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# Examiner's report 2009

## 2660007 Evidence Zone B

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### 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

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### 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 teaching 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.

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## Specific comments on questions

### PART A

#### Question 1

How has the Human Rights Act 1998 affected the law relating to hearsay?

The main topics covered by this question are the Human Rights Act 1998 and hearsay. See **guide** and **supplement** ch.6, particularly section 6.6. See also **developments** ch.6.

Your starting point should be an explanation of how the Act makes the Convention part of English law. In particular, reference should be made to s.2(1)(a) HRA 1998. This should be followed by an explanation of the 'minimum rights' referred to in Article 6 of the Convention, and reference should be made to Article 6(3)(d) in particular. The scope of this provision has been discussed in several cases in which hearsay has been the sole or main evidence against a defendant. Candidates generally showed insufficient knowledge of these. Reference could be made, for example, to *Luca v Italy* (2003) 36 EHRR 46; *R v Sellick* [2005] 1 WLR 3257; *R v Al-Khawaja* [2006] 1 WLR 1078; *Grant v The Queen* [2006] UKPC 2; *R v Cole* [2007] 1 WLR 2716; and *Al-Khawaja v UK* [2009] All ER (D) 152. (A further reference would now have to be made to *R v Horncastle* [2009] EWCA Crim 964.)

#### Question 2

'The rule that an expert witness may not give evidence on the ultimate issue is frequently ignored – and rightly so.'

Discuss.

The main topic covered by this question is opinion evidence. See **guide** ch.11, especially 11.3, and **pack** ch.12, especially pp.168–169.

Candidates should point out that this is a 'rule' that applies only to criminal proceedings (see Civil Evidence Act 1972, s.3). They might

then make some reference to the reason for the rule, perhaps citing Lawton LJ in *R v Turner* [1975] QB 834. The main part of the answer should deal with some of the criminal cases where the 'rule' has been considered. Again, candidates were generally weak in their knowledge of case law. Reference could have been made, for example, to *R v Theodosi* [1993] RTR 179; *R v Davies* [1962] 3 ALL ER 97; *DPP v A & BC Chewing Gum* [1968] 1 QB 159; *R v Stockwell* (1993) 97 Cr App R 20; *R v Doherty* [1997] 1 Cr App R 369; and *R v Hodges* [2003] 2 Cr App R 15.

### Question 3

'Riddled with anomalies and plagued by obscurity.' (Goudkamp)

Is this a fair assessment of those provisions of the Criminal Justice Act 2003 which govern the admissibility of evidence about a defendant's bad character?

The main topic covered by this question is hearsay. See **guide** and **supplement** ch.6, especially 6.2–6.5; **developments** ch.6.

The quotation comes from the article by Goudkamp referred to in **developments**. If you have read it, you should be able to make several points, which might include some or all of the following.

- The difficulties of interpreting 'reprehensible behaviour'.
- The extent of the judicial discretion available under this part of the Act.
- The problems with evidence adduced to show a propensity to untruthfulness. Reference should be made to *R v Campbell* [2007] 1 WLR 2798. A first-class answer might also refer to the commentary on this case by Mirfield, to which you were referred in **developments**.
- The scope of s.103(1)(a).
- The extent to which clarification has been provided by *R v Hanson* [2005] 1 WLR 3169 and subsequent decisions.

### Question 4

'Where serious or potentially criminal allegations are involved in civil proceedings, a higher standard of proof is required.'

Discuss.

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

A first-class answer would appreciate that there is ambiguity in the quotation. 'Is' could mean 'is in fact' or 'ought to be', and both elements could be discussed. If you do not pick up on this, there are still some good points to be made. The first sentences could describe the problems that can arise where serious misconduct, or misconduct with grave results for an individual, is alleged in civil proceedings.

The next question for consideration would be whether there are degrees of proof within the civil standard. Reference should be made to 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**.

## PART B

### Question 5

Oliver is charged with the murder of Nick. The case for the prosecution is that Nick was stopped in Foregate Street, Worcester, by two men: Oliver and Miles. Oliver attacked Nick, who defended himself. At first Miles, who was carrying a knife, took no part, but after some minutes Oliver called out to Miles, 'Finish the bastard! Use your knife!' Miles did so, and Nick died from the wound that he received. Miles was arrested a week later. He was interviewed under caution in the presence of a solicitor and admitted stabbing Nick at the instigation of another man, whom he would not name. In due course, Miles pleaded guilty to murder and was sentenced.

Before his arrest Miles had a conversation with Penelope, his partner, in the course of which he admitted stabbing Nick and described the part taken by Oliver. After Miles had been sentenced Penelope made a written statement to the police giving an account of what Miles had told her. Penelope originally agreed to give evidence at Oliver's trial, but since then she has told the police that she is afraid to do so because she has received anonymous telephone calls, which she believes came from Oliver's sisters, threatening that she would be 'wiped out' if she gave evidence. Miles has refused to cooperate with the police in their investigations concerning Oliver.

When interviewed by the police, Oliver declined legal advice and refused to answer any questions. Apart from Penelope, the only witness available to the prosecution is Quentin, who says that he saw the fight in which Nick was killed and thinks that Oliver, whom he had known at school, was one of the attackers.

Discuss the evidential matters arising.

The main topics covered by this question are as follows:

- Hearsay. See **guide** and **supplement** ch.6, especially 6.2; **developments** ch.6.
- Inferences from silence under s.34 CJPOA 1994. See **guide** and **supplement** ch.9; **developments** ch.9.
- Identification evidence. See **guide** and **supplement** chs.7 and 8, especially sections 7.3 and 8.1; **developments** ch.8.

Two mistakes in dealing with this question were frequently made. The first was the failure, probably due to careless reading, to realise that Miles'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 Oliver'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 Oliver and had failed to name Oliver when confessing his own part in the offence.

The second mistake was to assume that problems of competence or compellability arose in relation to Penelope. She was not Miles'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 un-compellable as a witness against Oliver, who was, as emphasised above, the only defendant under consideration.

The problem arising with her evidence is its admissibility. Before jumping to s.116 you should always ask whether the witness could have given oral evidence of the matters referred to. (Why is it necessary to do this? Check s.116 now if you do not remember.) So, could Penelope have gone into the witness box (**not** 'could she have taken the stand') and given evidence of what Miles had told her? As against Miles at his trial, if he had contested the matter, she could have done so to the extent that it was a confession by Miles of his part in the offence. But it was Miles's confession; it wasn't a confession by Oliver. Under the old law it would have been clearly inadmissible as evidence against Oliver, 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. You should also consider whether this evidence should be excluded because it might be the main evidence against Oliver. (The only other evidence appears to be that of identification by Quentin; it is unclear at this stage what weight it is likely to have.) You needed to discuss *Al-Khawaja v UK* [2009] All ER(D) 152 (but if this problem arose now you would also refer to *R v Horncastle* [2009] EWCA Crim 964).

Only after discussing the admissibility of Penelope's oral evidence should you go on to consider whether her written statement could be used instead. This, of course, requires consideration of s.121 as well as s.116 because in written form the statement was an example of multiple hearsay.

Oliver's refusal to answer questions could bring s.34 CJPOA 1994 into play, and the correct directions to the jury should be described with reference to *R v Gill* [2001] 1 Cr App R 160 or *R v Petkar* [2004] 1 Cr App R 270.

Lastly, candidates need to consider Quentin's evidence of identification. Should there be an identification procedure? The *Turnbull* direction and its content should be explained.

#### Question 6

Robert, aged 45, is charged with raping Susan, aged 30. Susan says that she met him for the first time at a party, and that later in the evening he invited her back to his house to hear some vintage recordings of Beethoven symphonies. He attempted to have sex with her while she was listening to one of his recordings and, when she resisted, he raped her. Afterwards she ran from the house. Susan lived alone, but when she reached her flat she telephoned her sister and told her what had happened. The next day Susan went to work as usual, but in the evening she went for a drink with Tessa, a colleague whom she knew well, and told her about the rape. Tessa persuaded her to go to the police. Susan gave the police a written statement, and shortly afterwards Robert was arrested.

Robert was interviewed under caution in the presence of his solicitor. At first, he denied meeting Susan. Later during the interview he admitted that he had done so and that he had had sex with her, but he said that it had taken place with her consent. He wishes to give evidence in his own defence and to call Una, a friend, to say that for a period of several months earlier that year she had had a lesbian relationship with Susan. During that time

Susan on several occasions had told her that she used to have sex with men, 'but only to make them suffer', and that on several occasions she had falsely alleged that she had been raped. Una has given a signed statement to this effect to Robert's solicitor, but Robert has heard that she is unlikely to be available to give evidence for him at his trial because a week after making the statement she took an overdose of drugs and has suffered brain damage as a result.

Robert also wishes to call Vernon to say that he was present at the party earlier in the evening of the alleged rape and had consensual sex with Susan, whom he had not previously met, in a cupboard under the stairs.

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.
- *Lucas* directions. See **guide** and **supplement** section 7.2.
- Hearsay. See **guide** and **supplement** ch.6, especially section 6.2; **developments** ch.6.
- Section 41 YJCEA 1999. See **guide** and **supplement** ch.4, especially section 4.1.2; **developments** ch.4.

Candidates should first deal with the admissibility of Susan's complaints (the noun is 'complaints', **not** 'complains') to her sister and to Tessa. Reference should be made to s.120 CJA 2003 and to *R v O* [2006] 2 Cr App R 405. You should also refer to the new position about the evidential status of such complaints under s.120: they are not now merely evidence of consistency. Robert's initial denial should prompt an explanation of the *Lucas* direction and its content.

A more complex problem is presented by Una's evidence. As always, before considering the use of a witness's statement you should consider whether the witness could give oral evidence of the matters to which she refers. For this purpose, it would be necessary to break up what she says into a number of propositions, because some may be admissible but others not. Una's evidence could be broken down into the following propositions;

1. For several months before this alleged incident I had a lesbian relationship with Susan.
2. On several occasions during that time she told me that:
  - a) she used to have sex with men, but only to make them suffer; and,
  - b) she had on several occasions made false allegations of rape.

The first question that arises is whether the precise nature of the relationship between Susan and Una was relevant to the defence case. Possibly not, although it would doubtless be necessary to establish that for the period in question the women were at least friends in order to account for the fact that Susan had revealed this information to Una. There is less difficulty in deciding the relevance of items 2(a) and (b), but candidates should still show their reasoning.

You should consider the admissibility of items 2(a) and (b) on the assumption that Una was available to give oral evidence. This would

require consideration of s.114(1)(d) CJA 2003. Item 2(a) would also require consideration of s.41 YJCEA 1999. Item 2(b) does not, but would be subject to the restrictions set out in cases such as *R v T* [2002] 1 WLR 632.

The next step would be to consider whether Una's written statement could be used if she were unfit to give evidence. This would require consideration not only of s.116, but also of s.121 CJA 2003 because the written statement would amount to multiple hearsay.

Finally, it would be necessary to consider the admissibility of Vernon's evidence. What is its relevance? What would be the arguments on s.41?

#### Question 7

Timothy and Adrian are charged with robbery. The case for the prosecution is that they attacked Beatrice in a subway and snatched her bag after threatening her with an oriental dagger. Beatrice was seen by Cuthbert as she emerged, weeping, from the subway. He asked her what had happened and she replied, 'Two men threatened me and stole my handbag.' Cuthbert asked if she recognised them. She said that one man had a scarf partially concealing his face, but she thought she recognised him as Timothy, one of her neighbours. She said that she did not know the other one, but thought she would recognise him if she saw him again.

Beatrice reported the robbery to the police about an hour later. She was shown a number of photographs and picked out those of Timothy and Adrian. She subsequently identified both men on an identification parade, and they were arrested. When Timothy's house was lawfully searched by the police, they discovered an oriental dagger hanging on a wall. Beatrice subsequently identified this as 'very like' the one that had been used to threaten her. The police also discovered, hidden under floorboards in a bedroom, a meat cleaver and a revolver. When questioned under caution in the presence of his solicitor, Timothy said that the dagger had been inherited from an uncle and was used only as an ornament. He denied any knowledge of the objects found under the floor in the bedroom, saying that he had moved in only recently. He said that he had not taken part in the robbery of Beatrice.

When Adrian was questioned under caution in the presence of a solicitor, he denied taking part in the offence but said that on the day before Beatrice was robbed, Timothy had tried to persuade him to take part in a robbery, but that he had refused.

Timothy has no previous convictions. Adrian has a spent conviction for burglary. They intend to plead not guilty at their trial. They will be separately represented.

Discuss the evidential matters arising.

The main topics covered by this question are as follows:

- Evidence of a complainant's distressed state and 'recent complaints'. See **guide** section 4.2.2 and **developments** ch.4.
- Identification evidence. See **guide** and **supplement** ch.8; **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.
- Hearsay. See **guide** and **supplement** ch.6, especially 6.2; **developments** ch.6.

- Character evidence. See **guide** and **supplement** ch.10; **developments** ch.10.

The first point for consideration would be Cuthbert's evidence of Beatrice's distressed state and complaint. It would be necessary to refer to s.120 CJA 2003 and to *R v Islam* [1999] 1 Cr App R 22. (Some candidates thought that Cuthbert asked her a leading question. He did not. You must remember that this expression has a technical meaning in evidence law.)

Next for consideration would be Beatrice's identification of the defendants by means of photographs. Relevant provisions of Code D, Annex E should be mentioned. In particular, candidates should consider whether it was right to show Beatrice a photograph of Timothy when she had already identified him, albeit tentatively. If it was not, how might the defence have used this breach of the Code?

Candidates often argued quite well about the relevance of the meat cleaver and revolver, but failed to appreciate that it was also necessary to consider the bad character provisions of CJA 2003. Candidates should consider the evidential status of what Adrian told the police about Timothy; reference should be made to *R v Y* [2008] EWCA Crim 10. They should also consider possible implications for Adrian under ss.101(1)(e) and 104 CJA 2003. Timothy's good character should be the subject of a *Vye* direction and candidates should explain its content.

#### Question 8

Kevin, a police detective, was investigating the disappearance of Lee, a police informer. Among other information, he received an anonymous letter saying that Mike and Nigel had been involved, and that a rumour was going round that Lee was dead. Kevin lawfully searched Mike's house. In a diary belonging to Mike he found a memo which read as follows: 'Disposal: 1. Fire. 2. River. 3. Acid. 4. Pet food factory.' He questioned Mike about his discovery, but was not satisfied by Mike's explanation that it was a note that he had made when he was working out a plot for a novel. Kevin arrested Mike on suspicion of murdering Lee. Mike was then taken to the police station, where he asked for a solicitor. Kevin refused his request, saying that he did not want others who might be involved in the offence to be alerted. Mike denied knowing anything about Lee, but Mike was an alcoholic who had not had a drink that day and was beginning to experience unpleasant withdrawal symptoms. Kevin, who realised this, said to Mike after about an hour of questioning, 'All right. You can think about things for a bit in a cell. We'll see if you are more cooperative a few hours from now.' Mike could not bear the thought of going without alcohol for much longer and said, 'I'll tell you if you'll give me bail. It was Nigel who killed Lee. I only got rid of the body because he threatened to harm my wife if I refused. I took the body to a disused quarry and hid it there.'

Lee's body was later found in the quarry. Kevin then arrested Nigel and took him to the police station for questioning. Nigel, on legal advice, refused to answer any questions, but a week later his solicitor sent Kevin a statement setting out Nigel's defence, which was to the effect that at the time when Lee was killed Nigel had been abroad with his partner, Olive. Olive has been investigated by the police, who have discovered that she worked for a time as a prostitute and has a conviction for fraud.

Discuss the evidential matters arising.

The main topics covered by this question are as follows.

- Hearsay. See **guide** and **supplement** ch.6, especially 6.2; **developments** ch.6.
- Relevance. See **guide** section 2.1; **developments** ch.2; **pack** ch.5, especially pp.137–147; ch.6, especially pp.98–108.
- 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.
- Character evidence. See **guide** and **supplement** ch.10; **developments** ch.10, especially section 10.2.2.

A brief reference might be made to the inadmissibility of the anonymous letter. The first main point to deal with, however, would be the discovery of the memo in Mike's diary. Candidates generally did not deal well with this. Was it relevant? (Candidates who tried to avoid the problem altogether by saying simply that it would be admissible if relevant earned few, if any, marks.) The prosecution would have argued that it was relevant because it showed that Mike was considering methods of disposing of a corpse. The fact that Mike had an innocent explanation for the entry would not have made it irrelevant (evidence does not have to be conclusive to be relevant); nor would the fact that the body was ultimately disposed of in a different way. The entry still tends to show that at a particular time he was interested in means of disposal, though no doubt, the prosecution would argue, he went on thinking about the problem and reached what he thought was a better solution later. Given the basis for the relevance of this item of evidence (the defendant's interest in a particular subject) a hearsay problem would not arise (see *R v McIntosh* [1992] Crim LR 651).

Next it would be necessary to consider Mike's interview at the police station. Many candidates made much of the fact that there was no positive statement to the effect that Mike was cautioned, and assumed that this had not happened. It was preferable to concentrate rather on what you were told: namely, that he had been refused a solicitor. Very often you will find some sort of excuse given in a question for this failure; you should always consider the excuse in the light of s.58 of PACE and Code C, Annex B, para 3 and Note B3. Many candidates appeared to know nothing of these provisions, particularly those contained in Annex B.

The admissibility of Kevin's confession is obviously a major topic. In order to use the provisions of s.76 PACE you need to take into account the failure to provide a solicitor, Kevin's knowledge of Mike's condition, and the fact that the reference to bail came from the defendant, not the police officer, without, apparently, giving the latter any opportunity to respond. The discovery of the body involved a simple point under s.76(4) of PACE. Some reference could be made to the evidential status of the reference to Nigel in the light of *R v Y* [2008] 1 WLR 1683, but if you had dealt with this case in the answer

to another question no more than a quick reference would be needed at this stage.

Nigel's refusal to answer police questions should be fully considered. 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 consider the police evidence about Olive's past in the light of s.100 CJA 2003.