

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2023

LEVEL 6 UNIT 3 – CRIMINAL LAW

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the January 2023 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

Some candidates were still woefully under prepared and either did not bother to put the work in or were not ready to sit a paper at this level.

Candidates must be told that between 100 and 500 words is not going to be enough detail for a Level 6 answer which is worth 25 marks. Too many candidates this session thought that bullet points or defining something but not applying/evaluating it would be sufficient.

Candidates still seem to be afraid of essay questions, instead of seeing them as a way to express themselves in respect of the subject area. This does not mean that it is acceptable to write everything that they know about an area but they are not as tied to specific areas as they are with problem questions.

The main issue with problem questions is that candidates seem to want to speculate whether anything and everything in the questions is a reference to an offence. They are still seeing what they want to see and waste a lot of time writing an answer which isn't relevant to the questions, or they try to include too much detail in respect of peripheral matters.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1(a)

This was the most popular essay question this session and the third most popular overall. The question set out that the answer required evaluation in respect of the role and function of the defence of duress in criminal law.

On the whole, this question was answered very well. Most candidates identified and defined the 2 types of duress and their limits. There was some good evaluation which is evidenced by 14 candidates scoring 10 or over out of 14.

The main reason for failure of the question was because candidates gave all they knew on necessity which wasn't relevant here or either didn't provide enough detail, just didn't provide an answer at all or just didn't evaluate as requested.

1(b)

The question required an evaluation of the offence of Gross Negligence Manslaughter (GNM). A number of candidates provided really good answers.

Some of the candidates went into far too much detail on causation and not enough detail on GNM. The main reason for failure was the lack of relevant information and evaluation. A number of candidates wrote between 50 and 100 words.

Question 2

This was the second least popular essay question. This question asked about the impact of recent case authority in respect of dishonesty offences. What was required here was an overview of s1 Theft Act 1968, then a discussion of s2(1) instances of an honest belief and then a discussion of the issue of dishonesty for a jury using caselaw to support and culminating in the recent decisions in Ivey, Patterson and Barton & Booth.

The main reasons for the failure of the question were that there was not enough detail. Some candidates did not cover the development of the dishonesty concept and just started at the Ghosh test. Others stopped at Ivey and didn't go on to the most recent caselaw which meant they couldn't evaluate.

Question 3

This was the second most popular essay question and the fifth most popular question overall. Of the 23 candidates who attempted it, 16 (70%) passed it and passed it well. There was generally a good understanding of what was required for this question.

As has been said previously, this is Level 6 and a candidate could not pass a 25 mark question at this level with so little detail/relevant information.

Question 4

This question was the least popular essay and the least popular overall.

This is a complex area of law and 3 candidates displayed a sound understanding of the issues Those who failed had no idea of the subject area and missed the point totally.

Again, there was a problem with candidates not providing enough relevant information.

Section B

Question 1

This was the most popular problem question and the most popular overall this session The question was either answered very well or very poorly.

The first offence was burglary as Warren entered as a trespasser and once inside the museum did commit theft and GBH. The second was the theft of Elijah's wallet. The third was the GBH on Hugo and finally the common assault on Andy.

In respect of the burglary, incorrect responses included attempted burglary, making off without payment, obtaining services dishonestly, fraud and no mention of burglary.

In respect of the theft incorrect responses included no definition of theft or the MR of theft, attempted theft, robbery and no mention of theft at all.

In respect of the GBH on Hugo, incorrect responses included UDAM due to speculation that Hugo had died. Murder, attempted murder, s16 OAPA (not covered in unit), theft of dagger, s47 ABH, criminal damage of the dagger and no mention at all of the assault on Hugo.

In respect of the assault on Andy, it either wasn't mentioned at all or was briefly mentioned. Some described Andy's actions as duress, this was incorrect as the Q clearly states that advice is only being provided to Warren.

The other more general problems were, lacking detail and caselaw and too much repetition of the facts in the scenario.

Question 2

This question was the third most popular problem and the fourth most popular overall.

The correct offences/defences were, criminal damage to George's car, common assault on George by Luca, battery resulting in GBH on George by Luca and intoxication.

In respect of the damage to George's car, it was either covered well or not mentioned at all. A few candidates mentioned failure to stop and s4 RTA when the question clearly states 'you are not required to discuss motoring offences.'

In respect of the common assault on George, it just wasn't mentioned by a number of candidates.

In respect of the physical assault on George, this was incorrectly identified as theft or attempted theft of George's phone, robbery or attempted robbery of George's phone (outside the scope of the unit), S47 ABH. The reason this wasn't ABH is the severity of injury to George – a complete hip replacement. The Chief Examiner would have accepted s20 GBH or the better candidates would have applied s18 GBH, the intention being evidenced by the threats made to George.

In respect of defences, incorrect responses included, automatism, self-defence, duress, consent, insanity and loss of control.

Other general problems included, lacking detail and caselaw and too much repetition of the facts in the scenario.

Question 3(a)

This was the least popular problem question and the sixth most popular on the paper this session.

The main problem was that candidates incorrectly applied Ss 3, 9 and 12 of the Fraud Act which weren't relevant, theft and making off were also applied which were also incorrect.

This was quite a straightforward question but there did appear to be some confusion re the Fraud Act but having re read the question it should have been obvious what the correct sections were.

(b)

One of the main problems with this part was that candidates wasted time saying what the offence was when the question supplied the offence and just asked about defence/s.

Some candidates just applied self-defence and didn't go into a situation of a mistaken belief. Some applied insanity, duress, diminished responsibility and loss of control. Some candidates wrote less than 100 words and most of that was repetition of the facts from the scenario.

Question 4

This was the second most popular problem question and second most popular this session.

The first offence was the death of Imani. Murder and UDAM should have been discussed and murder dismissed as Xander's actions were reckless not intentional. The base offence for the UDAM was s20 GBH. The chain of causation should have been applied.

The second offence is the death of Tariq. There is no need to discuss UDAM as murder is clearly made out. What needs discussion is whether Carrie would have a defence. Diminished responsibility and insanity were the correct defences to discuss providing outcomes for both.

Incorrect responses included a combination of, loss of control, burglary, conspiracy, criminal damage, the defence of mistake, automatism, gross negligence manslaughter, necessity and firearms act offences (not in scope of unit).

Other general problems included, not considering insanity as a defence for Carrie, mentioning but not applying UDAM re Imani. Repetition of the facts and lack of detail/ caselaw.

Going forward my top tips for candidates sitting this exam in future would be:

- Read all of the questions before you start answering as there will be clues signposting you to the correct area of law;
- Ensure you write enough for the number of marks provided, i.e., 25 marks would be 650 words + to be able to provide sufficient detail; and

Read the question thoroughly so that you totally understand what is being requested of you before you start answering it.

SUGGESTED POINTS FOR RESPONSE

JANUARY 2023

LEVEL 6 UNIT 3 – CRIMINAL LAW

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of the relevant Case Law and statutory provisions • Discussion around the above with detailed arguments, for and against being evidenced • A reasoned conclusion which is supported with evidence • Response appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of duress by threats and duress of circumstances and their limits as defences in criminal law. • Definition of duress by threats and duress of circumstances which should be supported by relevant caselaw. • Discussion of how the defence exists to remove culpability for committing a crime when the individual had no choice but to act in the way that they did. • The defence reflects an urgent act by D to avoid a perceived threat of death or serious injury. • The limits placed on the defence mean that the defence cannot be taken advantage of. <p>Responses could include:</p> <ul style="list-style-type: none"> • Additional case law to support the points discussed 	14
1(b)	<p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Marks should be distributed in the following areas:</p>	11



	<ul style="list-style-type: none"> • Correct identification of the relevant Case Law and statutory provisions • Discussion around the above with detailed arguments, for and against being evidenced • A reasoned conclusion which is supported with evidence • Response appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of gross negligence manslaughter and the elements that satisfy the offence • Discussion of duty of care and the different types of duty • Discussion of breach of duty of care • Discussion of the term ‘gross negligence’ and how it has been interpreted <p>Responses could include:</p> <ul style="list-style-type: none"> • Application of caselaw correctly to support their reasoning • Clearly address the purpose of the question and what is required to produce a considered and structured response. 	
Question 1 total:25 marks		
2	<p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of the relevant Case Law and statutory provisions • Discussion around the above with detailed arguments, for and against being evidenced • A reasoned conclusion which is supported with evidence (max 5 • Response appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Explain the law relating to dishonesty • Negative aspect S2(1) • Positive Aspect <u>Ghosh</u> (1982) test – 2 limbs: • Objective limb – Would the honest and reasonable person regard what D did as dishonest? If answer is ‘yes’, • Subjective limb – Would the D himself have realised that the honest and reasonable man would regard what he did as dishonest? • Discussion of whether dishonesty should be left to the jury to decide. • Consider the observations of the Supreme court in <u>Ivey</u>. • Comments are <i>obiter</i> and the court is not bound by them. The court was still technically bound by <u>Ghosh</u>. • Discussion of the criticisms of the <u>Ghosh</u> test. • Supreme Court calls for universal application of <u>Ivey</u> test. 	25

	<ul style="list-style-type: none"> • Indications from Court of Appeal re universal acceptance of the <u>Ivey</u> test – <u>DPP v Patterson</u> (2017) • Clarity came with <u>Barton and Booth</u> (2020) - <u>Ivey</u> test to be used in Criminal proceedings <p>Responses could include:</p> <ul style="list-style-type: none"> • Discussion of any arguments in favour of and against the current law on dishonesty. • Arguments supported with relevant case law 	
Question 2 total:25 marks		
3	<p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of the relevant Case Law and statutory provisions • Discussion around the above with detailed arguments, for and against being evidenced • A reasoned conclusion which is supported with evidence • Response appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of the law relating to consent - General rule <u>Brown and others</u> (1993), consent can be a defence to assault and battery, but cannot be a defence when any harm is caused. Implied consent relates to everyday touching • Situations where consent can be a defence – <u>A-G’s Reference (No6 of 1980)</u> (1981) test for consent is “whether there is a good reason for the Actual Bodily Harm” (ABH). Good reasons include:- <ul style="list-style-type: none"> i) Religious and/or medical reasons ii) Tattooing and branding iii) Some forms of sexual activity • Situations where consent cannot be a defence <ul style="list-style-type: none"> i) Sadomasochistic behaviour ii) Street fighting iii) Deceit as to the identity of the defendant or the nature and quality of the act • The House of Lords in the leading case of <u>Brown</u> (1993) attempted to clarify the law in relation to consent and the deliberate infliction of physical harm. • Lord Templeman in the above case concluded that sadomasochistic behaviour was not in the public interest and there should be sufficient safeguards against exploitation and corruption of others. • Decisions since <u>Brown</u> (1993) have sought to develop the common law position in this area. 	25

	<ul style="list-style-type: none"> • There are still difficulties in this area drawing a line between violent acts which can be said to be in the public interest (ie contact sports) and those which are not. <p>Responses could include:</p> <ul style="list-style-type: none"> • Additional relevant case law illustrating principles outlined above 	
Question 3 total:25 marks		
4	<p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of the relevant Case Law and statutory provisions • Discussion around the above with detailed arguments, for and against being evidenced • A reasoned conclusion which is supported with evidence • Response appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Definition of secondary liability. • Explanation of the law relating to Joint Enterprise (JE) before the decision in <u>Jogee</u> • AR - agreeing to participate was sufficient • MR – Knowledge that one of several offences could be committed • Scope of the agreement • Inconsistent decisions • Decision in <u>R v Jogee</u> (2016) • SP must now intend to encourage and/or assist the crime. • Foresight not sufficient MR. • Foresight and authorisation of a crime are not the same. • Impact of decision – completely overturns previous common law on JE and JE is no longer a separate category to liability. • The previous law in relation to secondary liability was unfair. • The decision makes this area of law fairer to SPs. <p>Responses could include:</p> <ul style="list-style-type: none"> • Additional case law to support the points discussed • Exhibit comprehensive knowledge and understanding of a difficult area 	25
Question 4 total:25 marks		

SECTION B

Question Number	Suggested Points for Responses	Marks (Max)
1	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro’s and con’s but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification and definition of the relevant Offences and Case Law • Discussion around the above with application of the facts to the outcome • Relevant alternatives/options available • A reasoned conclusion which is supported with evidence, offering the suggested best option available • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • A detailed discussion and definition of s9(1)(a) and 9(1)(b) Theft Act 1968 – entry into museum and theft of wallet • A detailed discussion and definition of ss 1 to 6 of Theft Act 1968 – Wallet • Discussion and definition of s18/20 GBH OAPA – stab wound to Hugo • Discussion and definition of common assault s39 Criminal Justice Act 1988 – Assault on Andy • Identify and define offence/s • Application of above areas to the facts • A considered response which clearly addresses the purpose of the question <p>Responses could include:</p> <ul style="list-style-type: none"> • Additional relevant case law illustrating principles outlined above 	25
Question 1 total:25 marks		
2	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro’s and con’s but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification and definition of the relevant Offences, Defence and Case Law • Discussion around the above with application of the facts to the outcome • Relevant alternatives/options available 	25



	<ul style="list-style-type: none"> • A reasoned conclusion which is supported with evidence, offering the suggested best option available • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of criminal damage (basic offence) s1(1) Criminal Damage Act 1971 (CDA) • Discussion of common assault and battery s39 Criminal Justice Act 1988 • Discussion of GBH S20 OAPA • Discussion of GBH with intent to do GBH – s18 OAPA • Discussion of the general defence of intoxication • Damage caused to George’s Car – criminal damage, no defence available • Threat to break both of George’s legs – common assault, no defence available • When Luca rugby tackled George to the floor it was a battery, no defence available • The assault resulted in a broken hip, minor concussion and bruising to the shoulder and is a serious injury. Luca has committed GBH against George contrary to s20 OAPA or s18 OAPA dependent on whether intent can be proven • Intoxication – it would appear that Luca was voluntarily intoxicated and as s20 GBH is a crime of basic intent the defence would not be available. • If charged with s18 GBH he may have a defence if he can convince a jury that he was too drunk to form the intent, however the threat will add weight to the charge <p>Responses could include:</p> <ul style="list-style-type: none"> • A variety of caselaw used to support application • Discussion of aggravated Criminal Damage s1(2) CDA 1971 re overtake under the bridge 	
Question 2 total:25 marks		
3(a)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro’s and con’s but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct definition of the offence and use of the relevant Case Law to support • Discussion around the above with application of the facts to the outcome • A reasoned conclusion which is supported with evidence, offering the suggested best option available 	13



	<ul style="list-style-type: none"> • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of Fraud by false representation – s2 FA 2006 • Discussion of Fraud by obtaining services dishonestly – s11 FA 2006 • Website – Misbah would be guilty of s11 offence she employed the web design company knowing that they made the service available on the basis that payment will be made for it – she had no intention of paying for the service. • Advertisement – Misbah would be guilty of a s2 offence as she advertised the items as new or unworn – she knew that this representation was untrue at the time she made it. <p>Responses could include:</p> <ul style="list-style-type: none"> • Demonstrate an understanding of the area in a coherent and structured way • Confidently apply caselaw to support theories. 	
<p>3(b)</p>	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro’s and con’s but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct definition of the offence and use of the relevant Case Law to support • Discussion around the above with application of the facts to the outcome • A reasoned conclusion which is supported with evidence, offering the suggested best option available • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of private defence– common law • Discussion of public defence– s3(1) Criminal Law Act 1967 (CLA). • Both of these defences are now governed by the guidelines established under s76 of the Criminal Justice and Immigration Act 2008 (CJIA 2008). • Discussion of mistake relating to a defence. • Zack could claim that he acted in self-defence. • He could say that his actions were reasonable in the circumstances as he thought he was going to be assaulted. • There is nothing to suggest that he was looking for a fight or was motivated by revenge. • Zack’s mistaken belief that he was going to be assaulted would be judged objectively by a jury. 	<p>12</p>

	<ul style="list-style-type: none"> If a jury believed he acted to protect himself but that his actions went beyond the use of reasonable force, then he would have no defence under common law. <p>Responses could include:</p> <ul style="list-style-type: none"> A demonstration of an understanding of each defence. Adopt a more in-depth use of case law and will apply relevant case law to the facts. 	
	Question 3 total: 25 marks	
4	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> Correct identification and definition of the relevant Offences and Case Law Discussion around the above with application of the facts to the outcome Relevant alternatives/options available A reasoned conclusion which is supported with evidence, offering the suggested best option available Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> Discussion of wounding with intent to do GBH – s18 OAPA. This offence should be considered and discarded. Discussion of wounding/ GBH – s20 OAPA Discussion of involuntary manslaughter in particular unlawful/ dangerous act When considering the AR must consider causation (both in fact and in law), whether there was a break in the chain of causation (novus actus interveniens) Discussion of murder – common law offence, unlawful killing with intention to cause death or do GBH Discussion of voluntary manslaughter – common law, causing the death of someone with the requisite MR but has a partial defence which reduces the charge to voluntary manslaughter Identify that Diminished Responsibility is a partial defence under s2(1) HA which has been amended by s52 C&JA. Discussion of diminished responsibility Discussion of insanity - Define the general defence of insanity Unprovoked and unlawful assault on Imani by Xander albeit a reckless act. Xander committed an unlawful and dangerous act by shooting Imani with the air rifle. Xander caused Imani's death both in fact and in law 	25

	<ul style="list-style-type: none"> • Murder – Tariq dies from the injuries sustained in the assault by Carrie. Causation in fact and law present. Intention to cause GBH – she stabbed him with a knife that she took with her from her home. • Identify that murder is the relevant offence with a partial defence. • If she wanted to plead diminished responsibility she would bear the burden of proof on the balance of probabilities but the decision would rest with the jury. • General discussion of insanity and the necessity for the disease of the mind suffered to be caused by an internal factor. • Discussion of Carrie’s potential ability to rely on the defence of insanity and whether she would want to rely on it. • Relevant outcomes for the successful plea of either defence. <p>Responses could include:</p> <ul style="list-style-type: none"> • When considering voluntary manslaughter, diminished responsibility should be the only possible consideration. • Clearly address the purpose of the question and provide a considered and structured response. 	
	Question 4 total:25 marks	