
Examiners' report 2009

2650010 Criminal law Zone B

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

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 identical to that on the Zone A paper.

It 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 2

- a. John, who did not like doctors but instead believed in the power of prayer and natural healing, went to stay with his friend Luke. Luke was not very clean and always forgot to throw old food away. John ate a piece of cooked meat which he found in the kitchen, not realising it had gone mouldy. He contracted food poisoning and began to feel very ill. Luke wished to call a doctor but John refused to allow it. Eventually John fell into a coma. Luke waited for a day hoping that John would wake up but he did not. Luke then called for an ambulance but it was too late. John died on the way to hospital.

Consider Luke's possible criminal liability for gross negligence manslaughter

This question is based on an activity in the subject guide although the question posed is different. It is a very straightforward question requiring you to consider whether Luke may have been under a duty to act. This is considered in the feedback to the activity and you should be able to explain, citing relevant authorities, what matters the court would take into account in determining this issue.

If he was under a duty to act you should consider whether he was in breach of that duty and, if he was, citing the relevant authority(ies),

did it amount to gross negligence? (Again, this is considered in the feedback to the activity).

If it did amount to gross negligence, did it cause John's death?

- b. Under what circumstances might an existing duty to act cease?

This issue considered at page 43 of the Criminal law subject guide

Question 3

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

This part of the question also appears on the Zone A question paper.

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. Natalia stabbed Ivan. Ivan was taken to hospital where he was told he needed emergency surgery and a blood transfusion. Ivan was a Jehovah's Witness. One of the tenets of this religion is that its adherents must not accept the blood of another. Ivan, despite being told that if he did not have a transfusion he would probably die, refused the blood. He died

Consider Natalia's possible liability for murder.

This is a very straightforward 'mini' problem based on a 'causation' activity in the subject guide. You should demonstrate that you understand what needs to be established for the offence of murder.

You should consider the causation point in the context of the *actus reus* and as, in this version of the question, Natalia's mental state is not made clear, show that you understand and can apply the model direction to the jury outlined by Lord Steyn in *Woollin*.

Question 4

James had been sexually abused as a child and, as a consequence, still suffered from mild bouts of depression. One night, after spending a happy evening drinking heavily, he left his local pub with his workmate, Vicky. As Vicky was too drunk to travel home, they decided to go and sleep it off at James's flat. James gave Vicky his bed and then went to sleep on a chair.

In the middle of the night, James woke up and was startled to find Vicky kissing him and undoing the zip of his trousers. He pushed her away but she

would not stop and he became very angry. Intending serious harm, he grabbed her by the throat and hit her head against the wall. Vicky died.

Consider James's possible criminal liability for Vicky's death.

The facts of this question are loosely based on those in the case of *Hill* (Feb 2008). The March 2008 newsletter discusses this case and it is also referred to in the 2009 *Recent developments*.

Offence

- Murder – outline elements of the offence and explain what needs to be established. This is very straightforward as you are told that he intended serious harm.

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 James did. In *Hill*, the Court of Appeal acknowledged that childhood experience of sexual abuse would, following *Attorney General for Jersey v Holley* [2005] UKPC 23, be relevant to the question in provocation whether the reasonable man would have done as the defendant did. The jury would be entitled to take into account the evidence as it might affect the gravity of the provocation to the defendant by making him more likely to be affected by an indecent assault than an ordinary person.

In the alternative, because of James' history you should also consider diminished responsibility.

- Diminished responsibility – s.2 Homicide Act 1957 – a partial defence. You should point out that, unlike the defences of self-defence and provocation, the burden of proof is on the defendant on balance of probabilities. Note that medical evidence is required to support this defence. Again, you should analyse and explain the elements of the defence by reference to the facts, using the appropriate authorities and distinguishing questions of law and fact. Would his depression, independently of the intoxication, have substantially impaired his mental responsibility? See *Dietschmann* [2003] UKHL

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

To what extent should voluntary intoxication limit a person's criminal liability?

This question is almost identical with one on the Zone A paper. As with that question, you should explain what voluntary or self-induced intoxication is and the contexts in which it might be used. For example, as evidence of lack of *mens rea* or as evidence supporting a mistaken belief in the need to use a defence. You should explain, using authorities, 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 'reasonable force' in self-defence. The latest pronouncement (ie the current position) in this area is s.76 (5) Criminal Justice & Immigration Act 2008. Is the law clear? Is it reasonable and fair? Does it need reform?

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 be aware of at least some of the recommendations and the draft Bill.

Question 6

Kevin was a used-car dealer. One day Eric came into Kevin's showroom to look at some cars. Kevin showed him around and said of one particular car: 'This is a good little bus. I would stake my life on her. He went on to say that the car had only had one careful owner, a nun who used it to do the shopping for the convent, and that there were only 5,000 miles on the clock'. It had, in fact, belonged to a car-hire company and been driven for 140,000 miles. Kevin had stolen it from the car-hire company. Eric bought the car

Later that day, Kevin thought that it was time he completed his income tax return for the Inland Revenue. As most of his sales were for cash and not recorded he did not declare them on the form which he completed online. Having done so, he then clicked the 'send' icon feeling very pleased with himself for having reduced the amount of tax he had to pay but, due to a glitch on the Inland Revenue's website, his form was not received.

Kevin's daughter, Chardonnay, worked in a charity shop. Somebody had donated a coat to the shop and, as Chardonnay liked it and had forgotten to bring her own coat, she decided to take it instead of putting it on sale.

The charity shop paid its employees in cash every week. When Chardonnay opened her pay packet she discovered that she had been overpaid by £50. She decided to keep it.

Discuss the possible criminal liability of Kevin and Chardonnay.

This, like question 6 on the Zone A paper, is 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 concentrate on the particular issues which arise in each part of this question.

The car – 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. What fraudulent representations have been made? Express/implied? Section 3, fraud by failing to disclose information? Is there a legal duty to disclose? Theft contrary to s.1 Theft Act 1968. Provided K was dishonest consent to the appropriation is (s.3) irrelevant. *Gomez* (1993)/*Hinks*(2000)

Tax return – Fraud contrary to s.1 FA 2006. Section 2, fraud by false representation. Elements as dealt with above. No requirement that fraud is operative on the mind of the victim. Using a system or device s.2(5). Section 3, fraud by failing to disclose

The coat – Fraud contrary to s.1. Section 4, fraud by abuse of position. Based on an activity in the subject guide. Possible theft.

The wages – Theft contrary to s.1 Theft Act 1968. Legal obligation to restore money (s.5(4)) – money treated as belonging to original owner. Based on an activity in the subject guide

Question 7

- a. When is an act 'sexual' for the purposes of the Sexual Offences Act 2003?

Each of the sexual offences on the criminal law syllabus requires that the defendant commits an act or causes an act to be committed which is sexual in nature. How is it determined whether or not an act was sexual for the purposes of the Act? Candidates should **explain** the test in s.76 (rather than just copying it out!).

- b. Jake, an artist, was a member of a cult which persuaded him that women always wanted sex and when they said "no" they really meant "yes". The cult's mission was to encourage its members to 'give sexual pleasure to womankind'. Jake decided that, to be faithful to the cult, he should have sexual intercourse with his long-term platonic friend, Anna. Anna had always made it clear to Jake that they would never be more than very good friends but Jake now believed that she did not mean this. He went to her bedroom where she was asleep and climbed into bed with her. Anna woke up but was very sleepy and Jake had sex with her. She only vaguely recalled this incident the following morning. Consider Jake's possible criminal liability.

This part of the question is a section of the sample examination question on page 173 of the subject guide. The question and the advice is considered in the audio presentation on criminal law, available to candidates through the VLE.

The possible offences to be considered are rape, s.1 Sexual Offences Act 2003, sexual assault s.3 and assault by penetration s.2. The particular issues to be analysed are whether Anna could be said to have consented (ss.74-76) and, if not, Jake's state of mind, i.e. did he reasonably believe that she was consenting.

Question 8

Jessica and her husband, Tariq, both aged 85, were disappointed as they had not won the local 'Elderly Pop Idol' competition and were very cross that the trophy had been awarded to their neighbours, Fifi and Salvatore, who were only in their early sixties. They agreed to break into Fifi and Salvatore's house to steal the trophy. They broke a window, climbed into the house and found the trophy. As they were leaving with it, Fifi, disturbed by the noise they had been making came into the room singing loudly. They could not bear to listen so they dropped the trophy and ran away.

As they were leaving Fifi and Salvatore's home, Jessica, who had, that day, forgotten to take the insulin she needed to control her diabetes began to behave strangely. She punched the wall and, in doing so, knocked down an oil lamp which started a fire. Although the fire damage was quite extensive, everybody managed to get out of the house and nobody was hurt.

Consider the possible criminal liability of Jessica and Tariq.

Jessica and Tariq – joint principals

Conspiracy contrary to s.1 Criminal Law Act 1977. Husband and wife cannot conspire – *Chrastny*

Window – Criminal damage contrary to s.1 Criminal Damage Act 1971 – no need to discuss recklessness here as the facts of the question make

it clear that they deliberately broke the window in order to gain entry to the house.

When they entered the house – burglary contrary to s.9(1)(a) Theft Act 1968

When they picked up the trophy – burglary contrary to s.9(1)(b) provided all of the elements of theft present at the time they picked it up – it doesn't matter that they later dropped it and left without it

Jessica

Possible criminal damage contrary to ss.1(1), (2) and (3) of the Criminal Damage Act 1971

Possible defence of automatism. Would it be considered to be sane or insane?