FHS Jurisprudence and Diploma in Legal Studies Examiners' Report 2021

First and foremost, the Examination Board wishes gratefully to acknowledge the tireless work of Paul Burns and Clara Elod in connection with the FHS and DLS examinations. As a result of a bereavement, an urgent need for administrative support arose in relation to the examination process. Paul and Clara took on this very substantial burden without hesitation and their magnificent work ensured that the whole process worked extremely well in a year that had, for obvious reasons, significant potential for derailment and error. The Examination Board and the Law Faculty are most grateful.

Part I

Statistics

FHS Course 1, BA Jurisprudence

Class	Number			Percentage (%)		
	2020/21	2019/20	2018/19	2020/21	2019/20	2018/19
I	51	54	41	25.24	30.86	20.19
II.I	147	120	155	72.77	68.57	76.35
II.II	2	1	5	0.99	0.57	2.46
III						
Pass						1.11
Fail	2		2	0.99	0.98	

FHS Course 2, BA Law with Law Studies in Europe

Class	Number			Percentage (%)		
	2020/21	2019/20	2018/19	202/21`	2019/20	2018/19
I	11	12	2	39.28	6.66	30.30
II.I	17	13	28	60.71	93.33	69.70
II.II						
III						

Pass						
Fail						

Classifications - FHS Course 1 and 2 combined

Class	Number			Percentage (%)		
	2020/21	2019/20	2018/19	2020/21	2019/20	2018/19
I	62	66	43	26.96	30.84	18.45
II.I	164	133	183	71.30	68.70	78.54
II.II	2	1	5	0.87	0.46	2.14
III						
Pass						
Fail	2		2	0.87		0.85

Diploma in Legal Studies

Category	Number			Percentage (%)		
	2020/21	2019/20	2018/19	2020/21	2019/20	2018/19
Distinction	8	11	7	32	36.67	25.92
Pass	17	19	20	68	63.33	74.07
Fail						

Vivas

Vivas are no longer used in the Final Honour School. Vivas can be held for students who fail a paper on the Diploma in Legal Studies, but none has been held for the last seven years.

Marking of scripts

A rigorous system of second marking is used to ensure the accuracy of marking procedures. This second marking occurs in two stages.

The first stage takes place during the initial marking that is carried out prior to the first marks meeting. In subjects with a large number of candidates, marking teams meet shortly after the examination concerned to ensure that a similar approach is taken by all markers. Regardless of

whether there is a discrepancy in the marking profiles among members of the team, a sample of scripts is sent for second marking to ensure consistency. This sample comprised at least six scripts, or 20% of the scripts, whichever was larger. Further, any scripts where the first mark ends with a 9 (e.g., 69, 59, 49) or any mark below 40 were also second marked at this stage together with potential prize scripts. In 2021, 571 scripts were second marked prior to the first marks meeting.

Following the first marks meeting additional scripts were sent for second marking in three situations. The first concerned scripts that were 4 marks or more below the candidate's average mark. The second was where a script had been marked at 58 and an increase to a mark of 60 would result in a First; the third was where a script ended in a 68 and 67, and an increase to a mark of 70 (either in isolation or in conjunction with other 67s and 68s in the profile) would result in a First.

In 2021, 173 scripts were second marked following the first marks meeting.

Following the second marks meeting, additional scripts were sent for second marking (and, in some instances, third marking) where the Examination Board felt that further second marking (or third marking) was warranted upon reviewing candidates' marks profiles.

Overall, the level of second marking was somewhat higher than in the last few years.

	Number			Percentage %		
	2020/21	2019/20	2018/19	2020/21	2019/20	2018/19
Total Scripts	2162	1915	2219			
First stage	571	395	431	26.41	20.62	19.42
Second stage	173	188	224	8.00	9.81	10.09
All second marking	744	583	655	34.41	30.44	29.51

Jurisprudence Procedure

As the two elements of the Jurisprudence assessment (i.e., mini-option essay and examination) are marked separately, a slightly different procedure is used for second marking. During first marking, the standard procedure was used for the examination component (see above) while all mini-option essays were second marked. Following the first marks meeting, some scripts were sent for second marking where one or both elements were 4% below the candidate's average. Second marking also occurred where the combined marks leave the student on the borderline between classifications. 14 Jurisprudence scripts were second marked after initial profiles were considered. In calculating Jurisprudence combined marks, the Examination Board followed the previously established convention that a combined mark of 69 should be increased to 70 if the mark for either component (essay or exam) was a 70, but providing the 69 was not itself the result of a rounding up of component marks from 68.5.

NEW EXAMINING METHODS AND PROCEDURES

B.

1. Format of exams

Coursework

Three papers (History of English Law, Comparative Private Law and Advanced Criminal Law) were assessed by way of essays written over the course of a working week. The assessments for Comparative Private Law and Advanced Criminal Law took place in Week 0 of Trinity Term and Week 9 of Hilary Term respectively. History of English Law had assessments on both of those weeks in order to accommodate candidates who were also taking Comparative Private Law or Advanced Criminal Law as their other options.

Open-book examinations

Candidates sat examinations online using the Inspera platform. This platform enabled students to write answers directly into the system and thus avoided the need for any files to be uploaded (in contrast with the Weblearn platform, which had been used previously). Candidates were allowed four hours per exam save for Jurisprudence which paper candidates were required to answer in three hours. In order to accommodate time zone differences and candidates who were permitted additional time, each paper had to be completed within 25 hours with the four-hour (or three-hour) period commencing when the candidate opened the paper via the Inspera system. Because of the open-book nature of the exams, no material was made available to candidates beyond case lists (which were made available via Canvas). Candidates were forewarned in the Notice to Candidates that they themselves would be expected ensure that they had access to relevant materials.

2. Mitigating the impact of the changes

In 2021, the University introduced an Assessment Support Package that offered four means of mitigating the impact of the difficulties that students faced as a consequence of the pandemic.

Submission statements: For those subjects that required the submission of essays rather than timed examinations, examination boards were permitted to invite candidates to submit statements explaining how their essays had been negatively affected by restrictions on in-person access to libraries. The Examination Board chose not to adopt this measure on the grounds that work had been undertaken for the 2020 examinations to establish that the necessary library resources were available online and because doing so would be unfair potentially to give students undertaking essay assessments an advantage over their counterparts taking online examinations.

Marks safeguard: The University required all examination boards to consider the median mark for each paper against the median result for marks for the period 2017-2019 and to scale marks if the two figures were more than two marks apart. In the event, no scaling was required as in all cases, the median marks for papers in 2021 were within two points of the reference value.

Outcomes safeguard: The University gave examination boards permission to scale classifications if they were significantly out of line with the averages from the 2017-2019 period. For FHS results, the Board chose not to implement this measure given that the proportion of Firsts was higher than the reference value. In the case of the Diploma in Legal Studies, the proportion of Distinctions under the standard exam conventions was 20% than the reference value. Accordingly, the conventions were adjusted so as to require students to attain one mark of at least 68% and an average mark of 64% rather than one mark of at least 70% and an average of 65%.

Disruption affecting a group or cohort of candidates: There was no particular incidence of disruption to account for, beyond the general effects of the pandemic.

Actions in respect of individual MCEs are reported under heading 4, below.

3. Operation of Exams and use of ARD Database

The examinations went smoothly and the Inspera system worked well. In the small number of instances when problems arose, these were almost all down to incorrect use of the Inspera system, and typically the result of candidates choosing to upload PDFs to Inspera, rather than following the instructions to type their answers directly into the system. FHS classifications were calculated by the ARD Database. This worked satisfactorily though there were some areas in which improvements could be made (see Future changes below for further information).

4. Examination Board

Examination Board meetings: The absence of the Faculty's Exams Officer, as the consequence of a bereavement, meant the process of inputting marks into the ARD Database happened significantly later than originally intended, with the consequence that marks profiles were not available for the first marks meeting. Instead, profiles were made available to the Examination Board and the Chair of Examiners, Paul Burns and Clara Elod (who had been seconded from her Equality and Diversity role to support the examinations), identified instances where additional second marking was required. Profiles were then considered at the second marks meeting on 13 July 2021. The Examination Board required some further second marking following which the Examination Board convened for a third marks meeting on 16 July 2021 to finalise classifications and prizes (although certain prizes were determined by correspondence on 20 July 2021 as was one issue concerning a rubric violation).

MCEs: In 2021, the University instituted an enhanced MCE procedure which permitted candidates to submit a student impact statement and to submit MCEs directly. The Examination Board considered 158 MCEs in total. Three candidates were elevated to a First on the basis of strong 2:1 profiles and relevant MCEs (a fourth was elevated to a First simply on the strength of the marks profile). One candidate had a paper disregarded and their classification confirmed in recognition that the paper in question had been severely affected by illness. Two candidates were marked on the basis of answers submitted rather than the number of answers required in respect of three papers. In one instance, this allowance was made in circumstances where an MCE that would have secured the student concerned extra time arrived too late for the MCE recommendation to be put into effect. One candidate submitted a paper significantly late (after encountering problems submitting the script through Inspera). Concerns were expressed that the student may have used the time to improve

their answers. However, the Examination Board ultimately accepted the explanation given in the MCE and the late submission was marked with no penalty imposed.

Decisions made in respect of individual cases: Three candidates were penalised five marks each for rubric violations in either Contract or Tort (in each case for not answering the required number of problem questions). One candidate was penalised 10 marks in the Jurisprudence examination for extensive paraphrasing of a source text which the Examination Board determined constituted poor academic practice (but not plagiarism). One candidate submitted a script which had sufficient typographical errors to prompt a request from the markers that a penalty be imposed. However, the Examination Board concluded that no action should be taken given that the Examination Conventions did provide for typographical errors to be penalised (although the Examination Board recommended that the Examination Conventions be adjusted so as to permit the imposition of a penalty in these circumstances in the future).

5. Recommendations

Degrees below the 2:1 band. The Examination Board is concerned that virtually no candidates were awarded degrees below the 2:1 band. Consequently, students are virtually assured of achieving a 2.1 degree regardless of how little work they do, and this means that the examination process does not fully achieve its primary purpose, which is sufficiently to differentiate students from each other based on their academic performance. The issue requires, in the Examination Board's view, consideration by Undergraduate Studies Committee.

ARD Database: It is proposed that changes be made to the Database to provide a more concise version of the profiles report;[1] to record instances where second marking has been undertaken; and to identify more systematically instances where second marking should be undertaken. The Examination Board understands that there will also be discussions with the ARD support team to see what could be done to expedite the process of uploading marks and maker details (this had required the creation of in excess of 150 individual spreadsheets).

Marking conventions: The Board asked that Undergraduate Studies Committee consider whether more specific rules could be agreed to determine when further marking should take place.

Jurisprudence mini-option essay questions: The Examination Board was concerned that no arrangements seemed to exist for Jurisprudence mini-option essays questions to be supplied to the Law Faculty by the required date. The absence of any essay questions was discovered very late in the day and urgently addressed. The Examination Board recommends that: (i) the convenor of the Jurisprudence subject group keep a watchful eye on the need for members of the group to submit mini-option essay questions going forward, and that outgoing convenors specifically address this issue with incoming convenors; and (ii) the Examinations Officer circulate at the start of Hilary Term a note to members of the jurisprudence group reminding them of the deadline by which to submit mini-option essay questions.

[1] The report needed to be amended manually by administrators so that all results for each profile could be viewed simultaneously and did not require extensive scrolling.

Examination Conventions: Arrangements should be made to adjust the Examination Conventions to permit penalties to be imposed where typographical and associated errors are sufficiently numerous that they seriously impair the readability and quality of a script. More generally, the Examination Board considers that the Examination Conventions should be more prescriptive in terms of the penalties imposed (while still leaving the Examination Board with ultimate discretion) in order to ensure consistency in the penalty across cohorts. There is no reason why, for example, students should not be made aware that rubric breaches of the kind discussed above will ordinarily attract a 5% penalty.

6. Thanks

The Examination Board reiterates the note of thanks set out at the start of its this report. It also expresses its graduate to the external examiners, who contributed significantly to the work of the Examination Board.

PART II

A. General comments on the examination

The proportion of Firsts awarded, while not as high as the 2020 figure, was nonetheless notably higher than in previous years, which accords with the aspiration emerging from Undergraduate Studies Committee's deliberations earlier in the year to see a sustained increase in the proportion of Firsts. It is impossible to say to what extent this is the product of online examinations in themselves, and to what extent the four-hour time window (and three-hour time window for Jurisprudence) played a part, although the latter explanation seems unlikely given that the 2020 cohort did not have as much time and yet secured an even higher proportion of Distinctions). Withdrawals and suspensions may have been a contributory factor, but the total of 23 withdrawals/suspensions was significantly lower than the figure of 30 for 2020.

FHS Course 1, BA Jurisprudence

	2021				2020				2019				2018			
	Male		Female		Male		Female		Male		Female		Male		Female	
	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%
I	23	31	28	22	31	41	23	23	18	20	23	20	23	29	15	15
II.I	51	68	96	76	43	57	76	77	69	78	85	75	56	69	83	84
II.II			2	1	1	1	0	0	1	1	4	4	1	1		
III																
Pass													1	1	1	1
Fail	1	1	1	1					1	1	1	1				
Total	75			127	75		99		89		113		81		99	

FHS Course 2, BA Law with Law Studies in Europe

	2021				2020				2019				2018			
	Male		Female		Male		Female		Male		Female		Male		Female	
	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%
I	4	57	7	33	5	55	7	44	1	8	1	6	4	33	6	29
II.I	3	43	14	67	4	45	9	56	12	92	16	94	8	67	15	71
II.II																
III																
Pass																
Total	7		21		9		16		13		17		12		21	

FHS Course 1 and 2 combined

	2021				2020				2019				2018			
	Male		Female		Male		Female		Male		Female		Male		Female	
	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%
I	27	33	35	24	36	43	30	26	19	18	24	18	27	29	21	17
II.I	54	66	110	74	47	56	85	74	81	80	101	78	64	69	98	82
II.II			2	1	1	1			1	1	4	3	1	1		
III																
Pass													1	1	1	1
Fail	1	1	1	1					1	1	1	1				
Total	82		148		84		115		102		130		93		120	

The imbalance in the number of men and women attaining Firsts reduced significantly from 2020, though the figures for that year were something of a nadir, and the 9 percent gap for 2021 still means there is work to be done.

C. Detailed numbers on candidates' performance in each part of the examination

Students on the BA programmes take nine papers as part of the FHS examinations. These are made up of seven compulsory papers and two optional papers. Students chose from a list of 23 option papers for this year's FHS. The distribution of students across the option papers is shown below

	2021	2020	2019	2018	2017	2016
Advanced Criminal Law	31	25	15			
Civil Dispute Resolution	15	4	5	5		
Commercial Law	20	-	11	25	11	17
Company Law	14	12	13	2	20	10
Comparative Private Law	14	15	17	14	11	12
Competition Law and Policy	24	17	15	1	33	28
Constitutional Law	8	5	9	6	9	5
Copyright, Patents and Allied Rights	-	-	9	34	29	22
Copyright, Trade Marks & Allied Rights	31	16	15	18	13	8
Criminal Law	8	5	9	6	5	5
Criminology and Criminal Justice	20	16	16	12	27	24
Environmental Law	22	12	16	3	6	9
Human Rights Law	30	20	18	17	20	19
Family Law	37	41	57	60	49	29
History of English Law	7	3	5	3	2	5
International Trade	11	15	10	13	8	5
Labour Law	20	1	13	15	21	15
Media Law	38	23	30	28	1	20
Medical Law and Ethics	(5)[2]	51	85	73	78	47
Moral and Political Philosophy	30	35	17	24	34	18
Personal Property	2	16	12	2	17	13
Public International Law	35	31	29	41	46	39
Public International Law (Jessup Moot)	5	5	6	3	4	
Roman Law (Delict)	13	16	5	7	9	18
Taxation Law	20	15	27	16	22	12

[2] Medical Law and Ethics did not run in 2020-21 but marks were carried over for five students who suspended the previous year and returned in 2021 to take Finals

Students on the DLS take three papers, and choose from a shortened list of FHS option papers. The distribution of DLS students across the core and option papers is as follows:

	2021	2020	2019	2018	2017	2016
Administrative Law		1		1		2
Advanced Criminal Law	1					
Commercial Law	1					
Company Law	8	12	6		6	6
Competition Law and Policy	4	5	5		5	3
Constitutional Law	2	4	4	3	5	5
Contract	19	25	22	28	27	27
Copyright, Patents and Allied Rights	-	-	3	3	2	6
Copyright, Trademarks and Allied Rights	4	6	2	4	4	2
Criminal Law	-	2		6		1
Criminology and Criminal Justice	3	2	3	4	2	2
Environmental Law	3	1	4	1		
European Union Law	3	3	4	5	8	7
Family Law	-	-	1			
History of English Law	1	-		1		
Human Rights Law	-	-			4	5
Labour Law	1	-	1	2	3	2
Media Law	-	2	1			
Medical Law and Ethics	-	-		4	3	
Public International Law	6	6	5	9	5	3
Roman Law (Delict)	1	-	2		1	
Taxation Law	1	2		4		
Tort	15	23	17	23	23	22
Trusts	2	2	1	4	4	4

The table below shows the marks distribution across the various subjects taken by FHS and DLS students in 2021-22.

	Student Count	75-79	71-74	70	68-69	65-67	61-64	60	58-59	50-57	48-49	40-47	39 or less
Administrative Law	230		6	16	10	31	29	3	3.5	1			
Contract	250		8	14	14	29	24	3.5	3.5	3.5			
European Union Law	233		10	7	7	37	29	5	2	2			
Jurisprudence	231		6	10	14	36	26	3	3.5	1			
Land Law	230		5	9	5	29	34.5	6	6	3.5			1
Tort	246		7	15	12	37	21	1	2.5	3		1	
Trusts	233		5	15	8	26	24	9.5	5	5.5		1	1
Advanced Criminal Law	32		3	41	34	22							
Civil Dispute Resolution	15		7	33	33	20	7						
Commercial Law	21	5	14	19	14	29	5	9		5			
Company Law	22		9	14	9	32	32	4					
Comparative Private Law	14		14		14	22	29	7		7			7
Competition Law and Policy	28		4	7	21	39	21	4		4			
Constitutional Law	10			40	10	10	20	20					
Copyright, Trade Marks and Allied Rights	35		8.5	8.5	14.5	43	17			8.5			
Criminal Law	8				12.5	75	12.5						
Criminology & Criminal Justice	23			21	30	21		13					
Environmental Law	25		20		12	40	16						

	Student Count	75-79	71-74	70	68-69	65-67	61-64	60	58-59	50-57	48-49	40-47	39 or less
Family Law	37		16	19	13.5	38	13.5						
History of English Law	8		25	12.5	25	25							12.5
Human Rights Law	30		7	20	17	23	27						
International Trade	11	9		9	9	27	36			9			
Labour Law	21		14	14	0	33	29						
Media Law	38		13	16	11	37	11		8				
Medical Law and Ethics	5					20	20	20	20	20			
Moral and Political Philosophy	30		10	20	20	17	17	7					
Personal Property	2		50				50						
PIL	41		10	20	22	34	12	2					
PIL Jessup Moot	5		80	20									
Roman Law (Delict)	14		14.5	14.5	21	50							
Taxation Law	21		19	19		38	24						

Part III Reports on individual courses

Administrative Law

General comments:

Overall, the scripts in Administrative Law were strong at the top end and solid in the middle. There were few weak scripts.

We had two overarching comments. First, on a few questions, candidates appeared to be answering a slightly different question from the one set. We do not mean that it was on a different topic, but rather an answer that did not directly engage with the prompt. Second, there has been recent, appellate case law on many topics in administrative law. The stronger scripts engaged carefully with this material.

Comments on individual questions:

Question 1: on procedural fairness – was well answered. The strongest scripts engaged in close analysis of the case law, including cases where Lord Reed's rationale was not the animating rationale.

Question 2: on scope and monopoly power – was not all that popular. The best answers were directed at the issue identified in the prompt – that is, monopoly power – rather than a more general discussion of the issues.

Question 3(a): was answered by a number of candidates. As with most quote-prompt questions, the best answered engaged closely with the different parts of Lord Carnwath's statement in *Privacy International.* Answers that provided a general discussion of the *ultra vires* debate didn't score as well. By contrast, 3(b) was not a popular question – even though it did provide scope for original answers.

Question 4(a): on *Carltona* and *R v Adams* – was not answered by many candidates even though it concerned a recent, Supreme Court decision. 4(b) was slightly more popular. Strong answers engaged with the rationales for the rules on fettering identifiable in the case law, with *R (Sandiford)* being an important decision.

Question 5: on legitimate expectations – was very popular with candidates. Three points might be made here. First, some answers seemed to provide a more general discussion of the law on legitimate expectations, perhaps similar to other questions commonly seen or discussed in tutorials. Second, the stronger answers engaged with recent authority on legitimate expectations. Although *Coughlan, Bibi, Nadarajah*, etc, remain important, it is crucial for candidates to discuss more recent cases too. Third, the best answers were explicitly evaluative – answering the question of whether the distinction *should* be abolished.

Question 6(a): on improper purposes and Wednesbury – was not particularly popular with candidates. The stronger answers engaged with the implications of subsuming improper purposes within Wednesbury – what would change, would it make doctrinal sense, etc. Question 6(b): on national security and proportionality – did allow strong candidates to show their close engagement with the material. Strong answers moved beyond a general discussion of the relationship between

reasonableness and proportionality and focused on whether national security is and ought to be treated distinctively.

Question 7: on standing – was, perhaps as to be expected, popular. There were few weak answers, with many clustered in the middle. The strongest answers provided a definition of a virtuous citizen, as set out in the prompt, and then assessed the case law against it. We'd also note that where the question is explicitly in two parts – 'does'… and then 'should' … – candidates ought to remember to address both in detail. There were some very good answers on the first part which didn't fully address the second.

Question 8: on applying different principles in tort – was not popular. The stronger answers went beyond the law of negligence. As before, close engagement with recent case law was also necessary.

Question 9: on errors of law and fact, and deference to the interpretations of administrative decision makers – was answered by a number of candidates. Generally, answers were solid, with many clustered in the middle. As with the legitimate expectations question, we had a slightly sense here that some answers were focused on a more general discussion of the issues around law/fact or deference, rather than a direct engagement with the question. Nonetheless, some candidates scored very well on this question.

Question 10(a): on courts' control of tribunals – was not popular, even though the prompt did offer some distinctive avenues of analysis. Question 10(b) – on ombudsmen – was done by a few candidates. Strong answers worked through what is distinctive about ombudsmen and whether, in that light, different principles ought to apply.

ADVANCED CRIMINAL LAW

General comments:

The essays were, by and large, of a high level. The marks reflect the significant intellectual work done by the candidates and the care taken to develop their arguments. The standard expected was appropriately high, candidates had to master a narrow range of material, and had a week to write two essays. Part A contained a compulsory question covering the material across the course. Candidates who answered by reference to multiple areas in the course were rewarded appropriately; candidates who answered without covering the scope within the course that the question called for were held back. Proper, if abbreviated, referencing was important, as well as going deeply into issues rather than just summarizing them. It was not surprising to see a bunching of answers on terrorism, rape

Comments on individual questions:

Question 1: concerned the identity of the criminal law. It was a compulsory question. The criminal law could have been described, and its identity found, by reference to many of the seminar sessions done in the course, with candidates supplying at least two, and usually more, tending to fare better. The key issues related to what the criminal law was, compared to other areas of law and to what any area of law was. It required an analysis of norms, substance and procedure, to do well, with candidates who considered legal reasoning and legal cultures tending to gain high marks.

Question 2: on procedural rules linking tort and crime, was not answered by many candidates. The material on tort and crime is large, giving a range of possible interpretations and perspectives. This

question focused on the procedural connections, well-known in the literature, especially compensation, trespass merging in a felony, and convictions as evidence in later civil claims. It was also open to candidates to consider whether "most effective" really meant "procedural" was the best route. That could have involved comparisons with other ways to link criminal and civil law, including substantive ones.

Question 3: on terrorism, was very popular. The question asked about why Roach's claims would matter, and whether, and if so, how, reform should take place. The quote prompted particular consideration of status offences, thought crimes and guilt by association, but the quote was written with respect to the USA, and some adaptation for the English and Welsh context was appropriate. Detailed discussion of what the offences relating to terrorism were, what their rationales were, and why pushing the envelope of inchoate liability might be objected to, was required. Reform was a significant issue, and some candidates found it difficult to present realistic options.

Question 4: on rape, was also very popular. Good answers were produced, probing what the wrong was in rape, and how theoretical approaches could be applied in practice. Practical decisions, backed by coherent reasoning, on the complicated group of cases in the area was rewarded.

Question 5: on regulatory aims and functions of criminal law, was answered by just a few candidates. The question asked for a wider look at what regulation showed about the content of the criminal law. What criminal law can be used to do, and why, is a complex area, but candidates were able to find some space for arguments, particularly in financial regulation, within the course, and other examples drawn from across the syllabus could assist.

Question 6: on civil and criminal enforcement, was answered by few candidates. It contrasted the nature of rules with how they are enforced and gave an opportunity for interesting discussion on different forms of orders, by different legal actors, as means of furthering the goals of the criminal law. Candidates who considered how enforcement tied into deeper principles of the criminal law, and what "most effective" in the question might mean, were rewarded.

CIVIL DISPUTE RESOLUTION

15 students sat the exam, and 6 students were awarded first class marks overall, reflecting the high quality of the scripts. 8 of the 10 questions were attempted including both optional problem questions. No answers were provided to the history question or the question on arbitration (most candidates choosing to focus on mediation instead in what was an either/or question). The fair trial question tended to produce weaker answers where candidates regurgitated as much partially relevant information as they could. Apart from the problem questions, most questions required both descriptive and normative analysis. The examiners were flexible as to the weight students gave to the *is* and *should* parts of their answers, but strong answers had to cover both in a way that demonstrated a solid grasp of the reading list and the underlying issues.

COMMERCIAL LAW

We saw a number of high-quality scripts this year, well over a third of which were first class.

Candidates had a marked preference for problem questions over essays. This is a shame, given the dynamic nature of commercial law and the reforms (and reform proposals) that have been implemented (or not implemented) in recent years. Given the unusual nature of the exam due to the pandemic, essay questions this year were somewhat less predictable and certainly required more specific answers, and this may well have been behind this trend.

It was rather surprising to the markers that, in problem rather than essay questions, a minority of candidates engaged in quite a lot of cutting and pasting (printers suddenly appearing in questions about cars and cellos in questions about Edwardian tables). This did not universally work to those candidates' advantage.

Question 1: This question, on the desirability of distinguishing between consumer and non-consumer contracts, had very few takers, even though, as a very broad question, most candidates should have been able to say something about it. It required more than simply setting out the terms implied by SGA and CRA. Why should consumers be protected and from what? Does consumer legislation care about substantive justice? To what extent does the CRA represent an advance over the SGA and UCTA?

Question 2: As essay questions went, this was a reasonably popular question and some of the answers were very good indeed. A common failing was that candidates simply regurgitated the parts of the course relating to security, rather than engage with the question and address the points raised in it.

Question 3: Again, quite a popular question. Most answers did not really address the oddity that s. 13 prescribes that what will usually be an express term of the contract (the description of the goods) is to be an implied term. Good answers focused on the history of the section and what it set out to achieve. Only very few focused on the distinction between 'identity' and 'attributes', the extent to which it is useful and the struggle of the courts to keep terms relating to quality (rather than description) out of s. 13.

Question 4: This question, on undisclosed agency, had few takers. Most answers were competent, though not outstanding. Only one managed to raise the question that underlies the quote: given the lengths the law goes to in order to protect third parties from the intervention of undisclosed principals when this would lead to injustice, can 'commercial convenience' justify its continued existence?

Question 5: Not a question with many takers, but those who did tackle it did a very good job, tackling the two parts of the question well and pointing out how they related to one another.

Question 6: Most candidates struggled applying s. 12 to these facts. Most went straight to the problematic restitutionary claim (*Rowland*), but did not consider any conversion claims the true owner would have against either Bexhill or Camphill, or any claim for breach of the term implied by s. 12. Many candidates missed the tension between durability, expressly mentioned in s. 14(2), and acceptance by lapse of time in s. 35, and accordingly failed to mention that, if rejection was no longer possible, damages might still be available. Most answers simply assumed the CRA would apply, ignoring the issue that A also uses the car for his business.

Question 7: Many candidates did not notice that, in the first transaction, there had been, or at least might have been, a course of dealing and that 50k was described as the usual limit. One common error was to focus on agency to the exclusion of all else. Thus, in the part of the question relating to purchase of furniture by the branch manager, most candidates jumped on ratification without considering if the breach of contract, ie the failure to pay on time, entitled the supplier to terminate in the first place. A number of candidates were not happy unless they tried to apply *Watteau v Fenwick* in some way – even though it had no application to the facts whatsoever!

COMPARATIVE PRIVATE LAW

This being the fourth year that this course has been examined by the submission of extended essays, the examiners continue to feel that their original hopes and expectations prompting the decision to move from a 3-hour paper to an extended (max. 4,000-word) essay have been borne out by the exam experience, now in statistically relevant numbers.

The essay format with three demanding and wide-ranging questions to choose from – two based in the law of obligations, namely contract or tort/delict, the other in core property law – is ideally suited to assess candidates' performance in a subject which inherently requires candidates to have both a broad (three different jurisdictions) as well as deep (contextual) understanding of the materials they have studied, to understand the way that different areas of the law interrelate within each system, and to analyse similarities/differences between them across jurisdictional divides.

This year, just over half of the candidates chose an obligations topic (with contract being more popular than tort/delict), the rest chose to write on property law. The overall quality of the submitted work was good or at least reasonable, with a number of very impressive and one truly outstanding essay. Given the relatively small number of candidates, the examiners prefer to make a few general comments rather than engaging in a separate discussion of each question.

Candidates opted for a range of different approaches in their essays, many of which were successful and well-suited to structuring the essays and answering the question – provided that there was a direct, careful and thoughtful engagement with it on its own terms. Those who took their cues from the terms of the actual question set (which in two cases involved quotes) generally did better than those who tried to use the question as a 'springboard' into a more generic discussion or one which sometimes appeared to be inspired by a pre-prepared essay plan.

A wide range of literature from the reading list (and sometimes beyond) was consulted. This worked very well when candidates made targeted use of information to advance their own argument, referencing it properly, rather than just relying on books as a pool of information or to provide a model line of argument. In a few cases, candidates seemed unaware that the literature they were using predated a particular reform and could therefore not be relied on as an accurate source of the current law or indeed of the current numbering of codal provisions.

The best answers were those which displayed both a good understanding and overview of the relevant law within each of the jurisdictions and managed to assemble this information into a clear, coherent, well-structured and lively <u>comparative</u> account and/or argument in direct answer to the question, such that the overall essay conclusion became more than the sum of its component parts.

COMPETITION LAW AND POLICY

The paper comprised eight questions of which four were essay questions and four problem questions. Following the successful change of format initiated last year, both FHS and DLS candidates were asked to answer three questions, including at least one problem question, in four hours.

Essay questions were of a mixed nature, probing the student's ability to reflect on transversal, topical, timeless, and/or very focused elements of the course.

Question 1 required candidates to reflect on a quote drawn from Advocate General Bobek's Opinion in the *Budabest Bank* case, which argues that the case law precludes abstract assessments of business practices under EU competition law. This was a popular question attempted by twelve students. Answers were somewhat uneven —generally, either they were excellent or simply good. Three candidates obtained a mark of 70% or over. Amongst the remainder, the average mark obtained was 63%.

Question 2 required students to reflect on a quote, drawn from the European Commission special advisors' report on 'Competition Policy for the Digital Era', which recommends important adjustments to EU competition law to account for the special features of digital platforms and, more generally, the maturing digital economy. Only three candidates attempted this question. None obtained a distinction mark; the average was 60%.

Question three required candidates to discuss Advocate General Øe's claim that the legal test for refusal to deal established in *Oscar Bronner* represents a peak in the regulatory landscape of Article 102 TFEU. Five students attempted this question. The standard was generally very high with one candidate achieve a mark of 70% or over. The average of the remaining four scripts was 65%.

In question four, candidates were given the opportunity to reflect on whether the *AKZO* presumptions on market dominance and abusive predation could well be abolished. Only one student attempted it, achieving a mark of 67%.

Problem questions focused on the application of Article 101 TFEU, Article 102 TFEU, the European Merger Regulation and the enforcement of competition law, with significant crossover in all four of the questions on offer.

Question five predominantly concerned issues in relation to horizontal and vertical coordination under Article 101 TFE, as well as issues concerning public enforcement. This was the most popular question. Overall, students performed unevenly, averaging 63%. Of the nineteen candidates who attempted it, three obtained a mark of 70% or above.

Question six contained a multitude of issues including whether there was jurisdiction, several potential restrictions under Article 102 TFEU (predominantly), and Article 101 TFEU, as well as the lawfulness of acts carried out by the European Commission in the context of a dawn raid. On the whole, the ten students who attempted this question performed very strongly. The average mark obtained was 66%. No student, however, achieved a mark of 70% or above.

Question seven essentially probed candidates' ability to properly analyse joint ventures (under Article 101 TFEU or the EUMR depending on whether the joint venture is "full-function" or not) and concentrations under the EUMR. The question was another very popular choice with eighteen of the students who submitted a script attempting it. Performance-wise, the standard was once again very good with an overall average of 67%. Five candidates achieved marks of 70% or above.

Question eight similarly cut across several areas of the course, with issues revolving around (primarily) the question of whether "undertakings" were actually present (and if so, when), potentially abusive practices under Article 102 TFEU, cartel-like conduct potentially caught by Article 101 TFEU, as well as the relevance of the leniency programme. Sixteen students attempted this question, making it a very popular choice. The average overall mark was 64%, with two examinees obtaining a mark of 70% or above.

Twenty-nine students were registered to sit the examination (four Diploma and twenty-five FHS), with twenty-eight of them submitting answers that could actually be marked. On the whole, the scripts showed a very good command of the subject and good analytical skills. The overall overage mark was 66%. In line with last year's observation, it seems as though the change in format (ie three questions instead of four, with at least one being a problem question) does enable finer differentiations between candidates and does enable the most prepared ones to shine. Three students achieved a first class mark. As in previous years, students generally chose to spread their answers across both essay and problem questions, although there was again a clear preference for the latter (ie 2, sometimes even 3 problem questions). First class answers generally displayed excellent grasp of the underlying material, evidenced by sustained references to case law and commentary, combined with robust analytical engagement and creative —sometimes highly innovative— reasoning. Weaker answers tended to miss important substantive issues, engage in perfunctory analysis and/or misrepresent the relevant case law.

CONSTITUTIONAL LAW

The standard this year was high: a large percentage of scripts were awarded a First or upper 2.1, though there were also some on the low end of the 2.1 scale. The better papers gave thoughtful answers that addressed the question set in precise terms, and the strongest candidates supported their arguments with detailed discussion of cases and statutes. The weaker ones presented unfocussed arguments and repeated well-worn observations that sometimes failed to go beyond textbook summaries. Although most candidates showed a knowledge of the basic structure of the UK constitutions and awareness of the main controversies surrounding it, the more successful ones went beyond descriptive outlines and engaged in critical evaluation of scholarly authorities rather than acquiescence in their conclusions.

CONTRACT LAW

Question 1: Not a particularly popular question. Better scripts distinguished different varieties of mistake, the rules governing their application, their effects, and had something to say about the underlying principles. All of these were potentially relevant (though not all needed to be discussed to do well): unilateral mistake as to terms; unilateral mistake as to identity; non est factum; *Raffles v Wichelhaus* mistakes; rectification for unilateral mistake. A few candidates addressed common mistake, which was not within the scope of the question.

Question 2: Many candidates answered this question. Weaker answers gave a general account of consideration and its possible justifications, without anchoring their analysis in the specific issue of whether consideration should be required for contract variations. Better scripts compared the desirability (or otherwise) of dispensing with the requirement of consideration compared to other

possible approaches to the bindingness of variations, e.g. promissory estoppel, an expansive concept of consideration.

Question 3: A question about whether protection of the 'performance interest' can be understood to underpin anything other than specific performance. The best answers could make analytical and normative observations about a range of remedies beyond specific performance itself.

Question 4: A very popular question. There were some excellent answers which demonstrated a sophisticated understanding of the recent statements of principle from the Supreme Court, and engaged critically with some of the secondary literature. Weaker answers had little to say about the post-*ICS* law.

Question 5: An open-ended question that could be taken in many directions – virtually any area of contract was eligible for discussion here. Not many candidates attempted it. As always with such broad questions, a major difficulty was imposing a coherent structure on the material – there can be a temptation simply to list multiple examples of a phenomenon without a clear attempt to categorise them.

Question 6: Very few candidates answered this question, which required analysis of the statutory regulation of exclusion and limitation clauses, and some normative analysis of what the appropriate boundaries might be of exclusion and limitation in general.

Question 7: A question about the theoretical basis of implied terms in fact, in law, and the appropriateness of judicial intervention, depending on that theoretical basis. The best answers had a sound grasp of the law on terms implied in fact *and* in law and could make critical observations about the possible justifications of both.

Question 8: Many candidates answered this problem. It was generally well done. It mainly required application of the rules on offer and acceptance. The better answers considered the possibility of a unilateral contract to sell to the highest offer, and complications surrounding the nature of the offers in question – eg the conditionality of C's offer, B's offer apparently being made without awareness of the specific thing being sold, the referential nature of B's offer – and whether D's attempt to revoke his initial offer was successful. Some candidates also made good points about possible misrepresentation/unilateral mistake issues.

Question 9: A question raising issues concerning the action for the agreed sum, *White and Carter*, termination for breach of condition/substantial breach of an innominate term, the penalties jurisdiction. The best scripts showed sound understanding across the range of issues. Most candidates moved straight to applying the 'legitimate interest' limb of *Makdessi* without showing awareness that the penalties jurisdiction is limited (subject to any doctrine of concealed penalties) to secondary obligations. Weaker scripts focussed on damages for breach in part (a), or seemed unaware of the action for the agreed sum and limitations on its availability.

Question 10: This question raised issues of privity, frustration, incorporation, the enforceability of the terms contained in clauses 2 and 3 under the Consumer Rights Act 2015, and the remedies available depending upon who sought to enforce the contract. It was generally reasonably well done.

Question 11: The best answers contained a systematic treatment of the different remedies likely available for both breach of contract and misrepresentation. Weaker answers omitted analysis of

breach of contract entirely, assumed without analysis that the 'all statements…are mere opinions' clause fell within s.3 of the Misrepresentation Act 1967 – this required explanation, and/or neglected to consider the operation of Part 4A CPUTR 2008 in (b).

Question 12: This problem was generally well done. It mainly raised (arguable) issues of consideration, promissory estoppel, duress, and undue influence. Weaker scripts tended to miss one or more of these issues or give some issues only superficial attention.

COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS

Question 1 was the most popular copyright essay by a significant margin and produced a wide spread of marks (53-76). Candidates were required to deal with both the descriptive and normative parts of the question. The expectation was that in the descriptive part of the essay candidates would deal, at a minimum, with Hensher, Edinburgh Woollen Mills, Burge v Swarbrick, Bonz Boys or at least provide a clear explanation of why their essay took them in a different direction. Unfortunately, some of the weaker scripts ignored the normative component entirely or dealt with it in a cursory fashion. One or two of the weaker scripts used the question as a pretence to talk about a different topic (e.g. originality). In contrast, the best scripts managed to move seamlessly from the descriptive to the normative.

Question 2 was only attempted by a small number of students. The expectation was that candidates would consider what role a fixation requirement should play against the backdrop of the decision of the CJEU in *Cofemel* and ongoing debate about how to fix the boundaries of protectable artistic subject in the absence of a statutory fixation requirement for such works. Candidates were, of course, free to take their answers in a less expected direction and the best answer did exactly that, focusing on how a fixation requirement might map onto questions of legal certainty and predictability.

Question 3 was only attempted by three students and the answers were satisfactory (scoring marks in the 60s). Candidates were free to explore this question from first principles (relating the question back to possible justifications for the copyright system) or by reference to the economic and social benefits and costs of having such a long term of protection.

Question 4 was the second most popular copyright essay. Some of the answers were excellent and attracted marks in the 70s, while the rest were invariably satisfactory. Some candidates chose to spend a good deal of time unpacking the reasoning of the Court of Appeal in *Kogan*, but there was a clear expectation that candidates would engage with the possible limitations of the judgment and form a view as to whether the criticism in the quote is merited.

Question 5 was the most popular with 17 candidates attempting it. The question had an overtly normative orientation and those essays restricting their analysis to the limits of the tort of passing off in protecting celebrity image obtained modest marks. Better answers opted to engage with (i) whether a free riding or misappropriation of celebrity image rationale was justified and what a right fashioned upon that basis might look like; or (ii) explored the potential for rights beyond passing off which better protected dignitary interests without going so far as protecting pure misappropriation. Some of the best essays additionally explored limits and exceptions to any such new rights. Those who scored highly therefore addressed normative debates as well as doctrinal design choices when fashioning any new right to protect celebrity image.

Question 6 was the second most popular trade marks essay. Conventional approaches to the question outlined the policy rationale(s) for the exclusion and its scope, as developed by case law. Better answers considered the expansion of the provision beyond shapes to incorporate other 'characteristics'; its expansion beyond aesthetic value to capture other forms of value addition; the extent to which the new version of the rule overlapped with other IP rights; and whether the sub-factors and stages of the new version of the test made sense, in light of the evolving rationales for this rule.

Question 7, which was chosen by several candidates, revisited the controversial rule that any mental association or connection between two signs ought to be prohibited where the defendant might benefit from such an association. The question required candidates to engage with the normative basis for preventing free riding. However answers focusing on why as opposed to how didn't go far enough. More sophisticated answers additionally engaged with whether Brexit meaningfully provided for any opportunity to rethink free riding; if English courts did decide to draw back, which doctrinal sites were the most promising avenues for doing so (e.g. focusing on the 'unfairness' requirement, as opposed to 'due cause'); and whether new (attenuated) forms of harm should (or should not) be recognised as providing the unfairness element.

Question 8, on whether a free speech defence ought to be recognised for parodists and other defendants making expressive use of trade mark, was attempted by only two students. Both were good attempts. They reviewed the possible sites for developing speech-based defences within trade mark legislation and identified the constrictive effect of the 'honest practices' proviso to existing defences, which is presently interpreted in a manner favouring mark owners. Each argued for ways to reinterpret existing rules to better accommodate speech interests, while preserving the legitimate interests of trade mark owners.

Question 9 was the less popular of the two copyright problem questions. In relation to ownership most candidates recognised that the question was whether an exception to s 11(2) applied, but many failed to cite authority on point (eg. *Noah v Shuba*). The Welsh translation issue was done less well, with many candidates getting bogged down in a discussion of s 80, rather than focusing on the application of the rule in *BBC v Frisby* and s 84. The third part of the problem was fairly straightforward, but the best scripts were able to juggle the tension between the traditional UK approach to infringement and the approach articulated by the CJEU in *Infopaq.* The final part of the question was done competently in most cases, but only one or two candidates referred to a possible s 59 defence.

Question 10. The first part of the answer required candidates to consider copyright in snapshots. This was generally done competently, but the better candidates were able to draw on a greater range of authority. In relation to the first potential infringement weaker candidates tended to miss that photographs are excluded from the current events exception and got bogged down with the question of whether there had been a communication to the public. In relation to the second potential infringement very few candidates considered the possible application of the pastiche defence. In contrast the third potential infringement was in most cases handled well, with candidates being separated by their grasp of the finer points of the law governing communication to the public.

Question 11, focusing on registrability requirements, was the marginally more popular of the two problems, attempted by 9 candidates. Part (a) required candidates to explore the consequences of a

colour/position mark application, the extent to which it was non-distinctive and whether acquired distinctiveness was possible through long use and when supported by a word mark (applying *Kit Kat,* which a surprising number of candidates missed). Part (b) required an assessment of distinctiveness for slogan marks. Part (c) called for assessing both inherent and acquired distinctiveness for the jumping shoes, treated as a composite mark (shape + word), which many candidates did not pick up on. Better answers also considered whether the policy exclusions for shapes applied and whether, given the word element, the shape was 'exclusively' technical.

Question 12 centred on infringement and defences provisions. While Part (a) required a detailed application of the confusion test (and a brief assessment of dilution), which all answers considered, several candidates missed the potential for a revocation argument, given the variations in font, size and colour when using the registered mark. Part (b) was designed for candidates to apply *SkyKick,* since this was a factual scenario within the first five years of registration and revocation for non-use was not yet available. It was disappointing to note that more than a few missed this point, while those who identified this issue handled it extremely well. Most candidates correctly identified that part (c) called for an application of the passing off case law on celebrity image protection, as well as its limits (e.g. politicians might not have commercial goodwill, only fame).

CRIMINOLOGY AND CRIMINAL JUSTICE

This year 26 candidates took this paper, four of whom sat the DLS paper, answering three, rather than four questions. As per the instructions, six papers were marked by the second assessor, representing the range of marks and including any borderline papers. The agreed marks ranged from 66% (upper second class) to 71% (first class). The papers seemed at once stronger and more homogenous than in previous years. With respect to this observation, the assessors note that there had been extra teaching provision provided during this pandemic year. There were six distinction marks, although the highest mark was 73. The first class answers were well written, critically engaged with the academic literature, rather than simply describing it, and showed a good understanding of the theoretical perspectives underpinning arguments raised within the literature or by criminal justice professionals. Those papers that were awarded an upper second class mark showed sufficient attention to detail and a sound knowledge of policy, practice and academic debate. On the other hand, there were occasional errors or inaccuracies and some answers were insufficiently well-grounded in a strong theoretical framework. In the examiner's view, none of the papers were poor and all showed a good appreciation of criminal behaviour, and criminal justice policy and practice. As is generally the case on this exam, some questions were more popular than others; for example, of particular interest to the students this year were the question addressing the fair treatment of minorities in the criminal justice system, the questions about sentencing as well as theoretical models of criminal justice.

ENVIRONMENTAL LAW

Students were offered the choice of ten questions, including eight essay questions and two problem questions. Some questions were notably more popular than others. The questions on the definition of waste (Question 2), the Aarhus Convention (Question 3) and Article 23 of the Air Quality Directive (Question 9) were particularly popular. Others, such as the problem question on national policy

statements/environmental impact assessment/nature conservation (Question 5) and the essay question on the Water Framework Directive (Question 6) were tackled less frequently. However, all questions were tackled by multiple students.

The general quality of scripts was good. Answers generally showed a good understanding of the main legislation, case law and secondary literature. The paper's questions were deliberately set to encourage students to go beyond a descriptive overview of the law and students were rewarded for close attentiveness to the question. Stronger answers offered original, thoughtful responses to the questions, and were often able to successfully weave together learning from different weeks of work. The top end of scripts was very impressive indeed and displayed a good balance between attentiveness to legal detail and the drawing out of significant, broader themes. Scripts towards the lower end sometimes stuck too closely to the format of the textbook/lecture handout/a previous tutorial essay, offered a chronological overview of the development of the law with too little focus on the question or made substantive errors.

EU LAW

Question 1: This was one of the less popular questions, requiring a good understanding of free movement law and the effect of the CJEU's case law not only on compatibility of national measures with the Treaties but also on the regulatory competences of the Member States and the EU legislative institutions. Very few students explained what was meant by 'the horizontal allocation of powers' or correctly set out the way in which the Court's definition of a trade barrier under Article 34 TFEU or a restriction on free movement under Article 56 TFEU determines the scope and content of these regulatory competences.

Question 2: This was a very popular question, which most candidates answered competently and exhaustively. The better answers engaged with the question of what it means for the CJEU to be hierarchically superior to the Member States' courts and discussed it across a range of issues, such as admissibility of preliminary references, the Court's ability to enforce compliance by the Member States' courts or its reliance on their cooperation in referring the case and then giving effect to the CJEU's judgment. The weaker answers summarised the case law on admissibility of preliminary references without reflecting what it means for the relationship between the CJEU and the Member States' courts.

Question 3: This was one of the less popular questions. Some of the answers were very good, engaging with the relevant aspects of the EU Citizenship topic (its significance for non-economically active persons). However, many answers included discussion that was only marginally relevant, such as on the role of the Treaties' Citizenship provisions in protecting third country nationals from expulsion. The question of whether the situation of non-economically active migrants should be regulated only at national level has been addressed only by a handful of candidates.

Question 4: This was a fairly popular question that attracted many good answers. However, some candidates interpreted the question as inviting them to consider the authority of the national courts to refuse to apply EU law more generally, rather than the more specific question of the national courts' duty to interpret national law in conformity with EU law and its limits. Those who stayed adequately focused on the question discussed the circumstances in which EU law as it stands

permits national courts not to adapt the interpretation of national law to EU law and why and how these circumstances should be extended.

Question 5: This was a very popular question to which many mid and low 2.1. answers were submitted. Candidates described in general terms the principle of national procedural autonomy, assuming without discussion, that effectiveness and equivalence constituted 'departures' from it. The better answers considered the CJEU's case law creating new remedies or imposing particular remedial responses in certain defined contexts. The best answers reflected on the content of the principle of national procedural autonomy and what a departure from it would look like, where it could be identified in the case law, what justification if any had been offered for it by the Court in each case, and why it should or should not be regarded as satisfactory.

Question 6: This was another very popular question, inviting candidates to consider the CJEU's case interpreting the reformed (now) Article 263 TFEU regulating direct access to judicial review proceedings before the Court. The majority of answers focused on the requirement of individual concern and thus largely neglected the post-Lisbon case law of the CJEU and the Court's interpretative choices relating to the definition of 'regulatory act' under Article 263 TFEU. The better answers correctly identified the latter issue as central and discussed the Court's decision not to include legislative acts within the category of 'regulatory acts'. The best answers discussed the extent to which democratic legitimisation can be used to explain these choices and interrogated in detail AG Kokott's opinion in *Inuit*.

Question 7: This was a fairly popular question that attracted many misdirected answers. Despite the question asking candidates to focus on the case law of the Court of Justice of the EU, many candidates chose to discuss the case law of the Member States' courts questioning the primacy of EU law without considering how this case law has affected or might affect the CJEU's approach. The better answers discussed the CJEU's primary case law extensively and reflectively, explaining the implications of different Court's judgments. The best answers focused on particular consequences of the principle of primacy and discussed areas where these consequences are removed or modified by the CJEU itself.

Question 8: This question invited candidates to consider proportionality as a principle restricting the regulatory competence of the EU both in the light of the CJEU's case law in this field and in the light of Article 5(4) TEU, where the principle is expressly laid down. Many candidates where able to spot the difference between the two formulations and defend or criticise the Court's case law vis-à-vis the broader constitutional and practical considerations. The weaker answers did not engage with these issues and merely described proportionality across different (not only the legislative) contexts, frequently alongside subsidiarity and the principle of conferral.

Question 9: This problem question attracted many good answers but it was not overly popular. Candidates explained well how the European Commission's decision could be challenged directly before the General Court, whether it was a regulatory act and how the applicant could show direct concern. They also discussed what possibilities were available to the applicant who tried to go through the national courts but where the question of validity had not been referred to the CJEU.

Question 10: Only a small number of candidates answered this question, but those who did, dealt with it rather competently. They correctly applied Article 45 TFEU in order to establish whether EU law is at all engaged; how the rules of Member State B are both discriminating migrant employees

and constitute a restriction on access to that state's employment market. The second part of the question, requiring in-depth consideration of the relevant parts of the Citizenship Directive, posed a bigger challenge. The best answers correctly applied its relevant provisions in the light of the CJEU's case law, and identified to which benefits the applicant would be entitled and on what his right to remain in Member State B was based.

FAMILY LAW

Comments on the examination of Family Law:

General comments:

This year marked a change to the Family Law examination rubric as candidates were required to answer three questions from a choice of nine rather than four from a choice of twelve as required in previous years. This change was intended to give candidates the time to explore a wider range of facets of each question and to draw on relevant material from across the course where relevant. Many candidates took the opportunity to do so and gave detailed, thoughtful analysis of the precise question asked with extensive discussion of the law and wider literature. Disappointingly, a number of scripts gave very generic answers that appeared to contain extensive pre-prepared discussion of the broad subject area rather than responding to the question. As explained below, this was a particular problem in relation to question 3.

Comments on individual questions:

Question 1 (adult relationships): This was a popular question. Candidates demonstrated a very good knowledge of the Divorce, Dissolution and Separation Act 2020 and the background to its introduction as well as the previous legislative expansion of the availability of marriage and civil partnership. Most answers gave careful attention to the question of whether state scrutiny of entry and exit from marriage and civil partnership was desirable and remained a feature of the law. A number of candidates used the opportunity to consider the law on religious marriage and whether it truly reflected the intentions of the parties.

Question 2 (children's views): this question was generally answered well. Good answers considered why children's views might be important, the difficulties of discerning those views and whether there were circumstances in which they should be given determinative weight. In doing so candidates drew on a wide range of areas of the law including child arrangements orders, medical decisions and children in care. The best answers took care to distinguish these different contexts and also considered the relevance of rights-based arguments.

Question 3 (child arrangements orders and harm): this was a popular question and was often answered well. Good answers carefully considered the wording of s1(6) Children Act 1989, the application of Practice Direction 12J and the extensive research literature concerning the risk of harm in child arrangements cases. Despite the clear instruction to consider 'child arrangements orders', a small number of candidates mistakenly assumed that the question was concerned with harm in child protection cases. These candidates produced what appeared to be pre-prepared answers concerning s31(2) Children Act 1989, with little attempt to answer the question asked.

Question 4 (financial provision on divorce): answers to this question demonstrated a sound knowledge of the statute and the detailed case law concerning the application of s25 Matrimonial Causes Act 1973.

Question 5 (a) (parenthood): this was a popular question and was generally well answered. Candidates carefully considered the different means by which the law recognizes parental relationships and demonstrated detailed knowledge of the law. Many candidates chose to use a number of example areas to examine in detail to consider whether the law does, and should, reflect social change. In particular, candidates considered recent developments in relation to surrogacy, transgender parenthood and the possibility of recognizing multiple parents.

Question 5(b) (surrogacy): too few candidates answered this question to give a general comment.

Question 6 (Douglas' quotation): this question received relatively few answers but those who did so generally received very good marks. These candidates used the quotation to explore the legitimacy and effectiveness of legal regulation of personal relationships using examples from throughout the course.

Question 7 (domestic abuse): Answers to this question tended to show an impressive understanding of the detail of the relevant criminal and civil law and the research evidence concerning the legal response to domestic abuse. Many candidates had a good knowledge of the Domestic Abuse Act 2021 and considered whether the effectiveness of the law is likely to be enhanced by the changes that it introduces.

Question 8 (child protection): this question was generally answered well. The best candidates focused closely on the question of factual uncertainty and demonstrated a detailed understanding of the complex case law on this topic.

Question 9 (parental decisions): this was a reasonably popular question. Weaker answers tended to explain the law on medical decision-making and young children without giving close attention to the question. Stronger answers considered whether parents have an independent right to make decisions for their children. These answers considered the theoretical literature as well as the case law and often used examples from outside of the medical context to further test their answer.

HISTORY OF ENGLISH LAW

This subject was assessed by submitted essays (two chosen from eight questions) for the first time this year. Nine candidates submitted essays. The standard of the work was overall good, with some outstandingly strong. There was some clustering of attempts on the questions on treatise literature, feudalism and the land law, and trespass and the emergence of the action on the case, and the examiners were surprised to encounter no attempts on the development of trusts. The essays on treatises tended to be marred by dependence on older literature at the expense of more recent, and the weaker feudalism essays tended to be general rather than focussed precisely on the question set; beyond this, the numbers are small enough that no comment is possible which would not identify individual candidates.

HUMAN RIGHTS LAW

INTERNATIONAL TRADE

The results generally were encouraging this year, with some candidates displaying an excellent grasp of International Trade Law. The markers were pleased to note that more students opted to answer essay questions than in previous years. Excellent essays, as always, were the ones that engaged with and answered the question rather than the ones which regurgitated knowledge that had little or no connection with the question asked.

Question 1 Only one candidate attempted this question so that it would be inappropriate to say anything about it here, other than that, given that it was a fairly straightforward question, the low uptake surprised the markers somewhat.

Question 2 Answers to this question were either extremely good or quite poor, with very few in between. Good answers displayed a thorough understanding of risk in cif contracts in English law and were then able to contrast the English position to that obtaining under the CISG. Some (poor) answers failed to read the question properly, treating Art 68 of the CISG as some sort of reform proposal for English law or, worse, a (mistaken) attempt to describe English law. This misunderstanding compounded the common failing of not answering the question asked or even of answering a different question altogether.

Question 3 Many candidates tackling this (relatively) popular question were clearly expecting a question on the fraud exception and proceeded to discuss this (sometimes also looking at the effect of nullity) after a very superficial (if any) discussion of the autonomy principle itself. While the fraud exception is, of course, an exception to the autonomy principle the question invited a discussion of the principle itself, and this was lacking in some of the answers.

Question 4 Some answers to this (popular) question displayed an impressive knowledge of the historical developments relating to deviation. Stronger answers also took into account more recent developments in the case law and, crucially, also answered the second half of the question relating to the effect of the Hague Rules and its variants on the English doctrine.

Question 5 There was one outstanding and several very good answers to this question. Other answers were competent, including a good basic survey of the case law including recent cases such as *The Eternal Bliss*. More extensive use could have been made of examples.

Question 6 This question had few takers. Weaker answers missed several key points, and, in particular, failed to discuss the legal consequences of the missing 5,000 tonnes of soya beans while not devoting sufficient effort to addressing the alternative fact scenarios. Again, it is imperative to read the question thoroughly before attempting to answer it!

Question 7 This was a popular question attempted by most candidates, and the majority did a good job, with some outstanding answers. Weaker answers ignored the transhipment issue and/or failed to discuss the question whether an out-of-date navigation system might render a ship unseaworthy. Another common failing was that issues were discussed that did not actually arise on the facts given.

Question 8 Only one person attempted this question so that it would be inappropriate to comment on it.

Question 9 A small number of candidates attempted this question, and some produced excellent answers. Part (a) of the question called not just for a discussion of O's claims against the seller and the carrier, but also of the carrier's claim for freight, and this was missed by some weaker answers. Some candidates who went wrong in answering part (b) got hold of the wrong end of the stick altogether and then refused to let go of it, ignoring the pledge as well as the freight point.

Question 10 This was the most popular question alongside question 7. Some answers were, again, excellent. Almost everyone discussed *Kwei Tek* damages and showed an awareness of *Panchaud*. The most frequent mistakes involved a failure to appreciate the role of the certificate of quality, thus avoiding a discussion of whether or not it was conclusive.

JURISPRUDENCE

Candidates answered on a broad range of questions this year, with the exception of the question about justice (question 9). Question 3 (coercion and the society of angels) was particularly popular, and generally handled well, although answers tended to be very much alike. Questions 2 (the obligation to obey the law) and 7 (the limits of the law) were not well tackled on the whole, and returned a high number of weaker answers. Weaker answers to question 2 were unnecessarily concerned with whether or not there is a *general* moral obligation to obey the law, which was not the question asked (nor a necessary step in answering it). Good answers to this question focussed only on arguments about the obligation to obey the law which suggest that our obligation to obey could be determined by the behaviour of others, and made good use of examples to demonstrate how that might be so.

Many answers to question 7 offered general surveys of literature (such as the debate between Hart and Devlin), and did little to pick up the particular challenge presented. A number of answers simply pitched the harm principle of the law's limits against the case for paternalistic interference in people's lives, concluding that the harm principle was inadequate because it does not sanction paternalistic laws. Good answers explored the theoretical underpinnings of the harm principle to ask what extensions those values might sponsor. The best answers engaged in fine-grained discussions about the nature and value of personal autonomy, principled and instrumental considerations for limits on the law, and the difference between coercive and non-coercive legal interference.

Question 10 (necessary connections between morality and law) produced answers of markedly different quality: a small number of very impressive, rigorous, and ambitious answers, and, on the other end of the spectrum, some very weak answers which reflected a poor understanding of some central issues in jurisprudence.

As in previous years, candidates who performed well in the exam wrote answers that were tailored to the question throughout, coherent and fluid, and exhibited depth in argumentation. Where discussing jurisprudence scholarship, good candidates engaged in a close reading of the work. Despite a number of good quality scripts, there was also a significant portion of candidates who were unable to demonstrate sufficient competence with the subject matter, familiarity with arguments, and attention to nuance to be awarded a good 2.1 mark. Many such candidates either risked or earned an overall 2.2.

Unfortunately, a good number of candidates mistook the work *limit* for a word *target*, and filled out their answers with superfluous material that did not further their answer to the question. Where

they did so, the unhelpful material did not only fail to enhance but positively detracted from the quality of their answers.

Amongst the weaker candidates, engagement with jurisprudence scholarship often took the form of repeatedly linking names of scholars to vaguely stated ideas (frequently by means of the phrase "as per Raz"/"as per Finnis"), rather than setting out the detail of an argument so as to engage with it and put it to work in answering the question. When the emphasis in a subject is on depth of analysis, candidates should not expect to gain marks in proportion with the number of times scholars' names appear on the page. Better scripts were more selective in their use of existing scholarship and demonstrated familiarity and attention to detail when invoking it.

Finally, a concerning number of candidates relied far too heavily on one particular textbook in jurisprudence by McBride and Steel, to the detriment of their script. Future candidates should be warned that introductory, secondary literature is not a substitute for engaging first hand with core work in this subject and that, where used as such, the quality of their answers, and their mark, will be much diminished.

LABOUR LAW

On the whole, candidates displayed a very good knowledge of the subject-matter and there were some interesting and well-thought-out answers to particular questions. Around 28% of the 21 candidates taking this paper got a First Class mark.

However, one of the consequences of online exams is that candidates are able to type quite long essays, and we would encourage students in future years to think about writing shorter, more focused answers addressing the precise question set, without including quite so much 'background' material.

There was a good spread of answers across the twelve questions set. We offer some comments on the more popular questions.

Question 2: on mutuality of obligation, was answered by a large number of candidates and on the whole was managed well, though there were some digressions into its possible role in establishing worker status, a topic not included in the question.

Question 3: on the *Uber* decision, was highly popular even though it was quite challenging because the decision was handed down during the year so students were required to rethink during revision some of what they had learned earlier on. Most students showed a good knowledge of the decision and its significance, though not everyone quite appreciated the full importance of basing the decision on preventing the employer from evading statutory employment rights rather than on the contractual reasoning found in the earlier *Autoclenz* case.

Question 5: on the law's treatment of 'on call' time, attracted some good answers. We did not differentiate between students on the basis of their treatment of the Supreme Court's decision in the *Mencap* case, which was handed down after the cut-off date for new material. Some answers to this question were, however, rather one-sided, and while it is good to have a clear argument, this is a genuinely complex issue and a good lawyer should always be able to see different aspects of a problem.

Question 6: on dismissal in breach of the employee's human rights, gave rise to some good answers but also some weaker ones. Some students did not notice the specific focus of the question on human rights and offered a general critique of unfair dismissal law instead.

Question 7: on wrongful dismissal, seemed to attract stronger answers with careful attention paid both to the problems with the current law and to whether legislation would be the best avenue for reform.

Question 8: on the distinction between direct and indirect discrimination, was attempted by a large number of candidates and generated some very good answers, though as with Question 5 there was a tendency among some candidates to assert that their preferred answer was crystal clear when this is a complex issue and has troubled the courts over many years.

Question 9: on trade union membership, required close attention to the quotation, which described trade unions as 'expressive associations' and drew attention to the potential role of equality law in this area. Some of the less successful answers ignored these elements and simply presented a general account of the law on trade union membership.

Question 11: on the right to strike, similarly required careful attention to the question, which encouraged students to focus on the extent to which the law protects a 'right' in this area. This invited discussion both of the potential role of the ECHR and of the 'immunity' structure adopted in the current law. Some answers also wasted time on the treatment of individual strikers when the question asked for a discussion of the law applicable to trade unions and strike organisers.

Land Law

The overall quality of this year's Land Law scripts was generally good. With problem questions there was no particular question caused difficulties for candidates. As in previous years, we found that candidates knew the rules in outline, but often lacked detailed knowledge of relevant authorities or lacked precision in their handling of the facts. For instance, in the easements (Q 7) and covenants (Q 8) questions most candidates were able to set out the general frameworks (e.g. the *Re Ellenborough* requirements for an easement), but fared less well when dealing with specific requirements such as accommodation and ouster. Candidates could also deal with some forms of acquisition extremely well, but in the same answer ignore another (relevant) form of acquisition (e.g. *Wheeldon v Burrows*, s. 62 and benefit/burden were sometimes overlooked). A similar lack of precision was encountered with the proprietary estoppel question (Question 11). Almost all candidates dealt with the basic requirements for the doctrine reasonably well, but often overlooked issues of proportionality, third-party effect and priorities. The leases question (Q 10) generally attracted good answers, although we were surprised by the number of candidates who are still seemingly unaware of the decision in *Berrisford v Mexfield* and who, consequently, did not pick up on the issues surrounding certainty of term. Candidates were normally able to identify s. 54(2) LPA (short leases) as relevant to the question, but several failed to apply its requirements (especially the need for a market rent).

Lack of detailed knowledge of relevant authorities was also a recurrent problem in the essay questions. The question on registration (Question 1) attracted some high quality answers; but it also attracted several answers that were only able to cite one or two cases, and would give extremely brief attention to the statutory rules on indemnity. The family homes question (Question 3) was the most popular essay question and was generally done well. The adverse possession (Question 5) and

numerus clausus (Question 6) questions attracted several strong answers, as candidates were able to engage with the normative issues in these questions and could discuss periodical literature. The human rights (Question 2) and mortgages (Question 4) questions attracted very few answers.

MEDIA LAW

38 students took the Media Law exam. 11 received First Class marks, 22 received Upper Second marks, 4 received Lower Second marks, and one candidate failed.

The scripts were mostly of a very high quality, with candidates demonstrating a good knowledge of the materials, literature and debates. As the exam for this year had an open book format, it was particularly important that candidates used the material to directly engage with the question. Those candidates that thought creatively in developing an argument were rewarded. Some candidates were let down by appearing to cut and paste content into the answers.

Question 1: candidates were invited to compare the role of contempt of court and privacy law in relation to the reporting of police investigations. Most noted the limits of contempt, and many were critical of the developments in cases such as *ZXC*.

Question 2: candidates considered the role of voluntary disclosures in misuse of private information. Many considered issues such as the zonal argument along with past conduct. Some answers were let down by providing a rehearsed essay outlining the law of privacy more generally.

Question 3: the answers were generally very good, surveying the arguments for televising the courts. Many queried whether livestreaming would serve the goals of open justice. Some answers also drew on the experience with the pandemic to highlight some of the problems associated with televising/livestreaming the courts.

Question 4: was a fairly-straight forward question on the Official Secrets Act 1989. To answer the question well, candidates needed to critically scrutinise the Law Commission's proposals in relation to the damage requirement, the Statutory Commissioner and the public interest defence. Most were familiar with *Shayler* and ECHR jurisprudence.

Question 5: invited candidates to consider the reasons for protecting journalists' confidential sources. The question required candidates to focus on a more specific angle by asking if the rationale extended to other types of publisher. Candidates considered the role of editorial responsibility in deciding whether protection is warranted, looking at cases such as *Totalise* and *Hourani*. Candidates also noted the differences between anonymous speech and a publication relying on an anonymous source.

Question 6: gave candidates a choice on the topic of media regulation. The first question looked at the justification for different regulatory regimes. Many noted that the technological differences were becoming less significant, but also considered the justification for plural models of regulation. The second question invited an assessment of press regulation, with candidates demonstrating a good knowledge of the Leveson proposals and the workings of IPSO.

Question 7: asked about the recent proposals for social media regulation. Many candidates raised the difficulties associated with the harm concept, in defining the duty and the impact on free speech. The best answers also considered some broader questions, such as whether the obligations could impose a monitoring obligation.

Question 8: was a challenging question on the rationale for obscenity law, which prompted some diverse responses. The very best answers looked at a range of different legal provisions and considered the competing rationales that are recognised in the law.

Question 9: invited candidates to draw on the course as a whole and make comparisons in the way the concept of the public interest is applied. The best answers noted how different areas of law frame the question in different ways and may strike a different balance. With such a broad question, there are many ways to provide a good answer and the title allowed candidates to make connections between the various subjects.

Question 10: The final question gave a choice on the topic of defamation. The first part asked candidates to consider whether defamation aimed to guard against actual damage to reputation. This invited candidates to look at the different rationales for the tort, and also to consider the serious harm requirement (and the extent to which it changed the traditional approach). Some answers also thought about the issue creatively (for example, asking whether the single meaning rule can be consistent with a focus on actual damage). The second option for the question, a problem question, was answered by relatively few candidates, but generally well done.

MORAL AND POLITICAL PHILOSOPHY

About four exams (out of 30, with two additional scripts coming in late) were of top-notch quality, with two being outstanding, and the top exam being a cut above all the others. These four exams were original, sophisticated, and highly engaging. Another six exams were borderline firsts, with the quality dropping off after that in a marked way. These six were all strong papers with good structure, cogent arguments, clear writing, and above-average expertise with the literature and philosophical arguments, and so were awarded Firsts. But although these six contained a lot of competent recitation, they were lacking in originality compared to the best four papers.

Many of the Upper Second papers had competent and clear recitation of the relevant literature along with clear and simple argumentation but lacked the philosophical sophistication of the Firsts. There were two other papers that were 2.2s and markedly inferior to the 2.1s.

As usual, the paper was divided into Part A (moral philosophy, 8 questions) and Part B (political philosophy, 4 questions). Candidates had to answer at least one question from each part.

This year the distribution was quite skewed, with over 2/3s of those sitting the paper helping themselves to the most straightforward question, Question 1, about utilitarianism and the separateness of persons. How candidates answered this question was often a good indicator of the mark of their paper overall since the very best answers went above and beyond the expected points and proposed original but well-argued-for ideas. Some of the more open-ended questions were unpopular. Question 2 about ‘inventing’ right and wrong, inviting students to pull together their reading in metaethics and extend it with some original thoughts of their own, had only one taker, and the provocative Question 6 asking students to reflect on whether someone could ever be required to do what is morally wrong had no takers. Candidates for the most part stuck with questions that triggered traditional material learned in tutorials and, for the most part, did a fine job recapitulating what they learned in a cogent and satisfactory way. Those who got Firsts showed some special spark or sophistication, and those who received lower seconds made multiple mistakes – both philosophical and expository – in the course of their essays.

Some candidates *didn't answer the question.* The question about Aristotle's account of how we come to be virtuous was sometimes morphed in a question about what *constitutes* being virtuous and the question about free will was sometimes morphed into a pre-canned discourse on moral luck. Candidates who wish to do well on the exam must focus on what the question is asking and answer it. This year's format made clear that open-book exams encourage students to cut and paste pre-canned material even more than usual, disincentivizing precisely the kind of original thinking that distinguishes good philosophy from mediocre. Too many students slotted in what they probably considered their best prepared material and arranged the rest of the argument around it as far as possible.

Candidates should know that of prime importance is clarity in expression. Those who wrote pellucidly tended to receive higher marks than those who tried to write in a sophisticated manner but did not have control over the material. Some candidates struggled with presenting a clear argumentative structure. Clarity is a sine qua non. Sophistication and expert knowledge come second. Philosophical insight is the cherry on the top that will earn you a First.

PERSONAL PROPERTY

The personal property FHS course did not run in 2020-21. As such, the paper was sat by two candidates who had studied the option in a previous year. One of the scripts was of a very high quality and the examiners decided to award a subject prize, notwithstanding the small group.

PUBLIC INTERNATIONAL LAW

The overall performance by students in this paper was excellent, with over 80% of students being marked at an Upper Second or First Class level (30% were awarded firsts), and the rest of the candidates being marked at a Lower Second mark. In general, the scripts reflected a high degree of conceptual clarity and understanding. Even the weaker scripts reflected understanding of core concepts, with the weaknesses deriving less from conceptual fuzziness than from limited engagement with the specific issues raised by the question, lack of structure and flow to the argument, lack of narrative development, and scanty use of case law and academic authority.

As in previous years, the paper contained a mixture of problem questions (4) and essay questions (5). Although not required to do so, almost all the 41 candidates who sat the exam elected to answer at least one problem question, many chose two, with selections focussing on use of force (Question 8, 21 chose this), state responsibility (question 9, 19 chose this), treaties (question 6, 17 chose this) and dispute settlement (question 7, 11 chose this).

Question 8, the use of force problem question, as in previous years, proved the most popular, and elicited some excellent answers from the candidates, with the best among them drawing on a range of state practice, on humanitarian intervention, different scholarly positions, and exploring the salience and effect of the legal opinion by Selfrighteousa. Also popular were the essay questions on custom (question 2, 28 chose this), the third world approaches to international law (question 1, 26 chose this) and recognition (question 3, 17 chose this). Less popular were question 7 (10 chose this) and specialized regimes of international law (international environmental law, law of the sea, or human rights law, 10 chose this). It was heartening to see keen interest in and engagement with the

issues raised by the question on third world approaches to international law. This topic was recently added to the syllabus, and it evidently struck a chord with the students. The question required students to draw on illustrations from the entire course, and they rose admirably to the challenge, drawing on examples from the development of custom, treaty law, use of force and even statehood.

More generally, as in previous years, the weaker answers provided a general description of the topic or topics covered by the question without focussing on the specific issues raised. And, the best answers to both essay and problem questions made thoughtful use of case law and academic authority, thereby providing insightful analysis that demonstrably went beyond the basic textbook material.

ROMAN LAW (DELICT)

General comments:

The gobbet questions were generally impressive. The best candidates distinguished themselves by maintaining a sharp focus on the text posed, rather than using it is a springboard into discussions of ancillary issues. Weaker candidates had relatively little to say about the text itself, and launched into (often quite good) treatments of the broader area of law. As a general tip, if a candidate finds it difficult to see what the "point" of a text is (i.e. why a jurist thought it was worth making the point, why the compilers thought it worth including in the Digest, why an examiner thought it might make for a good question), that gobbet is best avoided.

The answers to essays were perhaps a touch more disappointing, with a greater number of solid 2:1 answers and fewer in the first class. They tended to draw on quite narrow evidential bases, and stuck closely to the lines taken in seminars. Stronger candidates were more willing to engage with the material rather than offer summaries of the reading or seminar discussions. At the top end there were some very strong efforts.

Overall the markers were pleased with the quality of answers to the 2021 paper.

Comments on individual questions:

The spread of answers was even across the paper, with very few questions attracting more than three or four answers. This makes general comments difficult for the most part, but the below are offered in relation to the most popular questions:

Question 2 and Question 6 both raised complex scenarios, and candidates who methodically worked through the analytic thicket were duly rewarded. The first half of Question 4 was similarly dense. The markers were impressed at how much candidates were able to extract from these text in the time available.

Question 7 was very popular, but not terribly well done. It concerned the applicability of Gaius's corpore corpori test to chapter III of the lex Aquilia. Strong answers showed a good knowledge of the texts on corrumpere, and were sensitive to the possibility that the earlier chapter III verbs might colour the analysis. Weaker answers offered lengthy summaries of chapter I liability, or showed patchy knowledge of the juristic treatment of the harm verbs in chapter III.

Question 8 was similarly popular, but was met with a lot of "standard" answers – a good number of candidates offered concise summaries of the literature and the views expressed in the relevant

seminar, but were unwilling to go much further in interrogating the notion that the lex Aquilia was "a poor man's statute". This led to a clustering of marks in the mid-to-high 60s.

TAXATION LAW

As in prior years there were 8 questions (6 essays and 2 problems) which gave considerable choice since the students all cover all of the core material in lectures, seminars and tutorials. Q.3 (essay question on tax avoidance) was the most popular, attempted by nearly all the students. Q.6 (two-part question on tax authority concessions) was the least popular. About three-quarters of the candidates attempted at least one of the problems—although not required to do so—and about one-half of candidates attempted both problems.

Question 1 on tax policy invited the candidates to consider two alternatives to taxing wealth—a new one-off wealth tax and the existing inheritance tax. The better answers showed a high degree of comfort with recent academic work on wealth taxation and the literature on reforming/abolishing inheritance tax. Weaker answers failed to distinguish a one-off wealth tax from an annual wealth tax. Question.2 asked candidates to evaluate the position of the Office of Tax Simplification on closer alignment of capital gains tax rates with income tax rates. A good answer to this question focused on the arguments for and against lower capital gains tax rates and the difficulties in taxing capital gains versus recurring income, including lumpiness, inflation and the lock-in effect. Question.3 concerned the cases on tax avoidance and the GAAR and was answered quite well overall. Those students who focused on the specific wording in the question's quote, analysed both pre- and post-*BMBF* cases on the *Ramsay* principle as well as considering in some detail the role of the GAAR were duly rewarded. Question 4 asked candidates to consider the role of neutrality in the design of the CGT and IHT regimes as they apply to trusts. Better answers demonstrated a high degree of comfort with the technical rules and the difficulties in applying neutrality in the context of trusts, and addressed the ramifications of such difficulties in taxing trusts under a wealth tax. Question.5 concerned the different tax regimes applicable to employees and the self-employed. It required a good understanding of the case law tests on employment status, the IR 35 regime and recent cases on that regime, as well as an appreciation for the topical nature of these issues as reflected in policy work by eg the Taylor Review and the Office of Tax Simplification. Question 6 was a relatively straightforward two-part question on the rationale for two tax authority concessionary positions (D33 and A32). Strong answers considered at some length the operation of the concessions in the context of the cases sparking them, and highlighted the recent government review on ESC D33. They also formed a view on whether the concessions should be legislated, having regard to the *Re Wilkinson* case concerning the tax authority's use of concessions in managing the tax system.

The facts in Question 7 raised a broad spectrum of major and minor self-employment tax issues. Candidates were tested in particular on the availability of deductions under ITTOIA section 34 and the application of the 'wholly and exclusively' test to a non-statutory fine, the upkeep of clothing, travel and rented accommodation. A government support payment and 'fan favourite' award raised issues concerning the taxability of unusual receipts. Question 8 contained a number of issues on the taxation of an employed person under ITEPA who was also carrying on an activity that might have been a trade taxable under ITTOIA. Candidates for the most part spotted the correct issues, but the depth of analysis of those issues was variable especially on whether the taxpayer was trading. Better

answers on the trading issue covered a range of cases in their analysis and also considered, briefly at least, the capital gains tax consequences should the taxpayer be found not to be trading.

TORT

The overall standard was high this year, and candidates in general seemed to respond well to the open-book format. The essays were less popular than in previous years, perhaps because the questions were not very predictable, though with the open-book format this helped to ensure that there was little scope for the reproduction of prepared work. There was a tendency to cite irrelevant or marginally relevant cases which were not to be found on the core reading list, sometimes instead of more relevant cases which were on the core reading list. It also needs to be remembered that while cases from other jurisdictions can be cited as persuasive authority in a problem answer they are not direct authority and should not be treated as such.

Question 1 (floodgates) This was quite a popular question. Stronger answers identified the concerns underlying the floodgates argument and assessed their validity, as well as honing in on pure economic loss and psychiatric illness as contexts in which the argument is most frequently observed. Weaker answers never addressed the threshold issue of what the courts actually mean when they speak of floodgates concerns (the courts use the language of floodgates to express a range of often quite different anxieties), and often focused on contexts in which floodgates concerns have not been especially prominent, such as the liability of the police and of other public authorities. Some candidates tried to twist the question into one on the appropriate methodology for determination of the duty of care, or the role of policy arguments in duty cases more generally, which were not strategies that paid dividends.

Question 2 (reasonable foreseeability) This question produced some strong answers, which emphasised the flexibility inherent in tests of foreseeability and demonstrated how these could therefore be manipulated to produce the desired outcome on the facts. The discussion of the role of foreseeability at the remoteness stage was generally stronger than the discussion of its role in duty and breach, and in some of the weaker answers the role of the concept at the duty and breach stages was ignored altogether. Few candidates grappled with the difficult issues of why tort law employs the concept of reasonable foreseeability and whether it should do so.

Question 3 (material contribution) This was a reasonably popular question but it was frequently badly handled. There was considerable confusion about the distinction between divisible and indivisible injury, and also between the material contribution to injury test (which was the subject of the essay) and the *Fairchild* test of material increase of, or contribution to, risk (at which the essay question was not directed). Some answers drew on a very narrow range of sources, focusing almost entirely on a single academic article. Stronger answers critically analysed the recent case law on the material contribution concept and considered what, if anything, the concept adds to the basic but-for test of factual causation.

Question 4 (product liability) This was a less popular question than might have been expected. There was a tendency not to answer the question but instead to focus on supposed inconsistencies in the case law on the 1987 Act, especially with regard to defectiveness.

Questions 5, 6 and 7 (sexism of tort law/non-pecuniary loss; economic torts; defamation). There were not enough answers to these questions for meaningful general observations to be made.

Question 8 (property damage/economic loss/defective premises, etc) This was the least popular of the problem questions and also, overall, the least well answered. Few candidates considered whether the addition of the cladding could be characterised as property damage, or whether, if it could not be, there might be exceptional circumstances justifying a claim for pure economic loss. The possible relevance of the Defective Premises Act 1972 was often overlooked, while some candidates failed to address Anil's depression and consequential economic loss. Few candidates discussed the alternative scenario in a way that demonstrated detailed knowledge of the case law. The question raised difficult issues concerning factual causation and remoteness which were generally ignored.

Question 9 (breach of duty/psychiatric injury, etc) This problem question was popular but not always handled well. There was some lack of clarity in scripts with regard to the breach of duty issues, and the need for a two-level analysis of that question (with consideration of both a possible breach by the hospital and a possible breach by the junior doctor) was often overlooked. Weaker answers often featured elaborate discussions of whether Forset owed Eric a duty of care (even though it obviously did), which then left insufficient time for full discussion of other aspects of the problem that called for sustained analysis. Some of the discussion of the 'close tie of love and affection' issue was far too perfunctory, and it was surprising how many candidates simply assumed that the secondary victim requirement of proximity would be satisfied in the case of live video, without reasoning by analogy from the discussion of television pictures in *Alcock*. Candidates tended to handle Mona's claim badly (few considered the possibility of a defence of volenti or contributory negligence, for example) and generally insufficient attention was paid to the position of Karol and Life Support, and in particular whether they (as opposed to Forset) might be liable to Mona.

Question 10 (battery/vicarious liability/non-delegable duty/illegality/act of third party) This was also a popular question, and in general it was answered competently, though to do well candidates needed to have good knowledge and understanding of the recent case law on vicarious liability. The discussion of the 'akin to employment' category was frequently out-of-date, with the focus often being entirely on the very early case law, especially the *Christian Brothers* case, with insufficient reference to the recent *Barclays Bank* case, or even to earlier decisions such as *Cox* and *Armes*. Similarly, when it came to the course of employment question, some candidates seemed to be unaware of the impact of the second *Morrison Supermarkets* decision on Lord Toulson's approach in *Mohamud*. There was also a tendency when dealing with the course of employment issue simply to draw analogies with the facts of cases and not to apply the test or tests laid down by the courts. In considering alternative (a), there was some confusion over the possible vicarious liability of the Gallery and its potential primary liability for its own personal fault. Only a minority of candidates spotted the possible illegality issue in the claim by Paul against Ray. Many candidates overlooked the trespass to the person/battery claims and the possible relevance of non-delegable duties of care.

Question 11 (nuisance/*Rylands*) This was a very popular question. The standard of the answers was generally high, though there were some recurrent weaknesses. These included (1) overcomplicating the locality principle, the application of which was straightforward on the facts (and did not require critical discussion of Lord Neuberger's judgment in *Coventry v Lawrence*); (2) misplaced discussion of public nuisance, which was not realistically an option on the facts; (3) significant over-reliance on (and misunderstanding of) the decision of the House of Lords in *Southwark LBC v Mills*, which related to the ordinary use of *residential* property; (4) supposed complications relating to the requirement of 'actionable damage', which is rarely an issue in the nuisance context; and (5) failing to consider

whether Sara was an occupier or a landlord out of occupation. The *Rylands* issues were generally handled well, although many candidates failed to discuss the complications around recovery for damage to chattels. In weaker answers, issues concerning remedies were often either missed or not dealt with in sufficient depth. The nineteenth-century nuisance case of *Walter v Selfe* was given a contemporary gloss by one candidate who referred to it as *Walter v Selfie*.

Question 12 (occupiers' liability/omissions) This was also a very popular question. Most of the answers were competent but again there were some recurrent weaknesses. It was surprising how many answers mishandled the issue of exclusion of liability, particularly as regards the statutory controls. Since this issue comes up very frequently (in both the tort and the contract paper), and the law is tolerably clear, this was disappointing. In particular, many candidates clearly did not know which statute applies in which circumstances (a recurrent error here being the assumption that if no fee is charged for entry then either (a) the UCTA 1977 applies and not the CRA 2015, or (b) *neither* Act applies). Some candidates also did not differentiate for this purpose between claims for property damage and for personal injury, while only a few considered the possible application of section 66(4) CRA 2015. The difference between an attempt to exclude liability and a warning also eluded many. The handling of the possible claim against Wanda betrayed considerable confusion as to what amounts to omissions liability in a negligence context, since it was perfectly clear from the facts that her intervention had made things worse for Vikram by causing him further injury. It was also disappointing that so few candidates discussed the possible relevance of SARAH 2015 to a claim against Wanda or whether her intervention had broken the chain of causation between a possible breach of duty by Urban and the further injury to Vikram's leg that resulted from Wanda's attempt to help him. Nor should candidates simply have assumed that, as a nurse, Wanda would be held to a higher standard of care even when off duty. Some candidates responded well to the issues raised by the death of Yannick.

TRUSTS

The Trusts paper was generally done well, and produced some sophisticated answers. However, there were some disturbing general issues, mainly concerning problem question technique. One issue was the poor handling of academic views as opposed to cases. For example, candidates would sometimes say that though the Court of Appeal decided X, Professor Y has said that the law should be Z, so therefore the law is Z. On the other hand, there was sometimes uncritical application of the case-law. To take one example, *Grey v IRC* (1960) is arguably irreconcilable with *Vandervell v IRC* (1967), yet was applied by many candidates (Question 12) without question. Case-law of course needs to be applied to the given facts but, where cases are open to criticism/doubt, that criticism needs to be voiced; in this respect, problem questions are no different to essay questions. A further issue is that there was often a failure to get to the point, with much time wasted on non-problematic issues. The clue is in the name. These are 'problem' questions, so candidates should focus on what is problematic, addressing that and only that. Another complaint was a failure to apply the case-law to the facts of the problem. So, for example, Question 11 raised issues concerning the certainty of objects of a power of appointment. Although candidates generally identified *re Baden (No 2)* (1973) as a relevant authority and discussed the differing views of the judges in that case (though often with a degree of inaccuracy such that the examiners were forced to go back and re-read the decision for themselves to ensure they were not going mad), there was a signal failure to apply the differing

views to the facts, with candidates simply saying 'therefore the power fails/does not fail'. Another problem was the wording of questions being ignored. If the examiner says there is a power of appointment, then there is a power of appointment, and not a discretionary trust. If the examiner says there is a contract, there is consideration as there cannot be a contract without it. Finally, and most frustratingly of all, candidates would often fail to come to a decision, saying the courts might follow one line of authority, but then again might follow another, and leaving it at that. Such fence-sitting will not score the highest marks.

On essay questions, common errors were a failure to focus on the question asked and instead drop in prepared essays. The most egregious example of this was with Question 2, where many candidates inserted an essay on the thorny issue of the classification of the trust in *Rochefoucauld v Boustead*, an issue tangential to the question at best. Another was the tendency to produce general essays on resulting trusts for Question 4 rather than take apart Lord Millett's quote line by line. Yet another problem was equivocal language. Thus, candidates would say that case X 'suggests' that the rule is Y, whereas what is being described is a decision of the House of Lords which *held* that the rule is Y. This suggests an unfamiliarity with the case-law, leading to an unwillingness on the part of candidates to commit themselves. There was also an odd notion of the sorts of arguments available to courts in reaching decisions. Thus, although many argued that the decision in *Barclays Bank v Quistclose Ltd* (1970) (Question 7) was indefensible as a matter of legal principle, they went on to say it could be defended on the 'policy' ground that it was important to encourage lending in cases of corporate rescue. Even if that latter proposition was true, and it was generally just asserted, it pays no attention to how courts (rather than legislatures) can reason. This showed once again an unfamiliarity with the case-law.

Question 1: This essay question had few takers, though there were some very good answers which discussed the potentially misleading language of legal and equitable title, with its inference that these were the same thing simply viewed from different perspectives, and which could lead to mistaken decisions, such as that of the Court of Appeal in *Shell v Total* (2010). Weaker candidates took the quote as an excuse to write a general essay on whether beneficiaries of trusts have property rights and were rewarded accordingly.

Question 2: Though a popular question, it generally was not well done. As noted, weaker answers tended to focus on the correct categorization of the trust in *Rochefoucauld*. There were also a number of candidates who said that 'compliance' (how can a rule concerned with admissibility of evidence be complied with by a settlor?) with the sub-section ensures there is no duress, undue influence or misrepresentation, though how that could possibly be the case was not explained. Many also struggled with the meaning of the word 'nullity' in the question, not, one would have thought, a tricky word. By far the worst failing, however, was citation of Fuller's three functions of formality and the assumption that all three could apply to s 53(1)(b) LPA 1925. Very few candidates bothered to ask whether this was in fact the case. Stronger answers examined the different ways in which a declaration of trust respecting land could be proved without the requisite writing, and considered how that might vary according to whether or not the alleged settlor was the beneficiary, whether what was alleged was a self-declaration of trust, and whether the alleged trustee had conveyed the title to the land to a third party. They also explained how the so-called exceptions in s 53(2) were probably not exceptions at all, and that s 53(2) was otiose. Some answers also demonstrated an impressive knowledge of the history and purpose of the statutory provision, and its predecessor, s 7 of the Statute of Frauds 1677.

Question 3: A moderately popular question which was generally competently done. Good answers questioned whether what Lord Reed said in the quote was correct, arguing that while causal issues might be relevant to surcharge claims, they had no place in claims to falsify the trustee's account. They also dealt well with Lord Millett's extra-judicial defences of both *Target* and *AIB*. Weaker candidates failed to deal with the case-law post-*AIB*.

Question 4: This was a popular question. Strong candidates engaged with the question whether the requirement for beneficiaries in private trusts was necessary for reasons other than having someone with standing to enforce the trust, and discussed the status of *Re Denley*, with particular attention on how the case has been treated in later decisions. Weaker scripts took it for granted that *Re Denley* was good law, and simply discussed generally whether English law should recognise private purpose trusts.

Question 5: This was a moderately popular question. Good answers examined the law before 2006, and closely tied discussion of reform into the provisions of the Act itself, and their discussion in later cases. Weaker answers spoke more open-endedly about whether charity law was in need of reform, and took certain features of the law pre-2006 (eg, the 'presumption' of public benefit) for granted.

Question 6: A very popular question. Unfortunately, many candidates did not pay sufficient attention to the terms of the quote. Some seemed to feel the need to discuss every major theory of resulting trusts in the literature. This was neither necessary nor sufficient for a good answer to the question, especially when done without any real discussion of the material facts of decided cases. The best answers paid close attention to the quote throughout, making sure to note the context in which Lord Millett made these specific comments, and struck a good balance between discussing the cases and academic commentary.

Question 7: A very popular question. Weaker answers were essentially prepared essays on the proper categorisation of *Quistclose* trusts, with a tendency to rely on sometimes dubious or dated academic commentary at the expense of discussing judicial reasoning. Stronger answers: (i) discussed how in *Quistclose* Lord Wilberforce found the necessary intention for the trust to arise despite the fact the trustee could use the rights for their own benefit, (ii) critically engaged with the issue whether the case recognised a 'new category' of trusts, (iii) discussed Lord Millett's alternative theses in his LQR piece and in *Twinsectra*, and (iv) looked at the treatment of such trusts in the most recent Court of Appeal judgments.

Question 8: This question had almost no takers.

Question 9: A moderately popular question that elicited very mixed answers. The weakest simply discussed whether a fiduciary's liability for unauthorised gains should be purely personal or not. Others did discuss more broadly whether or not constructive trusts should be remedies—but without any discussion of the most recent Supreme Court decisions on the issue. Strong answers showed that different types of what are usually thought of as 'constructive trusts' resembled or differed from express trusts to different degrees and in different ways, and supported the argument with a range of examples.

Question 10: This question had almost no takers.

Question 11: A very popular question that was, generally speaking, reasonably answered. A large number of candidates wrote at great length about certainty of intention and certainty of subject matter, which were uncontroversial on the facts. Most missed the fact that there was a fixed trust

for the University of Stamford, subject to powers of appointment exercisable in favour of the other listed classes. Surprisingly, many had trouble with the fixed trust, seeming to think that a non-natural legal person such as a university could not be its object and that the trust had to be either charitable or a private trust for the staff and students of the university. A large number of candidates also took it for granted that 'capriciousness' was a free-standing legal principle which could render a power of appointment void, despite Templeman J's statements in *Re Manisty* being *dicta* only.

Question 12: A popular question. Stronger answers applied the rules in light of the specific reasoning in the relevant cases and bearing in mind academic criticism of them, and properly considered whether a purported declaration of sub-trust caused the settlor to 'drop out', and for what principle *Oughtred* stands as authority. Weaker answers took such points for granted.

Question 13: A question that attracted few answers. Strong candidates recognised the different ways M's acts might have given rise to obligations binding on her estate. Weaker candidates became confused about the relationship between the statement to Dr Gower and the letter to the bank manager.

Question 14: A moderately popular question. Strong answers recognised that the reason E was going to make inquiries in the first place was crucial to his liability, that F's liability might well turn on his recollection of drafting the original trust deed, and how changes in the law since *Twinsectra* might affect H's liability. Weaker answers either missed these points, or took them for granted.

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