

A LEVEL

Examiners' report

LAW

H415

For first teaching in 2017

H415/02 Autumn 2021 series

Introduction

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



Reports for the November 2021 series will provide a broad commentary about candidate performance, with the aim for them to be useful future teaching tools. As an exception for this series they will not contain any questions from the question paper nor examples of candidate responses.

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

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Paper 2 series overview

This paper was part of an extraordinary series offered in October 2021.

H415/02 is the second of three papers taken by OCR A Level Law candidates following two years of study. This particular paper assesses two key themes – law making and the law of torts.

The cohort for this paper was extraordinarily small. So, it is not possible to extrapolate general lessons, trends and feedback from such a small number of scripts. Therefore, with the exception of a small number of useful series specific lessons, this report will focus on providing a running commentary on the general expectations of the paper and the application of the mark scheme.

As with both the H415 and H418 specifications, the paper has three assessment foci and, in order to do well, candidates will need to demonstrate the skills of knowledge and understanding of the relevant law (AO1), the ability to apply the law to a given factual scenario in order to construct liability (AO2), and the ability to analyse and evaluate the law (AO3). All of which must be done in the proportions indicated in the mark scheme.

<i>Candidates who did well on this paper generally did the following:</i>	<i>Candidates who did less well on this paper generally did the following:</i>
• AO1: 'Explained' the law rather than simply 'stating' it • AO1: Cited relevant case law to show understanding • AO2: Made clear use of the facts given in the scenario to support the application of legal principles • AO2: Considered alternative outcomes and used them to affirm the right approach • AO3: Demonstrated the ability to make a sustained argument. This was often achieved through offering supporting evidence and/or an objective approach which looked at both sides of the argument • AO3: Offered reasoned and justified conclusions.	• AO1: Gave unexplained or anecdotal principles which were unsupported and/or had little or no basis in law • AO1: Gave detailed accounts of case facts. There is generally no need to give lengthy accounts of case facts. Unless they bear directly on the question, the case name will suffice • AO2: Applied legal principles in abstract (with no reference to the given facts) and/or made unsubstantiated assertions or sub-conclusions • AO2: Showed a lack of evidence of any deductive reasoning having led to a particular outcome • AO3: Demonstrated a lack of development, evidence, counter-arguments and sustained discourse • AO3: Gave bald conclusions.

General points:

- There were too few papers to draw any general observations based on this particular cohort. However, there was continuing evidence of a persistent habit which undermines overall performance – the 'shotgun' approach. This is where some candidates are losing valuable time by slavishly rehearsing irrelevant law. In Question 6 (the OLA question), for example, it was obviously a 1984 Act question but even the candidates who knew this still went through the whole of the 1957 Act as well. A tailored approach is best.

	Misconception	There is no need to include case facts unless they have a direct bearing on the scenario.
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Section A overview

Section A assesses the 'law making' component of the specification. Although it is a mandatory section, candidates can choose either Question 1 or 2 (10 marks AO1) and either Question 3 or 4 (15 marks AO3). The overwhelming favourites were Questions 2 and 4 on the legislative process and its advantages.

Question 1

- High marks could be achieved by giving a definition of the purposive approach supported by at least two relevant cases and any relevant contextual points.
- The most common reason for not scoring high marks was the lack of relevant cases or not explaining the way the approach allowed Parliament's intention to be realised.
- The most able candidates were able to offer two or three cases as well as relevant contextual points such as the European background of the approach, its reliance on extrinsic aids or the associated risks of judicial law making.
- AO3 comments are not creditworthy, even if accurate, in Questions 1 and 2.

	AfL	In AO1 questions on the rules of statutory interpretation, candidates aiming for high marks should be encouraged to use contextual points in addition to a definition and supporting cases. Here, for example, they might comment on the need to rely on extrinsic aids to discern parliament's intention or note the European origins of the approach. If it were the literal rule, they might comment on the rules respect for the supremacy of parliament by avoiding judicial law making or note that, other than a dictionary, extrinsic aids are rarely used. These points may have an AO3 feel to them but they are factually accurate contextual comments and fully creditworthy as AO1.
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Question 2

- High marks required an explanation of each of the five relevant stages in the correct order.
- Most candidates ignored the rubric and wrote about the entire legislative process despite the clear wording of the question. This wasted time that could've been spent on other questions.
- The most commonly missed stage is the report stage. A few candidates also got the stages in the wrong order.
- Missing stages, the wrong order, and rubric errors where the remit of the question has been ignored cost some candidates full marks.

Question 3

- High marks required a range of advantages only. Disadvantages were given where they were used to place an advantage in context but stand-alone disadvantages were not given.

	Misconception	There is no need to for a conclusion in a Section A, 15 mark question, unless the rubric demands one.
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- There were a good range of responses with some thoughtful points, the skills involved in producing developed points are evidently being taught well.
- It was generally lack of range, not depth, which held some candidates back.

Question 4

- High marks required a good range of advantages with some evidence of the ability to produce a sustained (developed) commentary.
- Again, disadvantages were given where they were used to contextualise an advantage but not where they were offered as stand-alone points.
- Candidates should be taught to read the questions carefully. Here, for example, there is a distinction between advantages of the legislative 'process' and advantages of legislation generally.
- As above, candidates were more likely to be held back by lack of range rather than depth.

Section B overview

Section B assesses the law of torts. Candidates choose from Part 1 or Part 2 and then complete either Questions 5, 6 and 7 or 8, 9 and 10. In both cases, the marks for the two problem questions (5 and 6 or 8 and 9) are composed of a 10:15 AO1:AO2 split with a common essay question composed of a 10:15 AO1:AO3 split. Part 2, with the land-based torts, seemed less popular but the cohort was too small to draw any conclusions from this.

	OCR support	You will need to refer to the question paper and mark scheme provided with this report or available on the OCR Interchange site.
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Question 5

- This question was written to fit in with the traditional Salmond test. There were obvious clues to indicate: a) there was a tort – candidates were told Amir was negligent; b) that the traditional tests of employment would provide the resolution to Amir's employment status - employer deducts tax and NI; and c) Amir was doing an authorised act in an unauthorised way (Century Insurance).
- For this reason, there was no need to apply any of the Lister approach tests although they were given where supported with logical reasoning.
- For clarity in terms of current practice – where a scenario involves an unintentional tort, candidates should use the traditional Salmond test which has never been overruled and remains easy and conclusive to apply. Where the scenario involves an intentional tort, the Lister approach should be used.
- Alternative approaches will be given where they are supported by logical reasoning. Although there is more flexibility around the 'akin to employment' test (see Cox which was not an intentional tort), the 'close connection' test has not thus far been applied to an unintentional tort and may prove difficult to justify when used outside its current context.

Question 6

- This scenario was based very firmly on the Tomlinson case which is a leading case on the 1984 Act. There is a fundamental issue with OLA questions that requires the student to accurately identify the appropriate Act based on the claimant's status as a lawful or non-lawful visitor. Otherwise, they will approach the duty owed based entirely on the wrong Act.
- Some candidates seem to be struggling with the distinction between a sign which, if disregarded, will make someone a trespasser, a sign which warns of a danger and a sign that does both. In this instance, just like Tomlinson, the sign said 'no swimming' and Layla ignored it – hence she became a trespasser and the duty owed to her by the Council is dependent on the application of the test in s.1(3).

- Warning signs will either (s.1(5) 84 Act) potentially discharge the occupier of liability or (s.2(4)(a) 57 Act) only be relied on to discharge a duty to the extent they are capable of making the visitor safe. Furthermore, there is no duty to warn of an obvious danger – as in this case.
- Despite the clues and the close similarity to Tomlinson, very few candidates worked out that Layla was a trespasser and therefore they did not identify the applicability of the s.1(3) tests to establish whether the Council owed a duty to her.

Question 7 and Question 10

- The concept of fault based liability is fundamental to the law of negligence. To answer the question well, candidates needed to consider the good and bad aspects of basing liability in negligence on the requirement of proving fault.
- There were a number of possible approaches. These include looking at the fairness or unfairness of case outcomes in cases where the defendant did or did not fall below the required standard of care (i.e. what makes D 'at fault'); looking at the possible advantages and disadvantages of the current (fault based) system of negligence especially in relation to its objectives (e.g. deterrence, loss allocation, policy aims and accountability); the fairness/unfairness of a system based on an objective standard and looking at comparisons to alternative systems.

	Misconception	There seems to be a misconception that the essay questions require little or no AO1 and are purely or mostly AO3 discussion. This is not the case. In a 25 mark question (or 20 marks in the new H418 specification), the marks are split 10:15 AO1:AO3 (or 8:12 in H418). Many candidates in this session and in June 2019 and October 2020, gave little or no AO1 – seemingly deliberately. Candidates need to remember there are a significant proportion of the marks available for AO1.
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Question 8

- This question was the first occasion where a nuisance question featured both private and public nuisance.
- Many candidates attempted to answer both Sam and Kareem's potential claims as both being private nuisance.
- Given Sam's age and status as a child in his father's house, he clearly lacked the proprietary interest in the property to help him to bring a claim in private nuisance.
- There were also clear clues in the question to indicate that the issue was affecting a class of people (the whole village) but affecting Sam above and beyond the rest of the class and hence an instance of public nuisance.
- Candidates seemed unaware of the fact that where there is physical harm to the defendant's property (in this case manure covering Kareem's cottage), there is a *prima facie* nuisance (see *Halsey v Esso*) and, therefore, no need to consider the factors of unreasonableness such as duration and locality. This made the private nuisance a much shorter question to justify the fact that there was a second form of nuisance in the same question.
- Other important issues candidates should be aware of include the fact that public nuisance doesn't require a proprietary interest in the property concerned and it covers personal injury and property damage where private nuisance only covers damage to property. Furthermore, social utility or benefit is not a defence in nuisance. While it may not be irrelevant in determining whether a nuisance has been committed, it is not a defence once the nuisance has been proved.

	AfL	In any problem question on any topic, candidates should not speculate about possible defences if there is no clear evidence for them in the facts. Here in Question 8, for example, some candidates attempted to apply prescription based on Tom's acquired right to spread manure. Not only were there no facts to support this in the scenario, there were indicators against it being long-term (it was a new super-spreader). If the given facts do not indicate a possible defence, there will be no credit for unsupported and speculative defences.
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Question 9

- Probably the most well-answered question. candidates seem to have a clear view of the requirements of the tort and navigated through the given facts very well. Most of them correctly picked up on the act of a stranger defence and applied this correctly as well.
- There does seem to be a little persistent misunderstanding of 'non-natural use' with some candidates looking for the thing that is accumulated itself to be 'non-natural' rather than the use of the land.
- As with private nuisance, this is a land tort and it is only possible to recover for the damage to property (Jane's tyres and shoes) not the personal injury (Jane's foot).

Themes in candidate responses

- Timing – there was clear evidence of candidates spending disproportionate amounts of time on certain questions to the detriment of the other questions. Broadly speaking, the time available divided by the marks available (taking a little reading and thinking time on the problem questions into account), should be a good guide.
- Exhaustive AO1 in problem questions – this is a persistent and detrimental practice. Candidates will often write everything they know about a topic regardless of whether it is relevant to the question. In this paper it could be seen in the OLA question where both Acts were exhaustively covered and in nuisance where issues such as location, duration, sensitivity and malice were covered but irrelevant to the actual question.

	AfL	Including cases While there is no requirement that a particular or specific number of cases are required for a certain level, the mark scheme makes it clear that citation of at least some relevant case law is an AO1 requirement: Level 2 'some' Level 3 'good' Level 4 'excellent' A comprehensive account of the AO1 of a topic with no citation of relevant case law may not achieve a given level for this reason.
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- 'Explaining' not simply 'stating' the law – the extent to which a candidate 'explains' the law is the most common discriminator between the bottom and top of any AO1 band.
- Making reasoned links between the given facts and the relevant legal principles – it is not sufficient to leave application of legal principles as implied or to simply and baldly state 'so this applies to X'. candidates need to show 'why' the principle applies.

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