



## **General Certificate of Education**

# **Law 6161**

**Unit 5 (LAW5) Criminal Law (Offences against Property) or Tort or Protection of Human Rights or Consumer Protection**

## **Report on the Examination**

*2007 examination - January series*

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## Unit 5 (LAW5): Criminal Law (Offences against Property) or Tort or Protection of Human Rights or Consumer Protection

### Question 1

- (a) The offences involved in this part of the question were possible theft of both the purse and the membership card, deception involving obtaining services and evading liability (as well as an offence of making off without payment), arising out of the use of the membership card, and basic and aggravated criminal damage in relation to the photocopier. In discussing the use of the membership card, candidates could obtain maximum marks by dealing with any *two* of the possible offences, and very good marks by dealing thoroughly with *one*. Discussion of all three would have permitted a slightly more superficial treatment of all or any. Though, alternatively, candidates could have answered this part of the question by reference to the offences under the Fraud Act 2006, there was no evidence that candidates had yet been introduced to them. Accordingly, this report will not seek to comment on them.

In dealing with theft of the purse and the membership card, not all candidates perceived that the key issue lay in the *mens rea*, rather than in the *actus reus*. In truth, though there were often excessively detailed accounts of 'appropriation', 'property' and 'belonging to another', there was very little about *actus reus* that could not have been explained and applied briefly, with a conclusion that the *actus reus* of theft could be simply established in relation to both items. Similarly, though discussion of dishonesty in the *mens rea* was certainly creditworthy, the real issue was the meaning and application of intention permanently to deprive, given the contrast between the disposal of the purse and the disposal of the card. Once again, candidates often struck the wrong balance in discussion of the *mens rea* elements, and many failed entirely to consider what deductions about intention permanently to deprive could be made from the way in which Uma disposed of the two different items. Some candidates sought to deduce intention permanently to deprive from the *use* of the card to get the training session, speculating rather improbably that this may have exhausted the value of the card. On the whole, the use of the card was likely to be much more relevant to appropriation, though largely redundant even in that context, given the earlier 'assumption of the rights of owner' involved in taking the card. Even more puzzling were those answers in which getting the *training session* was seen either as *theft*, or as obtaining *property* by deception. However, most candidates did succeed in identifying correctly one or more of the offences arising out of use of the card. There was some tendency to a polarisation in approach here, with most candidates opting for deception or making off without payment, and only a few considering both. In discussing the deception offences (again, this tended to be one or the other, rather than both), candidates were usually able to deal competently with some of the elements, though few presented comprehensive explanation and application. There was also some tendency to repeat explanations of dishonesty, rather than to rely on earlier explanation and ensure that attention was paid to application in the specific context. On the other hand, explanation and application of the elements of making off without payment were frequently thorough and comprehensive, and usually accurate.

The fire in the photocopier evidently passed a number of candidates by, though most observed that the incident had taken place and discussed, at the very least, the offence of 'basic' criminal damage. More perceptive candidates recognised that the fire must have actually posed a risk to life, and so went on to analyse the possible offence of

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'aggravated' criminal damage. As with discussion of theft in the earlier part of the answer, so here there was often an apparent failure of confidence on the part of students, which led them into unnecessarily lengthy discussions of *actus reus* elements where, in reality, the *actus reus* was not in doubt and the focus should have been on *mens rea*. In particular, it was important to examine the meaning of subjective recklessness and to apply this carefully in the context both of the damage by fire itself and of the requirement to prove awareness of the risk of endangering life. So, it was surprising how many candidates made little use of the fact of the notice on the photocopier. A persistent misconception in this area is that the *actus reus* of the 'aggravated' offence requires proof that a person's life actually was endangered. Though no doubt that will frequently be the case when the offence is charged (and was remarked upon above in the *context* of this question), the requirement lies purely in the *mens rea* – the accused must *intend* to endanger life or be *reckless* as to doing so.

- (b) Perhaps the most efficient way to approach the analysis of the possible offences in this question was to concentrate initially on the specific offences *apart from burglary* which may have been committed by Uma when she went into Violet's work area, broke the lock on the filing cabinet, removed the papers and then copied them prior to returning them to the filing cabinet. This strategy is suggested because it then became much easier to consider the relevance of the commission of those offences in the attempt to establish whether Uma had also committed burglary. For example, if it were already proved that Uma had committed criminal damage in breaking the filing cabinet lock, it could then be argued that she might have intended all along to do so. This would help to supply both the *actus reus* and *mens rea* for the trespass element of burglary, as well as the ulterior intention to commit criminal damage which suffices as one of the three alternative forms of ulterior intention required for proof of s9(1)(a) burglary. Consequently, candidates could have examined not only the criminal damage but also the possible theft of the papers. Of course, if the conclusion were to be that there was no theft of the papers themselves because the return of the papers demonstrated that there never was an intention permanently to deprive, and that the confidential information contained therein was not property and so could not be stolen, there was at least possible theft of the copier paper. Yet, theft of the *copier paper* would not have taken place in the part of the building in which Uma was a trespasser, and so would not have contributed to an argument for burglary unless candidates were able to recognise a much more sophisticated argument about parts of the building, the pursuit of which would have been unrealistic in the time available.

In reality, candidates usually focused immediately on the possible burglary. However, because they had not yet established whether Uma had stolen the papers, the information or the copier paper, or had committed criminal damage, they were often side-tracked into confronting such issues whilst trying to set out the *actus reus* and *mens rea* elements of the two different forms of burglary themselves. This inevitably produced confusion in and omissions from the elements explained and applied in both burglary and the other offences, even though discussion of some of both usually emerged eventually. In taking this approach, many candidates relegated the theft aspects to a relatively minor status, losing the opportunity to debate some interesting issues about the elements of the offence. Conversely, there were those candidates who missed the burglary aspect completely and who, instead, concentrated entirely on theft and criminal damage. Once again, candidates often displayed a hesitancy about eliminating any extended discussion of aspects of the offences which were simply not problematic on the facts. This was often accompanied by a failure to explain, and particularly to apply in detail, those elements which *were* problematic! Most candidates who dealt with burglary addressed the issue of trespass, though many took it for granted that simply because

the screen could be said to mark off a separate part of the building (as in **Walkington**), therefore Uma was a trespasser. This ignored the probable true purpose of the screen, as well as the status and rights of work colleagues, and inhibited discussion of other possible explanations for trespass, such as the intention on entry to damage the lock or (though subject to the arguments introduced above) to steal the papers, or simply to borrow the papers and acquire the information (since a person's purpose may render her a trespasser even if that purpose does not involve commission of a criminal offence). Equally, most candidates understood the current view that confidential information is not property for the purposes of theft, though many tried to argue that this could be circumvented by suggesting that the papers themselves *had* been stolen because Uma had intended to return them deprived of their essential quality of being secret. This argument frequently relied on an inaccurate account of the result of the decision in **Lloyd**, and even when it did not, the argument did not appear to recognise that, attractive though it might be, there is as yet no authority for it, and nothing specifically to contravert the outcome of the decision in **Oxford v Moss**. It was encouraging to discover that not only did most candidates identify a defence of duress as possibly available to Uma, but also that most discussed the defence in rather more substantial terms than has often been evident in the past. In particular, candidates clearly understood the change in emphasis on the significance of a chance to escape the threat wrought by the House of Lords in **Hasan**. On the other hand, many failed to consider whether it was of any importance to the possible plea that Uma had two reasons for undertaking to get the information for Ali, and even those candidates who did remark on it were rarely able to analyse and apply the rules accurately.

- (c) In this question, candidates were given the opportunity to engage in a critical evaluation of the offence of theft, and to consider in particular whether the offence is in urgent need of reform. As has been indicated in previous reports where the question was of a similar nature, a comprehensive answer would have examined both *actus reus* and *mens rea* issues, though candidates concentrating on one or the other could have scored high marks for a sufficiently detailed evaluation. In reality, most candidates did attempt to deal with both aspects, though, inevitably, the balance between the two and the general level of detail supplied varied enormously. As in previous years, candidates most often discussed *actus reus* issues drawn from consent and appropriation, confidential information as 'property', and the possibility that the owner of property can be guilty of stealing it from another, with perhaps rather less emphasis on the status of land as property on this occasion. At their best, these answers revealed a considerable degree of knowledge and understanding of the direction that the interpretation of theft has taken in consequence of decisions such as **Gomez** and **Hinks** on appropriation, **Turner (No 2)** on the concept of property belonging to another, and **Oxford v Moss** on the meaning of property. At their weakest, answers did little more than indicate that there might be a problem in one or more of these areas, so that they took on the character of a list.

In dealing with *mens rea* issues, candidates were much more adept at evaluating the law on dishonesty than on intention permanently to deprive, and it was not unusual to see answers in which discussion of the latter was relegated to the status almost of an afterthought. As always, the development of the **Ghosh** test provoked the greatest interest, with its potential to promote uncertainty in the application of the law, though few were able to relate this in any convincing way to the problems identified in the interpretation of the meaning of appropriation. When candidates introduced discussion of the statutory beliefs which prevent a finding of dishonesty, they tended to slip into mere description and had little to offer by way of evaluation. Discussion of intention permanently to deprive, where it appeared at all, was generally confined to assertions

that the requirement could be dispensed with entirely, though there were also occasional forays into the mysteries of s6, as well as attempts to criticise the interpretation that a person intends permanently to deprive another of money even though he intends to replace that money at some time. In this particular criticism, candidates rarely appreciated that absence of dishonesty would be the accused's stronger claim. Those candidates who saw the question as an invitation to discuss criticisms of the Theft Acts rather than of the offence of theft, were often able to benefit from the fact that there are common elements in many of the offences, particularly in matters such as 'property' and in the mens rea requirements of dishonesty and intention permanently to deprive. Nevertheless, such candidates often spent much time on issues which were simply irrelevant to a critical evaluation of the elements of the offence of theft itself.

## Question 2

- (a) The circumstances in which Sam obtained the model car from Rose suggested two possible offences. The first was the offence of obtaining property by deception. If that offence could be made out, then, following the decision in **Gomez**, it would be almost inevitable that Sam would also have committed theft. However, there was clearly at least one significant obstacle (for a further possible obstacle, see below) in the way of a conviction for obtaining property by deception, since it could be argued that Sam had done nothing other than offer to buy the model car. So, if he did not respond in any way to confirm Rose's joking but, unknown to her, perceptive comment about his not being a dealer, then the only way to establish a deception would have been by showing that he had kept silent in circumstances where he was under a duty to make disclosure. This obstacle, perhaps insuperable, would not exist in the case of theft, so that such an offence would represent a significant *alternative* possibility and not merely an *additional* one. This much is clear from the decision of the House of Lords in **Hinks**. But the second obstacle would present itself whether the charge was one of obtaining by deception or one of theft, for in both cases it would be necessary to prove that Sam was dishonest at the time when he obtained by the deception or appropriated the property.

Invariably, candidates began their answer to this question by examining the offence of obtaining by deception. If they dealt with theft at all, and many did not, then they did so principally as if it were merely an additional offence, committed if the deception offence were committed but otherwise not worthy of remark. There was a very firm conviction on the part of most candidates that Sam had been guilty of a deception, though the framework of legal explanation which might have supported this conviction was rarely in evidence. Because Sam was a dealer, it was assumed that he should have spoken up and revealed himself as such, probably as soon as he recognised the value of the model car, and certainly upon hearing Rose's joking comment. However, it was not obvious that the facts fell within any of the commonly understood categories of case where disclosure is required, or that there was any relationship of trust and confidence which might defeat normal commercial expectations. Some candidates were convinced that they had detected a deception in Sam's response to Rose's comment, though they were usually rather vague about how exactly it could be described. Similarly, it seemed to be too readily assumed that Sam was dishonest, though this was an assumption that may have followed rather naturally from the assumption that there was a deception. In coming to this conclusion, candidates often wrote at length on the **Ghosh** test (and sometimes, rather oddly, on the statutory description of beliefs which render a person not dishonest). Given this approach, few candidates took the opportunity to consider the implications of the decision in **Hinks** in any detail, so that there was little discussion of how crucial proof of dishonesty would be in establishing an offence of theft where there was no evidence of a non-consensual appropriation or of a deception. Inevitably, therefore, few candidates

considered whether it would have been possible to prove dishonesty against Sam in the absence of any deception.

Some candidates, alerted by the undoubted fact that Rose's house was a 'building', and perhaps alarmed by the prospect of being unable to identify an offence of burglary anywhere else in question 2, were determined to discuss burglary by Sam. If this discussion were to have any substance, it would have to proceed from the assumption that Sam had some particular offence of deception/theft in mind all along, and so entered as a trespasser under **Jones and Smith**, or that he had entered as a trespasser (perhaps because he would not have been allowed to enter had he revealed that he was a dealer) and had then committed theft. Candidates rarely dealt with the issue in this way, opting instead for simplistic assumptions that he would be a trespasser, and failing to consider precisely how the elements of either s9(1)(a) or of s9(1)(b) burglary would have been proved. Note that, as in the answers to Question 1, there was no evidence that candidates were familiar with the offences in the Fraud Act 2006. Consequently, though the question could have been answered, in part, by reference to those offences, no comment is made on them in this report.

- (b) In this question, it seemed very clear that Sam had not gone into the shoe shop with any intention of stealing or of causing criminal damage (still less of inflicting grievous bodily harm). Consequently, there was no reason to suppose that he was a trespasser, and so no reason to argue for an offence of burglary. Instead, he had obviously appropriated the shoes, and so had possibly committed theft. It seems that he did not want to return them and, further, had perhaps knowingly damaged them sufficiently to change their essential character (they were now no longer shoes fit for retail, though they must have retained some utility and value). This suggested a possible intention permanently to deprive. On the other hand, Sam did seem to have an unshakable belief that the shoes were actually his, and this would have been an assertion under the Theft Act 1968 s2(1)(a) that he held a belief that meant that he was not dishonest. If his conduct could be regarded as theft, then there was a further possibility of robbery, given that he had used force to enable him to walk away from Trisha, still wearing the shoes. Yet it might be argued that any theft was already long committed and that the force used was neither at the time of the theft nor to assist the theft but, rather, simply to enable him to get away. In addition to a separate offence of 'basic' criminal damage in relation to the shoes, Sam may also have committed the offence of making off without payment, in that he had left the shop without paying for the shoes. Once again, he would have contested this assertion in various ways, based on his belief that they were his own shoes – for example, that he was not dishonest, or that he did not know that payment on the spot was required or expected. Of course, the reason for Sam's fundamental misapprehension about the shoes was probably his degree of intoxication, and he would have been obliged to rely on intoxication to explain away his mistake. This introduced a complication, in that it became necessary to consider the effect of voluntary intoxication on criminal liability, distinguishing between specific and basic intent offences and properly categorising the offences identified above.

It was possible to achieve maximum marks by a number of routes in answering this question. In particular, though it was necessary to discuss the offences of theft and robbery, as well as the defence of intoxication, discussion additionally of either making off without payment or of criminal damage would have sufficed. Candidates who omitted theft in favour of making off without payment could have expected substantial, though less, credit. Taken as a whole, it was possible to discover in the answers to this question discussion of all the points made in the analysis above. Taken individually, few answers were comprehensive and most failed to establish a clear structure for the analysis, so that highly relevant explanation might be left unassociated with other required explanation or

undermined by weak application. In some answers, this was attributable to the attempt to argue from the framework of an offence of burglary, which distracted attention from detailed explanation and application of the elements of, say, theft, or of criminal damage. In other answers, there was an attempt to pre-empt discussion of the elements of the offences by immediate resort to discussion of intoxication. The consequence here, usually, was that neither offences nor defence were explained and applied with any clarity.

A rather surprising feature of many answers was the approach to the issue of dishonesty in the offence of theft. It has already been mentioned above in the comments on the answers to Question 2(a) that many candidates wrote at length about the statutory beliefs identified in s2(1) in circumstances where they had little relevance and the focus of attention should have been the **Ghosh** test. In answers to *this* question, where s2(1)(a) seemed so obviously to be engaged, it was remarkable how many candidates stated specifically that Sam would *not* be able to bring himself within any of the statutory beliefs and so would have to rely on a favourable application of the **Ghosh** test! Discussion of robbery was usually quite perceptive, with many candidates disputing the purpose of the force used by Sam and so concluding that the offence probably would not have been committed. On the other hand, candidates rarely developed explanation and application of the criminal damage offence in any detail. In particular, candidates tended to give little thought to recklessness in relation to how the damage came about. When intoxication was introduced as a defence after candidates had established *prima facie* liability for the offences, it was often explained very well, though candidates tended to be much more hesitant in application, particularly in categorising the various property offences as offences of specific or basic intent.

- (c) For comments on answers to this question, see the comments on the answers to Question 1(c), above.

### Question 3

- (a) Candidates generally understood that this question raised issues of private nuisance in relation to the noise from the entertainments provided by Jarvis, and many also recognised that, conversely, Jarvis might be able to bring an action in nuisance against Ken, arising out of the use of the manure. Many went on to discuss the possibility that Ken could bring an action in **Rylands v Fletcher** against Jarvis, arising out of the damage caused by the fireworks. Bizarrely, however, many candidates reserved their consideration of **Rylands v Fletcher** for the spreading of the manure by Ken, and dealt with the fireworks, if at all, merely as an aspect of nuisance. Given the universal recognition of at least some aspects of Ken's claim to an action in nuisance, most candidates were able to score at least moderate marks on this question, though it was often disappointing to read answers which could have aspired to much higher marks on nuisance alone had they been a little more detailed, and had they provided a much stronger explanatory foundation for the analysis. In particular, though elements of the concept of reasonable user, such as the nature of the locality and the time and duration of the alleged noise nuisance, often found their way into the discussion, they were rarely set within a framework which established the potential significance of different kinds of harm in the action in nuisance. Additionally, not only were explanation and illustration by use of authority often limited, but there was also a tendency to apply the rules in a very superficial manner without regard to any of the detail supplied in the facts of the scenario. This also applied to the consideration of the possible remedies available to Ken. Here, a common approach was merely to identify remedies of damages and injunction but to ignore the opportunity to comment further on the different kinds of loss that Ken might have alleged and to ignore equally the opportunity to consider the terms in which an

injunction might have been imposed. Candidates who recognised that the spreading of the manure might also have given rise to an action in nuisance, this time by Jarvis against Ken, usually perceived that malice was an important consideration. However, once again, this was rarely placed within a more general framework (which could, of course, have been the framework used to analyse Ken's liability to Jarvis, had such a framework been provided). Thus, malice was often discussed as a free-floating concept and not related in any way at all to reasonable user or to the other important aspect in this context, namely, locality.

Stronger candidates were able to give a convincing explanation of the elements in the tort of ***Rylands v Fletcher*** and to make a careful application to the facts to argue the potential liability for the damage caused by the fireworks. Weaker candidates either contented themselves with a very superficial outline or were able to give an explanation of only one aspect of the tort, say, the 'escape' aspect or the requirement for a non-natural accumulation. As indicated at the start of the comments on the answers to this question, many candidates who were expecting to find evidence of the commission of the tort of ***Rylands v Fletcher*** failed entirely to find it in the veering off course of the fireworks and the resultant damage. Instead, they detected it in the manure spread by Ken which presumably had caused an offensive smell. It seems that, despite the clear statement in the facts of the scenario that the manure was spread on Ken's land, albeit close to the boundary with Jarvis's land, such candidates had persuaded themselves that there had been an escape of the manure itself, for they did not attempt to argue that it was the 'smell' that had escaped. Indeed, the very vagueness with which the facts were related to the elements of the tort demonstrated that candidates had simply misunderstood this whole issue. Had there been no evidence of any other possible instance of ***Rylands v Fletcher***, the decision to pursue it in the context of the manure might have been less surprising. Given the clear evidence of the escape of the highly dangerous 'powerful fireworks', that decision remained perplexing.

- (b) Candidates understood that this question raised issues concerning occupiers' liability, and that it was necessary to distinguish between the liability of an occupier to *visitors*, under the Occupiers' Liability Act 1957, and to *trespassers* under the Occupiers' Liability Act 1984. Thus, they usually made the distinction between Liam, whose payment to enter clearly marked him out as a person to whom express permission to be on the premises had been given, and Maurice (considered by many candidates, surprisingly, to be female), whose 'sneaky' entry without paying marked him out equally clearly as a person who had no permission to be there. However, from this common starting point, answers diverged considerably in direction and in quality of analysis. In dealing with the possible liability to Liam, stronger candidates were able to explain the requirements of the 1957 Act and to apply them convincingly to the facts. This included not only the general issue of the nature of the duty and its application to Liam personally, but also the relevance of the warning sign. It seems evident that the warning applied to the circumstances of Liam's injury but perceptive candidates went on to enquire whether it enabled him to be reasonably safe, given that he was not prevented from transferring between different levels, and given the presence of the low spiked fence, which clearly contributed to the hazard. These candidates also considered whether Liam's behaviour could amount to contributory negligence. Weaker candidates generally understood some elements of this analysis but often failed to develop it in sufficient detail. In particular, they did not recognise that the duty owed to the visitor is to keep him safe for the purposes for which he has been invited onto the premises, nor did they adequately explore the relevance of the warning or consider the contribution of the low spiked fence to the dangers facing Liam.

On the whole, answers were less accomplished when dealing with the potential liability to Maurice as a trespasser. This was because many candidates were unable to explain accurately both what the 1984 Act demands before a duty in favour of trespassers is imposed, and what that duty, should it be imposed, requires of the occupier. Frequently, answers succeeded in establishing some of the relevant requirements but omitted others, or identified all of the elements but did not explain them comprehensively or accurately. This was particularly evident in the confusion that existed over whether the rules require *subjective* knowledge of the presence of trespassers and the existence of dangers, or merely that such matters *ought to have been known* by the occupier. Inevitably, difficulties in explaining the rules created difficulties in their application, which was often at a rather superficial level. Additionally, the application often failed to differentiate between the precise circumstances in which Liam and Maurice suffered their respective injuries. Whilst Liam's injury resulted from his slipping on the wet steps, and so was generally within the warning notice as discussed above, the injury to Maurice resulted from the poor condition of the steps themselves and seemed unrelated to any attempt by Jarvis to anticipate dangers to any entrants, visitors or otherwise. Yet many candidates either attributed injuries to both claimants to the wet weather or saw no essential difference between the two different ways in which the injuries had come about.

Drawing on the comments above, it may be helpful to make the general observation that, whilst most candidates are able to gain reasonable credit for answers on these topics, few seem to be able to explain and apply the rules in any truly comprehensive and accurate manner. Many seem content to settle for a rather superficial approach.

- (c) Candidates were given the opportunity to evaluate either the law on compensation for economic loss or the law on compensation for psychiatric injury. The specific suggestion in each case was that the law unduly restricts the rights of claimants to recover. A third choice available was to comment critically on the rules on vicarious liability, discussing also the reasons for their application. As in previous examinations when a similar question has been asked, by far the largest group of candidates selected the law on psychiatric injury. The remaining candidates chose economic loss or vicarious liability in approximately similar proportions. Whatever the choice, the answers presented bore close similarities to those presented in previous examinations, both in approach and content, and in general quality.

### **Economic loss**

Candidates generally understood the distinction between economic loss consequent on some kind of physical damage and so-called 'pure' economic loss, and were able to explain and comment upon the impact of the distinction on recovery of compensation. Stronger candidates succeeded not only in explaining the nature of the restrictive rules in an action such as that for negligent misstatement, but also in subjecting those rules to a careful evaluation in which anomalies were revealed (such as in the classification of conduct as acts or words). This was supported by reference to broader arguments which might be advanced to justify restrictions, such as the fear of indeterminate and disproportionate liability. Aspects of these explanations and evaluation were usually evident in the answers of weaker candidates, too. However, the answers were usually less comprehensive, expressed less coherently and supported by fewer authorities or examples.

## Psychiatric injury

Stronger candidates seized upon the rules which restrict recovery for psychiatric injury and wrote wide-ranging explanation and evaluation, often perceptively related to the broader rationale for such restrictions. These answers focused on issues such as the concern over what exactly qualifies as psychiatric injury, the requirement for a traumatic event as opposed to a continuing process, the distinction between primary and secondary victims, and the rules applied to actions in the case of the latter, such as the need for close ties of love and affection and for proximity to the incident or its aftermath. Many answers also considered the application of the rules to rescuers. There were often well-founded criticisms of aspects of these rules, particularly the restrictive rules on recovery by secondary victims. Attempts to consider the broader rationale inevitably focused on concerns about fraudulent claims and on the dangers of visiting disproportionate liability on defendants. As in the case of answers on economic loss, the same concerns were evident in discussion by weaker candidates, but their answers were less comprehensive and usually much more limited in evaluation.

## Vicarious liability

Most candidates wrote some explanation of the rules on vicarious liability, identifying the need to prove an employer/employee relationship and that the employee was acting in the course of his/her employment. However, the depth and quality of the explanation varied significantly amongst answers, so that the framework from which evaluation could proceed was often only tentatively established. Some candidates were able to suggest convincing criticisms of the rules, though most answers offered only hints that criticisms may exist. Answers were usually far stronger when dealing with the reasons for the imposition of vicarious liability, located in the greater economic power of the employer, and the capacity to spread the loss via commercial practices and insurance. Weaker candidates recognised some of these aspects but usually expressed them briefly or with some confusion.

## Question 4

- (a) Candidates readily understood that if Callum and Fritz were to be able to recover compensation for their respective losses, they would have to rely on the rules concerning liability for negligent misstatement. Most also recognised that, whilst an action might possibly be brought directly against Earl as the maker of the statements, the preferable defendant might be Bonnie, since she probably had greater financial resources or was supported by insurance. In that case, proof of liability against Earl would form the basis for a potential action in vicarious liability against Bonnie. However, some candidates failed to appreciate that there was no evidence that Bonnie had made any statements herself, so that they tried to deal with her liability without any reference to vicarious liability. Other candidates focused entirely on the possible liability of Earl and did not mention Bonnie at all. In relation to possible actions against Earl, candidates were generally able to give some account of the restrictive rules first introduced by the House of Lords in *Hedley Byrne v Heller* and subsequently developed in cases such as *Caparo Industries v Dickman*. In fact, many candidates went well beyond that to explain these rules comprehensively and in detail, so that a strong foundation was established. The major difficulties seemed to lie in the application of the rules. Stronger candidates recognised that Callum would find more difficulty than Fritz in bringing himself within the rules so as to prove that Earl owed him the relevant duty and had broken it. This was because Callum was merely one of a general target readership, whereas Fritz brought himself into a direct relationship with Earl by speaking personally to him about the

invention. However, rather too many of such candidates made the too-ready assumption that this difference was not only important but automatically fatal to Callum's hopes. A more careful review of the legal requirements against the facts might have suggested that an argument could be made, albeit tentatively, for a special relationship and reasonable reliance, based on the nature and size of the target audience and the purpose for which, to the expectation of all, the article might be used. Weaker candidates tended to ignore the distinctions between the two candidates and to assume that, not only would the same rules apply, but that the outcome of their application would be identical in both cases. Some candidates took this to the extreme of dealing with only one claimant, usually Fritz. In dealing with Bonnie's potential liability, candidates who introduced vicarious liability generally understood the two requirements – the need for an appropriate relationship of employer/employee, and the need to show that the tort was committed in the course of the employee's employment – but these elements were often treated in a very superficial manner, and almost all candidates seemed convinced that the description of Earl as "one of *Invest's* journalists" could be interpreted in no other way than that Earl was an employee. Of course, the conclusion that Earl was an employee was perfectly tenable, but it should have been possible to speculate that Earl might have been a self-employed journalist, perhaps contributing articles to a variety of publications. Similarly, candidates did not ask themselves how Earl came to speak directly to Fritz and, if he actually were an employee, whether this might cast doubt on whether he was giving the further information in the course of his employment.

- (b) Answers to this question adopted a variety of approaches, some comprehensive and some dealing with only some aspects of the issues raised. Thus, it was not uncommon for candidates to ignore Grant's potential claim entirely and to concentrate exclusively on the claims of Hayden and Ilsa. Equally, whether those claims were dealt with exclusively or alongside discussion of Grant's potential claim, there was often a surprising failure to identify the possibility that Hayden was a primary victim. In some instances, candidates appeared to have missed the potential claim of Hayden altogether. Stronger candidates began with Grant's claim and usually had little difficulty in establishing that Callum would owe a duty of care to all those who might be affected by his manner of driving, including Grant. Indeed, some candidates were tempted to introduce rather more complicated arguments than were really necessary here, speculating on whether all the elements of the *Caparo* three-part test could be satisfied on the facts (policy issues are of little significance in these incidents, where the facts fall firmly within one of the well established duty situations), and reviewing at length the factors which may be significant in determining breach of duty. Most candidates also considered the possibility that Grant was guilty of contributory negligence, though few considered against what dangers the wearing of a safety harness would be expected to protect, and some missed this aspect completely. Weaker candidates who recognised this issue often presented a very superficial outline of the action in negligence, perhaps by reference to a major case, and concluded without argument that Grant would succeed. Once again, stronger candidates gave a very clear explanation of the difference between primary and secondary victims in the context of liability for psychiatric injury and accurately classified Hayden as a primary victim and Ilsa as a secondary victim. This enabled them to deal fairly simply with Hayden's claim and to concentrate on the restrictive rules in relation to Ilsa as a secondary victim. Weaker candidates sometimes failed to make the distinction between primary and secondary victims and so treated Hayden and Ilsa as being subject to the same restrictive rules. Alternative, and perhaps more surprising, versions of these deficiencies, were encountered when candidates made the distinction between the two different categories but then appeared unaware that the restrictive rules applied only to secondary victims, and when candidates wrote accurately about the distinction, understood its importance, but then categorised Hayden as a secondary victim.

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- (c) For comments on answers to this question, see the comments on the answers to Question 3(c), above.

### Questions 5-8

Note that there were so few answers to these questions that any report commenting on candidate performance would in effect amount to a report on one or two, at best a few, individual scripts. Consequently, the comments below represent merely a brief indication of what kinds of answers might have been expected, and they make no attempt to consider the work of candidates in the examination.

#### Question 5

- (a) This question raised issues concerning the duty of confidentiality (though the developments in the elements in this action have taken it far from its origins as an action protecting only information imparted by one person to another in circumstances of confidence) and the tort of defamation. The circumstances in which Oona discovered the information would not have prevented Preston (Robin) from bringing an action against Oona and Sid, and the potential threat to Preston's life might have acted as a powerful incentive for the imposition of an injunction preventing disclosure of any information. Set against this might be arguments that disclosure was in the public interest. The information obtained from Tia was still more obviously within the notion of a duty of confidentiality and its disclosure much less likely to be susceptible to any defence of public interest, with obvious implications for success by Preston in actions against Tia, Sid and *The Daily Chronicle*. Similarly, there were interesting issues arising out of the photographs taken as Preston entered and left the counseling sessions, on which the approach of the House of Lords in ***Campbell v Mirror Group Newspapers*** would have provided useful guidance. Whether a court could be persuaded to differentiate significantly amongst these various disclosures for the purpose of issuing injunctions would also be a significant issue. Preston might also have resorted to an action in defamation (libel) in relation to the claim that he remained a danger to the public, though this might raise issues of fact and opinion, and whether a defence of justification could be raised. The chances of obtaining an injunction to prevent publication before the determination of any action might therefore be considered to be small.
- (b) In considering the effect, if any, of the Human Rights Act 1998 and of the European Convention on Human Rights on the answer to the foregoing question, candidates would first have been expected to explain the requirements of the 1998 Act in relation to domestic law and the European Convention on Human Rights, taking into account the jurisprudence of the Convention, and the distinction between public authorities (including the courts as public authorities) and private bodies/individuals in terms of the application of Convention rights. Then the task would have been to consider the provisions of articles 8 and 10, including the limitations permitted on each and the requirements for limitations to be established by law, and to be proportionate. Crucial to the discussion would be a consideration of the balance to be struck between privacy and freedom of expression, especially in the context of journalism, and how these interests could be raised in view of the fact that none of the parties (leaving aside the court itself) fell within the notion of a public authority. Assuming that the interests could be raised, the question would then remain of how a court could adapt current domestic law to be compatible with the requirements of the Convention, should any incompatibility be evident.
- (c) This question gave candidates the opportunity to consider whether the law has failed to establish an appropriate balance between either interests in privacy or interests in the

preservation of public order on the one hand, and freedom of expression on the other. Though candidates could have approached the discussion in any one of a number of ways, an answer would have been expected to contain discussion of both domestic law rules and the rights contained in the European Convention on Human Rights. Thus, in relation to domestic law and the privacy option, candidates would have been expected to consider the extent to which existing domestic law actions (for example, confidentiality, defamation, harassment) tend to protect privacy and restrict freedom of expression, as well as going on to consider how far Articles 8 and 10 might have an impact upon the balance between the two. In relation to the preservation of public order option, this would have involved discussion of the extent to which existing domestic law rules in relation to public order (for example, control of marches and demonstrations, breach of the peace, stop and search, harassment) tend to favour the interest in preservation of public order and to restrict freedom of expression. The Convention Articles relevant to this discussion would have been Articles 8, 10 and 11.

### Question 6

- (a) This question raised issues regarding the duty of confidentiality as between the drivers and the Northport City Council, given that photographs of the drivers were routinely taken and retained, and that some had actually been published. Northport City Council might have attempted to argue that these practices were in the public interest. Additionally, the association of some of the photographs with the clear allegation of fraudulent conduct gave rise to possible actions in defamation by those drivers who, though identified, had properly obtained a permit. In any case where photographs had already been published, a defamation action might seek a remedy in damages. In cases where the photographs were awaiting publication, there would have been an unusually strong argument for an injunction to prevent the Council from doing so. In view of the fact that the Northport City Council would undoubtedly be within the definition of a public authority, a cause of action would be available under the Human Rights Act 1998 for breach of any relevant Convention rights, in addition to any effect that those rights might have on the specific domestic law actions for breach of the duty of confidentiality and for defamation.
- (b) The planned march and the police response, including the conditions which they proposed to impose on it, required candidates to discuss the powers of the police to control 'processions and meetings' under the Public Order Act 1986 ss11-14 and associated legislation, as well as common law powers to deal with breach of the peace. Again, since the police are a public authority within the Human Rights Act 1998, Convention rights would also be directly engaged, whether through the action under the 1998 Act itself, or as part of a challenge to the exercise of powers under the Public Order Act or at common law for breach of the peace. The relevant Articles of the Convention would be Articles 10 and 11, though it would not be impossible to introduce consideration of Article 8, too.
- (c) For comments on answers to this question, see the comments on the answers to Question 5(c), above.

### Question 7

- (a) This question raised issues of formation of contract in relation to the free handsaw and gave candidates the opportunity to consider the rules on offer, acceptance and consideration in the collateral contract. (The basic structure of the agreements was that, by buying the workbench, Bert accepted an offer from Colin also to supply the free handsaw, and at the same time provided the consideration for the promise to supply it.) Of course, the 'subject to availability' statement bore on the terms of the offer but, probably, would only be regarded as incorporated within the terms of the offer if

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communicated equally effectively as the main terms of the offer. The question also invited candidates to explain and apply the requirements of the Sale of Goods Act 1979 (as amended), in terms of description, satisfactory quality, and fitness for purpose, to the sale of the water-hose and to the efforts by Colin to provide a suitable replacement when faced with the defects in the item originally supplied. In this context, it was also very important to discuss the effect of the supply of the replacement item on the right to reject the goods, given the shortcomings in the replacement supplied. Finally, since Colin was attempting to deny any liability to make a refund (which would not in itself, of course, have operated to restrict any obligation to repair or replace), it was necessary to consider whether the limitation clause had been incorporated into the contract and, if so, whether it could have any effect.

- (b) Since Bert had bought the workbench from Colin, he clearly had rights under the Sale of Goods Act 1979, should the workbench prove to be defective in any way. Since these rights, and consequent remedies, would have been very similar to those discussed above in connection with the defective water-hose, it would have been perfectly acceptable for candidates to rely on any relevant explanations previously supplied, extending them as appropriate, and then to have ensured careful application to the specific issues raised in connection with the workbench. Though the provisions of the Consumer Protection Act 1987 would apply to Bert, he would have been unable to take any advantage of them since he did not suffer any damage by virtue of the defects in the workbench and/or the instructions provided. On the other hand, Edwin had no contractual relationship with Colin, raising issues of privity of contract. Notwithstanding the inroads into that doctrine made by the Contracts (Rights of Third Parties) Act 1999, it seems unlikely that Colin would be able to rely on Sale of Goods Act 1979 rights, since there was no obvious attempt by Bert to extend the benefit of the contract to Edwin when he entered into his own contract with Colin. Consequently, Edwin would have been obliged to rely on the rights provided by the Consumer Protection Act 1987 in order to recover compensation for his personal injuries, though they would not have enabled him to recover for the damage to his saw, in view of the sums of money involved.
- (c) This question gave candidates the opportunity to evaluate the scope of the protection afforded by the law to consumers of goods and services against the suppliers of those goods and services, in order to consider whether the rights and remedies are inadequate. Thus, candidates could have explained and evaluated the nature and level of protection provided by statutes such as the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982, relying on any explanations previously provided in answering earlier questions. They could have combined this with explanation and evaluation of the remedies available, including an evaluation of protection provided by statutory and common law restrictions on the use of exemption clauses. Here, credit would certainly have been available for answers which dealt with issues of enforcement (including knowledge of rights to advice and assistance, as well as access to, and funding of, such advice and other assistance). A comprehensive answer would also have provided some explanation and evaluation of the contribution of the criminal law to the protection of rights available to consumers, in view of the fact that criminal law often operates as a very vital supplement to civil law rights and remedies in those areas where individual action is unlikely to be effective.

### Question 8

- (a) In this question, Vince and Will had entered into a contract by which Vince was to carry out specified repairs and other work for Will for a total cost of £2100, payable in three equal installments. Though Will had made the first payment, he had then refused to make further payments or to allow Vince to complete any further work because of the

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quality of the materials being used. Thus, the rights and remedies depended in part on whether the contract could be interpreted as comprised of divisible obligations or must be regarded as a whole. Candidates would have been required to examine whether Vince was in breach in supplying materials of allegedly inferior quality and, if so, whether this was a sufficiently serious breach to entitle Will to treat the contract as at an end and to sue for damages, or simply to sue for damages. In the latter event, it may well have been that Will himself was in breach of contract for his intransigence in refusing to allow Vince to complete the work. The lies apparently deliberately told by Vince about his labour charges laid Vince open to a criminal prosecution under the Consumer Protection Act 1987, in respect of the rules on misleading price indications. This required discussion of the general elements which must be proved to establish the offence, such as the need for the statement to be made in the course of a business to a consumer.

- (b) The work carried out by Alonso on Yana's house at the request of her father, Will, was clearly governed by the terms of the Supply of Goods and Services Act 1982. Thus, Alonso was under an obligation to supply goods of satisfactory quality which met their description and were fit for their purpose, as well as to carry out the installation of the patio with reasonable care and skill. There was certainly strong evidence that he had failed to fulfil these obligations and that a remedy would be available, certainly in damages, and possibly in respect of cure. The attempt by Alonso to take advantage of a term limiting liability to the cost of the materials supplied would require consideration of the rules on the incorporation and effect of limitation clauses, distinguishing between terms for the breach of which liability cannot be excluded or limited, and terms for which any such attempt would be subjected to a test of reasonableness. Since Yana did not make the contract with Alonso, the issue of privity of contract was raised. However, on this occasion (contrast the answer to Question 7(b), above), it seems fairly clear that Will and Alonso must have entered into the agreement on the understanding that the work was being done for Yana. In that event, the provisions of the Contracts (Rights of Third Parties) Act 1999 would apply, and Yana would be able to take advantage of the rights set out above in connection with the analysis of Will's rights. Equally, of course, Yana would be bound by any valid response that Alonso could make by reference to the purported limitation clause.
- (c) For comments on answers to this question, see the comments on the answers to Question 7(c), above.

## Mark Ranges and Award of Grades

Grade boundaries and cumulative percentage grades are available on the [Results statistics](#) page of the AQA Website.