Examiners’ report 2014

LA1010 Criminal law – Zone A

Specific comments on questions

Question 1

(a) Ahmed and Bashir are engaged in a bank robbery. Unknown to them Solly, a customer in the bank, is an off-duty policeman. Solly runs over to them intending to make an arrest. Zafar, another customer, believing Solly to be another robber, intentionally trips him up, thus making it easier for Ahmed and Bashir to escape.

Discuss whether Zafar is an accomplice to the robbery.

(b) Jack and Jill decide to burgle Humpty’s house. Jill takes with her a baseball bat as is usual when the two burgle houses together. She has sometimes had occasion to use it on householders who have returned home unexpectedly. On this occasion Humpty surprises Jack and Jill in the course of the burglary. Jill finds she has left the baseball bat in another room and so she takes out a knife. Jack tells her to put it away and runs off. Jill murders Humpty with the knife.

Discuss whether Jack is complicit in the murder.

General remarks
There is quite a lot in this two part question on complicity and so we did not expect candidates to cover all of the above points to get a good mark.

Law cases, reports and other references the Examiners would expect you to use
(a) indicative cases include Johnson v Youden and Carter v Richardson.

(b) see below.

Common errors
In (a) there was insufficient discussion of the principles governing liability as an accessory, in particular the intention to assist the principal with knowledge of the facts which make their action a crime. Indeed a minority of candidates went so far as to say that Zafar was an accessory to robbery. Others avoided the complicity element entirely and based discussion around mistake/prevention of crime relying on Williams (Gladstone). Clearly there is no need to rely on this defence unless Zafar is complicit in the first place, which he is not.

A good answer to this question would...
include a descriptive element and identification and discussion of the major issues arising on the facts as follows.

(a) See Wilson, pp.576–79, 593. A good answer should first outline the basic elements of accessoryship including the actus reus of assisting or
encouraging the principal in his commission of an offence and an intention to assist or encourage that commission. It should then move on to consider the requirement of knowledge. Zafar does not intend to assist A and B's commission of robbery by hampering the efforts of Solly to arrest them unless he knows or believes Solly to be trying to prevent the robbery or arrest them.

(b) See Wilson, pp.579–88, 593–99. A good answer should first outline of the principles governing joint enterprise liability. The joint enterprise is burglary. The secondary offence, committed by Jill, is murder. Jack and Jill are joint principals to burglary. Jill is guilty of murder as principal. The issue concerns joint enterprise liability and withdrawal, specifically:

- Whether Jack contemplated Jill's use of the knife with mens rea for murder in which case he is complicit (Powell) unless his order to put it away and running off counts as a withdrawal (Becerra and Cooper).

  Note that there is no evidence that he knew of the knife and so no basis upon which the jury could conclude that he contemplated its use.

- Whether Jack's contemplation that the baseball bat might be used with the mens rea for murder by Jill in such a circumstance renders him complicit if, with the mens rea for murder, Jill uses a different weapon (English, Carpenter, Mendez, Chan Wing Siu are indicative cases). These authorities suggest that since a knife is fundamentally different from a baseball bat (English, Rahman) or more lethal than a baseball bat (Mendez) he will not be complicit in murder.

- Whether Jack is nevertheless liable for manslaughter (Carpenter) or nothing (except burglary) (Mendez).

Poor answers to this question…
See common errors above. A large minority of candidates answered both parts of the question without reference to complicity, restricting their analysis in (a) to the issue of prevention of crime and in (b) to the issue of Jill's liability for murder.

Question 2
Alina accidentally collides with Casper who is supervising his child at the side of a swimming pool. Alina bangs her head and falls into the water. Henry, an off-duty lifeguard at the pool, sees this but does nothing to help. Neither does Casper although he sees that Alina is struggling in the water. Another swimmer, Mona, begins to effect a rescue by dragging Alina towards the side. Ellie, the official lifeguard, seeing that things are apparently in hand, returns to reading her newspaper. Meanwhile Mona, on realising she is late for an appointment, desists from any further efforts and leaves Alina still struggling in the middle of the pool, reasoning that someone else can effect the rescue. It is left to Bruce, another swimmer, to save Alina but by the time Alina is removed from the pool she is unconscious. She remains unconscious for three days but makes a full recovery.

Discuss the possible criminal liability of Casper, Henry, Mona and Ellie.

General remarks
This is a question which tests not only your knowledge and understanding of the law but also your willingness to read and answer the question since, unusually for these kinds of problems, no death has occurred. Your job was to identify what crime, if any, may have been committed, and whether it could be committed by omission. See Wilson, pp.81–97.
Common errors

Very few candidates talked meaningfully about what crime, if any, the various parties had committed, spending most of their time talking about duty situations and whether they apply. As a result, relatively few achieved the highest marks.

A good answer to this question identified the potential crimes committed and considered the issues arising in relation to each, as follows.

There are two possible crimes, s.47 and s.20.

Criminal liability for a result crime generally requires an act. An omission will count as the actus reus only if:

1. the crime charged is capable of commission by omission. Assault is not (Fagan). Section 20 may be, given that it does not require anything by way of assault or direct application of force (Burstow).

2. the respective parties owe a duty of intervention and will only support a conviction if the breach of such duty causes the result.

Liability:

Henry – no duty of intervention as his contractual duty as a lifeguard only operates when he is on duty.

Casper – Alina's fall into the water is not the result of any voluntary act of Casper and so Casper's liability depends upon him having a duty of rescue. This in turn depends upon whether the Miller principle (has he caused the dangerous situation) or its Evans variant (has he contributed to it) applies or whether simple involvement is/should be enough. We did not expect candidates to consider this last point but credit was given if they did.

Mona – her liability depends upon the application of the assumption of duty category (Instan) and also depends upon whether, assuming she is under such a duty, her desisting has caused the result (Morby). We didn't expect it, but some discussion of substantial (i.e. not the sole) cause would be useful. Some candidates, quite reasonably, treated this as a variation on the Miller principle. Credit would have been given for this.

Ellie – she is under a contractual duty but there are issues of breach. Is it reasonable not to intervene where others are doing your job? And causation as above regarding Mona.

Poor answers to this question… simply talked about the various duty situations and did not identify the offences which were chargeable or, not having read the question properly, talked about the parties' liability for manslaughter.

Student extract

This question relates to omissions and their potential criminal liability. By way of introduction, in UK law there is no general duty to act, a different situation to many civil law jurisdictions, e.g. France. However, a duty to act does arise in the following scenarios, existence of:

- Contractual duty (Pittwood, Airedale NHS v Bland)
- Special relationship (Stephens and Proctor)
- Duty linked to Public Office (Reeves)
And
- Creation of a dangerous situation (Miller and Evans)
- A voluntarily assumed duty of care (Stones and Robinson)

With this brief background, I will now consider the possible liability of each in turn:

**Casper**

Casper collides with Alina, this causes her to bang her head and fall into the water. ‘But for Casper’s actions Alina would not be. In the water and potentially drowning. He created a dangerous situation, not unlike Miller or Evans, and therefore has a duty to resolve it or ‘take reasonable steps to rescue (see how Evans expanded the law from Miller). There is no mention that Casper intended any harm, it was accidental, so arguably there is no mens rea and no actus reus (automatism) (see Hill and Baxter). Nevertheless, at some point Casper noticed.

**Comment on extract**

This extract shows good knowledge and understanding of omissions-based liability. It gives, as it should do, the general principle that criminal liability usually requires an unlawful act. In relation to Casper it makes the point that because the collision was accidental there is no act/actus reus but also indicates that Casper may still be liable because ‘he created a dangerous situation’. Two points on this. First, it is better not to make an assertion like this. Lawyers argue. They do not simply assert. Thus, a better way of putting it would be: ‘to be liable (for crime A) the prosecution needs to show that Casper has committed the actus reus of that crime. Here this will be difficult as we are told the collision was involuntary (Alina, not Casper, performs the act). Casper can only be liable for crime A, therefore, if his failure to rescue Alina was in breach of duty. Miller tells us that a duty arises where the defendant creates a dangerous situation. So the issue is whether Casper did create the dangerous situation or whether, as the defence will argue, Alina did …’

The second point is that nowhere does the candidate identify what crime Casper is to be charged with. Omitting to help someone is not a crime in itself. It can only form the actus reus of a crime and only then if the definition of the crime allows it (assault does not, for example). So there is a big hole at the heart of this answer which meant that the candidate got a good mark rather than a very good mark.

**Question 3**

**Compare and contrast intention and recklessness as fault terms governing criminal liability.**

**General remarks**

Most candidates know what intention means and what recklessness means. They also know the different forms of intention and recklessness. This question tests your understanding of these fault elements. Only if you know what they have in common and what differentiates them can you manifest such understanding. See Wilson, pp.128–50.

**Common errors**

Many candidates simply regurgitated lecture notes on intention and recklessness, making little or no attempt to compare and contrast. It was not expected that you should identify all or even most of the points of contrast and comparison so long as you mentioned some key points. That would be enough to get a decent mark if well written and discussed.
A good answer to this question would...
include a general statement about how intention and recklessness figure in criminal liability. The presence of intention and/or recklessness make it fair to subject the defendant to censure and punishment as they indicate the accused chose to act wrongfully. A good answer would also define intention (direct and indirect) and recklessness.

The following are the some of the more obvious points of comparison and contrast.

Comparing

- Both are forms of subjective fault. Credit was given for stating that Caldwell recklessness (no foresight required) involved objective fault which was another point of contrast with intention rather than a point of comparison.

- All involve degrees of choice/commitment to the outcome which render punishment deserved. Although this is not expected, a very good answer will explain how the fault terms reflect the retributive theory of punishment. It will also explain that for many crimes intention and recklessness are alternative fault terms indicating that the fault addressed by punishment is choosing to do wrong generally rather than aiming to do wrong specifically.

- Indirect intention and recklessness have fault based on foresight of the consequences in common.

Contrasting

- Recklessness reflects a lesser degree of commitment to the outcome than intention (desire versus willingness to run risk) and so may represent a lesser degree of fault justifying lesser label and penalty.

- Directly intended consequences are desired. Recklessly caused consequences are not. We have indifference at most.

- Indirect intention requires knowledge of the certainty that a consequence will ensue. Recklessness requires simply awareness of the risk that it may ensue. The two still are difficult to separate at the top end where the accused foresees the very high probability of the consequence.

- Recklessness, as a fault term, requires the risk taken to be unjustified (i.e. good motives stop risk-taking from being blameworthy and punishable). This is not the case with (oblique) intention. One can obliquely intend a consequence (and so be punished for it) even if one has a good motive. A very good answer will make the caveat that the Woolin special direction makes this difference more theoretical than real.

Poor answers to this question...
typically neither defined the terms properly nor compared or contrasted.

Question 4

 Ada has been married for 20 years. Her husband, Van, has consistently oppressed her. He refuses to allow her to take paid employment, to go out with her friends or to take driving lessons. He also belittles her in company and gives her only a tiny housekeeping allowance on the excuse that he cannot afford it. Ada discovers that Van has a secret bank account containing £100,000 and that he pays a monthly allowance of £1,000 to a secret lover. She is outraged and still seething, when Van takes his bath an hour later, she throws an electric fire into the bath, electrocuting him to death.
Discuss whether Ada may be able to raise the defence of loss of self-control and evaluate the applicable law.

General remarks
A straightforward question on the defence of loss of self control. There was no need to talk at length about Ada’s liability for murder – it is assumed by the question that she is liable – but it contains an extra added element of evaluation. See Wilson, pp.373–86.

Law cases, reports and other references the Examiners would expect you to use
Dawes, Hatter, Bowyer, Clinton, Duffy, Ahluwalia, Law Commission reports on Murder/Manslaughter and Partial Defences to Murder.

Common errors
Talking too much about the elements of murder and not evaluating the law of self control in relation to the question.

A good answer to this question would…
contain the following indicative elements.

- The offence – murder.
- Brief description of the elements of loss of self control.
- Issues relating to loss of self control, namely
  - whether the electrocution resulted from D’s loss of self-control (s.54(1)(a)). Although it does not matter whether or not the loss of control was sudden (s.54(2)) it matters that the killing was attributable to the loss of self control. Good answers will, therefore, make reference to the words ‘still seething’ in the light of the ‘slow burn’ analysis in Ahluwalia.
  - whether Van’s acts and omissions count as a qualifying trigger (s.55(1)): are extremely grave and induced D to believe he had been seriously wronged, which belief was, in the circumstances, justifiable. A good answer will make reference to the cumulative effect of Van’s behaviour and the role of the judge in filtering trivial triggers from the jury (s.54(5)), concluding, perhaps, that there is a prima facie case both of gravity and a justifiable sense of being seriously wronged, notwithstanding there is an aspect of his behaviour which is excluded from the range of qualifying triggers, namely sexual infidelity. A good answer will refer to Clinton in this respect and a very good answer will distinguish Dawes; Hatter; Bowyer.
  - Would a person of D’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, have reacted in the same or in a similar way to D? The only real issue here is whether ordinary people would have reacted by electrocuting as opposed to shooting.
- Evaluation. This is not often asked for in the context of a problem question for criminal law. It is here because the problem question is relatively small in its demands. A good answer would emphasise the cogency of the ‘loss of self control’ requirement rather than the ‘justified anger’ aspect and talk about the cogency of the ‘sexual infidelity’ exclusion.
Poor answers to this question… talked almost entirely about the element of murder or simply parroted the statutory provisions on loss of self control with little or no attendant analysis.

Question 5

‘No act is punishable if it is done involuntarily and an involuntary act in this context - some people prefer to speak of it as automatism - means an act which is done by the muscles without any control by the mind such as a spasm, a reflex or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion, or whilst sleepwalking.’ (Lord Denning)

Discuss.

General remarks
A straightforward question which requires description, analysis and discussion of the law relating to the defence of automatism. See Wilson, pp.203–27.

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

A good answer to this question would… include the following indicative elements.

- Introduction – state and explain the voluntary act requirement in criminal law and how the actus reus is thereby constituted.

- Description and discussion of the elements of automatism, making reference to its two forms (mental and physical involuntariness) and the conditions which have been accepted as grounding the defence.

- Explanation and discussion of the difference between insane and non-insane automatism concentrating on the internal/external test and its cogency. This is not addressed by this quotation. Some examples of its lack of cogency (diabetes, sleepwalking) would be useful and a specific mention that sleepwalking is covered by the statement but not now accepted as a qualifying condition (Burgess). A very good answer might question this.

- Explanation and discussion of the narrow notion of voluntariness operating for crimes of strict liability and negligence (e.g. Broome v Perkins, AG’s Reference (No 2 of 1992)).

- Explanation and discussion of prior fault which is also not addressed in this quotation.

Poor answers to this question… tended to be very light on case law and avoided the issues of prior fault and the distinction between insane and sane automatism.

Question 6

One day Abezola and Rahama go mountain climbing. Upon reaching the summit Abezola tells Rahama that he is going to kiss her. Rahama, who has strong moral and religious principles, says, “If you do, I shall jump.” Abezola does not believe Rahama, and kisses her. Rahama then jumps off the summit and falls 20 metres on to a ledge. Abezola, thinking Rahama has been killed and that he will be held responsible, carries her to his car, intending to drop her down a disused mine shaft at another location to avoid detection. After
travelling a few hundred metres the car is involved in an accident with a drunk driver. When the police arrive Abezola has survived and Rahama is found to be dead. At the post mortem it is discovered that it was the crash and not the fall which killed Rahama.

Discuss Abezola’s potential criminal liability.

General remarks
The question is designed to test your ability to structure an answer which contains a number of possible outcomes, particularly liability for homicide, where the issue is causation. On the assumption that the chain of causation is broken, you should discuss any default crime for which Abezola may be liable.

Law cases, reports and other references the Examiners would expect you to use
Church, Newbury and Jones, Dawson, Watson, Roberts, Williams, Blaue, Dhaliwal, Kennedy, Lebrun.

Common errors
Many candidates talked almost exclusively about causation in general rather than the crime (manslaughter) of which causation is but an ingredient. Many others began at the wrong end and talked about assault, rather than the right end, namely constructive manslaughter, with assault being the unlawful act to be relied upon in establishing this. Nevertheless, credit was given for the discussion in so far as it is relevant. A significant number of candidates talked about impossible attempts in relation to Abezola’s attempt to dispose of the body. This was not appropriate since to commit an attempt (e.g. attempted murder) requires the defendant to intend to kill by the act.

A good answer to this question would…
include the following indicative elements.

- The kiss.
- Constructive manslaughter:
  - The definition – unlawful and dangerous act causing death.
  - The unlawful act = common assault in the form of a kiss. Kisses are not (Church) dangerous per se (see e.g. Dawson) but may become so by virtue of context and knowledge (e.g. Watson). On that basis the kiss is dangerous.
  - Causation – Abezola’s belief is not relevant to causation. The issues are whether the jump breaks the chain of causation and, if it does not (indicative case law: Roberts, Williams, Blaue, Dhaliwal, Kennedy) whether the death by car crash is a novus actus interveniens.
  - The position is complicated by the ‘supposed corpse’ (Thabo Meli) aspect of the case. LeBrun makes clear that in the usual supposed corpse case it is simply a question of causation. Death in the course of clearing up the crime is a link and not a break in the chain. A really good answer will, however, identify Thabo Meli and LeBrun as a possible red herring as here the car crash is an independent and sufficient cause of the death.

Poor answers to this question…
tended to talk almost exclusively about Abezola’s liability for assault or sexual assault without considering manslaughter as a possibility, or simply regurgitated
their lecture notes on causation without linking them to a specific crime which Abezola may have committed.

Question 7

With reference to relevant case law explain and discuss:

(a) the meaning of 'belonging to another' for the purpose of the Theft Act 1968.

(b) the meaning of 'appropriation' with particular reference to the relevance of the owner's consent.

Common errors
Listing the provisions of the Theft Acts without explaining or discussing them.

A good answer to this question would...
include the following indicative elements.

Part (a):

- s.5(1) – there can be no theft if at the time of dishonestly appropriating the property the property does not belong to another person (e.g. Corcoran v Whent (1977))
  - belonging refers to not just 'owning' but possession/control/proprietary interest, etc (e.g. Turner, Meredith, Shadrokh-Cigari)
  - abandoned property may still belong to another person (e.g. Hibbert v McKiernan (1948), Williams v Phillips (1957), Woodman, Marshall).
- s.5(3) – how the ‘obligation’ comes about and how it is decided (e.g. Hall). Indicative cases are R v Wain, R v Hall, DPP v Huskisson, Davidge v Burnett.
- s.5(4) – little, if anything, expected on this beyond a possible mention of Moynes and Cooper and its contemporary irrelevance in the light of Shadrokh-Cigari (1988).

Part (b):

- explanation and discussion of how s.3(1) defines appropriation far more broadly than taking, including the case of coming by property innocently.
- examples of appropriations – indicative cases are Pitham and Heyl, Morris, Chan Man Sin v AG for Kong Kong
- relevance of transferor's consent – indicative cases are Morris, Lawrence, Gomez, Hinks
- discussion of the decision in and problem posed by Hinks.

Poor answers to this question…
talked generally about the law of theft rather than concentrating on the specifics of ss.3 and 5 and associated case law.

Student extract

Theft is defined in section 1 of the Theft Act 1968. Paraphrased it is:

‘Dishonesty appropriating property of another person, with the intention to permanently deprive the owner of it!’
a). ‘Belong to another’

Section 5 of the Theft Act 1968 explains ‘Belonging to another’. I will look at each subsection hereunder to relate it to the subsection’s heading with an illustration of a case.

S5(1): This subsection says property ‘belongs to another’, another here being a person who is in control of it, despite the owner having proprietary rights.

The case of Turner 2, illustrates the above, where the garage was in control of the Defendant’s car, by having a lien over it whilst the bill remained unpaid.

In the Oxford v Moss case, the defendant student was guilty of stealing the ink and paper of the institution.

S5(2): Property subject to a trust.

The most relevant and logical property in relation to this subheading is Land held under a trust by trustees for the benefit of beneficiaries.

Here a trustee who diverts from the interests of the trust, its purpose by dealing with the property is considered to be stealing the land and its interest.

S5(3): Receiving property from another and obligation thereto. This can be illustrated by the case where a flatmate, sharing a flat with other students received contributions in terms of money to pay a utility bill, and failed to do so, instead using the money for her own benefit, was held to have stolen the money.

Comment on extract

This extract shows some basic knowledge and understanding of the ‘belonging to another’ element of theft. It correctly identifies Turner as a key case and, in relation to s.5(3) also mentions Davidge v Turner (the flatmate case). There are few other cases on offer except Oxford v Moss which is irrelevant. What it does not do is ‘explain and discuss’ which is what the question asks. So there is no mention of the fact that theft protects property rights and so property which has no owner cannot be stolen. There is also no mention of the abandoned property cases such as Hibbert v Mckiernan. This answer looks as though the candidate has begun and ended their studies with the subject guide. There is no evidence they have gone further and performed the activities which required them to answer questions by reference to Wilson. See, for example, Activities 12.7–12.10 in the subject guide. If they had done these activities they would have been able to secure a good or very good mark rather than only an average one.

Question 8

Discuss Adam’s potential liability for fraud in each of the following scenarios. Do NOT discuss Adam’s liability for theft.

i. Adam, a shopper, on taking a pair of shoes to the cash desk for purchase, notices that the price tags on each shoe show different amounts. He goes back to the counter to find another to match the lower price but cannot. He chooses, therefore, a matching shoe without a price tag on it, intending to purchase the pair at the lower price. A store detective notices all this and arrests him before he reaches the cash desk.
ii. Adam takes his friend Brian to his (Adam’s) golf club for a round of golf. Club rules require all members to inform a senior club official when guests are invited, so that they can charge a fee. Adam does not do so.

iii. Eve goes into Virtualworld Computers and asks to see some computers. One attracts her particularly and she asks Adam, the salesperson, ‘Is this the latest model?’ ‘Yes’, says Adam, although he knows it will be withdrawn from stock and replaced by another model next week.

iv. Adam is jealous of his brother Bingo. He tells Wooster, their rich uncle, a scandalous and untrue story about Bingo so that he (Wooster) will cut Bingo out of his will. The ruse works. Bingo is left penniless on Wooster’s death.

Common errors
Few candidates in relation to any of these four questions analysed precisely what the representation was and, assuming there was one, whether it was false and why. The common response was effectively ‘Adam is guilty of fraud because he falsely represented ….’ This is assertion not analysis.

A variation on this, for candidates who could not work out what the representation was, was to rely on s.3 rather than s.2.

A good answer to this question would…
in each case identify the false representation and whether it is false.

Part (i)
What is the representation here? This is not at all clear. ‘Representation’ is not defined in the Act. The best analysis is probably that by handing in the shoe without the price tag along with the shoe with the price tag he is creating the impression (implied representation) that the shoe without the price tag belongs with the shoe with the price tag. Since it does not, that representation is false and so he has committed the actus reus of fraud. Alternatively the false impression that he is giving is that he picked up the shoes at random.

The only other issue is whether he is Ghosh dishonest.

Part (ii)
A person does not make a false representation (here of fact) by remaining silent about things of which he, but not the other, is aware. An exception is, as here, where A is under a duty to disclose the relevant information. This is specifically provided for under s.3 of the Fraud Act but also will usually be covered by s.2 (implied representation by conduct).

Part (iii)
Adam has made a false representation (of fact) for the purpose of s.2 since his statement is misleading and he knows it (s.2(2), although it is spot on in terms of accuracy).

Liability depends upon the jury’s assessment as to whether he is honest or not. The Ghosh test is applicable. As to whether it is objectively dishonest is uncertain as it is the kind of ‘half truth’ which society has traditionally condoned as being part and parcel of the seller’s repertoire of selling practices. Even if the jury find Adam’s action to be dishonest, this still leaves open the possibility that he will escape liability on the ground that he did not realise others would find his statement to be dishonest.
Part (iv)

This question effectively tells you all you need to know to conclude that Adam is guilty of fraud. He has made an untrue statement with a view to causing loss. Both actus reus and mens rea are present. It is a straightforward case of fraud assuming Ghosh dishonesty.