

## CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 2020

### LEVEL 3 - UNIT 3 – CRIMINAL LAW

#### Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the September 2020 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers 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

The exam paper appeared to perform well overall. There was some evidence that the students had difficulty in retaining the story line in Section B questions. In Section B Scenario 3 many candidates did not correctly identify some of the offences. The paper demonstrated that candidates who were properly prepared were able to pass easily and, where appropriate, to achieve a higher grade. Conversely, those who had failed to prepare, were not able to gain sufficient marks to pass. A key issue in Section B was the lack of accuracy in identifying and applying the law to problem questions.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

In Section A some candidates provided only a short answer with little or no explanation.

For Section B, a thorough knowledge and understanding of the law is essential to then progress and apply the law. Those candidates who achieved low marks, did so because there was insufficient depth in their answer to award

more than a few marks. Where candidates stated the law, they often failed to then apply the law, either at all, or thoroughly enough.

Often there was also a lack of correct legal terminology which, in some cases, left it to the examiner to try and determine what the candidate meant. The use of correct legal terminology is essential for a subject where words and phrases take on a meaning within the legal context in which they are used.

Use of case law/statute is also essential in order to score the higher marks.

Some students put the answers to some of their questions in the wrong box (e.g. answering Q1(a) and then also putting the answer to Q(1)(b) in the Q1(a) box).

Some students answered all three Sec B questions.

## **SECTION A**

Q1. Generally, well answered.

Q2. Generally, well answered.

Q3. Some students incorrectly referred to recklessness as an 'objective' test.

Q4. 3 marks were available for 4 points. Many students only achieved one or two marks, with almost a third achieving no marks.

Q5. Generally, well answered. 3 marks available for 5 points, so the majority of candidates scored well.

Q6. Qualifying triggers - Only one student gained all 4 marks, reflecting the need to use legal terminology accurately. Many students failed to appreciate what the qualifying triggers were (some merely mentioned the objective 'third' requirement)

Q7. Generally well answered

Q8. Generally well answered.

Q9. Many students were not specific enough in their terminology

Q10 3 marks for three points. Many students did not identify that (involuntary) intoxication is not a defence per se, nor did they cite relevant case law.

## **SECTION B**

**Scenario 1** – This was the most popular choice of the candidates.

Q1 (a) The majority of candidates provided competent answers. On occasion, students applied the law to the scenario, when all that was required was an explanation of the law (e.g. identify the offence and the elements of the offence...). Many candidates did not identify the legal term 'without lawful excuse'.

Q1(b) Most candidates scored well.

Q2(a) Some candidates failed to explain that the intention/recklessness applies to the destruction/damage to property, as well as the endangerment of life. Furthermore, some candidates did not identify that life does not actually have to be endangered.

Q2(b) Many candidates applied the mens rea of Criminal Damage as intention and recklessness. Accuracy is key here as the correct way to apply it is that there is no intention to endanger life, but there was recklessness in this regard.

Q3(a) Many candidates did not identify the offence of unlawful act manslaughter – choosing the offence of murder instead.

Q3(b) Those who identified the incorrect offence in Q3a were therefore unable to explain how the elements of the offence applied in Q3b.

Q4 Most candidates correctly identified voluntary intoxication, although many did not subsequently explain that the relevant offences are ones of basic intent. Because of this, the legal principle was not often applied to the scenario.

## **Scenario 2**

Q1(a) Some students applied the elements of the offence, rather than identifying the elements. There were also several instances where students failed to identify all of the elements.

Q1(b) Many students failed to apply all of the elements to the scenario.

Q2(a) Many candidates failed to mention a key case, or that recklessness is insufficient.

Q2(b) More often than not, candidates failed to include relevant caselaw to reinforce answers.

Q3(a) Many students identified the defence of duress, but then failed to explain the constituent parts of the defence (e.g. threat of death/serious injury, does not apply to murder...etc.).

Q3(b) Because of the issues in Q3(a), many students failed to apply the constituent parts of the defence.

Q4(a) Some students correctly identified the defence of self-defence, but then did not go on to define the defence. Students should be alert to the fact that this is a seven-mark question, so necessary detail should be included.

Q4(b) Many students needed to provide a conclusion – that the defence would probably fail.

### Scenario 3

Q1(a) Many students failed to identify the offence of murder, often choosing manslaughter instead.

Q1(b) Generally well answered for those who identified the correct offence.

Q1(c) Generally well answered for those who identified the correct offence.

Q2(a) Very few students identified murder as a result crime

Q2(b) The majority of candidates scored 2 marks or less (maximum 4 marks). The better marks were gained by explaining that intervening medical treatment does not normally break the chain of causation, unless the treatment was 'palpably' wrong – followed by a conclusion that there was no break in the chain.

Q2(c) Candidates often failed to identify the issue of 'reasonable foreseeability', or to identify a relevant case.

Q3(a) Although many candidates correctly identified the partial defence of loss of control, many answers lacked the detail needed in identifying the key features of the defence (e.g. qualifying triggers/sexual infidelity/revenge killings...)

Q3(b) The vast majority of candidates failed to apply the partial defence in any meaningful way. The requirements of the qualifying triggers do not appear to be satisfied, and a reasonable person of the same age/sex/normal degree of tolerance might not have acted in the same/similar way. Many students similarly failed to identify a relevant case to reinforce their answers.

## SUGGESTED ANSWERS

### LEVEL 3 - UNIT 3 – CRIMINAL LAW

#### SECTION A

1. The three elements that make up the *actus reus* (AR) of a criminal offence are:
  - conduct;
  - circumstances; and
  - consequences.
2. A 'thing in action' is a form of intangible property, e.g., a share in a company, a debt, a copyright, a trademark, a credit in a bank account, and an agreed overdraft. It is a personal property right which can be legally enforced.
3. The test for recklessness is subjective. It is the conscious taking of an unjustified risk. Cases might include R v Cunningham (1957) and G and another (2003).

4. The requirements of the defence of lawful excuse are that D had a genuine belief that the owner would have consented to the damage, that D genuinely believed that the property was in need of immediate protection and the means of protection adopted were reasonable in the circumstances. It is irrelevant whether the belief is justified but it must be genuine/honest.
5. Voluntary manslaughter is where the defendant has committed the AR of murder and also has the *mens rea* (MR) of murder, but liability is reduced due to a special defence (either loss of control, diminished responsibility or suicide pact).

Involuntary manslaughter arises where the defendant commits the AR of murder but does not have the MR for murder (either unlawful act manslaughter or gross negligence manslaughter).

6. There are two possible qualifying triggers under s.55 of the Coroners and Justice Act (CJA) 2009. The fear trigger (s.55(3)) and the anger trigger (s.55(4)), or the qualifying trigger might be a combination of both of these (s.55(5)).

The fear trigger under s.55(3) requires that the defendant's loss of control is attributable to his fear of serious violence from V against D or another identified person.

The anger trigger under s.55(4) requires that the defendant's loss of control is attributable to things said and/or done which amounted to circumstances of an extremely grave character and caused the defendant to have a justifiable sense of having been seriously wronged.

7. (a) Arguments in favour of strict liability (any two of the following):-
  - there is less stigma is attached to the offence;
  - it is easier to prove - no need to prove MR;
  - it saves time and money;
  - Public Protection;
  - they are often regulatory in nature forcing compliance with rules and regulations(b) Arguments against the imposition of strict liability (any two of the following):-
  - strict liability offences can be difficult to identify;
  - the fines imposed do not always act as a deterrent;
  - strict liability is contrary to the basic principles that D has to be morally blameworthy. The 'no fault' basis of strict liability is controversial.
8. The defence of duress of circumstances may be relied upon by a defendant who is compelled to commit an offence by force of circumstances. It is distinct from duress by threats as the 'threat' does not come from a person, as in duress of threats, but from the circumstances in which the defendant finds himself.
9. Attempts are governed by Criminal Attempts Act (CAA) 1981, section 1(1). The AR is defined as 'an act more than merely preparatory to the

commission of the offence'. There must be a positive act, not an omission. Cases might include Jones (1990), Campbell (1991).

10. Involuntary intoxication is not a defence *per se*. However, the effect of the involuntary intoxication must be that D did not form the required *mens rea* e.g. Kingston (1994).

## SECTION B

### Scenario 1 Questions

1. (a) The offence is basic criminal damage, s.1(1) Criminal Damage Act (CDA) 1971. There needs to be the destruction or damage of property belonging to another. Damage will be determined by the time and cost of repairing. The MR of the offence is intention or recklessness. There must be no lawful excuse for the damage.  
  
(b) Desmond has damaged the car bonnet which belongs to another. Desmond intended to damage the bonnet or was at the least reckless. The bonnet is repairable, but this will take time and money, Hardman v Chief Constable of Avon and Somerset (1986).
2. (a) The offence is aggravated criminal damage by fire, ss.1(2) and 1(3) CDA 1971. The offence requires that property, which may belong to the defendant or someone else, was destroyed or damaged by fire. The MR is intention or recklessness as to damage to property, Miller (1983). The damage, as in all aspects of criminal damage, will be assessed on the time and cost of repairing the property, together with, an intention to endanger life or the life of another through the damage, or recklessness as to whether life of another is endangered. Life does not actually have to be endangered.  
  
(b) By throwing the bottle with the lit rag through the pub window, Desmond has damaged the pub (property) by fire and it would require effort and cost to repair the pub, Hardman v Chief Constable of Avon and Somerset (1986). Desmond intended to set fire and cause damage to the pub. The pub either belongs to Simon or the brewery. Even though he may not have intended to endanger life, as he thought everyone had left, he has at least been reckless as to whether life might be endangered. Relevant cases are Webster (1995), Warwick (1995).
3. (a) Desmond initially committed an offence of arson. As Simon later died in the fire, the offence to consider is one of involuntary manslaughter, namely unlawful act manslaughter, also known as constructive manslaughter. There is a need for an unlawful act, not an omission, which needs to be of a dangerous kind. The defendant's actions must cause the death of the victim. There must be no intervening act, e.g. Franklin (1883), Lamb (1967).  
  
(b) Desmond has committed an illegal act by throwing a bottle containing petrol and a lit rag through the window of the pub. Desmond's actions were unlawful and dangerous, and Simon has died as a direct consequence of Desmond's actions.
4. The defence that will be pleaded is intoxication. The rules in DPP v Majewski (1976) deal with intoxication. Desmond was voluntarily

intoxicated as he had been drinking alcohol all afternoon by choice. The defence of voluntary intoxication only applies to specific intent offences, where the defendant lacks the necessary MR for the crime committed.

Basic criminal damage, reckless aggravated criminal damage by arson and involuntary manslaughter are all offences that require basic intent, therefore, voluntary intoxication would not apply. The defence will not be available to Desmond in relation to any of the offences above.

### Scenario 2 Questions

1. (a) In relation to the offence of theft, there needs to be the dishonest appropriation of property belonging to another with the intention to permanently deprive.  
  
(b) Claire dishonestly took property, (the money) which belonged to another, Barbara. Claire has therefore, dishonestly appropriated the money. She had the intention to permanently deprive as she was going to give the money to Teshwara, e.g. Basildon Magistrates' Court (Rickets) (2010).
2. (a) In relation to the jewellery, the offence is attempted theft contrary to s.1(1) of the Criminal Attempts Act (CAA) 1981. There needs to be positive act, an omission will not generally suffice. The act must be more than merely preparatory. The MR of the offence is the intention to commit the offence, the defendant must intend the consequences of his act. It must be an indictable or either way offence.  
  
(b) Claire committed a positive act. She intended to steal the jewellery from the jewellery box. She had opened the jewellery box and was choosing which items to take when Walter came back unexpectedly. Her actions could be considered more than merely preparatory, as she had already opened the jewellery box and was about to remove the jewellery from the box and was going to steal it.
3. (a) In relation to the theft and the attempted theft, the only defence that may be applicable to Claire is the defence of duress of threats. Claire would claim that she stole the money and attempted to steal the jewellery due to the threats made by Teshwara to increase the amount of money that she owed him. Duress of threats can be raised when there is a threat of death or serious injury to herself or to someone she regards herself responsible for, e.g. Shayler (2001). The threat must be to commit a particular crime and a sober person of reasonable firmness would have responded as D did.  
  
(b) In Claire's case, the defence would fail for a number of reasons. The first is that there was no threat of death or serious injury to Claire or someone she is responsible for, the threat was to increase the amount of money owed. The second is that Teshwara did not threaten Claire to commit any crime, she decided to commit a crime of her own volition and, finally, Claire has been at fault by voluntarily associating herself with someone who she knew might put pressure on her to commit an offence (Teshwara): Sharp (1987).



4. (a) In relation to the assault on Walter, Claire could try and claim that she was acting in self-defence. Claire needs to show that she used reasonable force either to protect herself, another or her property, s.76 Criminal Justice and Immigration Act (CJIA) 2008. Reasonableness of the force is judged according to the facts and circumstances as the defendant honestly believed them to be. Excessive or disproportionate force negates the defence: Hussain and Another (2010). Honest and instinctive self-defence is strong evidence that the force is reasonable.

(b) In this case, we are told that Claire panicked when Walter grabbed her arm, and that her actions after that were to defend herself as she thought Walter was going to hit her. Was it reasonable to wrap Walter's scarf around his neck pulling it tightly?

The test is objective and so one looks to see if a reasonable man would consider the degree of force used was reasonable based on the defendant's belief as to the facts and circumstances. Any fear that Claire was experiencing must be taken into account and, as a result, her ability to make judgements. It would appear that the force used by Claire to protect herself was not reasonable, and would be deemed to be excessive and disproportionate: Brooks v DPP (2015). For these reasons the defence will probably fail.

### **Scenario 3 Questions**

1. (a) In relation to Abby, the initial offence would have been grievous bodily harm (GBH) but Abby has since died, so murder would be the starting point. Murder is a common law offence. The definition of murder is the unlawful killing of a human being in Queen's peace with malice aforethought. This includes the intention to kill and the intention to cause grievous bodily harm. Intention can be direct or indirect.

In relation to Kate the offence would be murder. Justin has killed Kate, who is a human being, in the Queen's peace. It is an unlawful killing, not in self-defence. Justin possibly had the direct intent to kill Kate. He had threatened to kill Mei and Kate and had already stabbed Abby. If there was no direct intent, indirect or oblique intent needs to be considered.

(b) This answer requires application of the law to the facts. Justin stabbed Abby, who is a human being, this is an unlawful killing as it was not done in self-defence. He stabbed her with a large kitchen knife and intended to kill her or at the least intended to cause GBH.

(c) In relation to Kate, the question to be asked would be whether death or GBH was virtually certain to occur as a result of Kate trying to escape Justin's threats by jumping out of the window, and did Justin appreciate that this was the case. If direct intention is not found indirect/oblique intention is likely to be established due to Justin's demeanour and behaviour. Justin will be guilty of Kate's murder.



2. (a) Murder is a result crime. The test for factual causation is the 'but for' principle: Pagett (1983), White (1910). Legal causation is only considered if factual causation has been proved.

The defendant's actions need not be the sole cause but must be an operating and substantial cause of death. There must be no break in the chain of causation.

- (b) As murder is a result crime, this means that Justin's acts must have caused the result, which is the death of Abby. 'But for' Justin's initial actions Abby would not have died, which is true. Legal causation is only considered if factual causation has been proved.

In this case, even though Justin's initial act (the stabbing) wasn't the direct cause of Abby's death, we need to consider whether the doctor's actions broke the chain of causation or whether Justin's actions remained the operating and substantial cause of Abby's death: Smith (1959).

The question is whether the actions of the doctor in his misdiagnosis of the injury amounted to a *novus actus interveniens*. The courts are very reluctant to hold that medics break the chain of causation as primarily they would be trying to save the patient.

Applying the leading case of Cheshire (1991), it should be asked whether the doctor's act in misdiagnosing Abby's injuries was palpably wrong, so independent of Justin's act and so potent in causing Abby's death that it rendered Justin's act insignificant. Applying the above, it is highly unlikely that the chain of causation would have been broken and Justin will remain the legal cause of Abby's death.

- (c) As far as Kate is concerned, but for Justin banging on the door and threatening to kill Kate, she would not have jumped out of the window and died. Injuries resulting from an attempted escape will not break the chain unless Vs actions were not reasonably foreseeable. Even though Kate jumped out of the window, this would not have been a *novus actus interveniens* as it might have been reasonably foreseeable that she may try to escape, as Justin was carrying a knife and had threatened to kill her with it. There are no breaks to the chain of causation, which means that Justin's actions were the sole cause of Kate's death: Robert (1971), Corbett (1996).

3. (a) The partial defence of loss of control was established in the Coroners and Justice Act (CJA) 2009 s.54. It includes three parts: firstly, defendant's acts or omissions resulted from loss of control. Secondly, that there was a qualifying trigger. And finally, that a reasonable person, of the defendant's age and sex, with a normal degree of tolerance and self-restraint might have acted the same way, relevant case is Jersey v Holley (2005).

The definition of a qualifying trigger is found in CJA 2009 s.55. A qualifying trigger can be fear of serious violence or it can be anger/words or actions of extremely grave character that caused a justifiable sense of being wronged. Loss of control need not be

sudden, but neither qualifying trigger will apply if the defendant's fear of serious violence is caused by things the defendant incited to provide an excuse to use violence.

- (b) In Justin's case, the defence of loss of control would probably not be successful. He did appear to have suffered a loss of control. However, he would struggle to satisfy the requirements for a qualifying trigger, his only hope would be to say that Mei laughing at him was the trigger but that would not constitute an action of extremely grave character that caused him a justifiable sense of being wronged. It is also unlikely that the reasonable person would have acted in the same way. The defence would fail, and Justin will be guilty of Mei's murder: Clinton (2012).