

MARK SCHEME for the October/November 2007 question paper

9084 LAW

9084/04

Paper 4 (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.

All Examiners are instructed that alternative correct answers and unexpected approaches in candidates' scripts must be given marks that fairly reflect the relevant knowledge and skills demonstrated.

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 2007 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 “Bystanders who have no relationship with the primary victims of an accident are very unlikely ever to be able to sue successfully for psychiatric injury experienced as a result.”**

With reference to relevant case law, critically analyse the limitations imposed by the courts in instances of nervous shock sustained by secondary victims.

In the past, the courts have been reluctant to accept psychiatric injury or nervous shock as a head of damage in negligence claims; physical harm has been necessary. Today it is recognised, but there are severe limitations. Candidates should explain the concept of nervous shock: genuine psychiatric illness or injury required. The distinction between primary and secondary victims should be clearly, but briefly explained.

Focus must then be turned to secondary victims, i.e. those who have suffered psychiatric injury as a result of witnessing death or injury caused by a third party’s negligence as a result of acting as rescuers or as a result of their jobs (e.g. police officers). Until 1998 and the case of *White and Others*, all the above groups were treated differently, but since then they have all been subjected to two sets of rules: those established in *McCloughlin v O’Brien* and *Alcock v Chief Constable of Yorkshire*. The net result is that secondary victims today have to prove that psychiatric injury to secondary victims was a reasonably foreseeable consequence of the defendant’s negligence and that that the psychiatric shock amounts to a recognised psychiatric illness. The secondary victim must also show sufficient proximity in terms of relationship with the primary victim and in terms of time and space.

Candidates must offer a critical analysis of case law decisions. Cases are many and various, but candidates might consider how the rules have been applied and developed in cases such as *White*, *McCloughlin*, *Alcock*, *Bourhill v Young*, *Sion v Hampstead Health Authority*, *Greatorex v Greatorex*, etc.

- 2 ‘The tort of nuisance sets out to protect the right to use and enjoy land without interference from others and to balance such rights between neighbours.’**

Critically assess the extent to which you consider that this aim is achieved.

The tort of private nuisance arises from the fact that wherever we live work or play, we have neighbours and the way that we behave on our land may affect them when using theirs and vice versa.

Candidates are expected to analyse the elements of the tort, namely indirect interference, reasonableness of actions and the extent to which interests are balanced by taking into account the complainant’s sensitivity, locality and duration of the alleged tort, and the extent to which some sort of damage needs to be caused.

Candidates might also consider the extent to which available defences (such as prescription and consent) and remedies (such as damages, injunction and abatement) enable the aim of balance to be achieved.

Candidate responses that are limited to factual recall, however detailed, will be restricted to band 3 marks.

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3 Critically analyse the protection offered by the tort of trespass to the person and its impact on personal freedom.

Trespass to the person has now lost most of its significance in litigation in respect of personal injury and today arises mostly in the area of civil liberties, often associated with allegations of improper police conduct with regard to interference with freedom of movement.

Trespass to the person, in the form of false or wrongful imprisonment, can be defined as the unlawful prevention of another from exercising their freedom of movement. Candidates are expected to analyse the components of the tort, viz. imprisonment as in a total deprivation of the ability to move in any direction (e.g. *Bird v Jones*), a deliberate, positive act as opposed to a careless one (e.g. *Sayers v Harlow UDC*), knowledge of detention (e.g. *Meering v Grahame-White Aviation Co Ltd*, *Murray v Ministry of Defence*) and the mental element (*R v Governor of Brookhill Prison*), and the possible defences thereto.

Candidates are expected to draw clear conclusions from their deliberations in response to the question posed. Responses that are limited to factual recall, however detailed, will be restricted to band 3 marks.

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Section B

4 Omar’s wife now wishes to sue for compensation for her husband’s death. Advise Gulf Estates Ltd and the hospital staff as to their potential liability.

Candidates should briefly outline the essentials of the tort of negligence: duty of care, breach of duty and resultant loss. Focus should then be turned to the breach of the duty of care in particular; the defendants breach of duty must have actually caused the damage suffered. Omar’s employer had failed to supply him with a safety harness to wear when working at height. As a (partial) consequence, Omar fell and sustained injury and ultimately died.

On the face of it, the employer would appear liable to some extent for his death, unless it could be established that the negligent diagnosis by hospital staff broke the chain of causation. Candidates must examine the ‘but for’ test (Barnett v Chelsea & Kensington Hospital Management Committee, Brooks v Home Office) and consider whether the cause of death were the internal injuries occasioned by the fall or whether Omar wouldn’t have died had his injuries been correctly diagnosed and had he been appropriately treated immediately. Could this be a case of multiple causes (Hotson v East Berkshire Health Authority)?

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

5 Consider the liability of the race organisers and the owner of Whisky Galore and whether they can successfully defend any action taken against them by Bob or Gemma.

Candidates are expected to contextualise by briefly outlining the basic principles of negligence: duty of care, breach of duty and resultant loss. Attention must then be switched 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 is not conclusive proof that consent was actually given. Could this be so in Bob’s case, or was it a risk that arises from the very nature of his work? Cases such as *Smith v Baker* (1891), *ICI v Shatwell* (1965) and *Kirkham v Chief Constable of Greater Manchester* (1990) should be referenced as examples.

Relating the principles to the case of Gemma, candidates will need to conclude whether mere attendance at a horse racing event was evidence of consent to associated risks or not. Some reference to the duty of care imposed by the Occupiers’ Liability Act 1957 might be made, but should not be the principal focus.

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

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6 Assess Glendale Borough Council’s potential liability under the Occupier’s Liability Acts 1957 & 1984 for the injuries sustained by Kelly, and whether they can successfully defend any action that might be brought.

This scenario addresses the issue of an occupier’s liability for injuries sustained by entrants to their premises. Public parks are, by definition, places where members of the public are invited to spend recreation time. It would appear therefore that Kelly would have entered the park as a visitor and as such, GBC would owe her a duty of care to ensure her reasonable safety in the park (Occupiers Liability Act 1957). Candidates should examine the common duty of care imposed by S2(2) and consider whether or not that duty had been discharged.

Candidates should then consider whether in fact, by swimming in the lake, when notices had been clearly displayed by GBC to ban swimming, Kelly had in fact become a trespasser? The Court of Appeal’s decision in the case of Tomlinson v Congleton would seem to suggest so. Consequently, candidates should recognize the application of the Occupiers Liability Act 1984 and examine whether the duties imposed by S1(3) have been complied with by GBC. Would the notices be sufficient to absolve GBC from liability?

Is Kelly an adult or a child? What difference if any might it make to the outcome?

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