



**Cambridge Assessment**  
International Education

# Example Candidate Responses

## Paper 4

# Cambridge International AS & A Level

## Law 9084

For examination from 2017

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## Introduction

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The main aim of this booklet is to exemplify standards for those teaching Cambridge AS & A Level Law 9084, and to show how different levels of candidates' performance (high, middle and low) relate to the subject's curriculum and assessment objectives.

In this booklet candidate responses have been chosen from June 2018 scripts to exemplify a range of answers.

For each question, the response is annotated with a clear explanation of where and why marks were awarded or omitted. This is followed by examiner comments on how the answer could have been improved. In this way, it is possible for you to understand what candidates have done to gain their marks and what they could do to improve their answers. There is also a list of common mistakes candidates made in their answers for each question.

This document provides illustrative examples of candidate work with examiner commentary. These help teachers to assess the standard required to achieve marks beyond the guidance of the mark scheme. Therefore, in some circumstances, such as where exact answers are required, there will not be much comment.

The questions and mark schemes used here are available to download from the School Support Hub. These files are:

**June 2018 Question Paper 43**  
**June 2018 Paper 43 Mark Scheme**

Past exam resources and other teacher support materials are available on the School Support Hub:

[www.cambridgeinternational.org/support](http://www.cambridgeinternational.org/support)

## 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. The candidate answers are set in a table. In the left-hand column are the candidate answers, and in the right-hand column are the examiner comments.

### Example Candidate Response – high

### Examiner comments

Question Part

|    |  |  |
|----|--|--|
| Q1 |  | Misrepresentation is where an untrue statement of fact induces a party to enter into a contract. 1   |
|    |  | There are 3 requirements to show that a contract is actionable for misrepresentation. This includes that there must be an untrue statement, it must be a statement of fact, and the statement must have induced the party to enter the contract. |

1 A good start. A brief definition of misrepresentation, which is clear (this is often better than a very long and sometimes less accurate one). This is followed by the main elements of misrepresentation without being over lengthy and wasting time on unnecessary matters.

**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.

**Answers** are by real candidates in exam conditions. These show you the types of answers for each level. Discuss and analyse the answers with your learners in the classroom to improve their skills.

## How the candidate could have improved their answer

This was an excellent response, which used a wide range of illustrative detail and sound definitions. Three maxims were identified and explained, each remedy was explained with a relevant case, including the more recent Anton Pillar and Mareva injunctions.

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

## Common mistakes candidates made in this question

Candidates who fared less well in this response often made the mistake of offering responses based on custom and the Anglo Saxon system of law, rather than concentrating on the creation of Common Law and the way in which Equity was formed to solve problems. Poorer responses also contained far too few example citations for the maxims and particularly the remedies. Concepts such as trust, mortgages and deserted wives' equity could also have been used.

Often candidates were not awarded marks because they misread or misinterpreted the questions.

Lists the common mistakes candidates made in answering each question. This will help your learners to avoid these mistakes and give them the best chance of achieving the available marks.

# Question 1

## Example Candidate Response – high

## Examiner comments

Question Part

|  |  |  |
|--|--|--|
|  |  | <p>Whether or not the defendant has breached his duty - will depend on <del>whether</del> <del>or</del> <del>not</del> the conduct called into question. If the conduct of the defendant is an ordinary skill, then he will be judged based on the reasonable man standard. However, if the defendant is exercising his skill or profession, the standard used will be the standard of a professional.</p> <p>A reasonable man is a judicial construct which is used as an objective test to assess <del>the</del> whether or not the defendant's conduct is what a reasonable <del>with</del> man would do or would not do. As defined in the case of <i>Hall v Brooklands Racing Club</i>, a reasonable man is - an average man, an ordinary man, a reasonable man, and a man on the Clapham Omnibus. 1</p> <p><del>Whether</del> <del>or</del> the second element of breach to consider is whether or not the defendant has fallen below the standard. therefore, in order to assess this, there are four factors to consider, namely. magnitude of risk, practicality of precaution, utility of the defendant's conduct and state of knowledge.</p> <p><del>in order to assess</del> As suggested in the question above, <del>there factors</del> magnitude of risk is a crucial element which can be further subdivided into greater risk of harm and risk of greater harm.</p> <p>where the <del>the</del> defendant's conduct poses a greater <del>of</del> risk of harm to the claimant, the defendant will be held liable in negligence. this can</p> |
|--|--|--|

1 This is an accurate explanation of the standard of care. The meaning of 'objective test' and 'reasonable man' could be further developed; perhaps by distinguishing objective and subjective tests and reasonable care and absolute care.

Example Candidate Response – high, continued

Examiner comments

| Question | Part   |
|----------|--|
|          | <p>be seen in the case of Bolton v Stone. However, if the defendant fails this <del>requirement</del> factor, he will not be held liable, as in Miller v Jackson. <b>2</b></p> <p>The defendant was liable in the case of <del>Paris</del> Paris v Stepney because the <del>defendant's</del> defendant's conduct <del>has</del> had caused a risk of greater harm to the claimant. This is because in this case, the claimant only had one eye with a good eyesight, and <del>the</del> the defendant had not done anything to ensure that the claimant does not lose his good eyesight <del>and</del> given that the working condition of the <del>the</del> claimant's place of work was dangerous. Therefore, the dangerous condition had caused a risk of greater harm to the claimant as he was one-eye blind.</p> <p>The next factor is practicality of precaution. This element means that the defendant must have done some <del>that</del> practical precaution to ensure <del>that</del> the safety of the claimant. However, in the case of Latimer v <del>AEC</del> AEC, the precaution that the claimant had sued for was impractical. <b>3</b></p> <p><sup>determine</sup> The next factor to <del>consider</del> breach of duty is utility of the defendant's conduct. This would mean whether or not there was any good in what the defendant was doing. This can be seen in the <del>the</del> case of Watt v <del>herfordshire</del> herfordshire where the defendant was held not liable because of his <del>to</del> good conduct. <b>4</b></p> |

**2** The facts of Bolton v Stone or Miller v Jackson are relevant here. A brief outline of the facts of either case would strengthen the explanation of magnitude of risk.

**3** The facts of Latimer v AEC would be useful here in terms of supporting the explanation effectively.

**4** This explanation and use of case law could be improved with reference to the facts of this case. A very brief outline would suffice.

Example Candidate Response – high, continued

Examiner comments

Question Part

|  |  |   |
|--|--|---|
|  |  | <p>Lastly, the state of knowledge. <del>the</del> The state of knowledge of the defendant must be at the time that the act was complained about by the claimant. This can be seen in the case of <i>Roe v Ministry of Health</i>.</p>   |
|  |  | <p>However, if the defendant is <del>not</del> assessed based on the standard of a professional, different set of rules will apply. The test established in <i>Bolam v Friern Hospital Management Committee</i> will apply.</p>   |
|  |  | <p><del>The</del> <del>test</del> The Bolam test includes that a medical person's conduct would have to be supported and agreed upon by a group of medical <del>persons</del> <del>or</del> <del>not</del> <del>the</del> <del>test</del> practitioners within the profession. This test was further modified in <i>Bolitho v City of Hackney</i>, where <del>the</del> the group of <del>res</del> reasonable, respectable, responsible school of thought is able to draw logical analysis for their conclusion.</p> |
|  |  | <p>This test however, was heavily criticised by many academics as it allowed doctors to <span style="background-color: #ffcccc; border-radius: 50%; padding: 2px;">5</span> play 'god'. <del>that</del> though the test was supported by <i>Ordway v The Royal Bethlem &amp; Maudsley Hospital</i>, it was dragged in <i>Chester v Afshar</i>.</p>  |
|  |  | <p><i>Chester v Afshar</i> was followed by <i>Montgomery v Lanarkshire</i>, whereby the Supreme Court had confirmed that doctors owe a duty to disclose information and all significant risks to patients.</p>  |

5 There is both explanation and critical analysis here in relation to the standard of care and medical professionals.





## How the candidate could have improved their answer

- The explanation of breach of duty was detailed and generally accurate. The candidate identified the standard of care as that of reasonable care. In explaining the meaning of reasonable care the candidate could have explored the concept of an objective standard as distinct from a subjective standard. Distinguishing between reasonable care and absolute care would also strengthen the explanation.
- The explanation of the factors which must be considered could have been improved by more effective use of case law. Where the candidate identified the issue of the practicality of precautions and referred to the case *Latimer v AEC*, it would have been more effective if the candidate had briefly explained the key facts in order to illustrate the point made regarding the practicality of precautions.
- The critical analysis could have been more developed, which in turn would have produced a more convincing conclusion. The candidate identified some key issues but these points were stated rather than discussed. The reference to the 'floodgates' could have been linked to some of the aspects of the standard of care and a more convincing case made for the argument that the current rules prevent 'floodgates of litigation'. It could be argued, for example, that each of the factors considered by the court ensures that the standard is that of reasonable care rather than absolute care and therefore limits the number of successful claims. It could also have been argued that the concept of a reasonable person is vague and therefore creates uncertainty and injustice.

Example Candidate Response – middle

Examiner comments

Question Part

|   |   |  |
|---|---|--|
| A | 1 | <p>The Tort of Negligence is concerned with compensating those who are affected by another person's careless act. Negligence has been developed through the decades and there have been various ways to identify the doctrine of duty of care and the breach of duty, to establish that there is negligence.</p> <p>In the case of <i>Donoghue v. Stevenson</i> (1932) it was when the elements to identify the existence of duty of care was established. Lord Atkin had established that there must be reasonable foreseeability in causing injury to the person, and he also added that proximity is <del>an</del> an important element to ensure that our actions won't interfere or injure our 'neighbour'. Lord Atkin did not mean 'neighbour' as a literal term but as someone <del>close to you</del> <del>physically</del> near you. This was called the Neighbour principle.</p> <p>The Neighbour principle however developed into the two-stage test, established in <sup>1</sup> <i>Anns v. Merton Borough Council</i> (1978) where Lord Wilberforce had suggested that the additional test to identify the duty of care is the inclusion of policy consideration. <del>which means when there is policy that excludes the application of the Neighbour principle.</del></p> |
|---|---|--|

1 This level of detail and analysis regarding duty of care was not required. The question referred specifically to breach of duty therefore a brief overview of the other elements of negligence would have been sufficient.

Example Candidate Response – middle, continued

Examiner comments

Question Part

|  |  |
|--|--|
|  | <p><del>there is no duty of care this is</del><br/>                 This means when the Neighbour principle is applied, the second step is to ensure there is no policy to exclude the test. This attracted many criticisms as there would be no duty if a policy excludes the application of the test, despite the obvious negligence. This also created ripples within the development of law.</p> <p>The judicial retreat occurred when the case of <u>Murphy v Brentwood District Council</u> (1990) had separated itself from <u>Anns</u>, by using the practice statement 1966. The current test is called the <u>Angular composite test</u>, <del>test</del> established in <u>Caparo v Dickman</u> (1990).<br/>                 The <del>test</del> <sup>test</sup> established that there are <del>3</del> three elements <del>to establish</del> the 1st factor in finding duty of care, the first is reasonable foreseeability. This is seen in the case of <del>Haley v London Electricity Board</del> <u>Haley v London Electricity Board</u> (1965). The second factor is there must be proximity – this was observed in <u>Watson v British Boxing Board</u>. Lastly, it must be fair, just and reasonable. The case of <del>Taylor v McFarlane</del> <u>McFarlane v Taylor</u> Health Ministry</p> |
|--|--|

2 Detailed analysis of duty of care was not required in this question.



Example Candidate Response – middle, continued

Examiner comments

| Question | Part   |
|----------|--|
|          | <p>Airide from that, practicality of precaution is one of the factors that the courts have taken into account previously, such is submitted in Latimer v. AEC when there was a flood in the defendant's factory. They had made the effort to clean up the mess and put sandbags on wet patches, however, the claimant, an employee, still slipped. He sued AEC on grounds that they should've closed the factory after the flood. The court held that this was unnecessary as there was <del>enough</del> <sup>sufficient</sup> precautions taken by the defendant, thus, they are not liable.</p> <p>There is also the magnitude of risk, where courts consider whether there is a breach of duty observing the risk of <del>that</del> any breach to happen. <sup>6</sup> This is where the distinction between Bolton v Stone and the case of Miller v Jackson portrays the <del>meaning</del> <sup>link between</sup> of magnitude of risk and breach of duty of care. In Bolton v Stone, the claimant was hit by a cricket ball. The court found that two <del>catch</del> <sup>catches</sup> court had screens erected which is sufficient to prevent accidents, and that it proven in the six times the ball had being out within 30 years. Meanwhile, the case of Miller v Jackson portrayed has similar facts to Bolton</p> |

6 This point was well explained and developed with good use of relevant authority.

Example Candidate Response – middle, continued

Examiner comments

Question Part

|  |   |
|--|---|
|  | <p>however this happened more frequently; eight to nine times a year. Therefore the magnitude of risk here is higher than in Bolton, explaining why Miller <del>has</del> achieved a breach but Bolton did not.</p> <p>Breach of duty of care also includes the state of knowledge the defendant holds, in Roe v Ministry of Health, the claimant had been paralysed due to the disinfectant that was caught in defendant's equipment. <del>that was not</del> the courts found them not liable as the infection can't be spotted with the naked eye.</p> |
|--|---|

7 There should have been more critical analysis here and a clear conclusion. This candidate has focused on explanation at the expense of critical analysis. It is vital that both aspects of the question, explanation of legal rules and critical analysis, are addressed by the candidate.

Total mark awarded =  
14 out of 25

## How the candidate could have improved their answer

- In this response the candidate has given a comprehensive explanation of the development of the current test for duty of care, but this was not required as the question specifically referred to the factors which must be considered when deciding if there has been a breach of duty. Therefore the candidate could have improved their answer by focusing on the particular aspect of negligence identified in the question.
- The explanation of the standard of care and breach of duty was generally accurate but incomplete. The candidate correctly identified the standard as that of the reasonable man but this was not developed and there was no reference to the objective test.
- The explanation of the factors could be more detailed and more accurate. The case of *Paris v Stepney* was used to illustrate the point that the characteristics of the claimant were relevant but it would have been more accurate to use this case in the context of the issue of the gravity of any likely damage.
- The response could have been improved with a more comprehensive and accurate explanation of the factors which were considered when deciding if there had been a breach of duty of care, namely the magnitude of risk, gravity of injury, practicality of precautions and utility of conduct. This explanatory framework was essential in terms of addressing the critical analysis part of the question.
- This response could have been improved significantly if the candidate examined the standard of care and the factors from a critical perspective. Each factor should be examined and analysed so that conclusions could be reached by the candidate as to the effectiveness of the rules. In this response the emphasis was very much on explanation and the critical analysis is implied rather than expressed.



Example Candidate Response – low

Examiner comments

Question Part

|   |  |  |
|---|--|--|
| 1 |  | <p>Negligence, is, the most important tort in English Law. In order to prove negligence, four elements must be taken into consideration, namely Duty of Care, Breach in Duty of Care, Causation, and remoteness.</p>   |
|   |  | <p>To prove negligence, one first has to prove 'duty of care'. This first was argued in <i>Donoghue v. Stevenson</i>, in whether or not the drink company owed a duty of care. This led to the two-stage test, first used in <i>Anns v. Merton London Borough Council</i>. In said case, Lord Atkin stated that two things have to be taken into account - reasonable foreseeability and proximity. This later evolved in <i>Caparo Industries v. Dickman</i>, where fair, just, and reasonableness are taken into account. The 'Caparo test' is most commonly used today.</p> |
|   |  | <p>Breach in duty of care has to be proven right after. Breach takes into account several elements, like magnitude of risk and utility of defendant's conduct, to name a few. Magnitude of risk measures the likelihood of something happening. In the case of <i>Bolton v. Stone</i>, the risk was too small, therefore there was no breach and the defendant's claim failed. This can be contrasted with <i>Miller v. Jackson</i>, where harms (cricket ball going out of play) have</p>   |

1 The candidate introduces the tort of negligence and identifies the essential elements. This is sufficient; the candidate should now focus on the breach of duty.

2 An explanation of the development of the duty of care was not required here.

3 This material relating to the breach of the duty is relevant. The candidate correctly identifies two of the relevant factors i.e. magnitude of risk and utility of conduct. The inclusion of material relating to gravity of injury and practicality of precautions would have enhanced the explanation. The objective test and standard of the reasonable man should also have been covered here.



## How the candidate could have improved their answer

- In this response the candidate could have improved their answer by focusing on the requirements of the question. The question specifically referred to the factors which must have been considered when deciding when there was a breach of duty. Therefore an explanation and critical analysis of breach of duty and the standard of care should have been the main focus of the candidate's response. A detailed account of the development of the duty of care, causation and remoteness was not required.
- The candidate introduced the concept of breach of duty and outlined two of the factors, magnitude of risk and utility of conduct. The explanations could have been more developed and the additional factors relating to gravity of the injury and practicality of precautions should have been explained and illustrated with references to relevant case law.
- The candidate did not address the critical analysis element of the question at all. There needed to be an examination of the rules from a critical perspective, examining both the merits of the rules and any criticisms. While the candidate did reach a conclusion, it is not supported by any reasoning or arguments and is a statement rather than a coherent conclusion.

## Common mistakes candidates made in this question

- Too much emphasis on explanation and superficial critical analysis.
- Detailed explanations of material which was not required by the question, in particular in relation to duty of care, causation and remoteness.
- Incomplete explanation of the relevant factors relating to breach of duty.
- Ineffective use of authority – where simply stating the name of the case did not enhance or illustrate the explanation of the legal rules.
- Conclusions which were not supported by a reasoned argument or discussion.

## Question 2

### Example Candidate Response – high

### Examiner comments

Question Part

| Question | Part | Answer   |
|----------|------|--|
| 2        |      | <p>The tort of nuisance protects the right of a person to use and enjoy land, without interference of others. If the defendant infringed the claimant's enjoyment of land and was held unreasonable, claimant can bring an action under tort of nuisance. <span style="float: right;">1</span></p> <p>First and foremost, claimant who sue must have proprietary interest with the land, which means claimant must have some control over the land or owns the land, seen in <i>Hunter v Canary Wharf</i>. As for the defendant who can be sued, there are three categories which are the occupier, the owner and the creator of the nuisance. Generally, an owner who has parted with the premise should not be liable unless the owner authorised the nuisance, allow the premise to be let even though owner knew that the nuisance was already existed and if owner still has the obligation to keep premise in repairs will held liable, seen in <i>Wringe v Cohen</i> where <sup>owner</sup><del>occupier</del> liable for the nuisance as he is <del>obliged</del> obliged to keep premise in good repairs yet failed to do so hence give rise to liability. <span style="float: right;">2</span></p> <p>Besides that, occupier of the premise should be liable for nuisance caused by their employees or even independent contractors, seen in the case of <i>Matania v National Provincial Bank</i>. As for the creator of the nuisance will always be liable for the nuisance created, seen in <i>Thomas v National Union of Mineworkers</i> where striking miners picketing on the road outside a factory amounted to nuisance.</p> |

1 This is a clear and concise introduction to the tort of private nuisance.

2 This is an accurate account of the essential elements of the tort, supported with reference to relevant case law.

Example Candidate Response – high, continued

Examiner comments

| Question | Part  |
|----------|---|
| 2        | <p>To bring an action under tort of nuisance, there must be indirect interference with land, the interference must be unreasonable and must have caused damage. Indirect interference can be caused either physically or intangible intrusion. For example, in <del>Thomas</del> Tomlinson - Costaki v Schwab, the parading of prostitutes in front of claimant's house will amount to nuisance. In Davey v Harrow Corporation, the neighbour's tree roots which extended to claimant's land would suffice to amount to nuisance as well. As for intangible intrusion, in Christie v Davey, a noise would amount to private nuisance too. However, it has to note that recreational facilities is <del>not</del> considered as 'things of delight' and hence will not render as nuisance, seen in Hunter v Canary Wharf.</p> <p>Apart from indirect interference, the interference must be unreasonable in order to bring a claim under private nuisance. In Southwark London Borough Council v Mills, it was said that the claimant accepted the pre-existing condition of the house with open eyes? hence the noise resulted from neighbour due to this Mills was held reasonable as it was pre-existed even before the purchase. As a result, there is no liability in private nuisance as the defendant's use of land is reasonable.</p> <p>In order to determine 'reasonableness', several elements should be considered which are sensitivity, locality, duration and malice.</p> |

3 This is a clear and relevant explanation with effective use of relevant authority.

Example Candidate Response – high, continued

Examiner comments

| Question | Part  |
|----------|---|
| 2        | <p>In <del>the</del> <i>Mckinnon Industries v Walker</i>, the defendant held orchids <sup>^</sup>too sensitive to be grown and hence claimant should not be allowed to claim. However, defendant has infringed claimant's enjoyment of land hence can claim for his sensitive activities. As for locality, it was seen in <i>Sturges v Bridgman</i> where a nuisance in quiet residential area will not be a nuisance in an industrial area and hence courts will have to consider <del>to the</del> locality of the place to render the interference whether to be reasonable or not. <span style="color: red; border: 1px solid red; border-radius: 50%; padding: 2px;">4</span></p> <p>As for the factor of duration, even a 20 minutes fireworks would amount to nuisance, seen in <del>Kim</del> <i>Crown River Cruises v Kimbolton Fireworks</i>. In <i>De Keyser Royal Hotel v Spicer Bros Ltd</i>, pile-driving for building purpose at night would held to be unreasonable as well. As for malice, in <i>Christie v Pavey</i>, defendant who deliberately interrupt claimant's music class by creating noise such as hammering on the wall would amount to private nuisance too <sup>as</sup> <del>the</del> it is unreasonable to do so. <span style="color: red; border: 1px solid red; border-radius: 50%; padding: 2px;">5</span></p> <p>Last but not least, the interference must also have caused damage to render the nuisance unreasonable. In <i>St. Helen smelting Co v Tipping</i>, it was held that claimants have to distinguish between personal discomfort and actual damage to land as it would only be reasonable if there is actual damage to property <sup>which</sup> <del>the</del> amount to 'real damage' and give rise to liability in private nuisance. It is note that defendant can</p> |

4 Good explanation of factors considered by the court when deciding whether the use of land was reasonable. There is some consideration of the significance of reasonable use here which can be credited as evaluation.

5 There is clear explanation of the relevant rules. There is also some assessment of the importance of the issue of reasonable use but this could be better developed.

Example Candidate Response – high, continued

Examiner comments

| Question | Part |  |
|----------|------|--|
| 2        |      | raise a defence of prescription and statutory authority seen in case of Allen v Gulf Oil Refinery to remove or reduce its liability. Damages <del>is</del> will normally be awarded as remedy, seen in Delaware <sup>Mansion</sup> Pensions v minister of pensions and if damages is not suitable to be awarded, injunction will be granted at discretion of courts. |
|          |      | In conclusion, <del>there</del> must be indirect interference to land and the interference must be unreasonable in order to give rise to liability in private nuisance. <del>If</del> the interference is reasonable, no torts of  |
|          |      | nuisance will be committed and hence it plays a pivotal role in determining the liability of defendants.   |

6 Supported by a reasoned argument. There is not enough analysis of the rules to fully justify this conclusion.

Total mark awarded = 18 out of 25

## How the candidate could have improved their answer

- In this response the candidate set out the legal basis of the tort in the opening paragraph and then explained the essential elements of the tort – an interference with a person’s enjoyment of their property which was indirect, unreasonable and results in damage. This explanation was accurate and detailed and supported with reference to relevant case law.
- The candidate could have improved their answer by addressing the evaluative part of the question more effectively. The candidate concluded that the issue of reasonableness was crucial to determining liability in private nuisance but this conclusion was not supported by a developed discussion based on the legal rules. The candidate should have linked this conclusion to the explanation of the factors considered by the court and identified specific points which support the conclusion; for example the issue of malice could have been highlighted as evidence of the importance of reasonableness in private nuisance.
- In this response the candidate had focused on explanation but there was an imbalance in the response as the evaluation element was superficial and while the conclusion was accurate it was not supported by a reasoned argument.



Example Candidate Response – middle

Examiner comments

Question Part

|  |  |
|--|--|
|  | <p>Private nuisance is the indirect, unlawful interference of a person's enjoyment or use of the land. In contrast with trespass to land, it protects against the indirect interference rather than direct interference. The exception is nuisance to interfere with recreational activities such as in <i>Blundell v Rose</i>.<sup>1</sup></p> <p>Most often the interference is intangible like smells or sounds. For example, in <i>Christie v Davey</i>, the defendant was making so much noise to disrupt the claimant's music class.</p> <p>The person who can sue under private nuisance is the person who owns the land or rather the person who has proprietary based interest in the land. This is because private nuisance is land based right.</p> <p>Tenant occupiers of the land cannot sue under private nuisance as seen in <i>Malone v Laskey</i> where the spouse of the landowner is not allowed to claim private nuisance as she has no interest in the land.</p> <p>Children also cannot sue in private nuisance as they are not legally able to own land. In <i>Hunter v Canary Wharf</i>, the courts acknowledge that children cannot sue or claim under private nuisance.</p> <p>One of the people that can be sued under private nuisance is the creator of the nuisance. They do not need to own the land or have proprietary interest. This is shown in <i>Thomas v National Union of Mineworkers</i> where the courts held that the miners picketing were held accountable for creating nuisance.</p> <p>Another group of people that can be sued is the occupier. However, there are <del>are</del> exceptions to the liability. One of the exceptions is that the nuisance is a result of the act of nature. The nuisance is caused by an independent contractor. However, if it is foreseeable that the independent contractor will create nuisance then the occupier<sup>2</sup></p> |
|--|--|

**1** Good introduction which identifies the key characteristics of the tort of private nuisance.

**2** This is a very detailed discussion about the potential parties to the case. It is not linked to the question so therefore is not entirely relevant.

Example Candidate Response – middle, continued

Examiner comments

| Question | Part  |
|----------|---|
|          | is liable as seen in <i>Marania v National Provincial Bank</i> .  |
|          | lastly, landowners as a general rule is not liable for private nuisance <del>unless</del> because they have parted with their possession. There are instances where they are liable.  |
|          | They can be liable when the nuisance already existed way before the property was rent out.  |
|          | Furthermore they can liable when they have reserve the right to fix the nuisance. For example in <del>Conan</del> <i>Wringe v Cohen</i> , the courts held the defendant liable despite the defect was unknown to the defendant. However in <i>Leary v National Trust</i> , the defect is known but not fixed by the owner. <span style="float: right;">3</span> |
|          | lastly, landowners are liable when they authorise the nuisance. In <i>Tilly v Chiffy</i> , the landowner was liable as <del>the</del> he authorised leasing of a go kart club.  |
|          | There elements that must be satisfied in order to claim under private nuisance.   |
|          | One of the elements was indirect interference. As mentioned previously indirect interference can be done through various ways such as smell or sounds. This is shown <i>Sealeigh v O'Callaghan</i> .  |
|          | Another element is reasonableness, was the activity done by the defendant reasonable? If not, then the courts will classify as private nuisance but there are many factors to be considered such as sensitivity, locality, duration and malice. <span style="float: right;">4</span>  |
|          | The sensitivity test is subjective. In <i>Robinson v Klinef</i> , the courts refuse to hold the defendant liable because was over sensitive. But  |

3 More detail regarding the parties to the case which does not address the specific question which has been asked and therefore will merit limited credit.

4 The candidate addresses the question here by introducing the issue of reasonableness and identifying the factors which will be relevant to the determination of liability for nuisance.

Example Candidate Response – middle, continued

Examiner comments

| Question | Part   |
|----------|--|
|          | <p>in <i>McKinnon Industries v Walker</i>, the courts held that the nuisance created by the defendant cannot exclude the loss of the claimant's tulips which were sensitive. The claimant's loss is caused by the pollution done by the defendant.</p> <p>Another factor is locality, what might be a norm in a quiet household area might be a nuisance in an industrial area. This is shown in <i>St Helen's Smelting Co v Tipping Ltd</i>.</p> <p>Furthermore, the courts will consider the duration of the nuisance. If the nuisance is continuous after the reasonable hours, then the courts will grant an injunction to stop it. This is shown in <i>De Keyser Royal Hotel Ltd v Spicer Bros</i>.</p> <p>In addition, the malicious intent while doing an activity will render it a nuisance. In <i>Silver Fox Farm v Emmet</i>, the defendant had shot a gun facing the key causing a fright to the horses bred by the claimant. The activity is generally a norm however the defendant did it with malicious intent therefore it has counted as nuisance.</p> <p>In conclusion, the statement is valid to an extent. If the defendant's use of the land anyway interfere with the claimant's use or enjoyment of their land then it would be considered private nuisance. However the courts will consider other factors to limit the scope of liability.</p> |

5 This explanation of sensitivity is brief and both the explanation and the use of a relevant case could be expanded and developed to better support the explanation of the legal rule.

6 The explanation and use of case law in relation to locality and duration could be better developed.

7 This explanation of the rule relating to malice is clear and the case is used more effectively to support the explanation.

8 Having explained some of the relevant rules the candidate forms a conclusion but this is not based on any reasoned argument. There is no discussion, evaluation or critical analysis of the legal rules which are applied to determine whether the defendant's use of land is reasonable. Therefore the conclusion is not convincing.

**Total mark awarded = 13 out of 25**

## How the candidate could have improved their answer

- In this response, the candidate introduced the tort of private nuisance with a clear outline of its key characteristics. The candidate then examined the issue of who can sue and who can be sued in some detail. This part of the response could have been improved if the candidate had linked this discussion to the question more effectively. For example it could be argued that identifying the parties is a key issue in determining liability in nuisance and therefore the issue of whether the use of land is reasonable is only one of a number of key issues which must be examined by the courts.
- The candidate outlined the factors which were relevant to the issue of reasonable use of land. This explanation was lacking in detail and not fully developed. There was reference to relevant case law but this would have been more effective if the candidate had highlighted some of the key facts of the cases in order to better support the explanation of the legal rules.
- There was no evaluation or critical assessment. In the conclusion, the candidate asserts that the statement used in the question was valid but there was no discussion or analysis to support this conclusion. The candidate could have referred back to the explanation of issues such as locality, duration and malice and utilised this material to support an argument that the defendant's use of land was the key issue in determining liability. Without this reasoning the conclusion was not convincing.

Example Candidate Response – low

Examiner comments

Question Part

|   |  |   |
|---|--|---|
| 2 |  | <p>Nuisance <del>cases</del> <del>are</del> in the law of Tort cares for the enjoyment and use of land for every person. <b>1</b></p> <p>Private nuisance is when the enjoyment and freedom <del>of</del> use of land of a person is disturbed due to other people's activity. <b>2</b></p> <p>There are two types of nuisance which is physical intrusion and intangible nuisance. Physical intrusion is for example when a flood in A's house disturbs the peace of B's house as the flood enters his house. Intangible nuisance is when the disturbance is <del>made</del> <sup>felt</sup> by hearing or smelling. <b>3</b></p> <p>A defendant's use of land may be reasonable and unreasonable may be the key to determine liability in private nuisance.</p> <p>A defendant's use of land must be lawful and does not cause <del>nuisance</del> towards others. In a <del>saided</del> <sup>saided</sup> case where claimant tries to sue the defendant for disturbing his view does not amount to a nuisance. <b>4</b></p> <p>A claimant cannot <del>claim</del> hold its defendant liable if the <del>defence</del> <del>common</del> <del>area</del> <del>is</del> <del>acceptable</del> nuisance is expected to be common in the specific area. For example, a claimant cannot sue a factory for nuisance caused by the smoke from the factory if the area is <del>more</del> <sup>mainly</sup> a factory area. <b>5</b></p> |
|---|--|---|

- 1** This introduction does not fully explain the purpose or main characteristics of the tort of private nuisance.
- 2** This point is valid and demonstrates some understanding of the tort of private nuisance.
- 3** The candidate demonstrates some understanding here of the different types of private nuisance.
- 4** The candidate identifies that unlawfulness is a key issue – this implies an awareness of reasonableness. The example is not developed.
- 5** The candidate identifies one of the relevant factors here – locality – but the explanation needs to be better developed and there should be a reference to a relevant case.

Total mark awarded =  
7 out of 25

## How the candidate could have improved their answer

- The candidate introduced the tort of private nuisance by identifying some of the key characteristics of the tort. The candidate then demonstrated some understanding of private nuisance through the use of examples of different types of nuisance such as physical intrusion and intangible interference.
- The candidate could have improved their answer by presenting a more complete account of the essential elements of the tort of private nuisance, illustrated with references to relevant case law.
- The candidate identifies the relevance of locality to the issue of reasonableness but the explanation is brief and the example used is not developed.
- The candidate could have improved this part of the answer by discussing the range of factors which are considered in relation to reasonableness: duration, sensitivity and malice. Each of these should have been explained and reference to relevant case law should have been utilised to support the explanation.
- The issue of whether the statement is valid was not addressed and therefore no conclusion was reached. The candidate should have commented on the issue raised in the question and linked their explanation of the legal rules to a clear conclusion.

## Common mistakes candidates made in this question

- Focus on explanation of the elements of private nuisance but without the critical analysis or evaluation needed to address the issue raised in the question.
- Detailed accounts of elements of private nuisance which were not relevant to the issue of reasonable use of land.
- Evaluation of an issue other than the one raised in the specific question, for example detailed discussion of whether private nuisance is the 'law of give and take'. This was not the question asked.

# Question 4

## Example Candidate Response – high Examiner comments

Question Part

4. In determining negligence as to be pursuant to Lord Wright that element of duty of care, breach of duty of care, causation and remoteness of damage. This case is relevant with causation and remoteness of damage. 1

In simple, ABC Engineering owns a factory with a and thus it falls under the traditional category of employer and employee duty of care. In the fact the employer had provided safety glasses and instructed them to wear it. Next, whether there is a breach of duty of care, have ABC Engineering falls under the standard of care, the case here will be the as mentioned earlier there is a duty of care provided to the employee, so there will not be a breach of duty of care. 2

Next, the mark as the factory is in terms of causation, but for the negligence of ABC Engineering factory, would have Mark suffer a loss. As the factory are unaware of the glasses are uncomfortable and none of the employee had not been wearing the glasses and suffers an eye injury. The court may use the material increase in risk test as seen in *McGhee v National Coal Board* and where the risk and loss was simply a material increase the risk by not providing shower facilities to the work and they suffer dermatitis it is not because of the employer's fault. 3

completely complete

- 1 The candidate identifies the relevant tort and sets out the essential elements.
  
- 2 The candidate correctly states that a duty of care applies here as there is an employer–employee relationship. Therefore a detailed account of the legal rules relating to duty of care is not required.
  
- 3 This point needs further development. There should be an explanation of the legal rules relating to standard of care and breach of duty and the rules should be applied to the facts. Did ABC discharge their duty through the provision of safety equipment? Is there a breach as they were aware that the employees were not wearing the equipment and did not take any action to remedy this situation?

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Example Candidate Response – high, continued

Examiner comments

Question Part

And the court may use the material contribution to risk test as seen in case of *Bonnington Carting v Wardlaw* Marc didn't wear the safety glasses provided, thus it is material contribution to risk, ABC Engineering is aware of uncomfortable glasses but didn't improve or replace with a more comfortable one, thus it is material increase in risk. ABC may not be liable as they provided ~~moreover~~ safety goggles glasses must <sup>4</sup> in terms of remote of damage, was the ~~blow~~ losing one's sight of Marc's eye foreseeable? But ABC may be liable for negligence for causation but not in remote as they may foresee the injuries of employees eye as laid down in the wagon mound test.

Regarding to Marc and Helen, a new doctor, there is a duty of care between <sup>5</sup> doctor and patient, and there is a professional ~~stand~~ standard as seen in *Bolan v Friem Hospital* where a doctor is not liable who as court let the same professionals to provide evidence. But not in *Bolitho* as the court held there must be a logical analysis. On the fact Helen had remove a metal fragment from his <sup>6</sup> eye and let him return in a week time for check up. But if it because of failure to examine further causes Marc to lose eye because there is still one piece of metal in his eye. Thus, causation is satisfied, but did Helen

<sup>4</sup> The candidate provides a detailed account of causation and remoteness with reference to relevant case law to support the explanation of the legal rules.

<sup>5</sup> The candidate correctly states that a duty of care will apply here between a doctor and patient and therefore a detailed discussion of duty of care is not required.

<sup>6</sup> The issue of standard of care and breach of duty is identified but should be further developed, particularly in relation to the issue of a newly qualified doctor.



Example Candidate Response – high, continued

Examiner comments

Question Part

key

breach his duty of care, Court held that inexperience is not an excuse. excuse was the loss foreseeable, yes, if Helen didn't check up properly, Mark wouldn't have lost his sight.

~~As a conclusion~~ ABC Engineering is liable for Mark's injuries but may raise defence of ~~mate~~ contributory negligence as Mark didn't wear the provided glasses, ~~we may should~~ tell the management about his concerns. On the other hand, Helen is liable for Mark's loss of sight, but not ABC Engineering as the ~~of~~ damage was too remote and also it is because of Helen's negligent by not giving a more thorough examination ~~causes~~ an infection on Mark's eyes, an eventually ~~loss~~ loss of sight. Mark may be able to raise a sue ABC Engineering and Helen for negligence and there is potential liability for both defendants. As both of the damage is reasonable foreseeable, as in remoteness of damage, with the egg shell rule where you take your victim as you find him, doesn't matter of the extent of damage, as long as it is foreseeable, it is liable as perfectly illustrated in case of ~~of~~ IBC v. Cox Vehicles and Smith v. Leech Brain. ABC Engineering is not liable for Mark's loss of sight it is because there is an ~~or~~ novus actus interveniens where ~~the~~ when the liability stops as seen in case of ~~of~~ K. Knight v.

7 There should be a reference to relevant authority here.

8 An appropriate defence is identified here but the explanation of the relevant rules needs to be better developed.



## How the candidate could have improved their answer

- In this response, the candidate correctly identified the relevant tort as negligence. In the introduction, the candidate identified the essential elements of the tort and highlighted the elements which were relevant in this question.
- In relation to the first part of the question, concerning the potential liability of ABC Engineering to Mark, the candidate commented briefly on the duty of care on the basis that a duty applied, given that it concerned an employer and employee relationship. This was an appropriate treatment of the duty of care issue.
- The candidate could have improved their responses by discussing the issue of breach of duty in more detail. The issue of breach was discussed in conjunction with causation and remoteness. There should have been more development of this issue as it was a key issue in the scenario. The candidate should have commented on whether the employer has exercised reasonable care through the provision of safety equipment and the relevance of the employer's knowledge that the employees were not using the equipment.
- In relation to the liability of the doctor the candidate correctly identified that a duty of care applied. The candidate should have provided a more detailed explanation and application of the issue of breach of duty in the context of a newly qualified doctor. The candidate's explanation of causation and remoteness was more developed and the application generally accurate. The candidate also correctly identified a potential defence of contributory negligence but the explanation of the relevant rules could have been more developed. The candidate could have improved their answer by including a discussion of vicarious liability in the context of the liability of ABC and the hospital for the actions of their employees.

Example Candidate Response – middle

Examiner comments

Question Part

|                |  |   |
|----------------|--|---|
| 4 <sup>i</sup> |  | <p>Negligence is the most important tort in law, which essentially means that the defendant <del>has</del> owes a duty of care to the claimant, breached the duty, which causes harm to the claimant. In this case, Mark lost his <del>eyes</del> sight in his eye and may bring course of actions under negligence against his employers in ABC Engineering and another against the newly qualified doctor, Helen.</p> <p>For Mark against ABC Engineering, Mark must first establish that there is a duty of care between him and ABC Engineering. Based on the principles laid down in <i>Caparo Industries v. Dickman</i>, based on precedent there would be a duty of care between employer and employee, therefore this is satisfied. Next, Mark must prove that there is a breach of duty, which essentially means ABC Engineering has fallen below the standard of care expected. In the case of <i>Paris v Stepney</i>, the claimant suffered a similar condition when a piece of metal flew into his eye and cause him to be blind. The court in the case held that the defendant was liable under negligence. Thus, Mark may seek to argue the principles in <i>Paris v Stepney</i> and claim compensation.</p> <p>However, Mark's employers may argue that this case should be distinguished from <i>Paris v Stepney</i>, mainly because the claimant in <i>Paris</i> only had one useful eyesight, <del>but</del> but Mark has two. This means that unless Mark previously had only one useful eyesight, he would be unlikely to succeed. If he did, then the next step is to apply the 'but for' test in <i>Barnett v Chelsea and Kensington Hospital and</i></p> |
|----------------|--|---|

1 The candidate identifies the appropriate tort and sets out the essential elements.

2 The candidate deals with the duty of care in an appropriate manner. Given that this is an employer–employee relationship, a duty of care will apply.

3 The application of the case to the facts is not effective as the facts are not similar and the candidate does not demonstrate the relevance of the case to the facts of this scenario.

4 The use of *Paris v Stepney* is not convincing here. This issue of the gravity of potential harm needs to be explained and then linked more effectively to the facts of the scenario.

Example Candidate Response – middle, continued

Examiner comments

Question Part

|  |  |   |
|--|--|---|
|  | <p>argue that but for his employers not insist on them wearing safety glasses after knowing majority of them do not wear, he would not have been blind. The courts may agree and due to reasonable foreseeability that the accident would cause him to be blind, Mark may succeed in this claim. Even so, the employers may raise contributory negligence as defence and only pay for partial remedy as they did provide safety glasses but Mark chose not to wear them.</p>   | 5 |
|  | <p>For the claim under negligence against Helen, there will likely be a duty of care between a doctor and a patient. Then, Mark may argue that but for the doctor not examine more thoroughly he would not have lost the sight in his eye. Breach is likely to be satisfied because by only removing the metal fragment without further detailed examination she would have fallen below the standard of reasonableness laid down in <i>Blyth v Birmingham Waterworks</i>. The last element to be satisfied is remoteness, which is the test of reasonable foreseeability. The court would likely to agree that the doctor's negligent treatment would be able to foresee some risks of further injury, no matter how small it is, thus this is satisfied too.</p> | 6 |
|  | <p>The courts would then be likely to grant Mark remedies for the loss of eyesight. For the doctor, <i>volenti</i> would not be a valid defence because as a professional doctor, it is reasonable to expect her to do whatever necessary from preventing patient injured. Applying the logical analysis requirement in <i>Bolitho v City of Hackney</i>, Helen</p>  | 7 |

5 The candidate identifies an appropriate defence but this is not developed. The relevant legal rules need to be explained and then applied to the facts of the scenario, with reference to relevant case law to support the application.

6 The candidate correctly identifies that a duty of care is present and therefore a detailed discussion of this issue is not required.

7 The candidate refers to the issue of breach of duty in relation to a professional but this needs more development. The extent of the duty should be clearly explained and then applied to the facts of the scenario. The explanation here is brief and incomplete.



## How the candidate could have improved their answer

- In this response the candidate correctly identified the relevant tort as negligence and set out the essential elements in the introduction.
- In relation to Mark and ABC Engineering the candidate stated that a duty of care would apply as the relationship was one of employer and employee. This was appropriate and a detailed account of duty of care was not required here.
- The candidate could have improved their response by presenting a more detailed and accurate account of breach of duty. The candidate stated that the duty of care was breached but without an explanation of the applicable standard of care. The candidate made reference to the case *Paris v Stepney* here but the use of the case was not effective as the issues in the scenario are not sufficiently similar to the facts of *Paris*.
- The candidate did identify the potential defence of contributory negligence but the explanation and application here could have been more developed.
- In relation to the potential liability of the doctor, the candidate correctly identified that a duty of care would be found and therefore a detailed explanation was not required.
- The candidate identified the relevance of breach of duty but this could have been more developed, particularly in the context of a newly qualified medical professional. There was a reference to the case of *Bolitho* but the explanation and application were inaccurate.
- The candidate could also have improved their answer by including some discussion in relation to vicarious liability.

Example Candidate Response – low

Examiner comments

Question Part

| Question | Part  |
|----------|---|
|          | Question B.   |
| 4.       |   |
|          | <p>On the facts, all the employees <del>of</del> of ABC Engineering are supplied with safety glasses and was instructed to wear them. Mark, as an employee of ABC Engineering would also be provided the safety <del>glasses</del> glasses. However <sup>1</sup> when the incident occurs, he is not wearing the safety glasses that provide by the company. Hence it is important to identify whether ABC Engineering was vicariously liable to the <del>the</del> injury of Mark.</p>   |
|          | <p>The first element that must satisfy is to determine whether there is a duty of care owed by <del>the</del> ABC Engineering to Mark. On the fact, <sup>2</sup> ABC Engineering is the employer and Mark is the employee. <del>Hence the</del> Besides, it is <del>foreseeable</del> <sup>reasonable</sup> that this indicates that there was a <del>close</del> <sup>proximity</sup> proximity in both physical and relationship of Mark and ABC Engineering. Besides, it is <del>foreseeable</del> <sup>reasonable</sup> for the company to <del>foresee</del> <sup>prevent</sup> injury caused to the employees. Hence, the test that laid down in Donoghue v Stevenson <del>was satisfied</del> which is foreseeability of risk and proximity was satisfied. Besides, there is no policy consideration in the case of injury of Mark. Therefore it can be said that the test laid down in <del>Brace v Milton Borough Council</del> and Caparo Industries v Dickman was also satisfied. It can be concluded that <del>the</del> ABC Engineering owed a duty of care to Mark.</p> |
|          | <p>Secondly, it must <del>be identified</del> <sup>be identified</sup> whether ABC Engineering breaches the duty of care that owed to Mark on the facts. ABC Engineering did provide safety glasses to the employees, it can be said that <del>the</del> <sup>ABC</sup> <sup>3</sup> Engineering has taken reasonable care to the employees. However, the manager was aware that most of the employees <del>do</del> do not wear the safety glasses, but the <del>factory</del> <sup>factory</sup> <del>does</del> <sup>management</sup> management does not <del>take</del> take any action to ensure the employee <del>wear</del> to wear the glasses. Thus, according to the reasonable man standard, it is reasonable for the employee to expect that reasonable care has been provided by the employer. And on the fact, ABC Engineer does not <del>take</del> take reasonable step to</p>   |

<sup>1</sup> The relevant tort should be identified here before discussing the facts of the scenario.

<sup>2</sup> The candidate demonstrates an awareness that the relevant tort is negligence but the application of the Caparo test is unnecessary given the facts of the scenario. An employer will owe a duty of care to an employee as this is well established in previous cases.

<sup>3</sup> The candidate identifies and analyses the some relevant facts but does not explain the relevant legal rules. The standard of care is not well explained and there is no reference to relevant case law.





## How the candidate could have improved their answer

- In this response the candidate focused on a discussion of the facts. The candidate could have improved their answer by providing an explanation of the relevant legal rules, supported with reference to relevant case law.
- The candidate did not identify negligence as the relevant tort but did discuss relevant elements of the tort of negligence thereby demonstrating some understanding of the relevant issues.
- In relation to the potential claim against ABC Engineering, the candidate identified the requirement that the defendant owed a duty of care to the claimant. The candidate applied the three parts of the Caparo test to the facts but this was not necessary given that the duty of care is well established in the context of an employer–employee relationship.
- In relation to the breach of duty the candidate discussed relevant elements of the facts in relation to the potential liability of ABC Engineering. The candidate could have improved their answer by explaining the legal rules governing the breach of duty, using relevant case law to support the explanation. The candidate could also have included some discussion of the defence of contributory negligence here.
- The candidate could have further improved their answer by addressing the second part of the scenario, involving the treatment received by Mark when he attends the hospital, in particular the standard of care expected of a newly qualified doctor and the issue of vicarious liability.

## Common mistakes candidates made in this question

- Focusing on a discussion of the facts without providing an explanation of the relevant legal rules.
- Detailed explanation of the legal rules but limited application to the facts.
- Detailed discussion of elements which were not directly relevant to the facts of the scenario, in particular the issue of duty of care.
- Not explaining the applicable standard of care expected of an employer and a junior doctor.
- Not dealing with potential defences such as contributory negligence.
- Not addressing the issue of vicarious liability.

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