
Examiners' report 2009

2650010 Criminal law Zone A

Introduction

The overall standard of candidates' performance was certainly higher than last year and that was reflected in an increase in the pass rate. This improvement is likely to be from candidates who covered the syllabus, used the materials provided – both hard copy and on the VLE – who did the appropriate reading and activities and listened to the audio presentations on the VLE. Well done!

Nonetheless, the Examiners do remain concerned that there are still a number of candidates who make very elementary mistakes and/or fail to support their arguments and propositions by reference to the relevant law (that is, case law and the statutory provisions). Indeed, there was significant evidence from a number of papers that some candidates had prematurely entered themselves for this exam. In other words, their level of knowledge was insufficient to even be thinking about taking the exam. Please ensure that you have a reasonable level of knowledge and understanding of the subject before you enter yourselves for next year's exam as not only do you use one of your attempts (and the number is limited as you know) but it costs you money to enter for the exam! We know you have to submit your examination entry form some months in advance but you really should have some idea of how well you know and understand what you have covered at that time and how much time (barring unforeseen and unavoidable problems) you will have before the exam to concentrate on your studies. You should make your decision accordingly.

General remarks

Please ensure that you use the materials we provide for you. First of all, listen to the audio presentation on the topic you are studying. These are available on the VLE for each chapter of the subject guide and will introduce you to the topic(s). They are also useful for revision purposes. Then go on to the subject guide, which contains a fairly in-depth synopsis for each topic, guidance on what additional materials you should read and activities on each topic. You will see when you read the points to note on the exam questions below that some of the questions, in whole or in part, were based on activities in the subject guide.

Be careful how you express yourself – it really can make a difference. For example, as you know 'actual bodily harm' can be defined as a hurt *which is more than transient or trifling*. Now consider how it reads if you leave out the words '*more than*' as some candidates did. Be very

careful. Law is a precise subject and a slapdash approach will not gain you marks.

There were a number of other examples of errors of knowledge and approach. These tend to be the same every year so please see the comments in the 2008 Examiner's report and note the following.

- In your answer to a problem question about criminal damage please do not write copiously about the decision in *Caldwell* [1982] AC 341 and then merely state briefly that it has been overruled by *R v G* [2004] AC 1034.
- When dealing with fraud remember that 'gain' or 'loss' extends only to money or other property (section 5(2)(a)) – this does not include sexual favours!

Examination technique is another problem for some candidates. Please ensure that you read the examination paper properly – that includes both the questions and the rubric. As ever, there were quite a few candidates who only answered half of a two-part question. (See question 2 below where both parts should have been answered.) Don't assume that two-part questions give you a choice. Look at the rubric which will tell you whether you need to answer both parts or only one.

Make sure you paragraph your work and set it out clearly – don't meander from one discussion into the other or from one sentence into another. Read the materials and you will see how the authors/judges set out their discussions. Please remember to begin each answer on a new page.

Make sure you manage your time effectively. It really is important that you attempt four questions. Even if you get 50% for each question answered, if you answer fewer than four – even at that fairly good standard – you will not pass. To even scrape a pass on three answers rather than four you would need to get 53% for two of them and 54 for the third – and that would still just get you a bare 40% overall. If you only answer two questions you would need to get 80% for each answer (again just to scrape a bare pass) which is well nigh impossible. Conversely, do not attempt more than four questions as the final one(s) in your answer book will not be marked.

Please also read the general comments on last year's chief examiner's report. You will find this on the VLE.

Comments on specific questions

Please note that the following are merely 'points to note' and not model answers to the questions.

Question 1

Under what circumstances may a person be criminally liable for a failure to act?

This was a very straightforward essay question which was answered well on the whole. You should be able to explain that, although there is no general criminal liability for omissions to act, there are circumstances where a duty to act might be imposed either by statute (eg where it specifically states that a particular offence may be

committed by omission) or by the courts. You should be aware that, before a duty to act will be imposed by the courts, the specific offence must be capable of being committed by omission. Where it is so capable, what factors might a court consider in its determination of whether a defendant was under a duty to act?

Question 2

(this was a two-part question and required an answer to *both* parts)

- a. Could the reasoning in the cases of *Roberts* (1971) and *Williams and Davis* (1992) be said to conflict with that in the case of *Blaue* (1975)?

This is an online research activity in the subject guide. The issue is one of causation and the rules on whether or not the victim's own conduct breaks the chain of causation. In *Blaue*, which concerned the stabbing of a person who was a Jehovah's Witness who died having refused a blood transfusion it was decided that a defendant must take his victim as he finds him and that this includes the whole person and not just the physical person. This does not depend upon any notion of reasonable foreseeability. Cases such as *Roberts* and *Williams and Davis* relate to decisions taken by victims in a moment of panic when under threat from the defendant. The issue of reasonable foreseeability would seem to be relevant here in determining whether the victim's own conduct breaks the chain of causation. For example, in *Roberts* it was said that if the victim's conduct was 'daft' and therefore not reasonably foreseeable it may break the chain of causation. This would appear to be in conflict with *Blaue*. However you should note that in 'escape' cases, when determining whether the victim's conduct was within the range of responses which might be expected from a victim placed in his situation, the jury must take into account the fact that the victim was acting in the agony of the moment.

- b. Anna stabbed Iqbal. Iqbal was seriously injured. He was taken to hospital and placed on a life-support machine. One night, an intensive-care nurse, who hated money being wasted on expensive life-support machinery and without being authorised to do so, switched off the life support machine. Iqbal died.

Consider Anna's possible criminal liability for murder

This was also taken from an activity in the subject guide. At the time you completed this topic you were only expected to deal with the causation point, for the examination you were expected to consider it fully. This means you should consider the elements of the offence of murder in relation to Anna, dealing with the causation issue (the nurse's conduct) when you were looking at whether Anna might have committed the *actus reus* of the offence. You should have cited the *Woollin* direction on intention when discussing the *mens rea* and pointed out that if it is proved that she intended serious harm that is sufficient *mens rea* for murder. You should then briefly have considered the liability of the nurse for murder. It is clear from the question that, even if her primary purpose was not to kill Iqbal but to save money, she would have foreseen death or serious harm as being a virtually certain consequence of her conduct (barring some unforeseen intervention).

Question 3

Fred and Marcus had fought because Marcus was angry with Fred for having carved the letter 'F' on to Livia's arm using a penknife. Livia was Marcus's 14 year-old daughter, who had begged Fred to do this as she was in love with him. Fred had reluctantly agreed. The wound was not serious, although it did require one stitch. Fred and Marcus had decided to settle their differences by having a fight. Fred had punched Marcus, knocking him over and causing him to fracture his skull. Fred had run away when the police were called.

As Fred was making his way home, a beggar, Beryl, who was carrying a baby in her arms, approached him and asked him for money to feed the baby. This incensed Fred who hated beggars. He sprayed after-shave cologne in Beryl's face causing her to drop the baby which bruised it slightly.

The police then caught up with Fred. PC Bill tried to arrest him. Fred pushed PC Bill out of the way in an attempt to get away, causing PC Bill to stagger. In an effort to save himself from falling, PC Bill put his arm out and pushed it through a shop window, sustaining severe cuts to his arm.

Discuss the possible criminal liability of Fred

This question is based on a sample examination question in the subject guide. It requires knowledge and understanding of a range of non-fatal offences against the person and the issue of consent. As there are a number of offences to be considered, it is very straightforward with the issues clearly demonstrated. Although there is an overlap with some of the offences, it is explained in the subject guide that once you have explained an offence you do not need to repeat the basic elements. You should refer to your previous explanation but should be careful to note any different emphasis which requires consideration.

- Fred and Livia – ss.20 (wounding) and 47 OAPA/issue of consent.
- Fred and Marcus – ss.18 (intent to do GBH)/20 (inflicting GBH)/47 OAPA/issue of consent.
- Fred and Beryl – s.24 OAPA; could the 'after-shave' be a noxious thing.
- Fred and baby – battery/transferred malice.
- Fred and PC Bill – ss.18 (intent to resist arrest)/20.
- Fred and Marcus/Bill – s.47; unlikely on the facts but could be mentioned for 'completeness'.

Please remember that these are just points to note. It is for you to analyse the law and how it relates to the facts of the question.

Question 4

Egor, who had a history of depression and schizophrenia, and his wife Irina were eating in a restaurant. Egor was taking medication for his condition and was therefore not drinking alcohol. He was trying to reassure Irina who had received threatening letters from her ex-husband Alexey. All of a sudden, Alexey, who was very drunk, burst into the restaurant and stormed over to Egor and Irina's table shouting: 'You stole my wife! You must die!' Egor was alarmed. He picked up the heavy water jug from the table and threw it at Alexey. It hit Alexey on the head and he fell to the floor, unconscious. The sight of Alexey lying on the floor enraged Egor as he remembered the letters Alexey had sent to Irina. He was also worried that Alexey might wake up and kill him. He repeatedly kicked Alexey who died of a fractured skull before an ambulance could be called.

Discuss Egor's criminal liability.

You should consider the following points.

Offence

Murder – outline the elements of the offence and explain what needs to be established by the prosecution

Defences

- Self-defence – You should explain, using appropriate authorities, whether the use of force was necessary and whether the force used was reasonable (s.76 Criminal Justice & Immigration Act). This was considered in the 2009 *Recent developments*. You should have made the point that, if successful, it would be a complete defence. As a successful plea of this defence would be unlikely under the circumstances (it might be available for the original attack but not the kicking – why is that?) you should therefore have gone on to consider other potential defences.
- Provocation – s.3 Homicide Act 1957 – a partial defence. You should explain, by reference to the facts of the question and the appropriate authorities whether there may have been a sudden and temporary loss of self-control and whether a reasonable man might have done as Egor did. In the alternative, because of his medical condition, you should also consider diminished responsibility.
- Diminished responsibility – s.2 Homicide Act 1957 – a partial defence. You should point out that, unlike self-defence or provocation, the burden of proof is on the defendant on balance of probabilities and that medical evidence would be required in support of the defence. You should analyse and explain elements of the defence using appropriate authorities and by reference to the facts, distinguishing questions of law and fact.

The Coroners and Justice Bill was considered in the 2009 *Recent developments* and VLE newsletters. This was not directly relevant to the problem as the answer required knowledge and understanding of the current law but brief and sensible comments would have scored some extra points.

Question 5

“Self-induced intoxication is never accepted by the courts as an excuse for committing an offence.”

Discuss

You were expected to explain what is self-induced intoxication and the contexts in which it might be used (ie – as evidence of lack of *mens rea* or as evidence supporting a mistaken belief in the need to use a defence). Your discussion, using authorities, should have centred around how evidence of self-induced intoxication is treated by the courts, the distinction made between specific and basic intent offences and also its impact on other defences. For example, the ‘objective’ elements of duress, provocation and also ‘reasonable force’ in self-defence. The latest pronouncement in this area is s.76(5) Criminal Justice & Immigration Act 2008. This is an area which does lack clarity and on the 19 January 2009 the Law Commission presented its recommendations (Intoxication and Criminal Liability Law Com No 314) and draft Bill to parliament. This Report is considered in the 2009

Recent developments and you should have been aware of at least some of the recommendations and the draft Bill.

Question 6

On her way out from her workplace, Jenny found £50 which she used to buy a pair of shoes to go with the gown she had bought for her firm's centenary ball. She later overheard someone in her office saying that they had lost £50 but she did not return the money.

While chatting to her colleagues, she discovered that her firm had set up a fund to contribute £100 towards the cost of a ballgown for each female worker who could demonstrate financial hardship. Although, initially, she did not apply for this, as she had already bought her gown and was not in financial difficulties, after hearing that all of her female colleagues intended to do so, whether or not they had already purchased their gowns, she applied for the money stating that she was in financial difficulties. She thought it was probably alright as she knew that none of her colleagues was in financial difficulties either. She did not get the money as, by the time her application was received, she was told the fund had been spent.

On the day of the ball, Jenny went to the hairdressers which was offering a 20% discount to students. She had borrowed her sister's student union card which she showed to the receptionist and obtained the discount.

When she arrived at her house, Jenny noticed that her next door neighbours were having a delivery of shopping. She had forgotten to buy anything for her lunch and was hungry and so so, hoping they would not mind, took a microwave meal from one of the shopping bags, putting £5 through their letter box.

Consider Jenny's possible criminal liability.

This was a straightforward question requiring you to demonstrate that you know, understand and can apply the law relating to fraud (Fraud Act 2006) and theft (Theft Act 1968) to the facts of a problem, citing relevant case law where appropriate. In addition to dealing with the general elements of these offences, you should have concentrated on the particular issues which arose in each part of this question.

£50 – theft contrary to s.1 TA 1968. You should deal with elements of offence by reference to facts of question. Specific issue: dishonesty. Section 2(1)(c) and *Ghosh*.

£100 – Fraud contrary to s.1 FA 2006. Section 2, fraud by false representation. You should deal with elements of offence by reference to facts of question. Specific issues: the false representation need not operate on the mind of the 'victim' or cause 'victim' to part with the property. Dishonesty by reference to the *Ghosh* test including, here, the second limb of the test.

Section 4, fraud by abuse of position. Arguably this could apply here; it is a vaguely drafted offence.

Actus reus: does Jenny occupy a relevant position and has she abused that position?

Mens rea: the same as for s 2 which you should already have considered.

20% discount – Fraud contrary to s.1 FA 2006. Section 2, fraud by false representation. Elements as dealt with above. Specific issue: Representation can be express or implied.

Section 11, obtaining services dishonestly. For this offence a causal link must be established between the dishonesty and the obtaining of the service.

Microwave meal – theft – elements as above. Specific issue: Dishonesty s.2(1)(b), s.2(2) and *Ghosh*. This element of the question was based on an activity in the subject guide

Question 7

Antoine enjoyed dressing up as a woman and so every Sunday he wore his sister's clothes and called himself Antoinette. One Sunday, at his local pub, a visitor to the area, Geezer, starting chatting to him. Very quickly Antoine realised that Geezer thought he really was a woman and was sexually interested in him. Antoine did not tell Geezer the truth as Geezer was rather rough and Antoine was a little nervous of him. What Antoine did not know, however, was that Geezer was even more interested in Antoine's Cartier watch which he thought would make a nice gift for his wife. He told Geezer that he was going to 'powder his nose' and took himself off to the men's lavatory to think about how he was going to get away from Geezer. Geezer, however, came into the lavatory and was shocked to see 'Antoinette' there. As he came to realise what was going on, he became extremely angry at having been fooled. He ripped off Antoine's clothes and forcibly penetrated him with a bar of soap. He then held Antoine down while he removed his watch. He put it in his pocket and ran off.

Antoine, who was, by now, very distressed, put his clothes back on and left the pub. He thought a cup of tea might make him feel better and so went into a café where he ordered tea and toast. When he offered to pay, he was told that a bill would be brought to his table and that he should pay the cashier at the door as he left the café. When he had finished, he left the café without having paid. He was subsequently diagnosed with post-traumatic stress disorder and claims that he did not know what he was doing when he left the café.

Consider the possible criminal liability of Antoine and Geezer.

This was a very straightforward problem question and the following points should have been considered.

Geezer

- Assault by penetration contrary to s.2 Sexual Offences Act 2003, analysing the elements of the offence by reference to the facts of the question.
Specific issues: penetration can be by any object, penetration must have been of anus (in this case), penetration must be 'sexual'. Was it here? Section 78 sets out test and this should have been considered. If it was sexual then conduct may also amount to sexual assault contrary to s.3 Sexual Offences Act and causing another to engage in sexual activity contrary to s.4 including the aggravated form of this offence – s.4(4)
- Robbery contrary to s.8 Theft Act 1968, again analysing the elements of the offence by reference to the facts of the question.
- Possible assault. Also battery and possible s.47 in relation to possible post-traumatic stress disorder.

Antoine

- Possible offence – making off without payment contrary to s.3 Theft Act 1978

- Possible defence – automatism. Candidates should define defence and explain by reference to the facts of the question whether they indicate conduct was voluntary/involuntary and using appropriate authorities consider whether, if involuntary, it amounted to sane or insane automatism and impact on disposal.

Question 8

Priya and her twin brother Dipak - both aged 16 - hated their next door neighbour, Hans. He swore at them if they made a noise and they were convinced that he spied on them and reported everything they did to their parents who were abroad. They decided that it was time to teach Hans a lesson and that Dipak would break into Hans' house and give Hans a fright while Priya kept watch outside.

The following night, while Priya kept watch, Dipak entered Hans' house dressed as a skeleton, using a spare key he had found under a flowerpot. He put the key back once he had opened the front door. On his way to Hans' bedroom he spotted a £20 note on the table and decided to take it. He then went into Hans' bedroom, gently climbed on to the end of the bed and then started vigorously jumping up and down shouting: "We're coming to get you!" Hans woke up and was so terrified he had a heart attack and died instantly.

Consider the possible criminal liability of Dipak and Priya.

The elements of the possible offences and Priya's possible defence (below) should have been analysed by reference to the facts of the question

Dipak

- Possible conspiracy to assault contrary to s.1(1) Criminal Law Act 1977.
- Constructive manslaughter. What might have been the unlawful act/test for dangerousness and considering, for example, the cases of *Dawson/Watson/Carey*, did it cause death?
- Burglary contrary to s.9(1)(b) Theft Act 1968 in relation to the money.

As the question does not indicate that he entered the house with the intention to steal there is no s.9(1)(a) offence. So far as causing Hans' heart attack is concerned, for the same reason there is no offence contrary to s.9(1)(a). If 'inflict' and 'cause' can now be said to bear virtually the same meaning, then there is a possible s.9(1)(b) but, remember pure assault would suffice for the unlawful act element of manslaughter.

Priya

- Conspiracy (as above)
- Accomplice liability
 - a) Manslaughter – liability for unforeseen consequences?
 - b) Burglary – did Dipak go beyond the scope of the agreement?