

**FHS JURISPRUDENCE**  
**DIPLOMA IN LEGAL STUDIES**  
**(MAGISTER JURIS)**

**Examiners' Report 2009**

**.PART ONE**

**A. Statistics**

**1. Numbers and percentages in each class/category**

The number of candidates taking the examinations was as follows:

	<b>2009</b>	<b>2008</b>	<b>2007</b>	<b>2006</b>
FHS Course 1	205	205	201	229
FHS Course 2	27	33	31	30
Diploma	17	16	21	18
Magister Juris	34	34	38	43

**Classifications: FHS Course 1 and 2 combined**

<b>Class</b>	<b>2009</b>		<b>2008</b>		<b>2007</b>		<b>2006</b>	
	<b>No</b>	<b>%</b>	<b>No</b>	<b>%</b>	<b>No</b>	<b>%</b>	<b>No</b>	<b>%</b>
I	44	18.96	41	17.23	40	17.24	43	16.60
II.i	164	70.69	172	72.27	176	75.86	192	74.13
II.ii	23	9.91	18	7.56	14	6.03	21	8.11
III	0	0	6	2.52	1	0.43	2	0.77
Pass	0	0	0	0	0	0	0	0
Fail	1	0.43	1	0.42	1	0.43	0	0
Honours *	0	0	0	0	0	0	1	0.39
<b>Totals</b>	232		238		232		259	

\* 'declared to have deserved Honours'

**Classifications: FHS Course 2 (Law with Law Studies in Europe)**

<b>Class</b>	<b>2009</b>		<b>2008</b>		<b>2007</b>		<b>2006</b>	
	<b>No</b>	<b>%</b>	<b>No</b>	<b>%</b>	<b>No</b>	<b>%</b>	<b>No</b>	<b>%</b>
I	10	37	7	21.21	9	29.03	10	33.33
II.i	17	63	25	75.76	21	67.74	18	60
II.ii	0		1	3.03	1	3.22	1	3.33
III	0		0		0		1	3.30
<b>Totals</b>	27		33		31		30	

## **Results: Diploma in Legal Studies**

6 candidates (35.3%) were awarded the Diploma with Distinction. 11 candidates (64.7%) passed.

### **2. Vivas**

Vivas are no longer used in the Final Honour School. Vivas can be held in the Diploma in Legal Studies but none was held this year.

### **3. Marking of scripts**

Double marking of scripts is not routinely operated. 719 out of 2,139 (2,088 FHS plus 51 DLS) scripts (33.61%) were in fact second marked. This total compares with 33.06% in 2008, 28.73% in 2007 and 35.15% in 2006. Third marking may be used in exceptional cases (e.g. medical cases) and 18 FHS scripts were read a third time. Further details about second marking are given in Part Two (A.1.).

## **B. New examining methods and procedures**

There were no significant changes to the examining methods this year. The procedures for ensuring the accuracy of marking were the same as in 2008, 2007 and 2006. As in 2008, second marking of all scripts with marks ending in 9 took place before the first marks meeting; and all scripts identified on first marking as short weight were also second marked before the first marks meeting. This again facilitated a reduction in the number of scripts which had to be second marked in the short time between the two marks meetings.

The procedures for ensuring the accurate marking of scripts took the same two forms as in the last three years. That is, first, during the first marking process checks were made to ensure that markers were adopting similar standards. In larger subjects, this took the form of a statistical survey of marks and distribution between classes. Where any significant discrepancy was found, scripts were second marked to establish whether similar marking standards were in fact being applied. In smaller subjects, a proportion of scripts chosen at random were second marked with the same objective. The purpose of making checks at this stage is to ensure that first markers can adjust their marks (for all scripts) if they are out of line with other markers.

Second, scripts were automatically second marked after the first marks meeting if they were out of line with other marks achieved by the candidate in question. The test applied was whether the script was 4 or more marks below the average for the scripts of that candidate. However, as in 2008 but not in previous years, the final mark awarded by the examiners in such cases was not (except in exceptional cases) to be below the mark awarded by the first marker (i.e., the second marking of scripts identified as 4 or more marks below the average for the candidate's other scripts could normally result in the first mark either being confirmed or raised, but not lowered).

As in previous years, all scripts with marks of 49, 59, 69 were second marked and also all scripts with marks below 40. In addition, borderline scripts with marks ending in 8 or 7 were second marked if a higher mark in that paper might affect the candidate's overall result.

### **C. Possible changes to examining methods, procedures and conventions**

1. Setting and checking the paper and marking are the responsibility of a team of up to four members (larger subjects) and up to three members (smaller subjects). The leader of each team has considerable additional responsibility to ensure that procedures are carried out and deadlines met. These procedures worked very smoothly, and no changes appear to be required.
2. The examiners applied the classification and results conventions as previously agreed by the Law Faculty Board and notified to candidates. As determined by the Law Faculty Board, and notified to the students affected, a new convention was applied for the first time this year for the award of Second Class Honours, Division 1. The new convention requires 6 marks of 60 or above, and no more than one mark below 50 (which must not be below 40), rather than, as hitherto, 5 marks of 60 or above, and no more than one mark below 50 (which must not be below 40). Further detail is provided immediately below of the effect of the new convention and of the way in which it was applied by the examiners.

### **D. Examination Conventions**

These are detailed in paragraph 10 of the Notice to Candidates (Appendix 2 to this report).

This year there was one significant change to the conventions:

In the FHS, a new convention was applied for the first time for the award of Second Class Honours, Division 1, requiring 6 marks of 60 or above, and no more than one mark below 50 (which must not be below 40), rather than, as hitherto, 5 marks of 60 or above, and no more than one mark below 50 (which must not be below 40).

As the second table on the first page of this report shows, the proportion of Second Class Honours, Division 2 increased this year to 9.91% (from 7.56% in 2008, 6.03% in 2007 and 8.11 % in 2006). The proportion of Second Class Honours, Division 1 decreased this year to 70.69% (from 72.27% in 2008, 75.86% in 2007 and 74.13% in 2006). The examiners considered that these changes were not out of line with their expectations before marking began.

The examiners paid particular attention to candidates with marks profiles close to the new borderline, i.e. those with 5 but not 6 marks of 60 or above. Following the first marks meeting the examiners ensured that existing marks of 59 of such candidates (which had already by that stage been marked twice) were marked for a third time. At the second marks meeting a small number of candidates had profiles including 5 marks of 60 or above together with at least one mark in another paper of 59 or 58. The examiners considered that they retained a general discretion over the application of the convention at this borderline (as elsewhere), but they did not exercise that discretion in any case this year (although in two cases medical certificates were taken into account in such circumstances: see further below at Part Two (A.5)). In reaching the decision to apply the convention according to its terms in all cases save those where there was a relevant medical certificate, the examiners took account particularly of the fact that the proportion of Second Class Honours, Division 2 candidates had not increased to an unexpected degree, and of the extensive remarking that they had ensured was undertaken at this borderline. They did not consider that any of the borderline profiles was sufficiently exceptional (because of its average mark, or the spread of marks, or for any other reason) to call for the exercise of the residual discretion. The operation of the new convention

resulted in 7 candidates being classified in Division 2 of the Second Class who, had they been classified under last year's conventions, would have been classified in Division 1. This effect and the future effects of the new convention are no doubt matters that the Law Faculty Board will wish to keep under review.

## **PART TWO**

### **A. General comments**

#### **1. Second marking**

The procedures for second marking were identified in Part One (B) above. The timetable for marking is tight and was reviewed by the Examinations Committee in 2005 which concluded that there was no scope for seeking alterations, as it is important that candidates have sufficient time before the start of the examination for revision and a later start date would create an unmanageable overlap with the BCL and MJur examinations. However, removing the second marking of all scripts ending in 9, and all short weight scripts, to the period before the first marks meeting (as in 2008) helped to mitigate the pressure of the second marking conducted between the two marks meetings.

#### *Resolving differences*

As last year, first and second markers were required to discuss their marks and, wherever possible, agree a mark. This worked well, with almost all scripts receiving an agreed mark (out of 719 scripts second marked). In the handful of instances where markers were unable to agree (in none of which cases was the disagreement greater than 3 marks) the examiners awarded the script the higher of the two marks. In some previous years there had been scripts on which the markers were unable to agree a mark which had then been third marked (5 in 2006; 3 in 2005). No such third marking was undertaken this year.

#### *Statistics on second marking and agreed marks*

As in the last two years, there were three separate grounds for second marking. Second marking was undertaken blind.

(i) *Checks to ensure consistency between markers.*

The scripts were chosen at random, though in some small optional subjects all scripts were second marked. Ethics papers were also second marked before the first marks meeting. In addition, this year, all scripts ending on 9 and potential short-weight scripts were marked before the first marks meeting, together with all scripts given a mark below 40 on first marking. In total, 336 (15.70%) scripts were second marked on this basis. In 2007, 2006 and 2005 these scripts excluded those marked on a borderline 9 mark and potential short-weight scripts, and so the figures for marking before the first marks meeting in those years (183 (8.51%) in 2007, 281 (11.77%) in 2006 and 261 (10.5%) in 2005) are not directly comparable with 2008 (when 410 (18.64%) were second marked on this basis) and 2009. This year there were 6 scripts with marks below 40 (1.78%) (compared with 10 (0.45%) in 2008).

(ii) *Scripts which had been marked 4 or more below the average mark for that candidate.*

228 scripts (10.65%) were second marked on this basis between first and second marks meetings (223 scripts (10.14%) in 2008, 224 scripts (10.41%) in

2007 and 272 scripts (11.4%) in 2006). A small number (16) identified as being 4 or more marks below the average but which might also, if raised, affect the candidates final overall result are also included in (iii) below.

(iii) *Scripts second marked because they were borderline.*

This year all scripts with marks ending in 9 had been second marked already before the first marks meeting, and the markers had determined whether the mark should be raised to the higher class. In reviewing candidates' marking profiles at their first marks meeting the examiners therefore identified as borderline those scripts with marks ending in 8 and 7 where, if the mark were raised, the candidate's overall final result might be affected. In order to decide the winners of the Wronker overall prizes, the Gibbs prizes (performance in Contract, Tort, Land Law and Trusts) and some individual subject prizes a small number of scripts with marks ending in 8 and 7 were second marked and are also included here.

<b>First Mark</b>	<b>Number of Scripts</b>	<b>Number agreed in Higher Class</b>	<b>% agreed in Higher Class</b>
68	89 (39)	11 (10)	13 (26)
67	79 (35)	13 (4)	16 (11)
58	72 (12)	17 (6)	23 (50)
57	47 (13)	10 (4)	21 (31)
48	6 (1)	3 (1)	50 (100)
47	0 (0)	0 (0)	0 (0)

For the purposes of comparison the figures for 2008 are given in brackets.

The overall success rate of borderline scripts ending in 8 and 7 reaching a higher class was 18.43% (25.00% in 2008, 23.08% in 2007 and 18.77% in 2006).

**2. Third marking**

There were no scripts third marked because of failure by markers to agree a mark. The examiners arranged for the third marking of 18 borderline scripts in the course of deciding on the classification of candidates, with particular attention paid to those affected by the new convention on the borderline between Division 2 and Division 1 of the Second Class (as described above in Part One (D)).

**3. Examiners' agreed marks**

The examiners considered and settled the marks of a number of scripts. In most cases this was because of short weight (see 8, below) or because of information in medical certificates.

#### **4. Examination schedule**

As in previous years, the Examination Schools were responsible for producing the timetable. An attempt was made to avoid candidates' having two papers on the same day. It was only in the second full week of the examination (when candidates took two optional subject papers) that two papers were timetabled for the same day. Without extending the examination period, it proved impossible to ensure that no candidate had two papers on the same day.

#### **5. Medical certificates, dyslexia/dyspraxia and special cases**

31 medical certificates were forwarded to the examiners (compared with 25 in 2008, 19 in 2007 and 24 in 2006). In addition, three candidates were certified as dyslexic or dyspraxic. Two candidates (one of whom missed a paper) suffered close family bereavements during the period of the examinations. One candidate missed a paper because of illness.

4 candidates wrote some or all of their papers in college (compared with 7 in 2008, 5 in 2007 and 11 in 2006). A further 6 candidates wrote some or all of their papers in a special room in the Examination Schools. 3 candidates had special arrangements in the examination room (e.g. water, dextrose sweets) because of medical conditions.

The following additional specific details have been requested by the Proctors. In the FHS 18 medical certificates and similar documents (from 7.76% of candidates) were forwarded to the examiners under sections 11.8 – 11.10 of the EPSC's General Regulations for the Conduct of University Examinations (see *Examination Regulations* 2008, page 34), and in 4 cases the candidate's final result was materially affected. No medical certificate was forwarded to the examiners in respect of DLS candidates.

#### **6. Materials in the Examination Room**

There were no problems with the provision of statutory materials. The list of statutory materials is included in Appendix 2.

Permission to use a bilingual dictionary had to be sought at the time when candidates submitted their examination entry forms (in Michaelmas Term) and late applications were not permitted. No problems were encountered with unauthorized dictionaries in the examination room.

Candidates are required to display their University card on their desk to enable their identity to be checked. Very few failed to bring their cards to each examination paper. Those who did so fail were required to undergo identity and handwriting checks carried out by the staff of the Examination Schools.

#### **7. Legibility**

Typing was requested from 16 candidates for a total of 51 scripts. This compares with 13 for 26 scripts in 2008; 13 for 35 scripts in 2007 and 23 for 50 scripts in 2006.

## **8. Short weight, breach of rubric, short answers and misunderstood questions**

No change was made to existing practice as to what to treat as short weight, although, as in 2008, this year's Notice to Candidates gave guidance (with worked examples) of the penalties which would normally be imposed for short-weight answers. A number of candidates still fell into the trap of answering only one part of a two-part question, or two parts of a three-part question, and their marks were reduced by the examiners in accordance with the published practice. The examiners also had cause to consider the proper approach to persistent short weight, both in the sense of more than one short weight answer in a single paper, and in the sense of short weight answers appearing in more than one paper.

In a change from past practice, this year all scripts identified by the first marker as short weight were second marked during the first marking process.

Guidance was again given to markers, as in 2008, about the treatment of misunderstood questions. The marker was instructed to consult the other marker(s) of the paper in order to discuss the appropriate mark for the question in the light of the particular misunderstanding, thus giving the markers the opportunity to consider as a matter of principle how serious the misunderstanding was (and so to ensure that similar misunderstandings would be treated in a similar way in marking). The markers would consider the published assessment standards to determine whether the particular misunderstanding merited, e.g., a third class mark or a lower second class mark.

## **9. Moral and Political Philosophy**

In 2009 the Law Faculty's new optional paper on Moral and Political Philosophy, which replaces the Ethics paper for Law candidates, was examined for the first time. The examiners are not aware of any difficulties caused by the introduction of this new paper, the examining of which appears to have gone smoothly.

## **10. The computerized database**

The computer software worked satisfactorily as regards the entry of marks and the production of mark sheets for consideration by the examiners at their two marks meetings. However, as in 2008, there was again difficulty in the production of college marksheets, and the examinations officer had to conduct a full manual check on the accuracy of every candidate's reported marks. This remains unsatisfactory. The existing software, which was described in last year's examiners' report as "now very old" is still being used, and we again urge the Faculty to give appropriate priority to the resolution of the difficulties inherent in the existing database, to remove an unnecessary burden which presently falls on the examinations officer. However, the examiners were confident in the light of the checks conducted by the examinations officer, that the reported classifications and marks, made available this year for the first time to candidates via OSS, were accurate.

## **11. External Examiners**

This year we had the valuable assistance of Professor R. Buckley of Reading University (for his second year) and Dr S Watterson of the London School of Economics (for his first year). Their active involvement and advice at all stages was extremely helpful and we are very grateful to them. The external examiners report to the Vice-Chancellor about their views of the examination process, and their reports are attached as Appendix 1.

## 12. Thanks

We can only repeat and re-emphasise what has been said by successive Boards of Examiners: that our examination could not have been conducted so smoothly without the efficient and tireless work of our examinations officer, Mrs. Julie Bass. Her contribution to the examinations process is invaluable; she anticipates and provides solutions for problems even before they arise. We are extremely grateful to her. We are also very grateful to Mark Freedland, Director of Examinations, who was available throughout to give advice and to assist with difficulties when they arose. In addition to the examiners, 60 colleagues were assessors, involved in setting and marking, and we owe our thanks to them all.

## B. Equal Opportunities issues and breakdown of the results by gender; ethnicity analysis

The gender breakdown for Course 1 was:

	2009				2008				2007				2006			
	Male		Female		Male		Female		Male		Female		Male		Female	
	No	%	No	%												
I	20	21	14	13	16	18	18	16	15	16	16	14	16	17	17	13
II.i	66	69	81	74	64	70	83	73	65	69	90	80	71	75	103	77
II.ii	9	9	14	13	6	7	11	10	9	10	4	4	7	7	13	10
III	0		0		5	5	1	1	0		1	1	0		1	1
Pass	0		0		0		0		0		0		0		0	
Fail	1		0		0		1	1	1	1	0		0		0	
Hons.	0		0		0		0		0		0		1	1	0	
<b>Total</b>	96		109		91		114		90		111		95		134	

The gender breakdown for Course 2 was:

	2009				2008				2007				2006			
	Male		Female		Male		Female		Male		Female		Male		Female	
	No	%	No	%												
I	5	62	5	26	4	33	3	14	2	14	7	41	4	31	6	35
II.i	3	37	14	74	8	67	17	81	11	79	10	59	7	54	11	65
II.ii	0		0		0		1	5	1	7	0		1	8	0	
III	0		0		0		0		0		0		1	8	0	
Pass	0		0		0		0		0		0		0		0	
Fail	0		0		0		0		0		0		0		0	
<b>Total</b>	8		19		12		21		14		17		13		17	

The gender breakdown for Course 1 and 2 combined was:

	2009				2008				2007				2006			
	Male		Female		Male		Female		Male		Female		Male		Female	
	No	%	No	%												
I	25	24	19	15	20	19	21	16	17	16	23	18	20	19	23	15
II.i	69	66	95	74	72	70	100	74	76	73	100	78	78	72	114	76
II.ii	9	9	14	11	6	6	12	9	10	10	4	2	8	7	13	9
III	0		0		5	5	1	1	0		1	1	1	1	1	1
Pass	0		0		0		0		0		0		0		0	
Fail	1		0		0		1	1	1	1	0		0		0	
Hons.	0		0		0		0		0		0		1	1	0	
<b>Total</b>	104		128		103		135		104		128		108		151	

The examiners were not asked to produce an ethnicity analysis of the results. No question of ethnicity is asked in the examination entry form.

### C. Detailed numbers taking subjects and their performance

#### 1. Numbers writing scripts in optional subjects: FHS Courses 1 and 2

	2009	2008	2007	2006
Roman Law (Delict)	6	2	3	1
Comparative Law of Contract	11	6	5	16
Criminal Justice and Penology	42	58	60	72
Public International Law	44	59	78	69
History of English Law	13	16	16	20
Ethics *	1	14	14	10
International Trade	8	20	21	26
Family Law	65	73	84	94
Company Law	34	28	26	45
Labour Law	39	48	65	61
Criminal Law	5	5	8	11
Principles of Commercial Law	16	28	31	50
Constitutional Law	5	5	8	10
Taxation Law	12	16	12	27
Environmental Law **	5	10	10	
Competition Law and Policy ***	36		5	
Copyright Trade Marks & Allied Rights **	19	32	19	

European Human Rights Law ****	21	39		
Personal Property **	16	8		
Copyright, Patents and Allied Rights ****	24	9		
Moral and Political Philosophy*****	35			
Commercial Leases*****	7			

- \* Not marked by FHS examiners
- \*\* Examined for the first time as a standard subject in 2007
- \*\*\* Examined for the first time as a standard subject in 2007, but not available in 2008
- \*\*\*\* Examined for the first time in 2008
- \*\*\*\*\* Examined for the first time in 2009

## 2. Numbers writing scripts in Diploma in Legal Studies

	2009	2008	2007
Contract	17	16	19
Tort	17	16	19
European Union Law (previous to 2009 EC Law)	5		5
Comparative Law of Contract	4	6	2
Company Law	3	2	3
Jurisprudence			5
Principles of Commercial Law			
Public International Law	1	1	4
Criminal law			2
Copyright, Trademarks and Allied Rights	1	2	2
Trusts	1		1
International Trade			1
Labour Law	1	2	
History of English Law		2	
Copyright, Patents and Allied Rights		1	
Constitutional Law	1		

### 3. MJur candidates taking FHS papers

	2009	2008	2007	2006
Jurisprudence		0	3	0
Contract	6	9	7	9
Tort		0	0	0
Land Law		1	0	0
Family Law		0	0	0
Comparative Law of Contract		1	0	0
Public International Law	5	0	4	4
European Community Law		5	5	4
International Trade		0	0	2
Company Law	6	14	9	10
Principles of Commercial Law		0	0	3
Constitutional Law		1	1	1
Trusts	1	3	2	3
Administrative Law	1	0	1	1
Labour Law		0	2	1
Criminal Law		0	1	1
Copyright, Trademarks and Allied Rights		0	2	
Ethics		0	1	

### 4. Percentage distribution of final marks by subject: FHS Courses 1 and 2

(figures are rounded. Zero means less than 0.5%. Blank space means no scores in range)

	75-79	71-74	70	68-69	65-67	60-64	58-59	50-57	48-49	40-47	39 or less	Nos. writing scripts
Jurisprudence	1	7	12	5	22	43	6	4				232
Contract		4	15	11	17	36	7	8		1		232
Tort		4	9	5	23	36	8	12	1	1		232
Land Law*	1	7	11	13	23	31	5	8		1	1	232
Trusts		3	9	5	22	41	6	11		1		232
Admin. Law*		6	15	6	23	38	6	6				232
Comparative Law of Contract				9	18	55	9			9		11
Crim. & Pen.		7	12	10	33	31	2	5				42
PIL		11	9	11	45	20			2			44
History of		23	8	8	46	8		8				13

English Law												
Ethics							100					1
International Trade		25	13	13		13	25	13				8
EU Law		4	13	6	23	39	8	6		1		232
Family Law		9	14	17	40	18	2					65
Labour Law		5	23	15	26	28		3				39
Company Law		3	18		35	26	3	15				34
Criminal Law					20	60		20				5
Principles of Commercial Law		6	25		25	25	6	13				16
Constitutional Law		20			20	20		40				5
Taxation		17	8	25	17	25				8		12
Roman Law (Delict)			33	33	17	17						6
Copyright, Trade Marks and Allied Rights			21	26	32	21						19
Environmental Law		20			40	40						5
Copyright, Patents and Allied Rights		4	8	25	42	21						24
European Human Rights Law		5	38	24	29			5				21
Personal Property		13	13	6	25	31	6			6		16
Moral & Political Philosophy		11	14	9	31	26		9				35
Commercial Leases		14	14	14	29	14		14				7
Competition Law & Policy		6	11	14	31	33	3	3				36

\*1 candidate entered for, but did not write, this paper

\*\* 2 candidates entered for, but did not write, this paper

## **D. Comments on papers and individual questions**

These appear in Appendix 3

R.A. Buckley (external)  
J. Dickson  
P. Eleftheriadis  
G. Lamond  
L. Lazarus  
M. Macnair  
E. Simpson (Chair)  
N.E. Stavropoulos  
S. Talmon  
S. Watterson (external)

Appendix 1: Report of External Examiners  
Appendix 2: Notice to Candidates (Examiners' Edict)  
Appendix 3: Reports on individual papers

# APPENDIX 1

## EXTERNAL EXAMINER'S REPORT ON FHS JURISPRUDENCE 2009

### Academic standards

I am satisfied that the standards required are appropriate. The levels of achievement required for each class are at least as demanding as those found elsewhere.

### Assessment processes

The administration of the examination by the Examinations Officer was excellent; and the careful preparation by the Chairman of the provisional results, and identification of borderline cases prior to the meetings of the board, ensured that the whole process was conducted with scrupulous fairness.

The thoroughness of the scrutiny of each candidate inspires confidence. The Board is provided with a sheet of the marks of each candidate, including those for every individual question on each script, and the identities of all the markers. Extensive re-marking takes place, all scripts 4% or more below a candidate's average are remarked as are all borderlines; and it is not unusual for critical borderline scripts to be remarked three times. This rigorous procedure ensures that the examination is conducted with as high a degree of accuracy as is in practice achievable.

### Standards of student performance

The standards achieved were high. It is notable that a change in the convention for achieving an Upper Second this year (requiring *six* marks of 60% or above out of nine papers instead of *five* as previously) produced fewer borderline cases than might have been expected, indicating that most Upper Second candidates are comfortably within the class (with a significant number of near misses for Firsts).

### Comparability of standards

In my opinion the standards for classification are comparable with those found elsewhere in leading universities. The relatively high proportion of candidates in the First and Upper Second classes almost certainly reflects the highly competitive entry rather than any undue generosity on the part of markers.

### Issues for supervising committees

Although no difficult issues arose in 2009, and extensive remarking reduces the number of difficult borderline cases in any event, the absence of any formal provision in the examination conventions for weakness in one or more papers to be compensated by strength elsewhere does have the potential to result in undue harshness. This is a tendency which is increased by the more demanding convention for achievement of an Upper Second (see above), especially when accompanied by a possible degree of uncertainty as to the circumstances in which the examiners may exercise their discretion to disapply the classification conventions in individual cases. It might be helpful for boards of examiners to be reminded (for the avoidance of doubt) that their discretion is exercisable on a candidate's marks profile alone (ie without any medical or other external evidence), and that it is therefore a legitimate use of the discretion to allow strength to compensate for weakness. The cases in which the discretion was exercised on this basis should then be recorded as precedents for future years (as indeed is the current practice) in order to promote

consistency: this is particularly important in Oxford in view of the frequency with which the composition of examination boards changes. It would not be easy to defend placing a candidate with, say, five First class marks and four Lower seconds in the Lower Second class (as the current convention would require if not disapplied); but less extreme cases can be envisaged across all the borderlines in which it could seem unjust to fail to give credit for strength.

Good practice

Use of precedents from previous years in the resolution of borderline cases is particularly desirable when examination conventions are general in nature, and the composition of examining boards changes frequently.

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July 2009

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21 August 2009

Dear Vice-Chancellor

**External Examiner's Report 2009:**

**Final Honours School in Jurisprudence/Diploma in Legal Studies**

I am pleased to enclose the following report, in my capacity as external examiner for the University of Oxford's Final Honours School in Jurisprudence/Diploma in Legal Studies for the academic year 2008-2009.

(i) *Academic Standards*

I am satisfied that the standards set for satisfying the FHS/DLS examiners are appropriate.

(ii) *Assessment Processes*

Based on all that I have witnessed in my capacity as external examiner, I am satisfied that the FHS/DLS assessment processes are rigorous; that they ensure equity of treatment for its candidates; and that they are fairly conducted in accordance with the University's regulations and guidance.

An important feature of the FHS/DLS examination process is that it does not involve comprehensive double-marking of scripts. Nevertheless, I am satisfied that everything is

done, short of comprehensive double-marking, to ensure consistency in the marking process. Indeed, the FHS/DLS examination process incorporates an elaborate system of checks which mean that, in practice, it is probably better able to ensure consistency than a simple system of comprehensive double-marking.

At the first stage of the examination process, individual subject groups carry out their own internal checks on the consistency of their first marking, such as randomized second marking. A second, general layer of oversight is then provided by the Board of Examiners' First Marks Meeting. At this meeting, the Board receives very full statistical information to enable it to compare the performance of individual markers, and it has the opportunity, if appropriate, to direct re-marking if such comparisons reveal inexplicable variations between first-markers of the same examination paper, and/or between the marking of different examination papers. In practice, however, the primary value of the First Marks Meeting lies in the opportunity it affords the Board to scrutinize the complete mark profiles of all candidates, and to direct the re-marking of scripts of 'borderline' candidates, whose overall classification might be affected by a higher mark in one or more 'borderline' scripts: scripts with a mark ending in -7 or -8. The high quality of Oxford's FHS candidates means that a large number of candidates are 'borderline' candidates in this sense at the 2:1/First borderline, and as such, find one, two, or often several of their scripts re-marked. When this re-marking is combined with the automatic re-marking of all scripts with marks ending in -9, of failing scripts, and of scripts with marks 4 or more below the candidate's average mark, the total volume of re-marking is considerable. I am in no doubt that the degree classifications of FHS candidates which result from these processes are robust.

As external examiner, I did not witness the deliberations of individual subject groups. I did, however, attend the Board of Examiners' First and Second Marks Meetings. I am pleased to report that the conduct of both meetings was exemplary. The Chairman of the Board and the Examinations Officer had prepared meticulously. This careful preparation, and the Chairman's very able chairing of the meetings, ensured that the Board was able to perform its functions in an efficient yet rigorous way. I was also impressed by the sensitivity with which the Board of Examiners dealt with candidates who had submitted medical evidence. The difficult task of evaluating and then acting on this evidence was made substantially easier this year by the decision to require this evidence to particularize which papers taken by the candidate might plausibly have been affected by the candidate's medical condition.

(iii) *Classification Conventions*

The FHS/DLS classification conventions are clear and simple, and avoid much of the complexity one encounters elsewhere. The only feature of these conventions meriting further comment is the new, higher threshold for a 2:1 classification.

It is apparent that the new 2:1 classification threshold was introduced with the aim of increasing the exceptionally low number of candidates awarded a 2:2 classification. It is also apparent that, at least at first sight, the new classification threshold is markedly more exacting than one can find in other institutions. At least two-thirds of a FHS candidate's scripts must be at 60 or above: i.e. at least six of nine. This contrasts with common practice elsewhere, where a 2:1 classification is typically awarded where a candidate has at least half of his or her scripts at that level, at least in the absence of marks below 50; and where conventions may well allow a 2:1 to be awarded to a candidate with a weaker overall mark profile on the basis of 'exit velocity', or perhaps a good aggregate mark. Indeed, the new FHS conventions can seem all the more exacting when judged in light of a combination of

circumstances which distinguish the FHS examination process from that of comparable UK institutions: that all courses are examined by an unseen written examination; that all examinations which bear upon a candidate's final degree classification must be sat in one sitting, reflecting studies spanning a period of more than two years; and that there is no provision for selective, deferred sitting of fewer than all papers, forcing a candidate having difficulties to sit all nine papers, or none.

I have two observations to make regarding the 2:1 classification, in light of concerns expressed by some members of the Board of Examiners about its rigours.

First, although the new 2:1 threshold is certainly rigorous, once it is seen in context, I remain unconvinced that it is unduly high if compared with the threshold(s) adopted in other institutions. Simple comparisons with other institutions' practices have to be treated with caution, because of the different contexts within which these practices operate. Elsewhere, the norm is for candidates' degree classifications to be based on assessments – by examination and/or coursework – in their second *and* third years. This is important, for the reason that law candidates, who are typically new to the subject at the start of their undergraduate studies, tend to display a clear upward trajectory in their mark profiles as they progress through their three years of study. The corollary is that in an annually-assessed system, there is a real risk that candidates who are consistently performing at 2:1 level at the end of their degree may find their degree classifications depressed by their relatively weaker second year results. Oxford's FHS candidates do not confront the same dilemma. Their second year studies are not examined until the end of their final year when they are at their most mature. A further corollary is that they have an opportunity to revisit and reflect on their studies earlier and more often than is possible in an annually-examined system. In light of the exceptional nature of Oxford's FHS examination system, it is doubtful that its candidates are really prejudiced by the new, more stringent 2:1 threshold, relative to their law colleagues at other institutions.

Second, the application of the new classification convention is, of course, subject to the Board of Examiners' overriding general discretion; but the exercise of this discretion seems fraught with difficulty. Faced for the first time with applying the new 2:1 threshold, some members of the Board of Examiners were initially of the view that a candidate with five of nine papers at 60 or above, *and* an overall average of 60 or more, was a 2:1 candidate, and deserved to be classified as such. The Board ultimately resisted this, concluding that it was inherent in the new convention that more was required. The difficulty then lay in identifying what that 'something more' was. After discussion, the Board took the view, based upon the candidates before it, that its discretion to award a 2:1 should only be exercised in favour of borderline candidates with an average of 60 or more, who had submitted evidence to suggest that their under-performance was the result of a medical condition.

The borderline in issue, between 2:1/2:2 classifications, is particularly critical for FHS candidates. The concerns exposed during the deliberations of the 2009 Board suggest that thought could usefully be given by the Faculty of Law to whether it wishes the conventions to be as exacting as they now are – if applied rigidly – and if it does not, whether further guidance should be given to future Boards relating to the considerations that should/should not be taken into account when deciding whether to award a 2:1 classification to a candidate who falls short of having at least six of nine scripts with marks of 60 or more. Other institutions certainly sometimes take into account factors such as high overall averages and/or compensating 'high' performances in individual papers. The Faculty of Law should not feel compelled to follow these examples: it is consistent with the general tenor of its

classification conventions to attach overriding weight to consistency of performance at or above 2:1 level across a minimum number of papers. However, if – cases involving a medical condition aside – the Faculty of Law considers that there may be circumstances in which it would be proper for the new 2:1 threshold to be mitigated, it would seem desirable that these circumstances should be explored and identified in advance.

(iv) *Comparability of Standards*

As in previous years, the final classification profile of the FHS cohort was impressive. There were an exceptionally large number of strong performances, and an extremely small number of weak performances. This profile is as expected, given the high quality of Oxford's intake, and the fact that all FHS/DLS examinations are sat in one sitting, at the end of a candidate's studies. Candidates are then at their most mature; they no doubt benefit from cross-fertilization between their nine FHS papers; and they have a chance to revisit and reflect on their work more often and more fully than is possible in an annually-examined system. No doubt too, Oxford's tutorial system, and its regular writing requirements, enables weaknesses to be anticipated more readily.

(v) *Issues requiring consideration*

I have nothing to add under this heading.

(vi) *Good practice*

I should stress again how impressed I was with the steps taken during the FHS/DLS examination process to ensure consistency in marking. The First Marks Meeting, which enables the Board of Examiners to conduct a general review of marking practices *and* to direct the focused re-marking of scripts of 'borderline' candidates, seems particularly well-designed to ensure the robustness of Oxford's final degree classifications. The task of the Board in carrying out its functions at the First Marks Meeting is also greatly assisted by the exceptional volume and range of information made available to it by the Chairman of the Board and the Examinations Officer. This information includes: the marking profiles of all first-markers; the marking profiles for each FHS/DLS paper divided by marker; and full mark breakdowns for every candidate, on first marking and re-marking, which disclose the candidate's overall mark for each paper, their attainment in individual questions, and the name(s) of the marker(s).

Yours sincerely

Dr Stephen Watterson

Senior Lecturer

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# APPENDIX 3

## REPORTS ON INDIVIDUAL PAPERS

### JURISPRUDENCE

The paper included a broad variety of topics but, as usual, each question was set in a way which invited candidates to consider an issue from a particular angle or with a particular concern or set of concerns in mind. As has frequently been commented on in the past, a major reason for some candidates under-performing was a failure to pay adequately close attention to the exact question set, and a tendency instead to repeat well-rehearsed points relevant to the topic in general terms. Candidates also seemed to be rather conservative in their choice of questions, with many candidates choosing to answer the same questions with very similar material, and failing to realise that a wide range of different material could have been used to answer various questions. As an example: relatively few candidates wrote extensively on Ronald Dworkin's general theory of law, although this material could have very successfully been used to answer several questions, including (but not limited to) questions 1, 2, 4, 9, 11, 12, 13 and 16. The best answers were far more thoughtful as regards question choice: they did not merely look for phrases reminiscent of lecture discussion or tutorial debate and then take these as a prompt to repeat the views of others gleaned in that context; rather, such answers skilfully selected material from across the course to tackle specific questions in a tailored and creative way, and did so with a genuine curiosity as regards what the answers to those questions might be.

Questions 5 and 8a were exceptionally popular, and questions 4, 6 and 12 were also answered frequently. The best answers to question 5 offered subtle and thoughtful consideration of the relationship between an autonomous life and a valuable life, and also addressed the variety of ways, coercive and other, that law might play a role in such lives. The best answers to this question also addressed whether it would be possible for law to *ensure* that people lead autonomous and valuable lives, and what it would mean for law to do so. Weaker answers were content to repeat lecture and tutorial material on the familiar Hart/Devlin/Raz/Mill/Feinberg debates and did not adequately use that material to generate and explore puzzles relating to the specific question set. Question 8a was incredibly popular, perhaps because it obviously lines up with an issue which is frequently taught as a discrete tutorial topic, but for all that, it was not answered well in many cases, due to insufficient focus on the terms of the question and, in particular, on the issue of whether legal obligation *entails* moral obligation. The best answers exhibited intense focus on that specific issue, and were able to make points regarding the sense in which, and extent to which, various arguments in favour of a moral obligation to obey the law do or do not view such an obligation as being entailed by the legal obligation. Question 8b was answered less frequently, but candidates who did answer it tended to tailor their answers to the specific problems raised by civil disobedience rather well.

Question 4 frequently attracted a regurgitation of material on command theories of law, and Hart's criticisms thereof. More thoughtful answers took seriously the request to consider the methodological point about theoretical adequacy, and to do so in terms of the specific issue of whether any theory of law must at least address, in some sense, the role of coercion in law.

Question 6 elicited many answers which rehearsed in a descriptive way the main theories regarding whether punishment can be justified in general and ignored the fact that the question asked specifically whether there are *forms* of punishment that can never be justified.

Question 12 was answered almost universally using Hart's criticisms of command theory; more creative answers also considered issues raised by legal realism of various kinds, and also by Dworkin's theory of law.

Question 10, despite specifically asking about the relationship between legal *rights* and moral *rights*, was too often answered in terms of the relationship between law and morality in general.

Question 15 was not answered very often but where it was answered it was frequently tackled very well, with intense focus on the question set and on the puzzles and apparent paradoxes generated by authority.

Although many candidates could have been more creative in terms of question selection, and paid insufficient attention to the specific question set, there were very few candidates who did not possess a good understanding of the theorists under discussion. Candidates were on the whole knowledgeable and competent, but many could have gone much further in terms of independent thought and critical analysis as regards the specific question set. There were, however, also some remarkable answers of excellent quality. Those answers revealed candidates with a genuine sense of intellectual curiosity and puzzlement regarding jurisprudential issues, who were willing to explore their views in the context of specific questions, and who were not content merely to repeat tutorial and lecture material, but rather used that as a valuable resource from which to launch creative lines of inquiry and discussion of their own. What some of these candidates achieved under examination conditions genuinely impressed the examiners.

## CONTRACT

There were fewer First Class scripts than in recent years, with several candidates being pulled down by a weak final answer. This was a surprise because, although some of the problems were demanding, the essay questions offered a wide range of choice and most were on central topics in the course.

Of the essay questions, those on the relationship between economic duress and consideration (question 2), promissory estoppel in relation to part payment of a debt (question 3), remoteness after *The Achilleas* (question 5) and common mistake (question 6) were the most popular. By and large they attracted good answers although some candidates tried to answer question 2 without much knowledge of the law on economic duress and weaker candidates failed to appreciate that the question was not asking for a survey of all the law on consideration. The best answers focussed specifically on pre-existing duty and variation and indicated that renegotiation is better controlled by duress than consideration. Question 4 on termination for breach was essentially calling for a critical examination of conditions, warranties and innominate terms although some candidates legitimately construed it as also covering repudiatory breach. Question 7 'Is a doctrine of frustration necessary?' could be, and was, answered in a number of different ways although surprisingly few considered

whether construing the contract or implying a term might be regarded as negating the need for the doctrine.

Question 1 on rectification proved a disastrous question for several candidates. It was clear that many who answered it knew nothing about the law on rectification and incorrectly construed the question as asking generally about mistake.

Of the problem questions, question 8 (misrepresentation and exemption) question 9 (certainty, remedies, privity, and frustration) and question 10 (damages and exemption clauses) were the most popular and were, in general, well answered. In question 8, only a handful of candidates noticed that the exemption clause was neither a 'no reliance clause' nor an 'entire agreement' clause. In question 9, a surprisingly large number of candidates revealed a misunderstanding of the law on mental distress damages. Mental distress damages were here recoverable by Clare (assuming she satisfied the requirements of the Contracts (Rights of Third Parties) Act 1999) because her distress was directly consequent on physical inconvenience and in relation to that category of mental distress there was no need to show that mental distress was an important object of the contract. The main weakness in the answers to question 10 was the lack of careful attention paid to the provisions of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. Despite those statutes being provided in the exam, candidates commonly applied the wrong provisions or were unclear about the precise wording. Many failed to discuss whether Bob was dealing as a consumer and why that mattered.

Questions 11 and 12 were often poorly answered. Question 11(a) was essentially on unilateral mistake and did not call for a rehash of lots of the rules on offer and acceptance; and questions 11(b) and 11(c) on privity (both benefit and burden) and exemption clauses were misunderstood by several weaker candidates. Questions 12(a) on presumed undue influence and unconscionable bargains and 12(b) on the impact of a third party's undue influence or misrepresentation were well answered by those who properly understood *Royal Bank of Scotland v Etridge (No 2)*. Weaker candidates tended to miss the point of the question or revealed a poor understanding of the requirements for presumed undue influence.

## TORT

There were 249 candidates for this paper. After first marking, 12 per cent (29 candidates) were awarded a mark of 70 or more, 62 per cent (155 candidates) a mark between 60 and 69, 25 per cent (62 candidates) a mark between 50 and 59, and 1 per cent (3 candidates) a mark below 50. A number of scripts moved up a class on second marking. The standard seemed to be a little lower than usual.

Three general comments can be made. The first is that the treatment of the duty of care issue remains surprisingly weak: candidates who think it relevant to go through the three-stage *Caparo* 'test' in a medical negligence problem clearly lack a grasp of the realities of negligence law. Second, many candidates ended up dropping a class simply because they did not read the questions properly. This was particularly a problem with question 3 (which was on defences, not duty of care), question 4 (which was not limited to the liability of employers, and was restricted to the deliberate acts of third parties), and question 2 (which was restricted to omissions). And third, many candidates failed to structure their answers to

problem questions effectively, and simply threw ideas together rather than working through the issues in a systematic way.

### **Question 1 (assumption of responsibility)**

This was the most popular essay question, with more candidates choosing to answer part (b), on economic loss, than part (a), on the role of assumption of responsibility more generally. Answers to part (a) varied widely in their focus, with some candidates emphasising omissions, some economic loss (so much so in some cases that they might have been answering part (b)), and the best ranging widely. The best answers to part (b) looked closely at the relevant case law, and drew effectively upon judicial and academic analysis of the concept. There was a tendency in some of the less persuasive answers to argue that assumption of responsibility was some sort of trick used by the judges to keep the spectre of indeterminate liability at bay, though how this analysis could be squared with the defective premises/products cases was not made clear.

### **Question 2 (liability of public authorities for omissions)**

This question was not particularly popular, and nor was it particularly well handled. Answers tended to be rather unfocused, and insufficient attention was paid to the precise implications of the *Gorringe* decision.

### **Question 3 (defences)**

This question was reasonably popular, but again, it was in general not well handled. The point of the quotation was that the positive elements of the negligence tort (duty, breach etc) cover so much ground that there is little space left for defences. Some of the better answers dealt with this claim head on, but far too many candidates treated the quotation as a pretext for the worst kind of pre-prepared 'duty of care' essay, without any analysis of defences, for which an appropriately low mark was awarded.

### **Question 4 (liability for deliberate third party acts)**

This question was very popular, but was widely assumed to be limited to the liability of employers. In fact, the question was asking about liability for deliberate third party acts both generally and in the particular context of vicarious liability. Candidates who did not deal with the general aspect of the question (cases such as *Dorset Yacht*, *Smith v Littlewoods* and *Mitchell v Glasgow CC*) were marked down accordingly. Discussions of employers' non-delegable duties were irrelevant unless a deliberate third party act was involved.

### **Question 5 (remedies)**

This question was the least popular on the paper. There were so few answers that it is not possible to comment in general terms.

### **Question 6 (torts and rights)**

This was a reasonably popular question, but the standard of the answers varied widely. The weakest used the breadth of the question as another pretext for a pedestrian essay on the duty of care, while the strongest demonstrated a familiarity with Stevens's thesis, and subjected it to critical evaluation. Many of the answers came somewhere in the middle, linking the idea of torts as rights infringements with recent cases such as *Chester v Afshar* and *Rees v Darlington NHS Trust* but without really constructing a coherent argument.

### **Question 7 (economic torts)**

This question was as popular as an economic torts essay could be expected to be, and was generally handled very well indeed. Candidates looked closely at the reasoning and parameters of the *OBG v Allan* and *Total Network* cases, and were good at bringing out the tensions and inconsistencies between them, and putting forward proposals for further reform.

**Question 8 (occupiers' liability/nervous shock problem)**

This was the most popular of the problem questions. Answers tended to be sound but uninspiring. Candidates who failed to address the Occupiers' Liability Act 1957 were dealt with with appropriate severity. More generally, candidates failed to notice the relevance of the *Tomlinson* decision to the occupiers' liability issue, and to deal effectively with the warning/exclusion of liability, failing to differentiate between the two, and failing to consider the precise provisions of UCTA 1977 when looking at its possible application. As usual, the nervous shock issues were generally dealt with adequately, but there was a lack of subtlety when considering the application of the case law to the facts of the problem. Weaker answers struggled with the basics, such as the definition of a primary victim.

**Question 9 (product liability/causation problem)**

This was also a very popular question, but in another outbreak of 'statute blindness', a truly astonishing number of candidates failed to mention the Consumer Protection Act 1987 at all. There is no surer way to drop at least one class on a question, and a good few candidates who ended up with lower second marks in this paper as a result have only themselves to blame for ignoring frequent previous warnings by the examiners. By contrast, candidates who applied the legislation tended to produce satisfactory answers, although many did not consider any of the relevant cases. It was disappointing how few considered the application of the defectiveness test in design defect cases, and the more subtle aspects of the development risks defence. On the causation front, although there was some very good discussion of the loss of a chance issue, many candidates seemed not to know *Gregg v Scott* very well, and there was also a surprising degree of confusion about the *Fairchild/Barker* principle. The better answers considered not only whether the defendants would be liable, but also what the extent of their liability would be.

**Question 10 (nuisance/economic loss problem)**

Again, this was a very popular question. The nuisance issues were generally dealt with well, although most candidates struggled with the defence of statutory authority, frequently confusing it with the effect of planning permission (and so thinking it relevant to the locality issue), and very few candidates realised that the drop in revenue from the bed-and-breakfast business was consequential (as opposed to 'pure') economic loss, and hence probably recoverable – similarly, quite a few candidates mistakenly thought that the cracks in the walls of the property caused by the lorries were pure economic loss. There was also confusion over the liability of landlords for nuisances created by their tenants, and a tendency to equate their position with that of occupiers sued for the acts of licensees, despite the well-established test of 'authorisation' applied in the case of a landlord out of occupation. Finally, not many candidates thought carefully enough about which claimant would be seeking which remedy. Although a surprising number of candidates ignored the professional negligence issue altogether, those that did deal with it generally displayed a good understanding of the scope of the *Smith v Bush* decision. As usual, public nuisance was often overlooked.

**Question 11 (breach of duty/wrongful conception/attempted suicide problem)**

This question was quite popular but often handled badly. To do well on this question, candidates needed to have a very sound footing in the case law on two topical issues, wrongful conception (plus, as regards Quentin's position, 'wrongful birth') and tort claims arising out of suicide/attempted suicide. Candidates who gave some thought to what Ophelia's actual complaint was – namely, that had Patrick warned her of the chance of the operation failing, she would probably have continued to use contraception, and so probably avoided the pregnancy – would have realised that the scope of liability issue in *Chester v Afshar* was not relevant, and saved themselves a good deal of time and ink. The possible relevance of Patrick's knowledge of Ophelia's special circumstances was frequently overlooked. Surprisingly few candidates identified all the relevant claims arising out of the allegedly wrongful conception. On the suicide aspect, the better answers played close attention to all the various arguments against liability dealt with in *Corr v IBC*; the weaker answers referred only to the remoteness aspect (usually citing only *Page v Smith*, and not *Corr*), and ignored *novus actus interveniens*, *volenti*, and contributory negligence.

### **Question 12 (defamation problem)**

This question was more popular than other defamation questions have been in recent years, and the answers were generally good, particularly when it came to issues such as *Reynolds/Jameel* 'responsible journalism' qualified privilege and the recently developed reportage defence. Weaknesses included discussing fair comment when the statements under consideration were statements of fact, not considering the 'sting' test for justification or whether Rasheed could be liable for the repetition in *The Camford Student*, and not discussing the possible application of the 'offer to make amends' defence.

## **LAND LAW**

The paper was a challenging one, but most candidates coped with it well. Three questions were especially popular: 3 (common intention constructive trust), 8 (formalities and registration) and 10 (leases).

Question 3 was generally well answered, though a few candidates were still unaware of *Stack v Dowden*. A common failing was to concentrate on the views of commentators, without anchoring them in the decisions and dicta in the leading cases. Candidates who were able to handle both the cases and the views of commentators scored well. Many candidates gave insufficient consideration to what "conduct" might mean.

Though it was answered by many candidates, Question 8 caused a lot of difficulty. Few candidates noticed that the first part involved an express easement which needed to be by deed. It was common to find LPA, s 62 being relied upon. This is a puzzling error; the section operates to imply easements in favour of the grantee whereas use of it in the problem would impose an easement upon the grantee. The second part raised a point on the requirements before short leases are free of formality requirements (LPA, s 54(2)). Many candidates missed the point altogether and very few applied the section accurately. In both these parts, registration issues (if dealt with at all) were rarely dealt with accurately (usually caused by their failure to get the formalities points correct). The third part raised a moderately straightforward *Boland* issue. Most candidates saw the point clearly enough, though fewer were able to bring any cases (or a close reading of the statute) to bear on the issue. Overall, the question showed a marked weakness of candidates in dealing with

formalities and priority issues. Fortunately, there was enough in the question for most candidates to redeem themselves.

Question 10 was generally well answered, the better candidates being able to use the authorities to good effect on the facts of the question. Most candidates spotted the *Bruton* point, but few were able to analyse its relevance to the facts (a difficult point). Very few candidates considered the possibility that the initial transaction might create a tenancy at will. It was striking how many candidates sought to apply overriding interests to the question whether the assignee of a licence was bound, revealing a serious misunderstanding both of the effect of licences and of registration rules.

Other popular questions were 5 (estoppel) and 6 (covenants). Question 5 was generally well answered. The House of Lords decision in *Thorner* came too late to be included on the Faculty list. Some candidates were unaware of it, others made much of it, whilst the majority gave it a passing mention. All three styles of answer were equally acceptable to the markers. As with Question 3, a major failing was dealing with the arguments of commentators at the expense of what Lords Scott and Walker actually said in *Cobbe* (the point of the question). Candidates who showed that they had read and thought about the judgments were well rewarded; indeed, there were some excellent answers to this question. Question 6 attracted pretty good answers. It was gratifying that in part (d) quite a few candidates saw the possible use of schemes of development to bind land retained by a developer, a point which the markers regarded as far from obvious.

Questions 1 (implication of easements reform), 4 (registration) 7 (trusts of land and severance) and 9 (mortgages) attracted smaller numbers. Answers were generally sound, though the essay questions revealed a tendency to ignore the terms of the question. Many candidates chose to write about just some of the issues within the question (for example, ignoring reservation in the easements question). Others dealt with issues within easements and registration generally. Question 2 was a very challenging question requiring a linking of ideas in trusts of land and mortgages. Very few candidates rose to the challenge.

### **ROMAN LAW (DELICT)**

Six candidates took the FHS exam. There was a remarkable unanimity in the choice of questions, but the range of questions chosen covered the subject well and the results were good to excellent.

### **COMPARATIVE LAW OF CONTRACT**

Of the nine questions set, all were answered by one or more candidates. Questions 2 (distinctive features of the French and English conceptions of contract); 3 (good faith in negotiation); 4 (mistake); and 6 (comparative commentary on art. 1165 of the Civil Code) were particularly popular. The overall standard was good to very good, though it was rather disappointing that there were few outstanding answers. Many answer demonstrated a good understanding of both the relevant English and French laws and an ability to compare them.

### **CRIMINAL JUSTICE AND PENOLOGY**

Overall the examiners were happy with the quality of the answers this year, although remain concerned that some students still seem to believe it is acceptable to answer questions in this subject without making sufficient reference to the relevant theoretical or empirical literature. While it was clear in a number of cases that candidates were familiar with the general issues in a particular area, their answers often failed to engage with those issues in detail or to refer to evidence in support of their claims. Having said this, some of the best answers displayed an impressive ability to move between discussions of evidence and principle, and showed real signs of original thinking about possible avenues of reform.

### **PUBLIC INTERNATIONAL LAW**

There were 50 FHS, DLS and MJur students who wrote the Public International Law examination paper. The level of performance of these students was, in overall terms, very good. More specifically, 9 students (18%) achieved a first class mark; 38 students (76%) achieved 2:1; 2 students (4%) obtained a 2:2; and one student (2%) obtained a third class mark. Of the students in the 2:1 range, 25 (66%) obtained marks between 65 and 69.

All questions were answered by at least two candidates. However, there was a clear preference for questions 1, 4, 6 and 11 which were all answered by more than 20 candidates. Among those who obtained 2:1 class marks, there were a considerable number of students who may likely have achieved a higher, possibly First class, mark if they had integrated a greater degree of analysis of the material being considered into their answers instead of employing a more descriptive approach.

More generally, a number of papers would have scored higher if they had answered the specific question being asked rather than providing a formulaic, general essay on the topic of the question. Moreover, greater attention to detail and less inaccuracies in a number of cases would have also seen higher marks.

### **HISTORY OF ENGLISH LAW**

Thirteen candidates attempted this paper. The overall standard of scripts was high, with 4 1st class scripts (30.8%), 8 in the 2.1 (61.5%) and 1 in the 2.2 (7.7%), and an average mark of 66.7.

The most popular questions were questions 6 and 7 (seven attempts), followed by questions 2 and 3 (six attempts), but there was overall a wide spread of questions attempted.

Question 2 (medieval remedies for the recovery of land) was broadly competently handled, though some candidates showed some tendency to date the fictional action of ejectment as a mode of trying freehold title too early (i.e. in the 14th rather than the 16th century).

Question 3 (entails) produced some strong answers with real attempts to grapple with the conceptual problems involved.

Question 6 (covenant and debt) tended to be answered with competent accounts of the two actions, but with less engagement with the conceptual differences posed by the question.

In question 7 (trespass and case) candidates showed a sound grasp of the basic issues about the emergence of the case, but some candidates had difficulty balancing the use of cases, etc, with discussion of the debate in the secondary literature. There was a certain amount of confusion in the use of the cases, with both *The Oculist's Case* and the *Humber Ferryman* being mistakenly identified by some candidates as involving successful use of fictions of force and arms.

Four candidates attempted one or another version of question 10 (on the debates around subsidiarity of the action on the case around 1600), either (a) comparing assumpsit and nuisance or (b) comparing assumpsit and conversion. These were difficult questions but those who attempted them rose very successfully to the challenge.

### **EUROPEAN UNION LAW**

There were many strong scripts and overall the distribution of scripts between classes was more or less in line with patterns of previous years. All ten questions attracted a good number of takers, but Questions 2, 3 and 6 were the most popular. There were many well-informed and thoughtful answers. Weaker answers tended to commit a familiar error of technique. This is the tendency simply to treat the questions as (respectively) 'the subsidiarity question', 'the human rights question' and 'the standing question' and then to write a splurge with little or no attempt to tie the narrative to the question asked. The examiner has asked something more nuanced than 'tell me everything you know about this topic' and candidates handicap themselves if they disregard that. Students also often failed to demonstrate adequate understanding and analysis by relying heavily on the opinions of one, or several, commentators. Relevant academic views can be very helpful when used to bolster, reject or define an argument, but they do not substitute for independent thinking by candidates and can lead to deviations from the question if not incorporated carefully. So do answer the question that the examiners have asked, do not simply present what the textbooks treat as priorities. The problem questions, 9 and 10, were probably a little more difficult than normal, but there were plenty of insightful answers as well as (especially in answer to Q.9) a handful of odd ones. There was, however, a point of technique which was missed by some weaker candidates. These are problem questions: that means the factual background must be taken into account and the law must be applied to it. It is poor technique to trot out a more-or-less prepared answer to an essay (Q.9, on free movement goods, Q.10 on direct effect and other devices for securing the penetration of national legal orders by EC law) and then make a superficial attempt to add a sprinkling of concern for the facts with which the problem seeks engagement.

### **COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS**

The standard of answers to the Copyright section of the Paper was good overall. A large number of students answered question 1, and engaged well with both parts of the question. Answers to question 2 were also good, particularly those which engaged critically with intent-based theories of authorship. Few candidates attempted questions 3, 4 or 6, but those that did wrote very good answers overall. Question 5 was also popular, with the stronger answers going beyond Ashdown to consider the law on fair dealing and s 171(3) more generally.

Overall, students performed very well on the trade marks/passing off portion on the exam, particularly when dealing with the theory and development of the law of trade marks and passing off. Question 7 on public policy and trade mark registration, question 8 on misrepresentation in passing off, and question 10 on trade mark infringement were the most popular. Few students attempted question 9 on the relationship between the European single market and national trade mark law. Students demonstrated some weakness in addressing the effects of European law and international obligations on the national law in the context of answering other questions.

## INTERNATIONAL TRADE

There were eight candidates and the marks varied quite markedly with three at 70+, two between 60 and 69, and three below 60, though none of the latter fell lower than 50.

As is often the case with this paper, problem questions were preferred over those requiring an essay (a consequence, no doubt, of a certain emphasis in the course on problem questions). It was disappointing to find that the time taken to set a problem on 'title' and spent bills of lading tempted no candidate (a consequence, no doubt, of the time spent on the course on rather more 'typical' problem questions of the type set in the remainder of the questions). The remaining problems were done reasonably well, but it is necessary (again?) to note that too many candidates are still unable to explain the reasoning in key cases such as *Gill & Duffus*, and *Procter v Gamble*.

So far as the essays were concerned, the question on banks and 'defective shipping documents' was the most popular, but no candidate seemed willing to give a broader interpretation to 'defective' and instead turned out an essay on the autonomy principle (competently so in most cases; very competently in the case of those awarded the higher marks); clearly whatever was attempted, no candidate was going to discuss spent bills.

## TRUSTS

The general standard of scripts was reasonable, but there were few really outstanding scripts and the team of markers had some concerns. When answering essay questions, many candidates appeared to base their knowledge on the views of commentators rather than on their own detailed reading of the cases. Candidates are required to answer at least one problem question (out of four set) and far too often a good overall script mark was pulled down by a very poor problem question answer. Problem answers suffered from sloppy analysis of the facts, failure to identify all the issues raised and inadequate explanation of the relevant law and its application to the particular facts. Candidates with only a sketchy knowledge of the actual cases are handicapped when dealing with possible different approaches to the facts in problems, and the manipulation of arguments and theories to arrive at solutions.

**Question 1** (crucial feature of the trust). Rarely answered, and most candidate confined themselves to a straightforward discussion of the situations where beneficiaries have rights not amounting to full proprietary interests.

**Question 2** (no conflict rule). Also not popular. Candidates were usually in favour of greater flexibility in the operation of the rule on secret profits, but few examined the relationship between the no conflict rule and the unauthorised profit rule.

**Question 3** (constructive trust). Moderately popular, with some good answers analysing the relationship between constructive trust and restitution.

**Question 4** (*Quistclose* trust). Very popular and usually competently answered, though candidates tended to base their views on the secondary literature rather than their analysis of the cases.

**Question 5** (constitution of trusts). Quite popular. Good answers identified flaws in the reasoning in *Re Pryce* and went on to consider the position if the trustees sued on the covenant. Few asked about the possible application of the Contracts (Rights of Third Parties) Act 1999.

**Question 6** (exclusion or limitation of trustee's liability). Attracted few takers and mostly from weaker candidates who had no views on what should be permitted.

**Question 7** (knowing receipt). Quite popular. Good answers tackled the confusing caselaw on the requirement of knowledge. Although most candidates preferred the wrongdoing analysis, there were some excellent answers which saw the doctrine as based on unjust enrichment or as conflating two separate doctrines of unjust enrichment and wrongdoing.

**Question 8** (matrimonial home). Also quite popular. The best answers explained how Lord Denning used Lord Diplock's speech in *Gissing v Gissing* to underpin 'a constructive trust of a new model', continuing with later judicial moves to retreat from this approach, and ending with comments on the House of Lords' decision in *Stack v Dowden*.

**Question 9** (resulting trusts). The most popular essay question and generally very competently tackled.

**Question 10** (charities). Not very popular. The best answers unravelled the quotation and explained the law before the Charities Act 2006 and what was or was not 'presumed'.

**Question 11** (certainties). The most popular of the problem questions but, as noted above, too often candidates failed to analyse the facts, identify the relevant certainty test and explain how it might be applied to the fact situations.

**Question 12** (formalities). Quite popular and probably avoided by weaker candidates as there were few really inadequate answers. Candidates who chose this were adept at analysing the facts and thinking through the different arguments.

**Question 13** (secret trusts). Very popular with some well argued answers. Weaker candidates failed to consider alternative interpretations of the words on the face of the will.

**Question 14** (unincorporated associations). Quite popular, but too many candidates mechanically applied the surplus cases without any discussion of the underlying legal analysis.

## ADMINISTRATIVE LAW

It is hardly unusual for an examiner to note that candidates who failed to answer the specific questions set were unlikely to do well, but that was certainly the case on this paper. In particular we noted that a number of candidates were determined to answer ‘the *Wednesbury* versus proportionality question’, notwithstanding that none of the questions on the paper actually fitted this description precisely. Conversely there was an unfortunate tendency for candidates to make assumptions about what the questions must be asking, rather than reading them and thinking about them independently. We were also concerned that a worrying number of candidates seemed to think that they essentially need only know the recent cases discussed in revision sessions and update lectures, plus one or two absolutely key cases such as *Anisminic* or *Coughlan*. This is not the case; while it is important for candidates’ knowledge to be up to date, knowledge of recent cases alone cannot replace a thorough understanding of the chronological development of the case law *up to and* including the present.

### **Question 1**

This was a relatively popular question and, possibly because it was not a great departure from previous years, it was generally answered well. Stronger candidates not only mentioned a variety of theories, but also tied this discussion to specific instances in which the practice of administrative law would be noticeably affected by the choice of underlying theory. Particularly good candidates were even able to move beyond the standard discussions of light theory and the ultra vires debate to consider other theoretical debates underpinning specific aspects of administrative law. Candidates who chose only to discuss one theory tended to receive much lower marks, especially those who addressed only the ultra vires debate.

### **Question 2**

Unfortunately many of those who answered this question did so simply by describing the current law on bias, fair hearings and the duty to give reasons, which was not a very successful tactic. Better candidates examined dignitarian, instrumentalist and other theories underlying the law on procedural fairness and the best candidates were also able to give practical examples of the circumstances in which adoption of one or other of these theories had led to a specific practical result in the case law. A worryingly large number of candidates appeared to concentrate almost exclusively on the law of bias, and many candidates did not seem to understand this area of law properly.

### **Question 3a**

This was one of the questions that many candidates assumed was ‘the *Wednesbury* versus proportionality’ question. Alternatively, many candidates who answered it assumed that, because question 3b concerned review for error of law and fact, so did question 3a. In fact, read on its own without any of these assumptions, the question simply asked whether *in general* the intensity of judicial review is dictated automatically by the particular aspect of the decision-making process which is being reviewed. As a result, the best answers were those which addressed more than one ground of review (possibly including jurisdictional and substantive review), examining the relationship between content and intensity in each of these different contexts, as well as the factors which should affect the intensity of review. Those who presented pre-prepared essays on one ground of review only, on the other hand, were not highly rewarded.

### **Question 3b**

Again, weaker candidates tended to read the word ‘deference’ in the question and produced only a standard essay on the development of the doctrine of deference in the human rights context. Slightly stronger candidates produced standard essays on the development of review for error of law and fact. The best candidates, however, answered the specific question set, examining whether the development of review in this area has followed Beatson’s suggested approach, investigating whether a satisfactory line can be drawn between error of law and error of fact, analysing whether his approach is desirable on its own terms and then linking this with any other views they may have had on deference more generally.

### **Question 4**

This was another popular question where pre-prepared answers on legitimate expectations were not highly rewarded. The examiners were also very concerned by the number of candidates who thought that *Bancoult* and *BAPIO* were the only cases on the issue to be decided since *Coughlan*! Better candidates were able to give a more detailed and thorough account of the development of the law, up to and including the more recent cases. Such candidates also addressed both the relevant aspects of the question; examining whether or not the aim of legitimate expectations is to promote legal certainty, and assessing whether or not the current state of the law is itself certain or conducive to the promotion of certainty. This required them to discuss the roles of knowledge and reliance and competing justifications for the upholding of legitimate expectations (such as consistency or equality) as well as areas of the current law which may not yet be wholly clear or satisfactory (the ingredients necessary for establishing a legitimate expectation, the degree of clarity necessary following *Bancoult*, the test to be applied in the context of substantive legitimate expectations, ultra vires expectations etc).

### **Question 5**

Again, this was a relatively specific question which required candidates to address the particular issue raised in *Miss Behavin’*, namely the extent to which in ‘ordinary’ judicial review the courts do and should concentrate on the process of reaching the decision whereas in human rights review they do and should concentrate on the particular decision reached. We were concerned in particular that many candidates were not familiar enough with cases like *Huang* or *Miss Behavin’* itself to answer this question successfully, and indeed many weaker candidates again resorted to a pre-prepared essay on deference or *Wednesbury* v proportionality.

### **Question 6a**

This was another popular question. Good candidates answered this question with a thorough analysis of *YL* and previous cases on the definition of public authorities under the Human Rights Act, drawing comparisons with academic commentary and case law on the definition of public authorities for the purposes of non-HRA judicial review. The best candidates examined Lord Neuberger’s specific point and gave examples from the case law of how particular underlying theories had led to particular substantive outcomes. Less successful candidates took the more simplistic view that ‘everything is subjective’ and tended to describe, rather than analyse, the relevant cases. Weaker candidates did not demonstrate a particularly thorough understanding of the law in any of the relevant contexts and in particular seemed confused by the distinction between ‘getting into’ and ‘getting out of’ the ‘ordinary’ judicial review procedure.

### **Question 6b**

This was a relatively popular question and was generally answered well. Good candidates demonstrated a thorough understanding of the case law on both individual and group standing, drew comparisons between standing under the HRA and for judicial review more generally and considered academic commentary on the question.

Weaker candidates seemed to confuse issues of standing with questions of whether the body should be considered to be public.

### **Question 7**

This was not a very popular question. Good candidates not only described the law on each of the doctrines thoroughly but were able also to analyse it and to discuss the extent to which it is coherent or conversely open to manipulation by the courts. Weaker candidates simply described one or two relevant cases without much analysis.

### **Question 8**

This was not a very popular question either and was often answered by weaker candidates who essentially only discussed questions of informality/formality or the personnel involved in each of the different kinds of institution. Better answers contained a thorough discussion with relevant details.

### **Question 9**

As with other questions, the better answers were those which addressed the question specifically, considering whether the law should treat public bodies differently either by having torts applicable only to public bodies or by adjusting the rules for torts applicable in the private context. Successful candidates were also able to give a detailed account of the case law concerning various different torts.

### **Question 10a**

Good answers to this question were really excellent, exploring the implications of Bradley for the delicate system of persuasion used by the ombudsman, while weaker candidates just tended to produce pre-prepared ombudsman answers, sometimes with no reference to Bradley at all. Needless to say this was not a successful tactic.

### **Question 10b**

This was an unpopular question and unfortunately one or two weaker candidates assumed that it was the same as question 6a. While the question of human rights protection was of course one potentially relevant issue, there were many others which also needed to be addressed.

## **FAMILY LAW**

The papers in family law this year were generally of a good standard, but there were fewer clearly first class answers than usual. There were many candidates who were of a good 2(i) level. The examiners were hoping that more candidates would be able to reveal a broad range of materials to refer to and show some independent thought on the issues raised. A candidate cannot hope for a first class mark if their revision is based on learning the points made in the textbooks. The best papers showed an excellent and critical understanding of the law.

1. [Parents]. This was a very popular question. However, it was, perhaps, deceptively easy. The question asked “what” is a parent, but quite a number of candidates answered “who is a parent”. Only the best candidates considered what we might learn about the nature of parenthood from who is given the status of parent. Weaker candidates failed to discuss the relevance of parental responsibility, and surprisingly many failed to refer to the House of Lords’ discussion of parenthood in *Re G*.
2. [Contact orders]. Perhaps surprisingly, this was not a particularly popular question. The best candidates were able to discuss the ambiguities over the approach of the courts and the potential relevance of the Human Rights Act. Few candidates were able to discuss enforcement of orders in a detailed way.
3. [Deciding for oneself]. There were some good answers to this question. Many candidates focused on issues surrounding mediation and pre-nuptial agreements. There were some interesting discussions about the benefits and disadvantages of doing these and of the nature of autonomy in family law.
4. [Child protection]. This was a fairly popular question. Weaker answers simply set out the leading cases on child protection and the interpretation of the threshold criteria by the House of Lords. Stronger answers were willing to look at the wider theoretical issues the quote raises.
5. [Divorce] This was a popular question and was done reasonably well. Good candidates undertook a discussion of the special procedure and also considered the extent to which the law on divorce (or the apparent law on divorce) might affect divorce rates.
6. [Ancillary Relief] (b) was a far more popular than (a), although those who did attempt (a) addressed the issues raised in the quotation extremely well. The answers to (b) were more mixed, with weaker candidates merely setting out the current law, and the stronger candidates considering the extent to which equality, compensation and needs are aspects of fairness.
7. [Rights]. Few candidates answered this question and it was generally not answered particularly well. Candidates tended to select one topic and consider how rights might operate in that area. It was hoped candidates would consider the practical and theoretical issues raised by the use of rights in family law.
8. [Domestic Violence]. Pleasingly this was a very popular question. The standard of answers was generally very high with a good understanding of the secondary literature and the legal principles. Candidates were expected to consider both civil and criminal law, although, understandably, most focused on criminal law issues.
9. [Immoral conduct] Very few candidates attempted this question. Those who did tended to focus on divorce. The examiners were hoping candidates would consider, in addition, the role of fault in ancillary relief, disputes over children and child protection issues.
10. [Same-sex]. This was a popular question and generally candidates performed well. Good answers gave attention both to the claim that marriage is an outmoded institution and

to the debate over same-sex relationships, and the best brought an impressive range of materials in support of their arguments on both points.

11. [Children's rights]. This was a fairly popular question. Weaker candidates focused on the Gillick line of cases; while better answers looked at a boarder range of issues. Most candidates were able to bring out the debate over the extent to which children's rights of autonomy should be recognized.

12. [sex]. Only one candidate answered this question. Perhaps the answer was thought too obvious! The examiners were expecting candidates to consider the extent to which a person's legal rights and responsibilities in family law depend on their sex and also to consider whether notions of care might be better foundations for the structure of family law, than sexual relations.

## COMPANY LAW

The standard of answers was generally high, with some really excellent scripts. On the whole candidates had a sound grasp of the issues, but often let themselves down by not focussing closely enough on the particular question set. The importance of addressing and answering the specific question set cannot be emphasised strongly enough. For example, in Q7 on corporate opportunities, the question specifically asked candidates to address in what circumstances *should* directors be able to take up corporate opportunities. A surprising number of candidates confined their answers to the present position on corporate opportunities without any assessment of the appropriateness of the current position. Candidates also failed to read the problem questions carefully enough. For example, in question 9, which dealt with the relationship between minority and majority shareholders in a small private company, the facts were different from the usual scenario. Here the majority was weaker than usual, with enough control to pass ordinary resolutions, but not special resolutions. Nevertheless a number of candidates wrote at length about the ways in which the minority could challenge an alteration of the articles by the majority. Similarly in question 10 some candidates read the phrase "the market value of K's shares has dropped dramatically" and wrote about reflective loss whereas it was clear from the facts that K had no personal cause of action and therefore the problem of reflective loss did not even arise. More generally, the examiners noted a sloppiness and lack of precision in some candidates' writing (eg, 'the companies gave dividends to shareholders' rather than 'the company paid dividends to shareholders').

All of the questions were answered. The most popular were questions 4, 5, 6 and 7 (for the essay questions) and questions 10 and 12 (for the problems questions). Some candidates answered two problem questions, and one or two even answered three.

Question 1 (fixed/floating charges) attracted a modest number of candidates. Most answered it competently. Weaker candidates focussed on a description of the law regarding characterisation and did not discuss in any detail the issues that they felt remained to be addressed. Question 2 (a general question on the Companies Act 2006) and question 3 (company contracts) did not have many takers. Question 4 (limited liability) was a popular question. Weaker candidates addressed lifting the veil at common law in detail but said little about statutory constraints (sections 213 and 214 Insolvency Act 1986) or self help remedies available to creditors. Stronger candidates were able to differentiate between different types

of creditors when assessing the value of the current regime. Some candidates failed to distinguish between cases in which the veil was lifted to impose liability for the debts of the company onto the creditors, and those in which the veil was lifted for some other reason.

Question 5 (legal capital) was another popular question. On the whole it was answered well, with most candidates displaying a sound understanding of the underlying principles. Question 6 attracted a lot of takers. Most candidates were able to explain the effect of section 172 Companies Act 2006 and to explain how the interests of creditors, employees and society generally might be taken into account. Stronger candidates addressed specifically whether these interests can (or should) ever be put ahead of the interests of the members, as the question specified, and to discuss the implications and difficulties for company law should this occur. Question 7 (corporate opportunities) was popular and has been mentioned already. Stronger candidates were able to discuss when directors *should* be able to take up corporate opportunities. Question 8 (majority rule) did not have many takers. Question 9 has already been mentioned. Weaker candidates provided an answer to the “usual” question on minority protection in a quasi-partnership company, but the facts here involved a weakened form of majority and therefore called for a slightly different discussion. Any candidates who addressed these particular facts and advised *these* majority shareholders were well rewarded. Question 10 (derivative actions) was popular, and most candidates dealt well with both the derivative action (D Ltd) and the double derivative action issues (E Ltd). As discussed some candidates wrote about reflective loss, which was not called for on the facts of this problem question. Question 11 (capital) had very few takers. Question 12 (directors’ duties) was popular. It was generally well handled, and the case law was analysed thoroughly and well by most candidates.

## LABOUR LAW

### QUESTION 1

This question attracted few answers.

### QUESTION 2

A popular question which produced some outstanding answers, displaying a subtle knowledge of the case-law and the surrounding issues.

### QUESTION 3

This question attracted a number of answers but they were generally weak. Most candidates were able to identify the ‘but for’ test but few considered the ‘reason why’ approach from cases like *Shamoon*. Few candidates considered the relevance of motive to the question of whether direct discrimination can or should be the subject of a justification defence.

### QUESTION 4

This question did not attract many answers but those candidates who did attempt it generally did a good job.

### QUESTION 5

A relatively popular question. Most candidates showed good knowledge of the Act but there was a slight tendency to produce a prepared answer instead of focusing on the exact terms of the question.

#### QUESTION 6

As with question 5, candidates showed good knowledge of the legal materials but sometimes ignored the exact terms of the question.

#### QUESTION 7

A relatively popular question which attracted some good answers focusing on the reasonableness test. Outstanding answers also considered the role of 'automatically unfair' reasons for dismissal and scrutiny of the employer's dismissal procedures.

#### QUESTION 8

The answers to this very popular question were on the whole satisfactory, and sometimes very good, displaying a subtle knowledge of the case-law and a sophisticated understanding of the issues.

#### QUESTION 9

An unpopular question but one which attracted some excellent answers.

#### QUESTION 10

Many candidates attempted this question and most did so with some success, showing a detailed knowledge of *ASLEF* and the recent statutory reforms.

#### QUESTION 11

Another popular question. Candidates generally displayed a good knowledge of the relevant legal materials but few noticed the exact focus of the question on 'the individual's right to have trade union representation at work'. There was little attempt to define what this might mean or to consider whether any particular aspects of the anti-discrimination regime contributed more than others to the realisation of this right.

#### QUESTION 12

Candidates seemed confused by this question. Although most had a good general knowledge of industrial action law, few were able to give a precise account of the ways in which individuals' participation in industrial action is conditional on the actions of a trade union.

### **CRIMINAL LAW**

The overall standard of the scripts this year was encouraging: candidates generally showed that they had engaged with the material and had thought about the major issues. All four problem questions were answered by 2 or more candidates and, although the level of detail in the answers could have been higher, most candidates were able to make some good points. There were some weaknesses in understanding consent in non-fatal offences against the person, and drunken consent in sexual offences. The essay questions were less well done, with candidates typically writing patchy answers that showed a less than complete understanding of the structure of the offence or defence in question.

### **PRINCIPLES OF COMMERCIAL LAW**

The standard of scripts in Commercial Law was generally high, with the majority of candidates achieving solid to high 2:1 results. There were a number of excellent First class scripts and only a small minority of 2:2 candidates.

The most popular essay question was question 3. The best answers paid attention to both aspects of the quote, highlighting how the contractual rules on mistake of identity related to the statutory *nemo dat* exceptions. A minority of weak answers focused on just one or the other of these. There were some excellent answers on less popular questions such as questions 2 and 4, although it was disappointing that in answering question 2 some candidates merely described the operation of bills of exchange, while none addressed the question why their use has declined in recent years and what might have replaced them. Only very few candidates attempted questions 1 and 5, although those who did generally answered them very well.

Of the problems, question 6 was by far the most popular, and many of the answers were excellent, dealing with each class of assets in turn. Most candidates appreciated the significance of the fifty undated letters authorising withdrawals from the blocked accounts and made sensible suggestions of what their effect would likely be following the decision of the House of Lords in *Spectrum*. There were also some very good discussions of the likely characterisation of the sale and leaseback transaction. Most candidates attempting question 7 found it difficult – mainly because few took the time to follow the two cars through the chain of transactions. This also explains why only very few candidates realised that it was very much in Bertha’s interest to argue that her rejection of the Porsche was ineffective! There were a number of excellent answers of question 8, although it was noticeable that many candidates tried very hard to introduce *Watteau v Fenwick* issues into the discussion, even though the case was not remotely relevant! Most answers to question 9 and 10 were solid, with question 9 proving particularly popular. Here, the best answers did not restrict themselves to issues relating to the bill of exchange but also referred to general sale of goods issues, albeit briefly.

## **CONSTITUTIONAL LAW**

The Constitutional Law paper was taken, as is normal, by a small number of candidates. The most popular questions were those on sovereignty, the rule of law, separation of powers, direct effect and the HRA. The standard of the papers varied. The best was clearly first class, and displayed a clear understanding of both the positive law, and the underlying theory. At the other end of the scale there were some weak papers, where the candidates knew relatively little about the questions that they were addressing. There were however a number of perfectly solid 2.1s.

## **TAXATION LAW**

The answers to the questions on the tax law paper were generally of a high standard with candidates making very good use of relevant cases and statutory provisions. In particular, those candidates who used the literature referred to on reading lists properly in their answers were duly rewarded. Those answers to essay questions which were not focussed on the precise question asked, but instead provided a general description of the area, were not awarded high marks.

As in prior years there were 8 questions (6 essays and 2 problems) which gave considerable choice given that the students all cover all of the core material in a seminar format. Q.8 (the problem question on self-employment) was attempted by eleven of the twelve candidates whilst only three candidates attempted Q.5 (trading receipts and employment income) and Q.6 (employment benefits). The problem questions were very popular – almost all the candidates attempted at least one of the problems and seven answered both problems.

Q.1 on ‘ability to pay’ required integration of tax policy and technical material for a complete answer and in general the answers were very good. Q.2 concerned capital taxation policy; answers that engaged with the literature as well as the statutory material were awarded high marks. Q.3 on trusts was less popular than questions on this topic in previous years, but the answers were generally quite strong; the best candidates demonstrated a good understanding of the technical rules and particularly the effects of the 2006 changes. Most answers to Q.4 on tax avoidance were quite good; however, there is a tendency for students to fall into a standard historical overview of the *Ramsay* line of cases which produced weaker answers than those which focused on the specific question asked. Q.5 on trading receipts and employment income required a strong familiarity with the cases; the answers were very well done by the candidates who attempted this question. Q.6 concerned the tax treatment of ‘lower-paid employments’ and employer-provided living accommodation; the answers were generally weak, demonstrating a poor understanding of the relevant statutory material.

Turning to the problem questions, the answers to Q.7 and Q.8 were generally good but not as strong as problem answers in previous years. The facts in Q.7 raised a host of major and minor employment tax issues and also whether the taxpayer could offer her services on a self-employed basis; the self-employment status issue was generally not handled as well as the employment issues. Q.8 raised a number of issues concerning trading receipts and expenses; the best answers were comprehensive and also discussed the personal versus business aspects in some depth.

## **COMPETITION LAW AND POLICY**

The paper comprised ten questions of which five were essay questions and five problem questions. Candidates were asked to answer four questions including at least two problem questions.

The first essay question focused on the notion of undertakings under European Competition law. The second essay question dealt with the law governing Article 82 EC and the Commission’s Guidance on its enforcement priorities. Question three focused on the leniency programme and the fight against cartels. Question four addressed the interrelationship between public and private enforcement of competition law. The fifth essay question considered the economic effects of vertical agreements.

Problem questions focused on the application of Article 81 EC, Article 82 EC, The European Merger Regulation and the enforcement of competition law by the European Commission.

The examination was taken by 36 candidates. On the whole, the scripts showed a very good command of the subject and good analytical skills with 17 per cent of the candidates achieving a first class mark.

### **ENVIRONMENTAL LAW**

Generally the scripts were of very pleasing quality with candidates addressing the questions with critical analysis of the relevant legal detail. As with previous years, the vast majority of candidates did problem questions even though they are not compulsory. There was also some very thoughtful engagement with the policy dimensions of environmental law issues.

### **MORAL AND POLITICAL PHILOSOPHY**

This option was offered for the first time this year, and taught through a combination of classes and tutorials. It proved to be more popular than the teaching team had anticipated: in the end, 35 sat the paper.

The examination was divided into Part A (8 questions in moral philosophy) and Part B (4 questions in political philosophy). Candidates were instructed to answer three questions, including at least one from each Part. This emphasis reflected the asymmetric structure of the paper, with more emphasis on the moral philosophy side. Some topics in political philosophy have always been treated in the Jurisprudence paper, so Moral and Political Philosophy was designed to avoid overlap with those, and the Faculty and teaching team wanted this paper to provide knowledge directly relevant to other legal philosophy papers, but not systematically taught elsewhere in the course.

The examiners were very pleased with the results, especially in view of the fact that it was a first run at a difficult subject. The modal result was a II:1, and the mean overall mark 66. Eight candidates received first-class results, and their work really was distinguished: they displayed excellent knowledge of the literature, a deep understanding of the issues, and presented answers that gave cogent arguments in favour of their positions, while considering and turning the main objections thereto.

The examiners noted, however, a very uneven distribution of answers among the questions set, one that could not be explained by a variation in difficulty of the problem or by delivery in teaching. Question 1 (on act utilitarianism), Question 4 (on Kant's theory of duty), and Question 12 (on moral contractualism) accounted for the bulk of the answers. Only one candidate attempted Question 8 ('Are moral reasons overriding?'). The other answers distributed themselves fairly evenly among the remaining questions. Apart from Question 8, there was only a modest variation in the modal or mean marks as between questions, though Questions 6 (special projects and relations) and 4 did receive the highest means overall. There was no significant difference in candidates' performance as between Part A and in Part B.

We did, however, find among the bottom quarter of the papers, a high degree of 'play-back' from the lectures and classes, especially on the questions about utilitarianism and moral luck. And the number of candidates who could think only of one alternative to act-utilitarianism (namely, rule-utilitarianism) was very surprising, as other possibilities were discussed and

on the reading list. While candidates were in general careful not to produce overlap among answers, there was also a tendency to miss interconnections between certain issues, for example, between the cogency of act-utilitarianism as a moral theory and the force of special relations and projects in morality. No one was penalised for not noticing these, but the very best papers displayed an acute sense of how one general moral view might influence or constrain answers to other questions, and thus an excellent grasp of the subject as a whole.

## **EUROPEAN HUMAN RIGHTS LAW**

This is the second year that this paper has been offered. Twenty-one candidates sat the examination. The examination paper had a different format from the previous year: the paper was not divided into parts, and a (non-compulsory) problem question was set. Only one question (Q. 2, on positive obligations and criminal law), failed to attract any answers. Of the remaining questions, Q. 6 (on Article 14) and Q. 8 (on extraterritorial application) proved the most popular, with 15 and 14 answers respectively. Qq. 1 (on housing), 9 (on self-incrimination), and 10 (the problem question), attracted the fewest answers (respectively, 4, 6 and 5 answers each). Turning to the substance of the answers, in general, the standard was high, with the better candidates having clearly derived considerable benefit from attending the wide range of seminars available. Candidates who did not discuss the relevant European Court of Human Rights cases in detail were marked down. The better candidates illustrated their discussions of ECtHR cases with comparisons and contrasts drawn from Human Rights Act case law, but those who attempted to answer questions primarily on the basis of British case law were penalized. Candidates who showed knowledge of the relevant academic literature were rewarded, and those who were able to be convincingly critical scored even higher. Answers that were analytical were preferred over those that were strong on rhetorical flourishes at the expense of analysis. Some more detailed comments on specific questions are: Q. 1: Weaker answers ignored that fact that the question was framed as ‘should ...’. Q. 3: Weaker answers did not consider the second part of the question. Q. 4: Weaker answers considered proportionality but not specifically in the context of Article 3. Q. 5: Weaker answers did not adequately consider the issue of CCTV. Q. 6: Weaker answers ignored, or failed to demonstrate any real knowledge of Protocol 12. Stronger answers were well versed on the cases regarding ‘ambit’. Q. 7: Weaker answers concentrated only on the discussion of academic views without linking these to specific ECtHR decisions. Q. 8: Candidates who misstated the ratios of the main cases were, not surprisingly, penalized. Q. 10: (problem question) provided two problems, with candidates choosing which, if either, to answer. In general, those who chose to do this question answered it well, with some excellent answers.

## **COPYRIGHT, PATENTS AND ALLIED RIGHTS**

The standard of answers to the Copyright section of the Paper was good overall. A large number of students answered question 1, and engaged well with both parts of the question. Answers to question 2 were also good, particularly those which engaged critically with intent-based theories of authorship. Few candidates attempted questions 3, 4 or 6, but those that did wrote very good answers overall. Question 5 was also popular, with the stronger answers going beyond Ashdown to consider the law on fair dealing and s 171(3) more generally.

The patent law answers were of high quality. Answers dealing with the distinction made in patent law between invention and mere discovery were particularly strong. The question directed to patent claim scope (for both validity and infringement) was a challenging one, but one that was generally handled in a sophisticated manner by those students who attempted it. A question included this year which asked whether patent incentives were required for medical research, and required students to integrate domestic and international law in their essays, was also answered well.

### **PERSONAL PROPERTY**

The numbers in this subject continue to be relatively small, so meaningful conclusions are difficult to draw. However, though questions were generally done well, one major criticism is a failure on the part of a number of candidates to answer the specific question asked. This was especially problematic in question 6, where those who answered it seemed content to simply trot out the relevant principles of law. In the same vein, an issue in question 4 which was hardly addressed, and which was flagged up by the examiners by the use of quotation marks around the relevant word, is whether the so-called ‘exceptions’ to *nemo dat* really are exceptions at all.

### **COMMERCIAL LEASES**

This was the first year this subject was examined. Between the candidates, all of the questions on the paper were attempted. Overall, the candidates exhibited a good level of knowledge of the cases, and an awareness of proposals for legal reform, which was most obviously relevant in the question on forfeiture (question 1). Candidates were also deft at handling the statutory material. The better candidates also showed commercial awareness, and, where appropriate, engaged with the problem questions by construing the relevant lease provisions. Generally, the essays were clearly structured and easy to follow, making it significantly easier for examiners to mark, and for points (and good scripts) to stand out. When the scripts were good, they were very good. Two of the seven candidates scored first class marks, and all of the other papers included material which was of a high calibre. Timing may have been a problem for some candidates whose scripts were less good. If a criticism could be made, then the main one is that in question 2 the implications of the decision in *Reichman v Beveridge* (2007) L & TR 18 for repudiation of leases were not always fully considered. Further, perhaps overall the level of reference to academic materials and to, for example, the legislative history and purposes of the Landlord and Tenant Act 1954 could be improved in essays. Overall, the examiners were pleased by the quality of the papers.