Version 1.0: 0610

General Certificate of Education

Law 2161

Unit 3 (LAW03) Criminal Law (Offences against the Person) *or* Contract

Report on the Examination

2010 examination - June series

Further copies of this Report are available to download from the AQA Website: www.aqa.org.uk

Set and published by the Assessment and Qualifications Alliance.

The Assessment and Qualifications Alliance (AQA) is a company limited by guarantee registered in England and Wales (company number 3644723) and a registered charity (registered charity number 1073334). Registered address: AQA, Devas Street, Manchester M15 6EX

Unit 3 (LAW03): Criminal Law (Offences against the Person) or Contract

Centres are thanked for preparing so thoroughly their candidates to work with the new numbering system and the new style answer book. The majority of candidates responded well to the changes to the June 2010 exams, but where difficulties were experienced, centres are asked to draw candidates' attention to the comprehensive range of guidance material that is available on this subject in order that they are confident about what is required of them in future examinations. Support available on this issue includes Guides for teachers and students, and specimen question papers and mark schemes showing the changes in action. All documents published in support of the changes to exams can be accessed via notices published on all qualification homepages, all subject notice boards, and on the parent and student area of the web.

Crime Scenario 1

Question 01

In this question, candidates were required to analyse the possible criminal liability of Chris for injuries inflicted on David, and of Benjamin for injuries inflicted on Aaron. The bruises and bleeding nose suffered by David suggested, at the least, an offence of assault (battery) occasioning actual bodily harm. Chris's actions and state of mind in intentionally striking David with the branch clearly amounted, *prima facie*, to a battery, so that all the elements of the offence seemed to be present. However, the profuse nose-bleed suggested the further possibility of an offence of unlawful and malicious wounding under the Offences Against the Person Act 1861 s20. It should be noted that the ***JCC v Eisenhower*** case specifically confirms that injuries of this kind can amount to a wound (*"There must be a break in the continuity of the skin. It must be a break in the continuity of the whole skin, but the skin may include not merely the outer skin of the body but the skin of an internal cavity of the body where the skin of the cavity is continuous with the outer skin of the body."* [Robert Goff LJ]). It would be difficult to resist the claim that Chris intended, or at least foresaw the risk of, some harm when he swung the branch 'very powerfully'. Indeed, there might even have been a possible argument for a s18 offence, with a *mens rea* of an intent to cause grievous bodily harm, though this seems rather improbable. It is also unlikely that the injuries, even in combination, were sufficiently serious to amount to grievous bodily harm, so that only the wounding version of the offences under s20 and s18 would be arguable. The fact that Chris and David were children engaged in consensual rough play raised the issue of a defence of consent. At 13 years of age, it is likely that both boys understood the general nature of the risks, but it might be doubted whether David had given any implied consent to the risks of injury resulting from Chris's anger-fuelled actions, a doubt rendered all the more substantial by the possibility that Chris intended to inflict the injury.

Aaron suffered serious burns to his hands when, after being pushed by Benjamin, he instinctively tried to save himself from falling by putting his hands onto the barbecue coals. These injuries undoubtedly amounted to grievous bodily harm, so that offences under s20 and s18 were in issue. Though Aaron was the person most immediately responsible for his own injuries, there was little doubt that his reaction to the push would not constitute a *novus actus interveniens*, whether this conclusion was justified by the 'instinctive reaction/agony of the moment' kind of approach or by the 'reasonably foreseeable' argument familiar from cases such as ***Roberts***. However, the fact that Benjamin merely 'pushed' Aaron made proof of intention to inflict, or recklessness as to inflicting, some harm (s20) problematic, and intention to cause grievous bodily harm (s18) overwhelmingly unlikely. In general terms, there was some evidence that candidates still rely on the Joint Charging Standards in determining which offence

or offences may have been committed. It has been emphasised in many earlier reports that the Joint Charging Standards do not represent the law but, rather, choices made by prosecuting authorities which are informed, in part, by extra-legal considerations. Additionally, such an approach often leads candidates to underestimate the significance of *mens rea* considerations in distinguishing between possible offences. Many candidates also wasted valuable time in considering procedural and sentencing issues associated with the different offences, matters for which no credit was available, though they might have been relevant in the answer to Question 03 (and, of course, Question 06). These comments apply equally to the relevant questions or parts of questions associated with Crime Scenario 2.

In relation to the analysis of the criminal liability, the strongest candidates were able to develop the broader framework outlined above, in which each incident gave rise to the possibility of the commission of at least two offences. Such candidates usually displayed a sound understanding of the elements of the offences and were able to apply them confidently to the facts of the scenario. However, many candidates were also able to score highly by concentrating on only one offence (say, battery/actual bodily harm on Chris's part). Weaker candidates tended not only to write on a narrow range but also to introduce errors or to omit discussion of vital aspects. For example, there was often no explanation of the meaning of actual bodily harm, or a wound was identified as an essential component of grievous bodily harm, or ***JCC v Eisenhower*** was cited as authority for the proposition that a nose bleed could not possibly be a wound (see above), or the *mens rea* of the offence of unlawful and malicious wounding was misstated as requiring intention or recklessness as to serious injury or as to a wound. Though some candidates were content to restrict their analysis of the possible liability of Benjamin to the offence of battery encompassed in the 'push', or to the offence of actual bodily harm in consequence of the burns resulting from the push, most examined the possibility that Benjamin had committed a more serious offence against Aaron (s20 or s18).

The causation issue was generally treated confidently by reference to ***Roberts***. However, few really attempted to advance a credible argument that he intended or foresaw injury, let alone serious injury. Of those who did, many made use of the notion of oblique intention to argue that Benjamin must have been aware that it was virtually certain that Aaron would instinctively thrust his hands into the coals to steady himself. Inevitably, such candidates also found it relatively easy to make an argument for the lesser *mens rea* of foresight of risk (by contrast, in discussing the liability of Chris, candidates sometimes sought to rely too strongly and inappropriately on the idea of oblique intention). Candidates also usually perceived that Chris might be able to rely on the defence of consent, and there were some very good analyses of the defence and its application. However, once again (as in responses to questions on this issue in earlier examination papers), it was more common to encounter answers which dealt only in part with the defence. So, candidates often failed to set the defence within the context of the general rule which denies the defence to anyone causing at least actual bodily harm, and in consequence failed to elucidate the general nature of the defence as a series of exceptions. Though they were often adept at explaining that consent must be genuine, and at applying this in respect of the age of the participants, they rarely examined the possibility that Chris, by his actions and his accompanying state of mind, might have stepped outside the scope of any consent implied by David's participation in the rough horseplay. Some candidates suggested that a defence of self-defence might be available to Chris. Though this suggestion merited some credit, the conclusion ought to have been that the defence would fail because Chris was not actually defending himself at all (but, rather, acting aggressively), or there was no necessity to defend himself, or his actions in 'self-defence' were disproportionate. More bizarre, and indicative of a fundamental misunderstanding of the law, were the many responses in which candidates confidently asserted that Chris would be able to rely on the defence of provocation, a defence available only on a charge of murder. However accurate the discussion of the elements of the defence, no credit could be given for it.

Question 02

In this question, candidates were instructed to discuss the liability of Fred and of Aaron for the involuntary manslaughter of Eli. The most appropriate way to analyse the liability was to consider that Fred might be guilty on the basis of unlawful act manslaughter, whilst Aaron might be guilty on the basis of gross negligence manslaughter. However, an alternative, though rather more complex, analysis might have concentrated on gross negligence manslaughter for both Fred and Aaron. In releasing the dog in response to Eli's silence, it seems quite likely that Fred intended, or at least foresaw, the risk that the dog would chase Eli, who would inevitably be frightened and fear for his personal safety. In consequence, Fred probably committed an offence of assault. Of course, Fred had just taken some drugs before this incident occurred and this may well have affected his reasoning and mood. Since there was no evidence to suggest that the consumption of the drugs was not voluntary, the relevant rules on the effect of intoxication on criminal liability would be those developed from the initial decision in ***DPP v Majewski*** in relation to basic intent offences. So, either Fred would be denied the right to introduce evidence of intoxication to resist the assertion that he had *mens rea* for the assault, or it would have to be determined whether he would have recognised the risk that Eli would fear immediate personal violence had he been sober (***Richardson and Irwin***). Proof that the assault was dangerous, in the sense that any reasonable person would have recognised the risk of some injury resulting from it, would not be too difficult to establish. A reasonable person would take account of Eli's age, of the environment (including the river), and of the degree of panic which might afflict Eli, and conclude that he might suffer injury in a variety of ways when seeking to escape from the dog. Similarly, although Eli stumbled and fell into the river (rather than, say, being pushed), Fred's conduct was clearly the cause in fact of what happened. Equally, given his age, Eli's behaviour was reasonably foreseeable (***Roberts***) and did not break the chain of causation, so that Fred's conduct was also the cause in law of Eli's death.

In relation to Aaron, it was necessary to explain and apply the rules on gross negligence manslaughter as developed from the re-introduction of that offence in ***Adomako***. It is clear that he owed a duty to Eli by virtue of being his father, and it could certainly be argued that he broke that duty by failing to supervise Eli properly. However, there were three significant obstacles to maintaining the allegation that he had committed gross negligence manslaughter. First, it was by no means clear that Aaron's breach of duty created an obvious risk of Eli's death (***Misra and Srivastava***), even if there was a river. At 5 years of age, children do not inevitably fall into rivers if unsupervised, nor do they usually die from other hazards present when playing in woods. Second, it is very strongly arguable that any breach by Aaron was not the cause of Eli's death. It has already been explained that Fred caused Eli's death by his conduct in releasing the dog to chase Eli. Of course, the law recognises that two people, acting independently, may each contribute significantly to a consequence, and so both be liable for it in law. The law also recognises that a later cause may operate as a *novus actus interveniens* to break the chain of causation between the consequence and an earlier cause. In this case, had Eli simply fallen into the river and drowned, then Aaron's breach of duty might well have been regarded as a significant cause of Eli's death. Yet Fred's intervention was probably sufficient to render Aaron's breach merely 'part of the history', relegating it to the status of a cause in fact but preventing it from being a cause in law. Third, even if the earlier obstacles were overcome, it would still be necessary to show that, in all the circumstances, Aaron's failure to supervise Eli was 'so bad' that it should be described as criminal negligence. At the time, Aaron was trying to deal with the consequences of the trouble between Chris and David, and actually ended up quite seriously injured himself. In these circumstances, was his inattention to Eli 'so bad'? Indeed, it might even have been possible to argue more fundamentally that Aaron was not in breach of his duty at all, given everything that was taking place, and that there were probably other responsible members of the party present (for example, Eli's mother and David's mother).

For the most part, candidates recognised the structure of the liability outlined above, so that the variation in the quality of the answers related entirely to the depth and accuracy of treatment. On the whole, candidates were more comfortable in discussing Fred's possible liability than in

discussing that of Aaron. It was widely recognised that the unlawful act was an assault, though many candidates opted for a less specific offence concerned with the care and control of dogs in public places, which inevitably bore on the subsequent explanation and application of the concept of 'dangerousness'. Sometimes, candidates did not take care to explain the elements of the assault and relate them to the facts in the scenario, so that explanation and application on this aspect were both superficial. Most candidates attempted to deal with the possible effect of the drug-taking on Fred's liability, with frequent discussion of, or reference to, the cases of ***DPP v Majewski*** and ***Kingston***. Answers tended to be brief but usually distinguished between voluntary and involuntary intoxication, and between basic and specific intent. Candidates then usually argued that this was probably voluntary intoxication, and correctly concluded that evidence of such intoxication would be inadmissible because assault/unlawful act manslaughter is a basic intent offence. In discussing the concept of 'dangerousness', candidates were usually able to explain its meaning by reference to the case of ***Church***, and some explored what knowledge would be attributed to the reasonable man by reference to the cases of ***Dawson*** and ***Watson***.

Perhaps understandably, many candidates argued that the danger evident in releasing a dog was that the dog would attack the victim. Yet this would be to assume that the unlawful act was a battery rather than an assault, the causing of fear of immediate personal violence. Strictly speaking, therefore, the danger resulting from the assault had to be the danger that Eli would be injured because of his response to his fear of immediate personal violence (as by, for example, running away and falling, or, as actually happened, falling into the river). Most candidates addressed the causation issue, though many dismissed it a little too briefly. Stronger candidates dealt with the 'escape' cases such as ***Roberts***, often without fully articulating the rule for which those cases are authority.

In discussing Aaron's liability, candidates usually identified the duty and breach requirements and were able to apply them to the scenario by reference to cases such as ***Gibbins and Proctor***. Thereafter, answers varied significantly in quality. Many candidates did not refer at all to the requirement for the breach to create an obvious risk of death, whilst others simply assumed without argument that it did. Few candidates saw the requirement as posing any serious obstacle to a conviction. Candidates usually recognised that there might be a causation issue, and many argued that it would probably be fatal to a conviction because Fred was the true cause of Eli's death. However, few candidates were able to express this conclusion within a convincing legal framework. Some candidates, rather unwisely, refused to enter into any discussion of Aaron's liability for gross negligence manslaughter on the basis that his failure of supervision did not cause Eli's death. In doing so, they deprived themselves of most of the possible credit available for discussion of this aspect. Once again, most candidates attempted some discussion of the requirement that the conduct be 'so bad in all the circumstances', usually citing the case of ***Bateman***, but very few used the facts of the scenario seriously to question whether it could be satisfied.

Candidates who argued that Fred's liability could be based on gross negligence, rather than on unlawful act, manslaughter tended to fall into confusion over the conduct on which the liability was to be based, alternating between his act in releasing the dog, and his general failure to do anything subsequently to minimise the danger. This approach also tended to result in a confusion between discussion of Fred's liability and discussion of Aaron's liability, seriously undermining the analysis of the latter. In particular, the causation aspect was poorly explained and applied. Some candidates argued for the rather problematic offence of (subjective) recklessness manslaughter. Obviously, this approach was creditworthy, though few candidates fully understood the elements or their application. In spite of the instruction to consider the liability for involuntary manslaughter, a small number of candidates embarked on a discussion of murder in relation to the scenario. In some cases, they subsequently retreated and turned their attention to involuntary manslaughter, having wasted valuable time. In other cases, murder remained the focus, so that very limited credit was available.

Question 03

This question was similar in style to questions set on the topic under the previous specification, though it required not only a critical analysis of the current law on non-fatal offences against the person but also a discussion of possible reforms. In relation to the critical analysis, answers tended very much to follow the pattern established under the previous specification. So, criticisms were focused on two main areas. First, there was analysis of the general language and structural problems. Second, there was more detailed analysis of the elements of the individual offences themselves. In some cases, candidates also introduced critical discussion of the defence of consent. Inevitably, differentiation in quality depended almost entirely on the range and depth of criticism undertaken, since all candidates were drawing on essentially the same material, and structuring their answers in essentially the same way. Weaker candidates often gave extremely superficial accounts of language issues, treating it as almost self-evident that words such as 'grievous' and 'malicious' have no place in modern discourse, without ever considering how the words have been interpreted and whether the objections might be more theoretical than practical. Similarly, there was a familiar tendency to argue that the structure of the 1861 Act is illogical, in that more serious offences precede less serious offences. This is a puzzling criticism since most criminal statutes, including the very modern, work from the most serious to the least serious offence. More substantial criticism was to be found in the observation that the sentencing structure is anomalous.

There are, of course, many criticisms of the individual elements, and these were made with varying degrees of confidence. For example, there are difficulties in establishing a comprehensible and practically applicable meaning of 'immediate' in assault. The levels of injury in actual and grievous bodily harm are difficult to interpret. 'Wound' remains an anomalous concept, being merely a description of a type, rather than of a level, of injury. The *mens rea* requirements of the various offences, being often only imprecisely related to the consequence which must be proved in the *actus reus*, appear to breach the requirements of the correspondence principle, should that principle be accepted. The version of the s18 offence which depends upon proof of an intention to resist or prevent apprehension or detainer, rather than on intention to cause grievous bodily harm, allows for the possibility of a conviction for a very serious offence where there was neither serious injury nor any intention or recklessness as to serious injury. Those candidates who discussed consent usually gave a rather superficial account of the problems associated with the decisions in cases such as ***Brown***, ***Wilson*** and ***Emmett*** on consent for purposes of sexual gratification, though more perceptive and well-informed candidates were sometimes able to extend this analysis to include consent to transmission of infection in the course of sexual activity (as in ***Dica*** and ***Konzani***). Occasionally, candidates explored the public policy basis for the exceptions to the general rule that consent cannot be a defence to offences involving actual bodily harm or worse.

On the whole, discussion of proposals for reform was very disappointing in view of the fact that a strong foundation is readily available in the Law Commission Report on Non-Fatal Offences, and in the ill-fated Draft Bill proposed by the Labour Government in 1997/98. Though many candidates were able to give some indication of some of the proposals, they were usually introduced very briefly, were hardly ever comprehensive, even on the description of the offences which would replace the major current offences, and almost never sought to discuss other proposals such as the meaning of injury, or how transmission of infections might be dealt with. Equally, even those candidates who presented a critical analysis of the defence of consent rarely sought to make any suggestions for reform, though the difficulties surrounding this defence provide fertile ground for such suggestions, many of which have also been considered by the Law Commission. It seems evident that some candidates were ill-prepared for this particular question, possibly because they had anticipated a question on a different topic. Sometimes, the evidence consisted of answers which actually introduced critical discussion of defences or of homicide and voluntary manslaughter, or a combination. Sometimes, the evidence was simply that candidates wrote very little of any substance at all.

Crime Scenario 2

Question 04

In this scenario, Ian spat on George, and then waved a bottle of beer above his head, the general context being a noisy and menacing queue making complaints against George and his colleague, Henry. There is little doubt that Ian committed the offence of battery when he spat on George. Though spitting as an offence tends to arise in the context of public order offences, where the victim is often a police officer, and occasionally as raising the issue of criminal damage, the *actus reus* of battery easily extends to accommodate such action. An analogy might be drawn with the throwing of liquids (***Savage***) or the use of weapons. All the evidence, apart from the fact that Ian was very drunk, suggests that he must have intended to spit on George. The waving of the bottle was probably the *actus reus* of the offence of assault, since it would not be at all surprising if, in the circumstances, George (and probably Henry, too) were to apprehend immediate personal violence. However, Ian's intention or foresight accompanying this conduct was perhaps a little more difficult to determine, and it could easily be envisaged that, in his drunken state, he did not appreciate the effect that his conduct might have. Consequently, the effect of intoxication on criminal liability was an important consideration.

In the context of voluntary intoxication and basic intent offences (see the explanation relating to the equivalent issues in the comments on answers to Question 02), Ian was unlikely to be able to avoid liability by arguing a lack of *mens rea* on account of intoxication. George responded by gripping Ian by the arm and throwing him to the ground. The bottle broke beneath Ian as he fell and he suffered a deep cut to his face. *Prima facie*, George committed offences of battery, assault (battery) occasioning actual bodily harm, and unlawful and malicious wounding or infliction of grievous bodily harm. Proof of the *actus reus* of both of the more serious offences would require proof that George's conduct caused the injury. Since Ian was holding the bottle when thrown to the ground, there was nothing surprising about the fact that it broke and injured him, and so every reason to argue that George's conduct caused the injury. The reason why it would be advisable to consider both the actual bodily harm and wounding/inflicting grievous bodily harm offences is that the *mens rea* for the actual bodily harm offence was merely the *mens rea* for the battery, which George could hardly dispute. By contrast, the *mens rea* for the wounding/inflicting grievous bodily harm offence required proof, at the least, that George foresaw the risk of some injury. George might be able to claim that his only intention was to throw Ian to the ground so as to avert any immediate danger and that, in doing so, he did not intend or foresee the risk that Ian would suffer anything more than a minor impact with the ground. Was it credible that, in the heat of the moment, he would have given no thought to any risks associated with the fact that Ian was holding the bottle, bearing in mind that it was the very danger from the bottle which George was seeking to avert? Even if *prima facie* liable for any of these offences, George would attempt to assert a defence of self-defence/prevention of crime, the approach to which has now been supplemented by the provisions of the Criminal Justice and Immigration Act 2008 s76. This would require proof that the use of some force was necessary, and that the force actually used was proportionate to the risk of harm threatened by Ian. In this context, it was important to note both that, if George feared that the bottle would be thrown, then some rapid action was necessary, and that George had merely thrown him to the ground. He had not punched or kicked him, and the serious injury actually suffered by Ian was probably out of all proportion to the consequences intended or foreseen as a risk by George, and possibly which any reasonable person would have foreseen.

Most candidates succeeded in presenting at least some aspects of the analysis outlined above, though few dealt with the full range, and application was often superficial. Stronger candidates had no difficulty in perceiving that Ian might be guilty of offences both of battery and assault, and treated the two instances of conduct separately. In dealing with battery, these answers tended to refer to cases such as ***Cole v Turner***, ***Thomas*** and ***Fagan v MPC***, and much less frequently to ***Savage***. ***Venna*** was often cited as the relevant authority for the *mens rea*. Perhaps the assumption here was that spitting on George would be more likely to result in

contact with his clothes than with his body (***Thomas***), which clearly represented a possible interpretation. In dealing with assault, candidates tended to argue perceptively that George's response in taking hold of Ian was eloquent proof that he had anticipated immediate personal violence. They usually argued for recklessness as to this consequence. Intoxication was dealt with much as in the answers to Question 02, accurately but briefly, and rarely comprehensively. Weaker candidates tended to omit discussion of either the battery or the assault, or, rather strangely, ran the two together, so that the spitting was regarded as part of the assault rather than as a battery in its own right. Less frequently, and much more awkwardly, candidates reversed this approach and attempted to use the waving of the bottle of beer as evidence to support the *mens rea* in the battery associated with the spitting.

In analysing George's possible liability, most candidates opted for a discussion of battery in relation to the initial gripping of Ian's arm, and then moved to consider either wounding under s20 or, less frequently, infliction of grievous bodily harm. The battery was easy to dispose of but the analysis of the liability for the more serious offence, though sound on *actus reus* aspects, including the definition of wound or grievous bodily harm (subject to the usual instances of confusion over the precise relationship between the two) and the causation issue, was frequently undermined by a weak discussion of the *mens rea* aspects. Some candidates simply explained the requirements incorrectly (intention or recklessness as to a wound or serious injury, or simply 'intention or recklessness', being the most common errors). Even where the *mens rea* was stated accurately, there was often a failure to apply the definition carefully enough to the facts, many candidates simply asserting that George must have been reckless without seeking to demonstrate why this might have been so. There was some very good explanation and application of the defence of self-defence (though rarely any reference to the new statutory provisions). In dealing with the necessity for the use of force, candidates often stressed that the facts should be taken as the accused genuinely perceived them to be (certainly relevant to George's perceptions of Ian's intentions).

In examining the issue of proportion, many candidates cited ***Palmer*** and emphasised that account must be taken of the panic that those about to be attacked might suffer, though some argued equally strongly that George and Henry were employed and trained to deal with such incidents, and might be expected to remain calmer than an ordinary victim. Following ***Clegg*** and ***Martin***, some candidates argued that the force was disproportionate by reference to the serious injury to Ian which had resulted, perhaps indicating a confusion between the idea of the conduct and its intended, foreseen or likely consequences, and those which rather unexpectedly occurred. Weaker candidates either failed entirely to identify the possibility that the defence could apply or treated it very superficially, sometimes concentrating only on the requirement for proportion with little attempt to develop an explanation of the relevant legal framework. Once again, some candidates displayed a fundamental misunderstanding of the law by attempting to introduce the defence of provocation.

Question 05

This question required a relatively straightforward analysis of John's liability for murder, involving consideration of the elements of the offence of murder and the possibility of pleading either or both of provocation and diminished responsibility to reduce the crime to voluntary manslaughter. Though Henry died in consequence of losing control of his car and crashing, rather than from the direct effects of being struck by the brick, there is little doubt that the throwing of the brick was both a cause in fact and the cause in law of Henry's death. It was entirely predictable that Henry might lose control and crash in such circumstances, and that he might be seriously injured or die as a result.

So, the *actus reus* aspects of the offence could have been dealt with speedily and simply. The *mens rea* was rather more problematic. The offence of murder requires proof of an intention to kill or to cause serious injury, and intention certainly consists of an aim or purpose and possibly includes foresight of virtual certainty (***Woollin***). Alternatively, foresight of virtual certainty is

evidence of intention (the ***Matthews and Alleyne*** interpretation of ***Woollin***). It was arguable that John must have intended at least serious injury in throwing the brick at John, whether he intended that to result directly from the striking with the brick, or indirectly by causing him to crash. If this could not be proved, it might have been permissible to fall back on the proposition that foresight of virtual certainty would suffice. However, would death or serious injury be a virtually certain consequence of John's conduct? Would John have thought that it was? John was probably subjected to conduct from Henry which amounted to provocation within the definition in s3 of the Homicide Act 1957, even though he himself may be said to have initiated the confrontation (***Johnson***). Additionally, Henry's laughter and rude gesture could be set in the context of the earlier conduct by George in relation to John's friend, Ian. Of course, there was a short time delay between the provocation and John's response but, in the light of the decision in ***Baillie***, this was hardly likely to prove fatal to the defence. More problematic would be the application of the objective test, since the decisions in ***AG for Jersey v Holley*** and ***James*** would prohibit any reliance on the effect of his reactive depression. On the other hand, that very reactive depression would have formed the basis for an argument that John was suffering from diminished responsibility sufficient to reduce his crime to manslaughter. His state of mind might well have amounted to an abnormality of mind within the test in ***Byrne***, and its origins in the reactive depression could be attributed to disease or, possibly, to an inherent cause. Inevitably, the requirement to prove that it resulted in a substantial impairment of his mental responsibility for his acts or omissions would always be an obstacle but there would be a reasonable prospect of success.

Candidates generally dealt confidently with the *actus reus* aspects of homicide, and particularly with the causation issue. The major criticism of answers in this area would be that some candidates could not resist the temptation to write at excessive length about causation and/or about other aspects of the *actus reus*, such as the meaning of 'human being'. Analysis of the *mens rea* aspect was of much more variable quality. Most candidates distinguished between express and implied malice aforethought, citing ***Cunningham*** and/or ***Vickers***. Candidates also frequently distinguished between direct and oblique intent, citing ***Nedrick*** and/or ***Woollin***. However, few showed a sound understanding of the distinction and its relevance to the facts of the scenario. Typically, candidates concluded that John intended grievous bodily harm in throwing the brick, though some asserted that John intended to kill because Henry was engaged in driving the car and John intended that he should crash. This was a very questionable assertion. Equally, attempts to assert that John must have foreseen the virtual certainty of death or serious injury were rarely supported by any convincing reasons and candidates did not pause to compare the degree of likelihood that the relevant consequences would occur with that evident in cases such as ***Hyam v DPP***, ***Moloney***, ***Hancock and Shankland***, ***Nedrick*** or ***Woollin***.

Rather surprisingly, a few candidates completely dismissed the possibility that malice aforethought could be proved, and so did not pursue the obvious clues that should have led to a discussion of provocation and diminished responsibility. They turned instead to a discussion of unlawful act manslaughter, for which only limited credit was available. Candidates usually, but not always, recognised that a defence of provocation might be available, though some rejected it after a very cursory examination on the basis that John's response was based on considered revenge rather than on a sudden loss of self-control. However, there were some excellent discussions of the subjective element which identified the relevant conduct of George and Henry, as well as recognising that John's own conduct was no barrier. Additionally, most candidates considered the requirement for a sudden and temporary loss of self-control, frequently citing both ***Ibrams*** and ***Baillie***. Though some treated it as almost self-evident that John had lost self-control, more perceptive candidates debated whether there had been sufficient time for John to reflect and cool down.

Discussion of the objective element tended to be weaker. Even though many candidates referred to the case of ***Holley*** and recognised that age and sex would be considered, significantly fewer understood that only characteristics or factors relevant to the gravity of the provocation would also be relevant. So, few went on to point out that the reactive depression could not be considered, and many merely asserted rather disappointingly that a reasonable person would not throw a brick in anger. Weaker candidates opted out of any attempt to apply the rules to the facts by stating simply that it would be a matter for the jury to determine. Some candidates continued to refer to the law as established in ***Morgan Smith***, with the inevitable consequence that they considered that the condition of reactive depression could be attributed to the reasonable man.

On the whole, the analysis of diminished responsibility was a little stronger than that of provocation. Candidates were able to explain and apply the abnormality of mind and qualifying cause aspects with some confidence, though there was some understandable doubt about how to classify reactive depression. Some perceptive candidates sought to overcome this doubt by relying on the fact that, in ***Dietschmann***, the House of Lords (Supreme Court) had found no difficulty in accommodating such depression within the defence. Discussion of the requirement that the abnormality result in a substantial impairment of mental responsibility was rather less accomplished, many candidates apparently being very uncertain as to its meaning and scope. This was not entirely unexpected since the test is fundamentally flawed and leaves a great deal to the discretion of the jury. However, some candidates made more significant errors in confusing this element with the objective test in provocation.

As always, some candidates discussed insanity instead of, or in addition to, diminished responsibility. This was creditworthy, though the facts gave little reason to suppose that a defence of insanity would survive the scrutiny of the requirement that the defect of reason from disease of the mind must result in a failure by the accused to understand the nature and quality of his act or, if he did so understand, that he did not know that he was doing what was legally wrong. A less acceptable variation on this appeared in those answers which confused the elements of diminished responsibility with those of insanity.

Question 06

For discussion of answers to this question, see the comments on answers to Question 03, above.

Contract Scenario 3

Question 07

The identical messages sent to Bilal, Carl and Derek could have been interpreted as either an offer or an invitation to treat. However, in the absence of an offer, it would be difficult to make sense of Andy's promise to award the contract to the person quoting the lowest price. Two possible ways of dealing with this might have been suggested. First, that the message was indeed an offer, to which the only valid acceptance would be the quoting of a price which met the condition of being the lowest. Second, that the message was both an invitation to treat and an offer. It invited offers to be made to build the extension and offered at the same time to award the contract to the lowest price quoted. The acceptance of this offer would take place when each party submitted his quotation. So, the contract would be a collateral contract entitling anyone to sue if, despite providing the lowest quotation, his offer was not accepted by Andy.

Thus, Bilal would have broken the main contract when he refused to go ahead, the measure of damages being the additional cost over his quotation of getting the work done. Derek might possibly argue that the contract should have been awarded to him but it is more likely that, on either interpretation above, his failure to meet the initial requirement (to have submitted the lowest of the three quotations) meant that he made no valid acceptance, or that he did not meet the requirement to take advantage of breach of the collateral contract. Carl's claim for extra money for doing the same amount of work that he had agreed to do in the contract would only be valid if it could be argued that he supplied consideration over and above that originally agreed. In other words, it was necessary to examine whether the facts fell within the terms of the original approach in ***Stilk v Myrick***, or could be considered more akin to those in ***Williams v Roffey***. On the whole, there was little evidence that Andy received any additional benefit, practical or otherwise, and some possibility that Carl was merely exploiting his position to charge more for the work than he had promised. In those circumstances, his claim would have been rejected on the grounds that the only alleged consideration for the additional money was a promise to perform (or the actual performance of) work which he was already bound to perform by virtue of the terms of the existing contract. The poor standard of plastering by Carl clearly fell within the terms of the Supply of Goods and Services Act 1982 s13 in connection with the exercise of reasonable care and skill. As an innominate term, breach might have entitled Andy merely to damages, or, in addition, to treat the contract as at an end, depending on the severity of the breach in the context of the performance of the contract as a whole.

For the most part, answers on the first issue were simplistic and superficial. Most candidates considered the message sent by Andy to be an invitation to treat, so that the quotations received in response were offers. However, very few attributed any significance at all to the promise to select the offer containing the lowest quotation. Most simply ignored the statement entirely, whilst a few dismissed it as being equivalent to the statement in ***Harvey v* Facey**. Though some candidates asserted on the basis of ***Carlill v Carbolic Smoke Ball Co*** that Andy was making an offer, they were equally unable to explain the significance of Andy's promise. It was generally recognised that Bilal was bound by the contract and that his failure to go through with it represented a breach. The discussion of an award of damages often extended to include the issue of Andy's duty to mitigate his loss, though this rarely induced candidates to consider whether the choice of Carl rather than Derek had satisfied that duty. Indeed, most candidates simply made no reference whatsoever to Derek's position.

Answers were often much stronger when addressing the consideration issue, candidates usually being familiar with the possible conflict in approach represented by ***Stilk v Myrick*** and ***Williams v Roffey***. They also often provided further context by discussing the decision in ***Hartley v Ponsonby***. The general consensus was that Carl would be unable to recover the extra amount. Some candidates attempted to resolve the issue on the basis of a discussion of past consideration, failing to note that there was work yet to be done by Carl. Many candidates

recognised that Andy could rely on the Supply of Goods and Services Act 1982 in relation to the poor standard of work by Carl but only the stronger candidates were able to consider the nature and legal consequences of the breach. Some incorrectly identified the Sale of Goods Act 1979 provisions, whilst others attempted to treat the issue by reference to general contract rules, apparently totally unaware of the statutory provisions.

Question 08

If Andy were determined not to proceed with his contract with Ed, there were two possible ways in which he might have attempted to extricate himself from the obligations apparently undertaken. First, when Ed persuaded Andy that he should be the supplier, he was able to do so largely because he appeared to have the capacity to service the equipment at any time, and had assured Andy of this. Since Ed knew that he had lost key workers whom he was finding it difficult to replace, he must have been well aware that he might not be able to fulfil this assurance. Consequently, there was a strong argument that Ed had been guilty of an actionable misrepresentation and, moreover, that it was fraudulent rather than merely negligent or innocent. This would have entitled Andy to rescind the contract and to claim damages on the basis of the tort of deceit. Second, even if the allegation of misrepresentation were to be rejected, Andy could attempt to assert that the contract had been frustrated in consequence of the international agreement signed by the Government which rendered it illegal for the Government to be party to a contract for the kind of work performed by Andy. This argument was rather more problematic because the illegality did not directly touch the contract between Andy and Ed, and Andy might well have been able to continue to do the work for private clients.

Essentially, then, Andy would have to argue that the cancellation of Government contracts rendered his contract with Ed something fundamentally different in nature from that originally envisaged, that it was a frustration of the common venture more akin to a case such as ***Krell v Henry*** than to one such as ***Herne Bay Steamboat Co v Hutton***. In that event, the consequences would be determined by application of the rules set out in the Law Reform (Frustrated Contracts) Act 1943. All sums payable would cease to be payable, and all sums paid would be recoverable, subject to recompense from sums paid or payable up to the date of the frustrating event for any amount expended in performance of the contract. On these provisions, the Court could have decided to award Ed a maximum of £5000 to meet the £8000 incurred in expenses. However, Andy might still have been obliged to pay up to a further £3000 if it appeared that anything done by Ed prior to the date of the frustrating event had conferred a valuable benefit on Andy.

Most candidates identified the possibility of both misrepresentation and of frustration. There were some very good explanations of the meaning of misrepresentation and of the types of misrepresentation, with the conclusion usually being that Ed had committed fraudulent misrepresentation. Discussion of the remedies for misrepresentation tended to be much weaker, especially where candidates opted to argue for negligent misrepresentation, because the relationship between rescission and damages and the basis of an award of damages were poorly understood. The nature and meaning of termination of a contract by frustration was also well explained, candidates generally displaying a sound knowledge of the different kinds of frustrating event and of the limitations on the doctrine.

However, many candidates were misled by the illegality associated with the contracts between Andy and the Government into believing that the contract between Andy and Ed was equally frustrated by illegality, so that only the stronger candidates perceived that frustration of the common venture was the more appropriate classification. As with the discussion of misrepresentation, however, the major weakness in the discussion of frustration lay in the inability of most candidates to provide an accurate and sufficiently detailed explanation of the provisions of the 1943 Act so that, inevitably, consideration of exactly what would follow from a determination that the contract was frustrated was superficial and often misconceived.

Question 09

Unfortunately, answers to this question were so poor in general that it is difficult to find anything very positive to say about them. It appears that candidates, for whatever reason, were simply not prepared to answer a question on this topic. So, some candidates attempted to discuss aspects of formation of contract (offer and acceptance, or consideration, or intention to create legal relations) as if that was the sole topic for which they had prepared. Others seized upon the words 'breach of contract' in the question as a justification to give an account of various aspects of breach, in some cases the nature of a breach, in other cases the consequences of a breach. What all of these answers had in common was that they never addressed the crucial requirement to discuss terms purporting to limit or exclude liability for the breach! This was especially puzzling in the case of candidates who had answered Question 11 on Scenario 4 (and so, here, were answering Question 12 rather than Question 09) and had discussed limitation and exclusion clauses. More generally, it was disappointing that candidates were not able to take advantage of a question which was designed to assist them in focusing their knowledge and understanding of terms in the contract on a particularly manageable area.

In the case of the very small number of candidates who did present appropriate responses, there were often some very good critical explanations of the common law approach to incorporation and to interpretation *contra proferentem*. The statutory control of such clauses was usually less well understood and the explanations were often superficial and confused. However, candidates often made good use of the overlap between, and the gaps and anomalies evident in, the 1977 Act and the Unfair Terms in Consumer Contracts Regulations 1999 to make a simple, yet compelling, case for reform.

Contract Scenario 4

Question 10

Geri's advert was either an invitation to treat or an offer. In view of the fact that she had only one book and was advertising it for sale to anyone who might read the magazine or be informed of its contents, it seemed more likely that this was an invitation to treat, in accordance with a decision such as that in ***Partridge v Crittenden***. To conclude that, on the contrary, it was an offer (relying on, say, ***Carlill v Carbolic Smoke Ball Co***), would have been to allow for the possibility that she would have found herself contractually bound to anyone who managed to accept in any appropriate way. This could have resulted in contracts with a number of offerees which she could not possibly fulfil. So, Helen's message, left on Geri's phone (presumably a text message, since Geri 'saw it'), was itself an offer, not an acceptance. This meant that no contract had yet been formed when Jamelia rang and made her own offer, raising the price by £100 in an attempt to forestall any other deal. Of course, though Helen had stated that she would consider the book hers if she heard nothing from Geri by the next morning, it was not yet the next morning and, in any case, Helen would be unable to impose an acceptance by silence on Geri even, it would seem, if Geri was content to comply (***Felthouse v Bindley***). Did Geri accept Jamelia's offer? Geri's question to Jamelia, "Will you pay in cash?" seemed more a request for further information (***Stevenson v McLean***) than a counter offer. Had it been the latter, then it would have been a rejection of Jamelia's offer (***Hyde v Wrench***). As a request for further information, it was neither an acceptance nor a rejection of the offer. Since the request for further information was obviously not an offer in itself, Jamelia's response could be nothing more than a clarification of her own offer.

Consequently, at this point, Geri was holding two offers, either of which she was entitled to accept. Since there was no obvious immediate urgency about the transaction (Helen herself had talked in terms of 'tomorrow morning'), it seems unlikely that either offer would have terminated by lapse of time by the next day. So, when Geri indicated to Helen that she had kept the book for her, this amounted to a valid acceptance. Helen's refusal to go ahead constituted a breach of contract for which Geri would have been entitled to damages of £100 as representing the difference between what the book eventually fetched on the open market, and the price that she expected to obtain from the sale to Helen. Yet, a further obstacle to the existence of a contract between Geri and Helen might have been their friendship. Was this sufficient to create a presumption against an intention to create legal relations as in cases such as ***Balfour v Balfour***, or was this perhaps more akin to the social arrangement which ultimately was considered to evidence such an intention in ***Simpkins v Pays***?

Answers invariably incorporated some aspects of the analysis outlined above, though they rarely succeeded in developing comprehensive and fully coherent explanation and application. Candidates were strongest in dealing with specific aspects of the analysis, such as the explanation of the distinction between offers and invitations to treat, and between counter offers and requests for further information, and the proposition that silence cannot amount to acceptance. They were generally much weaker in revealing how these various aspects could be brought together to suggest a substantial and coherent application. For example, few candidates suggested any rationale for the proposition that 'offers' to sell contained in advertisements are usually regarded as invitations to treat. Consequently, they were driven to rely merely on the fact that it was an advertisement for the conclusion that it was an invitation to treat and not an offer, even though, as many explained, advertisements may well be regarded as containing offers in some circumstances.

Again, candidates often became confused when pursuing the analysis, with invitations to treat suddenly and mysteriously being converted into offers, or offers becoming acceptances. Discussion of the intention to create legal relations aspect was perhaps a little more straightforward. If candidates recognised its significance, then they usually dealt with it very competently. However, many candidates did not recognise it at all and attempted to resolve the liability on the basis of offer and acceptance considerations alone.

Question 11

It is clear that Storeright accepted that the first bookcase supplied did not meet the description in the online catalogue within the terms of the Sale of Goods Act 1979 s13 (note that the scenario did not say that she bought the bookcase online, merely that she studied the catalogue online – it is not at all unusual for customers to study catalogues, whether as hard copies or online, but then to make the purchase in person!). Their response was to send a replacement bookcase (again, this could have been delivered from a local store) and it seems that Geri would have been content to accept this replacement had there been no further problems. In reality, there were defects of a cosmetic nature which certainly could have amounted to a breach of the implied term as to satisfactory quality under the Sale of Goods Act s14(2). The usual remedies for a breach of these implied terms, which are conditions, include the right to reject the goods and to claim damages for consequential loss. However, the right to reject may be lost where the goods have been accepted, including by lapse of a reasonable amount of time, though the buyer is not deemed to have accepted until he or she has had a reasonable opportunity to inspect the goods.

Additionally, under s48, where the buyer is a consumer, and in the event of a breach, he or she is given rights to require repair or replacement, or to a reduction in the price. Thus, Geri might have been able to reject the replacement bookcase, though the delay in doing so occasioned by her holiday might have proved fatal. In any case, she would at least have a right to a reduction in the price to account for the cosmetic defects, and may actually have retained a right to have yet another replacement bookcase. The attempt by Storeright to impose a limitation on their liability would not be successful. Even if the term was incorporated into the contract, which would raise issues of adequate notice in accordance with the common law approach, the Unfair Contract Terms Act 1977 s6 would invalidate any such term.

Many, though not all, candidates understood that the respective obligations were governed essentially by the provisions of the Sale of Goods Act 1979 but few candidates had a sufficiently detailed knowledge of those provisions to attempt a comprehensive analysis. Many embarked rather needlessly on an examination of the breach of s13 committed by Storeright in the initial sale of the bookcase, failing to perceive that the true relevance of this aspect was its implication for subsequent obligations in connection with the supply of the replacement. Indeed, some candidates were so intent on dealing with this aspect that they devoted much of their answer to a discussion of misrepresentation, sometimes dealing with very little else. Some credit was given to this approach but it should be emphasised that it was largely misconceived. Geri was not seeking to treat this as a matter of misrepresentation and her statutory remedies under the Sale of Goods Act 1979 were far more powerful and accessible than any which could have been sought by an action in misrepresentation.

Discussion of the implied term under s14(2) was usually brief and superficial, though occasionally accompanied by examination of relevant cases. There was virtually no reference to the provisions of s14(2B), listing the aspects of state and condition of the goods which may be taken into account, including appearance and finish and freedom from minor defects.

Discussion of the possible remedies was weaker still. It appeared that very few candidates were aware of the specific remedies provided by the statute and most simply relied in a very superficial way on general contractual remedies. Thus, though the right to reject, and the circumstances in which that right may be lost, were occasionally mentioned, there was no

recognition at all of the rights available to a consumer to require repair or replacement, or a reduction in the price. Of those candidates who examined the attempt by Storeright to limit or exclude liability for the breach, many dealt only with the common law approach to incorporation, or with the statutory prohibition (more understandable). Surprisingly, therefore, many candidates were totally unaware that the 1977 Act absolutely bars restrictions on liability for breach of the implied terms as to description, quality and fitness for purpose in consumer sales. Other candidates recognised that the 1977 Act does intervene but incorrectly asserted that it renders any such term subject to a test of reasonableness.

Question 12
For discussion of answers to this question, see the comments on answers to Question 09, above.

Mark Ranges and Award of Grades

Grade boundaries and cumulative percentage grades are available on the Results Statistics page of the AQA Website: http://www.aqa.org.uk/over/stat.html.