

**MARK SCHEME for the May/June 2011 question paper
for the guidance of teachers**

9084 LAW

9084/41

Paper 4, 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.

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

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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 Consent to risk is fundamentally different from knowledge of risk.

Using appropriate case law to illustrate your answer, critically analyse the above statement with regard to defences in tort.

Candidates are expected to identify the question as relating to a defence in tort known as volenti non fit injuria. Better candidates will translate the Latin as meaning “to one who is willing (volenti), actionable harm (injuria) is not done (non fit)”. Commonly known as the defence of consent, which is of general application within the law of tort. Thus if it can be established that the complainant consented, the defendant will not be liable.

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 there is not conclusive proof that consent was actually given. Cases such as *Smith v Baker*, *ICI v Shatwell*) and *Kirkham v Chief Constable of Greater Manchester* should be referenced as examples.

Special cases such as sporting activity and rescue cases in the tort of negligence should also be explored and better candidates might also be expected to reference S1(6) Occupiers Liability Act (1984).

2 Either the tort of trespass to land or private nuisance could be abolished without significant loss to society because each overlaps with the other.

Analyse the two torts and critically assess the extent to which the above statement is true.

The question requires candidates to look at the similarities and differences between these two torts that affect interests in land.

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>Trespass to Land</u>	<u>Private Nuisance</u>
Involves a direct, physical interference with the possession of land.	Involves an indirect interference with the enjoyment or use of land in another’s possession.
Technically actionable per se.	Only actionable on proof of actual loss.
Justifies a series of legal actions as long as it lasts.	Generally needs to be continuous state of affairs to give rise to a cause of action.
Isolated incidents suffice to give rise to a cause of action.	Interference must be substantial to give rise to liability.
Reasonableness of act of no consequence; even if in ignorance, liability arises.	Must be an unreasonable interference.

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3 The remedy of damages in tort is based on the principle that the victims of tort should be restored to the position they would have been in had the tort not occurred.

Using examples from case law to support your views, assess the extent to which this aim is achieved.

An award of damages in tort aims to compensate claimants for actual losses suffered; restitutio in integrum means restoration in full and the aim is to put a claimant in the position they would have been in had the tort not been committed. Restoration in full may necessitate awards of general damages for losses arising naturally from the tort and special damages which have been claimed in particular because the loss is not a natural result of the tort in question.

Pecuniary and non-pecuniary losses may be subject to an award of damages. The former, which are financial, are easier to calculate than the latter, but even when losses are purely financial, the issue of what amounts to restitutio in integrum is not always straightforward; disagreements between first instance and appeal decisions were very evident in *Gardner v Marsh & Parsons* and *South Australia Asset Management Corporation v York Montague Ltd*. Issues of over-compensation also arise (*Parry v Cleaver*; *Longden v British Coal*) as does the issue of lump sum payments in cases where the true effects of a loss are not felt until after an award has been made (Pearson Commission (1978) recommendations might be referred to here).

Fault ought also to be discussed. Compensation by way of damages does not take degree of fault into account.

Candidates are expected to draw clear conclusions, summing up by saying how far they feel that the aim of restitutio in integrum is achieved.

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Section B

4. Advise Jamel and the hospital regarding their possible liability in tort for Zaheer's death.

The focus of this question is straightforward negligence set in a medical context. Candidates should define negligence and briefly outline and illustrate the three elements: a duty of care between defendant and claimant, a breach of that duty and damage to the claimant as a result of a chain of causation flowing from the breach of duty to the loss suffered.

Candidates are told that Jamel walked carelessly into Zaheer's ladder, thus indicating that he was in breach of his duty of care towards Zaheer whilst Zaheer was working at his premises. Was his death a reasonably foreseeable consequence of Jamel's carelessness? On the face of it, it would appear so, but could the failings at the hospital be seen as an intervening act which broke the necessary chain of causation? Could the failure to attend to Zaheer for several hours and the lack of a more than cursory examination on his first visit be a contributing factor here?

It would seem that the chain of causation may have been broken. But was death a reasonably foreseeable result of Jamel's negligence? Ladders are a known source of danger to most people, so assuming that Jamel is an adult, should the risk to Zaheer have been one against which he might reasonably have safeguarded? Candidates may use the illustrative cases of *Hotson v East Berkshire Health Authority* and *McGhee v National Coal Board* to support this view.

Clear, concise and compelling conclusions should be drawn by candidates.

5. Taking care to consider appropriate defences that might be raised, consider the potential liability of Cameron in the tort of negligence for the injuries sustained by Johnson in the situation above.

This scenario anticipates that candidates will identify the relevance of the torts of negligence and trespass and will outline and apply those essentials to the problem set.

For context purposes, the essentials of duty of care, breach of duty and resultant loss should be explored **in outline** and principles supported by appropriate cases such as *Donoghue, Anns, Murphy and Caparo, Nettleship, Bolton and Paris, Barnett and Wagon Mound*. Did Cameron owe Johnson a legal duty of care?

Focus of attention should be turned to foresight of harm, the standard of care required by the tort of negligence and to decisions in cases such as *Bolton, Paris and Latimer*. Was there anything peculiar about Johnson requiring special care to be taken? Was it foreseeable that someone would ride a bicycle along the pavement or was it sufficient for some potential harm to be foreseeable?

What about defences? Might the defence of contributory negligence be in any way applicable given the lack of lights on the bicycle to help Johnson to see after dark and the lack of cycling helmet? What would the consequent effect be on Cameron's potential liability for Johnson's injuries?

A clear, compelling conclusion is expected.

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6 Advise Malik of his liability under the Occupiers' Liability Acts 1957 and 1984 in relation to the injuries sustained by Arbuckle following the above incident.

This scenario addresses the issue of an occupier's liability for injuries sustained by entrants on their premises. Malik would appear to know that children come to his front door as visitors and as such any liability towards them would be owed by virtue of the 1957 Act: he must ensure their reasonable safety for the purpose for which they are permitted to be there.

Candidates should identify the fact that when the same children enter his property via unauthorised means (i.e. over the garden wall) they are trespassers and his liability towards them would be governed by the 1984 Act (following the *Herrington* case).

In considering Malik's liability, S1 of the 1984 Act must be discussed. A duty of care is imposed if the occupier is aware of the danger, knows or has reasonable grounds to believe that trespassers might come into its vicinity and the risk must be one against which he can be expected to offer protection (S1(3)). The circumstances should be discussed in the light of case law such as *Herrington*, *Swain v Natui Ram Puri*, *Scott v Associated British Ports* etc and conclusions drawn.

As the pond was covered with wire mesh, might the defence of consent be applicable? Would it make any difference that Arbuckle was only ten years old?

Whatever conclusion is reached it should be clear, compelling and fully supported.