tristan and Isolde should they choose to sue.

The torts of negligence should be defined and the elements should be briefly explained by way of introduction. Candidates should then focus their response on the two potential claims that might be made. Examination of the issue of vicarious liability is anticipated and should be suitably credited.

In Tristan's case the issue is of rescuers. Can rescuers consent to injuries sustained as a consequence of risk 'freely' undertaken? Cases such as *Chadwick v British Railways Board*, *Cutler v United Dairies* and *Haynes v Harwood* must be explored here and conclusions drawn regarding the consent issue.

Isolde has suffered 'nervous shock' perhaps. She is a secondary victim. Candidates must explore the proximity requirements imposed as a consequence of *White, Alcock and McLoughlin*.

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