Examiners’ report 2012

LA1010 Criminal law – Zone B

Introduction

As with all undergraduate cohorts, the quality of answers ranged from first class to weak fails. Too many candidates were content to skate over the question in front of them and to give a descriptive account of the relevant area of criminal law, gleaned from textbook or subject guide. This is neither correct legal method nor does it show sufficient scholarship for those desirous of an excellent mark.

By contrast, the best scripts were able to identify the issues, state them clearly, and produce a balanced argument or discussion centred on the key issues. They also showed good scholarship in terms of the Further reading recommended in the subject guide and available in the VLE.

Please note that for student extracts, spelling errors and other linguistic problems have been left as they were on the examination scripts.

Specific comments on questions

Question 1

Betts and Ridley, while in the process of stealing from Veronica's house, are disturbed by her. Betts produces a pocket knife which Ridley had known he was carrying. Ridley shouts at Betts, “What do you think you are doing? Put it away.” He then runs out of the house. Betts fatally stabs Veronica.

Consider the extent of Ridley's complicity.

Would it make any difference if Betts killed Veronica in the course of a frenzied attack, punching and kicking her?

General remarks

The question is directed towards the law of criminal complicity in cases of joint enterprise. It asks you to consider the liability of Ridley for an unauthorised crime (murder) committed by Betts in the course of their joint enterprise, that is burglary. The answer must deal first with the primary liability of Betts for murder and then with the prospect of Ridley being complicit in that murder on the basis of his possible contemplation that Ridley might intentionally kill.

Law cases, reports and other references the Examiners would expect you to use

Your discussion and argument will require consideration of cases such as Powell, Mendez, Carpenter, Beccera and Rook.
Common errors
This question was badly done by most candidates. The overwhelming tendency was for candidates to talk at length about aggravated burglary when this was only peripheral to the question. Think about how the police would view the matter. They would be concentrating on the killing rather than the burglary, which simply forms the context within which the killing takes place.

A good answer to this question would include the following points…
• The joint enterprise is burglary. B and R are principal offenders.
• B is principal offender for a homicide offence, but which one? There is evidence that B had the mens rea for murder, at least R seemed to think he had! However, it was only a pocket knife which is not the kind of instrument one would use if one wanted to cause serious injury.
• If it is murder, is R complicit? This requires proof that R contemplated at the outset of the joint enterprise that B might stab V with the mens rea for murder. There is some evidence here, namely that he knew the weapon was being carried. However, he would argue plausibly that it was only contemplated that it would be used for burglary purposes since:
  o it was a pocket knife
  o his reaction (both words and deeds) were indicative of someone who was unprepared for what transpired.
• Assuming this argument fails is the running away sufficient to withdraw?
• There may be room for some discussion of possible liability for manslaughter, although B is convicted of murder (Carpenter) but since there is little evidence of contemplation of any harm, this seems to scotch this argument.

Poor answers to this question would…
Concentrate on the offences committed by the two parties, without identifying the issue at the heart of the problem which is the scope of liability for joint enterprise.

Question 2
Critically evaluate the law relating to criminal liability for omissions. Should there be a general duty to assist persons in peril?

General remarks
This an essay question. The key elements comprise:

a. critical evaluation. This requires you to discuss what is good and bad about omissions liability;

b. discussion of the arguments for and against replacing or adding to the existing system by having a general duty of intervention.

Law cases, reports and other references the Examiners would expect you to use
Indicative cases – Airedale NHST v Bland, Instan, Pittwood, Miller, Bonnyman, Evans, Stone and Dobinson, commentators on this question such as Ashworth and Glanville Williams, French Criminal Code.
Common errors
Far too many candidates presented a descriptive account of the law in relation to omissions, without any critical evaluation at all. The second part of the question was generally done very briefly without due consideration of the numerous and strong arguments for and against.

A good answer to this question would…
Include the *actus reus* principle and how omissions form a qualification thereto. Evaluation should emphasise the cogency of the act/omission distinction, the scope, determinacy, and cogency of duty situations, and the theoretical arguments for and against omissions liability. On the general duty question, the arguments concerning autonomy and legality should be rehearsed and some understanding of the distinction between a generalised duty to act (for example, the French system); and being accountable for the consequences of omitting to act, would be useful.

Poor answers to this question…
Tended to be descriptive and not tackle the evaluative part of the question or the desirability of a general duty.

Question 3
(a) Critically evaluate the current test for dishonesty in theft.
(b) Jane drives her car into a self service garage, fills up with petrol and then drives off without paying.

What offences, if any, has Jane committed assuming the following facts:

i) she intended all along not to pay;

ii) she decided not to pay, only after she had filled up?

Do not consider Jane’s potential liability for fraud.

General remarks
Both parts of this question are straightforward. Part a. is concerned with s.2 Theft Act 1968 and the *Ghosh* test. Part b. is concerned with the requirement in theft that all elements coincide in point of time and the fall back offence of fraud where they do not.

Law cases, reports and other references the Examiners would expect you to use
Indicative cases include *Feely, Boggeln v Williams, Ghosh*, s.2 Theft Act 1968, *McHugh, Corcoran v Whent, Hammond*. Commentators JC Smith, DW Elliot and Peter Glazebrook.

Common errors
In Part a., to talk descriptively, without reference to a critical analysis. In Part b., to omit analysis of how the timing of the decision not to pay is critical to the offence to be charged.
A good answer to this question – Part a – would…
Examine both s.2 and the Ghosh and other common law tests and consider whether dishonesty should be a legal test, an objective test, a subjective test or, as now, a part legal (s.2) and a midway objective/subjective test (Ghosh). Reference should be made to critical accounts of the role played by the dishonesty element, such as those advanced by JC Smith, DW Elliot and Peter Glazebrook.

A good answer to this question – Part b – would…
Conclude that all the elements of theft coincide, the consent of the owner does not prevent there being an appropriation (Gomez).

In the second case, the elements of theft do not coincide due to the transfer of ownership (preventing appropriation of property belonging to another) prior to the mens rea being formed. See McHugh, Corcoran v Whent. Liability remains for making off without payment.

Poor answers to this question…
Tended to ignore effective discussion of theft and concentrated on making off.

Student extract:
a) and b) 'Dishonesty is an element of mens rea under the offence of theft in S(1) of Theft Act 1968. However, S.2(1) of the same Act provides three situations as to when a person may not be deemed as dishonest but does not provide the test for dishonesty. Under this section if person provides honest that if the defendant appropriates the property belonging to another person in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person or if he appropriates it in the belief that he would have the owner’s consent if the other knew of the appropriation and circumstances of it or if he appropriates it in the belief that the owner of the property cannot be discovered by taking reasonable steps. However, the test for dishonesty in theft is provided by R v Gihosh. It applies two stage test firstly objective and the subjective. In determining whether the defendant is acting honestly, the court must consider whether according to the ordinary standards of reasonable and honest man, what was done was dishonest. Secondly, if the conduct was dishonest by those standards then the court must consider whether the defendant himself has realized that what he was doing was dishonest by those standards.'

Comment on extract
This is a fairly typical answer to Part a. There is no attempt to answer the question. It is simply an outline of lecture notes on the tests for dishonesty. There is no evaluation, critical or otherwise.

Question 4

A major UK retailer of household goods, Universal Sweepers plc, embarks on an advertising campaign which encourages the public to purchase its new cleaner, the DirtSucker, by promising to provide free flights. The campaign is successful, sales figures for the DirtSucker, and Universal’s profits, increase dramatically. The system put in place by the company for redeeming vouchers for free air travel is hopelessly inadequate, and only the first 5,000 purchasers receive free flights. Thereafter the system crashes. Universal states that it did not anticipate the high level of demand for the DirtSucker and could not hope to provide the free flights which had been claimed.
However, they had manufactured 100,000 DirtSuckers, and knew that they only had 5,000 free flights to give away.

What criminal liability arises?

General remarks
This is a question designed to explore your understanding of the broad coverage of the Fraud Act, in particular the possibility of liability for misleading statements and over optimistic advertising schemes.

Law cases, reports and other references the Examiners would expect you to use
Being a new Act, law cases were not expected.

Common errors
Very few candidates answered this question. Those who did, tended not to identify the various elements of fraud, preferring rather to assume that they were present.

A good answer to this question would...
Consider whether the elements of fraud by false representation are present. In particular, candidates should engage in precise factual analysis of the question, identifying the false representation, and whether this false representation was intended to secure a gain, etc. It would identify what made the representation false (ie untrue or might be untrue; or, as some flights were available, misleading). And whether, on the basis of the numbers gap between the amount manufactured and the number of free flights the company knew this. Candidates should also consider whether, assuming these elements are established, it automatically follows that the company were dishonest (Ghosh). Given their implicit argument that this was the type of exaggerated claim that purchasers expect of sellers, and that they did not expect such a high level of demand, this might tell with the jury.

Poor answers to this question...
Tended to skate over factual analysis of the question and simply assert that the elements of fraud were present.

Question 5
According to the presumptions in the Sexual Offences Act 2003, is there rape in the following situations?

(a) Donald and Vera had sexual intercourse. Donald had promised her money for doing so, but left without paying.

(b) Donald tricks Wendy into having sexual intercourse with him by pretending to be George Clouseau, a famous film actor.

(c) Donald, who is happily married to Xenia, comes home to find her asleep and starts having sexual intercourse with her. She wakes up and tells him to stop.
(d) In a bar, Donald buys Yvonne an alcoholic cocktail rather than the non-alcoholic drink she asked for. Yvonne does not notice the difference and, not being used to alcohol, becomes drunk. Donald drives Yvonne back to her flat where they have sexual intercourse.

General remarks
This question asks you to consider whether the absolute and evidential presumptions in the Sexual Offences Act are applicable in the four scenarios and, if they are, whether rape has occurred. It is not simply a set of questions on rape. In each case, therefore, your first task is to identify the relevant presumption and whether it is a conclusive or an evidential presumption.

Law cases, reports and other references the Examiners would expect you to use
Indicative cases include Elbekkay, Richardson, Tabbassum, Linekar, Devonald, Bree, Dougal.

Common errors
The most common error was to sideline the presumptions and to talk more generally about the elements of rape. This was not the point of the question which was to explore the interaction of s. 74, 75 and 76.

A good answer to this question would...
Identify in each case what the relevant presumption was and whether it could be made out as follows.

Part a.
The presumption is a conclusive one. By s.76(2)(a) consent is negated where D deceived the complainant as to the nature or purpose of the relevant act.

The issue, here, is whether Donald deceived the complainant as to the nature or purpose of the relevant act. Clearly not as to its 'nature', but what about 'purpose'? In Linekar, a pre-Act case, it was not rape for a person to trick a prostitute into having intercourse without payment. This was not a case where the defendant had intentionally deceived the complainant as to the nature or purpose of the relevant act as the purpose was sex. Good candidates will, however, refer to Devonald, a post-Act case on 'causing a person to engage in sexual activity' in which a notably less stringent test of purpose was accepted by the Court of Appeal. In the light of this conclusion Linekar might well be decided differently today. From the prostitute's point of view the purpose of the act was financial, unlike the defendant whose purpose was gaining sexual satisfaction.

Part b.
The presumption is a conclusive one. By s.76(2)(b) consent is negated where 'the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.'

The issue is whether George Clouseau can be said to be 'known personally to Wendy'. On the face of it he is not. Under the pre-Act law Wendy intended to have intercourse with the person in front of her. She is not mistaken as to his identity, only as to his name and his attributes. Credit will be given to candidates who consider what it is 'to be known personally' given the existence of social networking sites which permit and encourage relationships which do not involve 'face to face' encounters.
**Part c.**
The presumption is evidential. By s.75(2)(d) consent is presumed absent where the complainant was asleep or otherwise unconscious at the time of the relevant act. This is only an evidential presumption. Being asleep makes it much more likely that there was no consent and no reasonable belief therein. He would not be able to raise evidence of actual consent for the obvious reason that Xenia told him to stop immediately upon waking up. However, Donald might wish to raise evidence suggesting that, despite being asleep, he did in fact reasonably believe that it was the case. Donald would use the evidence of the type of sexual relationship they had, particularly if it had involved sex while asleep.

**Part d.**
The presumption is evidential. By section 75(2)(f) consent is presumed absent where any person had administered to or caused to be taken by the complainant, without the complainant’s consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

In a case of sex after spiking a drink, it seems reasonable to start from the assumption that the complainant did not consent to the acts that took place and that the defendant did not reasonably believe that he/she did. However, Donald may rebut this evidential presumption by giving evidence suggesting that the drink served to loosen Xenia’s inhibitions rather than preventing her from making a free choice (Bree, Dougal).

**Poor answers to this question**
Tended to skate over the presumptions and concentrate on looking at the general law of rape. A common example was to discuss the old married person’s implied consent which is quite irrelevant to the question.

**Student extract**
‘The fact that rape has been defined under section 1 of the Sexual Offender Act 2003 has been stated above in part (a) of the question. The relation to consent too has been stated in that part (a).

Therefore, with regard to the situation of Donald tricking Wendy into having sexual intercourse with him by pretending to be George Clouseau, falls into the elements of consent that have to be considered under sec 76 of the 2003 AO.

What is stated with regard to section 76 is that if any of the circumstances set out in subsection (2) exists, that the victim’s consent is invalidated and that the defendant (in this case Donald) did not believe that Wendy consented to the relevant act.

In this case, sec 76(2)(b) applies with regard to Wendy’s consent. This is because Wendy only consented to sexual intercourse with Donald is because she thought that he was George Clouseau.

Nevertheless, the agreement that will be raised is whether Wendy ‘personally knew George Clouseau. This is somewhat different to the instance where the defendant is impersonating the victim’s husband or partner who she has had a long relationship.’
Comment on extract

This extract identifies the general issue in relation to part b., namely whether s.76 (2)(b) applies. However, it does so in a rather informal manner.

It would be more impressive for the candidate to state, for example: 'By section 76 (2)(b) consent is negated where “the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.” The issue therefore is whether Donald has done this.'

The candidate has also identified the specific issue, namely the question of whether it is possible to ‘personally know’ someone one has not met in person, but has not made any real attempt to discuss this. The last sentence, frustratingly, leaves us wondering what ‘the difference’ is. In court you can be sure that the prosecution will be doing their best to argue that it is possible. You must do likewise to get a good mark.

Question 6

James suffers from bi-polar disorder. His wife, Amelia, has taunted him about his condition for the duration of their five-year marriage. One evening, during a very heated argument, she tells him that he is a ‘raving maniac who needs to be locked up’. The next morning, James puts a week's supply of his medication into the pot of tea that he makes every morning for Amelia. He has no idea what the effect of mixing the tea with the medication will be, but he hopes that it will kill her. The tea has no immediate effect on Amelia and so, ten minutes later, James pours another cup of tea from the pot for his son, Hamish. A few hours later, Amelia and Hamish both suffer extremely bad reactions to the medication in the tea, and die. Medical evidence shows that the dose administered would normally be insufficient to kill.

Discuss any criminal liability arising.

General remarks
This is a question designed to test understanding of the relationship between murder and manslaughter, the test of causation, and the special defences to murder.

Common errors
The main errors were a general failure to consider James’s liability for Hamish’s death separately from Amelia. Few candidates examined both special defences preferring to deal only with loss of self control or diminished responsibility.

Law cases, reports and other references the Examiners would expect you to use
Moloney, Woollin, Hancock and Shankland, Mathews and Alleyne, Duffy, Clinton, Nedrick, Newbury and Jones. Also detailed analysis of the provisions in the Coroners and Justice Act.

A good answer to this question would...
Separate the different parts of the question as follows.

1. James’s liability for Amelia’s death:

   Charge murder.

   Issue 1. Mens rea. The mens rea is the direct intent to kill and lack of understanding of the likelihood of death is not relevant to establishing direct intention. Good answers will engage in factual analysis to find or not find this mens rea.

   Issue 2. Causation. The causal chain is unaffected by objective unlikelihood of fatal result (for example, Blaue).

   Issue 3. Defence: loss of self control. Candidates should have considered in particular the qualifying trigger. Was the loss of self control triggered by a justified sense of being seriously wronged? This needs explaining and discussion. Candidates should also consider the relevance of his mental condition to the objective question.

   Issue 4. Diminished responsibility. Students should outline the elements of this defence and examine the following issues in particular:

   a) Bipolar disorder is a recognised medical condition but does it provide an explanation for D’s acts and omissions in doing the killing? It seems it must as the killing was triggered by the taunt.

   b) Did the condition substantially impair his ability to:

      (1) understand the nature of D’s conduct;
      (2) form a rational judgment;
      (3) exercise self-control?

   This is less obvious given the mode of killing and his muddled thinking about the likelihood of success.

2. Liability for Hamish’s death – There is no evidence of direct or indirect intent to kill. Candidates should have considered therefore gross negligence manslaughter. The issue here is whether liability depends upon death being objectively a serious possibility (Adomako) of constructive manslaughter. The issues are (a): is the act unlawful? Yes (s. 23 OAPA); (b) dangerous? Yes (Church).

   Poor answers to this question…

   Did not distinguish the facts of Amelia and Hamish for the purpose of identifying effectively the correct charge for Hamish. They also failed to distinguish clearly between direct intention, which James has, and indirect intention, which he has not.

   Student extract

   ‘James will be liable for murder of his wife Amelia and his son, Hamish, for feeding them with medication of poisonous effect. It can be said that the actus reus of James is present because the act of killing, the addition of medication into the tea of Amelia and Hamish, was the direct causal link to the death of both parties. Using the case of R v Smith where the principle laid down by the judge was that to be effective actus rea, there must be a direct causal link from the unlawful act done to the death. For it to succeed, it must also be that the cause must be operative and substantive to the death. There is no question or doubts pertaining to the actus rea of James act.

   The next part would be to satisfy the mens rea of James. It is clear that the desire, aim and purpose was there when James, ‘hopes that it (medication) will kill her’ and
by forseeing such risk, it can also be virtually certain that it will kill Hamish although there was no desire, aim and purpose when it comes to James’ son, Hamish. He only intended to kill the wife but was also can be argued based on the Nedrick’s virtual certainty test that Hamish will be risked death due to the medication given to him.

It would have been a straight-forward case for the prosecution to charge James on the grounds of murder if not for James’s bi-polar disorder. In this case, James have a defence of loss of control. Using the principle of Duffy, it was stated that the test is where a person have sudden loss of control and causing the person to not know the that nature of his/her act. The Defendant, James, in this case was being taunted all throughout the marriage and the triggering factor was the day where the wife said that he was a raving maniac. Also applying from the case of Ahluwalia, it was Defendant, Ahluwalia killed her husband because, throughout the marriage, she was beaten up by her husband and one day, she found her husband having an affair and killed her husband later.’

Comment on extract

The discussion of the primary liability of James is almost OK. It makes the correct distinction between direct and indirect intention, explaining that liability in murder for Hamish’s death must be on the basis of the latter. However, the candidate then completely ignores the facts of the question in concluding that James has indirect intention in relation to Hamish. There is strong evidence that he does not because of the words ‘and so’ which suggests that he has concluded the tea is safe. The candidate should then have gone on to talk about manslaughter, concluding no doubt that this would be a successful charge whether charged as reckless, constructive, or gross negligence.

On the loss of self control point, there is no need to use Ahluwalia. The Coroners and Justice Act provisions should have been applied.

Question 7

7. (a) Graham suffers from delusions. Often they take the form of hearing voices which tell him to do things. One day the voices tell him to set fire to a van parked outside a block of flats. He does so. The fire spreads quickly to the block of flats. Karen, who lives in an upstairs flat, escapes uninjured at the last moment.

(b) Ian, while walking along the street, is attacked by a dog. While flailing his arms around to protect himself, he hits Dawn in the face, breaking her nose. Harry, a passer-by, bends over Dawn and asks if she needs help. Marian, another passer-by, assumes that Harry is attacking Dawn and strikes Harry on the head with a brick lying nearby, killing him instantly.

Discuss any criminal liability arising.

General remarks

Part a. concerns the possible use of the defence of insanity to the crime of criminal damage and aggravated criminal damage.
Part b. concerns the availability of the defence of automatism to the crime of assault and, in relation to Marian, the availability of the defence of self defence in relation to either murder or manslaughter.

**Common errors**
The most common error was to devote disproportionate time to different parts of the question. The defence of insanity was not very well tethered to the need to negate *mens rea* and many candidates mistook Ian’s defence as self defence rather than automatism.

**Law cases, reports and other references the Examiners would expect you to use**

**A good answer to this question…**
Would separate the analysis into different defendants as follows.

**Graham** – The offence chargeable is aggravated criminal damage. The *mens rea* for this fault element is intending or being reckless both as to the damage and as to the risk of death. Reference should be made to this fault element and the relevance of the *McNaghten rules* in establishing this fault element. On the face of it, they do not apply since there is no evidence that Graham did not know what he was doing or that it was (legally) wrong (*Windle*).

**Ian** – The offence chargeable is s. 47 OAPA 1861. A broken nose is ABH. The issue is whether *mens rea* is negated by the involuntary nature of his conduct (*Hill v Baxter*).

**Marian** – The offences chargeable are murder or constructive manslaughter depending upon *mens rea*. The evidence is equivocal on this since it appears there was only one blow. The main issues relate to mistake (which is not fatal to the defence of self defence (*Williams*)) and disproportionality (which is fatal), unless, for murder, Marian can be brought within the defence of loss of self control which on the facts is doubtful.

**Poor answers to this question…**
Tended not to examine closely the *McNaghten rules* and left Marian’s liability underanalysed in a number of ways, particularly in failing to discuss both the offence chargeable and the defence thereto.

**Question 8**
Romeo and Juliet are lovers. Romeo discovers he has AIDS (a potentially fatal disease capable of being transmitted by sexual intercourse). He decides to break off the relationship with Juliet out of love for her, not wishing to communicate the disease or admit to his condition. When he tells Juliet, first she becomes angry and then she despairs. She begs that they have sexual intercourse telling him that it will be a sign that he still loves her. Reluctantly he agrees, convincing himself that this will be the last time and that no harm will come of it. Six months later Juliet is found to have contracted the disease.
Discuss Romeo's possible liability under each of the following sections of the Offences Against the Person Act 1861.

(a) s.47

(b) s.20

(c) s.18

General remarks
There is an ambiguity in this question, namely whether Juliet is made aware of Romeo’s condition before the request for sex. Candidates’ papers were marked according to whichever of these two interpretations they adopted. I am assuming she does not know.

Law cases, reports and other references the Examiners would expect you to use
Indicative cases include Clarence, Wilson, Salisbury, Dica, Konzani, Burstow, Ireland, Belfon.

Common errors
Few candidates made the point that irrespective of whether consent is operative s.47 requires an assault and s.20 does not. Quite a few other candidates did not seem to understand that whereas consent needs to be informed to negate liability (Dica), if it is informed it is a defence despite the risk of serious harm (Konzani). Brown is irrelevant. There is also an argument that the recklessness required by both s.20 and s.47 might be negated by the reason for having intercourse.

A good answer to this question would separate out the different offences as follows:
s. 47 Dica and Konzani held that a person’s consent to intercourse must be informed if it is to act as a defence to assault. By ‘informed consent’ in this context we mean that the victim was aware that her partner was suffering from venereal disease. The effect of these decisions is to place agents under a duty of disclosure in cases where there is a risk of transferring a disease. Clearly, if she knew of R’s condition there is no assault as these cases confirm that one can consent to the risk of sexually transmitted disease. Brown is not applicable.

s. 20 As above, except a very good answer might suggest that no infliction without the serious harm being delivered by the application of force (Salisbury) except in the case of psychiatric injury (Burstow). It will state that serious harm includes AIDS (Dica). It may also argue that recklessness requires the running of an unjustified risk which, given the context, might conceivably be countered.

Section 18 – Section 18 requires proof of an intention to cause GBH. There is no evidence of this specific intent here, whether of direct or indirect intent.

Poor answers to this question…
Tended not to distinguish between the answers to s.20 and s.47 and miss the point that informed consent is a valid defence to each offence.