

Teacher Resource Bank

GCE Law

Other Guidance:

- Assessment Process and Candidate Exemplar Work



THE ASSESSMENT PROCESS

Section 1: The subject criteria

The assessment of A level Law is designed to test candidates' mastery of the subject criteria. In particular, candidates are encouraged to:

- develop knowledge and understanding of selected areas of the law of England, Northern Ireland and Wales;
- develop an understanding of legal method and reasoning;
- develop the techniques of logical thinking and the skills necessary to analyse and solve problems by applying legal rules;
- develop the ability to communicate legal arguments and conclusions with reference to appropriate legal authority;
- develop a critical awareness of the changing nature of law in society.

The first of these aims requires candidates not only to have detailed knowledge of different areas of law, with appropriate authority and examples in support, but also to display awareness of their significance and of the relationship between them.

The second and third aims apply in particular to evaluative part (c) questions in Unit 1 and to application and evaluation in Units 2, 3 and 4. They require candidates to identify the issue in question, explain the relevant law with appropriate supporting evidence and then either discuss or apply that law as directed by the question.

The fourth aim not only identifies the importance of candidates basing explanation, application and evaluation of the law upon evidence, but also focuses upon the need for their writing to be sufficiently clear, legible and grammatically correct to communicate its meaning effectively. This is reflected in part in the additional marks for the quality of written communication.

The fifth aim is assessed across every unit, but particularly in the part (c) questions in Unit 1, the evaluative part (c) questions in Unit 3 and in the Concepts of Law essay in Unit 4. Candidates need as far as possible to draw upon recent issues and developments within the law when answering these questions.

Section 2: The assessment units

The specification consists of four units, two each for the AS and the A2. Each unit carries 25% of the total marks for the full A level. The units can be taken at any stage of the course, theoretically in any order, and are available in the January and June sittings, with the exception of LAW04, which will only be available in June.

Unit 1 has eight questions, one for each topic in the specification. Candidates answer three questions, with at least one from each of the two sections entitled Law Making and the Legal System. There will be no mixed questions, ie each question will be based upon a single topic. Each question has three parts: (a) and (b) are explanatory, (c) is evaluative. Each question carries 30 marks. An additional 5 marks are available for QWC assessed over the whole paper.

Unit 2 has three sections. Section A, Introduction to Criminal Liability, is compulsory. Candidates then choose either Introduction to Tort or Introduction to Contract for their second question. Each section has a scenario followed by a series of compulsory questions which test candidates' knowledge and understanding of the substantive law, of court procedure and of either sentencing (Section A) or damages (Sections B and C). Some questions in each section require application of the law to the scenario. The specimen booklet illustrates the structured nature of these questions. There are a further 5 marks available for QWC assessed over the whole paper.

Unit 3 has two questions on Criminal Law and two on Contract Law. Candidates are required to answer one question. Each question comprises three parts: parts (a) and (b) test their ability to explain and apply the law to a problem scenario; part (c) asks them to evaluate one area of the substantive law. Part (c) is common to both questions on the same topic. Each question carries 25 marks. There are a further 5 marks available for QWC assessed over the whole paper.

Unit 4 has three sections. Sections A and B focus upon Criminal Law (Offences against Property) and Tort respectively. Candidates must answer one question from a choice of two on their chosen area of law. Each question contains two parts, each of which tests their ability to explain and apply the law to a problem scenario. Part (a) and part (b) in Sections A and B carry 25 marks each. In Section C, Concepts of Law, students must answer one essay question from a choice of three. Questions in Section C carry 30 marks. A further 5 marks are available for QWC assessed over the whole paper.

Examples of the questions for each unit are available in the Specimen Question Papers.

Section 3: Marking the papers

Candidates complete Units 1 and 2 for certification at AS, and also Units 3 and 4 for certification for the A level. All work is externally assessed: no coursework option is available in Law.

Examiners are issued with mark schemes which have been written by the Principal Examiner at the same time as the question paper (see the Specimen Mark Scheme booklets). These identify the potential content of each question and the levels of response. The levels of response reflect the guidelines developed since the introduction of the previous AS and A2 exams in 2000; the assessment is aimed at the notional 17- or 18-year-old, so the level of understanding required by these criteria will be those of the notional 17-year-old (for AS) or 18-year-old (for A2). The descriptors for the levels of response that are currently being used are set out below.

Descriptors for Units 1 and 2

Sound

- The material will be generally accurate and contain material relevant to the Potential Content.
- The material will be supported by generally relevant authority and/or examples.
- It will generally deal with the Potential Content in a manner required by the question.

As a consequence, the general features of the Potential Content are dealt with competently and coherently.

Clear

- The material is broadly accurate and relevant to the Potential Content.
- The material will be supported by some use of relevant authority and/or examples.
- The material will broadly deal with the Potential Content in a manner required by the questions.

As a consequence, the underlying concepts of the Potential Content will be present, though there may be some errors, omissions and/or confusion which prevent the answer from being fully rounded or developed.

Some

- The material shows some accuracy and relevance to the Potential Content.
- The material may occasionally be supported by some relevant authority and/or examples.
- The material will deal with some of the potential Content in a manner required by the question.

As a consequence, few of the concepts of the Potential Content are established, as there will be errors, omissions and/or confusion which undermine the essential features of the Potential Content.

Beneath these three levels are the descriptors “limited” and “fragments”, the former describing an answer where there is limited knowledge or understanding under AO1, and/or limited application or evaluation under AO2, and the latter an answer where the answer is largely incoherent but contains some fragments of material that are at best tangential to the question.

Descriptors for substantive questions on Criminal Law, Contract and Tort

| Level | Explanation | Application |
|--------------|---|--|
| sound | The answer correctly identifies and accurately explains the relevant rule(s) in the central aspects of the potential content. Where appropriate, the explanations are supported by relevant statutory and/or case authority and illustration (which is adequately developed where necessary to explain the ratio and/or assist in the application to the facts). Where there are more marginal aspects of the rules, there may be some minor omissions or inaccuracies in the explanation of the rule(s) and/or supporting statutory/case authority and illustration. | The answer selects and emphasises the relevant facts from the scenario and makes close reference to them when explaining how the rules (including any supporting and/or case authority) apply to afford a solution. Where appropriate, the application explores the effect of different interpretations of the rule(s) and/or of conflicting rules and/or of different interpretations of the facts. The solution suggested is clearly based on the explanation and application of the rules and is sustainable. |
| clear | The answer correctly identifies and accurately explains significant parts of the rule(s) in the central aspects of the potential content, though there are omissions of some part(s) of the rule(s), or errors in the explanation, in those central aspects. There may be a little over-emphasis on marginal aspects of the rules at the expense of some of the more central aspects. In the higher part of the band, statutory and/or case authority and illustration are used but there may be a little confusion and error in selection and/or explanation or the explanation may be limited. At the lower end of the band, there may be little evidence of statutory and/or case authority and illustration or more evident inaccuracies. | The answer selects and emphasises some of the relevant facts from the scenario and makes reference to them when explaining how the rules (including any supporting statutory and/or case authority) apply to afford a solution. The application, though otherwise persuasive, may fail to canvass credible alternative solutions (based on alternative interpretation of the law or of the facts) or there may be a little error or confusion in the application to the facts. The solution suggested is broadly based on the explanation and application of the rules, though there may be some evident weakness. |
| some | The answer correctly identifies and accurately explains a very limited part of the relevant rule(s) in the central aspects of the potential content. There may be a very evident imbalance between explanation of central and of more marginal aspects of the rule(s). Alternatively, the answer explains a more substantial part of the relevant rule(s) in the central aspects of the potential content but the explanations suffer from significant omission, error or confusion. Explanations may emerge only out of attempts to introduce relevant case authority and illustration. If introduced at all, statutory and/or case authority and illustration may be of marginal relevance or the explanation may be highly superficial or subject to significant inaccuracies or not properly used to support the explanation of the relevant rule(s). | The answer selects and emphasises one or two relevant facts from the scenario and makes reference to them without being able to suggest a coherent application. More broad-ranging attempts to identify and make reference to relevant facts display confusion or error. Alternatively, the answer tends to make simple assertions or assumptions about the way in which the rule(s) apply to the facts, so that application is general and unspecific, being unrelated to particular facts. The application fails to canvass credible alternative solutions (based on alternative interpretations of the law or of the facts). Little use is made of whatever statutory or case authority and illustration is incorporated in explanations. The solution suggested is only imprecisely related to the explanation of the rule(s). |

Descriptors for Concepts of Law evaluative questions

| Level | Explanation | Application |
|--------------|---|--|
| sound | The answer presents a strong explanatory framework, correctly identifying and accurately and comprehensively explaining, say, relevant rules, procedures, institutions and theories in the central aspects of the potential content. Where appropriate, the explanations are supported by relevant examples and illustration (which is adequately developed where necessary to further elucidate the explanations). Where there are more marginal aspects of the potential content, there may be some minor omissions or inaccuracies in the explanation and/or in the treatment of the supporting examples and illustration. | Arguments are developed perceptively and coherently, making careful use of framework explanations, examples and illustration, and are directly related to the thrust of the question. Summaries and conclusions are sustainable, and demonstrably emerge from the supporting explanations and arguments. |
| clear | The answer presents an explanatory framework, correctly identifying and accurately explaining significant parts of, say, relevant rules, procedures, institutions and theory in the central aspects of the potential content, though there are omissions in the explanations of some parts of the rules, procedures, institutions and theory, or errors or some confusion in the explanation in those central aspects. There may be a little over-emphasis on marginal aspects at the expense of some of the more central aspects. In the higher part of the band, relevant examples and illustration are used but there may be a little confusion and error in selection and/or explanation or the explanation may be limited. At the lower end of the band, there may little evidence of relevant examples and illustration or more evident inaccuracies. | Appropriate arguments are introduced but may not be fully developed or may be restricted in range. Alternatively, the arguments suffer from a little inaccuracy or confusion. The arguments make use of framework explanations (including any relevant examples and illustration) but do not always succeed in incorporating them in a fully coherent way or in demonstrating their full relevance. Summaries and conclusions may be a little tentative and may not fully address the thrust of the question. Though broadly based on the supporting explanations and arguments, summaries and conclusions may not be closely and carefully related to them in the discussion. |
| some | The answer presents an explanatory framework which correctly identifies and accurately explains a very limited part of, say, relevant rules, procedures, institutions and theory in the central aspects of the potential content. There may be a very evident imbalance between explanation of central and of more marginal aspects of the potential content. Alternatively, the answer attempts explanation across a much broader range of relevant rules, procedures, institutions and theory in the central aspects of the potential content but the explanations suffer from significant omission, error or confusion. Explanations may emerge only out of attempts to introduce relevant examples and illustration. If introduced at all, examples and illustration may be of marginal relevance or their treatment may be highly superficial or subject to significant inaccuracies or not properly used to support the explanation of the relevant rules, procedures, institutions and theory. | There are relevant arguments but they are undeveloped and may tend to consist of simple assertions or assumptions. Alternatively, arguments may be characterised by evident confusion which significantly impedes coherence. Very limited use is made of framework explanations and any examples and illustrations. Summaries and conclusions may be absent. Where present, they may barely address the thrust of the question, and be only imprecisely related to any supporting explanations and arguments. |

Immediately after the examination, examiners (most of whom are A level Law teachers) attend a meeting run by the Principal Examiner, at which the mark scheme is explained in detail. Using anonymous photocopied live scripts, the examiners test their application of the mark scheme and arrive at an agreement with the Principal Examiner on the marks each answer in each script deserves. These marked scripts become the benchmarks for marking the remaining scripts. At different stages, the marking of each examiner is reviewed to seek to ensure consistent application of the mark scheme. Should lingering doubts continue about the marking of any particular examiner, the scripts of that examiner will be re-marked by another examiner who has consistently satisfied each review.

Once the marking is complete, an awards meeting is held where grade boundaries are decided. It is then possible to allocate Uniform Mark Scheme (UMS) marks and grades to each script. (Note that it is not necessary to secure full marks on a unit in order to obtain maximum UMS marks.) The UMS marks for each unit are aggregated to determine a final grade for the subject. At AS, where 300 UMS marks are available, 240 marks are needed for a grade A, 210 for a B, 180 for a C, 150 for a D, and 120 for an E. These marks are then doubled for the full A level: out of the 600 available, 480, 420, 360, 300 and 240 are needed for grades A, B, C, D and E respectively.

Following the publication of results in March and August, centres have access to scripts and/or the re-mark process. This is valuable where teachers harbour doubts about results or wish to review the application of the marking process for their own teaching purposes.

Section 4: Key Words

In Unit 1, the (a) and (b) part questions are introduced by a range of key instructions, including “explain”, “describe” and “outline”. Sometimes the adverb “briefly” is included. These words are inviting students to provide detailed, relevant, factual information. Where appropriate, this will include examples, cases, statutes, etc. As the answers are worth ten marks, no more than ten minutes’ worth of information is expected for a sound answer. The example below illustrates a sound 10 minute answer to a question on the appointment of magistrates. A more detailed answer is also provided. However, such detail cannot reasonably be expected within the time available.

Briefly describe the qualifications and selection of lay magistrates. (10 marks)

1 Magistrates must be between 18 and 65 years old on appointment, even though they don’t have to retire until they are 70. Younger applicants are being actively encouraged as most offenders are young people. They must possess six key qualities such as sound judgment, good communication skills, and social awareness. The last is particularly important as magistrates cannot have personally experienced all the issues that come before them. These key qualities are more important than legal knowledge. Thirdly, lay magistrates must live or work near the bench on which they will be sitting. This seeks to ensure local knowledge. Some people might have all these qualifications, but are still disqualified. This applies to the police, to certain criminals, and to bankrupts. This is designed to maintain public confidence in the impartiality and merit of the magistracy.

The first stage in appointing magistrates is advertising vacancies. This is done to attract people from different backgrounds, especially working class people. Then people must nominate themselves, or be nominated by others, such as family and friends, but with the candidate’s approval. Their applications go to a local advisory committee, a body which reviews the applications and shortlists for interview. There are two stages to the interviews. At the first interview they ask about personal interests and qualities. At the second they give case scenarios and question the applicants about them. This second stage is to assess their potential judicial qualities. The LAC then sends recommendations to the Lord Chancellor, who will review them and decide who to appoint. In doing this he considers the need for a balanced bench.

Examiner’s comment

The answer provides good balance between the two parts of the question, with a lot of relevant, accurate detail. Not much more can be reasonably expected of a notional 17-year-old in exam conditions with 10 minutes available. This would be regarded as a sound answer, scoring very highly.

2 Unlike judges, magistrates do not require any legal qualifications. However, there are many qualifications they do require. First of all they must be between 18 and 65 years old. The age has recently been reduced from 21 to 18 to encourage more magistrates in their twenties and thirties to apply. Since magistrates have to retire at 70, there is no purpose appointing anyone older than 65. Secondly, magistrates must possess six key qualities. These are: good character; understanding and communication; social awareness; maturity and sound temperament; sound judgment; and commitment and reliability. These qualities are much more important than any knowledge of the law. Without any one of these qualities magistrates would not be able to carry out their responsibilities effectively. Thirdly, lay magistrates must either live or work within or near the bench on which they will be sitting. This is to ensure that they are familiar with the area in which they serve. Finally, certain groups are disqualified: firstly the police are not allowed to serve because of their involvement with investigating crime and the fear of conflicting interests; those with serious criminal convictions are also disqualified as this would bring into disrepute the reputation of the bench; and bankrupts, as people who cannot pay their own debts cannot force others to pay theirs.

About 1,500 new lay magistrates are appointed every year. The first stage of the appointment process is advertising vacancies. Adverts might appear in local papers, public places, or even the sides of buses. Experienced magistrates will often go into places of work to attract new magistrates, particularly those from working class backgrounds and ethnic minorities, as both groups are under-represented on the magistrates' bench. Those who are interested can either nominate themselves, or be nominated by family, friends, or colleagues. Their applications go to the local advisory committee, a body largely made up of experienced magistrates. They review the applications and shortlist those they wish to interview. There are two stages to the interviews, often with a lengthy gap between. At the first interview they focus on personal interests and qualities, and try to discover the attitudes of the applicants towards such issues as drink driving or young offending. At the second interview they give case studies and question the applicants about them. This second stage is to assess their potential judicial qualities. The LAC then recommends certain individuals for appointment. These names are sent to the Lord Chancellor, who will examine them and come to a decision. He is keen to attract more working class magistrates, so has divided all occupations into 11 categories, and will allow no more than 15% of any one category to serve on the same bench.

Examiner's comment

An extremely detailed answer that would also score very highly. However, the student has probably spent too much time on this question and lost marks elsewhere as a result.

In Unit 2, some of the questions require students to explain, describe or outline particular facets of law. Students should note the number of marks available for each of these questions and allocate their time accordingly (one mark per minute as a rough guide). Most answers will require reference to relevant case law. There is an example below. Questions also ask students to “discuss the criminal liability of X” based upon a scenario. This requires students to identify a relevant offence, explain its *actus reus* and *mens rea*, with appropriate cases to illustrate, and apply to the problem. The second example below shows the style of answer that would score highly. On the tort and contract sections, students can expect to be asked to apply the law which they have already explained. In these questions, they are not expected to repeat their earlier explanations. The third example below illustrates this.

1 Explain, using examples, the meaning of the term *actus reus*. (7 marks)

Actus reus is the guilty action. It can be a voluntary act, a state of affairs or an omission. In *Hill v Baxter* it was said that an act would not be voluntary if a driver was being attacked at the time by a swarm of bees, as he had no control over his actions. An act can simply be a state of affairs: in the case of *Winzar*, the police escorted a drunk out of a hospital. They then arrested him for being drunk on the highway, as he was both drunk and on the highway. An omission can also form the *actus reus* of an offence. The general rule in English law is that there is no liability for a failure to act, eg watching a blind child being run over crossing a busy road. However, the law sometimes imposes a duty to act. *Pittwood*, a railway worker, was guilty of manslaughter for failing to close level crossing gates. *Stone and Dobinson*, an elderly couple, were also guilty of manslaughter for failing to care for an infirm relative. *Miller* was guilty of arson for failing to prevent the spread of a fire he had started accidentally.

Examiner’s comment

The student explains the range of situations in which the *actus reus* can occur and illustrates each with appropriate authority. The facts of cases are briefly explained to enhance the answer.

2 (Answer based upon the scenario in the Criminal Law section in the June 2005 exam paper)

Reg could be charged with inflicting grievous bodily harm under either section 18 or section 20 of the Offences against the Person Act 1861 (OAPA). The *actus reus* involves inflicting (causing) grievous bodily harm. The word “grievous” simply means serious (Saunders). This would include broken bones, permanent disability and dislocated joints. This can be either physical harm, as in *Martin* where theatregoers were physically injured in a stampede, or psychological, as in *Burstow* where the victim suffered severe depressive illness. Cutting out someone’s tongue would certainly be regarded as serious harm, and so the *actus reus* of gbh has been committed,

There are two forms of *mens rea* for gbh. Under Section 20 of the OAPA, the *mens rea* is either intention or recklessness (*Cunningham* ie conscious risk-taking) for causing some harm. There is no need to intend or be reckless about causing serious harm. This was confirmed by the Court of Appeal in *Mowatt*, where the defendant had attacked a police officer. Section 18 contains the more serious offence of gbh with intent. The *mens rea* is different in two respects from section 20: firstly, there must be proof of intention; recklessness does not qualify; and secondly, the defendant must have intended serious, rather than just some, harm. This was confirmed by the House of Lords in *Parmenter*. The fact that Reg used a weapon to knock out his victim and

then to cut out his tongue is evidence of his intention rather than mere recklessness. By using this weapon Reg must have intended to cause Jack at least some harm, so would be liable under section 20. However, the act of cutting out someone's tongue is not only deliberate, ie intentional, it is also very serious. Reg must have intended to cause serious harm, and so has the *mens rea* for Section 18 as well as for Section 20.

Examiner's comment

The student has identified the most appropriate offence, explained the actus reus and mens rea, citing relevant authority along the way, and then applied the law by referring to the facts of the scenario as evidence. A sound answer that would score very highly.

3 (Answers based upon questions 2(a)(i) to (iii) and 2(b) in specimen paper for Unit 2.)

2(a)(i) Explain, using examples, the meaning of the term *duty of care*. (7)

In *Donoghue v Stevenson* Lord Atkin established the neighbour principle as the test for deciding the existence of a duty of care. He said you "must take care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour". The courts now adopt the three-part test established in *Caparo v Dickman*. The first part is whether harm is reasonably foreseeable. In *Haley v LEB* it was reasonably foreseeable that a blind man would be injured by a trench dug by the defendants. Secondly there must be proximity (a close relationship) between the defendant and the victim. In *Caparo* there wasn't a close relationship between the accountants and any potential shareholder. In *Law Society v KPMG Peat Marwick* there was a close relationship as the claimants had commissioned the accountants' report. Finally, it must be fair and reasonable to impose a duty of care. Sometimes the police, rescuers and emergency services are exempt. In *Hill v Chief Constable of W Yorkshire*, the court decided it would not be fair for the police to owe a duty of care to all potential victims of crime. However, in *Kent v Griffiths*, it was fair for the ambulance service to owe a duty of care to a patient.

2(a)(ii) Explain, using examples, the meaning of the term *breach of duty*. (7)

The courts use the "reasonable man" to decide if someone is in breach of their duty of care. This is an objective test. The reasonable man is competent in his chosen activity. For example a learner driver is judged against the standard of a reasonable driver (*Nettleship v Weston*), and a doctor against the standard of a competent doctor (the *Bolam* principle). However, a child is judged against the standard of the reasonable child of his own age (*Mullins v Richards*).

The courts look at factors to help decide what is reasonable. Firstly, the size of the risk: in *Bolton v Stone* the risk of a cricket ball being hit out of the ground was tiny, as there was a high fence around it. The second factor is the cost of precautions. In *Latimer v AEC* the company had taken all reasonable precautions after flooding, so were not in breach. Thirdly, if the activity is of social value, the reasonable man is allowed to take risks, as in the case of *Watt* where a fire engine was rushing to the scene of the accident. Also, if there is a risk of serious injury, the defendant is expected to take greater care. Reasonable employers would have taken greater care in the case of *Paris*, a one-eyed man.

2(a)(iii) Explain, using examples, the meaning of the term *damage*. (7 marks)

The courts first consider factual causation. In *Barnett v Chelsea and Kensington Hospital*, a patient died shortly after receiving negligent treatment. However, he died not from medical negligence but from arsenic poisoning. The hospital therefore did not in fact cause his death and so was not liable.

Secondly the courts ask whether the harm suffered was reasonably foreseeable. In *the Wagon Mound*, it was totally unforeseeable that a ship spilling some oil would lead to a spark from welding igniting the oil and setting fire to another ship. The fire therefore was too remote. In using this test it is only the type of injury that has to be foreseeable, not necessarily the precise manner in which it occurred. In *Hughes v Lord Advocate* the burns suffered by the boy were the sort of injury that could be expected from leaving a paraffin lamp lying around.

Finally the courts consider the thin skull rule. In *Smith v Leech Brain*, the claimant was burned on the lip by molten metal. This triggered a dormant cancerous condition, which resulted in his death. The defendants were held responsible not only for the burn, but also for his death, as the burn on the lip triggered the cancer.

Examiner's comments

The three answers briefly explain the relevant law and illustrate with appropriate cases. There is brief reference to the facts of some of the cases to develop the explanation.

2(b) Using the explanations in your answers to 2(a), discuss whether Olga has been negligent towards Petra. (10 marks)

Using the *Caparo* rules, it is reasonably foreseeable that a novice windsurfer who is tired and using cheap equipment will cause harm of some sort to other users of the lake. Clearly there was a close physical relationship between Olga and Petra as they were both using the same lake, and Olga actually crashed into Petra. There is no public policy reason to deny the fairness of a duty of care: Olga is not a member of the police or emergency services.

When considering the reasonableness of Olga's behaviour, it is worth noting that the size of risk she took was increased by her continuing to surf after becoming tired, and by using a cheap sail board. It would have cost her nothing to have stopped or rested after becoming tired, and probably not an excessive amount to buy better equipment. Learning to windsurf is of no benefit to anyone other than Olga herself, and windsurfing when tired created the risk of serious injury, or even death by drowning of anyone she hit. Applying these factors, Olga would be deemed to have acted unreasonably. Furthermore, she would be judged against the standard of a competent windsurfer: clearly she fell below this standard and so breached her duty of care.

Establishing causation is straightforward: but for Olga breaching her duty of care, Petra would not have suffered any harm. Also the damage suffered ie the capsized boat and the loss of fishing equipment, is exactly the type of damage that is foreseeable. Olga therefore has caused this damage, and so is negligent.

Examiner's comment

The student has applied the three elements of duty, breach and damage. There is no reference to earlier case law: that is unnecessary here as it is already provided in 2(a). The answer concentrates on breach, as this is where most of the issues arise. By contrast there is relatively little to say about duty and damage.

In the part (a) and (b) questions in Units 3 and 4, students are often invited to “consider” or to “discuss” an area of law. This requires them to explain and illustrate the relevant law and then to apply it to the facts of the problem in the scenario. When applying the law, they should be aware that all the facts are material and should be used as evidence. Encourage them to avoid making unsubstantiated assertions. In the part (c) questions in Unit 3, they are also invited to discuss an area of law. A sound answer will normally offer a critique of the current law by explaining and illustrating its strengths and/or weaknesses, and then consider proposals for reform, referring to published proposals where available. Here is an example.

Critically consider the strengths and weaknesses of the current law on provocation, including in your answer any appropriate suggestions for reform. (25 marks)

Under section 3 of the Homicide Act 1957, the defence of Provocation is available to the defendant who is provoked by things said or done into losing his self-control and killing. He is allowed the defence only where a reasonable man would have reacted in the same way.

It seems strange that virtually anything, even the crying of a baby (Doughty) is considered sufficient for provocation. Many academics have argued that this first test should be limited to “things done” and should exclude “things said”. Others suggest that even “things done” should be limited to more extreme acts of provocation.

The loss of self-control test, a subjective one, has also become easier to satisfy. In *Duffy*, Lord Devlin said that the loss of self-control must be sudden and temporary. However, it has been extended to include slow-burn anger, as in *Baillie*, thus seeming to fail to distinguish between reaction and revenge killings. It has also been stretched to recognise the cumulative effect of domestic violence, as in *Ahluwalia*. Although understandable as a response to the criticism that provocation is discriminatory against women, this moves further away from Lord Devlin’s requirement that the loss of self-control be sudden and temporary.

It is arguable that senior judges have deliberately extended the availability of provocation to allow them more discretion in sentencing as they are bound by the mandatory life sentence for anyone guilty of murder.

The objective element of provocation has caused considerable confusion. Under the 1957 Act the jury has to consider whether the provocation was enough to make a reasonable man do as the defendant did. In coming to their decision they are invited to take into account what the effect of the provocation would have been on the reasonable man. This is clearly an objective test. There is an argument of course that a perfectly reasonable man would never kill, even under extreme provocation. However, the law is designed as a concession to human frailty.

When considering this (objective) test in *Smith*, the House of Lords declared that the jury should now consider all characteristics as relevant, even those that affected the defendant’s powers of self-control. Thus extreme jealousy and possessiveness were considered relevant in *Weller*. In other words they should consider the effect not on a reasonable man, but on a jealous or bad-tempered reasonable man! Such a decision blurs the distinction between provocation and diminished responsibility: the latter was designed as the defence for people with abnormalities, such as no self-control; the former for normal people who flip under extreme circumstances. It would be better to keep the two defences separate.

In Holley, the Privy Council has effectively done this by overruling Smith and Weller in declaring that only those characteristics that affect the gravity of the provocation can be considered relevant. This, I suggest, is a welcome limitation on the availability of the defence, and it keeps provocation and diminished responsibility as distinct defences.

In 2004 the Law Commission asked whether provocation should be scrapped along with the mandatory life sentence for murder. It also asked whether the current special defences should be replaced with a single defence of extreme emotional disturbance. I would support such a move, as it would provide a defence to deserving cases such as Cocker, who killed his terminally ill wife, not out of anger, but out of loving sympathy. In December 2005 the Law Commission proposed that provocation fall under the new umbrella of second-degree murder, along with homicides committed under duress or diminished responsibility. This change in terminology would have limited impact on the operation of the defence. In view of the uncertainties caused by House of Lords decisions in recent years, it would now be better for Parliament to intervene in this area. However, that does not necessarily remove future judicial uncertainty.

Examiner's comment

Although the answer does not deal with all the issues that could be raised, it does succeed in explaining the current law on provocation, taking into account recent developments and illustrating with cases. It also considers proposals for reform, and comments upon the desirability of these. It would therefore score highly.

Finally in Unit 4, students are required to write one essay in the Concepts of Law section. A successful answer will select and explain relevant areas of law, underpin with appropriate theory and develop a coherent line of argument. Below is an example.

Discuss the suggestion that fault is a central element of liability in English law, but that it should not be. (30 marks)

Fault is a legal and moral term used to describe a person's culpability or blameworthiness. Liability is a legal term describing a defendant's responsibility under the law. As a general principle the law should only hold a person liable where he is blameworthy. In criminal law liability does depend largely upon fault. For example there is a requirement that the *actus reus* be voluntary, thus excusing defendants such as Whoolley, who crashed his lorry while having a sneezing fit, and those acting under duress, such as Abdul-Hussain, who hijacked a plane because of his fear of facing certain death on being returned to Iraq.

Similarly, defendants escape liability if they are not the cause of the unlawful consequence in result crimes. White was therefore acquitted of the murder of his mother, as she had died of natural causes, and Jordan likewise as his victim had died of bad medical treatment rather than the stab wound which he had inflicted. Under the law it would be wrong to hold them responsible for consequences for which they were not to blame.

In criminal law liability is limited by the need for *mens rea*. Generally, the more blameworthy the offence, the higher is the degree of *mens rea* required. So, S18 gbh, with a possible life sentence, requires proof of intention to cause serious harm, whereas S20 gbh, with a maximum of five years, requires either intention or recklessness, and only as to causing some harm.

On the other hand, there are situations where convictions occur with limited fault.

Winzar, for example, was convicted even though he was brought to the scene of his offence by the police.

Similarly, Savage was convicted under section 47 abh even though she only had *mens rea* for battery. A problem with liability also arises in murder, where conviction can be based upon implied malice ie intention to cause gbh. Furthermore, some criminal offences require no *mens rea* at all for at least one element of the *actus reus*. These tend to be regulatory offences, dealing with matters of social concern, such as food hygiene (Smedleys Ltd v Breed), environmental pollution (Alphacell Ltd. v Woodward), and selling alcohol, etc to under-age children (Harrow LBC v Shah).

Those who support these decisions argue that individuals should be responsible for the consequences of their actions: Winzar and Savage were therefore rightly convicted even though the consequences were unforeseen by them. Interestingly, the Law Commission has proposed the new offence of reckless or intentional injury to replace S47 abh: under this Savage would not be convicted unless she was at least conscious of the risk of harm. This would accord better with the principle of fault-based liability. The Law Commission has also proposed reforming the law on murder: intention to kill would be required for first degree murder. This too would sit more comfortably with the general principle of fault-based liability.

Examiner's comment

This is the first third of an essay on the given title. It successfully identifies areas of criminal law where there is a close relationship between fault and liability, and the areas where the link is more tenuous. It identifies and comments upon proposals for reform. A coherent line of argument is shaping up. The essay would then go on to explore other areas of law to test the relationship between fault and liability.