
Examiner's report 2009

2660007 Evidence Zone A

Introduction

This report begins with some general observations about answering examination questions in this subject. A section follows which is devoted to specific comments on questions. Each of these begins with a summary of the main topics covered by the question, with references to teaching materials where further guidance can be found. These materials consist of the subject guide (2004), referred to as **guide**; the supplement (2009), referred to as **supplement**; the study pack (2007), referred to as **pack**; and Recent developments (2009), referred to as **developments**.

Abbreviations for statutes

CJA 2003 Criminal Justice Act 2003

CJPOA Criminal Justice and Public Order Act 1994

PACE Police and Criminal Evidence Act 1984

YJCEA Youth Justice and Criminal Evidence Act 1999

General remarks

You are told on the front page of your answer book that the Examiners attach great importance to clarity of expression. Once again, this needs to be emphasised. If you are unfamiliar with the rules of grammar and punctuation you put yourself at a disadvantage right from the start. While some allowance will be made for the fact that English might not be your first language, this will not extend so far as to make the Examiner guess what you are trying to say.

Clarity of expression is hindered by useless verbiage. Please do not state the obvious or use unnecessarily pompous language. This will not impress the Examiners. If somebody is advising you to do this, they are doing you no favours at all. As was said last year, you must **cut to the chase**.

Do not distract the Examiner with idiosyncrasies of presentation. For example, use a dot over the small letter 'i' rather than a circle – a mass of circles on a page distracts the reader and should be avoided. Avoid highlighting your text; generally you succeed only in making it more difficult to read. Underline names of cases (do not put the names in inverted commas), but not references to statutes. Make sure that you spell correctly words that are frequently used in a legal context, such as 'burglary' and 'admissible'.

It should be obvious that candidates will also be at a disadvantage if they fail to read the questions carefully before attempting to answer them. This year, despite the additional reading time, a significant number failed to read the question properly and lost marks as a result. **Careless reading costs marks.** This fault arose widely in answers to essay questions. Candidates must get into the habit of analysing these questions with particular care if they are to avoid missing the point. Problem questions were also carelessly read, with the result that important points were often missed. You must remember that questions in the subject guide (and in commercial Q&A series) are generally designed to test your knowledge on a chapter-by-chapter basis, and are therefore limited in scope. In the examination, however, a problem question will nearly always contain several different points. So don't think you have answered a problem question satisfactorily just because you have spotted one topic and have dealt with it; almost certainly there are others that need to be considered. For examples, see below.

Specific comments on questions

PART A

Question 1

'The civil standard of proof does not invariably mean a bare balance of probability... It is a flexible standard to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters.' (*B v Avon and Somerset Constabulary* (2001), *per* Lord Bingham of Cornhill CJ)

Discuss.

The topic covered by this question is the standard of proof. See **guide** and **supplement** ch.5, section 5.2; **developments** ch.5.

Far too many candidates misread this question and thought that they had been asked about the standard of proof in criminal trials. Although the civil standard is applied when a defendant in a criminal trial has a legal burden of proof in relation to some issue, it should be obvious that the civil standard of proof applies primarily in civil trials. It is in those trials that the question of whether there might be more than one civil standard has sometimes arisen.

Candidates should describe the difficulty that can be experienced where serious misconduct is alleged in civil proceedings. They should then refer to early attempts to deal with this problem in cases such as *Bater v Bater* [1951] P 35 and *Hornal v Neuberger Products* [1957] 1 QB 247. Reference should then be made to the approach taken in *Re H and Others* [1996] AC 563. Bonus points would be available for candidates realising that this was approved in the later cases of *Re Doherty* [2008] UKHL 33 and *Re B (Children)* [2008] UKHL 35, which were referred to in the article by Mirfield mentioned in **developments**.

Question 2

'The central tenet of the rationalist tradition is that the direct end of adjective law is the achievement of rectitude of decision in adjudication.'
(Twining and McCrudden)

To what extent is the admissibility of evidence in criminal trials determined by this 'central tenet'?

This question is concerned with current objectives of evidence law. See **guide** and **supplement** section 2.3; **pack** chs.1, 3 and 4.

The quotation comes from the passage by Twining and McCrudden included in **pack**. Again, this was a question that was not always carefully read; a surprising number of candidates confused rectitude of decision and relevance. The concepts are, of course, quite different. A little thought should have sufficed to see that the Examiner was inviting discussion of a familiar topic: the extent to which considerations other than rectitude of decision influence the law of evidence in criminal trials.

Obvious topics for consideration would be rules about the burden and standard of proof and ss.76 and 78 of PACE. Candidates could also discuss the effect of CJA 2003 on hearsay and evidence of bad character. A first-class answer would look at the 'legitimacy of the verdict' theory put forward by Duff or Dennis. More generally, candidates could discuss whether there are acceptable levels of error in criminal trials. They might also take into account the influence of the European Convention on Human Rights and cases such as *A v Secretary of State* [2006] 2 AC 221 and *Jalloh v Germany* [2006] 20 BHRC 575.

Question 3

'The complex mixture of detailed rules and broad discretions created by the Act places the law in the unhappy position of being neither sufficiently clear and flexible, nor at all predictable.'
(Birch)

Discuss this criticism of the hearsay provisions of the Criminal Justice Act 2003.

The topic covered by this question is hearsay. See **guide** and **supplement** ch.6, especially section 6.2; **developments** ch.6.

Many candidates failed to take into account this particular criticism. Where you are asked to comment on a quotation you must analyse with care what the person quoted has said. Here, for example, Birch has made several assertions: the hearsay provisions are complex; they consist of rules; they also consist of discretions; this mixture means that the law is unclear; it also means that it is insufficiently flexible; it also means that it is unpredictable. You cannot begin to agree or disagree until you have dissected what Birch said in this way.

Once you have done so, a variety of points could be made. Is s.117, as Birch argued, too complex for efficient operation? When do 'interests of justice' have to be considered, in particular under s.116? Was it desirable to preserve some common law, particularly *res gestae*, under s.118? How wide, and how uncertain, is the scope of s.114(1)(d)?

Quite a few candidates failed to take into account the advice given in last year's report, made up their own question, and wrote on why hearsay was unreliable. There appears still to be a belief that if you don't know the answer, you should write anything because you're bound to get some marks. **This is wrong.** You are not bound to get any marks at all if you fail to answer the question that has been set.

Question 4

How, if at all, would you justify the privilege against self-incrimination?

The topic covered by this question is the privilege against self-incrimination. See **guide** and **supplement** ch.12; **pack** chs.1–4 inclusive.

This is yet another question that many candidates misunderstood or misread. To 'justify' does not mean to 'illustrate'. Nor do you justify anything by saying merely that it is a fundamental principle. You need to go on and say why the privilege is regarded as fundamental, and whether it is right that it should be so regarded.

Again, of course, it would be necessary to analyse the question. Just what do you understand by 'the privilege against self-incrimination'? The expression is often quite loosely used, so you should make clear at the outset what you are going to talk about. After that, there are several points that could be discussed. You might discuss, for example, the reasons for protecting a suspect from being compelled to cooperate with the prosecution. Is there a connection between the privilege and the presumption of innocence? Does it protect against miscarriages of justice? Would its abolition lead to undue harshness against defendants? A first-class answer might discuss Bentham's criticisms on this point. Another way of looking at the question would be to consider how far the privilege might conflict with other theories of the criminal trial, for example, that the verdict should be capable of being justified to the defendant. On this, see the excerpt from Duff in **pack**.

PART B

Question 5

Alex is charged with the murder of Ben. The prosecution alleges that Ben's death arose from a street fight which developed when Ben was stopped outside a cinema by two men, Cedric and Alex. Alex attacked Ben and a fight between them took place. During the fight, Alex called to Cedric, who had so far not taken part but was carrying a knife, to 'use your blade on this guy'. Cedric then stabbed Ben, who died from the wound.

Cedric was arrested several days later. When interviewed under caution he admitted stabbing Ben at the instigation of another man, but he did not name Alex. In due course he pleaded guilty to Ben's murder. Before his arrest Cedric had a conversation with Deirdre, his partner, during which he admitted stabbing Ben and said that he had done so only because of what Alex had called out to him. After Cedric had pleaded guilty to murder and had been sentenced, Deirdre made a written statement to the police giving an account of what Cedric had told her about Alex's involvement.

Deirdre is now resident in New Zealand. She had originally agreed to give evidence for the prosecution at Alex's trial, but the police have recently been told that she has changed her mind. Cedric has refused to cooperate with the police in their investigations concerning Alex. The only other potential witness for the prosecution is Nathan, a prisoner on remand with Alex, who can testify that, when they were on exercise together, Alex admitted to him that he had told Cedric to stab Ben.

Discuss the evidential matters arising.

The main topics covered by this question are:

- Hearsay. See **guide** and **supplement** ch.6, especially 6.2; **developments** ch.6.
- Confessions. See **guide** and **supplement** ch.9; **developments** ch.9.
- Judicial warnings. See **guide** and **supplement** ch.7, especially section 7.1; **developments** ch.7.

Two mistakes in dealing with this question were frequently made. The first was the failure, probably due to careless reading, to realise that Cedric's case was over and done with. It was therefore unnecessary to consider whether, for example, s.76 of PACE might be used in connection with his confession to the police. It was wrong, also, to assume that he would be giving evidence at Alex's trial. He would not be a co-defendant in that trial. Candidates were told that he had refused to cooperate with the police in their investigation of Alex and had failed to name Alex when confessing his own part in the offence.

The second mistake was to assume that problems of competence or compellability arose in relation to Deirdre. She was not Cedric's wife and she could not be his civil partner (see the Civil Partnership Act). There was no basis, in any case, on which she might have been uncompellable as a witness against Alex, who was, as emphasised above, the only defendant under consideration.

The problem arising with her evidence is its admissibility. Before jumping to s.116 conditions you should always ask whether the witness could have given oral evidence of the matters referred to. (Why? If you don't remember, look again at s.116.) So, could Deirdre have gone into the witness box (**not** 'could she have taken the stand') and given evidence of what Cedric had told her? As against Cedric at his trial, if he had contested the matter, she could have done so to the extent that it was a confession by Cedric of his part in the offence. But it was Cedric's confession; it wasn't a confession by Alex. Under the old law it would have been clearly inadmissible as evidence against Alex, but what about the position under s.114(1)(d)? Reference would be necessary at this stage to *R v Y* [2008] EWCA Crim 10. Now suppose the judge had been prepared to admit it under this provision. Might the defence have argued that it should still be excluded because it formed the only, or at least the main, evidence against Alex? You would need to discuss *Al-Khawaja v UK* [2009] All ER(D) 152 (but if this problem arose now you should see also *R v Horncastle* [2009] EWCA Crim 964).

Only after this discussion should you go on to consider whether Deirdre's written statement could be used. This, of course, requires consideration of s.121 as well as s.116 because in written form the statement is an example of multiple hearsay. So far as s.116 is concerned, there must be real doubt as to whether the prosecution on the facts given can establish the relevant s.116 conditions. All the question says is that 'the police have recently been told'. By whom? On what basis? What further investigations have the police made to establish whether this information is correct? Few candidates considered any of these questions.

It remains to consider Nathan's evidence. This produced some bizarre suggestions about his competence to give evidence. There was a time when persons convicted of felony were incompetent as witnesses, but that has not been the law since 1843. In any case, a person on remand is someone awaiting trial and could very well be without any previous convictions. What needs to be discussed is the desirability of a judicial warning in respect of such evidence (see *R v Benedetto* [2003] UKPC 27; *R v Stone (MJ)* [2005] EWCA Crim 105). A first-class answer might consider the possibility that he was a police stooge, in which case it would have been necessary to refer to *R v O* [2006] 2 Cr App R 405.

Question 6

Edward, aged 29, is charged with raping Freda, aged 22. Freda says that she met him for the first time in a wine bar and that he invited her back to his house to see his collection of Victorian dolls when the bar closed at 11.00. She says that he tried to kiss her as soon as they were in the sitting room, but that she resisted. He flew into a rage, hurled her onto a sofa, and raped her. He then threw her out of the house. When Freda reached the flat where she was staying with her cousin, Gustav, she said nothing about what had happened. She went to work as usual the next day. After work she went for a drink with a colleague and told her that she had been raped by Edward. Her colleague said that she should go to the police, but Freda was not sure whether she should do so. Later that evening she told Gustav that Edward had raped her, and he persuaded her to inform the police. She gave the police a written statement, and shortly afterwards Edward was arrested.

At the police station Edward was interviewed under caution in the presence of a solicitor. He admitted having sex with Freda. 'But,' he said, 'she was the one who started it. She was begging for it. There's no way I'm guilty of rape.'

Edward wishes to give evidence in his own defence and to call Harry to say that he, Harry, had often seen Freda in wine bars trying to pick up men. Edward also wishes to call Iain, who has known Freda for several years. Iain says that usually Freda is a very quiet girl, but that from time to time she goes on drinking 'binges' and will then have sex with anyone. He also says that earlier in the evening of the alleged rape he had been in the same bar where Freda and Edward later met. On that occasion Freda had had a lot to drink, and at one stage had called out to him, 'Come over here, you gorgeous man! I need sex now!' Iain says that shortly afterwards they performed various sexual acts, but without full intercourse, in the men's lavatory and in a nearby car park.

Edward was convicted two years ago of theft, but has no other convictions. Freda has several convictions for being drunk and disorderly in a public place.

Discuss the evidential matters arising.

The main topics covered by this question are:

- 'Recent complaints' under CJA 2003. See **guide** section 4.2.2 and **developments** ch.4.
- Character evidence. See **guide** and **supplement** ch.10; **developments** ch.10.
- Section 41 YJCEA 1999. See **guide** and **supplement** ch.4, especially section 4.1.2; **developments** ch.4.

The complaints made by Freda should be discussed in the light of s.120 CJA 2003 and *R v O* [2006] 2 Cr App R 405. There was a tendency to treat them as confessions, to which s.76 of PACE applied. It is difficult to understand how such confusion could have arisen. A complainant in a sexual case is not in the same position as a defendant. Harry's evidence had to be analysed before the law could be applied. As it stands, his statement is a conclusion based on observations. What did he actually see? Whatever it was would have to be considered in the light of s.41 YJCEA 1999. You also need to consider the relevance and admissibility of Iain's evidence. It was in two parts. First, he could speak about Freda's general behaviour. Secondly, he could refer to her behaviour earlier that evening. Candidates should be able to explain why no hearsay problem arises with what Freda is alleged to have said to him.

Edward's bad character should be considered. Candidates often observe that a previous conviction is for an entirely different offence and assume that this excludes it. That is not so; previous convictions can also be relevant to propensity for untruthfulness. *R v Hanson* [2005] 1 WLR 3169 and *R v Campbell* [2007] 1 WLR 2798 should be considered.

Freda's bad character was not dealt with well. Many candidates assumed that she should be treated as a defendant for this purpose and forgot about s.100 CJA 2003. Care would be needed to see how the conviction might be relevant, given the evidence about Freda's drinking on the night in question.

Question 7

Jamie, aged 32, is charged with indecently assaulting Kate, aged 20. The case for the prosecution is that Jamie approached Kate in a museum and began a conversation about the exhibits. After a few minutes he touched her breasts. Kate ran to find an attendant and said to him, 'The man in the green jacket touched my breasts; I want him prosecuted!' The attendant said that she should report the matter to the police. When she did so, Detective Sergeant Pinkerton said, 'We've had a number of complaints like yours recently and we've narrowed the suspects down to six. Just look at these photographs and tell me which one assaulted you.' He then showed Kate six photographs; without hesitation she picked out a photograph of Jamie.

When Jamie's house was lawfully searched, the police discovered a collection of pornographic DVDs, some carnival masks and a green jacket.

Jamie says that he is the victim of mistaken identity. His solicitors asked the police to arrange an identification procedure, but the police told them that this would be a waste of time because Kate had already made a positive identification. Jamie wishes to call Lionel, a psychiatrist, to say that he has been treating Jamie for depression, and that Jamie could not have committed

the offence because he currently lacks sufficient confidence to talk to strangers.

Last year Kate made an allegation of indecent assault against a man whom she had met for the first time in a supermarket. She subsequently refused to give evidence for the prosecution and the case against him was dismissed.

Discuss the evidential matters arising.

The main topics covered by this question are as follows:

- Recent complaints under CJA 2003. See **guide** section 4.2.2 and **developments** ch.4.
- Identification evidence. See **guide** and **supplement** chs.7 and 8, especially sections 7.3 and 8.1; **developments** ch.8.
- Relevance. See **guide** section 2.1; **developments** ch.2; **pack** ch.5, especially pp.137–147; ch.6, especially pp.98–108.
- Opinion evidence. See **guide** ch.11, especially 11.3, and **pack** ch.12.

Kate's complaint to the attendant should be discussed in the light of s.120 CJA 2003. Most candidates dealt fairly well with the identification. The procedure with the photographs had to be discussed in the light of Code D, Annex E. See Code D again for the refusal of an identification procedure. How might the defence use this at trial? (Remember that a breach of a Code does not automatically lead to exclusion of evidence.)

The relevance of items discovered during the police search should be considered more carefully. What sort of pornographic DVDs were they? How might they have been relevant? (What generalisations might you make about their possessor that could increase the probability of his guilt?) If relevant, on what basis might they have been excluded? (Think of prejudicial effect and probative value.)

The psychiatrist's evidence was not considered with sufficient care. Obviously, he can give evidence as an expert witness that Jamie is suffering from depression. But what is the relevance of that alone? How does he know that one of its features is that Jamie lacks sufficient confidence to talk to strangers? If he discovered that as a result of a clinical test he could give evidence of it. But if that is merely something that Jamie has told him, it could well be excluded as hearsay.

Kate's earlier allegation should be considered in the light of *R v T* [2002] 1 WLR 632 or a similar authority.

Question 8

Dickie, a police detective, was investigating the theft of an antique bust of Plato from the Drones Club. Ned, a police informer, said to him, 'There's a rumour that Jasper and Woodrow were involved.' Dickie arrested Jasper, who at once asked for a solicitor. Dickie refused, saying that he knew others were involved in the offence and he feared that the bust would be sent abroad if he did not question Jasper at once. For fifty minutes Jasper, a heroin addict, denied any knowledge of the offence, but at the end of that time he was beginning to suffer from withdrawal symptoms. Dickie knew that this was the case and said, 'This can only get worse for you if I put you back in a cell. Now, do you want to tell me the truth?' Jasper said, 'I'll tell you if you give

me bail. It was Woodrow who did the theft. I just hid the bust for him. I buried it in the park near the statue of Aristotle.'

The police later recovered the bust, but no fingerprints could be found on it. Dickie then arrested Woodrow and took him to the police station for questioning. He was allowed to contact his solicitor, who asked Dickie about the nature of the evidence against Woodrow. Dickie refused to provide any information, and so the solicitor advised Woodrow to give a 'no comment' interview. Woodrow followed that advice. A week later, however, Woodrow's solicitor sent Dickie a statement which set out Woodrow's defence in detail.

Both defendants have now been charged with burglary. They intend to plead not guilty and are separately represented. Their solicitors have asked the police to disclose the names of any informers involved in the case.

Discuss the evidential matters arising.

The main topics covered by this question are:

- Confessions. See **guide** and **supplement** ch.9; **developments** ch.9.
- Inferences from silence under s.34 CJPOA 1994. See **guide** and **supplement** ch.9; **developments** ch.9.
- Public interest immunity. See **guide** and **supplement** section 12.2.

Generally, defendants should be considered separately. In relation to Jasper, the first point to consider is the refusal of a solicitor. Not enough candidates were familiar with Code C, Annex B. Candidates should then consider the significance of Dickie's knowledge of Jasper's condition in the light of ss.76 and 78 of PACE. Candidates might consider the bearing of *R v Y* [2008] EWCA Crim 10 on Jasper's reference to Woodrow. The discovery of the bust was governed by s.76(4) of PACE.

Comment should be made on Dickie's refusal to provide Woodrow's solicitor with information about the nature of the evidence against his client. The procedural rules governing disclosure did not apply at this stage, but reference should be made to *W* [2006] EWCA Crim 1292. The effect of legal advice on silence was not well treated; candidates simply did not remember enough of the relevant law, or forgot that if s.34 is relied on at trial the judge has to give a special direction to the jury. *R v Betts and Hall* [2001] 2 Cr App R 251, *R v Howell* [2005] 1 Cr App R 1, and *R v Hoare* [2005] 1 WLR 1804 are all relevant. On the later submission of the defence case, *R v Ali* [2004] 1 Cr App R 501 should be distinguished.

Candidates should refer to *Marks v Beyfus* [1890] 25 QBD 494 and *R v Agar* [1990] 2 All ER 442 on the point about disclosing informers' names.