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Law LAW03

(Specification 2160)

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

Report on the Examination

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Unit 3 (LAW03) January 2012

SECTION A

CRIME – SCENARIO 1

Question 01

In this question, students were required to consider whether Adrian bore any liability for the broken arm suffered by Ben, and the subsequent permanent restriction in movement. The broken arm clearly constituted actual bodily harm, at the very least, and may have been sufficient to be regarded as grievous bodily harm. The additional injury by way of permanent restriction in movement almost certainly amounted to grievous bodily harm but may not have been attributable in law to Adrian's conduct. This issue of causation would be resolved by reference to the cases on negligent medical treatment and causation, particularly ***Smith*** and ***Cheshire***. ***Cheshire***, for instance, asserted that there would be no break in the chain of causation by poor medical treatment unless the treatment was *'so independent of D's acts, and in itself so potent in causing* (the consequence) *that D's conduct no longer made a significant contribution.'* In the absence of any significant detail about the 'poor treatment', students would have to speculate a little on the possibilities. In understanding the ***Cheshire*** approach, the main difficulty, as yet not the subject of any further interpretation, is to determine what will make treatment sufficiently 'independent' of D's conduct. In particular, given that the treatment is likely to have been directed at the injuries (and so, in one sense, not independent), can 'grossness' of negligence in treatment translate into conduct which the law would regard as sufficiently 'independent'? Similar issues would be raised if the test being applied were expressed in the way stated in ***Smith***.

In terms of *mens rea*, D, *prima facie,* intended to apply force to Adrian in the initial arm-lock, which would be sufficient *mens rea* for the assault (battery) in assault occasioning actual bodily harm (*Offences Against the Person Act 1861 s47*). Consequently, *prima facie*, the elements of the offence of assault occasioning actual bodily harm could be made out. If Adrian's conduct caused grievous bodily harm, either because the broken arm itself amounted to grievous bodily harm, or because the poor medical treatment did not break the chain of causation between the conduct and the additional restricted movement, then, equally, it is possible that Adrian committed the offence of unlawful and malicious infliction of grievous bodily harm (*Offences Against the Person Act 1861 s20)*. Here, the *mens rea* would be the intention to cause some harm, or recklessness as to that consequence. When Adrian continued to apply pressure, there was certainly evidence of intention or recklessness as to some harm, and just possibly intention as to serious harm. Though perhaps a little unlikely, if Adrian could be shown to have intended serious injury, then the offence could be the more serious one under the *Offences Against the Person Act 1861 s18* of unlawful and malicious causing of grievous bodily harm with intent to cause grievous bodily harm. Of course, Adrian and Ben were voluntarily participating in the 'fight', and both seem to have drunk a great deal of alcohol. Consequently, it is possible that the *prima facie* case against Adrian may have yielded to a 'defence' (using that term for convenience in relation to intoxication).

Given that the *s47* and *s20* offences identified above are offences of basic intention, in that recklessness suffices as *mens rea*, Adrian would not be able to argue that he was so drunk that he did not form the intention to apply force, and did not form the intention to cause harm, nor foresee that his conduct might result in harm. However, he could put this argument in relation to the offence under *s18*, since this is a specific intent offence. Even if Adrian intended some harm, it is at least a credible argument that a person who had drunk a lot of alcohol might not realise the full extent of the injury to which his acts might lead. A second possible defence

is that of consent. Though it is firmly established that the general rule is that there can be no consent to injury amounting at least to actual bodily harm, and no consent to injury inflicted in the course of unregulated fights, there are a number of public policy exceptions. Since their consensual 'fight' would not be classed as a 'fight' at all but rather as rough, undisciplined play, Adrian could try to argue that he had Ben's consent. However, though this would clearly apply to the initial stages of the incident (unless Ben was himself too drunk to be able to give consent), it is arguable that Ben had withdrawn his consent to any further activity by 'accepting defeat', so that the defence could no longer apply to the continued pressure in the arm-lock, which resulted in the broken arm and ultimately provided the occasion for the restricted movement in consequence of the poor medical treatment. Despite the lack of clarity on the issue in cases such as ***Aitken*** and ***Richardson and Irwin***, it seems unlikely that Adrian would be able to rely on drunkenness to argue that he did not realise that Ben had withdrawn his consent. Additionally, any evidence that Adrian deliberately inflicted the injury would deprive Adrian of the defence in any case.

There was considerable variation in approach by students in addressing the issue of what offence(s) had been committed. Some dealt with it very much as analysed above, with a clear understanding that, in terms of degree of injury, there were two separate phases – the direct infliction of actual bodily harm by Adrian, and the development of grievous bodily harm subsequent to the medical treatment, for which Adrian might also be responsible if there was no break in the chain of causation. Others ignored the possibility of actual bodily harm entirely and immediately addressed the issue of grievous bodily harm, sometimes simply stating that any broken bone would be grievous bodily harm, and so ignoring the causation issue, sometimes bundling up the break and the restricted movement into a comprehensive package constituting evidence of serious injury. A further variant on this approach was almost to ignore the break and to focus instead on the restricted movement. Most answers adopting the grievous bodily harm only approach concentrated on *s20*, but some did also canvass *s18*, though not altogether convincingly. Conversely, some students considered only the offence under *s47*, correctly arguing that a battery had been committed which had led directly to actual bodily harm by way of the broken bone. Those students who adopted this approach but then went on to discuss causation issues in connection with the restricted movement often found themselves discussing causation in the abstract, detached from consideration of any particular offence. Clearly, it could not be relevant to the actual bodily harm itself, which was adequately established by proof of the minor break. Answers dealing in some form with grievous bodily harm, especially when combined with causation, were of greater general merit than those confined to actual bodily harm, even where such answers discussed causation, though the most successful approach combined all three elements.

Students were often hesitant in dealing with the problem of medical treatment and causation, and sometimes relied on excessively general explanations, or asserted a little too simplistically that medical negligence does not break the chain of causation. It was also interesting to observe that the decision in ***Jordan*** featured prominently in answers, often to the exclusion of cases such as ***Smith*** and ***Cheshire***, and that it was presented as if the 'palpably wrong' and 'not normal' descriptions of medical treatment which would break the chain of causation had not been subject to reinterpretation by later cases. Though ***Jordan*** remains significant as probably the only example to date of a case in which medical negligence was found to break the chain of causation, it is important to reinterpret it in the light of subsequent cases. In terms of other elements of the offences, students generally displayed very strong knowledge and understanding, and were able to support explanations with accurate references to relevant authority. Even so, there were still answers which revealed all the familiar confusion, such as that the *mens rea* for the *s47* offence requires proof of intention to cause actual bodily harm, that grievous bodily harm requires a 'wound', that the *mens rea* of the *s20* offence requires proof of intention or recklessness as to serious harm or a wound, and that the *mens rea* of *s18* includes recklessness.

Most students recognised that issues of intoxication and consent arose as possible pleas in defence that Adrian might make. On the whole, answers on intoxication were accurate and appropriately detailed, with reference to relevant authority such as ***DPP v Majewski*** and ***Brown and Stratton***. These answers distinguished between voluntary and involuntary intoxication, and between specific and basic intent, and were able to apply the explanations to conclude that, in principle, Adrian would be able to rely on intoxication only in relation to the (unlikely) charge under *s18*. Even here, perceptive students recognised that evidence of even severe intoxication would not be conclusive, since the true question was whether or not, in consequence of the intoxication, Adrian failed to form the requisite intention. There was certainly strong evidence to suggest that he formed *some* intention, though to do exactly what was perhaps more problematic. Weaker students usually identified at least basic intent, and correctly rejected the possibility of a plea in defence to *s47* and *s20* charges, but merely asserted this conclusion without explaining the meaning of basic intent and why the relevant offences could be designated as offences of basic intent. A small minority of students seemed to have little understanding of the intoxication plea, treating it as always being a defence, or never being a defence, or only a defence when resulting from involuntary intoxication (which some students, rather inexplicably, explored at length).

Answers on the consent issue were much more variable in content and quality. Stronger students located the plea firmly in the context of the general rule excluding consent to offences involving injury of actual bodily harm or worse, explained the rough, undisciplined play exception (with reference to cases such as ***DPP v Jones***, ***Aitken***, and ***Richardson and Irwin***), explored capacity to consent, and observed that Ben appeared to have withdrawn consent before his arm was broken. Very few, however, made any reference to the role of intoxication, either as having an effect on Ben's capacity to consent, or on Adrian's perceptions of the existence of the consent. A rather weaker variant on this approach was presented by students who plunged immediately into an explanation of rough, undisciplined play, with or without discussion of capacity issues. Some such answers introduced a further element of confusion by concluding that, even though it was an example of rough, undisciplined play, the plea would fail because it can never be a defence to injury amounting to actual bodily harm or worse. Some students ruled out the plea on that latter ground without ever appearing to recognise that there are exceptions, whilst others did so simply by treating it as a 'fight' (***AG's Reference (No 6 of 1980)***) or an unregulated sporting contest. Yet another approach was to explain issues of capacity to consent at greater or lesser length (though rarely including the effect of intoxication), but then to conclude that the defence would inevitably fail on account of Ben's withdrawal of consent without exploring any other aspects of the defence.

Question 02

In this question, students were required to consider whether Adrian bore any liability for the injuries to Charles and Dora, and whether Emma bore any liability for her conduct in slapping George. In relation to Adrian and Charles, Adrian caused a wound to Charles' head in causing him to fall by kicking away his walking stick. This injury was certainly sufficient to indicate a possible offence of unlawful and malicious wounding (*Offences Against the Person Act 1861 s20*). Given the amount of blood, and the age of Charles (***Bollom***), it seems possible that it could also be regarded as unlawful and malicious infliction of grievous bodily harm under *s20*. In these circumstances, consideration of the offence of assault occasioning actual bodily harm (*Offences Against the Person Act 1861 s47*) would be unnecessary, though clearly creditworthy. Similarly, the description of Adrian as being tired and annoyed, and his conduct in kicking away the walking stick rather than striking Charles directly, tended to suggest that it was not his purpose to cause any serious injury, and that it was unlikely that he would have foreseen such injury as a virtual certainty. Consequently, an argument in favour of the more serious offence under *s18* would have been difficult to make. It is likely, then, that Adrian could be proved to have intended some harm, still more likely that he could be proved to have

foreseen the risk of some harm to Charles. This would constitute sufficient evidence of the *mens rea* for the *s20* offence in either of its forms.

The possible liability for Dora's 'injuries' was more problematic. The anxiety and depression suffered by Dora appear to have been psychiatric injury (***Chan-Fook***, ***R v D***), which would certainly qualify as actual bodily harm. If sufficiently severe in nature, they could even be described as grievous bodily harm. If Adrian was to be guilty of committing an offence of assault occasioning actual bodily harm under *s47*, then he must first be proved to have committed an assault against Dora. Since he clearly did not commit a battery against her, the assault would have to be conduct which caused her to fear (apprehend) immediate personal violence, and he would have to intend or be reckless as to that consequence. Dora did indeed become 'very frightened', and this may have been for her own safety, in which case the *actus reus* of assault would be established. Alternatively, her fear may have been simply for Charles, or a more generalised fear at witnessing a violent incident, without necessarily fearing for her own personal safety. In that case, the *actus reus* of assault would not be established. It is also doubtful whether the *mens rea* could be proved against Adrian. It seems highly unlikely that he gave any thought to Dora when kicking away Charles' walking stick, so that he neither intended to cause Dora to fear (apprehend) immediate personal violence, nor foresaw it as a risk. Proof of the more serious offence under *s20* would also present some formidable difficulties. The technicalities of an assault would not be called into question, the issue being simply one of causation – did Adrian's conduct cause Dora's (severe) anxiety and depression (***Burstow***)? However, assuming a positive answer to this question, the *mens rea* issue remains. There is no doubt that Adrian did not intend some harm to Dora by kicking away Charles's walking stick, and it seems rather fanciful to suppose that he would have foreseen the risk of some harm to her in doing so, notwithstanding her age. A very tenuous argument might be put involving transferred malice, since, as previously discussed, Adrian probably did intend or foresee the risk of some harm to Charles. Even so, the risk foreseen by Adrian must have been of physical injury, whilst the injury to Dora was psychiatric. A conviction would depend, therefore, on being able to persuade a court that these two kinds of 'harm' are indistinguishable when the 'malice' is being 'transferred'.

When Emma slapped George twice, *prima facie* she committed the offence of battery, in the intentional application of unlawful force. It is possible, that, technically, the 'stinging sensation' experienced by George amounted to actual bodily harm but it is equally arguable that it was no more than 'trivial' hurt or injury (***Chan-Fook***). However, the main issue was whether Emma could successfully plead a defence of self-defence/prevention of crime. The defence will be established where the use of some force was necessary, and the force actually used was proportionate in all the circumstances. Of course, in reality, it was completely unnecessary for Emma to use any force against George, since George was not the person who had injured Charles and he clearly had no intention of injuring anyone. Applying the rule laid down in ***Gladstone Williams***, Emma must be treated as if the facts were as she genuinely believed them to be. Hence, the questions were whether the use of some force was necessary had George been the person involved in kicking away Charles' walking stick, and whether the double slap was a proportionate response. Emma seems to have believed that the danger was not yet over, and the facts might well support this belief. In those circumstances, it would be relatively easy to conclude that an intervention with the use of some force was necessary. Two slaps, without any weapon, must be regarded as a very moderate response to the danger perceived still to exist, so that it seems very likely that the defence would succeed.

Students generally demonstrated a good level of knowledge and understanding of the law in answering this question, though they frequently found it a little more difficult to present convincing application to the facts. Most saw immediately that the injury to Charles constituted a 'wound', which they were able to explain by reference to ***JCC v Eisenhower***. Some extended the analysis to consideration of grievous bodily harm, justified both by the severity of the bleeding and by reference to the age of Charles (***Bollom***). However, some students spent

an excessive amount of time dealing with lesser offences of battery, and assault (battery) occasioning actual bodily harm, and so left themselves with too little time to explore the more serious offences. Similarly, students readily identified offences of assault and assault occasioning actual bodily harm in the case of Dora. Again, some students went further and discussed grievous bodily harm, or, in a smaller number of cases, discussed only grievous bodily harm.

In the case of Charles, the quality of answers was often limited by a failure to consider sufficiently what state of mind prompted Adrian's actions. Students were perhaps a little too ready to assert that he intended some injury (sometimes, serious injury) or was aware of the virtual certainty of some injury (especially in view of the age of Charles), and unwilling to confront the possibility that, in his state of being tired and annoyed, Adrian may have given very little thought at all to the consequences of his actions. Answers which argued for recklessness as to some injury were perhaps the most convincing in this respect. However, there was little merit in the suggestion made by some students that Adrian may have been an automaton, or even insane, because of his tiredness and annoyance. Issues of application loomed still larger in the case of Dora. Students who dealt with assault, and who extended it to *s47*, invariably interpreted the description 'very frightened' as clear evidence that Dora feared for her own personal safety. Though this was one credible interpretation, it was a little disappointing to discover that so few students recognised the other possibilities referred to in the analysis above. The general approach to establishing the *mens rea* was to argue, rather as in the case of Adrian and Charles, that Adrian must have been aware that someone of Dora's age would inevitably be 'frightened', and specifically that she would fear that 'she was next'. Again, this was a credible, but certainly not the only possible, interpretation, and might have been in severe doubt if Adrian gave little thought even to injury to Charles. The minority of more perceptive students who recognised the difficulty of establishing an independent *mens rea* in relation to Dora, and so contemplated transferred malice, nonetheless usually did not observe that the alleged offences committed by Charles against Adrian were of a different nature from the foundation offence of assault identified in the case of Dora. Where students focused additionally, or alternatively, on grievous bodily harm, application was usually rather simplistic, with little recognition that proof of *mens rea* would be still more difficult.

In the case of Emma's possible liability for slapping George, students confidently established the offence of battery, and often went on to suggest that this was yet another example of *s47* assault (battery) occasioning actual bodily harm. Though creditworthy, this was perhaps a little excessive, in that the 'stinging' sensation probably did not amount to 'more than merely trivial hurt or injury' (***Chan-Fook***), and probably also revealed the dangers of continuing to rely on the definition of actual bodily harm in ***Miller*** in terms of 'interference with health or comfort'. Perhaps the more interesting aspect was Emma's possible plea of self-defence/defence of others or 'prevention of crime'. Here, there were wide variations in approach. The most comprehensive and coherent approach presented the explanatory framework in terms of reasonable force embodying the two components of necessity to use force, and proportion in the force actually used. This enabled students to accommodate Emma's mistake within the 'necessity' requirement and to consider proportion on the facts as Emma believed them to be. Set in this framework, students usually found no difficulty in concluding that the defence would be successful. A weaker variant on this approach provided the framework and discussed the mistake but did not locate the mistake within the necessity requirement. Common, but much less comprehensive approaches, focused on the mistake without reference to any explanatory framework, particularly necessity for the use of force, or concentrated on the proportion aspect without considering the requirement for the use of force to be necessary. Surprisingly, there were many students who missed the defence issue completely and concluded simply that Emma would be liable for the battery or the actual bodily harm. There was also a sizeable minority of students who misinterpreted the significance of the mistake made by Emma in slapping George rather than Adrian. These students argued that it would be necessary to use transferred malice to establish the battery. The error here was to assume that Emma intended

to slap Adrian but somehow ended up slapping George. The truth was simply that Emma intended to slap George, and did so. Of course, she would not have done so had she realised that he was not the person who attacked Charles, but that was relevant to self-defence/prevention of crime issues, not to *prima facie* liability for the initial crime.

Of course, there were also answers which displayed the same kind of weaknesses in the analysis of *actus reus* and *mens rea* elements of all the offences discussed above which were revealed in the answers to Question 01, as previously indicated.

Question 03

Broadly speaking, answers to this question consisted of critical analysis of various aspect of the offence of murder itself, critical analysis of either or both of the partial defences, and proposals for reform. Though the focus of the question was on criticism of the current law, students were, of course, entitled to present the analysis in a balanced way, incorporating discussion of positive aspects, as well as negative. On the other hand, given the uncertainties surrounding much of the new law on, say, loss of control, answers which merely sought to explain the deficiencies in the old law of provocation and then to detail how the new law had addressed them were certainly presenting a restricted analysis. In general, answers revealed that students had a strong understanding of the structural and other criticisms of the law of murder itself, and that they had developed perceptive insight into the deficiencies of the new law on partial defences, even though some of those deficiencies may be addressed by future judicial interpretation, as was evident in the decision in ***Clinton*** on loss of control and sexual infidelity. Proposals for reform, though not extensive, perhaps also carried a little more weight than has been evident in the past.

Discussion of the offence of murder itself commonly began with the suggestion that the law is outdated in language and structure, and that the continued reliance on case law for its definition serves to add to the confusion. This was invariably followed by discussion of the mandatory life-sentence and of the extension of the category of murder to those who kill whilst intending merely serious injury, even serious injury of a kind not foreseen as likely to result in death. The point usually being made here was that the law seemed to have no power to discriminate between degrees of blameworthiness. All were guilty of murder, from the serial killer to the mercy killer, from the cold-eyed deliberate, intentional killer to the killer who was merely 'unlucky' that his victim died, rather than suffered the serious injury that was intended. Sometimes students conceded that, in practice, guidelines for the tariff element in a life-sentence enable distinctions to be made but most were convinced that changes needed to be made which reflected varying degrees of blameworthiness. All of these arguments were powerful and appropriate. However, criticism of sentencing as such was not really relevant. For example, suggestions that life-sentences are, in practice, too short were unrelated to substantive law issues. Problems with the definition of intention were also analysed in varying degrees of detail. Though it could be said that this issue is not specific to the law of murder, it is certainly true that it has been raised most acutely in the offence of murder, so that this was also an appropriate area for analysis. Students also raised concerns about the failure to establish a clear definition of who is a 'human being', in terms both of the start and end of life, and also in relation to those born with extreme conditions (who is a *'reasonable creature in rerum natura'*?). There were also many discussions of the refusal of the law to permit the use of the defence of duress to charges of murder. Again, as an issue peculiar to murder, this was acceptable but the analysis was generally brief and superficial. Similarly, the discussion of the problem of excessive self-defence, with its traditional 'all or nothing' connotations, was more impressive when students did at least acknowledge that the inclusion of the 'fear trigger' in the new defence of loss of control had been intended, at least in part, as a response to the problem. Unfortunately, too many students made no reference at all to this development, and wrote as if nothing had changed.

In analysing the partial defences, it was acceptable for students to concentrate on either or both, though the defence of loss of control probably offered rather more fertile ground for criticism. Issues relating to that defence frequently identified included difficulties in expressing the meaning of loss of self-control; the significance, if any, of the removal of the requirement for it to be 'sudden', and its relationship with the exclusion of acts done out of a considered desire for revenge; the impact on the attempts to extend the defence more clearly to victims of physical and other abuse (say, 'battered women') of the retention of the requirement for a loss of self-control, contrary to the advice of the Law Commission; the perhaps excessive requirements of the 'anger trigger' in demanding that two tests be satisfied; the exclusion of evidence of conduct which 'constituted sexual infidelity', questioning both the need for the exclusion and its precise terms (what conduct 'constitutes' 'sexual infidelity', concepts which bristle with difficulties of interpretation); and allegedly unresolved doubts about the precise scope of the objective test. In the discussion of diminished responsibility, perhaps the most powerful criticisms advanced were that the burden of proof continues to be placed on the accused, possibly in contravention of human rights requirements; that the Law Commission's suggestion for the incorporation into the defence of the notion of 'developmental immaturity' should have been adopted; that the new version of the defence may not have the capacity to encompass all the cases thought to be deserving because of its more closely constrained requirements; and that juries are faced with insuperable difficulties in trying to apply the rules concerning diminished responsibility and intoxication. Additionally, many students criticised the new law for its failure to be more specific about the requirement for the abnormality of mental functioning to arise from 'a recognised medical condition'. Though there may certainly be some initial doubt over some unusual or newly-recognised conditions, this does not appear to be a very substantial criticism. There is ample evidence of medical recognition of most of the conditions which are likely to be in issue, whilst the provision of specific lists would be impractical.

In making suggestions for reform, students usually proposed a tiered structure of homicide, making references to law in the USA and drawing directly on Law Commission suggestions. These were interesting and substantial proposals but they were most impressive when explained in a little detail, with the different tiers properly described, and their relationship with criticisms previously advanced rendered plain. Unfortunately, many students mentioned a tiered structure without being able to supply any significant detail. There were also some very good accounts of proposals for changes to the definition of malice aforethought, in which an intention to cause serious harm would be qualified in some way which restricted it to serious harm from which death was foreseeable. Similarly, students were able to cite and discuss proposals from various quarters, including the Law Commission, for a re-definition of the meaning of intention. Though often combined with proposals for a tiered structure, abolition of the mandatory life-sentence was also frequently proposed as an independent reform, opening up the abandonment of the partial defences in favour of judicial discretion in sentencing. Students who discussed the notion of excessive self-defence sometimes recognised that it had been partially addressed by the Coroners and Justice Act 2009, but many did not. This lent a slightly unreal air to their subsequent pleas for some change to be introduced. Many of the criticisms of the partial defences inevitably suggested relatively simple reforms, and students frequently took advantage of this to say so! For example, the multitude of problems created by the retention of the requirement for a loss of self-control in the defence of loss of control could be addressed by simply adopting the Law Commission approach and abandoning the requirement entirely. Similarly, the sexual infidelity issue, already now to be understood in a significantly different way because of ***Clinton***, could be resolved at a stroke by simply removing the exclusion and leaving the evidence to be assessed according to the (rather fierce) demands of the two components of the anger trigger. Much the same could be said of the burden of proof and developmental immaturity issues in diminished responsibility, though the other criticisms mentioned above (the general reach of the defence, and the impact of intoxication) were much less susceptible of easy solutions, and proposals for which were either unspecific or simply ignored. Even weaker answers usually succeeded in making some

substantial proposals about murder itself, but tended merely to offer the comment that changes should be made to aspects of the partial defences.

SECTION B

CRIME – SCENARIO 2

Question 04

In this question, students were considering the possible liability of Harry for the injuries to Lauren, and the possible liability of both Harry and James for the death of Kim, in relation to whom the instruction was to discuss involuntary manslaughter. In relation to all of the potential liability, issues of causation arose. So, Lauren was the most immediate cause of her own injuries in flinging herself into the bushes when seeing the car go out of control, whilst Harry lost control of the car because the wheel became detached in consequence of the lack of concentration on the task by James. On the other hand, James might assert that Harry's manner of driving brought about the fatal collision with Kim. In the case of Lauren, causation in law would depend upon application of the approach in cases such as ***Roberts***, requiring proof, essentially, that Lauren's conduct was not truly voluntary, or was reasonably foreseeable, as indeed would seem to have been true. Furthermore, though the fact of the wheel becoming detached clearly was a major factor in the resulting 'accidents' with Lauren and Kim, it seems likely that Harry's method of driving was also both a factual and a legal cause. The decision to drive at speed directly at Kim meant that Harry significantly increased the possibility of a collision with Kim, or anyone else nearby, should he lose control of the car for any reason (for example, because of the condition of the road which he had not detected, or because of an undetectable fault in the car itself, or because of some sudden personal defect). Consequently, it is strongly arguable that the driving made a significant contribution to Lauren's injuries and to Kim's death, both the driving and the failure to secure the wheel acting as combined causal factors. Equally, from the point of view of the causal responsibility of James for the death of Kim, his failure to secure the wheel made a significant contribution which could not be disrupted by Harry's subsequent, albeit perhaps not reasonably foreseeable, conduct. Rather, as suggested, the failure of James to secure the wheel, and Harry's somewhat reckless manner of driving, operated in combination to bring about Kim's death. An alternative argument in Harry's case might have been that he did not commit the *actus reus* of any offence (fatal or non-fatal) because he was acting involuntarily (that is, a plea of automatism) when unable to control the car because the wheel became detached. This interesting argument was probably undermined by the responsibility that Harry bore for the dangerous manner of driving that he had adopted.

Clearly, Lauren suffered wounding of such severity (permanent scars) that it amounted to grievous bodily harm. Consequently, an offence either of unlawful and malicious wounding (*s20*), or of unlawful and malicious infliction of grievous bodily harm (*s20*) might be argued. The difficulty would lie in proving the *mens rea* (intention to cause some harm, or recklessness as to causing some harm). Harry's action was aimed at Kim. At best, it seems likely that he was no more than aware of Lauren's presence. Of course, if he possessed an appropriate *mens rea* against Kim, then the possibility of transferred malice would arise. However, Harry's intention to 'give Kim a bit of a scare' by speeding up and driving at her was far from an intention to cause some harm, and probably also provided little evidence that he foresaw the risk of some harm. Harry had no idea that the wheel might come off, and was no doubt utterly confident in his ability to control the car. Sometimes, in these circumstances, courts have talked about recklessness as 'closing the mind' to the obvious risk (***G and another***, ***Parker***), though this would have been a rather sophisticated argument.

Harry's possible liability for the death of Kim would lie in either unlawful act or gross negligence manslaughter. The unlawful act manslaughter offence would require proof that Harry committed an unlawful act (crime) of a dangerous kind, which caused Kim's death. The facts suggested a possible offence of assault, that is, that Harry intentionally or recklessly caused Kim to apprehend (fear) immediate personal violence. Given that Harry was driving a car at some speed, there was obviously some element of danger, in that any sober and reasonable person would foresee the risk of injury (even if, in view of Harry's obviously benign intentions, that risk was apparently low). The causation issue has been dealt with above. The weakness in this argument would be in proof of the offence of assault. Though it is true that Harry intended to 'scare' Kim, it does not seem that she truly apprehended immediate personal violence, or that Harry intended, or was reckless as to, that consequence (***Lamb***), since both understood it as a 'joke' scare. In that case, there would have been neither *actus reus* nor *mens rea*. Choice of any more serious offence, such as s*20* unlawful and malicious infliction of grievous bodily harm, would circumvent the *actus reus* problem but would not resolve the *mens rea* issue (see the discussion of *mens rea* in relation to Lauren).

Both Harry and James could be accused of having committed gross negligence manslaughter. In the case of Harry, this would have been additional or alternative to unlawful act manslaughter (and, obviously, was not a requirement). Given that the causation issues have been discussed, the elements required to be proved would be duty, breach, foreseeable risk of death, and the whole amounting to 'gross' negligence. Once again, it must be emphasised that, though reference to cases such as ***Caparo v Dickman*** was not 'wrong', nothing was to be gained by introducing the complexities of the civil law of negligence into the analysis of criminal law duties. Approaches developed to attempt solutions to such issues as the difference between liability for physical damage and for pure economic loss have little bearing on whether a person whose acts, by definition, have created a risk of death owes a duty in criminal law to take reasonable steps not to cause death. On any account, both Harry and James were under a duty by virtue of their activities (James was under a duty, of course, not only to Harry but to all those who might be affected by Harry's use of the car, whether that duty could be said to arise out of a contract between Harry and James, or out of the more general considerations suggested above) which each, in his own way, could be said to have breached. Equally, given the risks associated with the driving of cars, both could be said to have behaved in ways 'so bad in all the circumstances' (***Adomako***) as to amount to 'gross' negligence.

Before commenting on answers to this question, it should be emphasised that some of the issues raised were quite challenging and that, on the whole, students met the challenges remarkably well. Indeed, there were many impressive responses. Even so, students seemed to have some difficulty with causation issues. Often, even at times in the case of the possible effect on Harry's liability of Lauren's 'attempted escape', and certainly in the case of the respective contributions of Harry and James to Kim's death, the issues either went totally unremarked or were dealt with in a highly superficial and general way. Where students did deal with Lauren's conduct, they were usually able to give some appropriate explanation and application, though this often relied on rather terse statements about the case of ***Roberts*** rather than being located within a clear causation framework. This approach was still more evident in the treatment of the contributions of Harry and James to Kim's death. Students who did perceive that causation issues must be raised in relation to both were able to suggest that both bore causal responsibility for her death. These explanations were usually given in rather simple, but nonetheless accurate terms, such as that the 'accident' might not have happened if Harry had been driving properly or if the wheel had not come off, so both must have played some part (a proposition which applied equally to Harry's responsibility for Lauren's injuries, assuming that her own conduct did not break the chain of causation). Many, however, simply treated the causation issues wholly separately, as part of the elements of the individual modes of committing involuntary manslaughter. So, did Harry's

driving result in Kim's death? Self-evidently (on this approach) because he collided with her and killed her. Did the failure of James to tighten the wheel nuts cause Kim's death? Self-evidently (on this approach) because it caused Harry to lose control of the car, collide with her, and kill her. However, account was taken of the fact that there was undoubtedly some complexity in the anticipated explanation and application here.

In dealing with other elements of the offence(s) committed by Harry against Lauren, students generally opted for discussion of *s20* as wounding, though many also chose to characterise the permanent scarring as serious injury, and so discussed *s20* as grievous bodily harm. The discussion of *s20* itself was subject to all the strengths and weaknesses previously noted above in the discussion of similar issues in Questions 01 and 02. The general tendency in relation to *mens rea* was to opt for a very simple explanation in which it was asserted that Harry must have been aware of Lauren's presence, and so must have been aware of the risk of some harm to her in his manner of driving. As in issues raised in Scenario 1, this was a credible, but by no means the only, interpretation of the facts, and its pursuit inevitably involved some restriction in analysis. Students who were a little more cautious in drawing the simple conclusion that Harry was sufficiently reckless as to some harm nonetheless often found difficulty in constructing a convincing analysis of alternatives. Some slipped rather too easily from an argument that Lauren obviously feared immediate personal violence and that Harry must have been aware of this, into a slightly mystifying conclusion that, consequently, he had the *mens rea* for *s20*. Others, rather more perceptively, attempted to derive the *mens rea* from an application of the principle of transferred malice, drawing on Harry's *mens rea* in relation to Kim. However, this was an equally problematic route, not only because it presented an insuperable problem of lack of correspondence between offences (common law assault and *s20* wounding/infliction of grievous bodily harm), but also because it was strongly arguable that Harry did not commit the offence of assault on Kim anyway. Either form of the argument appeared much more coherent when related to the offence under *s47* of assault occasioning actual bodily harm, an offence which some students chose to analyse rather than the *s20* offence. However, reliance on this offence did not permit any more convincing conclusion as to ultimate liability, and understated the nature, and level of seriousness, of Lauren's injuries.

In dealing with involuntary manslaughter, students generally understood the constituent elements of both unlawful act and gross negligence manslaughter. The variation in quality of answers related to the detail and accuracy in explanation and application that they were able to provide. In relation to Harry's liability for Kim's death, the unlawful act was usually identified as assault, though some sought to argue it as a battery or more serious such offence. Students who relied on a rather generalised 'dangerous' or 'reckless' driving failed to observe that offences of negligence (as reckless driving is) do not qualify as the 'unlawful act' or 'crime' in this offence (***Andrews v DPP***). They also, inevitably, were unable to present any detailed explanation and application of the elements of any such offence. Though many students did question whether an offence of assault had been committed (either or both because Kim saw it as a joke, and Harry intended it only as a joke), most took the intention to 'scare' Kim at face value and interpreted it as the required *mens rea* for an assault, so also ignoring Kim's obviously unconcerned response. Students usually explained and applied the 'dangerous' requirement confidently, by reference to ***Church***, and so concluded that Harry was guilty (causation issues having been discussed as analysed above).

In considering the liability of James, students were divided on whether to treat his conduct as an act or an omission. In truth, it could be viewed either as an act (poor fitting of the wheel) or an omission (failure to tighten the wheel nuts) but was probably more easily dealt with as an act. In either case, it was unarguable that a duty existed, though students often over-complicated the issue by reference to ***Caparo v Dickman***, and distinctions between foresight and proximity, or fell into a little confusion when relating the duty to a contract between Harry and James (***Pittwood***), but ignoring its application to Kim (or any other person potentially

affected by its breach). Others taking the omission route often confidently analysed the duty in terms of ***Miller***, and the creation of a dangerous situation. Though there was certainly some merit in the way in which many students invoked the 'risk factors' familiar in the law of tort to assess whether James had broken the duty, that approach did perhaps make the issue seem a little more complicated than it really was. It also had the effect of obscuring discussion of the requirement that the breach of duty must create a risk of death. Many dealt with this as a risk factor for breach, and therefore as something to be weighed in the balance with other risk factors, rather than as an independent, absolute requirement. Students invariably recognised the requirement for proof that the negligence was 'gross', though they did not always quote the ***Adomako*** description of that requirement, or one of its earlier versions (***Bateman***, ***Andrews v DPP***). However, application was rather weaker, resting generally on simple assertion rather than on an attempt to identify what exactly it was about the facts that made the conduct of James 'so bad in all the circumstances ...'. Some students dealt with Harry's liability for gross negligence manslaughter, either having first ruled out unlawful act manslaughter, or without ever having considered that possibility. This approach was more successful when students clearly distinguished in their analysis between the liability of Harry and that of James. Unfortunately, many tried to treat the two together, and frequently failed sufficiently to isolate the issues specifically relevant to the liability of each. Some students identified the possibility of automatism and wrote perceptive, if brief, analyses, in which they often concluded that Harry's conscious choice to drive as he did would deprive him of the plea.

Question 05

In this question, students were asked to consider the liability of Mike for the murder of Oliver. Though Oliver had died after Mike had stamped on his head 'three or four times', there were two issues of legal causation. First, did the fact that Oliver had a weak skull make any difference to Mike's responsibility for causing Oliver's death? Second, did the decision of the doctors to turn off the life-support machine act as a *novus actus interveniens*? Clearly, the 'thin skull' rule applied, so that Mike could not claim that the injuries suffered by Oliver were unforeseeably more serious than might have been expected. Mike had to 'take his victim as he found him', special susceptibility and all. In any case, given the nature of the attack, it is arguable that Oliver did not suffer any greater injury than might have been expected in the case of a victim without the weak skull. The decision made by the doctors to switch off the life-support machine was presumably based on the medical judgment that Oliver had suffered brain-stem death. In the absence of any evidence that there was no rational foundation for this judgment, the assumption would be that Oliver was already clinically dead, so that switching off could not possibly have any effect on the chain of causation. Though this was not the precise *ratio* of ***Malcherek and Steel***, that case supported the proposition that a properly informed medical decision to terminate treatment in such circumstances would not break the chain of causation. Note that this was a different set of circumstances from those represented by a case such as ***Airedale NHS Trust v Bland***.

In relation to *mens rea*, it seems unarguable that Mike intended to cause Oliver *some* injury. The question would be whether or not his intention was to kill or cause serious injury. Though he could well be described as being furious about what he had heard, and perhaps to have lost self-control, he had also brooded on it for 45 minutes, and so could be said to have displayed a degree of deliberation in his actions. He chose to attack a particularly vulnerable part of Oliver's body (his head) at a time when Oliver would have been defenceless in consequence of the shock of the initial attack and the position in which he found himself. The attack took the form of 'stamping', a number of times. Though there are inevitably doubts about intention in such cases, the combination of vulnerability and precise method of attack certainly presented a strong argument for an intention to cause serious injury, even if not to kill. In such a relatively straightforward case, it seems unlikely that a judge would introduce

the complications of oblique intent, whether as substantive law or as evidence (***Woollin***, ***Matthews and Alleyne***). However, that approach would be available.

Mike would certainly have attempted to take advantage of either or both of the partial defences to murder, namely, loss of control (*Coroners and Justice Act 2009, ss54-55*) and diminished responsibility (*Homicide Act 1957, s2* (as amended by the *2009 Act*)). In relation to the former, there was certainly evidence of a loss of self-control, though the 45 minutes of brooding might have called this into question, and might also have raised doubts about whether Mike could be accused of having acted out of a *'considered'* desire for revenge. The most obvious qualifying trigger would be the anger trigger, related to any one of, or any combination of, the suggestion of Nora's sexual infidelity, the suggestion that Oliver had physically abused her or would do so (deduced from Oliver's general boast), and the disparaging comments made by Oliver about Kim. Though on one view, the evidence of the sexual infidelity might have to be discounted, the recent case of ***Clinton*** [2012] (with which, of course, students were not required to be familiar) indicated that, on the contrary, it could be taken into account if providing the context in which another trigger factor operated. Certainly in subjective terms, and probably also in objective terms, there was enough in the things said and done to amount to *'circumstances of an extremely grave character'* causing Mike to have a *'justifiable sense of being seriously wronged'*. An alternative, though perhaps more tenuous, argument was that Mike feared that serious violence would be committed by Oliver against Nora (*'another identified person'*), in view of Oliver's boasts about physically abusing women. The final element would be whether a person of Mike's *'sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of* [Mike]*, might have reacted in the same or in a similar way to* [Mike]*.'* Here, the 'circumstances' would have included the things said and done, including the alleged sexual infidelity (not excluded from this part of the enquiry by *s55(6)(c)* of the *2009 Act*, which applies only to the qualifying trigger) but not Mike's anxiety, stress, depression and irritability, which probably served only to modify his degree of tolerance and self-restraint when compared with the 'normal'.

If pleading diminished responsibility, Mike would have had to prove that he was suffering from an abnormality of mental functioning, from a recognised medical condition, which substantially impaired his ability to understand the nature of his conduct, or to form a rational judgment, or to exercise self-control. Further, this would have to provide an explanation for Mike's conduct, in the sense that it caused, or was a significant contributory factor in causing, him to carry out that conduct. Whatever the independent significance now of *'abnormality of mental functioning'*, it is closely tied to the effect which it must have, and here Mike might have tried to argue that his ability to form a rational judgment, or to exercise self-control, were substantially impaired by his depression, an obvious recognised medical condition. His anger and dismay at what he was hearing from Oliver clearly played a significant part in his subsequent conduct, but this did not necessarily mean that his abnormality of mental functioning from his depression did not also make a significant contribution, and so provide an explanation for his conduct. Inevitably, the facts also raised the possibility of a defence of insanity. However, though it might have been possible to argue for a defect of reason caused by a disease of the mind, much along the lines argued above for diminished responsibility in respect of abnormality of mental functioning and recognised medical condition, it seems unlikely that it would have been possible to prove that Mike either did not appreciate the nature and quality of his act, or that he did not understand that what he was doing was legally wrong.

Students almost always incorporated a discussion of *prima facie* liability for murder in their analysis of Mike's possible liability. In itself, this was wholly unremarkable. What was surprising is that many chose to do so at the end of the answer, after considering partial defences, or discussed one aspect first (often, but by no means always, *actus reus* rather than *mens rea*), and then delayed discussion of the other aspect until after the analysis of the partial defences. Some students actually asserted that Mike was *prima facie* guilty of murder

without ever considering causation, and then returned to causation after discussion of the partial defences, as though causation were somehow an element wholly separate from the *actus reus* of murder. Though these approaches did not prevent answers from containing appropriate explanation and application, nor from yielding convincing conclusions, they represented a puzzling and illogical strategy for establishing liability. On many occasions in the past, these Reports have commented on the fact that students have concentrated excessively on the *actus reus* of murder, particularly on causation, when no *actus reus* issues were raised. Ironically, on this occasion when such issues were raised, students often failed to explore them in any detail! The major issues were the significance, if any, for causation of Oliver's weak skull, and of the decision by the doctors to turn off the life-support machine. Eventually, most students confronted the weak skull issue, with frequent references to ***Blaue*** (acceptable, even though not a case of physical susceptibility). However, many students were content merely to state that Mike had to 'take Oliver as he found him' without seeking to explain this or to put it in context in a more general explanation of causation. Often, students did not mention the switching off of the life-support machine at all, whilst those who did tended to dismiss it as unimportant because it could not have broken the chain of causation. Stronger students sought to provide some explanation for this undoubtedly correct conclusion, and found it either in an application of rules on medical negligence and causation, citing ***Smith*** and ***Cheshire***, or (the more convincing approach) in references to ***Malcherek and Steel*** and the notion of brain-stem death prior to the intervention of the doctors. Though not without some merit, attempts to rely on rules derived from ***Airedale NHS Trust v Bland*** represented a failure correctly to categorise Oliver's 'unconsciousness' (which was, in truth, not the unconsciousness of a living person, but death itself), leading to an incorrect choice of the rules to be applied.

Analysis of *mens rea* was very variable in quality, ranging from very comprehensive explanation and application of the meaning of malice aforethought and, within it, of the meaning of intention, to simple assertions that Mike obviously intended either death or serious injury. In general, explanation (often excellent) predominated over application, with students being reluctant, or finding it difficult, to articulate their precise reasons for being so convinced that Mike intended, at the very least, to inflict serious injury, whether having that consequence as his aim, or foreseeing it as virtually certain. In some ways, all that was required of students here was that they should reflect a little on the reasons for their own certainty, and attempt to express them in the answer.

Once again, discussion of the partial defences was variable in quality but generally revealed good understanding of at least some aspects of the new law, and quite often of most aspects. In analysing the defence of loss of control, most students discussed the loss of self-control requirement, though discussions of the significance of acting out of a desire for 'revenge' rarely paused to assess the significance of the word 'considered', here. Commonly, students concentrated on the 'anger' trigger, with a small number also mentioning the 'fear' trigger. Many students accurately cited the two components of the anger trigger, and applied them confidently to determine that Oliver's implied suggestion that he physically abused Nora, and the disparaging comments about Mike's daughter, Kim, satisfied the requirements. However, even in these answers, there was little reference to the nature of the components as imposing a combination of subjective and objective tests. Students who were able to incorporate the ***Clinton*** decision into their answers generally understood its effect as permitting reliance on evidence of sexual infidelity in support of other things said which met the anger trigger requirements. Those not yet familiar with the decision correctly argued that evidence of the sexual infidelity would be excluded but that the other things said could still be utilised. Weaker students referred to the anger trigger but never discussed its components, jumping instead to the conclusion that it was satisfied. Some students were confused about the meaning of 'circumstances of a very grave character', which they misinterpreted as referring to the accused, who had to be, therefore, 'a very grave character'. Many students also misunderstood the effect of the sexual fidelity exclusion and simply asserted that the

defence would fail in its entirety because there was evidence of sexual infidelity, irrespective of what other evidence was available. In some cases, this meant that students abandoned any further discussion of the defence, always an ill-advised decision when the facts in a scenario point so strongly towards a particular offence or defence. In any case, a surprising number of students did not explain and apply the final objective test, and of those who did, some made no reference to the factors which bore only on Mike's capacity for self-control, and so distinguished him from a person of normal tolerance and self-restraint.

In discussing the defence of diminished responsibility, most students were able to provide an accurate account of the elements of the modified defence, though there were still many who referred to an 'abnormality of mind' whilst often correctly referring also to an abnormality of 'mental functioning'. Students were clear that the depression amounted to a 'recognised medical condition' but were understandably less certain about how to categorise the effect of the abnormality of mental functioning. Most opted for the suggestion that it substantially impaired his ability to form a rational judgment, or to exercise self-control, or both. Many, though by no means all, students discussed the requirement that the abnormality of mental functioning must provide an explanation for the conduct, in terms of causing it or being a significant contributory factor in its cause. Stronger students then discussed the range of factors which may have contributed to Mike's conduct and were usually able to conclude that, though not the sole cause, his abnormality of mental functioning probably did make a significant contribution. Weaker students did not go on to suggest any application. A relatively small number of students discussed insanity, either additionally or, occasionally, as a complete alternative to diminished responsibility. These answers were often successful in providing detailed explanation and application and, in particular, in doubting whether Mike would succeed because it was unlikely that he could show that he did not understand the nature and quality of his act, or did not understand that it was legally wrong.

Question 06

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

SECTION C

CONTRACT – SCENARIO 3

Note that there were relatively few Contract scripts, so that generalisations about answers and references to 'many' and 'some' students must necessarily be treated with caution.

Question 07

A comprehensive answer to this question required students to recognise that there were three essential components: possible liability for a misrepresentation committed by Quickstep; possible liability for breaches of both a specific term in the contract between Anna and Quickstep as to provision of personal tuition, and a term as to reasonable care and skill implied by the *Supply of Goods and Services Act 1982 s13*; the remedies available, and the effect on those remedies of the purported attempt by Quickstep to exclude liability for personal injury and damage to property.

Students usually recognised and addressed some of these elements but rarely succeeded in developing a comprehensive analysis. The fact that the scenario began with a reference to an 'advertisement' seemed to induce many students to believe that they were required to explain the elements of offer and acceptance, which they often did at great length. However, the question made it absolutely clear that Anna and Quickstep had entered into a contract, so that the only real relevance of the debate about offer and acceptance lay in the issue of whether any statements made about the nature of the tuition that would be available were merely (mis)representations or subsequently became terms of the contract. Yet, even here, it would have been open to Anna to rely on either or both misrepresentation and breach of term if the statements amounted to both. So, though some credit could be given for discussion of formation, it was necessarily very restricted. Those students who understood that misrepresentation was in issue often gave accurate and pertinent explanation of the elements, with good use of authority, which they were able to apply confidently. Others, however, managed only rather superficial explanation and application, particularly on the issue of the kinds of misrepresentation, which they simply assumed to be fraudulent, even though negligence might also have been in issue. A surprisingly large number of students did not deal with misrepresentation at all, and so revealed a failure to understand a significant part of the scenario.

However, the weakest component in most answers was undoubtedly the analysis of the terms in the contract. Most students simply did not recognise the possible express term(s) as to the nature of the tuition to be provided, which obviously had an impact on any further discussion of the nature of the relevant terms and the liability for any breach. Responses in respect of reasonable care and skill under the *Supply of Goods and Services Act 1982* were a little stronger, though the term itself was usually merely identified rather than explained. Even here, a sizeable minority failed to recognise that any such term was involved. Stronger students did discuss the nature of the statutory implied term, as condition, warranty or innominate term. It was usually correctly categorised as an innominate term, the implications of which were also usually understood. This provided the basis for a relevant discussion of remedies. Weaker students tended to omit this aspect, or to argue that it was either a condition or a warranty.

Students who understood the rules on misrepresentation usually had no difficulty in being able to relate the remedies of rescission and damages to the different kinds of misrepresentation. However, there was little discussion of the bars to rescission, whilst students often displayed confusion about when damages might be available for breach, as well as whether those damages would be based on tort (and, if so, whether they would be on

a deceit basis or on a negligence basis) or contract. There was also little evidence here of familiarity with relevant cases. Typically, students argued that damages would be awarded on a contractual basis and made no distinction between damages as of right and discretionary damages (for example, in lieu of rescission). In relation to terms, it has already been explained that many students did not succeed in recognising that express and implied terms were involved. So, in many answers, the discussion of terms was simply subsumed within a discussion of remedies, which often focused almost entirely on the exclusion clause aspect and provided little explanation and application of the remedies themselves. However, stronger students, having identified either or both express and implied terms and correctly categorised them, were able to consider whether any breach was sufficiently serious to be regarded as repudiatory, or merely gave rise to an action in damages. Though analysis of the exclusion clause was probably the strongest element in most answers, few students demonstrated comprehensive understanding of the rules and how they would apply. There were many extensive, and generally accurate, explanations of the common law rules on incorporation but students revealed rather less understanding of the relevant provisions of the *Unfair Contract Terms Act 1977*. Many students dealt with the issue of the purported exclusion of liability for personal injury, and most asserted that it was prohibited by the *1977 Act*. However, many failed to mention that the prohibition on exclusion of liability for personal injury contained in *s2* applies only where such injury is caused by negligence. Few students went on to consider the application of the exclusion clause to liability for negligently caused damage to property (the torn dress), so that most missed the opportunity to debate the 'reasonableness' criteria that would be applied. On the whole, then, despite the fact that there were some excellent answers on this aspect, students did not make the connection between the 'reasonable care and skill' requirement of the term implied by the *Supply of Goods and Services Act 1982 s13*, and the negligence requirement for the operation of the *Unfair Contract Terms Act 1977 s2*. Additionally, there was little attempt to consider the more general requirements of the *1977 Act*, such as that the prohibition discussed above applies only to 'business liability'.

Question 08

This question required students to discuss Anna's rights and remedies against BFS in connection with the coat that had been bought for her by her father, Cal. The very fact that it had been bought for her raised issues of privity of contract, and the possible application of the *Contract (Rights of Third Parties) Act 1999*, as well as the rights and remedies derived from the implied terms as to description, satisfactory quality and fitness for purpose to be found in the *Sale of Goods Act 1979 ss13 and 14*. Additionally, Cal had been aggrieved by denial of the right to use the discount voucher which had been given to him by BFS with his purchase of the coat. This raised formation of contract issues which could have been viewed from a number of different perspectives. For example, it could have been treated as an offer and acceptance issue in which the task was to determine exactly what conduct constituted each. From this perspective, there would have been doubts about whether any offer was ever communicated to Cal, and therefore whether anything that he had done (such as buying the coat) could have been interpreted as his acceptance. A variant on this analysis would have been to try to argue that there was a contract, giving him a right to the discount, collateral to the main contract. Alternatively, the issue could have been analysed from the perspective of consideration, and even of past consideration, given that he seemed to be rewarded for something that he had already done (bought the coat).

Most students began by tackling the privity issue, with many providing a detailed explanation of the general common law rule, based on cases such as ***Tweddle v Atkinson***. Stronger students then explained the effect of the *Contract (Rights of Third Parties) Act 1999*, and so were able to conclude that, in view of the very specific arrangements made to order the coat in Anna's name and to deliver it to her address, Anna might well have been able to take advantage of the rights under the contract. Weaker students either referred to the *1999 Act*

without really displaying any understanding of its provisions and how to apply them (frequently merely saying that the contract was 'for her benefit', without suggesting exactly what facts in the scenario would support the assertion) or sought to deal with the issue by reference to the traditional exceptions to the rule. This was inevitably a rather fruitless exercise. The general impression created by these answers was that, though many students were aware of the privity issues in general terms, rather fewer had any real understanding of the detailed application of the *1999 Act*.

In general, students demonstrated a reasonable level of understanding of the rights created by the *Sale of Goods Act 1979* implied terms. Most recognised that the initial supply of a coat of the wrong colour shade was a breach of the *s13* implied term as to description, and were able to quote relevant authority. This led to the assertion that Anna could have rejected the coat entirely and that BFS had no right to charge a delivery fee in respect of the supply of a suitable replacement, though this proposition was often expressed without reliance on any supporting authority, or stated as an aspect of the prohibition on exclusion clauses (see below for a discussion of *s48*). Some confused the issues by discussing either satisfactory quality or fitness for purpose rather than description. However, most reserved discussion of those implied terms for the defects in the stitching of the seams of the sleeves and the rather poor fit of the coat. Again, though there was considerable variation in detail, students were usually able to explain the terms and to illustrate their meaning and effect by reference to some case authority. The weakest part of the analysis here tended to be a failure properly to explore the implications of the description of matters relevant to the quality of goods contained in *s14(2B)*, in particular, appearance and finish, and freedom from minor defects. Students usually understood the remedies in terms of rejection of the goods and damages for any loss suffered but there was little evidence of any detailed understanding of the provisions of *s48* in giving additional rights to buyers in consumer cases. These provisions would have been specifically relevant to the attempt to charge the delivery fee for the supply of the replacement coat, as well as to the issue of how to address the defects in the replacement supplied. Even if rejection of the coat and rescission of the contract might have been the most likely course of action for Anna, still there were other possibilities provided by *s48* which could have been identified and briefly explored.

The discount voucher issue caused students considerable difficulty. Some ignored it entirely whilst most dealt with it very briefly. One approach commonly adopted was to treat it as an issue of withdrawal of an offer, and so to explore the circumstances in which an offer can validly be withdrawn, involving adequate communication. On this approach, Cal was said to be entitled still to use the voucher because he had not been told that he could not do so, and insufficient time had passed for the offer to lapse. This form of analysis never addressed the obvious issue of what was the offer and what would be the acceptance, though it certainly had some merit. Again, students who attempted to approach the issue specifically from the offer and acceptance perspective usually managed to develop some creditworthy analysis but explanation and application tended to lack coherence because no clear view emerged of how an offer had been made and what acceptance had taken place. Few candidates sought to examine the consideration aspect but, amongst those who did, the consensus appeared to be that Cal would not be able to insist on gaining the discount because it was only after he had bought the coat that he was informed that he would be entitled to it. Whether accurate or not in law, this approach certainly had the merit of coherence.

Question 09

This question asked students to present a critical evaluation of the current rules on making an agreement (offer and acceptance) and to suggest any appropriate reforms. In relation to critical evaluation, students were always able to present some creditworthy material, but there was enormous variation in the level of detail in which they succeeded in doing so. A small number of students wrote very perceptive analyses in which criticisms were detailed

and precise. A large number, however, did not progress very much beyond explanation and very limited comment. In relation to offer, the common approach was to explore the distinction between offer and invitation to treat by reference to cases such as ***Fisher v Bell***, ***Partridge v Crittenden***, ***Pharmaceutical Society of Great Britain v Boots Cash Chemists***, and ***Carlill v Carbolic Smoke Ball Co***. Of course, it was a relatively simple matter to provide some explanation of these cases and to assert that it is not always easy to decide what is an offer and what is merely an invitation to treat. Students found it rather more difficult to analyse the precise reasons for the contrasting decisions made in, say, ***Partridge v Crittenden*** and ***Carlill v Carbolic Smoke Ball Co***. Consequently, evaluation tended to remain on a rather superficial level. Similarly, the account of the rules on revocation of offers was usually accurate but a little too descriptive, though there were some telling criticisms of the extension from direct communication with the offeror to knowledge acquired from a 'reliable source' (for example, ***Dickinson v Dodds***). In relation to acceptance, attention focused mainly on the rules for postal acceptance, on the distinction between a counter offer and a request for further information, on acceptance in unilateral contracts, and on silence and acceptance. Here, the critical evaluation was often a little sharper than in relation to offers, with the postal rules in particular (***Adams v Lindsell***, ***Household Fire and Carriage Accident Insurance v Grant***) coming in for a good deal of adverse comment. In general, criticisms were often much more powerful when located within a general framework such as that provided by developments in technology. This gave students the opportunity to explore whether the traditional rules are sufficiently flexible to be adapted to electronic communications and current modes of, say, advertising of goods and services, and the making of contracts for their provision. Surprisingly, there was little attempt to debate the issues from the perspective of the so-called 'battle of the forms', a notion which has certainly served to illuminate some of the difficulties of practical application of technical rules (***Butler Machine Tool Co v Ex-Cell-O Corporation***). Consistently with the rather superficial level of evaluation, suggestions for reform were usually rather brief and unspecific. The general gist of those suggestions is perhaps accurately conveyed by the idea that 'something is wrong and changes should be made', the nature of those changes being left rather vague. Substantial proposals were most likely to be associated with very structured criticism centred on the capacity of the law to adapt traditional rules to modern modes of communication. Answers tended to be weaker when they concentrated on changes to individual rules.

CONTRACT – SCENARIO 4

Question 10

This question involved two possible contracts between Eric and Dave: a contract for the payment by Dave of £350 to Eric for repairing the burst water pipe; a contract for the payment of £150 by Dave to Eric for the installation of the outside tap. In both instances, there was an issue of intention to create legal relations, given that Eric and Dave were neighbours between whom there was obviously a relationship which was something a little more than simply business. In relation to the first possible contract, the difficulty lay in the fact that Eric had responded to an emergency at a time when, presumably, it was impossible to contact Dave. So, all the work had been completed by the time that Dave made his promise to pay for it, and the issue of past consideration was raised. In the case of the installation of the outside tap, the issue was whether there had ever been any agreement to the work being carried out. Eric clearly thought that Dave had asked him to do so. Dave clearly thought that they had merely been considering the idea and discussing what kind of cost would be involved. This required application of an objective test for the construction of the meaning of the various things said at the time.

As in other contract questions, students generally recognised some of the issues identified above but rarely all of them, so that answers were often detailed in explanation and application over a narrow area. Moreover, though many answers, whether comprehensive or

not, approached the analysis in the way set out above, many others dealt with it in a different way. This commonly involved treating the installation of the tap as an issue of past consideration, a rather awkward proposition in view of the fact that no subsequent promise to pay for the installation was ever made by Dave. In this approach, the repair of the water pipe was usually considered to be simply a matter of intention to create legal relations, thus restricting discussion of the scope of application of both consideration and intention to create legal relations. Students demonstrated strong understanding of the rules on presumptions in intention to create legal relations, distinguishing between domestic and commercial relationships, and sometimes examining the possible third category of 'social' relationships. Reliance was placed here on cases such as ***Balfour v Balfour***, ***Merritt v Merritt***, and ***Simpkins v Pays***. However, application tended to be rather more disappointing. The facts were balanced in such a way that there was scope for an argument either way about whether the relationship was tradesman and client (commercial) or friends/neighbours (domestic/social), though most simply opted for one or the other without reviewing the facts in any detail. Moreover, many students assumed that to classify the relationship was in itself to determine the answer, forgetting that these rules are about establishing what *presumption* applies. Since any presumption in this area is rebuttable, it was still worth exploring what the facts might suggest. So, for example, even if the relationship between Eric and Dave were to be classed as social, evidence of previous dealings might be used to suggest that, nonetheless, an intention to create legal relations was present. A little surprisingly, some students missed the intention to create legal relations aspect entirely.

Students who dealt with the consideration issue in relation to Eric's repair of the burst water pipe usually understood the rules on past consideration and were able to explain both the basic rule and the 'exception' to it, based on cases such as ***Re McArdle***, ***In re Casey's Patents*** and ***Lampleigh v Brathwaite***. However, once again, application tended to be a little superficial, with students usually asserting boldly that Eric would not be entitled to payment because his 'consideration' was past. In coming so easily to this conclusion, students tended to overlook the fact that Eric was a plumber making his living out of this kind of work, that he had often done work previously for Dave and been paid for it (as well as sometimes as a favour for the cost only of the materials), that he had expended money on hiring equipment, and that Dave had left him in charge of the house (with keys). All of these factors could suggest at least the possibility of an implicit agreement to pay for any services rendered, and necessitated by his stewardship of the house. Instead of analysing these facts in terms of consideration, some students applied traditional rules of offer and acceptance. Inevitably, this approach was interesting and creditworthy, though it tended to eliminate discussion of the notion of an express subsequent promise particularising the details of an implied earlier promise.

Whichever approach they adopted in dealing with the installation of the tap, students usually found difficulty in presenting a convincing analysis. If, as already indicated, students opted for the consideration approach, then they tended to ignore the fact that no later promise was ever made by Dave. This significantly undermined explanation and application. If they attempted to deal with it from a formation of contract perspective (as a matter of offer and acceptance), they were often rather uncertain about how exactly to make the arguments. The strongest arguments revolved around a case such as ***Harvey v Facey***, taking Dave to have been engaged merely in preliminary negotiations to determine whether he wanted to pursue an interest in the installation. Viewed in this way, Eric put a specific question to Dave about how much he would be prepared to pay, and Dave gave a specific reply to that question. That reply could not be interpreted as an offer which Eric could accept. Rather, it might have established a basis on which proper negotiations could begin.

Question 11

This question required discussion of two completely different areas of law: termination of a contract by frustration or breach, and the consequent rights and duties; the rights and remedies available in the event of a breach of implied terms as to description (possibly), satisfactory quality, and fitness for purpose (possibly) under *ss13-14* of the *Sale of Goods Act 1979*, including the effect on remedies of attempts to exclude liability.

It was likely that the contract between Eric and Fastbuild was terminated by frustration in the form of impossibility by destruction of the subject matter (by analogy with, say, ***Taylor v Caldwell***), though it might also have been possible to argue either illegality (because of the health implications), or frustration of the common venture (in that, even if the flats could be built, they could probably not be occupied). In that event, the consequences would be determined by application of the rules set out in the *Law Reform (Frustrated Contracts) Act 1943*. All sums payable would cease to be payable, and all sums paid would be recoverable, subject to recompense from sums paid or payable up to the date of the frustrating event for any amount expended in performance of the contract. On these provisions, the Court could have decided to award Eric a maximum of £1000 to meet the £2000 incurred in expenses. However, Fastbuild might still have been obliged to pay up to a further £1000 if it appeared that anything done by Eric prior to the date of the frustrating event had conferred a valuable benefit on Fastbuild. Clearly, the calculation here would be affected by the fact that Eric still had the materials he had bought. In the event of a finding of breach, Eric would have had rights to treat the contract as at an end, and to sue for his expected profits or his reliance loss.

Students had no difficulty in recognising the possibility of frustration and they were generally very knowledgeable on the different kinds of frustrating event, supporting their answers by reference to the major cases, such as ***Krell v Henry***, ***Herne Bay Steamboat Co v Hutton***, and ***Taylor v Caldwell***. Usually, they opted for the description of the frustrating event as impossibility because of the unavailability of something essential to the performance, namely the site. Occasionally, students also debated whether Fastbuild was in any way at fault, but this aspect was usually ignored. However, the main weakness in answers lay in the discussion of the consequences of frustration. Very few students properly understood the provisions of the *1943 Act*, especially those contained in *s1(3)*. So, though it was often correctly asserted that all sums payable would cease to be payable, and that all sums paid would be recoverable, it was also often incorrectly asserted that Eric would have a right to recover all of his expenses. This assertion ignored both the discretion in the judge and the distinction between the sums paid or payable before the frustrating event, and those payable after that event. In discussing this aspect, students usually made no reference whatsoever to the value of the materials actually still in Eric's possession, and rarely discussed the rather unlikely possibility that assistance in enabling Eric to recover the whole of the £2000 might be found in *s1(3)*.

The materials bought by Eric from Plumbserve raised issues under the *Sale of Goods Act 1979*. Though probably in conformity with description, there were clearly doubts about whether they were of satisfactory quality, given the range of minor defects, and possibly whether they would be fit for purpose. The remedies available, and the effect of any purported restriction on those remedies, would depend on whether or not this was to be regarded as a consumer contract. If so, then the attempt by Plumbserve to restrict rights to demand replacements by reference to a time limit of two weeks, assuming incorporation of the relevant term into the contract, would be prohibited by the *Unfair Contract Terms Act 1977 s6.* If not, then it would be subject to a requirement of reasonableness under the statute. Similarly, rights under *s48,* particularly in relation to replacement or reduction in price*,* would be available only if Eric was dealing as a consumer, otherwise he would be obliged to rely on the general right to reject the goods and/or claim for damages for any loss.

However, his right to reject might have been lost by the delay, irrespective of the purported limitation clause.

Students usually demonstrated strong understanding of the rights provided by the implied terms, relying mainly on satisfactory quality but sometimes also on fitness for purpose. However, as in answers to question 08, there was a tendency to ignore the description of matters relevant to the quality of goods contained in *s14(2B)*, and, in particular, appearance and finish, and freedom from minor defects. Though students recognised the remedies in general terms, and sometimes talked about business and consumer contracts, there was little evidence of detailed understanding of the implications of the consumer contracts category, so that most students simply assumed that Eric was dealing as a consumer when it came to analysis of the effect of the limitation clause. This deficiency was less obvious in the case of the analysis of the application of *s48*, simply because so few students dealt with that provision. Consequently, most of the discussion of remedies focused on rejection, with more perceptive students dealing with the possibility that Eric would have lost the right to reject, and with damages in general terms. Use of case authority in this area was limited and rather weak. As in the answer to question 07, perhaps the strongest element in the answers was the discussion of the common law rules on incorporation of exclusion and limitation clauses. Here, the rules were well understood and supported by ample reference to case authority. Application was equally accomplished.

Question 12

For comments on answers to this question, see the comments on answers to question 09 (above).

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