Examiner’s report 2010

265 0010 Criminal law Zone A

Introduction

The following introductory points apply equally to the Zone A and Zone B papers.

There were some very good papers this year and many competent ones. Unfortunately, there were many papers which demonstrated that candidates had not done sufficient work and/or had not properly prepared for the exam and/or did not really understand what was required of them. Criminal law is not an easy discipline. However, as those candidates who wrote good papers demonstrate, if you follow the subject guide and its activities, listen to the audio presentations and do the requisite reading around the subject you should be able to pass this subject and, of course, your mark will reflect the amount of work you have done over the year.

Studying Criminal law

Many of you reading this report will be studying criminal law for the first time this year and I would advise all of you to read the following very carefully.

First of all, ensure that you are familiar with the syllabus. You will find this on the Criminal law page of the virtual learning environment (VLE)

The Criminal law subject guide and study pack is based on the syllabus and is the guide for the course on which you will be examined. It is vitally important that you work your way through the subject guide, ensuring that you do the recommended reading and attempt all of the activities. Before you begin a topic, listen to the appropriate audio presentation (which you will find on the VLE). You will also find these presentations useful to return to later for consolidation and revision purposes. Make sure you understand the topic(s) covered in a chapter before you go on to the next one. There is a reflection and review section at the end of each chapter. Go through it and be honest with yourself when deciding on your responses. Revise any areas with which you are still experiencing problems.

Don't forget to read the Criminal law newsletters which are published monthly on the VLE and the Recent developments which are published in the spring of each year on the VLE.

Ensure that you do the computer marked assessments which are available through the VLE. Although the tests are in a different format to the examination, they are an excellent way for you to test your knowledge and understanding of a subject and your ability to apply your knowledge.
Finally, you should complete the online research exercises as early in the course as possible. They will take you around, and familiarise you with, some of the many databases provided for you on the Online Library. These exercises are, again, accessed through the VLE. Note that these exercises are a compulsory component of the Common Law Reasoning and Institutions course, but to help you with your studies generally you should complete them as soon as possible for you.

General remarks

All of the questions were answered at least competently by some candidates but, understandably there were some errors and omissions. Many of these were fairly common and I have outlined below, with advice on how to deal with them, some of the more pervasive ones.

Common errors and omissions

- It is crucial that you ensure you are up to date. It was obvious from the answers to some questions that quite a number of candidates had not read the Recent developments – or had not given sufficient thought to what they had read.

- It is also crucial that you are aware of what subjects are on the syllabus. For example, when answering question 1, many candidates considered the offences contrary to sections 3 and 4 of the Sexual Offences Act 2003. These offences are not on the Criminal law syllabus.

- When using a case as an authority for a legal principle in your answer to a problem question it is only very rarely appropriate to refer to the facts of that case. Rather, you should state the principle upon which you are basing your analysis of the issue, the name of the authority (case), the court in which the decision was made and, if possible, the year of the decision. Where, however, you wish to distinguish a case, it might be appropriate to explain the basis of the distinction by reference to the facts.

- It is not necessary to repeat verbatim the facts of the question. Of course you must make it clear to the Examiners which part of the question you are answering but it is not necessary to write out the whole paragraph you are about to discuss. If you do you will find yourself repeating what you have written before as you analyse this offence. It goes without saying that you should never re-write the whole question!

- All of the offences on the syllabus carry a maximum penalty – except for murder which has a mandatory penalty of life imprisonment. Although it is appropriate to mention briefly an offence’s maximum penalty the first time you refer to it –if only because it demonstrates that you are aware of the seriousness or otherwise of the offence you are dealing with, or that you are aware of the importance of a defendant succeeding with one of the special defences to murder – further repetition is not necessary.
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It should be emphasised that where there is unnecessary repetition (see points made above) the problem is not that you will necessarily lose marks – you will just not gain any. The time which you have used up in making these unnecessary repetitions could have been far better spent in a more careful formulation of your answers and in considering what you might have missed out – thus gaining you extra marks.

When writing an essay, it is important that you come to a conclusion. You should explain why you have come to your conclusion and, in order to do so, you must refer to the arguments both for and against which you have already made in relation to the proposition in the question. See the advice in the Criminal law subject guide.

Specific comments on questions

Question 1

Jake, an artist, is a member of a cult which has persuaded him that women always want sex and that when they say ‘no’ they really mean ‘yes’. The cult’s mission is to encourage its members to ‘give sexual pleasure to women’. Jake decides that to be faithful to the cult’s mission he should have sex with Anna, his long-standing friend. Anna has always made it clear that they will never be more than good friends, but Jake now believes that she does not mean this. He goes to her bedroom where she is asleep. He climbs into bed and has sexual intercourse with her. She only vaguely recalls this incident the next morning.

The following week Jake meets Fiona in a bar. While they are chatting she tells him that she suffers from migraine headaches. Jake tells her that he is a faith healer with mystical powers and can cure such headaches through the medium of sexual contact. Fiona is doubtful but thinks it is worth a try and they go to her house where they have sexual intercourse.

Jake is then invited to the cult leader’s house for dinner, where he meets Debbie, the leader’s 16 year old daughter. Jake and Debbie go out into the garden for a walk and, when out of view of the house, Jake asks Debbie to perform oral sex on him. Debbie does not want to, but has been taught by her father never to deny a man of sexual pleasure and so she agrees to Jake’s request.

Assess the criminal liability, if any, of Jake.

This question is very similar to the sample examination question that appears – with feedback – in Chapter 11 of the subject guide. Candidates who worked through the subject guide should, therefore, have been able to answer it easily. Feedback to the first two events in this question is given in the subject guide.

For some reason, when looking at the scenario involving Fiona, a considerable number of candidates discussed the offence of fraud contrary to section 1 of the Fraud Act 2006. Fraud is an entirely different offence which had absolutely no bearing on this question as Jake did not intend to make a gain for himself or cause loss to another in a monetary sense. If having sex involves a ‘gain’ for one of the parties, it is not a pecuniary gain so the Fraud Act cannot apply.

When dealing with the third event, you should have considered the possibility of rape or assault by penetration of Debbie. Sections 75 and
76 of the Sexual Offences Act 2003 would not apply, but you should have considered section 74 and the extent to which Debbie had the freedom to choose whether to consent or not. Note that Debbie is 16. It is not, in itself, unlawful to have sexual intercourse with a person over the age of 16 – given her age it is doubtful as to whether issues of capacity arose here. You should not, as many candidates did, consider the offences contrary to sections 3 and 4 of the Sexual Offences Act 2003 as they are no longer on the syllabus.

Question 2

‘Despite proposed changes to the law on homicide manslaughter by unlawful act remains an unacceptably wide offence.’

Discuss.

Not many candidates attempted this question and of those who did, a number missed the point of the question and spent a lot of time discussing murder – with some even considering provocation and diminished responsibility! The question required that candidates critically consider the constructive nature of unlawful act manslaughter, using the cases to illustrate whether liability is unacceptably wide. However, the question also requires knowledge of, and some discussion of, the Law Commission proposals on re-grading forms of homicide. You will find these proposals at http://www.lawcom.gov.uk/docs/lc304.pdf

Question 3

Jonas and Katie, who had been going out together for three years, were engaged to be married last year. One evening Katie told Jonas that she was having an affair with his best friend and that her relationship with Jonas was finished. Jonas was immensely shocked by this news and felt desolate. Feeling dazed and confused, he decided to go to Katie’s house to see if he could find something he could keep as a memento of her.

To gain entry into her house, Jonas used a spare key, which she had previously told him she kept under a stone by the front door. Jonas made his way to her bedroom. On her dressing table he saw the engagement ring that he had given her and he took it. He thought to himself that she had no right to keep it now that she had broken off the engagement. He then sprayed her teddy bear with her favourite perfume and stuffed it inside his jacket. He was about to leave her bedroom when he saw a photograph of Katie and her new boyfriend on her bedside table. Incensed, he grabbed her pyjamas from her bed and ripped them apart. As he was doing so, the teddy bear fell out of his jacket. He left it on the floor and ran out of the house.

Jonas was arrested later that night but told the police that he barely remembered anything he had done after his conversation with Katie because he was in shock.

Assess the criminal liability, if any, of Jonas.

This question, first of all, required consideration of a number of offences against property. First of all, when Jonas used the spare key to gain entry to her house in order to find a memento to take this raised the question of a possible burglary contrary to section 9(1)(a) of the Theft Act 1968. Now find the definition of this offence. What particular issues might need to be considered here? For example, did
he enter the building as a trespasser? Did he intend to steal? Is a conditional intent sufficient?

Once inside the house he took the ring? Was this theft? Go to the definition of theft in section 1 of the Theft Act 1968. What would the prosecution need to prove? Was there an appropriation of property belonging to another? Did he intend to permanently deprive Katie of the ring? What do the facts of the question indicate? What about the issue of dishonesty? Did he believe he had a legal right to take the ring? See section 2(1)(a) of the Theft Act 1968. If Jonas is guilty of theft in respect of the ring, what other offence might he also be guilty of? See section 9(1)(b) of the Theft Act 1968.

You would also consider the offence of theft in relation to the perfume and the teddy bear. Many candidates took the view that, because he did not leave the house with them he could not be guilty of theft but only of attempted theft. This was the wrong approach. Provided the appropriation was complete, at the time of the appropriation he was dishonest (the Ghosh test should have been considered here) and he intended to deprive Katie of these items permanently, then the substantive offence of theft would have been committed. If it was, as above, see also section 9(1)(b) of the Theft Act for the additional offence.

So far as the pyjamas were concerned, you should consider the offence of criminal damage contrary to section 1(1) of the Criminal Damage Act 1971. See Chapter 18 of the subject guide.

Jonas might plead the defence of automatism (see 3.2 of the subject guide). Some points to consider are whether – if he was suffering from automatism – it arose as a reaction to an external event or was the product of his internal emotional condition and how this might affect the burden of proof and his ultimate disposal.

Question 4

Ivan and Katarina had been married for several years. Katarina had suffered many years of violence and abuse from Ivan and as a consequence suffered from severe depression. She had also been diagnosed in her teenage years as suffering from a personality disorder, her characteristic which results in obsessive jealousy. One evening whilst on his way out of the house, Ivan insulted Katarina, calling her hideous and revealing that he was having an affair with her sister. This left Katarina feeling very depressed and she proceeded to drink half a bottle of whisky. A few hours later Ivan returned and, with a sneer, told her that he had had a wonderful evening. Katarina picked up the bottle of whisky and, intending to cause him serious harm, hit Ivan on the head with it. He died from the injuries sustained.

Discuss Katarina’s liability for Ivan’s death.

This was a reasonably straightforward and very standard problem concerning murder and the old defences of provocation and diminished responsibility.

Some candidates may have recognised it from the sample examination question in Chapter 8 of the 2007 edition of the subject guide. Since then, the law has changed and the 2010 edition of the subject guide takes account of these changes.
In 8.1 of the 2010 subject guide, you will see that the partial defence of provocation was abolished by section 56 of the Coroners and Justice Act 2009 and replaced by the defence of loss of control – see sections 55 and 56. The partial defence of diminished responsibility was retained by the 2009 Act but modified by section 52. These provisions come into effect in October 2010 – just in time for your 2010/11 Criminal law course!

A general point which relates to this question is that the offence of murder should be discussed before the consideration of any defence(s). Note that the question states that Katarina intended to cause Ivan ‘serious harm’. As an intention to cause grievous bodily harm (serious harm) is sufficient _mens rea_ for murder there was no need to spend time (as many candidates did) discussing oblique intent. Always read the question very carefully.

You would need to consider, by reference to the provisions in the statute, whether Katarina suffered a loss of self-control (s.54(1)(a)) as the result of a qualifying trigger (s.54 (1)(b)) and which caused her to have a justifiable sense of being seriously wronged (s.54 1(c)). See 8.1 of the subject guide. Note that Katarina would bear an evidential burden in respect of this defence (s.54(6))

So far as the alternative defence of diminished responsibility is concerned, the burden of proof on balance of probabilities remains on the defendant where s/he raises the defence. This defence is defined in section 2(1) of the Homicide Act 1957 as substituted by section 52 of the Coroners and Justice Act 2009. For the ingredients of the defence which you would need to consider in relation to Katarina see 8.2.1 of the subject guide.

The question states that Katarina had been drinking quite heavily. You would need to consider the impact of intoxication on this defence. See 8.2.2 of the subject guide.

**Question 5**

Pedro lost all his savings deposited with Dodgy bank after it ceased trading. He joined a campaign group called Action Against Avarice (AAA) whose mission was to make bank managers accountable for the global financial crisis ‘by any means’. Greg, recently released from prison for armed bank robbery, was the leader of AAA. Greg approached Pedro and told him that in order to be accepted as a member of the group he must attack Fred, the manager of Floyds Bank, outside the local branch and take photographs of his injuries. AAA would release these to the press to raise awareness of their cause, without identifying Pedro. If he completed this task, he would be paid £2000. Pedro, anxious to recoup some of his savings, but also fearful of Greg’s reputation for violence, agreed.

A few days later Pedro loitered outside the local branch of Floyds until he saw a man in a pinstriped suit leaving the bank. Pedro assumed this was Fred, but in fact it was Humphrey, the manager of Barking Bank, who had just been to Floyds for a meeting with Fred. Pedro threw an egg at Humphrey, hoping to then wrestle him to the ground. When the egg shattered on Humphrey’s face, a piece of shell entered his eye, scratching his eyeball. Unable to see properly, Humphrey tripped over a loose paving stone, falling into the road where he was hit by an oncoming car. Humphrey suffered a broken pelvis but eventually made a full recovery.
When the incident was reported in the press, Greg realised that Pedro had attacked the wrong man and was furious. He went straight to Pedro’s house to confront him. He slapped Pedro’s face, unaware that Pedro had a loose tooth. The tooth was dislodged, got stuck in Pedro’s windpipe and had to be surgically removed.

Discuss the liability, if any, of the parties involved.

NOTE – you are not required to discuss any inchoate offences arising in this question.

First of all, if you look at the sentence above beginning ‘NOTE’ you will see that you were not required to consider inchoate offences. A number of candidates ignored this note to their detriment. The old offence of incitement and the offence of conspiracy were removed from the syllabus. The offence of incitement was replaced in October 2008 by new offences of encouraging or assisting crime but these offences do not form part of the syllabus. The only inchoate offence which remains on the syllabus is that of attempting to commit an offence, which is not relevant to this question. As you will see from the note, you were only supposed to consider possible substantive offences which might have been committed by the parties.

The facts of the question require consideration of a number of non-fatal offences against the person and the defence of duress. Important points to note here in relation to dealing with problem questions are:

- deal with each incident/defendant separately and do not conflate them
- where there are two or more possible offences to consider in relation to the same defendant, finish the first before you go on to the second and so on
- where there is the possibility of a defence, deal with any relevant offence(s) before you go on to deal with the defence.

Unfortunately, a number of candidates did not follow this advice – which is given in the subject guide, on the audio presentations and in examination guidance on the VLE.

In relation to Pedro and Humphrey there were two injuries which you needed to consider and, in each case, you would need to consider both the extent of the harm and the mental element of the defendant in order to determine which offence(s) to consider. The first injury was the scratched eyeball. This does not appear to be a serious injury so you should have considered the offence contrary to section 47 of the Offences Against the Person Act 1861 which incorporates the offences of both assault and battery. See 10.1 of the subject guide where this offence is discussed. Note that there is a transferred malice point in relation to this incident.

The second injury was the broken pelvis – a far more serious injury and likely to amount to grievous bodily harm. How is this determined and who decides? What offence would you consider here? The question indicates that he did not intend to cause serious harm. Was he reckless and how would this be determined? See 10.2 of the subject guide and have a look at the discussion of the offence contrary to section 20 of the Offences Against the Person Act 1861. How would you apply this to the facts of the question? What cases are relevant? Is there an
unbroken chain of causation between the throwing of the egg and the broken pelvis?

Pedro would be likely to raise the defence of duress. See 13.1.1 of the subject guide where this defence is discussed. Would Pedro’s mixed motives for acceding to Greg’s wishes have an impact on his success with the defence. See Valderama Vega (1985). Pedro believes that there is a threat but is his belief reasonable? If so, has he put himself in a position where he is likely to be subjected to threats?

So far as Greg’s attack on Pedro is concerned you would need to assess the degree of harm in order to determine which offence(s) to consider. Is a loose tooth analogous to a thin skull?

Question 6

‘Case law on consent to offences against the person, even after the decision in Brown, is unjustifiably inconsistent. The irreconcilability of Emmett and Aitken demonstrates this amply.’

Discuss.

Very few candidates attempted this question, which called for a general discussion of the post-Brown (1993) HL case law on the defence of consent. A good answer would have dealt with the inconsistencies in this area, particularly on how the courts have assessed which activities are ‘lawful’ for these purposes. A good answer would also have considered in some detail the approach of the majority and minority in the House of Lords in Brown (1993) to assessing which activities should be lawful or not. Surprisingly many candidates ignored, in the course of their discussion, the two cases referred to in the question. Both of these involved D setting fire to V but with different outcomes because the activities in question were sado-masochism and horseplay respectively. See 9.4 of the subject guide where this topic is considered.

Question 7

Jemima asks Billy for a quotation to build a conservatory at her house, having seen his advertisement in the local paper stating, ‘Billy the Builder – a name you can trust. Experience, reasonable prices and quality workmanship guaranteed.’ Billy has just set up his own business after leaving college with a diploma in gardening. He tells her the materials will cost £15,000 and the Guild of Master Conservatory Builders requires him to charge her £5,000 for labour charges. In fact there is no such Guild.

Jemima agrees to hire him to build her conservatory. Billy goes to the local DIY store to buy the materials which cost him £5,000. Knowing he has insufficient credit on his credit card, he uses his father’s credit card for which he knows the PIN number. Before entering the store, he is approached and asked if he would like his van cleaned for which he must pay £5 when he leaves the store. He agrees. When he leaves the store, he sees that his van had been washed but he drives off without paying.

When he returns to Jemima’s house to start work, she is just leaving. She tells him that she has left some money on the kitchen table to pay the milkman. When the milkman calls later that morning, Billy tells him Jemima did not leave any money for him. Billy then uses the money to put a bet on a horse in the 3.30 race at Upsom.
Three weeks after completing the building job, the conservatory falls down and Jemima has to have it rebuilt.

Discuss the liability, if any, of Billy.

Although this is a single problem question, it is easier to produce a good, concise and precise answer by breaking it down into a number of smaller parts (or questions) and dealing with each part/question fully before going on to the next one. The completed answer will read as though it is the answer to a single problem question but there is less chance that you will conflate and confuse issues.

The question requires consideration of a number of offences contrary to the Fraud Act 2006, one possible offence contrary to section 1 of the Theft Act 1968 and one contrary to section 3 of the Theft Act 1978

Firstly, in quoting for the job has Billy committed fraud by false representation? What is it that needs to be established here? Has he also committed the offence of fraud by failure to disclose?

Secondly is his use of his father’s credit card fraud by misrepresentation using an electronic device? How would the prosecution establish this?

Next, could driving off without paying for the van to be cleaned attract liability under s.11 of the Fraud Act and/or under section 3 of the Theft Act 1968?

Finally, might using the money - left to pay the milkman – to place a bet be fraud by misrepresentation and/or fraud by abuse of position and/or theft?

Theft and fraud are discussed in Chapter 16 of the subject guide.

Question 8

(a) A bomb has exploded on the 8th floor of an office block. Workers in a meeting on the 8th floor realise that the only way they can escape the fire is to take the lift down to the ground floor. The lift will only take four persons of average weight. Graham, Virginia, Hetty and Kieran run to the lift and enter it. However, Nancy, who is petrified of enclosed spaces, refuses to get into the lift. Graham decides to close the lift doors anyway and proceed to the ground floor. The lift doors will not close, realising this is because Kieran is very overweight. Graham pushes Kieran out of the lift and closes the doors. Graham, Virginia and Hetty escape from the building on the ground floor, but Nancy and Kieran die from smoke inhalation.

Discuss the criminal liability, if any, of the parties involved.

(b) Archie, Frank and Kiranjit agree to beat up their arch rival Victor and seriously injure him. They approach Victor and start punching and kicking him. Frank suddenly pulls a cricket bat out of his rucksack and hits Victor very hard on the head. Archie believes Frank has gone too far and attempts to pick Victor up to take him to hospital. However, Victor is too heavy and Archie drops him. Victor is killed. Medical evidence at trial states that Victor died from a brain haemorrhage caused by being dropped on the ground.

Discuss the criminal liability, if any, of the parties involved.

NOTE – you are not required to discuss any inchoate offences arising in this question.
(a) Any possible liability on the part of any of the parties in respect of the deaths of Nancy and Kieran should have been considered separately even though there was some overlap in respect of liability. Unfortunately, some candidates considered them together which resulted in very confused (and confusing!) answers. So far as Nancy was concerned – she was a colleague. Was a duty owed to her? You should have considered Graham’s possible liability for murder. Although, arguably, his motive or purpose was not to cause her death if he foresaw it as a virtual certainty of his conduct (see Woollin (1998) HL) then he could be guilty of murder. Could any of the parties be guilty of gross negligence manslaughter? The question required candidates to discuss the defence of necessity, applying the guidelines in Re A (Children) (2000). Was Nancy self-designated for death and was saving the others the lesser of two evils? Could Graham be liable for the murder of Kieran? See above. So far as any defence is concerned, it would appear that Kieran was not self-designated for death and duress of circumstances is not a defence to murder.

(b) Again, please ensure that you read the question carefully – including instructions as to what you should not do. You were instructed, in respect of this question not to consider any inchoate offences which arose. Despite this, some candidates did so. No marks are awarded for irrelevant material in a script so it is a waste of your time to do this. This was a question about a joint unlawful enterprise. This area of law is considered in Chapter 15 of the subject guide. Please ensure that you complete all of the activities. Whose liability should be considered first? Did any of the parties go beyond the pre-arranged plan? Did the death of Alex arise from a continuing transaction? See le Brun (1991) Does the situation in this question differ at all from that in le Brun?