



**Cambridge Assessment
International Education**

Example Candidate Responses – Paper 4

**Cambridge International AS & A Level
Law 9084**

For examination from 2023



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Introduction

The main aim of this booklet is to exemplify standards for those teaching Cambridge International AS & A Level Law, and to show how different levels of candidates' performance (high, middle and low) relate to the syllabus requirements. This document helps teachers to assess the standards required to achieve marks beyond the guidance of the mark scheme.

In this booklet candidate responses have been chosen from the June 2023 exam series to exemplify a range of answers.

For each question, the response is annotated with examiner comments about where and why marks were awarded or omitted. This is followed by comments on how the answer could be improved. There is also a list of common mistakes and guidance for candidates.

Please refer to the June 2023 Examiner Report for further details and guidance.

The mark scheme is available on the [School Support Hub](#)

9084 June 2023 Question Paper 42

9084 June 2023 Mark Scheme 42

Past exam resources and other teaching and learning resources are available on the [School Support Hub](#)

How to use this booklet

This booklet goes through the paper one question at a time, showing you the high-, middle- and low level response for each question. In the left-hand column are the candidate responses, and in the right-hand column are the examiner comments.

Example Candidate Response – middle	Examiner comments
<p>maureen is in a novel duty situation suffering pure economic loss. It is likely to only be compensated for when suffered through fault or deceit. However in this situation maureen can rely on the Caparo plc v Dickman test for new situations and placing a duty of care. The Hedley Byrne principle must also be consulted so that duty of care of Nathan must be established by maureen for there to be liability. The Hedley Byrne principle can be used in order for there to be liability. By first establishing a special relationship between Nathan and maureen.</p>	<p>1 The candidate identifies the issue of pure economic loss.</p> <p>2 The candidate gives an explanation of some elements of Hedley Byrne, reference to some relevant case law and application to the facts.</p>
<p>Answers are by real candidates in exam conditions. These show you the types of answers for each level. Discuss and analyse the answers with learners in the classroom to improve their skills.</p>	<p>Examiner comments are alongside the answers. These explain where and why marks were awarded. This helps you to interpret the standard of Cambridge exams so you can help your learners to refine their exam technique.</p>

How the candidate could improve their answer

- In relation to negligent misstatement, the issue of breach of duty and damages should be analysed. The focus here is on the duty of care only. Whilst this is the main issue, any conclusion as to liability should include some analysis of breach of duty and resulting damage.
- The explanation of assault and battery should be developed and support the explanation. The analysis here explains the relevant legal rules.

This section explains how the candidate could have improved each answer. This helps you to interpret the standards of Cambridge exams and helps your learners to refine their exam technique.

Common mistakes and guidance

- Repetition of the facts of the scenario without analysis or evaluation in relation to the relevant legal rules is not creditworthy.
- Analysis of the facts of the scenario without an explanation of the relevant legal rules will not achieve the higher marks.
- Explanation of the relevant legal rules should be supported by analysis of the facts.

This section lists common mistakes as well as helpful guidance from the examiner. This will help your learners to avoid these mistakes. You can use this alongside the relevant Examiner Report to guide your learners.

Question 1

Example Candidate Response – high

Examiner comments

This question requires discussion on law of negligence and negligent misstatement, along with Tresspass to person to assess the extent of potential liabilities and success of claims. **1**

Negligence is when a party suffers due to the careless attitude of the other, so negligence is used to compensate people who have suffered loss. Negligence has three main topics that it roams around, Breach of duty; when a person has fallen below the standard of a reasonable man.

Duty of care; when a person owes standard of behaviour towards others and he breaches that duty. Causation; defendant's conduct was the actual cause of damage.

After these principles, negligence protects against personal injury, financial losses and protection of property. **2**

The financial loss covers the principle of negligent misstatement. It is when a person makes an inaccurate statement with negligence due to which other person suffers a reasonably foreseeable pure economic loss. Negligent misstatement is the exception of the rule that financial losses need to be recovered as seen in *Spartan v Steel*. **3**

As Nathan is a qualified accountant, it shows that he has a special skill and Maureen is relying on him by investing

1 The candidate identifies the relevant issues.

2 The candidate outlines the elements of negligence. A detailed account of the general elements of negligence is not required here as the issues relate to a novel duty situation.

3 The candidate identifies the issue of pure economic loss resulting from negligent misstatement. There is some analysis of the different types of loss.

Example Candidate Response – high, continued

Examiner comments

a large amount of money just by relying on Nathan's knowledge. ~~so~~ Now according to the Caparo test, ~~before~~ the knowledge must be of some special use. The purpose is known. He knows who advise will be given to. will only be used for that purpose and necessary for claimant to suffer financial loss. After this test another test in *Hedley v Heller* was set out where the key concept of **4** misstatement was established. This test clearly states some points the first one is that defendant must possess a special skill as seen Nathan was a qualified accountant and had knowledge of accounts. ~~as seen in~~ a similar case is *Chaudary v Prabhakar* where the claimant **5** relied with specialist knowledge of cars of friend. as well as in *Shakoor v Situ*. ~~So~~ the matter of fact that whether Nathan had knowledge or not has been answered.

Moreover, ~~Nathan~~ The second point in the test was that purpose for which the advise is given is known to the defendant, as Nathan clearly knew and was aware that Maureen is showing him accounts for the purchase of the cafe as she also tells her that its profitable which shows he was well aware. Thirdly, the defendant must know that the claimant has reasonably relied on him as Nathan, told her about the accounts and he knew that Maureen had just consulted him before

4 The candidate explains the elements of the rule in *Hedley Byrne v Heller* and applies the rule to the facts of the scenario.

5 The candidate supports the explanation of the law with reference to relevant case law in relation to each of the elements of the Hedley Byrne Rule.

Example Candidate Response – high, continued

Examiner comments

the purchase which depicts her reliance on Nathan as highlighted in Smith v Bush where the claimant relied on surveyors for the valuation of house and then bought it. ~~also~~ This shows the concept and shows that Maureen also went through similar stages and fulfills all the stages of the test which might be used against Nathan to hold him accountable for Negligent ~~misstatement~~ misstatement. If Nathan is held liable by courts then he must give damages to Maureen and those damage should be pecuniary in nature to cover the financial loss that Maureen has went through as the consultant told that cafe is not profitable.

Furthermore, when Maureen is angry and stops Nathan. However, Nathan pushes her and Maureen breaks her wrist shows the concept of trespass to person where there's direct and intentional interference with a persons right of freedom and safety, liberty. There are three things to be established in trespass to person, battery, assault and false imprisonment.

As Nathan shouts at Maureen and says 'I'll make you move it' shows that he's creating reasonable apprehension ^{in assault} which means creating fear, and if the person is not able to carry out the apprehension, then he won't be liable, however, first Nathan just

6 The candidate identifies elements of Trespass to the Person.

Example Candidate Response – high, continued

Examiner comments

threatened Maureen and didn't use any force till here it was just assault and as well as he was capable of carrying out the apprehension which he later did can be seen in Lodgon v DPP where imitation gun amounted as apprehension. At this point assault can be established. **7**

However, later when Nathan pushes her, battery is involved as well as it is the completion of assault and use of force as seen in Cole v Turner. Along with this, Nathan had intent to carry out the battery as if he ~~was~~ didn't have intention there could be a possibility of him being liable as highlighted in Letang v Cooper. **8**

Lastly, Maureen can be guilty of false imprisonment as it is the restraint on person's freedom and liberty. However, the restraint needs to be total and if it's not then Maureen would not be held liable as seen in Bird v Jones the person had other ways to escape so he was not falsely imprisoned, ~~so~~ as shown **9** Nathan has other ways to escape and is not totally restrained. ~~which~~ **10** This can also be seen in Austin v Metropolitan where imprisonment is possible when a person is drunk.

At the end, Nathan can escape liability by some defences that it was a necessity for him to do so as seen in Leigh v Gladstone and he can also say that it was a self defence more.

In conclusion, As Maureen breaks her wrist and as these trespasses are actionable per se, Nathan might be held liable as all three concepts of trespass are fulfilled by him to some extent.

7 The candidate identifies potential assault with a clear explanation of the elements and application to facts. Relevant case law is used to support the explanation.

8 The candidate identifies potential battery with a clear explanation of the elements and application to the facts. Relevant case law is used to support the explanation.

9 The candidate identifies potential false imprisonment with a clear explanation of the elements and application to the facts.

10 The candidate makes effective use of relevant case law throughout the response.

Mark for AO1 = 11 out of 12

Mark for AO2 = 5 out of 5

Mark for AO3 = 7 out of 8

**Total mark awarded =
23 out of 25**

How the candidate could improve their answer

- In relation to negligent misstatement, once the duty has been established there should be some discussion of breach of duty and resulting damage in order to reach a clear conclusion in relation to liability.
- In relation to trespass to the person, the concept of 'actionable *per se*' could be explained. It is mentioned in the conclusion, but without any explanation or justification for the statement.

Example Candidate Response – middle

Examiner comments

- maureen is in a novel duty situation suffering pure economic loss. It is likely to only be compensated for when suffered through fault or deceit. However, in this situation maureen can rely on the *Caparo plc v. Dickman* test for new situations and placing a duty of care. The Hedley Byrne principle must also be consulted so that duty of care of Nathan must be established by maureen for there to be liability.

The Hedley Byrne principle can be used in order for there to be liability. By first establishing a special relationship between Nathan and maureen which does not have to be strictly formal or legal in the sense that a domestic relationship may also impose liability. Since they were friends / neighbours and Nathan has been ~~an~~ qualified as an accountant he has the capacity to advise maureen on the buying of the café. (*Chaudry v Prahbakar*).

Furthermore, it must be proved that it is reasonable for maureen to rely on the advice given by Nathan. This can be proved by looking at the qualification of Nathan and their relationship (*JEB Fasteners v Marks Bloom and Co.*) It is reasonable for maureen to rely on Nathan's advice because he is skilled in his craft and qualifies as an independent contractor and maureen can argue that for her to reconfirm the judgement of Nathan was not required because he is a specialist and that it was reasonable to rely on his statement.

1 The candidate identifies the issue of pure economic loss.

2 The candidate gives an explanation of some elements of Hedley Byrne, reference to some relevant case law and application to the facts.

Example Candidate Response – middle, continued

Examiner comments

Nathan can argue his lack of capacity as he was newly qualified and lacked experience in the field. However Maureen can argue that Nathan has voluntarily assumed the right/responsibility to advise Maureen on the matter and without him excluding from responsibility he can be held liable under this limb. Maureen can make reference to the case of Commissioner of Police of the Metropolis v Lennon to argue liability because of voluntary assumption of responsibility.

It is most likely that Nathan will be held liable with reference to Hedley Byrne and Caparo. Requisites that state that defendant must be aware of the special circumstance/purpose the claimant was going to use the advice for and the defendant must have given that advice keeping in mind this purpose that it will be used for this purpose also. Nathan satisfies all requirements and is likely to uphold his liability.

Furthermore, when Maureen has moved towards Nathan and Nathan shouts towards her, he has committed assault. Words, that threaten or go against a person amount to the assault of words. Next when Nathan pushes her without her consent and goes beyond the permission and hurts her amounts to battery. Which Maureen can be held liable for. Nathan has committed the act of trespass to person and since his conduct satisfies all elements of the assault and battery with intention to hurt Maureen. In *Cock v Willow* both these torts were defined under which Nathan is liable.

The remedies available would be restitution which means being able to place back in ^{mistakenly} ~~presented~~ position and damages for assault and battery.

3 The candidate reaches a clear conclusion as to liability.

4 The candidate identifies potential claims in trespass to person for assault.

5 The candidate provides a very brief explanation of assault.

6 There is a very brief application of battery.

7 The candidate reaches a conclusion in relation to liability for trespass to the person.

Mark for AO1 = 7 out of 12

Mark for AO2 = 3 out of 5

Mark for AO3 = 3 out of 8

Total mark awarded = 13 out of 25

How the candidate could improve their answer

- In relation to negligent misstatement, the issue of breach of duty and damages should be analysed. The focus here is on the duty of care only. Whilst this is the main issue, any conclusion as to liability should include some analysis of breach of duty and resulting damage.
- The explanation of assault and battery should be developed, and relevant case law should be utilised to support and develop the explanation. The analysis here is brief and superficial and is not based on a developed explanation of the relevant legal rules.
- The conclusion reached in relation to liability for trespass to the person is not fully justified as the explanation of the law and the application to the facts is brief and superficial.

Example Candidate Response – low

Examiner comments

Here, in the case of Nathan and Maureen, Maureen relies on Nathan's piece of advice or information that the safe off appears to be profitable. Here, causation will be applied along with assault and battery. ①

Causation is when a defendant's breach of duty caused the claimant's harm. In other words, it can be when the harm happened, but for the claimant's advice. For example, in the case of Chandler, there was a decision that a person providing a piece of information will not have a duty of care towards a third party, since there is no contractual relationship between them. Lord Denning suggested otherwise, which was then followed in the case of Hedley v Byrne. ②

Here are three elements that need to be proved as per the case, in order for there to be a successful claim. First there should be a special relationship between the parties, voluntary assumption of responsibility by party giving the advice and the party should know that their advice will be relied upon and it must be reasonable to rely upon that advice. Caparo v Dickman case introduced another element that the claimant must have acted to their detriment in relying upon that advice. ③ ④

Here, there was a close relationship between both Maureen and Nathan, since they were

① The candidate identifies relevant issues.

② The candidate gives reference to some relevant authority.

③ The candidate identifies some of the elements required to establish liability for a negligent misstatement.

④ The candidate gives a brief explanation of the legal rules.

Example Candidate Response – low, continued

Examiner comments

neighbours but there was no legal or special relationship. Maureen relying on Nathan's information was not reasonable since he was not a professional advisor, that means Nathan was not liable and Maureen blaming him for her inheritance loss was unjustified. ⁵ Also, Maureen did act to her detriment by buying the cafe using all her inheritance, but since it was not reasonable for her to rely on Nathan's advice, he was not liable.

⁵ The candidate analyses the facts of the scenario and reaches a conclusion as to potential liability.

Now, Nathan when shouts at Maureen, threatens her intentionally that he will commit a battery if she does not get out of the way. This is assault, since Nathan intentionally threatens Maureen that he will put unlawful force on her. As per the case of Collins, ⁶ an assault, Nathan was then liable to Maureen since he threatened her with words and shouted at her.

⁶ The candidate identifies issues of assault and battery and provides some explanation of the legal rules.

Assault is when a party threatens to do some harm to a person, and the person ⁷ belief believes they have the ability to do so. However, ~~a~~ words cannot alone cannot amount to assault. It can also be silence, gestures, or words or combination of these such as in the case of R v Ireland. For there to be a claim in assault, a person does not have to prove ~~that~~ that they were in fear the harm, they just have to prove that they reasonable

⁷ The candidate develops their explanation of assault and refers to some relevant authority.

expect ~~that~~ the harm.

Moving on, when Maureen does not move, Nathan fishes her which is battery. He is liable towards Maureen, since he intentionally inflicted unlawful harm on her and touched her without her consent. ⁸ Since she ~~proves~~ ~~her~~ wrist, this meant Nathan's ~~fault~~ failure to take reasonable care harmed Maureen, and he is liable to compensate her since a duty of care has been breached.

⁸ There is an outline explanation of some elements of battery and a brief application to the facts.

Mark for AO1 = 5 out of 12

Mark for AO2 = 2 out of 5

Mark for AO3 = 1 out of 8

Total mark awarded =
8 out of 25

How the candidate could improve their answer

- As part of the explanation of elements of negligent misstatement; the candidate should explain the elements of the special relationship, explain the rules applicable to a social relationship, explain the elements of reasonable reliance, the standard of care required and how breach is shown, and the elements of causation and remoteness. Whilst some elements are identified there is little developed explanation.
- In relation to trespass to the person, the candidate needed to identify the different forms of trespass; explain the elements of each and identify any relevant defences or remedies. In this response the candidate has identified potential issues in relation to assault and battery, however the explanations are brief and the application is superficial.

Common mistakes and guidance

- Repetition of the facts of the scenario without analysis or evaluation in relation to the relevant legal rules is not creditworthy.
- Analysis of the facts of the scenario without an explanation of the relevant legal rules will not achieve the higher marks.
- Explanation of the relevant legal rules should be supported by reference to appropriate authority.

Question 2

Example Candidate Response – high

Examiner comments

The two situations referred to, include actions by Clive, Eoin and Tim, and ~~are~~ have taken place on the Barchester university property, which belongs to the university. So, the unlawful actions of the three students may be considered under the tort of trespass to the land to determine whether they are liable.

To begin with, Clive has gotten injured while cycling on a pathway at the university. Now, it ~~can~~ is clear that Clive is trespassing, as the university has put up signs that state 'no cycling', so as to insist that the pathways are for pedestrians only. ¹ So, Clive may be held liable for trespass to land when he cycles there. An example of this is the case of *Scott v. League Against Cruel Sports*, where the defendant was ² hunting and shot a deer on the claimant's land while remaining outside. He was held liable for trespass as he had gone beyond what he was allowed and had interfered with the claimant's land.

¹ The candidate identifies that the claimant may be categorised as a trespasser.

² The candidate explains the concept of trespass, provides relevant authority and applies the law to the scenario.

Example Candidate Response – high, continued

Examiner comments

however, it is indicated that Clive is injured while cycling due to the uneven pathway and his expensive bicycle is also damaged. Now this claim may be covered by the Occupiers' Liability Act 1984, which concerns occupiers' liability to trespassers on their land. Under this Act, the case of Siddons v. Patel was examined, where it was held that occupiers owe a duty of care as is reasonable in all circumstances, to make the premises reasonably safe for anyone who may come there, with or without the occupiers' permission. So the university may be liable for not looking into the uneven path and failing to make it safe even for trespassers. Although, section 1(b) of the act states that occupiers would not in deciding whether an occupier would be liable, the actions of the trespasser would also be considered. Here the Barchester university has provided warnings to prohibit cycling, but Clive has ignored them, so the defence of contributory negligence may apply.

Moving on, Tim and Eoin initially do not seem to be trespassing as they stopped using the pathway after

3 The candidate identifies the possible claim under the Occupiers' Liability Act 1984 in relation to the losses sustained by Clive.

4 The candidate identifies the relevance of the warning sign and the defence of contributory negligence.

Example Candidate Response – high, continued

Examiner comments

5 However, later, Tim pushes Eoin back on to the pathway, which may be a trespass. Although, trespass to land is a tort of 'actionable per se', meaning that Eoin must have intended to remain on the pathway to be trespassing. ~~his~~ Since he is pushed, he could not be trespassing, but may be when he remains on the pathway and keeps walking there instead of going back. So to say, remaining on the prohibited area may make Eoin liable for trespass. This was seen in the case of the Six Carpenters, where these carpenters went into an inn and ordered some bread and wine and paid for it. Some time later, they ordered some more wine, but this time, refused to pay. The court held that by refusing to pay, they were committing trespass, but it did not render their original entry unlawful. This can also be termed as trespass *ab initio*, or continuing trespass (*Holmes v. Wilson*). 7

To conclude, it can be seen that Clive may be liable for trespass to land and may also ~~be~~ bring a claim against the university under the occupiers liability Act 1984, but is

likely to fail due to the defence of contributory negligence. As for Eoin, his original entry by being pushed onto the pathway was not unlawful, but he may have become a trespasser by choosing to remain on the pathway. 8

5 The candidate identifies the tort of trespass to land.

6 The candidate explains that intention is required and applies the law to the facts of the scenario.

7 The candidate gives an explanation of Trespass *ab initio* supported with relevant authority.

8 A clear and reasoned conclusion is reached in relation to both occupiers' liability and trespass to land.

Mark for AO1 = 9 out of 12

Mark for AO2 = 4 out of 5

Mark for AO3 = 6 out of 8

**Total mark awarded =
19 out of 25**

How the candidate could improve their answer

- The candidate should have provided a more detailed explanation of the duty owed to an occupier under the Occupiers Liability Act 1984.
- The candidate should have distinguished between liability for personal injuries and liability for damage to property under the 1984 Act.

Example Candidate Response – middle

Examiner comments

The issue pertaining to the facts are about the pedestrian-only pathway where the cycling is restricted. So, according to the facts university made an pathway so that students can walk from their accommodation to the lecture halls & their purpose to create this pathway was to reduce level of pollution associated with driving. To reach to an successful outcome Occupiers liability act & Trespass to person will help to conclude it. ¹

So, Occupiers liability is the power of the owner of the premise, who controls it. The occupier will make reasonable steps to make the premise & people are safe. However, university encourage their students to walk to their lectures. It will come under Occupiers liability act 1957 s2(1) & s2(2). University students comes under authorized people. So, OLA 1957 s2(1) states that occupier ~~have~~ to owes a duty of care to the people. As the university has put up signs stating "no cycling" but still they received complaints about cycling using the pathways and they ignored the complaints. ²

So, on one day Clive, a cyclist used the pathway & he was cycling very quickly because he was getting late and there his bicycle slips on the uneven surface and he falls to the ground. He breaks his arm, & his bicycle is damaged beyond repair. So, in this scenario university

¹ The candidate identifies the relevant issues as occupiers' liability and trespass to land.

² The candidate outlines some elements of the duty owed under the Occupiers' Liability Act 1957.

Example Candidate Response – middle, continued

Examiner comments

used exclusion clause by putting up the sign & the location of the sign is also a big factor while excluding the liability. However, Clive bicycle slips on the uneven surface where the activity is leading towards the danger. Premise can be stated because of "uneven land" s2(2) will kick in & it states about the occupier should take reasonable steps to make premise safe & s2(1) already exist because they owe a duty of care to Clive.

Furthermore, following the incident, the occupier prohibited the use of pathways & new signs were placed around the campus stating that the pathways are not in use. Now, whoever use the pathway will come under OLA 1984 which is for trespassers. Jim & Eoin continue to use the pathways to walk to lectures. On one occasion a security guard tells them to leave the pathway & they do. As a joke Jim pushes Eoin back on to the pathway. Now, this comes under battery (Trespass to Person). And Jim committed the tort of battery whereas, Eoin continue to walk even though guard tells Eoin to leave so he became an trespasser. If anything happens to him OLA 1984 will support him.

However, in conclusion, Clive can claim personal injury & damages because OLA 1957 gave power to these claims & university exclusion clause can be ignored. And Jim did the tort of battery when he pushed Eoin and then Eoin became trespasser. And if anything happen he can claim P.I only via OLA 1984.

3 The candidate identifies the relevance of the warning sign.

4 The candidate identifies that any subsequent entrants to the pathway will be classified as trespassers.

5 The candidate identifies a possible battery arising from Jim pushing Eoin on to the path.

6 Here, the candidate points out a possible trespass to land arising from Eoin's continued presence on the land.

Mark for AO1 = 7 out of 12

Mark for AO2 = 2 out of 5

Mark for AO3 = 3 out of 8

**Total mark awarded =
12 out of 25**

How the candidate could improve their answer

- A more detailed explanation of the duties owed by the occupier under the relevant Occupiers' Liability Act is needed. Occupiers have a duty of care towards others who come onto the land and that this duty relates to the dangerous condition of the land rather than its use. Additional case examples should be given.
- A more detailed explanation and application of the elements of trespass to land is needed. The candidate should have explained the elements of direct interference, intention, and unlawful entry. The candidate should have explained the defences available and identify any possible remedies. More detailed analysis of Barchester University's liability and the status of Clive as a visitor and trespasser as well as the liability of Jim and Eoin. A more thorough analysis of whether any defences are available and if there are any appropriate remedies available would have improved this answer.

Example Candidate Response – low

Examiner comments

In the scenario of Barchester University with Clive. The university has clearly mentioned that the going is prohibited which means that they have warned the students and if there is any claim against them, they would easily acquit it that case. As Clive is cycling fast on the pathway and the university clearly uses the sign for students of 'no cycling' it means that Clive is taking a risk as he has no right of cycling on the pathway. As Clive fall and have some injuries he could ~~claim~~ make a claim against the university but there are more chances of a failure of the claim as university donot have any liability but due to the sign boards and as a result Clive could

1 also be held accountable for this as he is putting the life of pedestrians at risk and they can also get injured. But as there are many similar cases or complaints in past and the university was aware of this but had not done anything to counter with this so as a result the courts could also held the university liable for contributory negligence. As a result of this case the potential remedies could possibly be that the university ~~is~~ could be held contributory ~~negligency~~ negligence as they were aware that students are using the pathway with cycles but did not took any further steps and as a result ~~could~~ would have to give a very less or small amount of claim, but for Clive it ~~is~~ could be held that Clive was ~~having~~ being negligent as ~~they~~ ^{there} were sign of ~~or~~ no cycling but Clive didn't stop as a result to the claimants own negligence the court would not award claim to him and ~~losty~~ a fine could also ~~to~~ be made on Clive so that he would not do this again and this would as a result set an example for the other people.

In the second situation as the university has put signs but it is prohibited to use pathways the university would

2

3

1 The candidate identifies that the warning sign may impact on the liability of the occupier.

2 A possible defence of contributory negligence is noted.

3 The candidate recognises a possible breach of duty by the occupier in relation to a failure to act in response to the presence of trespassers.

Example Candidate Response – low, continued

Examiner comments

4

have a right to impose fine on Jim and Eoin as they are not following the bylaw and they can even held both of them trespasser and they are not allowed to use the pathway. Secondly as they have no right to walk on the pathway they were further made aware of this by the security guard and as they are still using the pathway the university could not be now held accountable for any claim as they have done their work and it is now the responsibility of Jim and Eoin not to use the pathway as now the university don't have any responsibility. But as the Jim has pushed Eoin back on pathway and count continue to walk the university can go for a claim against them as a trespasser of us and using private property and as a result of the sue of Jim and Eoin they can be held liable and as a potential remedy they would have to the fines imposed on them, so that they would not do this again and the sample would be set for others.

4

The candidate states that Jim and Eoin may be liable for trespass to land.

Mark for AO1 = 4 out of 12
 Mark for AO2 = 2 out of 5
 Mark for AO3 = 1 out of 8

**Total mark awarded =
 7 out of 25**

How the candidate could improve their answer

- A more detailed explanation of the key elements of the relevant Occupiers' Liability Act is needed.
- The candidate could have provided a more detailed explanation of the elements of trespass to land.
- A more thorough application of the legal rules to the facts of the scenario would have improved the marks awarded for this response.

Common mistakes and guidance

- In relation to occupiers' liability, candidates should justify the selection of either the Occupiers' Liability Act 1957 or the Occupiers' Liability Act 1984. Candidates should then ensure that they provide an accurate explanation of the elements of the duty owed by the occupier and any relevant defences. The law should then be applied in a logical way to the facts presented in the scenario.
- In relation to trespass to land, candidates should ensure that they provide an explanation of each element of the tort and then apply the legal rules to the facts of the scenario. A discussion of the Occupiers' Liability Act 1984 was not relevant here as the entrants to the property did not sustain any injury or damage.

Question 3

Example Candidate Response – high

Examiner comments

Contributory Negligence is a partial defence in the law of tort. Previously, it was a full defence, but it was limited by an Act of Parliament. This defence for the defendant allows them to allege that the claimant's actions or behaviour resulted in the injury or the harm. And thus it can reduce the damages awarded to the claimant for up to 90% as the ruling in Jayes v IMM is considered unfavorable.

An adult is expected to have reasonable knowledge and understanding of certain events when compared to children. The courts tend to consider both their age and their experience to decide whether their conduct was significant enough that it contributed to their injury. Most of the law on these defences have been developed through case law. Yachuk v Oliver's involved a nine year old who lied to a petrol seller to gain petrol. This resulted in serious burns and the court decided that they were liable as the child had no idea about the dangers of petrol while in a later case, the 13 year old boys were held to be ^{be} 1/3 contributory negligent when they were burned by petrol. So this suggests the courts do have special rules for children to account for their conduct, and age plays a big role. As it cannot be expected of a young child to specifically understand the risk of a specifically prohibited activity.

Furthermore, the later cases involve car accidents where most of the children were held to be not contributory negligent as children

1 The candidate presents a clear and accurate explanation of the defence of contributory negligence.

2 The candidate gives an accurate explanation of how the defence operates as a partial defence, supported with reference to case law.

3 The candidate analyses the operation of the defence in relation to a child. Analysis is supported by reference to relevant case law.

Example Candidate Response – high, continued

Examiner comments

cannot be expected to have the same understanding of roads and crossing as an adult. In the case of both 13 year old girls who were injured while crossing the road, the judge held that it was unreasonable to suggest that they would be contributorily negligent. As they cannot understand the benefit of waiting for a parent or wearing reflective clothing.

This debate is often seen in breach of duty where a child commits the negligence. Although not relevant to contributory negligence, it does shed light on the idea of rough play and the social benefit of it. It highlights the courts' view when it comes to children who are treated with care and understanding. So the decisions made in cases is usually due to social benefit and policy reasons. **4**

Hence it can be argued that the statement in the question is thoroughly valid. As the courts do consider the role of social benefit and their age. And although it is argued to be unfair on the defendant to be liable even due to the mistake of a child. However the famous saying of 'it takes a village to raise a child', is held to be true as the defendant usually an adult has the responsibility of some level of care when it comes to children and being a part of society. It may even deter defendants from selling dangerous items like petrol and flick knives so they can avoid liability. So it is fair that the defence of contributory negligence does not apply to children. Hence justice is achieved in all cases. **5**

6

4 The candidate uses comparison with treatment of breach of duty by a child to develop the analysis of contributory negligence.

5 The candidate provides some evaluation of policy issues and balancing of interests of claimant and defendant.

6 The candidate reaches a clear conclusion here in relation to the issue raised in the question.

Mark for AO1 = 8 out of 12

Mark for AO2 = 4 out of 5

Mark for AO3 = 7 out of 8

**Total mark awarded =
19 out of 25**

How the candidate could improve their answer

- To improve their response, the candidate could have developed the explanation of the elements of the defence and used more examples and/or case law to illustrate the different elements of the defence.
- It would have been beneficial to provide a more detailed analysis of the competing arguments in relation to how the defence should operate where the claimant is a child.

Example Candidate Response – middle

Examiner comments

Contributory negligence is a defence for tort which allows for a reduction in damages based on the degree of the claimant's fault. This defence was laid down in the Law Reform Contributory Negligence Act. It allows for a reduction of a certain percentage proportionate to the defendant's contribution. **1**

In regards to children, the defence of contributory negligence is given a subjective approach and the reasonable thinking of various children at different ages is considered. For instance, in the case of 'Yachnik v Oliver' ~~the~~ a nine year old boy **2** purchased petrol and happened to have been playing with it when his surroundings caught fire. In this case it was held that the child will not be contributorily negligent as he was only nine years old and could not predict the outcome of playing with petrol. It was held that the shop keeper/retailer was ~~to~~ to be completely liable for selling petrol to a boy of such ~~any~~ age. This subjectivity was further proven in the case

1 The candidate gives a brief but clear explanation of how the defence of contributory negligence operates.

2 The candidate explains and analyses the operation of the defence of contributory negligence in relation to a child claimant, with a relevant case used to support the analysis.

Example Candidate Response – middle, continued

Examiner comments

of 'Evans v Souls Garage' where two thirteen year old boys had bought some petrol. They were fiddling with it when one of the boys spilled some petrol on his shirt and the other threw his lit cigarette away which engaged with the petrol and the boy caught fire. In this case the boys were held to have had reasonable mind to configure the danger of using petrol and so they were held to be contributorily negligent. ³

Oftentimes when children are small a certain degree of care is expected of their parents for them. In the case of ~~Smith v Phillips~~ 'Phillips v Rochester' the parents were held to be negligent and so liable for the harm caused to their children as they had left them unattended.

This approach towards children allows for a fair decision and application. As ~~etc~~ the child's characteristics and the whole scenario is taken into play. ⁴

As compared to adults children's negligence is analysed deeply to

³ The candidate uses another relevant case used here to develop the analysis.

⁴ The candidate provides some brief evaluation of the issues.

Example Candidate Response – middle, continued

Examiner comments

protect them as they lack capacity for adults. It is even possible to be 100% ~~re~~ contributory negligent as was seen in the case of 'Jays v IMI'. However, even for adults considerations are applied to make a fair decision.

In the case of 'Nettleship v Weston' the driving instructor was said to be under the defence of contributory negligence as he had agreed to sit in the car monitored / driven by a learner. The agreement therefore reduced the damages for the defendant ~~at~~ ^{for} the accident. Moreover, adults are even responsible when they sit as a passenger with a driver who is drunk and they are aware of the drunkenness. This was seen in the case of 'Oliver v Brimmet' where damages were reduced by 20% as the passenger had agreed to the drunk driver driving the car. Lastly, to address that even omissions can help account for the defence of contributory negligence. For instance, if the claimant was not wearing a seatbelt at the time of the 5

5 The candidate references additional case law, but the relevance of these cases to the issues related to a child claimant is not made explicit.

Example Candidate Response – middle, continued

Examiner comments

accident the defendant can opt for contributory negligence as a defence. This phenomenon was seen reflected in the case of 'Froom v Butcher'.

To conclude, children are given special considerations as they have a different sense of reasonable thought process. Even in the ~~part~~ Occupiers Liability Act 1957; children are given special provisions. This helps protect them from exploitation as ~~it~~ it would not be reasonable to put up a child in a case against an adult. Both parties' reasonableness and understanding would vary considerably. Therefore, to be fair it is important to give special considerations. **6**

~~Even~~ Moreover, even in other defences children can and do have special provisions due to their lack of capacity. For instance the defence of violent non-fit-injury (consent) will vary for children as they might not be able to give consent. This is how the law is altered to provide for justice. **7**

6 The candidate reaches a conclusion in relation to the issue raised in the question.

7 The candidate makes a comparison with treatment of children in other areas of tort here, but this point is not fully developed.

Mark for AO1 = 7 out of 12

Mark for AO2 = 3 out of 5

Mark for AO3 = 4 out of 8

**Total mark awarded =
14 out of 25**

How the candidate could improve their answer

- To improve the response, the candidate could have provided further development of the analysis of how treatment of children in other areas of tort is relevant to the operation of the defence of contributory negligence when the claimant is a child.
- Analysis and evaluation of the influence of policy in balancing the interests of the child claimant and the defendant would have been beneficial for the candidate.

Example Candidate Response – low

Examiner comments

OLA, Occupiers liability act, was introduced to cover the area of liability owned by an occupier to people that visit his/her property. OLA 1957 was introduced to cover lawful visitors and liability, while OLA 1984 was introduced as an update covering trespassers. ①

An occupier is someone who has proprietary interest in the land e.g. owner/tenant/leasee. A person can still be an occupier regardless of the fact that they may not be living in the property. A lawful visitor is someone who is on the authority of the occupier to enter the premises i.e. someone carrying out routine tasks (food/parcel delivery), guests/family, or an independent contractor working on the site. It is ruled ② that the occupier must take reasonable

① The candidate introduces the topic of Occupier's liability, but relevance to the issue of contributory negligence is not explained.

② The candidate gives an explanation of elements of Occupier's liability, but there is no reference to contributory negligence.

Example Candidate Response – low, continued

Examiner comments

care to insure that the property is reasonably safe for visitors. There is different amount of liability owed to someone whose aware of potential risks and harm, and different to someone who does not, example a child. The different ways in which occupier can avoid liability are exclusions of liability, contributory negligence and warnings. However this may not work so well in case of children

Children are thought to be innocent, careless, unreasonable and unaware of potential harms and dangers. In the case of a normal adult under contributory negligence, the court would either hold the claimant completely liable, or hold that the defendant pays a reduced sum of damages. But when it comes to children; the occupier must take extra steps to insure his/her property; is children family; as they are more likely to get hurt or get themselves in ~~into~~ situations where a normal adult wouldn't. In the case of children who are of too small of an age, the occupier might not be liable, instead the parents, who let such young kids roam around unsupervised. If the child gets hurt under the supervision of the parent on the defendant's property, then there can be two uncertain outcomes,

3 Some analysis of the treatment of the extent of the duty owed by an occupier to a child visitor is made, but the relevance to the question is not explicit and, therefore, the analysis is limited.

Example Candidate Response – low, continued

Examiner comments

either the parent ~~part~~ is held liable as it was their negligence that led to the child getting hurt, or the occupier may be liable as the parents cannot be expected to guard/supervise the child constantly and protect against unforeseeable harm.

Although the level of reasonable care an occupier takes is dependant on the nature of the premises. If its a playground, then the defendant must take extra steps to insure the property is child friendly, as they'll know it'll be a place dominated by children, to play. In the case of lets say an industrial factory, the occupier is not expected to make it child place, as that is not a place for children, and neither are the primary visitors children. Also because there's a level of care that can be achieved, after which it either becomes ineffective or ~~was~~ unnecessary.

In conclusion, special considerations and loosening of strictness is seen in cases of children, as the test of reasonable man is not applicable to them. Although if the child is doing something they're not supposed to do for along time, with the permission of the parents, the children can

4 The candidate further analyses the treatment of the child claimant in cases of Occupier's liability, but connection to the issue of contributory negligence is only inferred rather than made explicit.

Example Candidate Response – low, continued

Examiner comments

be held liable. There was a case
 where a kid aged 11, would
 commonly park, or pull his father's car
 out of the garage. But one day
 the mother was supervising him whilst
 he was doing this. Instead of pressing
 on the brake, he accelerated injuring
 the mother. The child was liable as
 in this scenario, his driving was so
 compared to one of an adult with a
 license, as this was something he
 commonly do

5 We can see that the candidate attempts to reach a conclusion, but it is not supported by the material presented here.

Mark for AO1 = 4 out of 12
 Mark for AO2 = 2 out of 5
 Mark for AO3 = 1 out of 8

**Total mark awarded =
 7 out of 25**

How the candidate could improve their answer

- The candidate could have explained the elements of the defence of contributory negligence and the special rules which have developed in relation to the use of the defence where the claimant is a child.
- The answer would have benefited from further development of the analysis in order to make explicit the comparison between the treatment of a child visitor in Occupier's liability cases and the treatment of a child claimant in cases involving contributory negligence.

Common mistakes and guidance

- Emphasis on explanation of the elements of contributory negligence and insufficient analysis of how the rules have developed and the underlying policy issues which have influenced the development of the rules.
- Inclusion of irrelevant material and/or the relevance of material such as Occupier's liability not made explicit.

Question 4

Example Candidate Response – high

Examiner comments

Section 3 (Question 4)

Private nuisance aims to protect the rights of individuals to and enjoyment of land. There are three elements to private nuisance, which are indirect interference, unreasonableness and damage. 1

Primarily, to ~~so~~ prove nuisance there has to be an indirect interference towards the claimant's rights to and enjoyment of land by the defendant. Such interference could be physical such as damage to land ~~of~~ and noise, fumes or smell which makes the situation physically unpleasant for the claimant. 2 Interfer Such interference could also cause emotional distress. In the case of *Thompson-Schwab v Costaki*, it was held that having a brothel in a respected residential area could amount to nuisance.

Secondly, another element of nuisance is unreasonableness which refers to behaviours which are beyond the normal bounds of accepted ~~best~~ behaviour. In the ~~case~~ case of *Southwark London Borough Council v Mills*, the claimant ~~stain~~ the building was poorly sound-proofed and the claimant was disturbed by the ~~noises of the~~ ^{sounds of} residents. Court held that, the ordinary acts of people could not amount to nuisance. To establish unreasonableness, four elements have to be fulfilled which are

1 The candidate introduces the elements of the tort of private nuisance.

2 Here, there is development in the explanation of unreasonable interference.

3 The candidate explains the meaning of unreasonable interference with reference to relevant case law.

Example Candidate Response – high, continued

Examiner comments

sensitivity, locality, duration and timing as well as malice. ~~In the case~~ Firstly, a dependant is not liable for damage ~~that is due~~ that is due to the fact that the ~~the~~ claimant ~~was~~ was abnormally sensitive. In Robinson v Kilvert, the dependant heater from the cellar caused the claimants floor to be hot too, damaging his brown paper. It was held that the dependant was not liable as brown papers are extremely sensitive. Furthermore, locality also determines unreasonableness. An act that is considered a nuisance in a quiet residential area ~~is~~ may not be a nuisance in an industrial area. In Sturges v Bridgman, the court held that ~~the~~ the area mainly consist of doctor consulting rooms, hence, the noise by the confectioner are regarded as nuisance. Moreover, malice means bad motive. In Christie v Davies, Daviey, the dependant kept on ~~dis~~ disrupting the claimant's classes and parties. The court held his actions as nuisance as he clearly intended malice. Finally, ^{the element} duration and timing can be seen in the case of ~~that~~ Halsey v Esso Petroleum, where it is held that the act of filling petrol tank at 10 am is not a nuisance, however, ^{it is} if ~~it is~~ done at 10 pm it is a nuisance.

4

4 The candidate explains the meaning of unreasonable interference with reference to relevant case law.

Example Candidate Response – high, continued

Examiner comments

Generally traditionally, it was held that the person who can sue must have an interest in land. However, this ~~principle~~ principle changed in ~~Khorandson~~ Khoransandjian v Bush where a 16-year-old claimant who received menacing phone calls were able to sue the defendant in private nuisance, though not having interest in their family home. On the other hand, there are three categories of ~~the~~ people who can be sued. Firstly, the creator of nuisance can be sued. 5

For instance, in ~~the~~ National Mining Union, the ~~protest~~ ~~strike~~ strikers who are picketing on the road outside of the factory can be sued. Secondly, an occupier of land ~~can~~ can be sued for nuisance caused by themselves, their employees or independent contractors. 6

In the case of Mantania, the occupier was sued ~~to~~ due to the 'special danger of nuisance caused by their independent contractors. Thirdly, ~~the~~ owners of land can also be sued, under three circumstances. ~~First the rules are~~ First and foremost, the owner has to be aware of the ~~presence~~ ^{existence} of the ~~the~~ nuisance and. Secondly ~~the~~ when the land was let, the owner promised to do some repairs but failed to. Thirdly, the owner ~~got~~ authorised the nuisance. If these circumstances are fulfilled, the owner can be sued.

5 The candidate explains the rule governing who can sue for private nuisance and refers to a relevant case to develop their point.

6 The candidate gives a detailed explanation of who can be sued for private nuisance and the explanation is supported with relevant case law.

Example Candidate Response – high, continued

Examiner comments

The rules which determine who can sue or be sued for a private nuisance are not necessarily strict. As for who can sue, traditionally it was more restricted but due to the ~~alter~~ changes made ~~in~~ in reference of the case of *Khorasandjian v Bush*, it is not necessary that an individual has to have an interest in land to sue under private nuisance. It would be unfair if this is the case ^{not all} as individuals who are harassed under nuisance have an interest in land. The changes made about ~~has~~ have made the rule less strict and open spaces where there are more people who can seek ~~justice~~ ~~and~~ justice under tort. As for who can be sued, the rule is very lenient, ~~mean~~ ^{mean} almost no individuals are protected from the rule if they had committed a nuisance.

In a nutshell, ~~the~~ rules which determine who can sue or be sued for a private nuisance is not strict, however, it is not ~~un~~ unnecessary, on the other hand it is needed to ensure ~~if~~ fairness for each parties.

7 The candidate evaluates the rules governing who can sue for private nuisance.

8 The candidate gives justification for the rules here and then reaches a conclusion.

Mark for AO1 = 10 out of 12

Mark for AO2 = 4 out of 5

Mark for AO3 = 6 out of 8

**Total mark awarded =
20 out of 25**

How the candidate could improve their answer

- The candidate could have provided more evaluation of case law related to who can sue for private nuisance with particular focus on conflicting judicial opinions – for example *Hunter v Canary Wharf (1997)* – and the requirement of proprietary interest,
- More evaluation of the rules governing who can be sued for private nuisance was needed. The candidate should have discussed the extent to which some parties impacted by private nuisance cannot sue and the balancing of competing interests between two different individuals. There should be more evaluation on how these competing interests give rise to complex issues. There could be discussion surrounding the policy reasons underlying the current approach of narrowing the pool of potential claimants – trying to stop the floodgates being opened. This can be contrasted against the three potential categories of defendant – giving a claimant a broader range to receive compensation. The candidate could have discussed whether this approach is satisfactory.

Example Candidate Response – middle

Examiner comments

This essay will explain the tort of private nuisance, its elements and rules which determine who can sue or be sued and then assess the validity of the question statement.

The tort of private nuisance is concerned with protecting or balancing a person's right to ensure that they can use their land, enjoy it without any interference from others. ¹ The interference can come up from situations such as a ~~new~~ neighbour ~~ex~~ making noise or causing pollution. ²

For a claim to be successful in private nuisance, a person needs to prove certain elements. These are a person's intentional activity causing interference with the claimant's right, ~~the~~ to enjoy their land, the interference must be unreasonable, and ~~lastly~~, ~~lastly~~, the unreasonable interference must have caused some damage. An example can be the case of Southwark Borough Council v Mills. ³ Southwark Borough Council converted a house into flats, where in one of the flats ~~Mills~~ ~~li~~ Mills lived. The claimant claimed that the residency was poorly soundproofed, but her claim failed because this was not something unusual and was common in this type of residency.

In addition, ~~the~~ looking at who can sue in

¹ The introduction begins with the purpose of the tort of private nuisance.

² The candidate outlines some examples of private nuisance to develop this point.

³ The candidate explains the element of the tort.

Example Candidate Response – middle, continued

Examiner comments

private nuisance ~~was~~ was shown in the case of *Huntley v Canary*. A person who has proprietary interest can sue, this now includes an owner or even a tenant (both of them can sue). Three types of people can be sued. This includes the creator of the nuisance, even though that person may no longer occupy the land nuisance comes from. Secondly, the person who authorizes ~~can sue~~ the nuisance can be sued for private nuisance. This means if a person is willingly authorizing or supervising a nuisance, that person is liable and can be sued. Lastly, the person who adopts the nuisance can be sued. This means a person who allows the nuisance to be carried on can be sued.

4 The candidate outlines the rule governing who can sue for private nuisance.

5 The candidate outlines the rules governing who can be sued for private nuisance.

When considering if an interference that leads to nuisance is reasonable or not, the courts apply the reasonableness test. They look at a number of factors, mainly four which are locality, duration, duration, sensitivity and malice. A person who is sued is causing out unreasonable interference that ~~interfere~~ interferes with the right of a person to enjoy their property or use their land however they want.

As mentioned above, the rules in as to who

Example Candidate Response – middle, continued

Examiner comments

can sue or who can be sued are certain and cannot be changed. These rules are somewhat unreasonably strict since they create a standard who should be followed so as to sue, the right person.

As for the tort, only a person with proprietary interest can sue which is reasonable to do so since that person is deprived of their right to enjoy their land which is the main area on whose protection this tort focuses on. This rule is strict but reasonable, and prevents any unfairness. That is to say, if a person feels that their right to enjoy their own land is being threatened and interfered with makes it reasonable and fair. Secondly, the rules are that only three types of people can be used. Firstly is the creator of nuisance. A person can be sued here even if they not occupy the land from which the nuisance created. This prevents the person from being careful and forever preventing to create any such nuisance in future.

Moreover, the person who authorizes can be sued. This encourages that person to stop encouraging such unreasonable behaviour and try to put an end to it. Lastly, the person who adopts the nuisance can be sued, this allows to sue a person who are aware about the interference but

6 Here, the candidate evaluates the strictness of the rules governing who can sue for private nuisance.

7 This is then followed by an evaluation of the rules governing who can be sued for private nuisance.

Example Candidate Response – middle, continued

Examiner comments

are not taking actions to stop it or prevent it and are allowing the continuation of it.

All in all, the rules which determine who can sue or who can be sued for a private nuisance are strict, but beneficial since they create a guideline so as for there to be proper claims in this tort. 8

8 The candidate reaches a broad conclusion at the end of the response.

Mark for AO1 = 8 out of 12

Mark for AO2 = 3 out of 5

Mark for AO3 = 4 out of 8

**Total mark awarded =
15 out of 25**

How the candidate could improve their answer

- To improve, the candidate could have identified and evaluated the reasons why the rules governing who can sue and be sued for private nuisance can be said to be unnecessarily strict.
- To be awarded higher marks, there should be a coherent and reasoned conclusion which is justified by the explanation and evaluation of the legal rules.

Example Candidate Response – low

Examiner comments

Private nuisance is the damage to an occupier's property of enjoyment. The private nuisance are of three types direct interference, indirect interference, and damage, ①

Interferences can be above ground, on the property, below the ground in the subsoil, and airspace. However the rules which determine who can be sue or be sued for a private nuisance are unnecessarily strict. The validity of the statement above can be said to be not be valid entirely. The strict tort of liability to tort is the decision set in Ryland v Fletcher, which is considered to be the most strict, of the rules. Comparison of both the nuisance can be done as RvF is a part of nuisance of strict liability. The Ryland v Fletcher, considers anyone who is the owner of the land as liable, to any nuisance.

Anyone who has an interest in the land can be sued for nuisance. The claimant are the owners, the tenants or anyone in the direct ownership of the land. The Rule of Ryland v Fletcher focuses and emphasises on the escape of a dangerous thing which can cause the claimant damage when it escapes. It can be seen in one of the cases where the nuisance however emphasis on the damage done by defendant, to the claimant. ②

However, the exceptions to the Ryland v Fletcher include defences, which includes, damages or nuisance done by a third party, the defendant will not be liable if the nuisance is committed by a third party. Act of God is another defence which is an exemption to the strict tort of liability, which is the nuisance occurred through any unforeseeable event which is not in the control of the defendant such as fires, floods etc.

① The candidate identifies some of the essential elements of private nuisance.

② The candidate identifies some of the relevant factors which determine who can sue and be sued in private.

Example Candidate Response – low, continued

Examiner comments

However, a claimant who willingly or with a consent knowing the fo or having the foreseeability of an event still continues to carry on the nuisance such can be seen a case where a claimant built a mine ~~under a~~ above a ~~canal~~ canal, when a third party emptied their reservoirs the water was filled in the defendant's canal which burst, the defendant was not liable since this was an act of a third party.

Any anyone who can sue don't necessarily need to own a separate land, nuisance can take place on a combined area this was seen in one of the acts where a flying swing malfunctioned midair and hit the claimant, however the defendant was liable for the damages

Nuisance are tested on elements such as locality, duration, sensitivity, and. For example, it is important to know where the nuisance is taking place, for example in a case the claimant who lived near a kart racing track, filed for nuisance of noise, however, the sensitivity can be seen as the individual or the sensitive characteristics of the item or the thing that is being damaged. There is no liability for sensitivity, in one of the cases, a factory of a paper which was sensitive to fumes that would come from the defendant's land which would damage the brown paper, it was held that the defendant was not liable for the sensitivity since there is no precedent for sensitivity or the ~~of~~ nuisance to sensitivity.

The duration is the time for how long the nuisance is being taken place for, for example nuisance for more than 20 years become a legal, one of the defences to the strict liability of tort is the Authority by the

3 Some of the essential elements which must be established for liability in private nuisance are discussed here.

Example Candidate Response – low, continued	Examiner comments
<p>the Parliament for an act to carry on</p> <p>It can be strict can be said that the nuisance can only be unnecessarily strict as taking the Ryland v. Fletcher, where a defendant brings a dangerous and mischievous thing, the defendant will however be liable in every way, since the foreseeability of the thing if it escapes is already known when it is brought to the land, but even if the events are unforeseeable it can still hold the defendant liable.</p> <p>In conclusion, the validity of the statement is false, private nuisance, follows the common law, and it is not strict exceptions such as of unforeseeability are accepted but however, the rules to who can sue and can be sued are strict in the Ryland v Fletcher.</p>	<p>Mark for AO1 = 4 out of 12 Mark for AO2 = 1 out of 5 Mark for AO3 = 1 out of 8</p> <p>Total mark awarded = 6 out of 25</p>

How the candidate could improve their answer

- The candidate should have omitted any irrelevant material related to *Rylands v Fletcher*, as this did not add to the answer.
- An explanation could have been included about the rules governing who can sue and be sued for private nuisance with more detail and with reference to relevant case law.
- It would have been beneficial for the candidate to evaluate the reasons why the rules might be regarded as unnecessarily strict.

Common mistakes and guidance

- Too much focus on the general rules governing liability in private nuisance and insufficient explanation and analysis of the rules governing who can sue and be sued.
- It is important to examine the underlying policy reasons for the rules and try to reach a clear and coherent conclusion in relation to the question. The conclusion should be reasoned and supported by the explanation and evaluation in the essay.

Question 5

Example Candidate Response – high

Examiner comments

Negligence is one of the most important torts in civil law. It has influenced torts like Rylands v Fletcher. It also has formed basis for other various torts like nervous shock and negligent mis-statement. There are three main elements that need to be considered when discussing negligence. They are duty of care owed to a claimant by the defendant, breach of that duty and causation of the damage occurred. They were explained by Lord Atkin in Donoghue v Stevenson (1932) ①

Duty of care was first explained by Lord Atkin in Donoghue. Neighbourhood principle was established which explained the reasonable foreseeability and neighbourhood test. Afterwards, Lord Wilberforce introduced the 2 part test in Anns v Merton v London Borough Council (1977). It rested on principles of proximity and policy reasons. But since judges task to apply law and not focus on policy reasons. A 3 part test came in Caparo Industries plc v Dickman (1990).

① The candidate introduces the elements of the tort of negligence.

Example Candidate Response – high, continued

Examiner comments

Once the duty of care is shown. The second step is showing breach of duty. The defendant must have breach the duty. This idea first emerged in Blyth v Birmingham water works which stated "the omission of doing something which a reasonable man would do and doing something which a reasonable man would not do and a prudent man would not do" ²

However this proved to be uncertain because who was the reasonable man was not clear. Therefore, reasonable man was explained in Hall v Auto Racing Club, as the man on street man who gives magazines, a man who uses a lawnmower in his shirt sleeves is a reasonable man. In addition, Glasgow Corporation v Muis showed that he is free from 'over confidence and over apprehension. These three cases explained the reasonable man very clearly.

The defendant will be judged on the basis of a reasonable man and not on the

² The candidate explains the concept of the reasonable man as the test for breach of duty and supports the explanation with a reference to a relevant case.

³ An explanation about how the reasonable man test was developed through further judicial decisions is given here.

Example Candidate Response – high, continued

Examiner comments

actions of this particular defendant. In cases like Nettleship v Weston (1971), show that a learner driver will also be judged on the basis of a reasonable man. In this case the ~~defendant~~ (driving instructor) was sitting with the defendant who was a learner driver. She drove into the lamppost. Defendant was injured. The courts held that a learner driver will be judged on the basis of a reasonable, skillful and competent driver. This might seem unfair but this was done for policy reason because this will result in a learner ⁴ driving more recklessly.

It is also not fair if court set a standard of care too high. In Cole v Davis Gilbert, the occupier of a village green had taken all necessary precautions to fill a dip. Claimant hurt his leg when dig uncovered after 21 months. Court held that if standard of care was set too high the consequences would be quickly felt. So the defendant should be judged against a reasonable standard.

⁴ The candidate gives an explanation and evaluation about the application of the reasonable man test in relation to a learner driver, with reference to a relevant case.

Example Candidate Response – high, continued

Examiner comments

law
 The court have defined certain rules and regulations regarding the breach of duty. Firstly, magnitude of risk should be considered. In case of ~~Hill~~ Haley v London Electricity Board, the defendant was liable because his duty to take reasonable care extended to blind people walking along the pedestrian top. He should have known this risk and expected to know that blind pedestrians may walk as well and get injured. In this case claimant tripped over a hammer that was placed by defendant's who were carrying out their work along the pavement.

The extent of the possible harm should also be considered. This relates to the thin skull rule or eggshell skull rule where defendant knows that claimant already in a vulnerable state. In Stepney v Borough Council claimant was a mechanic. He had sight in one eye only. He was provided with goggles while doing welding work. Therefore, employers held liable as he was already in a worse state. This led to losing

5 The candidate explains and analyses a range of factors which are relevant to the decision as to whether a duty of care has been breached.

Example Candidate Response – high, continued

Examiner comments

sight of other eye as well and he became completely blind. It was held that the more the risk, the more the precautions needed to be taken.

Furthermore, the fact that if it is common practice should also be taken into account. In Brown v Rolls Royce worker was not provided with safety cream. Even though he was provided with washing facilities. The provision of safety cream by employees was a common practice at that time. However, it could not be shown that cream would have prevented the harm. So no duty of care was owed.

Moreover, in Lattimer v AEG there was water inside the factory due to heavy rain. It mixed with oil on the surface. The water was wiped away but a film of oil was there. The factory had put saw dust all over there. However, one place was left where ~~defendant~~ went to work unknowingly. It was held that factory took all the

Example Candidate Response – high, continued

Examiner comments

necessary precautions it could take. The rule here what that what actions were taken to prevent harm. So factory took all reasonable precaution, so no duty of care owed.

In addition, the foreseeability of harm should also be considered. In Bowhill v Young, psychiatric harm was not foreseeable but physical harm was. In Topp v London Bus Company, a woman was killed on a bus that was stolen by defendant. The theft of bus was foreseeable but death of claimant was not foreseeable.

However, standards are different from other classes of defendants, specially children and doctors. Children we have case of McHale v Watson where a children hit a dart on lampost and it hit a girl. Child was not negligent and no duty. In Mullin v Richards children were playing with plastic rulers. One

6 The candidate explains and evaluates the application of the reasonable man test in relation to a child.

Example Candidate Response – high, continued

Examiner comments

child hit the other but no duty. This is done for policy reasons as the imposition of liability will deprive children of fun. Playing is a desirable activity for them. However, there is a contrasting case of Zanner v Zanner where 11 year old was held liable when he ran over his mother. He used to drive the car. So he was judged against a reasonable driver.

For doctors, the landmark case is Bolam v Friern Hospital Management Authority. This established the Bolam test. Claimant was undergoing an electroconvulsive surgery. He was not given relaxant drug, so claimant sued. It was held that if drug given there was less chance of death and if not given less chance of injury. This was in favor of medical staff. In Dr Frietas v D'Brain, 11 out of 1000 doctors were considered to be a group of reasonable medical opinion. Bolam test also extends to Chinese herbal medicine. In Shator v Sit; claimant suffered diseases

7 The candidate follows by explaining and evaluating the application of the reasonable man test to medical professionals.

Example Candidate Response – high, continued

Examiner comments

as a result of herbal reaction but no duty. In Hatch v Blackmore, BBC broadcaster going for surgery. asked doctor if she will lose voice. She assured she will not. She lost voice but still no duty. ~~the~~ ~~that~~ Lord Denning was being over protective of medical profession. In Chesfor v Afshan, a duty was owed. This was a unique case as medical profession immunity. The claimant was not told of possible harm.

To conclude, it can be seen that reasonable man test ensures a consistent approach to breach of duty. However, in some situations this is not the case as seen in Medical profession and children. It is justified for children. It is criticised for medical profession that they may set their own standard and not against a reasonable man. But this is done to prevent any defensive approach towards work. ~~to~~ The juniors doctors are also held against same senior doctors as seen in Wilsher v Essex Comd Comd, this is fairly just. Law tries to be fair and just when looking at breach of duty.

8 The candidate reaches some conclusions about the use of the reasonable man test.

Mark for AO1 = 10 out of 12

Mark for AO2 = 4 out of 5

Mark for AO3 = 6 out of 8

**Total mark awarded =
20 out of 25**

How the candidate could improve their answer

- The candidate could have used the explanation as a basis for an analysis of whether the reasonable man test ensures a consistent approach to the issue of breach of duty.
- They could have used the material presented to reach a clear and coherent conclusion in which the reasoning is based on the explanation and evaluation presented in the essay.

Example Candidate Response – middle

Examiner comments

The tort of negligence is considered to have occurred if three vital conditions are met. Firstly, there is a duty of care owed from ~~claimant~~^{defendant} to the ~~defendant~~^{claimant}. Next, there is apparent breach of duty of care. Lastly, the harm suffered by the claimant is the cause of the breach. ①

① The candidate introduces the essential elements of the tort of negligence.

In order to determine standard of care for an individual. The objective test, or reasonable man test is used. In *H Glassbrook v Hall Racing Club*, an ordinary man is ~~considered~~ defined as 'a man on the street' which refers to what an average person would do in a situation to guarantee a reasonable standard of care. There are ~~three~~ six factors that courts ② take into account to assess a breach of duty of care. Firstly, the foreseeability of risk, whether it is ~~reason~~ foreseeable for the defendant to owe a duty of care to the claimant as apparent in *Poe v Ministry of Health*. Next, the magnitude of risk, how big of the risk to be considered a breach to the standard of care which is shown in *Haley v London Electricity Board*. ③

② The candidate continues by introducing the concept of the reasonable person.

③ The candidate outlines a range of factors which are considered when determining whether the duty of care has been breached.

Example Candidate Response – middle, continued

Examiner comments

~~that~~ Moreover, the extent of harm of the risk. Furthermore the social usefulness of the breach. This refers to whether the defendant's breach is due to not make things worse. In addition, practical practices in relation to risk. Lastly, ~~precaution~~ whether precautions have been taken to minimise the harm suffered. In short, these are basically what the courts look into before establishing a breach of duty of care in order to not put undue burden. On the ~~other~~ other hand, a ~~children's~~ children's standard of care is apparent in ~~Richard~~ ^{Millin} v ~~Richard~~ ^{Richard} and Blake v Galloway to be less than adults as they are more ~~py~~ physical and playful.

In terms of medical experts, the court will apply Bolam's test to determine the breach of duty. The test puts emphasis on ~~an~~ taking an expert body of medical opinion, even the slightest amount who agreed to it would not make it a breach of duty. As seen in De Freitas v O'Brien, even 11 out of 1000 doctors are considered an expert body of opinion which relieves the liability for the claimant. However, this is limited to the doctors disclosing of risks to the patient, as failed to do so in Chester v Afshar, which results in a breach. The case Wilsher v Essex also proves that the courts take into account the credibility and experience of doctors to

4 There is an evaluation about the application of the reasonable man test in relation to medical professionals.

Example Candidate Response – middle, continued

Examiner comments

decide if a breach of duty exists.

The reasonable man test ensures a consistent approach due to a few reasons. Firstly, standard of care is already hard to establish due to age, ethnicity and other mental or physical conditions. Hence, with comprehensive tests and factors taken into account, it ensures that everyone has a reasonable standard of care to other people. The test also ensures there are no undue **5** burdens for the society, which is beneficial as they would not worry about any form of negligence that can happen at any location and time.

Nonetheless, the test is inconsistent at times especially for medical experts. By only taking a body of expert ~~opinion~~ opinion, this doctor will most of the time base their judgements to protect their reputation, rather than justice for the patients. This leads to seem unethical as the rights of ~~at~~ a patient should be preserved than the reputation of doctors. Hence, consistency is an issue. In addition, the leniency for children's breach of duty could make them more aggressive and not careful in negligence, which would cause harm to more people than it should. **6**

In conclusion, the tests ensure a consistent approach to breach of duty in negligence but has its inconsistencies due to loopholes in tests for medical experts and children. **7**

5 The candidate examines the benefits of using the reasonable man test to determine whether the duty of care has been breached.

6 Some of the negative aspects of the use of the reasonable man test are identified.

7 The candidate reaches a broad conclusion now in relation to the reasonable man test.

Mark for AO1 = 7 out of 12

Mark for AO2 = 3 out of 5

Mark for AO3 = 2 out of 8

**Total mark awarded =
12 out of 25**

How the candidate could improve their answer

- The candidate could have used the explanation as a basis for an analysis of whether the reasonable man test ensures a consistent approach to the issue of breach of duty.
- They could have used the material presented to reach a clear and coherent conclusion in which the reasoning is based on the explanation and evaluation presented in the essay.

Example Candidate Response – low

Examiner comments

The question at hand refers to the assessment of the validity of reasonable man test under the tort of negligence.

A person can be sued under negligence when a person doesn't meet the standards set out by the duty of care to the claimant causing injury or losses arise to the claimant as a result of it.

To prove the defendant was acting negligently there are 3 requirements that need to be proven. These being duty of care to the claimant, breach of duty and causation. **1**

Breach of duty being one of the main elements to sue under negligence. This element further requires the establishment of two requirements set out by precedent.

The first requirement refers to standard of care. Standard of care can either be already established or a novel standard of care will have to be proven using the 3 fold test set out by Caparo v Dickenson.

Looking at the established ^{standard} duty of care these are set out in ~~examples~~ like situations between, Motorist & road user which was established in the case Nettleship, or another example being the standard of care between a doctor & patient which was established in the case of Baker. **2**

Considering the standard of care between ~~of motorist~~ and road user as an example in order to answer the question, we look at the case of Nettleship. In this case the defendant

1 The candidate identifies elements of the tort of negligence.

2 The candidate references some relevant case law.

Example Candidate Response – low, continued

Examiner comments

was only just a learner driver, however the fact that he was only a learner driver played no role and he was held liable under negligence. The case of Nettleship ^{held} said that a driver must have the competence of an average reasonable driver regardless of other facts. ³ This establishes the reasonable man test under the standard of care set out between a motorist and road users. ⁴

Consequently, the standard of care was decided by the court the facts are applied. The initial test that took place only considered the relationship between the claimant and the defendant, and if the duty itself, damage caused was foreseeable. Later on this was further developed in the case of Ann into a two-question test. First one being the proximity between the ~~D~~ Defendant & claimant and if the judge should establish that standard of care considering policy and such.

Later on the test set out by the case of Ann was further refined and developed into a 3-fold test in the case of Caparo v Dickinson. This first looked at the legal proximity between the claimant and Defendant and then looked at if the damage was foreseeable by the Defendant (D). Then it looked at if it was fair, just & reasonable to establish a standard of care taking into account policy and also the reasonable man test once again. This was seen in the case of XY v ZY, the reason for this being looked into is so that by establishing standard of care every

³ The candidate explains the standard of care applicable to a learner driver.

⁴ The candidate refers to the reasonable man test.

Example Candidate Response – low, continued

Examiner comments

Careful, they make sure the flood gates of litigation aren't opened, and this consistency is achieved.

Once the standard of care is established, then the next requirement is if the D has not reached its level yet. If this is established, as well it is safe to say that breach of duty has been established in said case.

Not only does the reasonable man test lead to consistency but furthermore since in Negligence cases courts make sure to not set the standard too high or too low as this would potentially lead to the claimant being ⁵ ~~over~~ over compensated or under compensated. The reasonable ~~man~~ ^{man} test makes sure this doesn't happen.

Once all that is established the only remaining thing to prove under the steps set out by Donoghue to prove negligence would be causation which talks about if the injury or damage faced by claimant is due to the actions of the Defendant.

In conclusion the reasonable man test ensures a consistent approach to negligence although in certain scenarios identifying an ⁶ ~~man~~ as a standard man is an issue of concern to the court.

5 The candidate gives a brief analysis and evaluation of the reasonable man test.

6 The candidate reaches a conclusion, however this is not fully supported by the analysis and evaluation.

Mark for AO1 = 4 out of 12

Mark for AO2 = 2 out of 5

Mark for AO3 = 2 out of 8

**Total mark awarded =
8 out of 25**

How the candidate could improve their answer

- There was a significant amount of material relating to duty of care. The candidate did not demonstrate how this was relevant to the question and it was therefore not creditworthy. This should have been omitted and there should have been a greater focus on relevant material relating to the standard of care and the reasonable man test.
- The candidate should have explained the meaning of breach of duty in the context of the law of tort, using material related to the reasonable man test. They should have explained the elements required to establish the tort – reasonable man, objective nature. The candidate should have examined how the test is applied in a variety of settings (children, professionals, and learners with reference to case law). They could have explained the factors considered by the courts when determining whether there has been a breach of duty – magnitude of risk, potential harm, precautions and social value. The candidate needed to evaluate whether it ensured a consistent approach to the issue of breach of duty.

Common mistakes and guidance

- It is important to provide a sound explanation of the reasonable man test and then evaluate how it is applied in specific circumstances. A focus on an explanation of the legal rules without an evaluation of the issue raised in the question will not achieve the highest marks.
- It is vital to use the explanation of the law and the evaluation of the issues to reach a clear and coherent conclusion which is justified by reference to the material presented in the essay.

Cambridge Assessment International Education
The Triangle Building, Shaftesbury Road, Cambridge, CB2 8EA, United Kingdom
t: +44 1223 553554
e: info@cambridgeinternational.org www.cambridgeinternational.org

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