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# **GCE AS MARKING SCHEME**

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**SUMMER 2018**

**AS (NEW)  
LAW - UNIT 2  
THE LAW OF TORT  
2150U20-1**

## **INTRODUCTION**

This marking scheme was used by WJEC for the 2018 examination. It was finalised after detailed discussion at examiners' conferences by all the examiners involved in the assessment. The conference was held shortly after the paper was taken so that reference could be made to the full range of candidates' responses, with photocopied scripts forming the basis of discussion. The aim of the conference was to ensure that the marking scheme was interpreted and applied in the same way by all examiners.

It is hoped that this information will be of assistance to centres but it is recognised at the same time that, without the benefit of participation in the examiners' conference, teachers may have different views on certain matters of detail or interpretation.

WJEC regrets that it cannot enter into any discussion or correspondence about this marking scheme.

## **GCE LAW**

### **SUMMER 2018 MARK SCHEME**

#### **UNIT 2: The Law of Tort**

#### **Marking guidance for examiners**

##### **Summary of assessment objectives for Unit 2**

The questions assess all three assessment objectives - AO1, AO2 and AO3. The assessment objectives focus on the ability to demonstrate knowledge and understanding of legal rules and principles; the ability to apply legal rules and principles to given scenarios in order to present a legal argument using appropriate terminology, and the ability to analyse and evaluate legal rules, principles, concepts and issues.

##### **The structure of the mark scheme**

The mark scheme for each question has two parts:

- indicative content which can be used to assess the quality of the specific response. The content is not prescriptive and candidates are not expected to mention all the material referred to. Examiners should seek to credit any further admissible evidence offered by the candidates.
- an assessment grid advising bands and associated marks that should be allocated to responses which demonstrate the characteristics needed in AO1, AO2 and AO3.

##### **Stage 1 - Deciding on the band**

Beginning at the lowest band, examiners should look at the learner's answer and check whether it matches the descriptor for that band. If the descriptor at the lowest band is satisfied, examiners should move up to the next band and repeat this process for each band until the descriptor matches the answer.

If an answer covers different aspects of different bands within the mark scheme, a 'best fit' approach should be adopted to decide on the band and then the learner's response should be used to decide on the mark within the band. For instance if a response is mainly in band 2 but with a limited amount of band 3 content, the answer would be placed in band 2, but the mark awarded would be close to the top of band 2 as a result of the band 3 content.

Examiners should not seek to mark candidates down as a result of small omissions in minor areas of an answer.

- The first stage for an examiner is to use both the indicative content and the assessment grid to decide the overall band.
- The second stage is to decide how firmly the characteristics expected for that band are displayed.
- Thirdly, a mark for the question is awarded.

## **Stage 2 - Deciding on the mark**

During standardising (marking conference), detailed advice from the Principal Examiner on the qualities of each mark band will be given. Examiners will then receive examples of answers in each mark band that have been awarded a mark by the Principal Examiner. Examiners should mark the examples and compare their marks with those of the Principal Examiner.

When marking, examiners can use these examples to decide whether a learner's response is of a superior, inferior or comparable standard to the example. Examiners are reminded of the need to revisit the answer as they apply the mark scheme in order to confirm that the band and the mark allocated is appropriate to the response provided.

Indicative content is also provided for banded mark schemes. Indicative content is not exhaustive, and any other valid points must be credited. In order to reach the highest bands of the mark scheme a learner need not cover all of the points mentioned in the indicative content but must meet the requirements of the highest mark band. Where a response is not creditworthy, that is contains nothing of any significance to the mark scheme, or where no response has been provided, no marks should be awarded.

**1. Explain what is meant by duty of care in the tort of negligence. [8]**

**Indicative content**

*NOTE: The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In explaining how the law decides what is meant by a duty of care, candidates are expected to demonstrate knowledge and understanding of legal rules and principles underlying a duty of care. In demonstrating this knowledge and understanding, candidates are required to focus on the specific nature of the question set and not simply to give a general answer on all elements of negligence.

The response might consider issues such as:

- History of test for duty of care – *Donoghue v Stevenson*
  - A person must take reasonable care to avoid acts or omissions which could be reasonably foreseen to likely injure a neighbour
  - Test of reasonable foreseeability
  - Who is ‘neighbour’? – persons who are so closely and directly affected by the defendant’s act that they ought to have them in their contemplation
- Possible illustrative examples such as the duty of care owed by drivers to pedestrians and other road users
- Test redefined in *Caparo v Dickman*. Three elements must be proved:
  - Reasonable foreseeability that a person in the claimant’s position would be injured
  - There was sufficient proximity between the parties
  - It is fair, just and reasonable to impose liability on the defendant

<b>Band</b>	<b>Marks</b>	<b>AO1: Demonstrate knowledge and understanding of legal rules and principles</b>
<b>3</b>	<b>6-8</b>	<ul style="list-style-type: none"> <li>• Excellent, detailed knowledge and understanding of legal rules and principles relating to the principle of duty of care.</li> </ul>
<b>2</b>	<b>3-5</b>	<ul style="list-style-type: none"> <li>• Good knowledge and understanding of legal rules and principles relating to the principle of duty of care.</li> </ul>
<b>1</b>	<b>1-2</b>	<ul style="list-style-type: none"> <li>• Basic knowledge and understanding of legal rules and principles relating to the principle of duty of care.</li> </ul>
	<b>0</b>	Response not creditworthy or not attempted.

**2. Explain remoteness of damage in the tort of negligence.**

**[8]**

**Indicative content**

*NOTE: The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In explaining the principle of remoteness of damage in the law of tort, candidates are expected to demonstrate knowledge and understanding of legal rules and principles underlying the principle of remoteness of damage. In demonstrating this knowledge and understanding, candidates are required to focus on the specific nature of the question set and not simply give a general answer on negligence.

The response might consider issues such as:

- Definition of causation – defendant’s acts or omissions must have caused the loss complained of. Both factual and legal causation must be proved
- Within legal causation – remoteness of damage – the damage must not be too remote from the negligence of the defendant:
  - *Wagon Mound* case
  - Damage must be ‘reasonably foreseeable’ – *Hughes v Lord Advocate (1967)*; *Doughty v Turner Asbestos (1964)*.
  - Thin skull test - ‘take your victim as you find him’ – *Smith v Leech Brain and Co. (1962)*

<b>Band</b>	<b>Marks</b>	<b>AO1: Demonstrate knowledge and understanding of legal rules and principles</b>
<b>3</b>	<b>6-8</b>	<ul style="list-style-type: none"><li>• Excellent, detailed knowledge and understanding of legal rules and principles relating to remoteness of damage.</li></ul>
<b>2</b>	<b>3-5</b>	<ul style="list-style-type: none"><li>• Good knowledge and understanding of legal rules and principles relating to remoteness of damage.</li></ul>
<b>1</b>	<b>1-2</b>	<ul style="list-style-type: none"><li>• Basic knowledge and understanding of legal rules and principles relating to remoteness of damage.</li></ul>
	<b>0</b>	Response not creditworthy or not attempted.

### 3. Explain the terms general and special damages.

[8]

#### Indicative content

*NOTE: The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In explaining the terms general and special damages, candidates are expected to demonstrate knowledge and understanding of legal rules and principles underlying an award of damages. In demonstrating this knowledge and understanding, candidates are required to focus on the specific nature of the question set and not simply give a general answer on negligence.

The response might consider issues such as:

- A claimant who successfully proves his case in negligence will be entitled to a remedy. Damages are one form of remedy.
- Damages aim to place the claimant, where possible, in the same position as if the tort had never happened. Not always possible for serious, life changing injuries.
- Damages can be divided into general and special damages:
  - Special damages – These comprise quantifiable financial losses up to the date of trial and are assessed separately from other awards because the exact amount to be claimed is known at the time of the trial. The major types of damages are as follows:-
    - Loss of earnings.
    - Medical Expenses.
    - Expenses to cover special facilities.
  - General damages - This term covers all losses that are not capable of exact quantification and they are further divided into pecuniary and non-pecuniary damages.
    - Pecuniary damages - The major type of pecuniary damages is future loss of earnings. The courts calculate this amount using the multiplicand (a sum to represent the claimant's annual net lost earnings) and the multiplier (a notional figure that represents a number of years for which the claimant was likely to have worked). These are multiplied together in order to calculate the future losses.
    - Non-pecuniary damages – pain and suffering, loss of amenity, damages for the injury itself.

<b>Band</b>	<b>Marks</b>	<b>AO1: Demonstrate knowledge and understanding of legal rules and principles</b>
<b>3</b>	<b>6-8</b>	<ul style="list-style-type: none"> <li>• Excellent, detailed knowledge and understanding of legal rules and principles relating to general and special damages.</li> </ul>
<b>2</b>	<b>3-5</b>	<ul style="list-style-type: none"> <li>• Good knowledge and understanding of the legal rules and principles relating to general and special damages.</li> </ul>
<b>1</b>	<b>1-2</b>	<ul style="list-style-type: none"> <li>• Basic knowledge and understanding of the legal rules and principles relating to general and special damages.</li> </ul>
	<b>0</b>	Response not creditworthy or not attempted.



4. David decided to go swimming in the lake in his local park run by the local council. He ignored signs informing visitors to the park that swimming in the lake is both dangerous and not permitted. Unfortunately, when he dived in, he hit his head on the bottom of the lake and broke his neck. David has been told that he will never walk again.

**Advise David as to whether the council is liable for his injuries.**

**[18]**

### **Indicative content**

*NOTE: The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In assessing the extent to which the council is liable for David's injuries, candidates are expected to apply legal rules and principles to the scenario in order to present a legal argument using appropriate legal terminology.

The response might consider issues such as:

- Occupiers' liability – Occupiers' Liability Acts 1957 (lawful visitors) and Occupiers' Liability Act 1984 (trespassers).
- Definition of 'occupier' as the potential defendant – person who is in 'control' of premises – the council in the scenario. *Harris v Birkenhead Corporation (1976)*.
- 'Premises' – could include the park/lake.
- 'Adult visitors' – common duty of care imposes a duty on the occupier to keep the visitor 'reasonably safe'.
- A visitor may become an unlawful visitor if he exceeds his permission – e.g. diving into the lake when expressly forbidden to do so. Protection under 1957 Act then fails and provisions of 1984 Act may apply. Exclusion clauses under 1957 Act – the sign erected by the council warning of the danger and banning diving.
- Contributory negligence.
- 1984 Act – 'common humanity' owed by occupiers. *British Railways Board v Herrington [1972]* – duty can be owed to trespassers.
- The occupier will owe a duty under s.1(3) – aware of danger/risk, vicinity of the danger, protection from risk. S.1(4) – take reasonable care to see that the trespasser is not injured by reason of the danger. Is the sign sufficient?
- Objective standard. Obvious dangers – *Ratcliff v McConnell (1999)*.
- Application of relevant case law - *Tomlinson v Congleton Borough Council [2003]*

<b>Band</b>	<b>Marks</b>	<b>AO2: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology</b>
<b>4</b>	<b>14-18</b>	<ul style="list-style-type: none"> <li>• Excellent, detailed application of legal rules and principles to the situation involving the council and David.</li> <li>• Excellent presentation of a legal argument, using appropriate legal terminology, case law and other legal authorities relating to the elements of the tort of negligence.</li> </ul>
<b>3</b>	<b>9-13</b>	<ul style="list-style-type: none"> <li>• Good application of legal rules and principles to the situation involving the council and David.</li> <li>• Good presentation of a legal argument, using appropriate legal terminology, case law and other legal authorities relating to the elements of the tort of negligence.</li> </ul>
<b>2</b>	<b>5-8</b>	<ul style="list-style-type: none"> <li>• Satisfactory application of legal rules and principles to the situation involving the council and David.</li> <li>• Satisfactory presentation of a legal argument, using some appropriate legal terminology, case law and other legal authorities relating to the elements of the tort of negligence.</li> </ul>
<b>1</b>	<b>1-4</b>	<ul style="list-style-type: none"> <li>• Basic application of legal rules and principles to the situation involving the council and David.</li> <li>• Basic presentation of a legal argument, using minimal legal terminology relating to the elements of the tort of negligence.</li> </ul>
	<b>0</b>	Response not creditworthy or not attempted.

**5. Analyse and evaluate the difference between primary and secondary victims. [18]**

**Indicative content**

*NOTE: The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

Candidates are expected to demonstrate knowledge and understanding of the English legal system and legal rules and principles relevant to primary and secondary victims in tort. Candidates will offer an analysis and evaluation of primary and secondary victims. In order to reach a judgement about these issues candidates will offer a debate and come to a substantiated judgement regarding the differences between the two.

The response might consider issues such as:

- A primary victim is where the claimant is involved, immediately in time, as a participant, e.g. a person who feared for their own safety, injured rescuers or an involuntary participant. They would be present at scene and usually (but not always) have suffered physical injury. It does not matter if the victim is more susceptible to shock.
- A secondary victim is where the claimant has suffered some type of psychiatric injury. To be classified as a secondary victim there must be a proximity in terms of relationship with a primary victim and the secondary victim must have witnessed the accident with his/her own unaided senses.
- Candidates may evaluate relevant case law such as *Hambrook v Stokes Bros*; *McCloughlin v O'Brien*; *Page v Smith*; *Alcock v Chief Constable of South Yorkshire Police*.

<b>Band</b>	<b>Marks</b>	<b>AO3: Analyse and evaluate legal rules, principles, concepts and issues</b>
<b>4</b>	<b>14-18</b>	<ul style="list-style-type: none"> <li>• Excellent, detailed analysis of legal rules, principles, concepts and issues relevant to primary and secondary victims in negligence.</li> <li>• Excellent evaluation of the law surrounding to primary and secondary victims in negligence, including a valid and substantiated judgement.</li> <li>• Excellent use of supporting case law and legal authorities.</li> <li>• Writing demonstrates accurate grammar, punctuation and spelling.</li> </ul>
<b>3</b>	<b>9-13</b>	<ul style="list-style-type: none"> <li>• Good analysis of legal rules, principles, concepts and issues relevant to primary and secondary victims in negligence.</li> <li>• Good evaluation of the law surrounding primary and secondary victims in negligence, including a valid judgement.</li> <li>• Good use of supporting case law and legal authorities.</li> <li>• Writing demonstrates reasonably accurate grammar, punctuation and spelling.</li> </ul>
<b>2</b>	<b>4-8</b>	<ul style="list-style-type: none"> <li>• Satisfactory analysis of legal rules, principles, concepts and issues relevant to primary and secondary victims in negligence.</li> <li>• Satisfactory evaluation of the law surrounding primary and secondary victims in negligence, including reference to a judgement.</li> <li>• Satisfactory use of supporting case law and legal authorities.</li> <li>• Writing demonstrates some errors in grammar, punctuation and spelling.</li> </ul>
<b>1</b>	<b>1-4</b>	<ul style="list-style-type: none"> <li>• Basic analysis of legal rules, principles, concepts and issues relevant to primary and secondary victims in negligence.</li> <li>• Basic evaluation of the purpose of the law surrounding primary and secondary victims in negligence.</li> <li>• Basic use of supporting case law and legal authorities.</li> <li>• Writing demonstrates many errors in grammar, punctuation and spelling.</li> </ul>
	<b>0</b>	Response not creditworthy or not attempted.