Examiners’ report 2011

265 0010 Criminal law – Zone B

Introduction

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

Studying Criminal law

Many of you reading this report will be studying Criminal law for the first time this year and I would advise 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 that knowledge.

General remarks

As in previous years, the questions were selected from a range of topics so as to provide candidates with the opportunity to demonstrate their understanding and knowledge of this subject.

The questions were very straightforward this year and this should have immediately made it clear what topics needed to be discussed when answering a particular question. Overall, however, the standard of candidates’ performance in 2011 was about the same as that of 2010 and the Examiners were concerned that there were
a number of candidates who made elementary mistakes or who failed to support their arguments and discussion by reference to relevant case law and statutory provisions. In addition, basic examination technique remains a problem for many and we would urge you to ensure that you read the questions carefully and manage your time properly in order to ensure that you attempt all four questions.

Common errors and omissions
All of the questions were answered well by some candidates but, as stated above, there were a number of common errors which appear in answers year after year. Please read these points carefully to ensure that you do not make them.

- It is crucial that you ensure you are up to date.
- 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. You should state the principle upon which you are basing your analysis, the name of the authority (case), the court in which the decision was made and, if possible, the year of the decision. Where, however, there is more than one case on the point at issue and an issue could fall into multiple categories, that is, your answer might differ depending upon which authority you choose, you might wish to distinguish one of the authorities on the facts. Here you can state why. In addition, if you forget the name of a case you wish to use as an authority it is permissible to state, as briefly as you can, the identifying facts of the case.
- It is not necessary to repeat verbatim the facts of the question. Of course you must make it clear to the Examiners which part you are answering but it is enough to say, for example, ‘when Sarah removed the book from the shelf... ’ (Question 1) and then go on to consider the possible offence(s) committed. You do not need to write out the whole paragraph.
- You do not need to write an introduction to a problem question – and certainly not a long-winded one. Just deal with the issues one by one beginning each time with something along the lines of: ‘In relation to... [here refer to issue outlined in the question] X is likely to be charged with... ’ or ‘When X... [here refer to the issue outlined in the question] he may have committed the offence of (...)’ and then go on to consider the possible offence(s) X may have committed, considering the elements of these offences in relation to the facts of the question. You should then consider whether the facts of the question give rise to the possibility of a defence or defences and, if they do, discuss that or those defence(s). When you have done this, you should then discuss the next issue raised in the question, beginning your discussion in the manner outlined above.

If you really do feel that you need to write a short introduction in order to get your thought processes working then keep it brief. Below is an example written by a candidate in the May 2011 examination at the beginning of his or her answer to a question on sexual offences in the Zone A paper which is now available to you all with the report. Although there was no real need for this it is brief and concise and would not have taken up too much examination time:

‘In order to establish criminal liability it is essential to consider......rape, assault by penetration, common assault, assault occasioning actual bodily harm contrary to s 47 Offences Against the Person Act [it would have been better if the candidate had added the date of the statute] and
battery. Then, it is to be established whether the relevant defences had a defence to the defendant.’

This last sentence is not well expressed although its meaning is fairly clear. How would you express what the candidate was trying to say?

• **The first time you refer to an offence, briefly mention its maximum penalty** – if only because this demonstrates that you are aware of the seriousness or otherwise of the offence you are dealing with. All of the offences on the syllabus carry a maximum penalty – except for murder which has a mandatory penalty of life imprisonment.

• **Avoid unnecessary repetition.** The problem with this is not that you will necessarily lose marks (although you will not be awarded them either) but that 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.

### Specific comments on questions

The comments below indicate the issues that a satisfactory answer to each question might consider, and also highlight some common problems. We will illustrate some of these problems with quotations from actual exam answers.

**Question 1**

Sarah visited her local lending library, hoping that she would get the chance to steal some books. While browsing there, she saw a book she had wanted for a long time and decided to steal it. She removed it from the shelf but, when she saw the librarian watching her, she changed her mind and put it back. She left the library.

On her way home she decided to do some shopping and went into a supermarket. When she got to the checkout with her purchases, she discovered that she had no money in her purse and so she used her credit card to pay for the goods, despite the fact that she had received a letter from the bank that morning telling her not to use the card as she had exceeded her credit limit.

She then, unsuccessfully, used a foreign coin to try to obtain some chocolate from a vending machine.

Feeling in need of a rest, she stopped at a café and ordered coffee and cake. She ate it, then waited until nobody was looking and ran out of the cafe without having paid.

Discuss Sarah’s criminal liability, if any.

**General remarks**

This is a fairly straightforward question which centres around theft and related offences.
Was Sarah’s conditional intention to steal if she got the chance when she entered the library sufficient to make her guilty of burglary contrary to s.9(1)(a) of the Theft Act 1968? Many candidates missed this point – remember she had gone beyond the condition of the permission she had to enter the building. Does that make her a trespasser? What is the authority?

When Sarah returned the book to the shelf in the library having seen the librarian watching her, provided it could be proved that she had, by taking it from the shelf with the present intention to steal, dishonestly (see Ghosh [1982]) appropriated property belonging to another (Gomez [1993] HL) with the intention of permanently depriving the other of it contrary to s.1 of the Theft Act 1968, she was guilty of theft.

Replacing the book would not change this. It would not be correct to say that she would not be guilty of theft. Yet many candidates did just that, and then went onto discuss attempted theft.

Another point many missed was that, if she had entered the library as a trespasser (see the first point above) then at the time she stole the book she might have become liable for burglary contrary to s.9(1)(b).

Fraud should also have been considered in relation to the supermarket (a representation can be implied or expressed) – remember there is no need for fraud to operate on any other’s mind. It should be pointed out that a fraudulent representation is an assertion which is untrue or misleading and which the person making it knows is or might be untrue or misleading (s.2(2)). It may be implied by conduct; there is no need to prove that anyone was actually deceived by the representation. Theft should also be considered here.

So far as the vending machine is concerned, under the old (and now repealed) law relating to offences of deception, it was not legally possible to deceive a machine as the deception had to be ‘operative’, that is it had to ‘operate’ on the mind of the victim, causing the victim to part with the property. It could be pointed out this is not the case under the Fraud Act 2006. Although it would need to be proved that Sarah intended to make a gain for herself or cause loss to another, this is the mens rea element of the offence. So far as the actus reus is concerned, it is not necessary that a defendant actually causes any loss to anyone or makes any gain for themselves.

In relation to the café, most who dealt with this point, wrote something like this:

‘For this fact, Sarah may be liable of making off without payment under Theft Act 1978. Here, it says a person who knowing that payment on the spot for any goods supplied or service done is required or expected from him, dishonestly makes off without having paid and avoid payment of the amount due shall be guilty of this offence’.

What is wrong with the above statement (apart from grammar mistakes, which are forgivable in an exam answer if it is clear what the candidate is trying to say)? First of all, even though you are allowed to take in and use your statute book, this candidate, like many others, did not tell us which section of the Act they were referring to. All they (and many others) did was to copy out the definition of the offence. There was no discussion of the elements of this offence in relation to the facts of the question.

Secondly, note that the question is deliberately ambiguous as to whether Sarah intended not to pay when she ordered her coffee and cake – although we knew from the previous paragraph that she had no money in her purse. Therefore, in addition to making off without payment contrary to s.3 of the Theft Act 1978, both
theft and fraud contrary to s.1 of the 1968 Act and s.1 of the Fraud Act 2006 should have been considered. Very few candidates did that.

Question 2

How would you distinguish between the defences of diminished responsibility and insanity?

General remarks
Candidates often confuse these two defences, as evidenced in the following typical error taken from an exam answer:

‘For diminished responsibility it is ascertained that there is a disease of the mind...’

What is wrong with this statement (apart from the phrase ‘it is ascertained that there is...’ which makes no sense in this context)? Does the defendant need to be suffering from a ‘disease of the mind’ in order to successfully plead the defence of diminished responsibility? Of course not – that term relates to the defence of insanity. You must be very careful with your terminology. Now read the points to note below which will aid you in answering a question like this.

You should, first of all, demonstrate that you are familiar with the elements which form the basis of these two defences. You should point out that those in respect of the defence of diminished responsibility are set out in s.2 of the Homicide Act 1957 as substituted by s.52 of the Coroners and Justice Act 2009, (that is, the defendant must be suffering from an abnormality of mental functioning which arose from a recognised medical condition which substantially impaired their ability to understand the nature of their own conduct and/or to form a rational judgment and/or to exercise self-control and which also provides an explanation for the defendant’s acts and omissions in doing or being a party to the killing of another).

The defence of diminished responsibility must be distinguished from that of insanity. The elements of the common law defence of insanity are set out in the M’Naghten Rules. What is the distinction between ‘an abnormality of mental functioning’ and a ‘disease of the mind’? Candidates should point out that insanity is a defence to all crimes, i.e. it is a ‘general defence’, a successful plea of which results in the special verdict of ‘not guilty by reason of ‘insanity’. By contrast, diminished responsibility is a statutory defence and is only available where the defendant has been charged with murder, i.e. it is a ‘special defence’, a successful plea of which will reduce the offence from murder to (voluntary) manslaughter.

Both defences are exceptions to the rule that the burden of proof lies with the prosecution in that, if a defendant pleads diminished responsibility to a charge of murder or insanity to any charge, the burden of proof will be on the defendant. The standard of proof is the civil standard, that is ‘balance of probabilities’, and in respect of diminished responsibility, this has not been changed by the 2009 Act.

Question 3

Sandra had just received her A level results and went to the pub with her boyfriend James to celebrate. James, who had drunk a lot of beer, was very jealous of Sandra’s success and when they got back to Sandra’s house began to insult her and then pushed her into the kitchen. Sandra hit him, he hit her back, spat at her and bit her thumb. He then grabbed hold of her and, as she was frightened by this, she grabbed a knife from an open drawer and, to try and make him stop, held it to his chest. As he was drunk, he fell against the knife which pierced an artery and he died within minutes.

Sandra has been charged with manslaughter. Advise her.
General remarks
This should have been a very easy question to answer as the facts of the question are based on the facts of McGrath – considered by the Court of Appeal in Keane and McGrath (2010) on which there is a newsletter on the VLE (which contained a very big exam hint!) Please always read the materials we provide.

A typical opening sentence in a significant number of answers to this problem question was:

‘First of all the offence of murder in relation to Sandra should be considered’

What is wrong with this statement? Look at the question again. You are told at the end that: ‘Sandra has been charged with manslaughter. Advise her.’ Candidates had about 40 minutes to answer this question and there was plenty to be said about the offence of manslaughter and the defence of self-defence. Do not discuss murder. The question tells you what you need to consider. Always read the question and do as it says. Instructions are there for a reason!

Another common error in relation to this question is exemplified in the following statement from an examination paper:

‘When they return to Sandra’s house James starts insulting her and pushes her into the kitchen. Hence, James could be liable for an offence under section 39...’

What is wrong with this statement? Candidates were asked to consider Sandra’s possible liability for manslaughter, not James’s liability, so it was a waste of time to do so yet many candidates spent time discussing James and various non-fatal offences against the person which were not relevant. (Interestingly, many did not discuss any relevant non-fatal offences in relation to the unlawful act element of the possible charge of constructive manslaughter vis-à-vis Sarah). Note, in any event, that James is dead! Always read the question and do as it says.

Now, what is wrong with the following statement:

‘For killing James, Sandra would be liable under the Homicide Act 1957.’

Manslaughter is a common law offence (as is murder which this candidate, like many others, mistakenly went on to discuss). This error pops up year after year. Note that the Homicide Act does not define murder or manslaughter. These offences remain common law offences.

Now see the points to note (below) in relation to this question.

You should consider whether all of the elements of constructive manslaughter could be established. Was there an unlawful act? If so, identify the offence and consider whether the elements of that offence are established (Lamb/Jennings). Was it dangerous (according to the test which should be set out – remember it is a question for the jury), and did it cause death? The question makes it clear that causation is established so there is no need to discuss this point. Some candidates considered gross negligence and/or reckless manslaughter. Although, given the facts, constructive manslaughter was the appropriate charge, the various types of manslaughter are not mutually exclusive and so some marks were given for this when it was done well.

You should also consider the defence of self-defence, noting that the requirements for this are now codified in s.76 of the Criminal Justice and Immigration Act 2008, although they remain as they were under the common law.
Question 4

‘Necessity in legal contexts involves the judgment that the evil of obeying the letter of the law is socially greater in the particular circumstances than the evil of breaking it.’ (Glanville Williams)

Discuss and explain the extent to which criminal law provides a general defence of necessity.

General remarks

This is a very easy ‘discuss and explain’ question if you are familiar with the topic.

There are, as with many essays, a number of ways this could be approached provided the salient points are dealt with. You could point out that the ‘necessity’ of choosing between the lesser of two evils has long been recognised as justifying conduct in, for example, the defence of self-defence and also in the Abortion Act 1967.

Historically, courts have been reluctant to recognise a general defence of necessity. Consider appropriate cases, for example, Dudley and Stephens (1884) and Lord Denning's comments in Southwark London Borough v Williams [1971].

Nevertheless, you could point out that, in Adams [1957] Devlin J (as he then was) directed the jury that in the case of a terminally ill and suffering patient, provided a doctor’s primary motivation was pain relief, he would be entitled to take measures necessary to relieve the pain and suffering of a patient even if those measures might incidentally shorten life. Was this an overt recognition of the defence of necessity or a distortion of intention? Devlin J’s direction to the jury was approved by the House of Lords in Bland. See also Gillick v West Norfolk and Wisbech AHA [1985] HL.

You could explain that although the defence of duress has long been recognised, and during the 1980s the courts recognised the related defence of duress of circumstances, there are limits to these defences which excuse rather than justify a choice between the lesser of two evils. Do these limits apply to the defence of necessity?

It could be argued that it is still not clear whether a general defence of necessity which justifies breaking the law is recognised by the courts. Is it, as Glanville Williams argued, in existence but merely difficult to formulate? There are a number of cases in which it seems to have been recognised. For example Lord Goff in F v West Berkshire HA [1990] was of the view that there was a general defence of necessity which applied to the facts of that case and Brooke LJ in Re A (Children) (Conjoined Twins: Medical Treatment) [2000] expressly stated in his judgment that the lawfulness of the operation on the twins derived from the operation of the doctrine of necessity. Marks would have been given for a comparison of Brooke LJ’s opinion about the breadth of the defence with that of Ward and Walker LJJ.

Question 5

Susie was bored with her husband, Pete, and frequently told him so. She often said to him that she wished he would go and live somewhere else. One evening, just after they had eaten, she taunted him continuously about his lack of sexual prowess until he became very angry and came towards her with his fists raised. Susie, who thought he was going to punch her, lost control. She grabbed a knife which had been left on the table and, intending to cause Pete serious harm, stabbed him, killing him instantly. Susie has been charged with murder and wishes to plead the defence of loss of control.

Advise Susie. Do NOT consider the defence of self-defence.
Would your answer differ in the following circumstances:

Susie’s attack was not immediately fatal. Pete was treated, but, while in hospital, the wound became infected and did not respond to medication. Pete died of septicaemia.

General remarks
This is another very straightforward problem question which was covered in the computer-marked assessments.

What is wrong with this statement? (Similar statements to this were made in a number of examination answers):

‘This offence fits under section 3 of the Homicide Act 1957... and from the details of the circumstances we can see that there has been a loss of self control due to provocation by Pete.’

First of all, the word ‘offence’. The candidate is considering a defence and confusing these two words indicates a lack of understanding. Please be careful with what you write. Secondly, s.3 of the Homicide Act 1957 has been repealed. The defence of provocation no longer exists. See the subject guide and your textbook, and note that Smith & Hogan is updated on the OUP website – details of this are on the VLE. This, and many other, candidates have obviously heard of the defence of loss of control (see the Coroners and Justice Act 2009) but have not done the necessary work and conflate the defence of loss of control with that of the (now repealed) defence of provocation.

Here is a statement from an answer which obtained a first-class mark:

‘Susie wishes to plead the partial defence of loss of control which, if successful, will lower the verdict from murder to manslaughter. Note that the burden remains on the prosecution to disprove the defence beyond reasonable doubt.

The candidate then went on to discuss the issues relating to this defence in a clear and concise manner, referring to the relevant provisions in the statute.

Now consider this statement – again, many candidates made this error:

‘As James came towards Susie with his fists raised – Susie could plead the defence of self-defence.’

Read the instructions at the end of the question. They say very clearly: ‘Advise Susie. Do NOT consider the defence of self-defence’.

Now consider the points to note in relation to this question below.

You should, first of all, consider whether Susie could be guilty, of murder dealing with the actus reus (which is straightforward in this part of the question) and then the mens rea. Did she intend to kill or cause gross bodily harm (GBH)? The question tells you that she did so there is no need to refer to Woollin (1998).

So far as her possible defence of loss of self-control is concerned, it could be pointed out that this defence replaces that of provocation by virtue of s.54(1) of the Coroners and Justice Act 2009. You should note that the defendant bears an evidential burden in respect of the defence – s.54(6) and that it is only where, in the opinion of the judge, a jury properly directed could reasonably conclude the defence might apply that it should be left for their consideration. Provided this threshold requirement is met, the probative burden is on the prosecution (s.54(5)) who must prove beyond reasonable doubt that Susie’s fatal act did not result from a loss of self-control (s.54(1)(a)) and/or that the loss of self-control was not a result of a ‘qualifying trigger’ as defined in s.55 and/or that a person of Susie’s sex and age,
with a normal degree of tolerance and self-restraint and in the circumstances of Susie, would not have reacted in the same or in a similar way (s.54(1)(c)).

Although the question makes it quite clear that, by taunting Pete, Susie incited him to threaten violence towards her, it is ambiguous on the issue of whether or not Susie did this for the purpose of providing her with an excuse to use violence. For the purpose of this defence, by virtue of s.54(1)(b) any loss of self-control must be as the result of a ‘qualifying trigger’, and s.55(3) provides that fear of serious violence against D or another may amount to a qualifying trigger.

So far as Susie is concerned, if she did what she did in order to provide her with an excuse to use violence (and the question does say that she wanted rid of him) then she would not succeed with the defence – see s.55(6). If, however, she did not taunt him to provide herself with an excuse to use violence, she genuinely feared serious violence from Pete and, by virtue of s.54(1)(c), a person of her age and sex, with a normal degree of tolerance and self-restraint and in the circumstances of Susie might have reacted in the same or in a similar way to Susie, then she would be likely to succeed with the defence.

The ‘alternative’ part of the question required a consideration of causation i.e. whether Susie’s conduct was the operative and substantial cause of Pete’s death. Note that the issue of causation relates to the actus reus of an offence. If there is no causation (where it is relevant) then there is no actus reus and, therefore, no offence. Consider the different approaches below and think about what marks you would give if you were the Examiner:

1. ‘The above conclusion will remain the same even if Pete died of septicaemia in hospital. The scenario is that of R v Gowans where the defendant was convicted of murder despite the victim dying of septicaemia. The standard for poor medical treatment acting as an actus novus interveniens and breaking the chain of causation is high. In the case of Jordan, the victim’s wound was almost healed before the doctors mistakenly gave the drug to which the patient was allergic and which caused death. This treatment was said to be ‘palpably wrong’ and it broke the chain of causation. In the case of Cheshire... the wound merely provided the setting and unless the treatment was independent from the act and was potent in causing death there would be no break in the chain of causation. See also Smith.

In Pete’s case, his wound remained the operating and substantial case of his death.’

2. ‘There will be no difference of the result of death of Pete. And the responsibility of Susie although Susie attack was not immediate cause Pete died. It is the factual and legal cause of Pete’s death by inflicting the wound on him by Susie’s stab. But for Susie’s stab wounded Pete, Pete would not have his wound be infected with and subsequently died. It is the fact suggested that the wound had never healed and did not respond to medication. According to Cheshire even the wound at V in Cheshire was not life threatening it was still operative and substantial cause of death, same as Pete’s wound.’

3. ‘No, my answer would not differ since there is no break in the chain of causation.’
Question 6

James and his girlfriend, Rosie, were at a party. James, who had been drinking heavily all evening, became angry when he saw Simon flirting with Rosie. He pushed Simon rather roughly. Simon stumbled and fell, hitting his head on a table. He suffered a fractured skull.

Rosie was cross with James as she liked Simon and so she decided to leave the party. As she left, she noticed that it was raining and so she picked up an umbrella she saw lying in the hallway. She liked it and decided, there and then, to take it with her and to keep it for herself. Unknown to her, however, it was her own umbrella which she had left there last time she visited the house.

Later on at the party, Neesha, who was in love with Iqbal, had sexual intercourse with him. Iqbal knew that he was HIV positive but did not tell Neesha. Later that evening, when Neesha approached Iqbal again, he pushed her away.

Neesha subsequently discovered that she was HIV positive.

Discuss any issues of criminal liability that arise.

General remarks

This is a straightforward 'party' question and requires discussion of a number of non-fatal offences contrary to the Offences Against the Person Act 1861.

So far as James’s liability in respect of Simon is concerned, ss.18 and 20 should have been considered as a fractured skull could amount to grievous bodily harm. Whether he is liable under ss.18 or 20 would depend upon his mens rea. The elements of both of these offences should be analysed. Intoxication and its possible impact on the mens rea for the s.18 offence should also have been considered. You should point out that intoxication is not a relevant defence to the basic intent offence of inflicting GBH (s.20).

So far as Rosie and the umbrella were concerned, consider the following statement from an examination answer. What is wrong with it:

‘Rosie picked up the umbrella and wanted to keep it for herself may lead her liable to theft contrary to section 1(1) of the Theft Act 1968’.

First of all, picking something up and wanting to keep it for yourself does not, of itself, amount to theft. Look at s.1. What are the elements of theft? What does the prosecution need to prove in order to gain a conviction?

Who did the umbrella belong to? As it belonged to Rosie, the appropriate offence to have considered would have been attempted theft contrary to s.1 of the Criminal Attempts Act 1981 – note that she was attempting the impossible. It would not be correct to find her guilty of the substantive offence of theft. Very few candidates considered attempt and, of those who did, very few mentioned attempting the impossible.

Neesha agreed to have sexual intercourse with Iqbal so you should not discuss sexual offences; the issue is what she did and did not consent to. Presumably, what she did not consent to was the risk of contracting the virus – Dica [2004] and Konzani [2005]. Section 20 of the Offences Against the Person Act is the most appropriate offence requiring proof of an awareness of risk of some harm on Iqbal’s part – Mowatt [1968] and Savage and Parmenter [1992].

You should consider battery in relation to Iqbal pushing Neesha away and possibly assault if she saw the push coming, i.e. apprehended the force.
Question 7

Zorro borrowed a car from Jinty telling her it was to be used for a ‘job’. Jinty assumed this to mean a burglary whereas Zorro was, in fact, planning to set fire to Fred’s house.

Zorro’s friend, Donna, who used to work for Fred, reluctantly agreed to help Zorro. Zorro had threatened to beat up Donna’s elderly mother if Donna refused to help. Because she was familiar with the house Donna was able to tell Zorro how best to get close to the front door without being spotted and they did a successful practice run together.

A few days before they were going to carry out their plan, Donna changed her mind about helping Zorro. She sent her mother to stay with her brother and told Zorro that she wanted nothing more to do with the plan. She advised Zorro to abandon it.

Zorro, using Jinty’s car, went on her own to buy the materials to start the fire and then on to the house where she set fire to it. The fire caused serious damage to the house. Although the house was empty, the adjacent houses had to be evacuated because of the risk of the fire spreading.

Consider the possible criminal liability of the parties.

General remarks

This question requires you to consider criminal damage offences, accomplice liability and the defence of duress.

You should first of all discuss Zorro’s possible criminal liability as she is the principal and you should analyse the offences of aggravated criminal damage (s.1(1) and (2) Criminal Damage Act 1971) and arson (s.1(3)).

You should then consider the possible accomplice liability of Jinty and Donna. Different issues (including those relating to the actus reus and mens rea requirements) need to be considered in respect of each of them.

So far as Jinty’s liability is concerned, she thought the car was to be used in connection with a burglary. You should examine the impact on her liability as an accomplice that this might have.

As to Donna, you should first consider her possible accomplice liability – and whether or not she withdrew from the enterprise – before considering whether she might succeed with the defence of duress.

Question 8

David, who bears a striking resemblance to a famous footballer, Shane Mooney, meets Jane, a student, at a party. Jane, who has always fancied Shane Mooney, walks up to him and begins to chat. David realises Jane has mistaken him for the footballer but does not inform her of her mistake. They go back to Jane’s hall of residence where she agrees to have sexual intercourse with him.

Afterwards, David goes to the bathroom where he encounters Penny who has just stepped out of the shower. He asks her if she fancies having sex with him. She tells him she thinks he is a menace to women and she would never let him touch her. David is incensed and shouts at her, ‘I'm going to teach you a lesson.’ He then picks up a bar of soap and forcibly penetrates her with it. Penny does not resist as he seems so angry that she fears she might provoke him further.
Advise David as to his possible criminal liability.

General remarks
This question is based on activities at pages 154 and 157 of the subject guide. There is feedback both in relation to the law and to the approach to answering such questions, so please refer to the appropriate activities in the guide.

A fundamental error made by a number of candidates when answering this question is exemplified by the following statement from an examination answer:

‘In relation to Jane, David could be guilty of fraud by false representation contrary to the Fraud Act 2006’

Even if it were to be decided that there was a fraudulent misrepresentation on the part of David here, he would not be guilty of the offence of fraud. Please do not make that mistake. Note that one of the elements of fraud is the intention, on the part of the defendant, to cause loss to another or to make a gain. Loss or gain are defined in terms of money or other property – see s.5 of the Act. So you can see that the type of deception (if there was one) in the question is not one which could result in a charge of fraud.

In relation to Jane you should consider the offence of rape contrary to s.1 of the Sexual Offences Act 2003 (SOA 2003) and, in particular, the issue of consent as she is deceived into thinking that David is Shane Mooney. However, it seems from the facts of the question that Shane Mooney is not known personally to Jane and therefore, notwithstanding the deception, Jane’s consent is valid. However, David knows she is making a mistake and does not enlighten her and this may raise questions in relation to his *mens rea* – does he hold a reasonable belief that she was consenting to the sexual intercourse?

In relation to Penny, David ‘penetrates’ her with a bar of soap. This cannot be rape, as he does not use his penis. As he uses an object, this would have to be an offence under s.2 – assault by penetration. It is not clear whether David has penetrated Penny’s anus or vagina, but provided the bar of soap is inserted in one or the other then the relevant act has taken place. You should consider whether or not the penetration is ‘sexual’ within the meaning set out in s.78 and should apply the two-part objective test. The facts here are similar to the facts of *H* where, in applying the second part of the test, the jury may take into account the wider circumstances in which the offence took place, including David’s earlier sexual proposition towards Penny. The final *actus reus* element is the issue of whether or not Penny has consented to the sexual act. Section 76 does not apply – there is no deception. Section 75 may apply if David’s words are construed as implying a threat of violence. That is certainly the effect that they have on Penny, so s.75(2)(a) could apply to give rise to an evidential presumption against consent. Could David rebut this presumption in any way?