



GCE AS MARKING SCHEME

SUMMER 2019

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

INTRODUCTION

This marking scheme was used by WJEC for the 2019 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.

WJEC GCE AS LAW
UNIT 2: THE LAW OF TORT
SUMMER 2019 MARK SCHEME

Marking guidance for examiners

Summary of assessment objectives for Unit 2

The questions in Section A and Section B 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 both Section A and Section B 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, with relevant case law, the Caparo three-part test used to decide whether a duty of care is owed. [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:

- Brief history of test for duty of care – *Donoghue v Stevenson*
- Possible illustrative examples of when a duty of care is owed – road user to pedestrian, doctor to patient, etc.
- Test redefined in *Caparo v Dickman*. Three elements must be proved:
 - Reasonable foreseeability that a person in the claimant’s position would be injured. *Kent v Griffiths*.
 - There was sufficient proximity between the parties. *Bourhill v Young*.
 - It is fair, just and reasonable to impose liability on the defendant. E.g. *Hill v Chief Constable of West Yorkshire*,

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

2. Explain the principle of causation in the law of tort.

[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 causation in the law of tort, candidates are expected to demonstrate knowledge and understanding of legal rules and principles underlying the principle of causation. 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
- Factual causation:
 - ‘But for’ test – Barnett v Chelsea and Kensington Hospital Management Committee
 - Intervening events may break the chain of causation – novus actus interveniens
 - Victim’s own act
 - Medical intervention
- Legal causation:
 - Operating and substantial cause
 - Remoteness of damage
 - Take your victim as you find them
 - Cases such as Wagon Mound

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

3. Explain breach of duty of care.

[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 breach of duty of care, candidates are expected to demonstrate knowledge and understanding of legal rules and principles underlying the law of negligence. 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:

- Breach of duty of care involves the failure to reach the standard of care of the reasonable man, taking into account various risk factors.
- Brief explanation with cases and/or examples of the meaning of the reasonable man e.g.
 - objective test – explained through a case such as Blyth v Birmingham Waterworks
 - special characteristics of the defendant and their impact on the objective test:
 - professionals – E.g. Bolam v Friern Barnet HMC
 - learners – E.g. Nettleship v Weston
 - children – E.g. Mullins v Richard
- In deciding whether the defendant has acted reasonably or is in breach of duty, the courts weigh up four factors:
 - Likelihood of harm
 - Magnitude of likely harm
 - Cost and practicalities of prevention
 - Potential benefits of the risk

Band	Marks	AO1: Demonstrate knowledge and understanding of legal rules and principles
3	6 - 8	• Excellent, detailed knowledge and understanding of legal rules and principles relating to breach of duty of care.
2	3 - 5	• Good knowledge and understanding of the legal rules and principles relating to breach of duty of care.
1	1 - 2	• Basic knowledge and understanding of the legal rules and principles relating to breach of duty of care.
	0	Response not creditworthy or not attempted.

4. Cerys owns a pop-up food stall that she sets up at festivals and events. Noah, a freelance journalist, bought a chicken burger from Cerys' stall during a concert and became very unwell shortly after consuming the burger. Tests revealed that it was food poisoning and environmental health also discovered poor hygiene conditions in Cerys' stall. Noah has a stomach condition that means he is much more likely to suffer serious long term conditions if he experiences food poisoning. As a result, he is hospitalised for a month and loses out on £3000 of work. In addition, he suffers long term stomach pain which affects his ability to work and socialise.

Advise Noah as to whether Cerys is liable in the law of negligence 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 Cerys is liable for Noah'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:

- For Noah to succeed in an action in negligence against Cerys, it must first be established that Cerys owed Noah a duty of care. The basis of whether or not a duty of care is owed is determined on a three-part test as laid out in *Caparo Industries PLC v Dickman*.
- Cerys does not owe a duty to the whole world but only to those persons that could be reasonably foreseen to be affected by her actions or omissions as determined in *Donoghue v Stevenson*. It could reasonably be foreseen that Cerys' poor hygiene conditions could lead to other persons being affected.
- If it is established that a degree of foreseeability exists, then the proximity of the parties involved must be considered. Proximity is determined on the basis of the relationship of the parties involved. There is a clear proximity of relationship between Cerys and those who buy food from her stall such as Noah.
- The courts will also consider if it is reasonable to impose a duty of care on Cerys on the basis of fairness or policy. It is both fair and in the interests of public policy to impose a duty of care on food outlets and would not result in the floodgates being opened.
- Noah has suffered damage as a result of Cerys' breach of duty of care. Objective test but consider potential special characteristics of the claimant. Application of relevant breach factors.
- Causation – 'but for' test.
- There was no evidence of *novus actus interveniens* that could negate Cerys' liability for the food poisoning and responsibility for the injuries suffered by Noah.
- Remoteness of damage – egg-shell skull rule for Noah's pre-existing condition. *Smith v Leech Brain*.

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

5. Analyse and evaluate the different types of damages in the law of negligence. [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 the award of damages in tort. Candidates will offer an analysis and evaluation of the purpose of both general and special damages. In order to reach a judgement about these issues candidates will offer a debate and come to a substantiated judgement regarding their adequacy.

The response might consider issues such as:

- Damages in a negligence case are compensatory
- Purpose is to put the claimant in the position he/she would have been in had the negligent event not occurred
- Actual losses and future losses can be compensated
- Mitigation of loss must be considered
- Two types of damages:

Special damages

- Compensation for the financial losses incurred up to the date of the trial
- Things that can be given an exact figure: medical expenses, prescriptions, loss of earnings
- Deductions made so claimant does not profit
- Calculation for special damages
- Evaluation of the extent to which this compensates adequately

General damages

- Pain, suffering and loss of amenity
- Non-pecuniary damages
- Judicial guidelines
- Awards where victim is a child – *Giambrone v JMC Holidays* 2002
- Loss of future earnings
- Evaluation of the extent to which this compensates adequately

Methods of payment of damages

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