

GCE

Law

H015/02: Law making and the law of tort

Advanced Subsidiary GCE

Mark Scheme for November 2020

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This mark scheme is published as an aid to teachers and students, to indicate the requirements of the examination. It shows the basis on which marks were awarded by examiners. It does not indicate the details of the discussions which took place at an examiners' meeting before marking commenced.

All examiners are instructed that alternative correct answers and unexpected approaches in candidates' scripts must be given marks that fairly reflect the relevant knowledge and skills demonstrated.

Mark schemes should be read in conjunction with the published question papers and the report on the examination.

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Annotations

| Annotation | Meaning |
|---|---|
|  | Not Relevant or no response or response achieves no credit |
|  | Not correct |
|  | Point |
|  | Developed point |
|  | Developed point extended |
|  | Link to the source |
|  | Feature |
|  | level 1 |
|  | level 2 |
|  | level 3 |
|  | level 4 |
|  | Case |
|  | Correct |
|  | Bald case/Definition |
| | Undeveloped case The highlight tool may also be used to draw attention to a word or phrase which means that the statement or reasoning is inaccurate |

Subject Specific Marking Instructions

| | Answer | Marks | Guidance |
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| 1 | <p>Describe the way that pressure groups and private members' bills influence parliamentary law making.</p> <p>Answers may include the following:</p> <p>Pressure groups:</p> <ul style="list-style-type: none"> • These are bodies which exist to apply pressure to bring about the introduction of new laws or the amendment/repeal of existing laws • Pressure groups serve as an example of the government taking note of public opinion and sometimes bowing to it • Some pressure groups have a high profile but, arguably, have little success in changing the law (Fathers for Justice) whereas some claim a good deal of credit for changes brought about following their actions (Stonewall who would claim they have influenced much legislation on homosexuality, equality and civil marriage including the repeal of Section 28 and the equalising of the age of homosexual consent under the Sexual Offences (Amendment) Act 2000) • Other examples include the League Against Cruel Sports and the Countryside Alliance who had conflicting interests around the Hunting Act 2004 • Other examples include Liberty and Justice who campaign for or against changes that might affect human rights • Also accept sectional interest groups such as the TUC, CBI, RAC, Electoral Reform Society, RSPCA etc <p>Private members (of Parliament):</p> <ul style="list-style-type: none"> • A member of the House of Commons or the House of Lords who is not a government minister can introduce a Public Bill • Introduced through a ballot, presentation or the ten-minute rule • A Private Member's Bill can be introduced in either House and must go through the same stages as a normal Bill | <p>10 AO1</p> | <p>Use Levels of Response criteria</p> <p>Level 4 (9–10 marks) Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant examples of both pressure groups and private members' bills.</p> <p>Level 3 (6–8 marks) Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant examples of pressure groups and private members' bills.</p> <p>Level 2 (3–5 marks) Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. There will be some citation of either pressure groups and/or private members' bills.</p> <p>Level 1 (1–2 marks) Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of either pressure groups or private members' bills as influences are limited.</p> <p>Level 0 (0 marks) No response or no response worthy of credit.</p> |

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| | <ul style="list-style-type: none">• Proposals tend to be non-party political and may be pragmatic, moral or of concern to an MP's constituency• Sometimes the proposal may not succeed as a Bill in its own right but it may influence another Government Bill. An example was the Stalking Bill 1996 introduced by Janet Anderson which failed but became part of the Protection from Harassment Act 1997• Examples include: Michael Colvin and the Computer Misuse Act 1991, David Steel and the Abortion Act 1967, Stephen Pound and the Anti-Social Behaviour Act 2003 and Sidney Silverman and the Murder (Abolition of Death Penalty) Act 1965 <p>Credit any other relevant point(s).</p> | | To attain levels 3 and 4 candidates need to explain both influences. |
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| | Answer | Marks | Guidance |
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| 2 | <p>Explain and illustrate how statutes are interpreted using the literal rule.</p> <p>Answers may include the following:</p> <p>Explain that the literal rule involves giving the words their ‘plain, ordinary, grammatical and literal meaning’ as it would appear in a dictionary</p> <ul style="list-style-type: none"> • Identify that the literal rule involves the judge applying the literal rule even if it results in absurdity – Lord Esher in <i>R v Judge of the City of London</i> [1892] • Describe how the rule can rely on the use of a dictionary – particularly one which is relevant to the time of the Act • Describe the way the rule can lead to absurd, harsh or ridiculous outcomes • Describe the way that cases decided under this rule can lead to amending legislation where a loophole has been exposed (<i>Fisher v Bell</i> [1961]) • Describe the historical dominance of the literal rule - developed in the 19th century and became the main rule until the recent advent of a more purposive approach • Describe how this rule respects parliamentary supremacy • Describe the Law Commission’s report of 1969 which was critical of the rule • Describe the way that the rule demands an impossible level of accurate legislative draftsmanship <p>Use cases to illustrate its use: <i>Fisher v Bell</i> [1961], <i>Whiteley v Chappell</i> [1868], <i>LNER v Berriman</i> [1946], <i>Cutter v Eagle Star</i> [1998], <i>Cheeseman v DPP</i> [1990], <i>IRC v Hinchey</i> [1960], <i>R v Harris</i> [1836], <i>R v Munks</i> [1964], <i>R v Goodwin</i> [2005], <i>R v Maginnis</i> [1987], <i>Bromley LBC v GLC</i> [1983], <i>Vacher v London Society of Compositors</i> [1913]</p> | <p>10 AO1</p> | <p>Use Levels of Response criteria</p> <p>Level 4 (9–10 marks) Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant case law. A clear definition of the literal rule and case examples will need to be explained.</p> <p>Level 3 (6–8 marks) Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant case law. An adequate definition of the literal rule and case examples will need to be explained.</p> <p>Level 2 (3–5 marks) Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. There will be some reference to case law. A basic definition of the literal rule and limited examples or illustrations will need to be explained.</p> <p>Level 1 (1–2 marks) Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of case law is limited.</p> <p>Level 0 (0 marks) No response or no response worthy of credit.</p> |

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| | Credit any other relevant point(s). | | |
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| <p>3</p> | <p>Describe both the <i>ratio decidendi</i> and the <i>obiter dicta</i> of a judgment in the system of precedent.</p> <p>Answers may include the following:</p> <ul style="list-style-type: none"> • Precedent operates because the legal reasons for past decisions are recorded in judgments • These judgments are written in continuous prose but can be divided into two parts - the <i>ratio decidendi</i> and the <i>obiter dicta</i> • There may be multiple separate judgments in an appeal case <p>Ratio decidendi:</p> <ul style="list-style-type: none"> • The <i>ratio decidendi</i> (reason for deciding) is the part of the judgment in which the judge explains the principles of law upon which their decision is based • Sir Rupert Cross defined the <i>ratio decidendi</i> as ‘any rule expressly or impliedly treated by the judge as a necessary step in reaching his conclusion’ • This is what creates a precedent for judges to follow in future similar cases • Judgments made by a higher court are binding on all courts beneath them • Examples of well-known <i>ratios</i> include: <i>Donoghue v Stevenson</i> [1932], <i>Carlill v Carbolic Smoke Ball Co Ltd</i> [1892] & <i>R v Dudley & Stevens</i> [1884] <p>Obiter dicta:</p> <ul style="list-style-type: none"> • The judgment will also include other material known as <i>obiter dicta</i> (other things said). For example, a judge may comment on what their decision would have been if the facts of the case had been different • <i>Obiter dicta</i> are not binding in future cases • <i>Obiter dicta</i> may be a form of persuasive precedent • It is sometimes difficult to separate the <i>ratio decidendi</i> from the <i>obiter dicta</i> • An example of <i>obiter dicta</i> which became important in a subsequent case is <i>R v Howe</i> [1987] which was followed as a | <p>10 AO1</p> | <p>Use Levels of Response criteria</p> <p>Level 4 (9–10 marks) Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. A clear definition of both the <i>ratio</i> and <i>obiter</i> of a judgment and case examples will need to be explained.</p> <p>Level 3 (6–8 marks) Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. An adequate definition of both the <i>ratio</i> and <i>obiter</i> of a judgment and case examples will need to be explained.</p> <p>Level 2 (3–5 marks) Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. A basic definition of either the <i>ratio</i> or <i>obiter</i> of a judgment and limited examples or illustrations will need to be explained.</p> <p>Level 1 (1–2 marks) Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of case law is limited.</p> <p>Level 0 (0 marks) No response or no response worthy of credit.</p> <p>To attain levels 3 and 4 candidates need to explain both the <i>ratio</i> and <i>obiter</i>.</p> |
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| | <p>persuasive precedent in <i>R v Gotts</i> [1992]</p> <p>Credit any other relevant point(s).</p> | | |
| <p>Answer</p> | <p>Marks</p> | <p>Guidance</p> | |

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| <p>4</p> | <p>Discuss the disadvantages of the system of precedent.</p> <p>Candidates may include the following points:</p> <ul style="list-style-type: none"> • Rigidity: Precedent can be inflexible with bad decisions being perpetuated – especially if it takes a long time for suitable cases to get to the senior courts that can change the law (<i>R v R</i> [1991]). Issues such as leave to appeal, the small workload of the UKSC and resources also inhibit development • Volume and complexity: Thousands of reported cases make it difficult to identify and locate relevant case law. The judgments can be very long with no clear distinction between <i>obiter</i> and <i>ratio</i> (<i>Dodd’s Case</i> [1973]) making it difficult to identify key principles • Illogical distinctions: Practices such as ‘distinguishing’ lead to ‘hair-splitting’ which, in turn, can lead to certain areas of law becoming over-complex. The minor differences between some cases can be so small as to make the distinction appear illogical • Lack of responsiveness: Courts can only deal with cases that are brought before them. Unless Parliament legislate, there is nothing the judges can do to reform the law – their hands are tied until suitable cases come along • Unpredictable & unreliable: The result of a case can be uncertain until the appeal process is exhausted. Also, multiple judges (in appeal cases) reaching the same decisions by different lines of reasoning undermines confidence • Unjust: Some argue that every case is different and should be argued from first principles rather than applying reasoning from a past case which is only similar • Instant impact without retrospective effect: Can result in injustice (especially in criminal cases with custodial sentences) where the offender’s action was not unlawful at the time of commission • Undue influence: A single judge (or a small number) who hear many cases/appeals of the same type can have a disproportionate role in the development of the law in that area and individual biases and prejudices are not balanced out. There is also evidence that judges try to manipulate precedents to achieve | <p>10 AO3</p> | <p>Use Levels of Response criteria</p> <p>Level 4 (9–10 marks) Excellent analysis and evaluation of a wide range of legal concepts. The response is wide ranging and has a well sustained focus on the question. The key points are fully discussed and fully developed.</p> <p>Level 3 (6–8 marks) Good analysis and evaluation of a range of legal concepts. The response has a mainly consistent focus on the question. Most of the key points are well discussed and well developed.</p> <p>Level 2 (3–5 marks) Basic analysis and evaluation of legal concepts. The response is partially focused on the question. Some of the key points are discussed and partially developed.</p> <p>Level 1 (1–2 marks) Limited analysis of legal concepts. The response has limited focus on the question. Discussion of any key points is minimal.</p> <p>Level 0 (0 marks) No response or no response worthy of credit.</p> |
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| | <p>particular outcomes (Lord Denning in <i>Miller v Jackson</i> [1977])</p> <ul style="list-style-type: none"> • Democracy and judicial law making: There is a view that judges can and do use precedent to ‘make law’ (e.g. <i>R v R</i> [1991]) and that they do not have the mandate to do so because, according to the theories of separation of powers and supremacy of Parliament, only Parliament should make law. However, many judges argue that they are simply adapting existing legal rules to fit changing social conditions (so-called declaratory theory) <p>Credit any other relevant point(s).</p> | | |
| Answer | Marks | Guidance | |

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| <p>5</p> | <p>Explain the way in which a claim is established under the Occupiers' Liability Act 1984.</p> <p>Answers may include the following:</p> <ul style="list-style-type: none"> • The claim will be made by someone other than a visitor – a trespasser • Trespass is a strict liability tort • A trespasser is a person who enters without an invitation • s.1 OLA 1984 sets out the duty of the occupier to the trespasser • The trespasser will have to show that the occupier owes them a duty of care • s.1(3) states that an occupier does not owe a duty of care to a trespasser unless: <ul style="list-style-type: none"> (a) The occupier is aware of the danger or has reasonable grounds to believe that it exists - <i>Rhind v Astbury Water Park Ltd</i> [2004] (b) The occupier knows or has reasonable grounds to believe that someone else is in the vicinity of the danger or may come into the vicinity of the danger - <i>Swain v Puri</i> [1996], <i>Donoghue v Folkestone Properties</i> [2003] (c) The danger is one which, in all the circumstances, the occupier may reasonably be expected to offer some protection against - <i>Tomlinson v Congleton Borough Council</i> [2004], <i>Platt v Liverpool City Council</i> [1997] • s.1(4) states that the duty is to take such care as is reasonable in all the circumstances to see that the trespasser does not suffer injury on the premises by reason of the danger concerned. The claimant will need to show that: <ul style="list-style-type: none"> ○ The claim arises out of the dangerous state of the premises - <i>Keown v Coventry NHS Trust</i> [2005] ○ That the defendant was aware of the danger • The occupier may be able to discharge their duty by: <ul style="list-style-type: none"> ○ using clear and visible warning signs bringing the danger to the attention of the trespasser | <p>10 AO1</p> | <p>Use Levels of Response criteria</p> <p>Level 4 (9–10 marks) Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant case law.</p> <p>Level 3 (6–8 marks) Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant case law.</p> <p>Level 2 (3–5 marks) Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. There will be some reference to case law.</p> <p>Level 1 (1–2 marks) Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of case law is limited.</p> <p>Level 0 (0 marks) No response or no response worthy of credit.</p> |
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| | <ul style="list-style-type: none">○ deterring or discouraging trespassers for example by fences and secured entrances• s.1(6) states that the occupier does not owe a duty where the risk is willingly accepted by the trespasser. <p>Credit any other relevant point(s).</p> | | |
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| 6 | <p>Advise whether or not Carl will be able to make a successful claim under the Occupiers' Liability Act 1957.</p> <p>Answers may include the following:</p> <ul style="list-style-type: none"> • 'Fishy Pets' will be considered the defendant in this case as they are the occupiers. They will have control of the premises - the shop • The shop will be considered premises • 'Fishy Pets' owe a common duty of care to all lawful visitors • Carl will be a lawful visitor to the shop • 'Fishy Pets' are required to keep all visitors reasonably safe for the purpose for which they entered • 'Fishy Pets' owe a higher duty of care to Carl as he is a child • 'Fishy Pets' will try and discharge their duty as they had put a notice on the fish tank about the sharp spikes • The allurements of the colourful, unusual fish and the nature of the warning is unlikely to be enough to discharge liability • The warning may suffice for an adult but not a child • 'Fishy Pets' may claim that no sensible parent would allow their child to wander off. However, parents should be able to assume that the shop was safe for the visit • 'Fishy Pets' will likely be liable for the personal injuries suffered by Carl. <p>Credit any other relevant point(s).</p> | <p>10 AO2 1a/1b</p> | <p>Use Levels of Response criteria</p> <p>Level 4 (9–10 marks) Excellent application of legal rules to a given scenario. Excellent presentation of a legal argument which is accurate, fully developed and detailed. Fully appropriate legal terminology is used.</p> <p>Level 3 (6–8 marks) Good application of legal rules to a given scenario. Good presentation of a legal argument which is detailed but not fully developed in places. Appropriate legal terminology is used.</p> <p>Level 2 (3–5 marks) Basic application of legal rules to a given scenario. Basic presentation of a legal argument which may lack detail in places and is partially developed. Some appropriate legal terminology is used.</p> <p>Level 1 (1–2 marks) Limited application of legal rules to a given scenario. Limited presentation of a legal argument which has minimal detail and is unstructured and/or unclear. Minimal legal terminology is used.</p> <p>Level 0 (0 marks) No response or no response worthy of credit.</p> |

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| 7 | <p>Advise whether or not the paramedic will be liable in negligence for the brain damage suffered by Carl.</p> <p>Answers may include the following:</p> <ul style="list-style-type: none"> • Carl will need to show that the paramedic owed him a duty of care • The relationship between a paramedic and patient is a recognised duty situation • The paramedic owed Carl a duty of care • Carl will need to show that the paramedic breached her duty • The paramedic fell below the standard of the reasonable paramedic by ignoring a head injury in a child and failing to fully assess the situation • There is nothing to suggest that it was such an emergency that it would be reasonable for the paramedic to forgo the usual medical assessment of the situation • Under the Bolam test the paramedic has not acted in accordance with reasonable, accepted practice by failing to assess the head injury properly • The paramedic is the factual cause of the brain damage • 'But for' the paramedic's negligence, Carl would not have suffered brain damage • There is no break in the chain of causation • The damage is reasonably foreseeable and not too remote • The paramedic will be liable to Carl in negligence. <p>Credit any other relevant point(s).</p> | <p>10 AO2 1a/1b</p> | <p>Use Levels of Response criteria</p> <p>Level 4 (9–10 marks) Excellent application of legal rules to a given scenario. Excellent presentation of a legal argument which is accurate, fully developed and detailed. Fully appropriate legal terminology is used.</p> <p>Level 3 (6–8 marks) Good application of legal rules to a given scenario. Good presentation of a legal argument which is detailed but not fully developed in places. Appropriate legal terminology is used.</p> <p>Level 2 (3–5 marks) Basic application of legal rules to a given scenario. Basic presentation of a legal argument which may lack detail in places and is partially developed. Some appropriate legal terminology is used.</p> <p>Level 1 (1–2 marks) Limited application of legal rules to a given scenario. Limited presentation of a legal argument which has minimal detail and is unstructured and/or unclear. Minimal legal terminology is used.</p> <p>Level 0 (0 marks) No response or no response worthy of credit.</p> |

| | Answer | Marks | Guidance |
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| 8 | <p>Discuss the extent to which the factors taken into consideration when deciding whether there is a breach of duty are fair and provide justice for both parties.</p> <p>Candidates may include the following points:</p> <ul style="list-style-type: none"> Justice is provided as the question as to whether the defendant has fallen below the standard is a question of fact. This is fair as the fact will be determined by reference to all the circumstances of the individual case - <i>Tomlinson v Congleton BC</i> [2004], <i>The Wagon Mound (No 2)</i> [1967] Justice may not be provided as the 'reasonable man' test is an objective test and a judicial concept. Over the years there have been many attempts to characterise the 'reasonable man' The 'reasonable man' test promotes fairness suggesting that it provides justice. It applies the same standard to all those carrying out the same task. However, this can be said to be unfair as negligence is conditional upon fault and there are times when the test means that a breach is found without genuine fault - <i>Blyth v Birmingham Waterworks</i> [1865], <i>Glasgow Corporation v Muir</i> [1943] No account is taken of the actual experience of the defendant, this may appear unfair. For example, the same standard of care is imposed on a learner driver as that of the most experienced driver - <i>Nettleship v Weston</i> [1971]. This might be considered unfair on the defendant A claimant may feel that justice is not provided as the courts consider both the interests of the parties and the interests of society in general. They consider how the decision may have an impact in the future. As a result, a claim can be defeated by policy considerations. For example, the floodgates argument and whether particular types of action should be discouraged (Compensation Act 2006) Defendants may argue that some factors are not fair and do not provide justice. Factors such as insurance and the issue of loss allocation are considered | <p>10 AO3 1a</p> | <p>Use Levels of Response criteria</p> <p>Level 4 (9–10 marks) Excellent analysis and evaluation of a wide range of legal rules and principles. The response is wide ranging and has a well sustained focus on the question. The key points are fully discussed and fully developed to reach a valid conclusion. There is a well-developed line of reasoning which is clear and logically structured. The information presented is relevant and substantiated.</p> <p>Level 3 (6–8 marks) Good analysis and evaluation of a range of legal rules and principles. The response has a mainly consistent focus on the question. Most of the key points are well discussed and well developed to reach a valid conclusion. There is a line of reasoning presented with some structure. The information presented is in the most-part relevant and supported by some evidence.</p> <p>Level 2 (3–5 marks) Basic analysis and evaluation of legal rules and principles. The response is partially focused on the question. Some of the key points are discussed and partially developed to reach a basic conclusion. The information has some relevance and is presented with a basic structure. The information is supported by basic evidence.</p> <p>Level 1 (1–2 marks) Limited analysis of legal rules and/or principles. The response has limited focus on the question. Discussion of any key points is minimal. The information is limited and communicated in an unstructured way. The information is supported by limited evidence and the relationship to the evidence may not be clear.</p> |

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| <ul style="list-style-type: none"> • Justice is said to be provided when children are involved. The courts are willing to recognise that a child's age needs to be considered when establishing whether a child recognises the danger. The standard of care in these situations is still an objective one but it is scaled to the age of those involved. This stops a child being measured against a standard of care that they are unable to reach due to age - <i>Orchard v Lee</i> [2009], <i>Mullins v Richards</i> [1998] • Justice is provided as the more likely/foreseeable the damage is, the greater the likelihood that the courts will find the defendants liable. Defendants are expected to guard against causing damage and it will be a breach of their duty if they do not do so - <i>Bolton v Stone</i> [1951] • The greater the potential for serious injury, the more likely the defendants will be found to have breached their duty if they did not guard against it. This provides justice for the claimant. The law demands that society guard against the risk of doing harm to others. The more serious the risk, the greater the precautions required. However, it is fair that if damage is very unlikely and/or the defendant has taken reasonable steps to ensure safety, they will not be held to have breached their duty of care - <i>Paris v Stepney BC</i> [1950], <i>Roberts v Ramsbottom</i> [1980] • Justice is provided to the defendant when addressing the social utility/value of the activity. There are situations, for example involving emergency services, where the standard of care might be lower. If it can be shown that, given the situation, the defendant behaved like a reasonable man, they will not be said to have breached their duty if they did not follow all safety precautions. The social utility of their conduct will outweigh the need to take precautions - <i>Watt v Hertfordshire CC</i> [1954], <i>Scout Association v Barnes</i> [2010] • Justice is achieved as courts will not allow a defendant to simply argue that they followed common practice. Courts recognise that 'common' practice does not necessarily mean 'best' practice and practice changes over time. However, it is recognised that in many situations justice is not provided as arguing common practice allows professions/industries to set their own acceptable standards which can result in claims being easily defeated - | <p>Level 0 (0 marks) No response or no response worthy of credit.</p> |
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| | <p><i>Wilson v Governors Sacred Heart Roman Catholic Primary School</i> [1997], <i>Thompson v Smiths Ship Repairers (North Shields) Ltd</i> [1984], <i>Bolam v Friern Hospital</i> [1957], <i>Bolitho v City and Hackney HA</i> [1996]</p> <p>Credit any other relevant point(s).</p> | | |
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