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Law 2161

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

Report on the Examination

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

Crime (Scenario 1)

Question 01

In this question, Andy was in a bar and threw a bottle at Chris in response to insults about his girlfriend (Debbie), in the context of a lot of ill feeling between Andy's group of friends and Chris's group. The bottle missed Chris, but obviously startled him when it shattered against the wall just behind Chris. It also resulted in a panic response from another customer, Edward, who, in his haste to get out, slipped on the wet floor and fell onto the broken glass, suffering such severe injury that he lost the sight in one eye. Clearly, both Chris and Edward were potential victims of an assault in these circumstances. In the case of Chris, he did not see the bottle being thrown. Consequently, he did not fear immediate personal violence from being struck by the bottle. The *actus reus* issue, therefore, was whether or not his 'instinctive' jumping away was evidence of his fear of some immediate personal violence to follow (for instance, anticipating that more bottles might be thrown and/or that Andy and his friends might launch a further attack), or was merely the almost involuntary physical response typical of being startled by an unexpected loud noise. The position in relation to Edward was slightly different. Though he was presumably somewhere nearby, Edward was not the intended target. If his panic response was evidence of fear, that fear might have been that he would unwillingly become caught up in any violence which might erupt, so that it could perhaps be regarded as a fear of immediate personal violence. Alternatively, he may simply have been fearful of being a witness to violent behaviour, without necessarily fearing for himself. In terms of *mens rea*, Andy obviously intended some kind of injury to Chris, rather than to cause him to fear immediate personal violence, and was probably not thinking of Edward at all. At best, therefore, Andy may have been reckless as to the consequence of causing Chris to fear immediate personal violence, and use of the doctrine of transferred malice might have been necessary to construct the relevant *mens rea* in relation to Edward. However, Edward actually suffered rather serious injuries, apparently far in excess of those required by the definition of actual bodily harm in ***Chan Fook***. So, any difficulties in proving assault/battery occasioning actual bodily harm under the *Offences Against the Person Act 1861 s47* might simply be circumvented by arguing that the injury to Edward was both a wound and serious injury, giving rise to possible offences under the *Offences Against the Person Act 1861 s20* and *s18*. Clearly, this raised a significant causation issue, which would require discussion of the attempted escape cases, such as ***Roberts***, and the reasonable foreseeability rule. In terms of establishing *mens rea*, it is likely that transferred malice offered the most persuasive route. If Andy intended some injury to Chris when he threw the bottle, then this intention could be transferred to the *actus reus* of the wound/serious injury inflicted on Edward, and would form the *mens rea* for the *s20* offence. If an intention to cause serious injury could be asserted, then a *s18* offence became a possibility. However, there was a suggestion that Andy and his friends had been drinking heavily. Consequently, Andy might have been able to introduce evidence of any resulting intoxication to seek to deny intention in the *s18* (specific intent) offence, even though it would not have been admissible in relation to those (basic intent) offences (assault, assault occasioning actual bodily harm, unlawful and malicious wounding/infliction of grievous bodily harm) for which recklessness suffices.

In answering the question, candidates usually undertook an analysis which included most of the issues discussed above, though a significant minority did not recognise that there may have been an offence of assault committed by Andy on Chris or, if they did so recognise, treated it as subsidiary to an assault on Edward, which could form the basis of a *s47* offence committed by Andy on Edward (providing, for example, a possible *mens rea* by way of

malice transferred from the assault on Chris). Where candidates did deal with the assault on Chris, there was a tendency to do so rather superficially, failing to perceive that there were both *actus reus* and *mens rea* issues to be resolved. So, these answers tended simply to assert that Chris's instinctive response was clear evidence that he feared for his own safety, and took it for granted that that was Andy's intention. Stronger candidates explored the issues more fully, using cases such as ***Logdon***, and ***Smith v Chief Superintendent of Woking Police Station***, and sometimes interpreted the 'sudden' throwing of the bottle as indicative more of recklessness than of intention. Bizarrely, some candidates treated the offence as battery rather than assault. Sometimes this resulted from a mistaken belief that the bottle had struck Chris, but sometimes it arose because candidates confused the elements of the two offences, or simply appeared to believe that throwing the bottle was an 'indirect' battery, irrespective of the outcome. On the whole, in dealing with Edward, candidates concentrated on the more serious offences under *s20* and *s18*, though there were some perceptive discussions of the possibility of a *s47* offence built on the assertion of an initial assault. In a small number of instances, candidates did not go beyond that offence and so were restricted in the credit available. Bearing in mind the severity of Edward's injury, it was surprising that candidates might fail to move beyond actual bodily harm for anything other than considerations of absence of *mens rea*. So, most candidates recognised the injuries to Edward as a wound, with reference to ***Eisenhower***, and/or grievous bodily harm by citing ***Smith*** and ***Bollom***, though, inevitably, some candidates erroneously claimed that a wound was needed for it to be grievous bodily harm. Others asserted that it could not be a wound simply because, it seems, it had something to do with an eye, and was therefore entirely on all fours with the *result* in ***Eisenhower***. Stronger candidates succeeded in presenting an accurate explanation and application of causation rules, citing cases such as ***Roberts*** and ***Williams***, and occasionally ***Dear***, in discussing the proposition that Edward's conduct was reasonably foreseeable, so that it did not amount to a break in the chain of causation. Weaker candidates often wrote an undiscriminating account of the causation rules, discussing at length irrelevant aspects such as improper medical treatment, even if they then reached an appropriate conclusion. Additionally, it was evident that some candidates did not understand that the courts have never yet been prepared to apply the 'thin skull' rule in the context of injury resulting to a victim in consequence of that victim's own attempted escape. In discussing the *mens rea*, many candidates examined both *s18* and *s20* in analysing the true state of mind of Andy. A typical approach was to state that Andy was reckless in throwing the bottle, and would have been aware of a risk of some harm to a bystander who might fall as a result of the bottle shattering and the spilling of beer. Some, however, concluded that, in throwing the bottle at *Chris*, Andy *intended* at least some, and possibly serious, harm. This *mens rea* could then be transferred to the *actus reus* of the offence against Edward using the transferred malice rule. Both in this context and in the context of actual bodily harm, the explanation and application of transferred malice were often imprecise. More generally, there were some candidates who did not accurately state the *mens rea* of the s20 offence, or who expressed it merely in terms of intention or recklessness without specifying the consequence which must be intended or foreseen. Even so, the general impression was that most candidates had understood the way that the offences would apply in Edward's case.

A majority of candidates identified the defence of intoxication, with frequent reference to the cases of ***Kingston*** and ***Majewski***, and sometimes to the alternative approach in ***Richardson and Irwin***. Analysis tended to be brief but usually recognised the difference between voluntary and involuntary intoxication and between crimes of basic and specific intent. Most candidates were then able to argue that, as this was voluntary intoxication, and most of the offences were of basic intent, evidence of intoxication would not be admissible. Where candidates had considered *s18* as a possible offence, there was some excellent discussion (often by reference to ***Lipman***) of the fact that, if a plea of intoxication were successful, the basic intent offence under *s20* would be established. Some candidates

erroneously discussed provocation as a defence, whilst others canvassed self-defence, for which there was no basis on the facts in the scenario.

Question 02

The facts in the part of the scenario relevant to this question left the solution rather more open-ended than has traditionally been the case in questions of this kind, allowing for a number of possible answers. Briefly to summarise the facts, Gary, Debbie's brother, who appears to have been angered by the insults to Debbie from Chris and his group, and who was participating in the general violence and disorder, chased Henry, one of Chris's group, and forced him onto the edge of a high cliff, threatening him with a knife. Probably fearing that he was about to fall or to be forced over the cliff, Henry 'grabbed at' Gary. Fearful of being pulled over the cliff himself, Gary struck out at Henry with the knife, causing Henry to lose his footing and fall (there is no suggestion here that Gary actually stabbed Henry). Gary ran off, leaving Henry lying on rocks below. It is possible that Henry died immediately in, or very shortly after, the fall. Alternatively, it is possible that, though badly injured, he did not die immediately and may have survived the fall had he received prompt treatment. In the absence of such treatment, he had died by the time he was found next day. It is important to bear in mind that, behaving in a very threatening way, Gary forced Henry into a position of extreme danger, from which a fall to his death or serious injury was a highly predictable outcome, whatever the precise sequence of events by which it might then occur. To this may be added the consideration that, when Gary ran off without attempting to assist Henry or even establish his condition, he must have known that, if still alive, then Henry was very seriously injured and would only have a chance of survival if treated promptly. Consequently, whether it could be argued that Gary had a direct, or merely an oblique, intention to kill or cause serious injury, and whether this related to the conduct resulting in the fall, or to the subsequent failure to raise the alarm, there was a clear requirement to address the issue of murder. Once this issue had been addressed, it was entirely acceptable for candidates to develop the answer along two alternative routes, namely, the voluntary and involuntary manslaughter routes. A further possibility would have been to attempt an analysis of both routes. In that event, a rather more superficial treatment of both would have been acceptable. Assuming an initial decision that malice aforethought could be proved, the defence of provocation (or of loss of control under the *Coroners and Justice Act 2009* – for simplicity, and in recognition of the fact that very few candidates dealt with the new law under the *2009 Act*, this Report will discuss only the old law on provocation) would then come into play. There was certainly evidence of provocation in the insults and, perhaps, the series of running fights, and evidence that Gary was responding to the insults in chasing Henry. It is doubtful that Henry's attempts to grab Gary constituted further acts of provocation. Of course, these events unfolded over some unspecified, though presumably very short, period of time, raising doubts about whether Gary killed Henry whilst suffering a loss of self-control. Beyond the context of the general ill-feeling, and Gary's experience of the insults and the violence, there were no issues about the 'characteristics' of the reasonable man. Viewed alternatively as involuntary manslaughter, Gary's liability could have been based upon unlawful act manslaughter and/or gross negligence manslaughter. The highly menacing chase surely amounted to an assault (as did the striking out at Henry with the knife) which can only have been dangerous, given the location, whilst Henry's stumble and fall was all too obviously foreseeable. However, on the same kind of argument discussed above in relation to murder (on the assumption that Henry was still alive after the fall), Gary's callous abandonment of Henry, even if not indicative of malice aforethought, was evidence of breach of a duty which arose when he created the dangerous situation. The breach clearly created a risk of death, and his failure could be categorised as "so bad in all the circumstances" as to amount to gross negligence. There was also some evidence to suggest that Gary could raise the defence of self-defence. However, the major stumbling block here was not so much whether the striking out with the knife was proportionate but whether such conduct could ever have been regarded as necessary in the first place. Gary

had no need to chase Henry, and his actions throughout were those of an aggressor, rather than of one called upon to defend himself. It is true that, at the very last, he may genuinely, and reasonably (though this would not be required), have felt himself in extreme danger, but he could hardly discharge himself of his responsibility for the circumstances in which that danger arose. Certainly, as victim of the initial aggression, Henry's response in making a grab at Gary to stop himself being forced over the edge of the cliff was proportionate within the ***Rashford*** notion. Instead of assisting Henry by pulling him back from the brink, Gary exacerbated the danger to Henry by striking out at him with the knife. Though Gary had been drinking heavily and this may have affected his mood, the evidence that he was responding to the insults to his sister, and that a degree of deliberation was involved in the acts comprising the chase and its climax, suggests that he was sufficiently rational to be able to form the required *mens rea* for the relevant offences.

Answers to this question fell into a number of different kinds. Potentially the strongest answers were those which addressed the murder issue first and then developed discussion of either provocation or unlawful act/gross negligence manslaughter, and concluded with an analysis of self-defence. Weaker variants of this approach were the answers which omitted consideration of self-defence despite the heavy clues contained in the facts of the scenario. One or other of these approaches accounted for the large majority of the answers presented. Additionally, some candidates pursuing the voluntary manslaughter route appeared either unable to believe, or lacked the confidence to assert, that diminished responsibility was not in issue. Consequently, their answers included a rather bemused analysis of that defence which often concluded (correctly, of course) that it was irrelevant. However, a minority of candidates did not examine the possibility of murder at all. For most such candidates, whether they stated it expressly or not, this was because they saw no prospect that malice aforethought could be established on the facts. This meant that they moved immediately into a discussion of involuntary manslaughter. Where this was accompanied also by a discussion of self-defence, then a high-scoring answer was still possible. In the absence of a discussion of both murder and self-defence, more limited marks were available. The analysis presented earlier of the possible liability arising out of the facts in the scenario emphasises the crucial importance of a discussion of murder. Rather oddly, some of the answers which omitted discussion of murder, nevertheless analysed the defence of provocation, sometimes understanding that it is a defence to murder, but sometimes incorrectly suggesting that it is a defence to involuntary manslaughter.

Though analysis of the possible liability for murder was often very strong, with a particularly determined effort to explore both direct and 'oblique' intention by reference to cases such as ***Woollin*** and ***Matthews and Alleyne***, many candidates spent far too much time on elaborate explanation and application of causation rules, to the detriment of an analysis of *mens rea*. Few candidates gave any real consideration to the 'oblique' intention to kill or cause serious injury aspect of Gary's failure to get help for Henry, apparently on the basis that omissions are associated inevitably with gross negligence rather than with intention. The circumstances of Henry's death led some candidates to believe that discussion of ***Thabo Meli*** would be helpful, though exactly how, if at all, the coincidence/contemporaneity rule might be applicable never emerged in the answers. Candidates were able to explain the elements of the defence of provocation in some detail, both subjective and objective tests, though they often seemed prepared to dwell excessively on the complications of the latter, despite the fact that, possible intoxication apart, Gary possessed no 'characteristics' that would have reduced his capacity for self-control. Equally, though stronger candidates readily identified the 'lapse of time' issue and cited cases such as ***Baillie*** and ***Ahluwalia***, weaker candidates often missed it entirely, so that application was imprecise. Interestingly, some candidates argued perceptively that the possible time-delay during the chase might have increased Gary's loss of self-control.

Discussion of unlawful act manslaughter was usually very accomplished, with candidates displaying sound knowledge and understanding of all the elements and how they might apply to the facts. However, there were some candidates who became confused about how exactly to classify the 'unlawful act' itself. Where they moved from assault as causing the fear of immediate personal violence into a possible offence involving actual injury (whether this was because of an erroneous belief that Gary stabbed Henry or because they concentrated on the fall itself), candidates sometimes strayed into the area of malice aforethought. Again, discussion of gross negligence manslaughter was often very strong, with a clear understanding of the duty as being based in the creation of a dangerous situation, and perceptive analysis of the other elements, especially whether the conduct was 'so bad in all the circumstances'. On the whole, therefore, the treatment of this aspect of the answer often merited very high marks. The treatment of self-defence tended to be rather more superficial, though most candidates did demonstrate that they understood the need for the actions allegedly in self-defence to be both necessary and proportionate, and many were able to explain that the law does not demand that an accused should 'weigh to a nicety' the precise response in the presence of, perhaps, extreme danger. However, there was a tendency to over-emphasise the 'proportion' aspect, often by reference to Gary's use of the knife (sometimes exacerbated by the interpretation of the facts that saw Gary as having stabbed Henry), to the detriment of the 'necessity' aspect. In this context, few candidates specifically discussed the extent to which a person who 'looks for trouble', or who goes where he knows that trouble will await him, or who, simply, appears to be an aggressor throughout an incident, is able to rely on self-defence when the predictable outcome is that he finds himself in a situation of danger.

Question 03

This question required candidates to choose, and critically evaluate, any two of the general defences. Additionally, candidates were then asked to suggest reforms to one of the chosen defences. Almost invariably, candidates observed these instructions in relation to the choice of two defences. However, where the choices were *insanity* and *automatism*, candidates often found difficulty in drawing appropriate distinctions, so that such answers could easily take on the appearance of a discussion of one defence only. In relation to discussion of reform, some candidates attempted to make suggestions relevant to two defences. In such cases, only the stronger treatment could be credited. More generally, though most candidates were able to advance at least some powerful criticisms of one or both of their chosen defences, they were usually unable to do more than make the briefest suggestions about reform. Indeed, suggestions very often amounted to little more than an assertion that the law should be changed or that "something needed to be done about it". Of the five defences available for selection, *self-defence* was least often chosen, whilst the others appeared to be about equally popular choices.

In dealing with *intoxication*, candidates presented critical evaluation of the crucial distinction between specific and basic intent crimes, often asserted an alleged injustice in the case of ***Kingston***, and explored the anomalies arising out of the application of the intoxication rules in circumstances where self-defence is pleaded (***O'Grady***, ***Hatton***). Sometimes, candidates discussed a perceived conflict between the cases of ***Sheehan*** and ***McKnight*** on the issue of when the jury must be directed as to the effect of intoxication. Many candidates also commented critically on the fact that some specific intent crimes have associated basic intent crimes, whilst others do not. In discussing reforms, few candidates made any reference to the Law Commission Report (LC314), *Intoxication and Criminal Liability, 2009*.

In the discussion of the defence of *consent*, the most frequent criticism concerned alleged problems in reconciling the decisions in ***Brown, Wilson,*** and ***Emmett,*** whilst there were also frequent criticisms of the horseplay exception, which often led to candidates contrasting unfavourably the decisions in ***Jones*** and ***Brown***. Additionally, many candidates examined

cases such as ***Richardson***, ***Tabassum*** and ***Dica*** on the genuineness of consent, as well as the issues arising out of euthanasia (citing ***Pretty***, in particular). Unusually, this was an area in which candidates were often well-informed on potential reforms, and many made very good use of the proposals in the Law Commission's second *Consultation Paper on Consent*.

Candidates were sometimes a little less confident when critically analysing the defence of *insanity*. They were often able to make sound criticisms of the rather antiquated definitions, their remoteness from current medical interpretations, and the consequent gaps in the scope of the coverage of the defence. On the other hand, there was often evidence of a failure to understand the implications of a finding of not guilty by reason of insanity, as well as the difficulty (referred to above) of maintaining a clear distinction between the treatment of insanity and the treatment of automatism. Nevertheless, there were some strong answers which contrasted the decisions in ***Hennessey***, ***Quick*** and ***Bailey***. Suggested reforms tended to be simplistic unless related to those proposed by official bodies such as the *Butler Committee*.

Most criticisms of the defence of *Automatism* focused on the extent of the loss of control required to raise the defence, illustrated by a case such as ***Broome v Perkins***, and on the alleged irrational distinctions between external and internal causes, and the overlap with the defence of insanity (once again using the examples of ***Hennessey***, ***Quick*** and ***Bailey***). Suggestions for reform tended to be limited to the eradication of these distinctions.

In discussing *Self-Defence/Prevention of Crime*, candidates concentrated on the "all or nothing" nature of the defence, the problems attendant on the distinction between aggression and self-defence related to the notion of the pre-emptive strike, the anomalies which exist where intoxication is also a factor, and the determination of what will amount to 'proportionate force (with discussion of ***Clegg***, ***Martin*** and other recent, well-publicised incidents being prominent). In discussing reform, reference was often made to the need for a partial defence for murder, though some candidates recognised that this had been partly addressed by the provisions in the *Coroners and Justice Act 2009*, even though few candidates were able to explain the provisions clearly.

Crime (Scenario 2)

Question 04

In this question, Leon had responded to persistent barking at him by Michael's small dog by shouting and indicating that he was preparing to release his own strong, aggressive dog. Somehow, Leon's dog then got free and attacked Michael, savaging his leg. Michael's wife witnessed this attack from a distance and suffered mild depression for months afterwards. Leon's conduct immediately before his dog got free might well have caused Michael to fear immediate personal violence (an attack by the dog), so amounting to a possible assault. The injuries suffered by Michael in the subsequent attack certainly amounted to actual bodily harm, but it seems very likely that they would be described as wounds and, probably, that they amounted also to grievous bodily harm. Apart from any specific defence that might be available to Leon, it was not clear how the dog managed to get free. If Leon deliberately released it, then this would provide powerful evidence of an intention to cause at least some injury, and so would provide the *mens rea* for offences of assault (battery) occasioning actual bodily harm and unlawful and malicious wounding/infliction of grievous bodily harm. There was also the possibility that Leon intended, whether directly or obliquely, to cause serious injury to Michael, so that commission of a *s18* offence became a possibility. If Leon's intention was to release his dog to attack Michael's dog, or if Leon's dog broke free rather than being released by Leon, then his liability would probably depend upon proof that he was reckless as to injury to Michael as a consequence of encouraging an attack on

Michael's dog, or as a consequence of his self-induced inability to control his dog. Pat's mild depression was probably sufficient to amount to a recognised psychiatric illness, and so to constitute actual bodily harm. However, Leon would only be guilty of an assault occasioning actual bodily harm if, indeed, his conduct constituted an assault on Pat. The attack on Michael may have frightened Pat, but not necessarily by way of causing her to fear immediate personal violence (she may have been frightened simply for Michael). Additionally, Leon probably did not have Pat in contemplation. Consequently, proof of any *mens rea* against him would probably depend on utilising the doctrine of transferred malice, operating on any relevant *mens rea* possessed by Leon against Michael. It seems quite likely that Leon's behaviour was strongly influenced by his use of 'supplements' to improve his physique. The resultant paranoia might have constituted a defect of reason from disease of the mind if sufficiently internalised over a period of time, so raising a possible issue of insanity. Alternatively, unless Leon could argue that he could not reasonably have known that the supplements were an intoxicant, then he would have to rely on the application of the rules on intoxication, whether argued straightforwardly as such or within the framework of automatism. Thus, he would only be provided with an excuse to any offence of specific intent.

Answers discussing Leon's possible liability for the injuries to Michael varied widely in scope and extent, very largely along the lines previously indicated. So, stronger candidates, even if they discussed assault and assault occasioning actual bodily harm, moved rapidly into an analysis of the more serious offences under *s20* and *s18*, on the basis that 'savaging' by a strong, aggressive, and frenzied dog was very likely to have resulted in injuries amounting both to 'wounds' and serious harm. The issue then confronting candidates was what *mens rea* could be proved against Leon. The fact that Michael knew his dog was in a frenzy, and his gesturing as if to release it, led many candidates to conclude that he intended serious harm, or at least foresaw such harm as virtually certain, with reference commonly being made to ***Woollin***. Perceptive candidates also identified the potential significance of the "sudden" release of the dog, leading them to consider whether, rather than intending any injury, Leon was at most reckless as to the possibility of some harm occurring. Answers of weaker candidates were characterised either by a more superficial treatment of the serious offences, attended perhaps by confusion over both *actus reus* and *mens rea* elements, or by a tendency to concentrate on the offences of assault and/or assault occasioning actual bodily harm. In the latter case, this resulted from the rather surprising assertion that the 'savaging' would amount to harm which was more than merely trivial, and yet not serious.

There was an equally varied response to the possible liability of Leon for the depression suffered by Pat. Apart from a significant minority of candidates who did not deal with this aspect at all, most candidates understood that the definition of actual bodily harm in ***Chan Fook*** extends to include psychiatric injury, though few emphasised the importance of establishing that it must qualify as medically recognised psychiatric injury (whatever that may be). The main difficulty for candidates lay rather in being able to show that Leon had committed an assault against Pat. Only a relatively small number of candidates understood that this was problematic in terms both of *actus reus* and *mens rea*. Most seemed to assume that Pat must have feared for her own personal safety, and did not perceive that there were other possible explanations for how she came to suffer depression. Similarly, many candidates seemed content to assume that Leon must have been at least reckless as to this consequence, failing to recognise that he may simply have given no thought to it whatsoever. Where candidates did understand that there was an issue, and sought to address it by reference to the rule of transferred malice, the treatment was often superficial, with a mere assertion without explanation that transferred malice would apply. Most candidates examined what defence Leon might be able to raise, and were approximately evenly divided in the choice amongst insanity, automatism and intoxication. In choosing insanity, candidates were often far stronger in presenting abstract explanation of the

elements than in suggesting detailed application. However, there were some interesting attempts to debate whether the third element in the definition would be satisfied, either as not knowing the nature and quality, or as not knowing that what he was doing was wrong, with some strong argument that Leon was merely suffering difficulty in controlling the supplement-induced rages. Candidates who considered that the appropriate defence was automatism, because the taking of the supplements was a purely external factor often wrote strong accounts of the defence, utilising cases such as ***Bratty***, ***Hill v Baxter*** and ***Quick***, though they also recognised that being 'barely' conscious of his actions might nonetheless mean that Leon was *sufficiently* conscious within the interpretation in ***Broome v Perkins*** for the defence not to apply. Additionally, candidates usually recognised that the supplements might well amount to intoxicants, and so subordinate the automatism rules to the intoxication rules. In that case, the evidence of intoxication would assist Leon only in only the s18 specific intent offence. In discussing intoxication in its own right, candidates were equally perceptive in debating not only whether the intoxication would be voluntary, and so in analysing its potential effect as above, but also in questioning whether the supplements would be described as 'intoxicants' at all, drawing on the approach adopted in ***Hardie***. In consequence, this aspect of the answer was often very well dealt with.

Question 05

In this question, Leon had injured his friend, Phil during the course of a 'friendly' wrestling match. Phil had then delayed seeking treatment for his head injury. Two days later, when he finally did go to hospital, Sally, an overworked doctor, failed to spot that his injuries were very serious, and sent him away with painkillers. Phil died next day. In considering the possible liability of Leon and of Sally for involuntary manslaughter, a key issue was whether either, or both, could be said to have caused Phil's death. Leon's conduct was clearly a cause in fact of Phil's death. In considering whether it was a cause in law, it is worth remarking that Phil seems to have died from nothing but the head injuries themselves (***Smith***, ***Blaue***). It is true that he may have survived had he sought treatment earlier, and had that treatment been appropriate. However, the courts have consistently refused to accept that self-neglect breaks the chain of causation (***Wall***, ***Dear***), so it is improbable that Phil's self-neglect would be of any significance. Moreover, even where inappropriate medical treatment has been administered, this has rarely been considered to break the chain of causation. Though the precise interpretation of the ***Cheshire*** test (that the medical treatment will break the chain of causation only if *"so independent of D's acts, and in itself so potent in causing death"* that the contribution made by D's acts in causing death was insignificant) remains open to doubt, it is impossible that it would have been satisfied by Sally's *failure* to act, however grossly incompetent. It seems certain that, at the very least, a grossly incompetent positive intervention would be required to satisfy the test. Yet, even if Leon were considered to have caused Phil's death, this does not mean that Sally did not also cause it by her own culpable conduct. The ***Misra and Srivastava*** case suggests that, in the case of an omission, the test of causation will be whether, had Sally fulfilled her duty, it was at least very highly probable that Phil would not have died. Applying that test, it seems that there was a strong argument for saying that Sally's failure to detect and treat the serious head injuries was a cause in law of Phil's death. Assuming that causation was satisfied in both instances, Leon's liability would be for unlawful act manslaughter, and Sally's for gross negligence manslaughter. In the absence of a defence of consent, Leon's conduct clearly amounted to the unlawful act of battery (at its lowest), and possibly unlawful and malicious infliction of grievous bodily harm (at its highest). The unlawful act created a risk of injury, and so was dangerous. Consequently, Leon's liability would turn on whether Phil's consent to the 'rough horseplay' was apt to include the specific acts and resultant injury. Phil may well not have consented to the particularly violent act by which he was thrown against the wall, and/or Leon's intention to cause injury may have invalidated any consent. In Sally's case, she was clearly under a duty to Phil by virtue of her job as a doctor, and equally clearly seems to have

broken that duty in a way which created a real risk to Phil's life. Whether that breach of duty was sufficiently 'bad in all the circumstances' is a question entirely for the jury. A jury would be able to take into account how far below the standard of an ordinary competent doctor her conduct fell, and to what extent this was affected by extraneous circumstances, such as the organisation of work within the hospital and the extent to which she was overworked.

In answering the question, few, if any, candidates took the opportunity to separate out the causation aspects, so that they could be considered together within a coherent framework. Instead, candidates tended to examine causation as part of the elements of each involuntary manslaughter offence discussed. This was not particularly surprising, and certainly was not fatal to a sound treatment of the relevant issues. However, in doing so, there were relatively few candidates who succeeded in presenting a comprehensive analysis. In part, this was because many candidates failed entirely to examine one of the key elements, especially the significance (or otherwise) of Phil's self-neglect, but also, quite often, the causation requirements for Sally's own liability (which was often bundled in with the examination of the effect of Sally's conduct on Leon's causal responsibility for Phil's death). In part, it was because even if the range was comprehensive, depth of treatment was absent. Where candidates did remark on Phil's causal responsibility for the possibly increased extent of the injuries to himself, this was usually more by reference to general rules governing *positive* interventions by the victim, and so often led to reliance on cases such as ***Roberts***. Occasionally, the thin skull principle was invoked. Similarly, when candidates did focus on the effect of Sally's conduct, the analysis rarely recognised that, essentially, Sally had done nothing. Consequently, discussion of cases such as ***Smith*** was avoided, whilst cases involving positive interventions, such as ***Jordan***, were much in evidence. Though many candidates referred to ***Cheshire***, few were able accurately to cite and apply the test proposed in the case. As indicated above, some candidates failed to develop the analysis of this aspect properly because they were content to assert their belief (taken up subsequently) that Sally herself would have caused Phil's death, so that this must have broken the chain of causation between Leon's conduct and Phil's death. Of course, proof of the former was by no means conclusive proof of the latter. Though most candidates found little difficulty in asserting that proof of a causal connection between an accused's gross negligence and the death of the victim is one of the key requirements of the offence of gross negligence manslaughter, very few were able to state accurately what test must be satisfied to establish causation in omissions. Inevitably, then, there was little discussion of the effect of the decision in ***Misra and Srivastava*** on this requirement. More generally, many candidates merely used the requirement to discuss causation as an opportunity to engage in a recitation of the general rules on causation, whether or not those rules had any specific application to the particular facts in the scenario.

By contrast, there were some very impressive analyses of the other elements of both unlawful act and gross negligence manslaughter, with candidates often displaying sound knowledge and understanding in explanation and application. The unlawful act was commonly identified as battery or one of its aggravated forms, though this sometimes did lead to confusion if *mens rea* of a more serious offence (especially, intention to cause grievous bodily harm) was being suggested. Nor did 'dangerousness' pose any problems, the citing of ***Church*** being much in evidence. However, this question, of course, also required discussion of the effect, if any, of possible consent on the proof of an unlawful act. Some candidates failed to notice this aspect entirely but most gave it some consideration. Weaker candidates often wrote extensively but included a great deal of irrelevant information about exceptions to the general rule which had no bearing on the facts of the scenario. Alternatively, they did not seek to explain the nature of the general rule but merely plunged into discussion of exceptions. Stronger candidates clearly explained the general rule, considered whether there was any true consent, and then focused directly on the 'rough horseplay' exception. Again, candidates were adept at establishing the elements of gross negligence manslaughter, relying heavily on the interpretation developed in

Adamako. However, one aspect which perhaps merits further examination is the tendency to assume that it is necessary to use the three-part ***Caparo*** test in order to establish that the accused owed a duty of care to the victim in such cases. This approach is often productive of a protracted analysis of the issue which is of little real value. It is highly questionable whether there is anything in Lord MacKay's opinion in ***Adomako*** which even supports, let alone requires, this approach in cases dependent upon an act. Where, as in the facts of this scenario, the conduct in question is an omission, there is a well established set of 'duty situations' which can readily be applied without invoking complex civil law principles of negligence in a manner wholly unsuited to the determination of criminal liability. The other area in which some weakness was perhaps evident was in the enquiry whether the conduct was 'so bad in all the circumstances' as to amount to gross (criminal) negligence. Candidates are usually able to identify this test, or some appropriate variant, but rarely seem to have the confidence to explore how it might be interpreted and applied in the specific context in question.

Question 06

For comments on answers to this question, see the comments on answers to question 03 (above).

Contract (Scenario 3)

Question 07

In answering this question, the majority of candidates were able to provide a competent explanation and application of at least some of the relevant areas of law involved in the problem. In particular, all candidates realised that the initial advertisements placed by AES raised the offer/invitation to treat distinction. A few candidates concluded that the advertisement in the problem was an invitation to treat on the basis of authorities such as ***Partridge v Crittenden***, but most correctly argued that, on the analogy of ***Carlill v Carbolic Smokeball Co***, it was more likely to constitute a unilateral offer to the world at large. Some candidates also correctly referred to the US authority of ***Lefkowitz v Great Minneapolis Surplus Stores***, for which they were credited. Most candidates then proceeded to explain the rules governing acceptance by conduct, although few pointed out that acceptance by conduct of the offer of a 'reward' is one of the exceptions to the requirement that acceptance must be communicated to the offeror. In assessing whether Ben had in fact complied with the terms of the AES offer, most candidates concluded that, since he was one of the first three persons "through the doors", he had validly accepted it, although better candidates considered whether the real intention of AES was that acceptance would only occur by a customer asking for a TV at the counter. As candidates generally realised, the question was complicated by the fact that AES attempted to terminate the original offer by revoking it by the substitution of new terms. This required candidates to consider two issues, first, that an effective revocation must be communicated to the offeree and, second, that, in general, communication must occur before acceptance of the offer. In relation to the issue of communication, many candidates incorrectly argued that, since Ben had not personally been informed by AES of the withdrawal of their original offer, it was ineffective to terminate the original offer. Stronger candidates, however, referred to the special rule governing unilateral offers to the world at large, that it is sufficient for the offeror to take reasonable steps to communicate the withdrawal to the public by publishing it in similar places to those in which the original offer was made (see, for example, ***Shuey v US***). AES appeared to comply with this rule. In relation to the second issue, the majority of candidates argued that, if AES communicated the revocation of the offer before Ben's acceptance of the offer by his

entering the store, then the offer would no longer be open for acceptance. Stronger candidates, however, referred to the rule in ***Errington v Errington*** that, once an offeree has *begun to perform* the requirements of a unilateral offer, it is too late for the offeror to withdraw it. In this connection, the debateable point raised by the scenario was whether Ben had commenced performance by camping out at the store. Some excellent candidates validly argued that his camping out might be viewed as preparing to perform rather than beginning to perform, and such answers received credit. Many candidates, unfortunately, missed the point of Ben's camping out and simply concluded that he had thereby accepted the original offer, which, given the terms of the AES offer, was not really arguable. On the assumption that AES had committed a breach of contract, candidates were obviously required to consider the possible remedies available to Ben, and most answers contained an explanation of damages for breach.

Question 08

The question required candidates to consider three areas of law, privity of contract, the *Sale of Goods Act 1979, s14(2)* and *s14(3)*, and the possible remedies for breach of these terms available to a consumer buyer. The issue of privity arose since Catherine, and not David, bought the games console from AES, with the result that David was clearly not a party to the contract. Most candidates, however, referred to the *Contract (Rights of Third Parties) Act 1999*, although few had an accurate understanding of its terms. Some candidates suggested that a third party can sue under the *1999 Act* provided that the parties to the contract intend to confer a benefit on that party, whereas it applies only if the contract either expressly provides that the third party can sue on it, or purports to confer a benefit on that third party by clearly identifying him. There was no suggestion on the facts of the scenario that Catherine and AES discussed the fact that she intended the console as a gift for David, with the result that David would not have had a claim against AES, although candidates were credited for considering the possibility that this might have occurred. In relation to the *Sale of Goods Act 1979*, candidates were expected to explain the elements of *s14(2)* (satisfactory quality) and *s14(3)* (reasonable fitness for purpose). Some candidates considered these sections in the barest outline, but many were able to provide considerable detail, especially in relation to *s14(2)* and the various aspects of "quality" listed in *s14(2B)*, for example, appearance and finish and freedom from minor defects, aspects which were particularly relevant to the dents and marks on the casing of the games console. Many candidates were also able to provide relevant judicial authority, for example, ***Rogers v Parish*** and ***Bartlett v Sidney Marcus*** in relation to *s14(2)*, and ***Crowther v Shannon Motors*** and ***Grant v Australian Knitting Mills***, in relation to *s14(3)*. On the facts of the scenario, it was clearly arguable that there was a breach of *s14(2)*, given that the console was new and expensive, and of *s14(3)*, given that the console would not play some games. Candidates were required, finally, to consider the possible remedies of Catherine and David (on the assumption that he could surmount the privity rule). In general, candidates were able to explain the buyer's remedy of rejection of the goods under the *1979 Act*, and the loss of the right to reject under *s35*, if the buyer has accepted the goods, in particular, by his retention of the goods for more than a reasonable time without giving the seller notice of rejection. This was particularly relevant to the scenario since Catherine had kept the games console for two months. It is obviously a question of fact as to what constitutes a reasonable period of time for the purposes of *s35*, although guidance on this issue can be found in some of the authorities, such as ***Bernstein v Pamson Motors***, which suggests that, so long as the buyer has had a reasonable opportunity to "try out" the goods, a reasonable time has elapsed. Several candidates also considered ***Clegg v Andersson*** on this issue. It was encouraging to see that most candidates seemed to have an understanding of the additional remedies of the consumer buyer to insist on repair or replacement of the goods, etc, which are now contained in sections *48A-48F* of the 1979 Act. There was, however, evidence of misunderstanding by candidates of the *s48A* remedies. Firstly, many candidates incorrectly

stated that repair/replacement must be claimed within six months of the purchase, whereas *s48A* does not contain a time limit. The *breach* must occur within six months of purchase but, assuming that it does, the buyer can insist on repair/replacement after the six months has expired. Secondly, the *s48A* remedies are additional to the buyer's remedies of damages and rejection of the goods, so that, even if the buyer is deemed to have accepted the goods under *s35* and thus to have lost the right to reject, this will not prejudice the buyer's remedies under *s48A*. A further factor bearing on Catherine's (David's) remedies was the exclusion of liability clause and candidates were clearly required to consider its validity. Most candidates correctly discussed the relevant common law rules relating to the effective incorporation of such clauses (signature/reasonable notice etc) and many candidates showed an accurate understanding of the *Unfair Contract Terms Act 1977 s6*, invalidating contract terms which seek to exclude or limit claims made by consumer buyers under *ss13* and *14*.

Question 09

In writing a critical evaluation, most candidates were able to provide competent criticism of the rules governing offer and acceptance. Issues commonly addressed were the difficulties in distinguishing between offers and invitations to treat, and between counter-offers and requests for information, and the problems relating to communication of acceptance (the postal rule and modern methods of communication). Many candidates provided valid criticisms of the various rules on consideration (for example, consideration need not be adequate, performance of existing duties, and past consideration/and the ***Lampleigh v Brathwaite*** approach), while a few candidates considered issues relating to intention to create legal relations. Unfortunately, many candidates failed to address the issue of possible reforms to criticisms offered. In this respect, examiners will reward any reasonable suggestions. For example, some candidates discussing the problems in distinguishing offers and invitations to treat discussed the possible reform of making shop displays offers; candidates discussing the rule that consideration need not be adequate often suggested that the rule should be reversed in order to protect consumers. Candidates should remember that proposals for reform constitute a significant part of this question.

Contract (Scenario 4)

Question 10

In this question, the rights and remedies of SCC would firstly depend on whether a valid contract had been formed by SCC and Farukh. In addition to the elements of offer and acceptance and consideration, it was particularly relevant to discuss the element of intention to create legal relations. On the one hand, the agreement had elements of a commercial transaction, but, on the other, it was made in the social context of a sports club. The question demanded that candidates explain the rules governing intention in the context of both commercial and social agreements, together with relevant authorities (for example, ***Balfour v Balfour***, ***Jones v Padavatton***, ***Parker v Clarke***). In the application of the presumptions, the facts of the scenario could clearly be interpreted in either way, and credit was awarded to candidates who proposed reasonable arguments that there was, or was not, contractual intention. If a valid contract *had* been entered into by SCC and Farukh, the remedy or remedies available to SCC would be for breach of contract and, since the breach by Farukh was a major, repudiatory breach, SCC would have the option of terminating the contract with Farukh and claiming damages (the difference between having to pay £200 and £3000). On the other hand, if SCC had *not* entered into a valid contract with Farukh, then SCC's possible liability to Farukh for misrepresentation would be relevant. Most responses

displayed a competent understanding of the elements of liability for misrepresentation (untrue statement of fact, inducement, reliance) and of the distinction between fraudulent, negligent and innocent misrepresentations. Many responses also displayed a competent understanding of the remedies available for the different types of misrepresentation, although few candidates were able to provide the details of the *Misrepresentation Act 1967 s2* in relation to negligent misrepresentations.

Question 11

In this question, the contract between SCC and Mark for the plumbing work on the club showers was clearly one for the supply of goods and services and, in the absence of express terms in the contract, Mark's principal contractual obligations were regulated by the implied terms in the *Supply of Goods and Services Act 1982*. The effect of *s.14* of the *1982 Act* was that he was bound to carry out the agreed work within a reasonable time. What is a reasonable time is a question of fact but, given that he started the work five weeks late and finished it after the start of the cricket season, it would clearly be arguable that more than a reasonable time had elapsed. The "poor water flow" to the showers resulting from Mark's work would suggest that he had failed to carry out the work with reasonable care and skill, resulting in his breach of the implied term in *s13* of the *1982 Act*. Stronger candidates correctly explained that the legal test for deciding whether there was a breach of *s13* is whether Mark acted with the skill and care to be expected from a reasonably competent plumber, which would obviously depend on the circumstances. There would also be a possible breach of *s13* by virtue of the uneven application of the tiles, although the poor quality of the tiles would involve a consideration of whether Mark had committed a breach of *s4*, which implies a term that the goods used in performance of a contract for goods and services must be of satisfactory quality. The nature of the possible remedies available to SCC, as strong candidates correctly pointed out, depended on the classification of the terms implied by *s4*, *s13* and *s14*. It is provided by *s4* that the term implied thereby is a condition of the contract, with the result that Mark's breach of this term would have entitled SCC to terminate the contract and claim damages for their loss. On the other hand, the terms implied by *s13* and *s14* are not classified in the *1982 Act* as conditions or warranties, with the result that they are innominate. Thus, the consequences of a breach of these terms depend on whether the breach is major (in which case the innocent party can terminate the contract and recover damages), or minor (in which case the innocent party can merely recover damages but not terminate the contract). Stronger candidates were able to explain the concept of the innominate term in some detail, and also to refer to relevant authorities, for example, ***Hong Kong Fir Shipping v Kawasaki***. On the other hand, responses from weaker candidates referred merely to conditions and warranties. In any event, since Mark had finished the work, SCC's claim would be for damages only. The complicating factor in relation to SCC's remedies was the limitation of liability clause in the contract which, if valid, would limit SCC's claim in relation to "defective work" to 5% of the contract price. Most candidates correctly explained the common law requirements of incorporation of such clauses and that, since SCC had signed an agreement containing the clause, it would be incorporated into the contract, assuming that the signature took place not later than the moment of offer and acceptance (***Olley v Marlborough Court***). On the other hand, many candidates were confused as to the effect of the *Unfair Contract Terms Act 1977* on the validity of clauses which seek to limit liability for breach of the terms implied by the *1982 Act*. In relation to Mark's failure to use reasonable care and skill, the effect of the *Unfair Contract Terms Act 1977 s2* would be that, since this breach did not cause death or personal injury, the limitation clause in the contract between SCC and Mark would be effective providing that it was fair and reasonable. On the other hand, the effect of the *Unfair Contract Terms Act 1977 s7* would be that the limitation clause would be void in relation to Mark's breach of contract in using poor quality tiles, since SCC probably made the contract as consumer, that

is, other than in the course of a business. Finally, it was unnecessary to consider the effect of the limitation clause in relation to Mark's arguable failure to complete the work within a reasonable time, since the clause, as a matter of interpretation, referred to "defective work" and it is questionable whether late performance would constitute "defective work".

Question 12

For comments on 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.