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June 2012

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) June 2012

SECTION A

CRIME – SCENARIO 1

Question 01

Students answering this question almost always recognised that Gavin's conduct in swinging himself up onto Alice's fence and staring at her raised the possibility of an offence of assault. Most, but certainly by no means all, identified Alice's depression as possible actual bodily harm, and so went on to discuss the possibility of the offence under *s47* of the *Offences Against the Person Act 1861* of assault occasioning actual bodily harm. A small minority also considered the possibility that the depression might be sufficiently serious to amount to grievous bodily harm, and so also discussed the offence of unlawful and malicious infliction of grievous bodily harm under *s20* of the 1861 Act. This latter approach, though not required for maximum marks, was obviously creditworthy. Variation in quality between answers on the assault aspect lay, in particular, in the depth of analysis of the *actus reus* requirements.

Stronger answers explored the nature of the conduct that must be proved, drawing on cases such as ***Ireland***, ***Constanza*** and ***Smith v Chief Constable of Woking Police Station***, and emphasised the likely effect of Gavin's conduct on someone of Alice's age. Weaker answers treated this aspect much more superficially, often being content to assert that the fact that Alice started "shaking" was sufficient proof that Gavin had caused Alice to fear/apprehend immediate personal violence. As previous reports have mentioned, some students remain unable to distinguish between fear of immediate personal violence (the actual requirement), and immediate fear of personal violence (which could be interpreted as fear at that moment of personal violence to be inflicted at some later date). Answers usually explained the *mens rea* of assault accurately, and applied the explanation perceptively.

However, perhaps the greater variation in quality emerged when students addressed the actual bodily harm issue. Most students categorised Alice's depression as actual bodily harm, though only the stronger answers explored the meaning of such harm, usually by reference to the definition in ***Chan-Fook***. Surprisingly, many saw no issue worth debating about the causal connection between Gavin's conduct and Alice's depression, and some made no reference to it at all. Of those who did, the overwhelmingly popular approach was to analyse it in terms of the 'thin skull rule', the application of which allegedly solved any problems. It was true that application of the rule was important in analysing legal causation but students seemed unaware of the potential significance of Alice's pre-existing tendency to suffer from problems with mental illness when considering factual causation. Discussion of unlawful and malicious infliction of grievous bodily harm rarely came to terms with the additional causation and *mens rea* issues raised beyond those applicable to the actual bodily harm offence.

The analysis of the legal significance of Gavin's subsequent exploits in relation to Brian and Jean appeared to cause students rather more difficulty. Apart from a minority of students who seemed content to concentrate on the offence of actual bodily harm or, rather bizarrely in view of the severity of the injury suffered by Jean, on the offence of battery, students generally identified a wounding offence under either or both of *s20* and *s18* of the 1861 Act. Additionally, and sometimes alternatively, this was presented as the grievous bodily harm version of the offence. Students found no difficulty in explaining and applying the meaning of 'wound' but were far less confident in their approach to causation and *mens rea* issues. Often, answers ignored causation or treated it simply as an issue of factual causation (if

Gavin had not hurled the bicycle, Brian would not have flung out his arm and inflicted injury on Jean with the shears). This was certainly an essential requirement, but a relatively small number of students realised that proof of legal causation demanded some further analysis of Brian's role, utilising a case such as ***Pagett*** or, perhaps, drawing an analogy with ***Roberts*** (a case of the victim's own conduct as a potential *novus actus interveniens*, rather than the conduct of a third party).

In discussing the *mens rea*, most students understood that proof of intention or recklessness as to some harm was required for the *s20* offence, and proof of an intention to cause grievous bodily harm for the *s18* offence. However, some students were confused about the requirements, asserting that *s20* required proof of intention only, or intention or recklessness as to serious injury, or that *s18* would be satisfied by proof of an intention to wound, or proof of recklessness as to serious injury. Additionally, there was some tendency to confuse *actus reus* and *mens rea* requirements in making inaccurate statements such as that the *mens rea* of *s20* "is intentionally or recklessly causing some harm". In application, many students simply argued that Gavin must have been reckless as to some injury to Jean. This was not an impossible argument but it had to be made with much more care than students usually displayed. For example, was it based on Gavin's foresight that Brian might respond instinctively whilst carrying the shears, or on the risk that a bicycle hurled at Brian might instead hit Jean, who was close by? An effect of this approach was also that it rendered any discussion of *s18* irrelevant. The more perceptive approach was that adopted by students who concentrated on Gavin's intention and foresight in relation to Brian, and then used the principle of transferred malice. This opened up the possibility of an argument about both *s20* and *s18*. Some students did deal with both causation and transferred malice, but in a rather confused way, in which they made a fruitless attempt to argue that if the malice could be transferred, it would demonstrate that causation had been established.

Question 02

This question asked students to discuss Colin's liability for murder. In such circumstances, there was a clear requirement to focus on the relevant aspects of the *actus reus* and *mens rea* of the offence of murder. The likelihood would be that, though there might be some doubts about elements of either or both of *actus reus* and *mens rea*, there would be a strong argument for a *prima facie* case of murder. Attention would then turn to whether Gavin might plead any partial or general defences, most obviously loss of control and/or diminished responsibility. For the most part, this was the approach adopted by students. However, a small but sizeable minority seemed strangely unsure that the question meant what it said. These students were tempted into a discussion of involuntary manslaughter, usually as a relatively minor addition to the discussion of murder, but sometimes as a substitute for it. At best, inclusion of discussion of involuntary manslaughter obscured the focus of the answer and reduced the time available for a detailed analysis of murder and voluntary manslaughter. At worst, it significantly reduced the credit that could be awarded because it wholly distorted the focus of the answer.

The quality of the analysis of the *prima facie* liability for murder varied very considerably amongst students but was rarely comprehensive in explanation and application. In particular, there was a surprising reluctance to acknowledge that there might be any causation issue, despite the fact that Harry had been dragged away by his friends and left on his own in circumstances where it should have been obvious that he might have suffered serious injuries requiring expert medical treatment. At the very least, there was a possible *novus actus interveniens* issue to investigate. Some students who did address the issue attempted to argue that Gavin and his gang might have been under a duty to assist Harry in consequence of creating a dangerous situation by virtue of their intervention. However, this usually led to a consideration of their possible liability for gross negligence manslaughter. Given that the instruction was to discuss Colin's liability for murder, not that of Gavin and his

gang for manslaughter, this approach was inevitably misconceived and diverted the focus away from causation. Most students understood that the *mens rea* of murder included both an intention to kill and an intention to cause grievous bodily harm, and most argued rather simply that Colin's actions displayed intention to cause grievous bodily harm. This argument could have been made a little more persuasively by closer reference to the facts, in which matters of relevance would have been what part of the body was Colin's target, how and with what apparent force were blows inflicted, and how sustained was the attack. Though the significance of intoxication was ignored by many students, those who did consider it usually explained its potential effect clearly and accurately. Answers drew the distinction between specific and basic intent offences, categorising murder as an example of the former, but also recognised that the fundamental question was whether any intoxication had prevented Colin from forming the intention to kill or cause serious injury, which they generally doubted. It should be noted that intoxication was relevant both in the discussion of *mens rea* and in the discussion of the defence of diminished responsibility (see below). However, full credit was available for its discussion in either context.

Stronger answers went on to discuss the possible defence of loss of control under the *Coroners and Justice Act 2009*, though a very large number of students failed entirely to identify its relevance. Of the students who did discuss it, very few were able to provide accurate and comprehensive explanation and application. There was usually some attempt to deal with the issue of loss of self-control, and an assessment of the notion of 'revenge' arising out of the suggestion that Colin had been outraged by the earlier behaviour of Gavin and his gang. Similarly, students were aware that the defence would not be successful in the absence of evidence of a 'qualifying trigger'. However, there was little detailed explanation of the elements of either the 'anger' trigger or the 'fear' trigger, and this meant that application was correspondingly superficial. Again, though many students identified the final objective test, few properly defined its elements or applied it with any precision. In particular, there was little attempt to consider whether or not Colin's personality disorder, and consequent anger and aggression, could be taken into account in the application of the test. Some students dealt with self-defence, either as an aspect of the analysis of the fear trigger, or as a defence in its own right. Though the facts made it reasonably clear that Colin's action was aggressive rather than defensive, this discussion was of some merit, but was a weak substitute for a detailed discussion of the defence of loss of control itself. Some students were obviously unfamiliar with the new law on loss of control, and answered the question from the perspective of the now abandoned common law defence of provocation. Such answers gained credit for discussion only of those areas in which there is some similarity between the old and the new law.

By comparison with the treatment of loss of control, that of diminished responsibility was generally very good. Though a small number of students revealed confusion between the original definition of diminished responsibility in the *Homicide Act 1957 s2*, and the amended version inserted by the *Coroners and Justice Act 2009* (particularly in relation to the concept of 'abnormality of mind'), most were able to explain and apply the elements of the new definition with confidence. Answers were especially accomplished in dealing with the required effect of the abnormality of mental functioning, and its origins in a recognised medical condition, but were probably at their weakest in identifying and explaining the requirement that it must provide an explanation for the accused's conduct. Many students also accurately explained and applied the rules on the relevance of intoxication to the defence of diminished responsibility, citing as authority the House of Lords decision in ***Dietschmann***. Some students confused the elements of the defence of diminished responsibility with those of the defence of insanity. Occasionally, this took the form of identifying one but explaining and applying the elements of the other. This mislabelling was of rather less significance than the confusion which attended an inextricable mixing of the elements of the two defences in explanation and application. Of course, a separate explanation and application of the defence of insanity, whether in addition to diminished

responsibility or as an alternative, had considerable merit. However, it should have been clear to students that, ultimately, the defence would fail because there would be insufficient evidence to support the proposition that Colin did not know the nature and quality of his acts, or that they were legally wrong.

Question 03

In answering this question, most students were able to deal reasonably well with issues of language and structure. Criticism frequently emphasised the age of the legislation, its outdated terminology, lack of comprehensiveness, and its poor organisation. The sentencing structure, in particular, was often subjected to withering criticism. Additionally, there was some perceptive criticism of the terminology used in the offences of assault and battery, terminology allegedly incomprehensible to the average person, and productive of confusion even amongst legal professionals. Students also sought to evaluate aspects of *actus reus* and *mens rea* of the specific offences.

Though never fully accomplished in making the relevant criticisms, stronger answers on this aspect tended to focus on issues such as the definition of 'immediate' in the requirement for proof of fear/apprehension of 'immediate' personal injury in assault, the inclusion of 'wound' as an *actus reus* element in the *s20* and s18 offences, even though, by contrast with, say, actual or grievous bodily harm, it describes a *kind*, not *degree*, of injury and, more generally, the lack of correspondence in most of the offences between the *actus reus* and the *mens rea* elements. Some students identified the particular problem arising from the inclusion within the *s18* offence of the alternative ulterior intent requirement of an intention to resist or prevent apprehension or detainer. The argument proposed here was that, in such a case, liability under *s18* might be established without any serious injury having been caused (a wound), and without any serious injury having been intended or foreseen, and yet the accused could, in principle, be subject to a maximum period of life imprisonment.

Inevitably, the difference between the stronger and the weaker answers dealing with these aspects was to be found in matters such as depth of treatment, range of issues discussed, and ability to develop the criticisms in an accurate and coherent way. Commonly, weaker students dealt with only one or two issues, or presented incomplete analyses (for example, of the range of sentencing anomalies), or wrote confused accounts of the lack of correspondence between *actus reus* and *mens rea* elements.

There was surprisingly little evidence of any attempt by students to introduce criticism of consent as a defence to personal injury offences, a regrettable omission in view of the fact that this area provides very fertile ground for critical evaluation, as well as affording considerable opportunity to present suggestions for reform. On the other hand, there were some interesting, albeit rather superficial, critical analyses of the deficiencies of the current offences in dealing with domestic violence. However, it may be that these criticisms are better directed to more general aspects of the criminal process, aspects not really encompassed within the Specification.

Suggestions for reform were often presented in a rather desultory manner, consisting of little more than an exhortation to engineer change in direct response to a criticism, but with no apparent idea of what form that change might take. However, there was generally some awareness of the replacement offences proposed by the Law Commission in 1993 and by the Government in its draft Offences Against the Person Bill in 1998, and this ensured that some credit was usually gained. Stronger answers directly related these proposed reforms to the criticisms advanced, and often explained further proposals, such as the definition of 'injury', the way in which transmission of disease should be treated, and the liability for omissions. Weaker answers displayed a little confusion, or omitted some of the proposals, or simply presented a list of definitions of proposed offences without further explanation.

Gratifyingly, there was also some evidence that students were aware that the Law Commission has recently re-embarked on work in this area, though the legislative appetite for change may still remain weak.

SECTION B

CRIME – SCENARIO 2

Question 04

In answering this question in relation to the injury inflicted by Jameela on Ken, most students dealt with the offence of unlawful and malicious infliction of grievous bodily harm under the *Offences Against the Person Act 1861 s20*, though a sizeable number dealt additionally, or sometimes alternatively, with the *s47* offence of assault (battery) occasioning actual bodily harm. The facts in the scenario clearly indicated that not only had Jameela knocked Ken over and broken his hip, but also that this had led to Iris suffering a heart attack. It was very surprising, therefore, that so many students completely ignored the possibility that Jameela could be guilty of any offence in relation to Iris.

When dealing with the injury to Ken, answers generally explained and applied the elements of the *s20* offence competently, even if the relevance of ***Bollom***, in view of the description of Ken as 'an elderly man', was not always appreciated. However, there was also much evidence of persistent confusion and misconceptions about the offence and its application. So, for example, some students incorrectly insisted that proof of a 'wound' is essential to proof of grievous bodily harm. In the evident absence of any such wound, they concluded that the offence under *s20* could not be made out, and so diverted their attention to the less serious offences. Discussion of those offences was not without merit but, clearly, was of rather less value than discussion of *s20*. Additionally, there was often confusion about the precise *mens rea* required for the offence, incorrect suggestions including intention or recklessness as to serious injury, intention (only) as to some injury, and intention or recklessness as to wounding.

As indicated above, many students did not even mention the heart attack suffered by Iris. Of those who did, few made any serious attempt to grapple with the issues posed. The approach often adopted was simply to extend the initial explanation and application of the elements of the offence in relation to Ken to include application to Iris, with little additional specific analysis of the issues in relation to Iris. So, the heart attack was a serious injury, and Jameela would have been aware of the risk that a person of Iris's age could be badly affected by the sight of her husband being knocked down and injured. On the other hand, many students did seize on the opportunity to debate the thin skull rule and its application to Iris, which they saw as resolving any causation difficulties. Since there is little exploration of this issue in the context of non-fatal offences, this was perhaps understandable. However, proof of *mens rea* clearly posed a more substantial difficulty, and few students recognised that the most likely way to overcome it would be to argue for recklessness as to some harm in relation to Ken, and then to 'transfer the malice' in relation to the heart attack suffered by Iris. This would not necessarily have solved all the problems but would have been a very strong analysis, given that those problems were left unaddressed and unresolved by the House of Lords in ***Burstow***.

The reference to the paranoid delusions induced by Jameela's schizophrenia clearly introduced the possibility that Jameela might be able to plead a defence of insanity. Most students recognised this possibility and explained and applied the rules very well, making this probably the highest scoring aspect of the answer. However, if there was a common weakness in these otherwise excellent responses, it was the failure to understand how to

approach the issue of whether the effect of Jameela's delusions was that she did not understand the nature and quality of her acts or, if she did, whether she understood that what she was doing was legally wrong. This issue was usually dealt with in rather general and superficial terms, often under the first head, rather than the second. In truth, Jameela believed that she was defending herself against imminent attack. Had this been a simple mistake about the intentions of others, then she would have been able to rely on the rule in ***Gladstone Williams*** to plead self-defence on the basis of the facts as she genuinely believed them to be. The fact that the mistake was the product of a defect of reason caused by a disease of the mind meant that the defence was actually insanity rather than self-defence. However, the correct interpretation of the effect of that defect of reason now emerges with greater clarity. Jameela certainly understood the nature and quality of her acts as striking out at people around her. What she did not understand was that she was doing what was legally wrong, because she genuinely believed that she was engaged in self-defence, using proportionate force. As in the answer to Question 02, discussed above, some students confused the defences of insanity and diminished responsibility. Where this was simply a confusion of elements of the two defences (for example, a 'defect of reason' described as an 'abnormality of mental functioning', or a 'disease of the mind' described as a 'recognised medical condition'), some, albeit reduced, credit was generally still available. However, where it was obvious that students had embarked on explanation and application of the defence of diminished responsibility, apparently in ignorance of the fact that that defence is a partial defence to murder only, there was little credit to be awarded.

The attack on Jameela by Leah was correctly treated by most students as a possible offence of unlawful and malicious wounding under the *Offences Against the Person Act 1861 s20*, eliciting the now customary detailed and accurate accounts of the meaning of 'wound' by reference to the case of ***JCC v Eisenhower***. Equally, most students were able to deal relatively straightforwardly with the *mens rea* for the offence, arguing that Leah was at least reckless as to inflicting some harm. Of course, consistently with errors reported in comments on answers to Question 01 and in earlier comments on answers to this question, some students fell into error over the *mens rea* requirements of the offence. Other students argued for the lesser offence of assault occasioning actual bodily harm under *s47* of the 1861 Act, treating Leah's intervention as a battery which had caused actual bodily harm by way of the split lip. This was of a little less value than the *s20* approach but still worthy of considerable credit. However, those students who relied entirely on the offence of battery itself were surely pitching the analysis at a level which was far too low. Nevertheless, though it was important to establish the offence possibly committed by Leah, it was equally, if not more, important to consider the defence that she could raise. Though the facts in the scenario were not absolutely specific, their clear implication was that Leah had intervened to prevent any further injury to Ken, Iris and any others present. When she did so, she had no idea of Jameela's mental condition. Consequently, students were absolutely correct in arguing for a defence of self-defence/prevention of crime. Those who did so usually presented competent explanation and application in which the necessity for the use of force was dealt with by reference to the ***Gladstone Williams*** rule, and the continuing danger apparently suggested by Jameela's behaviour. Similarly, in dealing with the issue of proportionate force, students frequently made good use of the decision in ***Palmer***. Perhaps the biggest surprise was that a large number of students missed the possibility of self-defence entirely, and so had to rely solely on their discussion of the offence possibly committed by Leah.

Question 05

This question instructed students to discuss Michael's liability for involuntary manslaughter arising out of the deaths of Nick and Tina. Michael had brought about Nick's death in the course of driving his car very dangerously but without giving any thought to that danger. Since unlawful act manslaughter requires proof, *inter alia*, of the commission of a crime other than one of negligence, unlawful act manslaughter was clearly not the appropriate form of

involuntary manslaughter. This was recognised by most students, who opted correctly for a discussion of gross negligence manslaughter. On the other hand, when Michael punched Tina and Tina fell and banged her head on the pavement, with the result that she died, students found themselves facing one of the classic instances of unlawful act manslaughter. Again, most students recognised this and embarked on the appropriate form of analysis. The quality of analysis of the gross negligence manslaughter issues was determined predominantly by two factors: first, how comprehensive and detailed the range of elements dealt with was; second, how the answer dealt with the evident problem of causation raised by the fact that the surgeon made 'some mistakes' during the course of the operation.

In relation to the first of those factors, most students identified the need to prove that Michael was under a duty to Nick, that he broke that duty, that the breach caused Nick's death, and that, in those circumstances as a whole, his conduct was 'so bad' that it should be accounted gross negligence (that is, more than merely civil law negligence). However, the depth of explanation and application varied very significantly in quality, from the very superficial to the highly accomplished. On the whole, students opted to discuss duty in very simple terms, without complicated reference to the three-part test in ***Caparo v Dickman***. Given that there is little doubt that road users owe a duty to other road users, this was a sensible decision which should have made time available to discuss more contentious issues. Even so, explanation and, particularly, application of the final jury issue of the 'grossness' of the negligence was often rather peremptory and lacking in real perception. Students also frequently omitted from their discussion of the elements the requirement that the breach of duty must create a serious risk of death, or expressed it in a confused way.

Yet it was in relation to the second factor, the causation issue, that answers were probably at their weakest. Many students saw no particular causation problem at all, and simply passed serenely over it. Others asserted confidently that medical negligence does not break the chain of causation, either with or without reference to any rule derivable from cases such as ***Smith*** and ***Cheshire***. Some attempted to rely on a requirement for the medical treatment to be 'palpably wrong' before it might be regarded as a *novus actus interveniens* sufficient to break the chain of causation. As earlier reports have pointed out, this is terminology perhaps better avoided, since its adoption in ***Jordan*** subsequently met with disapproval in ***Smith***. Still other students seemed to believe that the true question was whether the surgeon would be deemed to have caused the death. If so, then this would break the chain of causation between Michael's conduct and Nick's death. If not, then it would not do so.

In reality, the true question was simply whether the chain of causation was broken. It is quite clear that there can be more than one cause of death, and so more than one person independently liable for an offence of homicide. The precise nature of the liability in each case then depends on the nature of the fault attributable to each individual. A strong answer to this part of the question would have explained what rule is applied where there is evidence of medical negligence which is alleged to break the chain of causation. There is no absolute certainty about this rule, or its interpretation and application, but cases such as ***Smith*** and ***Cheshire***, though expressing it in different ways, suggest that, at the very least, there must be some overwhelming failure on the part of doctors administering medical treatment. Whether this is adequately captured by a phrase such as 'grossly negligent medical treatment' is open to debate. The answer would then have speculated on the meaning of the phrase 'some mistakes were made by the surgeon', pointing out that it was impossible to attribute any definite meaning in terms of seriousness of mistakes, but that the chain of causation would be threatened by only the most overwhelmingly serious mistakes.

Establishing a *prima facie* case of unlawful act manslaughter against Michael in relation to the death of Tina was relatively straightforward, since Michael punched her and she died from the head damage suffered in her fall. Most students outlined the elements of unlawful act manslaughter as an unlawful act (crime) of a dangerous kind, causing death, and were

able to conclude that there was little difficulty in establishing all of them. Consequently, weaker answers were characterised by a failure to identify the particular crime and by a failure to elaborate on the meaning of 'dangerous'. In respect of the first, students sometimes mistakenly (for the reasons explained above) attempted to rely on a driving offence, and in other cases opted for a simple assertion that punching is a crime without ever explaining what crime. Consequently, they were unable to demonstrate that the *actus reus* and *mens rea* elements of the constituent crime could be established. In respect of the second, some students mentioned ***Church*** but failed to explain the test, whilst others simply asserted that punching was dangerous without ever suggesting any meaning of that term.

Stronger answers then went on to consider the significance for Michael's possible liability of the fact that he had himself suffered a head injury in the collision between his car and Nick, as a result of which he was obviously in a state of mental confusion when he punched Tina. Those who identified a possible plea of non-insane automatism usually presented a very perceptive explanation and application of the elements, referring to cases such as ***Quick***. If students entertained any doubts about the applicability of the defence, they were usually based on the interpretation of 'little idea of what he was doing' as not entirely ruling out the possibility that he had *some* idea, and so had not suffered that total loss of control required by cases such as ***Broome v Perkins*** and ***AG's Reference (No 2 of 1992)***. There was little enthusiasm for the alternative argument that the automatism was in some way self-induced, so possibly bringing into play the ***Bailey*** approach. Unfortunately, and again very surprisingly, many students simply did not address this issue at all, so that they inevitably deprived themselves of a significant amount of the credit available for a comprehensive answer.

The relatively small number of students who attempted to deal with Michael's liability for both deaths as instances of unlawful act manslaughter, or, conversely, as instances of gross negligence manslaughter, invariably produced a confused analysis in which the potential liability for neither death was accurately and comprehensively addressed. Such answers obviously had more relevance to the liability for one of the deaths than to liability for the other, so that the answers had some merit. Nevertheless, even in relation to that death, the clarity of explanation and, particularly, application was likely to be significantly compromised.

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

Students answering this question almost always seized on the fact that Alec and Bill were brothers to afford an opportunity to explore the existence of an intention to create legal relations. They were usually adept at explaining the difference between domestic and commercial relationships in terms of the presumption as to such intention, but invariably chose to categorise the relationship between Alec and Bill as domestic rather than commercial. In turn, this usually prompted explanation of the contrast between the cases of ***Balfour v Balfour*** and ***Merritt v Merritt***, with the simple conclusion that there was no reason to doubt that the presumption was against an intention to create legal relations, so that there was no such intention. Clearly, there was merit in this approach, but it did not represent a comprehensive analysis. Firstly, it tended to assume rather too easily that the relationship should be treated as domestic rather than commercial. After all, though Alec and Bill were brothers, Bill was performing work which was vital to his brother's commercial survival, and to do which he might well have engaged another person, had he been mentally capable. To view it in this way would have been to reverse the presumption. Secondly, students generally assumed that to categorise it as a domestic relationship was in itself to resolve the issue in favour of a lack of intention to create legal relations.

Instead, answers should have recognised that it created a powerful, but nonetheless rebuttable, presumption against intention to create legal relations. This would have led to further exploration of the circumstances to determine whether indeed the presumption could be rebutted. Surprisingly, though Craig and Alec were father and son, many students failed to consider whether Craig's promise to buy ladders for Alec if he paid the money to Bill would equally be of no worth because there would be no intention to create legal relations. Yet, arguably, this arrangement was much more characteristic of one entered into in the domestic, rather than commercial, context than that between Alec and Bill. Students who did recognise the issue often treated the relationship between Craig and Alec as, in essence, no different from that between Alec and Bill, and saw no reason to develop any separate analysis of the former relationship. In consequence, answers to this part of the question were almost always of rather limited merit.

On the other hand, there were many excellent answers dealing with the consideration aspect of the arrangement between Alec and Bill. These answers explained the notion of consideration, and of past consideration (usually relying on ***Re McArdle***), and suggested that Bill would be unable to claim the payment of £500 promised to him by Alec because it would be deemed to be for the work done prior to the making of the promise. For some students, that represented the end of the argument. However, most went on to discuss the so-called 'exception' to the past consideration rule represented by cases such as ***Lampleigh v Braithwait*** and ***Re Casey's Patents***, and so queried whether an implicit earlier promise to pay might not be deduced from the circumstances in which Bill felt himself obliged to undertake the work on Alec's behalf. The difficulty from Bill's perspective would have been to determine whether it would be necessary to deduce this implicit prior promise from a request by Alec to do the work and, if so, how he could possibly prove such a request. In the answers themselves, the quality of application to the facts was not reduced by the very evident difficulty of discovering such a request and implicit promise.

By contrast, students appeared to find much more difficulty in establishing the correct approach to the alleged contract between Craig and Alec. Some ignored it completely, whilst others treated it as a general issue of agreement via offer and acceptance. Of those who perceived that, once again, the issue was one of consideration, very few recognised that it was a question of sufficiency of consideration in circumstances where Alec would be seeking to rely on his performance of an existing obligation to a third party (Bill) as the consideration for Craig's promise to provide him with the new ladders. Thus, appropriate cases would have been those such as ***Scotson v Pegg*** and ***New Zealand Shipping Co v Satterthwaite***. However, students who treated it as an issue of an existing duty owed to the promisor (***Stilk v Myrick***, ***Williams v Roffey***) had at least recognised the general sufficiency issue, and so gained reasonable credit. Those answers which somehow confused promisor and promisee on the facts, and so tended to look for the consideration supplied by Craig rather than by Alec, were somewhat less impressive.

Question 08

In this question, Ellie's rights, duties and remedies were dependent on two different sets of rules, namely, those derived from misrepresentation as a factor which vitiates a contract, and those derived from the incorporation of terms in a contract. In reality, students answering the question rarely perceived the terms aspect and instead concentrated all their efforts on explaining and applying the rules on misrepresentation and its effects. In the absence of any significant number of student responses to the terms aspect, it is possible to provide a brief summary only of what might have been expected. It was strongly arguable that there was an express term in the contract between Ellie and Dean Enterprises by which Dean Enterprises would provide customer contacts, and equally strongly arguable that there was an implied term that those contacts would be exclusive to Ellie. If so, then it appeared that the implied term had been broken by Dean Enterprises. In that case, it would have been necessary to examine whether the term was a condition, warranty, or innominate term, in order then to determine what remedies for its breach were available to Ellie.

The failure to deal with the terms aspect did not prevent students from gaining considerable credit for the answer, if they were able to present comprehensive and accurate explanation and application of the rules establishing that a misrepresentation had occurred, and the rules detailing the legal effect of an actionable misrepresentation. In general, students were able to explain successfully the nature of a misrepresentation as a false statement of fact which induces a party to enter into a contract. In doing so, they distinguished statements of fact from expressions of opinion by reference to cases such as ***Bissett v Wilkinson*** and ***Esso Petroleum v Mardon***, and were often at pains to emphasise the inducement/reliance aspect, citing cases such as ***Attwood v Small***. However, the quality of application to the facts was a little more variable. Students generally found no difficulty in determining that a false statement had been made by Dean Enterprises in grossly exaggerating the volume of sales, and so weekly earnings, that Ellie might expect to be able to achieve. Yet they rarely recognised that, in undertaking some research into the status of Dean Enterprises and its claims, Ellie might have compromised her assertion that she had relied on the statements. In examining the effects of any actionable misrepresentation, students usually opted to categorise the misrepresentation as fraudulent, occasionally as negligent, but never as innocent, and it seemed most likely to be an example of fraudulent misrepresentation, with Dean Enterprises knowing that they were exaggerating the claims beyond any reasonably acceptable level in order to boost their own profits, and with little regard for their 'operatives'. The remedies for fraudulent and negligent misrepresentation were generally well understood, with many answers containing strong explanation of rescission and its consequences, as well as the bars to rescission. Many students were also able to explain the rules on claims for damages for fraudulent and negligent misrepresentation, including their tortuous nature, both at common law for the tort of deceit, and under the *Misrepresentation Act 1967*. Inevitably, the explanations were a little superficial, and students were often a little confused, and

sometimes simply mistaken, when it came to application to the facts, where, for example, a contractual approach to damages might suddenly and inexplicably emerge.

Question 09

Students answered this question by attempting to provide a critical analysis of the common law and statutory approaches to the control of exclusion and limitation clauses, and then by suggesting reforms that might be made. Though there were some very good answers, including the discussion of proposals for reform, there were many in which students displayed little true understanding either of the rules themselves or of the deficiencies evident in them. Such answers often consisted of very superficial accounts of the rules, often characterised by confusion and error, from which no coherent critical evaluation could possibly emerge, and for which, equally, proposals for reform could make little sense. The stronger answers presented some explanation of the common law approach, based upon incorporation and interpretation requirements, ranging across issues such as the significance of signing documents, the use of excessively small print, the difficulty in distinguishing contractual from non-contractual documents, the incorporation of terms by a course of dealing, and interpretation *contra proferentem*. The criticisms offered tended to be rather simplistic, though not without merit (for example, signing documents assumes too great a significance, the 'course of dealing approach' is confused, the *contra proferentem* rule is overly complex in application).

However, it was perhaps slightly disappointing that these analyses did not attempt to make a rather broader argument about the inherent inability of these approaches to address the potential unfairness of exclusion and limitation clauses at a sufficiently fundamental level. That task had to be dealt with by the legislature which, according to some very good accounts, had made rather a mess of it in producing a highly complex and confusing statute in the **Unfair Contract Terms Act 1977**. It had then compounded the difficulties in responding to European demands by preserving the 1977 Act but setting alongside it the **Unfair Terms in Consumer Contracts Regulations 1999**, containing overlapping provisions inspired by unfamiliar continental legal principles. Much weaker answers dealing with the statutory approach tended simply to cite one or two provisions of the 1977 Act, often inaccurately, and to assert unexplained difficulties, or were content to rely on brief explanation of the provisions alone. Again, when discussing reform, the stronger answers tended to focus on the proposals made by the Law Commission in its 2005 Report on Unfair Contract Terms, particularly in relation to producing legislation of greater clarity, free from the confusing overlap and conflicting approaches of the 1977 Act and the 1999 Regulations. Weaker answers simply followed up superficial criticisms with confident assertion, transparently devoid of substance, that changes must be made.

CONTRACT – SCENARIO 4

Question 10

The task for students in answering this question was to combine explanation of relevant rules of law on agreement in contract (offer and acceptance) with a clear application to the facts which would enable them to place the sequence of events within a credible legal framework. There is little doubt that Faruq's original email constituted an offer to buy the car for £3000. George's reply was certainly not an acceptance, but could have been either a counter offer or a request for information/statement of price. This was the point at which students should have begun to construct two alternative routes through the sequence of events. Taking George to have made a counter offer to sell at £3250, Faruq's original offer now no longer existed, but his further message represented an acceptance of the offer to sell for £3250. The fact that Faruq told George not to reply was irrelevant, since it was Faruq not George making the acceptance. Since the contract was now in existence, a refusal by George to

supply the car would amount to a breach of a condition of the contract. The only question now would be whether George was ready to supply the car when agreed. If the car was available 'later in the week' and George was ready to hand it over, it seems that any talk about a sale elsewhere was of no relevance, and Faruq was obliged to pay the money.

On the other hand, if George's initial reply was a request for information/statement of price, then it could not be accepted by Faruq, whose further message concerning a sale at £3250 would, at best, be an offer in which he was attempting, unsuccessfully, to impose an acceptance by silence on George. The position now was that George was in receipt of an offer which he might implicitly have rejected by accepting an offer of a higher amount of money from another person. However, whether the information acquired by Faruq was from a sufficiently authorised source to have that effect might be open to doubt. In any case, it is possible that the offer terminated by lapse of time. Alternatively, if not terminated, then the offer might well have been accepted by George when he indicated his expectation that Faruq would buy the car. In the event that Faruq did not go through with a deal to which he was bound, he would be obliged to pay damages representing the difference between the contractual price of £3250 and the price for which George could subsequently sell the car having made all reasonable efforts to mitigate his loss.

Most students succeeded in presenting an analysis which contained some of these elements but which was rarely comprehensive or, in many cases, wholly coherent. Of the two 'routes' identified above, by far the more popular was that involving the interpretation of George's message as an offer rather than as a request for information/statement of price. The discussion was usually accompanied by explanation of the rules on offer and invitation to treat, including counter offers and statements of price, and supported by reference to cases such as ***Hyde v Wrench***, ***Harvey v Facey***, and ***Stevenson v McLean***.

The problems for students seemed to emerge after this initial aspect of the analysis, when students frequently became confused by the relevance of the information communicated to Faruq by a third party about an alleged sale of the car by George to another person. Even when the answer had argued that a contract had already been concluded, students were often tempted to argue that the 'contract' had been 'withdrawn' if the communication of the information met the requirements of ***Dickinson v Dodds***. Similarly, students were often drawn into an argument about acceptance by silence, citing ***Felthouse v Bindley***, despite the fact that they had already concluded that Faruq had accepted an offer from George. Students who did recognise that George's message could be a request for information/statement of price rather than an offer rarely got much further down that route in any way that could be placed within a coherent framework. It was much more likely that the answer then declined into a series of unconnected observations about issues such as withdrawal of an offer and acceptance by silence. Most students attempted to make some suggestions about damages as a remedy, but usually in very general terms, and often without any clear idea of who would be claiming the damages for a breach of contract.

Question 11

In this question, Faruq had been disappointed with his experiences with a TV aerial bought from Sharpview, which he considered to be of poor quality, and which had wholly failed to improve his TV reception. To make matters worse, there had been significant problems attending the installation of the aerial by James. The conventional way to approach the issues with the quality and performance of the TV aerial would be to rely on the relevant provisions of the *Sale of Goods Act 1979*, particularly *s14(2)* and *s14(3)*. This would involve arguing that the aerial was not of satisfactory quality and was not fit for its purpose. Of course, given that Sharpview had assured Faruq that the aerial would be 'perfect for improving the quality of his TV reception', there was a possible argument that Faruq had been the victim of a misrepresentation. However, in practical terms, the uncertainties of the

law on misrepresentation would militate against its use in this context, when the clearer requirements, and much more accessible remedies, for the breach of the statutory implied terms would come into play. Even so, many students relied upon misrepresentation either solely, or in addition to the *Sale of Goods Act 1979*.

Remarkably, far fewer students approached the issues solely from the perspective of the 1979 Act. In dealing with misrepresentation, students displayed the same kind of strengths and weaknesses commented on under Question 08. Perhaps the main weaknesses lay in application, where students too readily assumed that this would be a fraudulent misrepresentation, rather than negligent or even innocent. They also tended to present rather weak analysis of the possible remedies available. Nevertheless, the misrepresentation approach was very creditworthy and was relied on to good effect by many students. In dealing with the 1979 Act, stronger students explained the implied terms in detail, discussing relevant case authority such as ***Grant v Australian Knitting Mills***, ***Priest v Last*** and ***Griffiths v Conway***. However, very often answers consisted of little more than an identification of the terms, and it was not unusual to see the provisions of the 1979 Act confused with those of the *Supply of Goods and Services Act 1982*. Students had no difficulty in discussing remedies in very general terms, mentioning rejection of the goods and damages, but were much less adept at more specific and detailed explanation and application, particularly in relation to the rights given to consumers in connection with rights to require repair, replacement or reduction in price. A number of students also mistakenly sought to consider the effect of an exclusion clause on the rights available, failing to notice that the exclusion clause mentioned in the scenario was applicable to James only.

In dealing with the issues in relation to James, students recognised either or both of the implied terms under the *Supply of Goods and Services Act 1982 s13* and *s14*, and usually succeeded in explaining and applying them accurately, albeit in rather superficially. Stronger answers recognised that the terms are considered to be innominate, so requiring discussion of the seriousness of any breach when considering the remedies available. Answers were usually at their strongest in analysing whether or not the purported exclusion clause on which James sought to rely had met the common law requirements for incorporation. Students were far less competent when dealing with the effect of the *Unfair Contract Terms Act 1977*, since many were unable to explain that an attempt to exclude liability for a breach of the implied terms under *s13* and *s14* is subjected to a test of reasonableness, rather than prohibited entirely.

Question 12

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

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