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OCR
Oxford Cambridge and RSA

A LEVEL

Examiners' report

LAW

H418

For first teaching in 2020

H418/02 Summer 2023 series

Version 1

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Contents

Introduction

Our examiners' reports are produced to offer constructive feedback on candidates' performance in the examinations. They provide useful guidance for future candidates.

The reports will include a general commentary on candidates' performance, identify technical aspects examined in the questions and highlight good performance and where performance could be improved. A selection of candidate answers is also provided. The reports will also explain aspects which caused difficulty and why the difficulties arose, whether through a lack of knowledge, poor examination technique, or any other identifiable and explainable reason.

Where overall performance on a question/question part was considered good, with no particular areas to highlight, these questions have not been included in the report.

A full copy of the question paper and the mark scheme can be downloaded from OCR.

Paper 2 series overview

This paper is the second of three compulsory terminal papers taken by candidates after two years studying OCR GCE A Level Law. It was the second cohort to be assessed under the updated H418 specification (first assessed in Summer 2022) as opposed to the previous H415 specification (first assessed in Summer 2019). For further information on the detailed differences, please refer to the OCR website. However, in short, H418 has slightly reduced content, a smaller range of evaluation topics and a lower total mark value at 80 total marks compared with 100 previously.

This paper assessed Component 2 which has two key themes – law making and the law of torts. The paper has three assessment foci and, in order to do well, candidates will need to demonstrate knowledge and understanding of the relevant law (AO1), be able to apply the law to given factual scenarios in order to construct liability (AO2) and be able to analyse and evaluate the law (AO3). AO1 subject knowledge was robust but could have been improved by ensuring up-to-date subject knowledge and being more selective in only using AO1 which is relevant to the question. AO2 was variable and depended (understandably) on how secure and relevant the AO1 was. The AO3 performance seemed reasonably confident but could often be improved by greater clarity in written communication. The overall performance of the cohort was very positive with enthusiastic engagement from well-prepared candidates.

Assessment for learning

It is not always a lack of legal knowledge or understanding that undermines a candidate's performance but the inability to convey what they wish to say using effective written communication.

Candidates who did well on this paper generally:	Candidates who did less well on this paper generally:
• understood the assessment objective demands of each question and produced appropriately tailored responses • used selective and up-to-date AO1 (knowledge and understanding) which was comprehensive but not exhaustive • provided AO2 (application) which made appropriate links between given facts and relevant legal principles in order to draw reasoned conclusions • produced AO3 (evaluation) which was focused on the question (rather than generic) and demonstrated the ability to structure a reasoned discursive argument • had good time-management, wrote clearly and followed the exam paper rubric by answering the question.	• misunderstood the assessment demands of questions so that they could not access full marks (most commonly little or no AO1 in the essay question and insufficient AO1 in the problem questions) • took a 'shotgun' approach to their AO1 and used irrelevant or ruled out content taking up valuable time • did not use the scaffolding provided in the question stems to make links with the relevant legal principles in their application • did not focus sufficiently on the specific question or build developed arguments • mis-managed their timing and disregarded instructions in the question rubric (usually *not* to include particular material).

Assessment for learning

Candidates should read the questions carefully and tailor their responses accordingly. Many candidates simply look for a keyword to identify the broad topic and then write everything they know about it. This leads to wasted time and effort which then impacts on their performance on later questions.

Section A overview

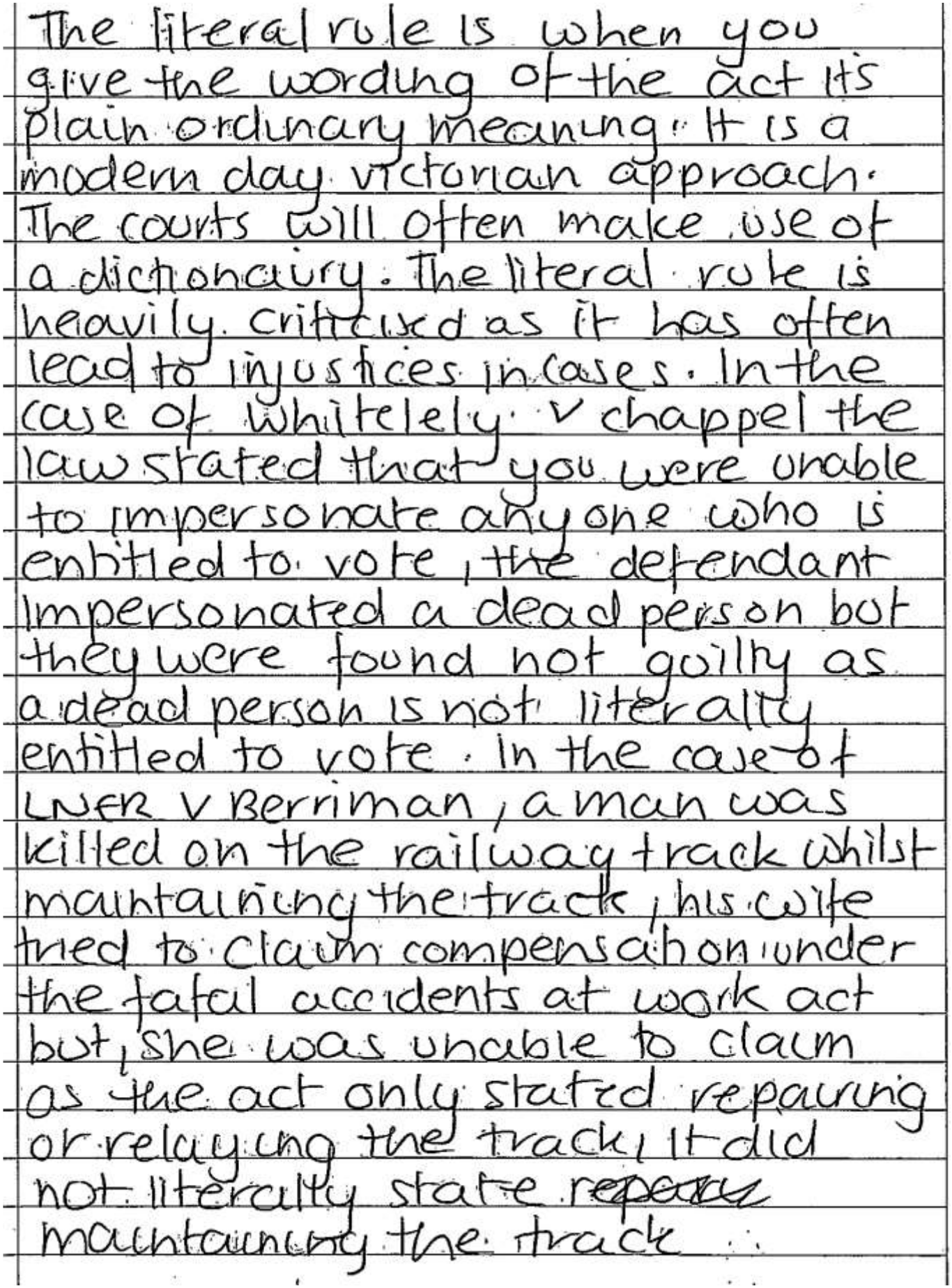
Section A assesses the 'law making' component of the specification. Although it is a mandatory section, candidates can choose either Question 1 or 2 (8 marks AO1) and either Question 3 or 4 (12 marks AO3). In the AO1 section (Questions 1 and 2), responses overwhelmingly favoured the literal rule question with very few candidates attempting the EU Question. In the AO3 section (Questions 3 and 4) there was a little more balance but the majority chose the literal rule Question. Candidates generally did well on the Section A questions. Like the 2022 session, there was evidence of candidates having left these questions to last and, so rushing them and under-performing. Some candidates omitted them altogether.

Question 1

1 Describe the literal rule of statutory interpretation. Give case examples to illustrate its use. **[8]**

This question was generally well answered. The question was looking for a definition of the rule, a case or cases which illustrate the rule in operation and any relevant features of the rule. More successful responses gave good definitions, more than one relevant case (where candidates also identified the word or words being interpreted and the impact of the rule on the interpretation of that word) and features such as the use of dictionaries or the way the rule respects constitutional doctrines. Less successful responses gave basic definitions, provided no cases or used cases from other rules of interpretation and did not include any features. Candidates should use established cases and avoid speculation. There was a notable trend of candidates who didn't know any literal rule cases drawing on their broader knowledge of law to speculate on how the rule might apply to random words chosen from those areas.

Exemplar 1



The literal rule is when you give the wording of the act its plain ordinary meaning. It is a modern day victorian approach. The courts will often make use of a dictionairy. The literal rule is heavily criticised as it has often lead to injustices in cases. In the case of Whitelely v chappel the law stated that you were unable to impersonate anyone who is entitled to vote, the defendant impersonated a dead person but they were found not guilty as a dead person is not literally entitled to vote. In the case of LNER v Berriman, a man was killed on the railway track whilst maintaining the track, his wife tried to claim compensation under the fatal accidents at work act but, she was unable to claim as the act only stated repairing or relaying the track, it did not literally state ~~repairs~~ maintaining the track

Exemplar 1 was given full marks. It has been included to demonstrate the way that an 8-mark response can be achieved in a single paragraph. There is no need for lengthy accounts with exhaustive numbers of features and cases. Quantity is not always quality. This script starts with a good definition, two features (the fact that it often uses a dictionary and the observation that the rule can lead to injustices) and then offers two relevant cases which are not only cited but feature the word(s) being interpreted by the rule ('entitled to vote' in Whitely and 'relaying or repairing' in Berriman). A successful, well-written and confident response which meets the Level 4 criteria.

Question 2

2 Describe Treaties, Regulations and Directives as sources of EU Law. **[8]**

There were very few responses to this question. It seemed to produce very polarised responses. Those candidates who felt confident with the topic produced some outstanding responses and those who chose it as the least favourable option often struggled to convey accurate detail. The questions was looking for a definition of what each source is, some further detail (typically about incorporation or effect/impact of associated rights) and an example.

EU Law after Brexit

Centres should be advised that in spite of Brexit, EU Law remains part of all A Level Law specifications until advised differently by the DfE. OCR recently updated the planner to reflect the way that some aspects of the topic would be viewed retrospectively.

Question 3

3 Discuss the disadvantages of the literal rule of statutory interpretation. **[12]**

Responses were generally successful for Question 3. Most candidates were able to link the rule with disadvantages such as producing absurd, harsh or illogical outcomes. They were then able to develop these themes with case examples and then counter-argue with benefits such as respecting doctrines like the Supremacy of Parliament. Some less successful candidates got into difficulties based on false assertions. For example, that the rule gives judges too much discretion. There was also some confusion around the function of the rule. For example, that it would always produce absurd, repugnant, harsh or illogical outcomes. However, the most common barrier to being given full or high marks was usually a lack of breadth or depth rather than incorrect responses.

Question 4

4 Discuss the reasons that make the use of delegated legislation beneficial. **[12]**

Responses to Question 4 were generally good. Despite the wording of the question referring to 'reasons that make delegated legislation beneficial', candidates understood (correctly) that this was simply asking for the advantages of delegated legislation.

More successful responses offered advantages such as saving parliament time, use of expertise, responding to emergencies and reflecting local concerns and developed these by providing explanations or illustrative examples before providing counterarguments based around issues such as limited scrutiny, accessibility and complexity. Less successful responses tended, again, to lack depth and/or breadth rather than being held back by lack of understanding or any especially obvious errors.

Section B overview

Candidates performed well in Section B. Part 1 was overwhelmingly the most popular option. Unlike last year when Question 9 did not yield high marks, candidates engaged with all the questions at a broadly similar level.

General advice for all problem questions:

- Read the question. Where aspects of a question have been ruled out, there will be no marks for covering those areas which wastes valuable time and effort.
- AO1 advice:
    - Be selective. Many candidates are adopting a 'shotgun approach' by reproducing standard or generic, pre-learned and exhaustive AO1. Candidates will only be given marks for *relevant* AO1.
    - Explain points and principles. Candidates should explain legal principles, not just state them. Marks cannot be given for '*good or excellent knowledge and understanding*' unless evidence is seen of it.
    - It is very rarely necessary to recite the facts of cases. The main exception would be a situation where there is a parallel between the facts of the case and the scenario and, for that reason, the same legal principle might apply.
- AO2 advice:
    - Application skills: the technique which gains the highest marks is where the candidate makes links between relevant legal principles and the facts given in the scenario in order to draw reasoned conclusions about liability.
    - Be selective. If candidates are including irrelevant AO1, they will end up including irrelevant AO2 and neither will be given marks.
- General advice:
    - Make sure candidates understand the contemporary law, if unsure, check the relevant Teacher's guide on Teach Cambridge. Similarly, there is no need to teach content which is not in the specification.
    - Do not mix different areas of substantive law. Some candidates had overlap issues with criminal law. This often came up in the form of using inappropriate cases and associated principles. The two most common examples are: a) using cases and principles derived from the criminal law of causation and applying them to the civil law of causation in negligence, and b) using criminal 'duty to act' cases in civil 'duty of care' situations. There may well be parallels, but the considerations applied to criminal cases where a duty to act means that an omission might constitute the *actus reus* of a crime (e.g. R v Pittwood, R v Gibbins and Proctor and R v Stone and Dobinson) are different from the considerations which determine whether a defendant owes a legal duty of care in the tort of negligence. A criminal 'duty to act' is not the same thing as a civil 'duty of care'.

Question 5

5 Advise Ben whether he will be successful if he sues Amir in an action under *Rylands v Fletcher*. Do **not** consider any defences or remedies. **[20]**

In general, the standard on this question was good. The question was relatively straightforward and there was appropriate scaffolding in the scenario to support all the elements of Rylands. There was a small discriminator in the form of the personal injury to Ben which worked very well. In general, the question was looking for candidates to establish the key areas of bringing on and accumulating, something likely to cause mischief if it escapes, non-natural use of land and that the thing does escape and causes reasonably foreseeable damage. Issues relating to the status of the parties and their rights in land were given marks, but defences and remedies were ruled out in the question and so could not. Many candidates did leave these elements out.

More successful responses set out the law by explaining rather than stating the key areas (above) and often illuminated on key aspects with relevant supporting case law. They also demonstrated up-to-date knowledge such as the standard for non-natural use of land as taken from Transco v Stockport (extraordinary and unusual) and good use of relevant authorities. Application made good use of the scaffolding in the question and would often pick up on the twin elements of a point such as 'bringing on' *and* 'accumulating', 'likely to do mischief' *and* 'if it escapes' or 'does escape' *and* 'causes reasonably foreseeable damage'. More successful responses were also more likely to pick up on the personal injury not being actionable.

Less successful responses tended to produce a single comprehensive definition of Rylands which might well be accurate but was little more than a bald statement of the elements not an explanation. There were also common misunderstandings such as the thing accumulated being non-natural rather than the use of the land. Rylands itself might be the only case referred to in more successful responses. Application tended to be characterised by bald assertions without making links between the legal principles and the facts of the scenario or responses which did not pick up on subtleties or dual aspects of an element.

Question 6

6 Advise Emma whether she will be successful if she sues Darcie in negligence. It is established that Darcie owes Emma a duty of care. Do **not** consider any defences or remedies. **[20]**

This question was also generally answered well. In an attempt to reduce the scope of the question, candidates were advised that the duty of care had already been established. However, this point was almost universally ignored, so candidates made the question more onerous than it needed to be. Indeed, some candidates produced two or three pages for their response, going through duty of care in considerable detail including the three-stage Caparo test that no longer exists. The question was, again, relatively straightforward and there was appropriate scaffolding in the scenario to support all the elements of breach and causation in negligence. In general, the question was looking for the candidates to establish the key areas of breach (the objective standard), breach (risk factors), factual causation and legal causation. Issues relating to the status of the parties could be given marks, but duty of care, defences and remedies were ruled out in the question and not given marks.

More successful responses gave explanations of the key areas rather than just stating them. They are more likely to have shown precise understanding. For example, that the effect of a risk factor is to vary the standard of care, explaining the operation of the but for test rather than just citing it and connecting foreseeability to remoteness in legal causation. They are also more likely to have used relevant case law to support their points. As indicated above, many candidates were insufficiently selective and this question was an example of this. More successful responses routinely included material on professionals, learners and children in the objective standard on breach when none of them was relevant. They also went through all four risk factors when choosing one would have been sufficient and included detail on a whole range of issues such as multiple and successive causes, intervening acts, *res ipsa locquitor*, the thin/egg-shell skull rule, contributory negligence and mitigation of loss, some of which is not even on the specification.

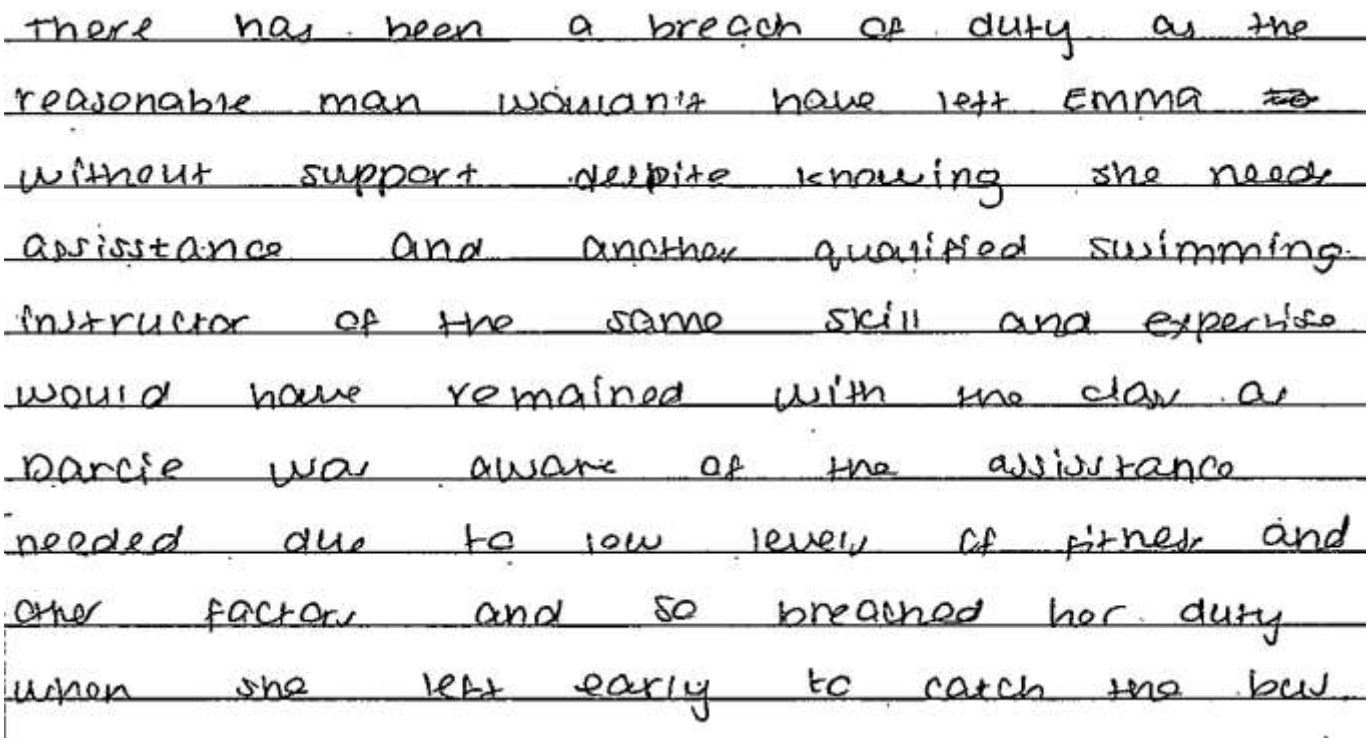
More successful responses made more thoughtful use of the facts when making links with legal principles to apply the law. This was evidenced by examples such as recognising that Darcie would be held to the standard of the reasonable swimming instructor or that there are two aspects to the risk factors whereby recognising a risk would require (where possible) some action to vary the standard of care and mitigate the risk.

Less successful responses were more likely to miss one of the key areas altogether or would not explain them all fully. Risk factors might be missed altogether or subsumed into the general discussion on breach. Legal causation might well discuss third party breaks or the thin-skull rule but miss remoteness. There were fewer cases and sometimes they would be confused with criminal cases. The application of less successful responses tended towards bald assertions rather than being reasoned through. Small errors were more likely. For example, stating that 'but for Darcie leaving Emma unattended, she wouldn't have fallen' rather than 'she wouldn't have been *injured*'.

Misconception

The standard approach to establishing a duty of care under the so-called three-stage Caparo test no longer applies. See Lord Reed's judgement in the UK Supreme Court's decision in Robinson v Chief Constable of West Yorkshire Police 2018 UKSC 4.

Exemplar 2



This response has been included for two reasons.

Firstly, it shows how to structure a piece of application in a way which will be given high marks. Application should include a reference to the relevant legal principle (what a reasonable person would not have done – *'because the reasonable man wouldn't'*), links it to the facts (what Darcie did that wasn't reasonable – *'left Emma without support'*) and draws a conclusion (*'so [Darcie] breached her duty'*).

Secondly, it demonstrates how the application of the objective standard in breach should have been dealt with. The candidate correctly identifies that Darcie would be held to the standard of *'another qualified swimming instructor of the same skill and expertise'.* Some candidates wrote too much about the Bolam/Bolitho/Montgomery professional or expert defendant idea. When dealing with a defendant exercising an ordinary trade, profession or calling, the starting point would typically be a case like Wells v Cooper. Invoking the Bolam test would involve the kind of expertise associated with professionals like doctors, lawyers, architects and so on. An illustrative case is Phillips v Whitely where the claimant contracted a blood disorder after a jeweller pierced her ears. The jeweller was not negligent. He had taken all reasonable care and could not be fixed with the same standard of care as a surgeon performing an operation. The appropriate standard of care was that of a reasonable jeweller carrying out the procedure.

Question 7*

7* Discuss whether vicarious liability is unfair on employers. **[20]**

The essay question continues to under-perform as it did in 2019 and 2022 and for exactly the same reason. Most candidates appear to be approaching the essay question as an exercise in purely discursive evaluation. It doesn't appear from the AO3 evidence that this is due to a lack of understanding of the topic. Rather, it appears to be a deliberate choice that candidates have made or an approach they have been taught. The essay question is worth 20 marks. 8 marks are for AO1 and 12 are for AO3. So, there is a 60:40 split in favour of AO3 but 40% of the marks depend on AO1. Many candidates are not producing any AO1 in their answers and many are only using the odd case as part of their AO3 with no overarching AO1 context. It doesn't matter whether it is set out discretely or integrated with the AO3, but the essay has to demonstrate good or excellent knowledge and understanding of the topic to access Levels 3 or 4 of the AO1 and this was missing in many responses.

The AO1 should have explained the law on vicarious liability. There are four identifiable strands of AO1: a) the traditional (Salmond) approach to establishing whether the tortfeasor is an employee, b) the traditional (Salmond) approach to establishing whether the tort took place 'in the course of employment', c) the modern approach to establishing whether the tortfeasor is an employee through the 'akin to employment' test, and d) the modern approach to establishing whether the tort took place 'in the course of employment' through applying the 'close connection' test.

The AO3 should have provided a discussion which addressed the 'theme' of the question – '*is vicarious liability unfair on employers*'? Candidates were free to evaluate both fairness and unfairness as part of their evaluation and the only proviso was that there must be *some* balance (looking at both sides) to access Level 3 and beyond. A small number of candidates did not address the spin of the question at all. Instead, they wrote a standard, pre-learned critical essay on vicarious liability (typically, advantages and disadvantages). Depending on whether any of the response was related (perhaps even impliedly) to the fairness issue, these responses may have been given some basic Level 1 marks. Candidates should be advised to prioritise focusing on the theme of the question. As there are only three evaluation topics, the particular theme of the question is the main method of discriminating between candidates to make sure marks are given to those who have actually answered the question rather than simply reproducing a generic pre-learned essay. It would also be unfair on candidates who do respond to the theme of the question, if those who did not, could access the same marks.

For AO1, more successful responses showed some understanding of both the traditional and modern approaches. Some candidates only described the Salmond tests and whilst this was not a barrier to high marks provided the AO3 was strong enough, it would have been a barrier to full marks. Given the comparatively exceptional number of UK Supreme Court cases on vicarious liability from Lister in 2001 to Barry Jehova's Witnesses v BXB in 2023, it is understandable that candidates may not be fully up to date and some flexibility was exercised in this regard. For AO3, more successful responses showed a confident understanding of the underpinning principles as well as some of their pragmatic implications. They produced well-developed arguments offering a balanced appreciation of the question (see Exemplar 3).

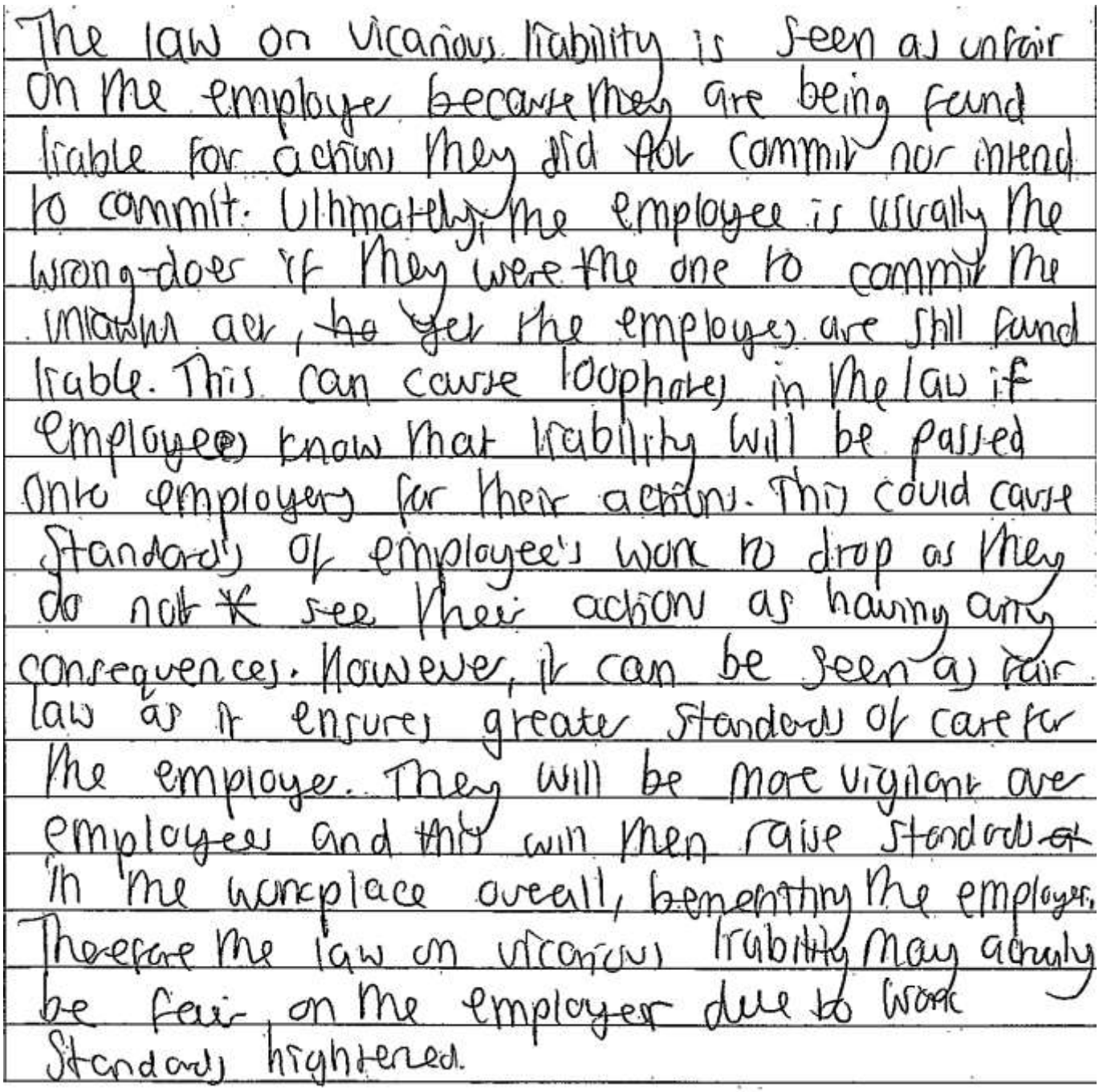
Less successful responses tended to offer AO1 which lacked both breadth and depth. It was fairly common to see a short summary attached to a definition in the introduction or to find cases used in isolation and expressing a single point with no overarching context. The AO3 tended to be either minimal but accurate or not made relevant to the question. There were also instances of candidates trying to use the same point over and over again in slightly different contexts each time. For example, the unfairness of an employer's lack of control in a myriad of different circumstances. The point here would be given the marks once.

All candidates should avoid basing their evaluation on an inaccurate assertion. For example, that a particular test or rule always produces a fair or unfair outcome. This is not true. For every aspect of vicarious liability, it is possible to point to cases where the outcomes have been both fair and unfair. This is acceptable if based on a particular cited case, but not as a generalisation. In fact, some of the best responses compared and contrasted the opposing outcomes in pairs of cases where the same rule had produced different outcomes.

Misconception

Vicarious liability is not a tort – it is a form of liability for the tort of another and because it is not a tort, there are no defences. Being an independent contractor or 'on a frolic of one's own' are not 'defences'. Furthermore, neither concept is new. They are both well-established principles in vicarious liability.

Exemplar 3



The law on vicarious liability is seen as unfair on the employer because they are being found liable for actions they did not commit nor intend to commit. Ultimately, the employee is usually the wrong-doer if they were the one to commit the unlawful act, ~~to~~ yet the employer are still found liable. This can cause loopholes in the law if employees know that liability will be passed onto employers for their actions. This could cause standards of employee's work to drop as they do not ~~*~~ see their action as having any consequences. However, it can be seen as fair law as it ensures greater standards of care for the employer. They will be more vigilant over employees and this will then raise standards ~~of~~ in the workplace overall, benefiting the employer. Therefore the law on vicarious liability may actually be fair on the employer due to work standards heightened.

Exemplar 3 demonstrates excellent AO3 skills. In a single paragraph, the candidate has made a number of critical points in a well-developed and balanced manner. It starts with the common 'no fault' argument that it is unfair for the employer to be liable for a tort they neither committed or intended. They qualify this by asserting that the *employee* is the one at fault. The point is then developed by suggesting that as a result, employees will not have to worry about the consequences of their actions. A counterpoint is then introduced suggesting that this is fair because it raises standards. They suggest that employers will be more vigilant and will ultimately benefit due to 'heightened standards'. This is a well-structured and clearly communicated argument. Three or four paragraphs like this would be given full marks. It is not necessary to produce pages and pages of AO3 to be given high marks.

Question 8

8 Advise Henry whether he will owe Felix a duty under the Occupiers' Liability Act 1984. Do **not** consider Henry's status as an occupier or Felix's status as a trespasser as these are not disputed. Do **not** consider any defences or remedies. **[20]**

This question produced some successful responses. Like Question 6, the scope was slightly narrower to improve accessibility. However, in this question most candidates did follow the rubric and so produced well-focused responses. The question was, again, relatively straightforward and there was appropriate scaffolding in the scenario to support all the elements of the question, in particular, Section 1 (3). In general, the question was looking for the candidates to establish the following key areas: awareness of the danger under Section 1 (3) (a), trespassers in the vicinity under Section 1(3)(b), expectation that protection offered by the occupier under Section1 (3) (c) and some engagement with the circumstances where a trespasser takes an obvious risk. Issues relating to premises, the nature and scope of the duty under Sections 1 (1) (a) and 1 (4) were also given marks, but anything relating to the status of the parties as occupier and trespasser as well as anything on defences and remedies were ruled out in the question rubric and not given marks. Given its statutory nature, relevant sections of the Act were given marks in the same way cases would be elsewhere.

More successful responses tended to provide the Section 1(3) AO1 in something close to the statutory language and often supported this with one or more appropriate cases. Some candidates developed points with cases that were relevant to the scenario. For example, the point made in Tomlinson that you can't 'fence off the countryside' might be made in order to support the parallel circumstances of Henry in the AO2. Furthermore, there was good knowledge of appropriate case law to support the 'obvious risk' point. The AO2 was done thoughtfully and made good use of the scaffolding provided. More successful responses were able to use more than one factual point to support their arguments. For example, under Section 1 (3) (b) Henry was aware of trespassers because of his awareness on social media, his awareness of past activity and the fact that he makes routine patrols.

AO1 in the less successful responses usually had the essence of at least two of the three Section 1 (3) criteria but usually expressed them in their own terms or paraphrased them awkwardly. Sections 1 (3) (a) and 1 (3) (b) could become confused or merged together. Statutory references and cases were less common or missing altogether. The application would tend to follow the AO1 so a narrow AO1 performance inevitably meant a narrow AO2 performance. Narrative and anecdotal application was also more common at this level. Some candidates took the sign as a warning when it carried no actual warning. It was there to justify the assertion that Felix was a trespasser and, to a lesser degree, to support the argument that Felix was somewhat reckless and, therefore, someone inclined to take an obvious risk.

Question 9

9 Advise Jamila whether the interference she is suffering is sufficiently unreasonable to constitute a private nuisance. Do **not** consider any defences or remedies. **[20]**

The question was relatively straightforward and produced some successful responses. There was plenty of appropriate scaffolding in the scenario to support all the relevant elements of private nuisance. In general, the question was looking for the candidates to address the key areas of establishing an actionable nuisance, locality, duration and sensitivity. Issues relating to the status of the parties and their rights in land were given marks, but defences and remedies were ruled out in the question rubric and not given marks. Furthermore, issues which were not relevant to the scenario (e.g. malice) were also not given marks. Regarding the recent UK Supreme Court decision in Fearn v Tate Gallery, until the Teacher's guide is updated to reflect any changes, candidates are not expected to be aware of such changes.

More successful responses set out the law by explaining rather than stating the key areas (above) and often evidenced this by citing relevant supporting case law or demonstrative quotes such as the Sturges v Bridgman quote contrasting Belgrave Square with Bermondsey. In a similar manner to that seen in Question 6, many candidates adopted a 'shotgun approach' and wrote everything they knew about the entire topic which is a waste of time and effort. Application made good use of the scaffolding in the question and made strong links to support their analysis. The sensitivity issue proved to be something of a discriminator. The mark scheme allowed for the issue to be approached from either a reasonable foreseeability perspective (Network Rail) or the traditional approach (Robinson and McKinnon).

Less successful responses tended to produce AO1 which lacked detail. In particular, there might be a modest amount of developed information on what constitutes an actionable nuisance, but the factors of reasonableness would often be little more than a list with the understanding coming out in the application. AO2 was reasonably confident on locality and duration, but candidates at this level missed or struggled with sensitivity and it was also common (with both AO1 and AO2) for a lot of irrelevant content to be described and applied (e.g. malice and defences).

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