Examiners’ report 2013

LA1010 Criminal law – Zone B

Introduction

As with all undergraduate examinations 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 the 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 on the VLE.

Please note that in the sample extracts provided below spelling errors and other linguistic problems have been left as they were on the examination scripts.

Specific comments on questions

Question 1

‘The common law doctrine of joint enterprise liability is not fit for purpose. Despite the best efforts of the judges to clarify the law, statutory reform is required.’ (Graham Virgo)

Discuss.

General remarks

This question required you to discuss the particular problems posed by joint enterprise liability within complicity generally. This is of particular topical concern because of the large amounts of cases coming to court in which two or more people participated in a crime in the course of which another crime, typically murder, takes place and there is insufficient evidence to show who did the killing. The overwhelming impression given is that candidates took little notice of the advice in the April 2012 and February 2013 newsletters about how to answer essay questions. Please go to these newsletters to see what the correct technique is.

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

Bainbridge, Maxwell, Anderson and Morris, Powell, English, Gamble, Mendez, Rahman, Carpenter, Rook, Cogan and Leek, Law Commission reports.

Common errors

Many candidates simply regurgitated their notes without explaining what joint enterprise liability is, the specific problems it poses and how judges have sought to address them. A good answer to this question would include the following elements.
1. Outline the law relating to accessorial liability, including a mention of its derivative nature.

2. Outline the law relating to joint enterprise liability. State the general principle (e.g. *Anderson and Morris*). Explain the problems which have surfaced and how they have been addressed. These include:
   - the fairness or otherwise of holding someone liable for another’s crime which they have not authorised or agreed to
   - the problems of application posed by the fundamental difference principle as illustrated by *English, Mendez and Rahman*
   - the continuing authority or otherwise of *Gamble* in the light of *Rahman and Mendez*
   - in murder, the problems of application posed by cases such as *Mendez* and *Carpenter* concerning the availability of manslaughter as a default verdict
   - the fairness and cogency of convicting an accessory to murder of murder on the basis of mere foresight
   - the desirability, in cases of joint enterprise, of ignoring the usual requirement of identifying which of two or more persons actually performed the wrongful act.

3. What form should statutory reform take?

We did not expect you to cover all of the above points. These are indications only of the kind of issues which you should be raising.

**Poor answers to this question...**
Tended to avoid answering the question and ended up simply regurgitating general points about accessoryship.

**Question 2**

‘*English Law does not normally impose liability for failure to act despite the fact that there may be compelling moral justifications for doing so.*’

Consider whether the current state of the law governing omissions is satisfactory.

**General remarks**
The overwhelming impression given is that candidates took little notice of the advice in the April 2012 and February 2013 newsletters about how to answer essay questions. Please go to these newsletters to see what the correct technique is.

**Law cases, reports and other references the Examiners would expect you to use**
Your discussion and argument should have included consideration of cases such as *Evans, Miller, Instan, Re A (conjoined twins), Ahmad, Lowe, Santana-Bermudez, Fagan, R v Smith*.

**Common errors**
The overwhelming tendency was for candidates to regurgitate their notes about the various duty situations. There is a lot more to this question than that. Those of you who use your textbook effectively will know that much of what you need to answer this question well is on pp.78–99 of Wilson.
A good answer to this question would...
Include the following points.

1. Outline the *actus reus* principle and how omissions form a qualification in the case of result crimes but not in the case of statutory crimes of omission where their appearance is ‘normal’.

2. Give illustrations of the general principle of no liability for omissions despite any moral imperative.

3. Outline the duty qualification and the reasons for it (e.g. it helps individuals know when they are expected to intervene, and establishes a basis upon which a person can be said to have ‘caused’ the result although they have done ‘nothing’).

4. Evaluate 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 you should consider the arguments concerning autonomy and legality. A very good answer will show some understanding of the distinction between a generalised duty to act and being accountable for the consequences of omitting to act.

We did not expect you to cover all of the above points. These are indications only of the kind of issues which you should be raising.

Poor answers to this question...
Talked almost exclusively about when English law imposes a duty to act. This is only a small aspect of the question and would have gained a pass at best.

Question 3
Critically evaluate the law relating to any TWO of the following THREE defences:

(a) duress;
(b) necessity; and
(c) self defence.

General remarks
The overwhelming impression given is that candidates took little notice of the advice in the April 2012 and February 2013 newsletters about how to answer essay questions. Please go to these newsletters to see what the correct technique is.

Law cases, reports and other references the Examiners would expect you to use
Your discussion and argument should have included consideration of cases such as *Graham, Martin, Conway, Howe, Hasan, Bird, Renouf, Williams, Yaman, Palmer, Owino, Re A (conjoined twins), Pipe.*

Common errors
Very few candidates who chose this question spent any time subjecting their defences to critical evaluation, for example, discussing whether duress is an appropriate defence to criminal liability and, if it is, whether it should be available to all crimes, and should have a less exacting availability threshold than a threat of death or serious injury for certain crimes.

A good answer to this question would…
Include the following elements.
Duress: indicative elements

1. Define and outline the law relating to duress, including duress of circumstances.

2. Consider and discuss the arguments for and against its being a defence.
   - The moral case for – concession to human frailty – the partial reasonableness of not sacrificing oneself for the sake of conformity to law.
   - The practical case for – the inevitability that those faced with a life or death choice will choose the former.
   - The moral case against – those who choose to victimise others as a means of protecting their own interests have no better moral excuse than other comparable excuses which are not accepted by the criminal law.
   - The practical/political case against – why should the demands of the gunman be permitted to carry greater clout than the demands of the State?

3. Consider and discuss whether its present form is unsatisfactory. This includes consideration of:
   - The fairness of the threat of death/serious injury requirement.
   - The fairness of the reasonable reaction and reasonable assessment of the facts requirement.
   - The fairness of the objective standards of courage requirement.
   - The fairness of the loss of flexibility (Hudson and Taylor) over the requirement that there must have been no evasive action D could reasonably take following Hasan.
   - The fairness and cogency of its unavailability for murder/attempted murder.

Necessity: indicative elements

1. Define and outline the law relating to necessity, indicating the relationship with duress of circumstances.

2. Explain the reasons for the reluctance to permit it as a general defence (e.g. the threat to the rule of law and the human rights implications).

3. Explain the reasons for its acceptance in its excuse form (duress of circumstances).

4. Explain the present uncertainties (e.g. the circumstances, if any, where necessity may be relied upon in the absence of a mortal threat).

5. Consider the desirability of further development to fill in the gaps between self defence and duress of circumstances in cases such as the Herald of Free Enterprise, terrorist hijack; and other cases where non-compliance with the law may prevent harm, including harm less than grievous bodily harm.

Self defence: indicative elements

1. Define and outline the law relating to self defence.
2. Indicate the problems posed by the use of reasonable force requirement including cases of honest but unreasonable mistakes as to the degree of danger one was in (Martin).

3. Cogency of the unavailability of the defence in cases where the avoidance method does not involve force and the fragility of the distinction between cases of using/not using force (e.g. in cases of preparing for crime (A-G’s Ref), threats of force, forceful driving (Renouf), forceful criminal damage (Blake)).

4. Problems relating to its availability as a defence to murder in cases of factual mistake, particularly where police or security services are involved (ECHR provision).

We did not expect you to cover all of the above points. These are indications only of the kind of issues which you should be raising.

Poor answers to this question…
Did not engage in critical evaluation but simply stated the law, or some aspect of it, relating to two of these defences.

**Question 4**

*Critically evaluate the principles governing causation in the criminal law.*

**General remarks**
This was a question designed to test understanding of the law of causation and in particular whether there are clear and consistently applied principles of causation and whether a different approach (e.g. concentrating on mens rea rather than foreseeability/voluntariness) would be preferable.

**Law cases, reports and other references the Examiners would expect you to use**
Your discussion and argument should have included consideration of cases such as White, Dalloway, Smith, Jordan, Cheshire, Roberts, Williams and Davis, Dawson, Watson, Blaue, Kennedy, Empress Cars.

**Common errors**
As usual there was a tendency to talk generally about causation generally rather than whether and to what extent the Draft Criminal Code provision is an accurate description of the present law. Another error was to talk about certain key cases (e.g. Blaue, White, Jordan) without pinpointing or discussing their relevance to the question. Again the overwhelming impression given is that candidates took little notice of the advice in the April 2012 and February 2013 newsletters about how to answer essay questions. Please go to these newsletters to see what the correct technique is.

**A good answer to this question would…**
Include the following.

1. Outline of law, explanation and discussion of the empirical and evaluative nature of causal attribution (factual and legal cause).

2. Explanation and discussion of the Roberts (reasonable foreseeability) principle, and the Smith (substantial contribution) principle.

3. Consideration of cases, such as Pagett and Cheshire, indicating how third party or victim reactions rarely break the chain of causation and why this is.

4. Explanation and discussion of the fit, or lack of it, between these Draft Criminal Code rules and the thin skull principle.
5. Explanation and discussion of the fit, or lack of it, between the Draft Criminal Code rules and decisions such as Watson and Ball.

6. Consideration and discussion of the lack of fit regarding omissions between the ‘might have’ approach of the Draft Criminal Code and the common law ‘would have’ approach (Morby).

7. Consideration and discussion of the competing tests of causation – (1) unforeseeable acts/events break the chain, (2) foreseen and foreseeable actions of V or T break the chain of causation if voluntary (e.g. Kennedy).

We did not expect you to cover all of the above points. These are indications only of the kind of issues which you should be raising.

Poor answers to this question...
Too many candidates simply repeated lecture notes without trying to work out and address what the question was about.

Student extract
In criminal law, when deciding whether an accused has done the offence he or she has been charged against, the first thing that needs to be considered is causation.

Causations are one of two kinds-

(i) Factual causation and

(ii) Legal causation

Factual causation is determined by virtue of the ‘but for test’ which is to see whether the victim would be in the condition he is in if but for the defendant’s act. In R v White, the defendant had poisoned his mother with potassium cyanide by mixing it in her drink with intent to kill her. The victim died but in the later post mortem it was found that the victim died not because of the poison but of a heart attack. The defendant was charged for attempted murder because the ‘but for test’ was not satisfied.

Legal causation is another main factor to be considered after the ‘but for test’. Though the ‘but for test’ is the starting point of considering the defendant’s liability, it however, cannot alone be sufficient to bring a charge against someone. Legal causation is satisfied if the defendant’s act is an operating and substantial cause, of the victim’s condition. In R v Smith, the defendant stabbed the victim twice with a bayonet. The victim was given the treatment at the hospital and died from the initial injuries. Here the legal causation was satisfied because victim’s injuries caused by the defendant were an operating and substantial cause of the victim’s death and the defendant was held liable for murder.

There is however a rule called novus actus interveniens (new intervening act) which if capable of breaking the chain of causation can reduce the defendant’s liability. A new intervening act can occur in three possible ways-

Comment on extract
This extract is pleasingly clear. It is easy to understand and this is the first rule of essay writing. It states the basic causation framework (factual and legal causation) and explains what both mean, giving pertinent examples and authorities as they go. It then moves on to explain how a causal connection can be severed by a novus actus interveniens. In later paragraphs the candidate explains and illustrates what this means in just the same clear fashion as here.
The weakness in the answer is that it is fairly superficial and there is little by way of critical evaluation and this is a major part of the question. Critical evaluation requires you to go beyond describing and illustrating the law to consider matters such as whether it is fair, coherent, consistent and so on. There is nothing of this in the essay and so the candidate, while getting a decent mark, does not get a very high one.

**Question 5**

Rav suffers from diabetes. He takes insulin three times per day. On the rare occasion he has not taken it, the failure resulted in hyperglycaemia which has caused him to black out. One morning he is attacked and robbed in the street outside his home. So upset is he that he forgets to take his insulin for a whole day. During the evening while driving, he drives his car to a petrol station where he fills up with petrol, and drives the car away without paying. Back in the car he drives through a red traffic light without noticing, nearly causing an accident. He is stopped by a police officer, Amir, who asks him to step outside the car for a breathalyser test. Rav punches Amir. He then gets back in his car and drives off at speed, not noticing Jimmi, who is crossing the road. Jimmi is killed in the resulting crash. Rav is arrested. He can remember nothing of what has happened.

Discuss Rav’s potential liability.

Would it make any difference to your answer if the reason for Rav’s mental condition was that he was voluntarily intoxicated?

Rav suffers from diabetes. He takes insulin three times per day. On the rare occasion he has not taken it, the failure resulted in hyperglycaemia which has caused him to black out. One morning he is attacked and robbed in the street outside his home. So upset is he that he forgets to take his insulin for a whole day. During the evening while driving, he drives his car to a petrol station where he fills up with petrol, and drives the car away without paying. Back in the car he drives through a red traffic light without noticing, nearly causing an accident. He is stopped by a police officer, Amir, who asks him to step outside the car for a breathalyser test. Rav punches Amir. He then gets back in his car and drives off at speed, not noticing Jimmi, who is crossing the road. Jimmi is killed in the resulting crash. Rav is arrested. He can remember nothing of what has happened.

Discuss Rav’s potential liability.

Would it make any difference to your answer if the reason for Rav’s mental condition was that he was voluntarily intoxicated?

**General remarks**

This was a question designed to test understanding of how externally and internally triggered involuntary behaviour affects criminal liability. It was important to show that you understood the difference between automatism and insanity and that this case was in the grey area between them. As for the alternative scenario you were required to state that intoxication can only ever affect liability if it acts to negate any mens rea that the prosecution have to prove. You should therefore in each part of the question have identified the offence to be charged, the mens rea for that offence and whether, by virtue of intoxication, the defendant had failed to form that mens rea. Then consider each offence in turn with a view to assessing whether it is a specific or basic intent crime.
Law cases, reports and other references the Examiners would expect you to use
Your discussion and argument should have included consideration of cases such as Andrews v DPP, Allen, Majewski, Clarke, Hennessy, Rabey, R v T.

Common errors
A surprising number of candidates considered murder as a possible offence. This was a very disappointing error given that it was explained in the April newsletter that you should not even consider murder if there is no evidence of mens rea which, given the words 'not noticing' means exactly that. It also cannot be constructive manslaughter. To understand why, read Wilson, p.386 and Andrews v DPP. The only possible offences in relation to the death are causing death by dangerous driving or gross negligence manslaughter.

A surprising proportion of candidates failed to deal satisfactorily with the issue posed by intoxication. Some ignored it altogether. Others did not distinguish basic intent from specific intent crimes and why these distinctions might affect the parties' liability. And very few indeed dealt with every part of the question.

The majority of candidates approached the making off crime in a rather strange way, namely by asserting that all the elements are present including dishonesty (citing Ghosh). They then considered whether the defence of insanity or automatism might be raised to excuse the commission of the offence. This is not how automatism/insanity is used. For crimes of mens rea it is used to negate the mens rea. So, in this case candidates should have said that the actus reus of making off is present but the mens rea is not. Rav will claim that his mental state was such that he did not know what he was doing which would negate both dishonesty and the knowledge that payment on the spot is required (Clarke). Given the undisputed evidence of hyperglycaemia no reasonable jury could convict.

A good answer to this question would...
Identify the following key issues. There are three obvious offences here (less obvious possibilities are theft, fraud, assaulting a police officer and causing death by dangerous driving), namely making off without payment, assault and manslaughter. A good answer would do the following.

1. Outline these offences (or a relevant substitute offence) and, in relation to each one, identify the relevance of Rav's diabetes to the charge.

2. Consider the evidential basis for a claim of automatism/insanity to negate the voluntariness/mens rea necessary for all offences, including, in this case, gross negligence manslaughter which does not require proof of subjective fault.

3. Explain and discuss automatism and insanity and identify the test(s) which separate them. In particular, you should make reference to the Kemp/Sullivan internal/external distinguishing feature. A very good answer would indicate the fragility of the distinction in cases where an internal condition is provoked, as here, by an external trauma. A good answer would cite Hennessy, Rabey and R v T, indicating that the grounds for preferring automatism to insanity are stronger here than in those cases due to the spontaneous nature of the trigger.

4. In the alternative scenario, explain how intoxication can be adduced only to negate mens rea and even then, where the intoxication is voluntary, as here, it will available for specific intent crimes but not basic intent crimes. Accordingly, it will not avail Rav on the manslaughter charge as neither intention nor foresight is necessary. Nor on the
assault charge (basic intent crime *Majewski*). It may avail Rav on the making off without payment charge which, requiring an intention not to pay, is presumably a specific intent crime.

You may well have advanced charges other than those dealt with here (e.g. theft, fraud, causing death by dangerous driving). So long as your analysis hangs together that is fine.

We did not expect you to cover all of the above points. These are indications only of the kind of issues which you should be raising.

**Poor answers to this question…**

Talked about murder or constructive manslaughter rather than gross negligence manslaughter, did not link the hyperglycaemia to the fault element for the offences of making off, assault and manslaughter but treated it as an add on defence. On the alternative part of the question the basic intent/specific intent dichotomy in particular was ignored.

**Student extract**

The party that has a potential criminal liability is Rav. Rav may be charged with a number of offences that include, making off without payment contrary to S3 of the Theft Act 1978, wounding or causing grievous (sic) bodily harm with intent to do some grievous bodily harm or to resist apprehension contrary to S18 of the Offences Against the Person Act 1861. Murder and manslaughter. In order to successfully convict a party of an offence both the actus reus and mens rea must be proved beyond reasonable doubt.

Rav may be charged with making off without payment contrary to S3 of the Theft Act 1978 in the situation where he drives off without paying at the petrol station. The actus reus of the offence is makes off without paying without having paid as required as expected. The facts indicate that Rav had driven off on the petrol station without making the payment as required or expected. Thus, it could be said that the actus reus is satisfied. The mens rea of the offence is, dishonesty makes off without payment or with the intention of avoiding payment, knowing the payment is required or expected. The facts indicate that Rav had filled up his tank and driven off. In order to satisfy the dishonesty requirement the Ghosh test is applied. This is where both the reasonable person and the individual knows that his act was dishonest. Paying for petrol is expected and required by every individual thus the reasonable test is satisfied. It must be proved that Rav too believed his act was dishonest. Rav must have known that payment was expected since he probably has filled up his tank before, thus, it could be said that the subjective test of the defendant knowing the act is dishonest is satisfied.

**Comment on extract**

The first paragraph is sound structurally. It sets out what the candidate is to talk about. However, it sends serious warning signals to the reader since it indicates that the candidate is not taking the facts of the question seriously, in particular Rav’s hyperglycaemia. If they were there would be no question of charging murder or s.18, both of which require proof of a specific intent to cause grievous bodily harm when the facts indicate that, at worst, Rav’s mental state throughout is one of mental confusion. This is followed through into the initial discussion of s.3.

In the second paragraph the candidate wishes to talk about making off without payment rather than theft. This is OK so long as the issues arising are covered. These issues are whether his mental state negates his liability. This is where the candidate’s analysis becomes weak. There is strong evidence that Rav really did not know what he was doing due to his hyperglycaemia. This is evidence which the
candidate should take seriously because it puts in doubt not only that Rav was dishonest in his dealings with the petrol station but more obviously that when driving away he had the intention not to pay. If a person is not aware of what he is doing he will generally also be unable to form any dishonest intention.

Question 6

Sue left home in 2012, aged 16, fleeing from abusive parents. She is now living with Bill, aged 25, who has introduced her to drugs and prostitution. Bill regularly forces Sue to give him her earnings. He is jealous and possessive and has beaten her on a number of occasions. Sue, a vulnerable girl, has often harmed herself as a means of coping. One night, fearing that Bill will beat her up as she has spent her daily earnings, Sue cuts her wrists. When Bill comes into the bedroom and sees what she has done, he taunts her saying she has made a pathetic job of slashing her wrists. Sue goes to the kitchen, gets a carving knife and returns to the bedroom, where she throws it at Bill. It strikes him in the eye and penetrates the brain, killing him instantly.

Discuss Sue’s potential liability for the death of Bill together with any defences she may raise.

General remarks

This question was attempted by a lot of candidates. It was designed for discussion around murder (together with its defences) and constructive manslaughter as a default crime. You were expected to identify the factual elements which indicated the mens rea for murder may have been present (use of knife, motive) as well as the factual elements which would be relied upon to raise the defence of loss of self control (cumulative abuse plus the ‘last straw’ derision) and which would be relied upon for the defence of diminished responsibility (cumulative abuse/ battered women’s syndrome).

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

Your discussion and argument should have included consideration of cases such as Moloney, Ahluwalia, Ibrams (or Dawes), Duffy, Clinton.

Common errors

The most common error was not discussing what the exact nature of the qualifying trigger was and whether there is anything in the facts to negate a loss of self control.

A good answer to this question would...

Identify the following points for discussion.

1. Consider if this is either murder or constructive manslaughter depending upon mens rea. Outline of the offences
2. Explain that on the murder issue the evidence of mens rea is equivocal and centres on both context (abuse, fear of violence) and reaction (carving knife thrown at Bill).
3. If murder, outline and consider the defences of loss of self control and/or diminished responsibility.
4. On loss of self control the issues will be whether a loss of self control is present (leaving room and returning may indicate deliberation, see Ibrams or Dawes) and whether a qualifying trigger exists.
5. Section 54(2) (loss of self control does not have to be sudden but the killing must still be prompted by the loss).
6. A very good answer may include reference to s.54(1)(c) and question whether the court is entitled to take into account Sue’s fragile mental condition in considering whether ‘a person of D’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D’.

7. On diminished responsibility outline of the defence and the issues examined. In particular:
   - Is her condition (e.g. battered women’s syndrome) a recognised mental condition?
   - Did it deprive her understanding of what she was doing, and/or forming a rational judgment, and/or exercising self control.
   - Did the one cause the other?

8. Default offence constructive manslaughter. Identify elements and apply to facts.

We did not expect you to cover all of the above points. These are indications only of the kind of issues which you should be raising.

**Poor answers to this question…**
Tended to copy out from the statute book the provisions on loss of self control and diminished responsibility. This is a waste of time. They also tended not to engage in factual analysis (e.g. explaining what the actual trigger was, and questioning whether this may have been a revenge killing).

**Student extract**
As all elements of the defence are satisfied, Sue may be able to raise the defence successfully.

However, regard must be given to the fact that if it is found that she acted for revenge, her defense would fail. (Section 24(4)).

If successfully raised, the defence of loss of control would reduce Sue’s liability from murder to manslaughter, as provided for by Section 54 (7) of the Coroners and Justice Act 2009.

Furthermore, if her vulnerable characters amount to a medical condition as provided for under the ICD 10 classification of diseases by the World Health Organization or by the diagnostical and statistical manual of mental disorders by the American Psychiatric association, she may be able to raise the defence of diminished responsibility as provided for by the Homicide Act 1957, Section 2(i).

**Comment on extract**
This extract deals solely with the part of the question concerned with partial defences to murder. The candidate had correctly identified the offence of murder as the appropriate offence to charge and identified the evidence which would support this. They also had identified the qualifying trigger of cumulative abuse and/or fear of harm.

The extract adequately identifies the further issues in relation to loss of self control, namely:
   - was the trigger a loss of self control, or a desire for revenge?
   - might a person of her age in similar circumstances do what she did?
The candidate also sees the relevance of her cumulative abuse to the possibility of raising the alternative defence of diminished responsibility. Once again the issues are identified (is her condition medically recognised and does it affect her powers of reason, self control etc.). Missing is the discussion of the requirement that her condition provides an explanation for what she did. This might be important given the possibility that rather than losing her reason/self control she has simply ‘had enough’. This is not too significant an omission however. The main way in which this extract could be improved is by the candidate analysing the facts of the question rather than simply writing ‘if her vulnerable…’ And ‘if it is proved…’ etc. The following kind of discussion would make this a better answer.

‘Given the evidence of cumulative abuse it may be implied that she was suffering from battered women’s syndrome which is a recognised medical condition, and indeed was the basis for the decision in Ahluwalia. However, there has been no post-Act confirmation that battered women’s syndrome will be recognised by the courts to be sufficient to ground this defence. Given the support accorded Ahluwalia it is probable that it will be so recognised.’

**Question 7**

Sunita and Barbara share a flat. One night Sunita finds Barbara kissing her boyfriend, Yuri. Sunita picks up a paperweight, raises it in the air and shouts at Barbara, “I'm going to kill you, you whore!” She then throws the paperweight at Barbara who ducks to avoid being hit. Barbara hits her head on a cupboard door, cutting her forehead.

Yuri is so angry that he pushes Sunita who falls backwards over a stool onto the floor and is knocked unconscious for a few seconds. When Sunita recovers consciousness, she is still dizzy and stumbles towards Barbara, knocking her onto the floor. Barbara suffers a fractured arm.

Later that evening, when Sunita is sleeping, Barbara takes a pair of scissors and cuts off Sunita's hair.

Discuss the potential criminal liability of Sunita, Yuri and Barbara for the above incidents.

**General remarks**

This is a straightforward question designed to test your knowledge of the different offences against the person.

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

Your discussion and argument should have included consideration of cases such as Mohan, Fallon, Burstow, Roberts, Latimer, Ireland, Quick, Savage, Parmenter, Mowatt, DPP v Smith.

**Common errors**

The most common error was to devote disproportionate time to different parts of the question.

**A good answer to this question would…**

Separate the analysis into different defendants as follows:
Sunita
You should have identified three, possibly four, possible offences – attempted murder, s.47, s.20, s.18.
- Attempted murder – specific intent to kill needed.
- Section 47 – you should identify the following ingredients: assault (the threat), the harm (cut forehead) and the causal link. The main issue here is whether Barbara ducking breaks the chain of causation (e.g. Mackie/Roberts).
- Section 20. You should consider both forms of the actus reus: wounding (does the wound need to be directly inflicted?) and inflicting GBH (is Barbara’s fractured arm caused by the throwing of the paper weight or does the subsequent act of Yuri (and/or involuntary conduct of Sunita) break the chain of causation?).
- Section 18 – a. The wound is present. b. The ulterior intent (evidenced by Sunita’s accompanying words). This is the issue of causation again.

Yuri
Sunita as victim.
1. You should identify two possible offences – s.47 and s.20 and their ingredients:
   - s.47 a. the assault (push), b. the actual bodily harm (the loss of consciousness), c. the causal link
   - s.20 – a. the infliction (push caused harm – Wilson), b. the GBH (the loss of consciousness). c. The mens rea (foresight of harm – Mowatt).
Barbara as victim.
2. You should identify two possible offences – s.47 and s.20:
   - ss.47 and 20, can Yuri’s mens rea in relation to Sunita be transferred to the actus reus (fractured arm) suffered by Barbara?
   - if it can, does Sunita’s involuntary action break the chain of causation linking the push and the fractured arm?

Barbara
Two possible offences: common assault (battery) and s.47. The issue is: is cutting hair actual bodily harm? (DPP v Smith.)

Poor answers to this question...
Tended to consider only one offence in relation to Sunita and not to talk about the involuntary nature of injury to Barbara.

Question 8
Roger, a butcher, is asked by Jane, a customer, if his meat and eggs are organic. He confirms this to Jane. In fact, he purchases all his produce from the organic counter of Aster supermarket and sells them having removed the Aster packaging.

One day, Roger takes his car to a garage for servicing. When he goes to collect the car, he finds the forecourt unmanned and his car unlocked, with the keys inside. Annoyed that his car has been so carelessly exposed to theft, he decides not to pay for the work and drives his car away. He then goes to a drive-in carwash. He finds that he has no money and so tries to put a foreign coin in the slot. The coin does not fit the slot and so he goes to the carwash next door. This time he is successful with his use of the foreign coin and his
car is washed. He then goes to the cash desk and tells Victor, the cashier, what he has done and that he will return later to pay. He does not.

Discuss Roger’s potential criminal liability.

General remarks
This question was designed to test your ability to analyse facts and distinguish between the different aspects of the law of property. Many candidates, disappointingly, were more focused on making general statements about the law rather than applying it to the facts.

Law cases, reports and other references the Examiners would expect you to use
Your discussion and argument should have included consideration of cases such as Charles v MPC, Turner, Meredith, Ghosh, Allen, McDavitt.

Common errors
Failing to pinpoint what was the false representation, if any, which Roger made with respect to the organic produce. When he confirmed that it was organic this representation was true as a matter of fact and he believed it. However, it was arguably a half truth in that it was misleading and he would have known this. It was misleading because when a customer asks you ‘is it organic’, they are also asking you, by implication, did you, using your professional expertise as a butcher, source from an organic wholesaler? It was unfortunate that some candidates preferred to rely on s.3, because s.2 does all the necessary work.

Another error was failing to consider properly whether, in regard to the car, the property belonged to the garage as per Turner or did not (as per Meredith, see below). Some candidates also failed to consider seriously whether R’s dishonesty was negated either due to s.21a or Ghosh.

A good answer to this question would...
Separate out the different offences as follows.
   You should have considered whether:
   • Roger made a representation about the eggs etc. What is it?
   • whatever representation Roger made was false in the sense of being untrue or misleading
   • Roger intended by that representation to make a gain. He might have other reasons for the representation
   • Roger was (Ghosh) dishonest.

2. Car – theft.
   You should have considered whether:
   • the car belongs to another – s.5(1), Turner/Meredith
   • if so, is Roger entitled to terminate the bailment unilaterally due to the context?
   • Roger is dishonest (either s.2(1)(a) or Ghosh).
   You may have dealt with making off without payment. If so you should have considered whether Roger knew that payment on the spot is required etc., and whether he had made off from the spot where payment is due (McDavitt).

You should have considered:

- whether, in relation to the first insertion, Roger ‘made’ a false representation. Only if he has not is it necessary to hypothesise an attempt
- what false representation is made when one puts a foreign coin in a machine?
- whether any false representation made was done with intent to make a gain. What is the gain?
- whether Roger did all this dishonestly bearing in mind he went to the cash desk and ‘confessed’ and promised to return
- whether Roger had obtained services dishonestly or made off without payment. In this latter case you should have identified an issue, namely whether a person who is ‘given permission to leave’ ‘makes off’ from the spot and whether in making off, it was done with the necessary intent – Allen.

Poor answers to this question…
Assumed on the organic food issue that a false representation had been made without identifying it.

Did not, on the car issue, talk about whether Turner applied due to the carelessness of the garage or talk seriously about whether R was dishonest (s.2(1)(a) and Ghosh).

Student extract
When Roger told Jane that all his meat and eggs were organic, a relevant offense is fraud by false representation under s1 of the Fraud Act 2006 (FA 2006) contrary to S2. Because the items were actually from Aster, and they were from the organic counter. The issue to consider is whether they were organic as he represented to Jane. S2 FA 2006 requires that he dishonestly make a false representation with the intention of making a gain or causing loss to another. Assumedly if the items were from the organic counter then they were organic as he said. This would not be a false representation. However, by removing the Aster packaging, he had made an implied representation that the items were his own products, and the representation can be implied – s2(4). Thus he had made false representation. Arguable this was alone with the intention to gain by its possibly by enticing more customers to buy them. The next issue is if he made it dishonestly. The Ghosh test of dishonesty should be applied. If a jury would find that his false representation was dishonest by the ordinary standards of honest and reasonable people, then he would be found dishonest in his act. This is arguable dishonest and if so, he would have committed fraud under s1 FA 2006, in breach of s2.

He could also have committed fraud contrary to s3 FA 2006, which applies if he had had a legal duty to disclose the information that the items were from Aster. He must have withheld the info dishonestly and with intention to gain, as discussed above. If he had no legal duty to disclose, however, s3 would not apply.

Comment on extract
This extract deals solely with the part of the question concerned with the organic meat and eggs. Although the style is a little garbled at the beginning I was pleased
with the way the candidate wrestled with the key problem of what false representation had been made. The candidate makes the telling point that Roger saying expressly that the food is organic is not a false representation. Certainly it was not untrue but s.2(2) defines false as ‘untrue or misleading’. His statement was surely misleading. No marks are lost for this as it is a question of opinion and the candidate has another important point to make, namely that Roger makes another representation which is untrue, namely the ‘implied representation that the items were his own products’. It is true that in his express representation there is another implied representation but this is not necessarily that the items were ‘his own products’. A stronger claim is that the items were represented as sourced by him as ‘organic’ using his skill and judgement as a butcher. Nevertheless, the candidate gets a good mark for this part of the question for ‘nearly’ getting it right.

The candidate deals with the dishonesty point adequately but could have tried a little harder to discuss whether ordinary people would consider Roger’s actions to be dishonest, and whether he would have known this, by reference to the candidate’s own evaluation of Roger’s conduct. After all, the test is the test of the ordinary jury person – as represented by you.

The s.3 point is covered adequately. Although it was not necessary to discuss s.3, as it has been, it would have been better to have some discussion as to whether there was a legal duty to disclose the information and where it comes from. A better way of addressing the failure to disclose is by reference to s.2 again. What Roger says is not untrue but it is false within the meaning of s.2 because it is only a half truth. In other words, he is saying something ‘misleading’.