CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

LEVEL 6 - 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 January 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

Overall most candidates elected to answer one or two questions from Section A and two or three from Section B. Most candidates seemed to prefer (and seemed to perform better in) the Section B problem scenarios rather than the Section A essays.

There were one or two areas where common mistakes were made by candidates.

CANDIDATE PERFORMANCE FOR EACH QUESTION

SECTION A

Question 1

Some candidates made a reasonable attempt at this question, but the evaluation part caused some difficulty. Candidates did not seem to have sufficient knowledge or detail of the law to do justice to the question. Some candidates did confuse the question and elected to answer it with regard to loss of control rather than diminished responsibility which resulted in some low marks for this question in those cases.

Question 2

In part (a) most candidates attempting this question were able to explain the law relating to burglary, but some did miss the need to consider aggravated burglary too. Some candidates lacked the level of detail needed for higher marks. Although some candidates made an attempt at the evaluation part of the question, this was sometimes quite vague for higher marks.

Part (b) was done relatively well by most candidates. There was a good level of knowledge of the law relating to consent to harm and some good use of case law in some cases. Generally, the advice is to ensure a good knowledge of the cases and to show this in this answers rather than just naming the cases.

Question 3

This question was one of the better performing Section A questions. Candidates generally were able to explain causation both factual and legal. Stronger answers used case law effectively to give a detailed explanation. Some candidates did not explain what is meant by result crimes though. Most candidates made a good attempt at explaining *novus actus* and the various types of *novus actus*. Again, stronger answers had a good level of detail and used case law effectively to give full explanations. Weaker answers just listed cases with no explanation of how those cases helped to answer the question. The weak part of this question was the critical evaluation. Most marks were awarded for the descriptive parts.

Question 4

This was a fairly popular Section A question and it was done well by some candidates. Stronger part (a) answers explained what is meant by strict liability and were able to give examples of some strict liability offences. Not many candidates were able to discuss the presumption of *mens rea* and the Gammon criteria and this was a common reason for a loss of marks. Candidates were mostly able to pick up some marks for the evaluation aspect of this question though. One common mistake made by a number of candidates was to confuse strict liability with omissions. This led some candidates to discuss irrelevant case law and this did cause some loss of marks. Part (b) was done reasonably well. Stronger answers were able to give a detailed and clear explanation of the law relating to intention, both direct and oblique, with a good level of case law discussion in the answer. Weaker answers were brief and vague in their explanation and lacking the detail of the relevant case law or the tests coming from the various cases. Even with

the stronger answers most marks were lost in the evaluation part with hardly any candidates managing to score well for the evaluation.

SECTION B

Question 1

This was a popular question and it was mostly done well by candidates. All candidates showed a good knowledge of criminal damage and many identified the aggravated offence for Bilpa and the basic for Alex. Candidates appeared to have a good level of knowledge of the relevant legislation and were able to supply a good level of detail regarding criminal damage. There was also good application of this law to the problem scenario. Many candidates were able to identify either section 18 or 20 OAPA for Alex and strong answers discussed both and offered a view as to which was more likely.

Most candidates did a good job of outlining the defences. Many identified intoxication and this was mostly done well with some very clear explanations of the distinction between voluntary and involuntary intoxication, and a good number also able to explain the difference between basic and specific intent crimes with reference to Majewski. The application was also done well. Strong candidates also discussed self-defence and mistake in a good level of detail with reference to relevant case law. Weaker answers either did not pick up the full range of available defences or did not supply sufficient detail regarding the defences for higher marks.

Question 2

This question did cause some confusion in part (a) for some candidates. Although the most relevant offences to consider were those under the Fraud Act, some candidates concentrated on theft to the exclusion of fraud. This was not correct and this did cause a loss of marks for some candidates. Some candidates elected to discuss a mis of fraud and theft and did pick up some marks. Stronger candidates identified that fraud was the correct offence and were able to explain the various Fraud Act offences at play in the case scenario. Most candidates showed a good knowledge of the case relating to dishonesty, both R v Ghosh and Ivey v Genting Casinos. Most candidates scored reasonably or very well in part (b) with Derek. Even those candidates who had mistakenly discussed theft in part (a) mostly recognised the fraud offence(s) in part (b).

Question 3

This was the weakest question in Section B. Most candidates who attempted this question struggled to gain good marks. Many missed the attempted burglary aspect and the conspiracy and procurement elements were generally not understood well by candidates. This question required an understanding of secondary participation and inchoate offences and these topics did not seem to have been revised for by most candidates attempting the question. The fact that so few candidates attempted this question suggests that this topic was one which many had not revised or were not confident with.

Question 4

This was a popular question and it was mostly done well by candidates. Most candidates appreciated that the offence was murder and were able to explain some elements of the offence of murder, although more detail of the elements of the offence with reference to case law would have strengthened some weaker answers. Many candidates did appreciate that diminished responsibility was a potential defence and several also identified insanity. Stronger candidates gave a detailed explanation of the elements of these defences with reference to statute and case law. Weaker answers lacked such detail. Almost all candidates identified that transferred malice aspect of the problem and were able to explain how this operates with reference to case law. The standard of application of the law to the problem was generally very good in this question.

LEVEL 6 - UNIT 3 – CRIMINAL LAW

SUGGESTED ANSWERS

SECTION A

Question 1

The defence of Diminished Responsibility (DR) was introduced into English law by s2 of the Homicide Act 1957 (HA). It operates as a partial defence to murder and, if successfully pleaded, will reduce the defendant's (D's) liability from murder to voluntary manslaughter. The burden of proof for this defence rests with the defence on the balance of probabilities.

Prior to the enactment of the Coroner's and Justice Act 2009 (C&JA), under s2 HA the definition of DR was that it occurred when, at the time a person killed another he was suffering from an abnormality of mind, arising from arrested or retarded development of mind or any inherent causes or induced by disease or injury, which substantially impaired his mental responsibility for the killing.

Under s52(1)(1A) C&JA, DR is an abnormality of mental functioning arising from a medical condition which substantially impaired his ability to understand the nature of his conduct or form a rational judgement and/or exercise self-control. This definition has amended s2 HA and is incorporated into legislation as s2(1) HA.

Medical evidence is crucial to the defence as it must show clear evidence of mental imbalance for a D to properly plead guilty to a charge of manslaughter on the grounds of DR: Cox (1968), Vinagre (1979).

Byrne (1960) is the authority on the meaning of abnormality of mind and it was decided in this case that an abnormality of mind was 'a state of mind that was so different from that of ordinary human beings that the reasonable man would term it abnormal'. This definition was extremely wide and covered most abnormal states from very minor to very serious states of mind.

Under the amendment, abnormality of mind was replaced by abnormality of mental functioning. The Law Commission (LC) in their report, *Murder,*

Manslaughter and Infanticide (November 2006), said that their reasons for the amendment were that the original definition had not been drafted with medical experts in mind even though their evidence is crucial to the success of the defence. Abnormality of mental functioning is not defined in s2(1) but there is nothing to suggest that it is any narrower than abnormality of mind.

The abnormality of mental functioning need not be permanent but has to have existed at the time of the killing.

The original definition required the abnormality of mind to have arisen from a condition of arrested or retarded development of mind or any inherent causes or to be induced by disease or injury. This is an exhaustive list which covered nearly all conditions including psychopathic states: Byrne, Schizophrenia: Terry (1961), Depression: Seers (1984), Gittens (1984), Ahluwalia (1992), battered woman syndrome: Hobson (1998), pre-menstrual tension and post-natal depression: Reynolds (1988) and alcohol dependence syndrome: Wood (2008), Stewart (2009).

However, it should be noted that voluntary intoxication alone cannot be used to support a plea of DR and the jury should be directed to ignore the effects of the intoxication and consider whether the medical condition on its own would be sufficient to amount to an abnormality of mental functioning.

Under the amended s2 the abnormality must have arisen from a recognised medical condition. This would include psychiatric, psychological and physical conditions. This is potentially wider than the original definition and gives more scope to the types of conditions that would be included in the defence.

In their report, Ministry of Justice Consultation Paper, *Murder, Manslaughter and Infanticide* (July 2008), the government said that the amendment would bring the terminology up to date whilst allowing for future developments in diagnostic practice. It also encouraged a link between the valid medical diagnosis and the accepted classificatory systems of psychiatric, psychological and physical conditions. It also removed language that could be perceived to be politically incorrect.

The original requirement that D's mental responsibility had to be substantially impaired derived from the case of Lloyd (1967), 'less than total and more than trivial'. This was interpreted as D's *general responsibility* had to be substantially impaired. The amended s2 provides that the substantial impairment has to be of the defendant's ability to understand the nature of his conduct, form a rational judgement, or exercise self-control thus removing 'mental responsibility'.

Although these elements are wide in scope, it is likely they are narrower than the previous requirement for *general responsibility*. This has potentially narrowed the requirement for responsibility for one's actions.

S52(1)(1)(c) C&JA added a new criterion that the abnormality for mental functioning must *provide an explanation* for acts and omissions. This provides a causal connection between the abnormality and the killing. This amends what was implicit under the old s2 HA to being explicit under the amended s2 HA.

The amendments made to s2 HA by s52 C&JA have definitely updated the terminology used in the definitions whilst making them clearer and more

specific. It could be argued that the clarity provided by the amendments has updated and improved the defence of DR.

However, the relationship between voluntary intoxication and alcoholism in this area is still unclear and is continually evolving through caselaw. The main area in which reservations may be expressed is in the area of D's responsibility for his actions, which could be argued to have been narrowed.

Question 2(a)

The most obvious rationale behind the offence of burglary is the protection of property. To what extent is this offence also an offence against the person? It also requires proof of elements which are designed to protect the wellbeing of people.

Under s9 of the Theft Act 1968 (TA) a person will be guilty of burglary if he enters any building or part of a building as a trespasser with intent to steal, inflict grievous bodily harm (GBH) on any person therein or to cause criminal damage to the building or anything therein (s9(1)(a)) or, after having entered any building or part of a building as a trespasser he steals or attempts to steal or inflicts or attempts to inflict GBH on any person therein (s9(1)(b)).

Burglary is clearly a property offence as it requires proof that the defendant entered a building or part of a building as a trespasser. Burglary is traditionally considered by lay people as primarily an offence against property and one which requires a theft to occur or an intention to steal. However, theft or an intention to steal is not always a requirement and burglary can be committed by entering a building as a trespasser with an intention to inflict GBH (s9(1)(a)), which clearly seeks to protect the physical well-being of the person, or an intention to do unlawful damage (s9(1)(a)), which seeks to protect property.

Under s9(1)(b), burglary may be committed by entering a building or part of a building as a trespasser and stealing or attempting to do so which seeks to protect property; or, by inflicting GBH or attempting to do so which seeks to protect the person.

Under s10(1) TA, aggravated burglary is committed when a person commits any burglary and at the time has with him any firearm, imitation firearm, any weapon of offence or any explosive. This seeks to protect property, as it has already been identified that the offence of burglary seeks to protect property.

The weapon of offence refers to an article made or adapted for causing injury to or incapacitating a person or intended by the person having it with him for such use. To obtain a conviction under s10(1) the prosecution must be able to prove that D's intention was to use the weapon to injure or incapacitate. If proven, this seeks to protect the person.

As far as sentencing is concerned, the maximum sentence for a non-dwelling burglary tried on indictment is 10 years, whereas the maximum sentence for a domestic/dwelling burglary tried on indictment is 14 years and the maximum sentence for aggravated burglary tried on indictment is life imprisonment. This would seem to indicate the increased protection of the person over the protection of property.

Therefore, it could be concluded that the offence of burglary does seek to protect the wellbeing of individuals as well as the protection of property.

2(b)

The general rule is that consent can be a defence to assault or battery: Donovan (1934), A-G's Reference (No 6 of 1980) (1981). These are both offences which require no proof of any harm being caused to the victim. However, the courts are stricter when a degree of harm is caused, therefore consent is no defence to charges of assault occasioning actual bodily harm (ABH), inflicting GBH or causing GBH with intent: Brown (1993). The law also dictates that we impliedly consent to physical contact in everyday life: Collins v Wilcock (1984), where touching someone to get their attention was held to be 'everyday' contact.

Public policy considerations play a significant role in the law on consent. In the case of Brown, the House of Lords were split in their views of when consent would be a defence. The majority agreed that the public should be protected from harmful conduct and that it would not be in the public interest to allow consent to sadomasochistic behaviour. The minority's view was that the law should have respect for individual bodily autonomy.

There are merits for both views. The majority's view was that consent could not be appropriate as the purpose of the sadomasochistic activities was violence within a sexual setting. They argued that such activities could not be deemed as socially acceptable situations as they were unpredictably dangerous and exposed individuals to the risk of serious injury and infection. There was also a risk that young people could be corrupted, and the public should be protected from such activities.

The minority's view was that the purpose of the activities was sexual with a by-product of harm, that all of the participants were adults who consented to the activities and they should have the right to conduct their sex lives without interference from the criminal law. The activities did not result in any permanent or serious injury nor was anyone infected.

The courts will not accept that it would be in the public interest for individuals to inflict harm on each other for sexual gratification: Emmett (1999), where it was held that the severity of injuries inflicted for sexual gratification was not in the public interest.

There was a conflicting decision in Wilson (1996) where branding between a husband and wife would be consensual as the branding was not for the sexual gratification of either party. This decision followed the view that there should be respect of individual autonomy and what happens between couples in private should not be a matter for criminal investigation. Taking the same view as the minority in Brown.

There are some socially acceptable situations where the law allows consent to the deliberate infliction of harm when it is in the public interest: A-G's Reference (No6 of 1980). Medical intervention and cosmetic surgery allows consent for the procedure to be carried out: Corbett v Corbett (1971), Bravery v Bravery (1954).

The same applies to basic tattooing and piercing. They are also permissible to protect individual autonomy: DPP v Smith (2006), Wilson. However, in the

recent case of R v BM (2018), D, a tattooist and body piercer added body modification to his services. Acting on the request of three individual customers, he removed an ear for one, a nipple for another and divided the third's tongue to produce a 'lizard' effect. All of these procedures were carried out without anaesthetic.

D was charged under s18 of the Offences Against the Person Act 1861 (OAPA). His defence was all three customers provided consent and that this was an exception as per the situations set out above. D was convicted and appealed. His appeal was dismissed as it was held that body modification was more akin to surgery and should be carried out by a medical professional under anaesthetic.

Sporting activities conducted outside the scope of the rules for that sport, in particular wrestling and prize fighting, negate consent to the deliberate infliction of harm: Coney (1882). Consent is also negated when the defendant has practised deception in order to obtain consent if the deception deceived the innocent party either to the identity of the person or to the nature and quality of the act: Clarence (1888), Richardson (1998). In the case of Tabassum (2000) D misrepresented to patients that he was a doctor. In Burrell v Harmer (1967) it was held that 12 and 13-year-old boys could not consent to being tattooed as they did not understand the nature of the act.

It would seem that there a number of situations whereby valid consent can be given to the deliberate infliction of harm, as long as it can be said to be in the public interest. Whilst Brown attempted to clarify the law in this area, the courts still face a difficult task when trying to find a suitable and consistent balance between the competing principles of the protection of the public and the respect for individual autonomy.

Question 3

Result crimes are those requiring a proof of consequence, e.g. murder and manslaughter. The prosecution must be able to prove that the D's act or omission (conduct) caused the resulting consequence. The jury must decide whether there is a causal link between D's conduct and the resulting consequence.

There are two main legal principles that the jury have to consider when deciding whether causation is proven. They are: -

They must be satisfied that D's conduct was a factual cause of the victim's (V) death or injuries; and they must be satisfied that D's conduct was a legal cause of V's death or injuries.

Both must be established before D can be found liable for the offence/s for which he has been charged.

Factual causation is very straightforward and is determined by the application of the 'but for' test which was established in the case of White (1910) and is still good law. The 'but for' test sets out that the resulting consequences would not have occurred *but for* D's conduct. If the resulting consequence would have happened anyway then D will not be liable.

Legal causation requires an unbroken chain of causation leading to the resulting consequence. This means that, whilst the D need not be the sole, or

even the main cause of death, legal causation can be shown provided he makes a significant contribution to the result: Pagett (1984).

Prior to Pagett, the case of Smith (1959) defined legal causation as the operating and substantial cause of the consequence. In some cases, even where factual and legal causation can be proven, a *novus actus interveniens (*a new intervening act) can break the chain of causation and absolve the D of liability for the resulting consequence.

Intervening acts fall into three categories: -
i) acts of the victim;
ii) acts of third parties; and
iii) medical negligence

Acts of the victim will break the chain of causation where they are 'daft' or 'unexpected' or 'unreasonable': Marjoram (2000), where V jumped out of a window as D was kicking open the door to his room; Corbett (1996), where V, whilst trying to get away from D who was assaulting him, tripped and fell into the path of a passing car; Roberts (1972), where V jumped out of a moving car to escape what she perceived to be a threat from D and Williams and Davis (1992), where V again jumped out of a moving car to avoid being robbed. In all the above cases the V was attempting to escape harm or injury and it was held that the Vs' reactions were not so daft or unreasonable as to break the chain of causation.

The thin skull rule provides that a pre-existing condition of the V which renders the V particularly vulnerable to the injury inflicted or death will not serve to absolve D of liability. The leading case in this area is Blaue (1975) in which V, having been stabbed by D, died after refusing a blood transfusion due to religious beliefs. The principle that D must take his V as he finds him is not confined to pre-existing physical or physiological conditions but includes religious beliefs.

A deliberate act by V will also break the chain of causation. In the case of Cato (1976) D injected V with heroin and V died. Causation was proven; D had caused V's death. However, in the cases of Dalby (1982), Dias (2002) and Kennedy (2007), D handed the syringe to V who self-injected the heroin and died. The chain of causation had been broken by V's deliberate and voluntary act.

V's neglect or mistreatment of any injuries caused by D will not break the chain of causation: Wall (1802), Holland (1841). In the more recent case of Dear (1996) D slashed V several times with a Stanley knife. V did not seek medical treatment and died two days later. It was held that D's conduct was the operating and substantial cause of V's death.

In the case of Benge (1865) it was held that the actions of third parties could break the chain of causation. This was supported by the case of Pagett (1983) where it was held that, where a third party's act is a reasonable response to D's initial act, the chain will not be broken. In the case of Watson (1989) V suffered a heart attack 90 minutes after being burgled by D. D's conviction was quashed on the basis that the chain of causation could have been broken by a third-party intervention – the police boarding up a broken window.

The starting point in respect of cases where medical negligence could break the chain of causation is Smith (1959), where it was held that the chain of

causation would only be broken if the medical negligence was so overwhelming that the original wound would merely be part of history and death did not result from the original wound.

A new test was proposed in the case of Cheshire (1991) where it was held that medical negligence would not break the chain of causation unless the medical treatment was so independent of D's acts and so potent in causing death that it would render D's acts insignificant. This approach has been followed in Mellor (1996), Gowans and Hillman (2003) and Warburton and Hubberstey (2006). It was also suggested in Cheshire that it was only in the most extraordinary and unusual cases that medical treatment would break the chain of causation and as long as D's conduct was a significant contribution to death then a jury could convict on that basis.

In conclusion, it would seem that the legal principles relating to the chain of causation and *novus actus interveniens* are satisfactory. Generally, a voluntary or foreseeable act of the V or a third party will not break the chain of causation and D will still be liable. However, there are circumstances where this could be the case and each case should be judged on its own circumstances. An unforeseeable and/or involuntary act of the V may break the chain of causation.

Generally, medical intervention will not break the chain of causation, unless it can be proven that the medical treatment was the operating and substantial cause of death not D's original act. However, it has been argued that negligent medical treatment is not in line with the rest of the law relating to causation and there should be a test based on foreseeability of the outcome as with other authorities relating to *novus actus interventions,* which would clarify the law in this area.

Question 4(a)

Strict liability refers to offences where the offence does not require proof of *Mens Rea* (MR) for at least part of the *Actus Reus* (AR) but the AR must be proven, and the D's conduct must be voluntary in performing the AR.

Strict liability offences can be common law offences, or they can be statutory offences. Under common law, strict liability is very rare and only applies to a small number of offences namely public nuisance, some forms of criminal libel and outraging public decency: Whitehouse v Gay News (1979), Gibson and Sylviere (1991).

In contrast, there are hundreds of strict liability statutory offences and most of them are regulatory in nature. There is a presumption that an offence requires MR: Sweet v Parsley (1969), B (a minor) v DPP (2000), but the judiciary are willing to interpret the offence as one of strict liability if there are no words indicating the MR in the statute.

The Gammon Criteria as set down in the case of Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong (1984) illustrates the judicial reasoning employed by judges when deciding whether an offence is one of strict liability or not. The starting point is that there should be a presumption of MR before a person can be convicted of a criminal offence.

The presumption can be displaced by clear words in the statute or by necessary implication: R v K (2001). It can also be displaced where the issue

is one of social concern: Blake (1997), and when it can be shown that strict liability will be effective to promote the objectives of the statute: Muhamad (2003). The presumption is particularly strong where the offence is 'truly criminal' i.e. serious crimes, crimes with long sentences and crimes carrying a stigma on conviction: Howells (1977).

There are a number of regulatory offences which are aimed at consumer protection and are interpreted as being offences of strict liability. In Callow v Tillstone (1990), it was held that the selling of meat unfit for human consumption was an offence of strict liability, this was so even though the meat had been certified by a vet. There have also been a number of other cases which involved a regulatory offence being interpreted as an offence of strict liability: Cundy v Le Cocq (1884), Gammon (1984), Harrow LBC v Shah and Shah (1999), and Alphacell Ltd v Woodward (1972).

Therefore, strict liability is typically used in less grave offences where no MR is required for at least part of the AR and the penalty quite often is a fine. This is because most strict liability offences are regulatory in nature. When the court decides that an offence is one of strict liability, it makes the process of dealing with that offence quicker and more straightforward. This is because the prosecution is relieved of having to prove MR and there is also no evidential burden on D to prove that he acted without fault. This has the effect of not clogging up the court system.

The imposition of strict liability can be justified as strict liability offences help to protect society in general by the regulation of activities involving potential danger to public health, safety or morals. It encourages higher standards in respect of hygiene when processing and selling food and it ensures that businesses are run properly.

Enforcement of the law should be more straightforward as there is no need to prove the MR and this in turn could lead to more early guilty pleas thus saving court time. In some statutes there is the inclusion of a due diligence defence although this area is very haphazard, as in the case of Harrow LBC where there was a section in the statute to allow a due diligence defence for promoters of the lottery but not for those managing businesses where the lottery is sold.

The alternative of this argument is that the imposition of strict liability cannot be justified as it imposes guilt on people who are not blameworthy in any way. Even those who have taken all possible care can be punished as in Harrow LBC and Callow. There is no evidence to support the argument that strict liability improves standards in respect of hygiene when processing and selling food or that it ensures that businesses are run properly. Strict liability offences that are punishable by imprisonment would be contrary to the principles of human rights as absence of proof of fault contravenes the presumption of innocence.

4(b)

Intention is the MR requirement for the most serious offences in criminal law, including murder. Two types of intention exist in criminal law, direct intention and indirect/oblique intention.

Direct intention has been defined by Mohan (1976) as a person desiring to bring about the consequences of his actions, this has been approved by Gillick (1986).

The Criminal Justice Act 1967 (CJA 1967) has played a part in the development of indirect/oblique intention and S8 makes it clear that foresight is a subjective concept, based on what a person actually foresaw not what he ought to have foreseen or, indeed, what the reasonable person would have foreseen in his position. Common sense dictates that the more probable a consequence, the more probable it is that it was expected or 'foreseen' and the more likely, therefore, it was intended by the person doing the act. This approach has been developed through case law and has become indirect/oblique intention.

In Hyam (1975) it was held that a person intends a result which he forsees as a (highly) probable result of his actions; whilst Moloney (1985) held that foresight of a consequence was a natural consequence of D's actions was evidence from which the jury may 'infer' intention. In Hancock and Shankland (1986) the Court of Appeal (CA) guidelines set out that the greater the probability of a consequence the more likely it is that the consequence was foreseen and therefore intended. Nedrick (1986) clarified the decision in Hancock and Shankland by deciding that the degree of foresight necessary to 'infer' intention is virtual certainty, this decision also supported the decision in Moloney.

This led to the current leading authority in respect of indirect/oblique intention. Woollin (1998) approved Nedrick, subject to modification. The most crucial was the substitution of the word 'find' for 'infer'. This was seen as defining indirect/oblique intention as: *D intends a result if he knows that, barring all unforeseen circumstances, the result is a virtually certain consequence of his conduct*

Matthews and Alleyne (2003) suggested that foresight of a consequence as a virtual certainty is evidence from which a jury *may* find that an act was intended. This decision reverted to the approach prior to Woollin and confuses the current standpoint in relation to indirect/oblique intention.

In cases where oblique intention arises a judge should give a jury direction as to the meaning of intention. Case law demonstrates that this is not as easy as one might think as it is difficult to define the degree of foresight necessary to satisfy oblique intention.

The meaning of intention has proved difficult to define, and it should be acknowledged that most of the leading cases that define intention are murder cases. The case of Woollin relates specifically to murder and it remains unclear whether this approach should be adopted in relation to other offences. Despite the judicial attention given to intention, some degree of uncertainty as to the meaning of intention remains.

SECTION B

Question 1

Alex and Bilpa's Liability

Criminal Damage

In respect of smashing the window of the shop next door to the pub, Alex could be liable for an offence of simple criminal damage contrary to s1(1) of the Criminal Damage Act 1971 (CDA). This offence requires proof that D intentionally or recklessly destroyed or damaged property belonging to another without lawful excuse. The damage need not be permanent*:* Gayford v Choulder (1898) but must be more than trivial: Fiak (2005), A (a juvenile) v R (1978) and the victim must be put to some expense in rectifying/repairing it: Roe v Kingerlee (1986).

It was held in Hardman v Chief Constable of Avon and Somerset (1986) that painting on a pavement in soluble paint was sufficient to constitute damage. Therefore, smashing the shop window would constitute damage. The window was the property of the shop owner: s10(2) CDA and Alex would have no lawful excuse to destroy it. Thus, the AR for the offence is satisfied. The MR for a s1(1) offence requires proof that D intended or was reckless in causing the damage. In this case it should be obvious to Alex that his actions would cause damage.

By cutting the brake cable on Chaz's motorbike Bilpa could be liable for an offence of aggravated criminal damage contrary to s 1(2) CDA. This offence contains an extra MR element. In order to convict Bilpa of a s1(2) offence the prosecution must be able to prove that Bilpa thereby intended to or was reckless as to endangering the life of another. The inclusion of the word 'thereby' is crucial to the uplifted MR.

When considering whether Bilpa was reckless the subjective test as set out in G and Another (2003) must be applied. This requires Bilpa to have considered the risk that Chaz's life might be endangered by her conduct, but to have taken that risk anyway.

In this case it would be difficult to prove that Bilpa intended to endanger Chaz's life, but she should have considered that by cutting the brake cable of Chaz's motorbike that Chaz's life might be endangered. If her actions are found to be reckless, she will be liable for aggravated criminal damage.

Assaults

Alex caused injury to Chaz when he punched him and repeatedly banged Chaz's head against the pavement. The relevant offences to consider are GBH contrary to s18 and s20 OAPA.

S20 OAPA is the unlawful and malicious wounding or inflicting of GBH upon any other person, either with or without any weapon or instrument. A wound consists of a break to both layers of skin: Eisenhower (1984). GBH means 'serious harm': Smith (1961), Wood (1830), Saunders (1985) and Bollom

(2004). There must be foresight (or intention) of causing some harm: Mowatt (1968).

S18 OAPA says that D unlawfully and maliciously by any means whatsoever wounds or causes any GBH to any person with intent to do GBH. The offence is virtually the same as that for s20 OAPA except that there must be an intention to cause GBH for a s18 OAPA offence whereas a s20 OAPA offence can be caused recklessly.

The injuries caused to Chaz were a gaping wound which required stitching and a fractured skull.

The injury described would satisfy the criteria for both a wound and/or GBH under s18 or s20 OAPA. The facts would indicate that there was an intention by Alex to cause harm to Chaz as he repeatedly banged Chaz's head against the pavement.

Therefore, the relevant offence here would be s18 GBH.

Potential Defences

The only defence that both Alex and Bilpa may have to the criminal damage offences is intoxication.
There are two types of intoxicants, dangerous and non-dangerous: Bailey; Hardie (1984). Dangerous intoxicants such as alcohol, heroin and amphetamines, are those that are known to cause the taker to become aggressive or unpredictable.

Alex and Bilpa took a dangerous intoxicant in the form of alcohol.

Intoxication can be involuntary or voluntary. Involuntary intoxication occurs when a drink is spiked, prescribed drugs are taken in excess or non-prescribed but non-dangerous drugs are taken: Bailey; Watkin Davies (1984). This is not the case here. Voluntary intoxication occurs when there has been voluntary taking of dangerous drugs or drinking alcohol to excess.

Alex and Bilpa were voluntarily intoxicated by choosing to drink alcohol to excess.

Whether they can use the defence will depend on whether the crime was one of specific or basic intent. As basic criminal damage and aggravated criminal damage are both crimes of basic intent the defence would not apply as, applying the rules set down in DPP v Majewski (1976), Alex and Bilpa's act of getting drunk was reckless in itself and voluntary intoxication is not a defence to crimes of basic intent. On the facts Alex had clearly formed the intention to cause damage to the window and a drunken intent is still an intent as far as the damage caused is concerned: Sheehan (1975), Kingston (1994).

In respect of the offence of GBH which was committed against Chaz, Alex could potentially rely on the private defence of self-defence and/or possibly a public defence under s3(1) of the Criminal Law Act 1967 (CLA 1967). Both of these defences are now governed by the guidelines established under s76 of the Criminal Justice and Immigration Act 2008 (CJIA 2008).

The public defence created by s3(1) CLA 1967 permits the use of reasonable force to prevent the commission of an offence. CJIA 2008 confirms that the

same principles apply to both the private and public defences in relation to the concept of reasonable force and mistaken belief.

Self-defence is a common law defence which permits a person to use reasonable force in protection of himself or others if he honestly believes the use of force is necessary: Rose (1884), Duffy (1967), Palmer (1971). The issue with this defence is usually whether the force was 'reasonable' in the circumstances. The evidence indicates that Alex feared that Chaz was going to assault him. Alex could say he was motivated in his actions by a desire to defend himself from a physical assault; he was not looking for a fight and the facts do not support the notion that he was motivated by any desire for revenge.

Mistake of fact occurs in situations where, if the facts had been as D believed them to be, he would have had a defence.

Even if Alex was mistaken in his belief that he was going to be assaulted, he is entitled to be judged on the circumstances that he genuinely believed to exist: Williams (1987), Owino (1995). A jury should be objective in deciding whether Alex's actions were 'reasonable'. It would have to consider whether Alex honestly believed that it was necessary to defend himself and, if so, on the basis of the facts and the danger perceived by Alex was the force used 'reasonable'? If the jury answers 'yes' to both points, then it must acquit Alex. However, if the jury accepts that, whilst his actions were to protect himself, he went beyond the use of reasonable force, Alex would have no defence under common law: Clegg (1995) anyway.

Question 2(a)

This question requires consideration of offences that can be committed contrary to the Fraud Act 2006 (FA).

Erin's Liability

In respect of using Martin's debit cards details to pay £5,000 off her personal credit card, Erin could be charged with fraud by abuse of position under s4 FA. Whilst 'abuse' and 'position' are not defined under the FA, it is likely that the offence will apply because, as a paralegal assistant, Erin 'occupies a position in which she is expected to safeguard, or not to act against, the financial interests of another person' under s4(1)(a) FA: Doukas (1978). S4(1)(b) requires an abuse of that position: Gale (2008). Erin abused her position when she used Martin's debit card to pay £5,000 off her personal credit card.

The MR requires that Erin was dishonest and has an intention to make a gain or cause a loss. None of the situations set out in s1(2) Theft Act 1968 (TA) apply, therefore the common law test for dishonesty must be applied. In the case of Ghosh (1982), a two-stage test was formulated to determine dishonesty. The first limb was objective and requires that the honest and reasonable person would regard using a client's debit card to pay £5,000 off a personal credit card as dishonest. The second (subjective) limb was only considered if the first (objective) limb was satisfied.

The second (subjective) limb required consideration of whether Erin realised that the reasonable and honest person would regard this as dishonest. If the answer to both limbs is 'yes' then she would be deemed dishonest.

The Ghosh Test has recently been reconsidered in the case of Ivey v Genting Casinos (UK) Ltd (2017). This was a civil case and even though the Supreme Court's (SC) comments in relation to dishonesty were *obiter*, it is likely that they will be followed in the lower courts. The SC concluded that the second (subjective) limb of the Ghosh test was significantly flawed and should be removed. This decision has been followed in the recent case of R v Patterson (2017).

In respect of her use of the false bus pass, Erin could be charged with obtaining services dishonestly contrary to s11 FA and fraud by false representation contrary to s2 FA.

The AR for s11 requires that Ella obtained services which are not paid for or not paid for in full: Nabina (2000), Rai (2000). When she used the bus pass she obtained the services of the bus for her journey; she has not paid for the journey, so the AR is satisfied.

The MR requires that in obtaining the services she acted dishonestly, knowing that the services are, or might be, made available on the basis that payment has been, or will be, made for them and she did not intend to pay for the service. When she got on the bus she knew that the service had been made available on the basis that payment would be made for the journey and she had no intention of paying as she intended using a false bus pass.

Applying the Ghosh/Ivey test, the honest and reasonable person would regard Erin's conduct as dishonest. Erin is likely to be guilty of obtaining services dishonestly in relation to her use of the bus pass.

The AR for s2 FA requires that Erin made a false representation: Barnard (1837). She did this when she made an implied false representation that the bus pass was legal and was hers. The MR requires that Erin knew that the representation was or might be untrue or misleading under s2(2)(a) and (b): Cornelius (2012) She knew that the representation was untrue. As proof of dishonesty is required, the Ghosh/Ivey test must be applied. The honest and reasonable person would certainly regard Erin's conduct as dishonest.

Finally, consideration would have to be given as to whether Erin intended to make a gain for herself or another or cause loss to another s2(1)(b): Gilbert and others (2012). Under s5(2)(a) gain and loss extend only to gain and loss of money or other property. In this case, she gained by not paying the fare and the bus company lost by her not paying the fare.

Erin could be charged with fraud contrary to s's 2, 4 and 11 FA.

2(b)

Derek's Liability

Derek could be charged with fraud by failing to disclose information contrary to s3 FA. By making the declaration, he is not only making a false representation, but is also failing to disclose that his family has a history of heart disease and that he had a minor heart attack a couple of years earlier. The AR of this offence requires that D fails to disclose information which he has a legal obligation to disclose, in this case Derek's heart attack and his family history of heart disease.

The MR requires proof of dishonesty and an intention to make a gain or cause a loss. None of the situations set out in s1(2) Theft Act 1968 (TA) apply, therefore Ghosh/Ivey test must be applied. The honest and reasonable person would certainly regard Derek's conduct as dishonest. Derek also intends to make a gain for himself by obtaining life insurance.

Applying the case of Ivey to the facts, Derek has acted dishonestly. The first (objective) limb of the Ghosh test is satisfied as his ultimate aim was to obtain life insurance.

Following the steps set out in a), Derek could also be charged with fraud by false representation contrary to s2 FA as he made a false representation that the he has no medical problems. He knows that the representation is untrue, and he will gain by obtaining life insurance.

Derek is likely to be charged with Fraud contrary to s's 2 and 3 FA.

Question 3

Hans, Ivan and Jon's Liability

Conspiracy

The first offence committed in the problem is conspiracy to commit burglary. Hans, Ivan and Jon could be charged with statutory conspiracy to commit burglary under s1(1) of the Criminal Law Act 1977 (CLA 1977). The AR is present as two or more people agree to pursue a course of conduct amounting to a criminal offence: Walker (1962), they agree to burgle Mari's room in the care home.

The MR requires firstly that the parties intend to enter into the agreement; this is clear on the facts. The second requirement is that the parties intend the agreement to be carried out and that the burglary is committed: McPhillips (1999), Yip Chiu-Cheung (1994).

Under s1(2) of CLA 1977 it must also be proven that the parties knew or intended that the circumstances constituting the AR of the offence existed. As the burglary does take place the MR of burglary is satisfied and all of them are guilty of a conspiracy to commit burglary.

Hans and Jon could also be charged with aiding, abetting, counselling or procuring the burglary contrary to s8 Accessories and Abettors Act 1861 (AAA 1861).

By asking Ivan to steal the necklace Hans could be liable for procuring the offence. A causal link is required to prove procuring this means that without procurement by Han, Ivan would not have committed the offence: A-G's Reference (No. 1 of 1975). In this case the causal link can be proven as Ivan would not have committed the burglary if he had not been asked to commit it by Hans. Hans could be liable for procuring the burglary as well as conspiracy to commit burglary.

By agreeing to act as a look out Jon does not carry out the AR of burglary, but he would aid the offence: Bryce (2004) by helping Ivan to commit the burglary. He also has the MR of a secondary party because he intends to do the act of assistance as he intends to keep a look out: National Coal Board v

Gamble (1959). It is also clear that Jon knew of the circumstances which constituted the offence: Johnson v Youden (1950).

However, Jon changed his mind well before the burglary was committed, he unequivocally communicated his change of mind to Ivan and went home. In the decided cases of Grundy (1977) and Whitefield (1984) the CA quashed both convictions as in both cases the D's had verbally communicated their withdrawal to the co-defendants prior to the commission of the offences. Simple, verbal communication of withdrawal is sufficient if it is communicated prior to the commencement of the offence. Jon may escape liability for the attempted burglary and the burglary but may still be liable for the conspiracy.

Attempted Burglary

For there to be an attempt, there must be a substantive offence that D was attempting to commit. In this case the substantive offence was burglary contrary to s9(1)(a) of the Theft Act 1968 (TA). Under s9(1)(a) of the TA a person will be guilty of burglary if he enters any building or part of a building as a trespasser with intent to steal, inflict GBH on any person therein or to cause criminal damage to the building or anything therein. The AR of attempted burglary is therefore doing an act which is more than merely preparatory to entry of the building.

Under s1(1) Criminal Attempts Act 1981 (CAA) to be guilty of attempting to commit an offence a person must perform an act which is more than merely preparatory to committing the offence, intending to commit the offence and intending to bring about the result, and knowing that the surrounding circumstances would be in existence or being reckless as to this.

At common law the act had to be sufficiently proximate to the crime: Eagleton (1835). The CAA requires an act to be more than merely preparatory to the commission of the crime: Gullefer (1990), Jones (1990), Litholetovs (2002), Tosti (1997), Moore (2010).

When Ivan started to climb into Mari's room, he did an act which was more than merely preparatory as the only part of the act left was to enter the room with the intention to steal. It appears that there is no effective entry as the scenario does not say that any part of Ivan's body actually entered the building.

The MR for an attempt is an intention to commit the full offence and recklessness in respect of any circumstances surrounding it: Khan (1990). The fact that Ivan intended to commit burglary was sufficient for the offence. Ivan would be liable for attempted burglary contrary to s1(1) CAA.

Burglary

When Ivan managed to climb all of the way into the room, he entered the room with intent to steal, so would be guilty of burglary contrary to s9(1)(a) of the TA as set out above.
Ivan may also have committed an offence under s9(1)(b) TA. To prove a s9(1)(b) offence, theft or GBH has to be committed or attempted after having entered the building as a trespasser.

This would be made out in this scenario as after having entered Mari's room as a trespasser, Ivan then stole Mari's necklace, so he would be guilty of

burglary contrary to s9(1)(b) TA. Ivan also satisfied s1 TA, as he entered the property and once inside he appropriated a necklace which belonged to Mari, with the intention to permanently deprive Mari of the necklace by giving it to Hans.

By applying the Ghosh/Ivey test we can also show that he was dishonest. The first (objective) limb of the Ghosh test is satisfied as his ultimate aim was to steal Mari's necklace and gain £10,000 from Hans.

Question 4

Kiki's Liability

Kiki has caused the death of Norman in both fact and law. 'But for' Kiki's actions, Norman would not have died: White (1910) and Kiki's actions were the operating and substantial cause of Norman's death: Smith (1959).

The first offence to consider would be murder. The definition of murder is the unlawful killing of a human being with malice aforethought. There is no problem here with the AR being satisfied as Kiki caused the death of Norman. The problem for the prosecution would be proving that she did it with malice aforethought which means an intention to cause death or GBH: Vickers (1957).

As we are told that Kiki stabbed Norman with a knife that she kept after the afternoon reception, it could be argued that she intended to cause GBH, this would be sufficient MR for murder. Kiki would not be charged with involuntary manslaughter as her actions satisfy the AR and MR of murder.

It is obvious that Kiki intended to either kill Lester or to do him some GBH. Kiki would be charged with the murder of Norman if it can be shown that she intended to cause serious harm to Lester when she tried to stab him. This intent was then transferred to Norman.

It does not matter that Norman was not the intended victim as under the doctrine of transferred malice, the MR in relation to one victim can be transferred to another as long as the MR remains the same: Latimer (1886) Mitchell (1983). Malice can be transferred irrespective of whether Kiki succeeds in committing the MR against her intended target, Lester. In this case the AR of the crime was directed at Lester but was transferred to Norman when Kiki stabbed him as the MR remained the same.

Potential defences

It is likely that Kiki will be charged with murder. However, due to her severe mental health issues, she may be able to plead the partial defence of diminished responsibility or the defence of insanity.

Diminished Responsibility under s2 HA, as amended by s52 C&JA, occurs when, at the time a person kills another, he was suffering from an abnormality of mental functioning arising from a medical condition which substantially impaired his ability to understand the nature of his conduct or form a rational judgement and/or exercise self-control.

The abnormality of mental functioning must have arisen from 'a recognised medical condition'. This includes psychiatric, psychological and physical conditions.

In the original defence it was D's general responsibility that had to be substantially impaired. In the amended defence the substantial impairment has to be of D's ability to understand the nature of his conduct or form a rational judgement and/or exercise self-control. S52(1)(1)(c) adds that the abnormality for mental functioning provides an explanation for acts and omissions.

Kiki suffers from severe mental health issues, which is likely to constitute an abnormality of mental functioning arising from a medical condition: Seers (1984). The defence should be able to prove that this substantially impaired Kiki's judgement or ability to exercise self-control. This will provide an explanation for Kiki's actions if it causes, or is a significant contributory factor, in her carrying out the actions.

It would be for the jury to decide whether the severe mental health issues caused, or was a significant contributory factor in causing, her to kill Norman. The burden of proof would lie with Kiki on the balance of probabilities.

Kiki may want to consider self-defence, but this would not be relevant in this case. The court in the case of Oye (2013) held that where D assaulted someone as a result of a psychotic episode, he/she could not argue reasonable force as an insane person could not set standards of reasonableness as to the force used so the relevant defence would be insanity.

Kiki could also consider a defence of insanity. The definition for insanity is founded on the M'Naghten Rules (1843) and their subsequent interpretation by the courts. To satisfy the defence of insanity Kiki would have to be able to prove that, on the balance of probabilities, she was suffering from a defect of reason caused by a disease of the mind and that she did not know the nature and quality of her act or that it was wrong, and that she was insane at the time of the commission of the offence.

The disease of the mind must be internal to D: Sullivan (1984). The case of Hennessey (1989) found that hyperglycaemia due to diabetes was a disease of the mind together with epilepsy: Sullivan (1984), sleepwalking: Burgess (1991) to name but a few.

A defect of reason means an impairment of D's powers of reasoning as opposed to a failure to use such powers: Clarke (1972). Nature and quality of an act relates to an awareness of its physical nature and quality not its moral quality: Codere (1916). Johnson (2007) confirmed the position that D can only rely on the defence of insanity if he did not know the act was legally wrong, even if he knew it was morally wrong.

Kiki can supply medical evidence to support her claim that she suffers from severe mental health issues. This is deemed to be a disease of the mind and an internal factor: Sullivan (1984). For a plea of insanity to be successful she must also be able to show that either she did not know the physical nature of the act she was doing, or that she did not know that the act was legally wrong.

If she successfully pleaded diminished responsibility she would be convicted of voluntary manslaughter instead of murder. If she successfully pleaded

insanity, as the charge is murder, she would be subject to a qualified acquittal which would result in indefinite hospitalisation.