CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 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 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

Within good/comprehensive answers was evidence of good knowledge of the substantive law/case authorities.

Time management in answering questions: candidates often discussing irrelevant issues where no credit could be given. Albeit online exam, still worth planning question to note down key points before beginning the answer.

Too many candidates recited case authorities without applying them to the facts of each case or how they would support a key point within the question. Candidates will not be credited each time they recite a case but only when it is applied correctly to the facts. Credit can be given if additional cases can be recited which support/approve the ratio of an earlier case or show a development in the law e.g. specific cases on subjective/objective recklessness from Cunningham through to R v G and beyond. Authorities should where possible provide the year of the decision to put it into context, but candidates will not normally be penalised if naming the case is applied accurately to the facts

- If a candidate recites a provision of a statute there must somewhere within the text of the answer be the complete(and correct) version of

the applicable section /sub section eg " Section 1(1) Criminal Damage Act 1971 (CDA).Reference to CDA/Basic Offence can be credited if used in the correct context.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Overall, the questions within both Sections A and B were in part challenging but provided sufficient scope to enable candidates to obtain reasonable marks on each chosen question. The content of each of the questions were within the parameters of the Unit Specification and a well-prepared candidate should not have difficulty in answering any of the questions to an appropriate level.

It appears that Question 1 from Section A and Question 4 from Section B provided the greatest challenge to candidates. It may be a coincidence that both consisted of "part questions"

Section A

Question 1(a)

Some papers were reasonably well answered although candidates overall had limited knowledge of lawful excuse as a possible defence to criminal damage. The question requires an evaluation, so candidates provided limited evidence of discussing whether the statutory defences were "fit for purpose".

In **Question 1(b)** the level of knowledge of the substantive law was better but the evaluation of "entry" as a requirement of burglary was limited.

However, it is important for teaching centres to remind themselves that whilst knowledge and understanding of the substantive law is fundamental, candidates must be able to demonstrate their ability to "critically evaluate a given issue or situation to identify probable legal implications" This applies both to the Questions in Section A and B, and which are assessed criteria within the Unit Specification.

Question 2 Limited answers to this question; this requested an "evaluation of the meaning and scope of the defence of insanity". There was some evidence of knowledge of the elements of the defence i.e. the need for "defect of reason" and "disease of the mind "but limited evaluation of the statement in the question. Limited understanding between insanity and automatism distinguishing between external and internal medical factors. Reasonable recognition within answers of the effect of the labelling of "insanity" as opposed to "mental health" issues, which is possibly more appropriate within modern thinking. Overall, inadequately answered, but suggestive that candidates did not fully understand the elements of the defence of insanity or its scope and how it can be critically evaluated under the current law.

Question 3 and Question 4 were more extensively answered but provided a mixed performance. Most candidates were able to explain what "an omission to act" was and particularly the different types of duty that might create a liability if breached.

There was evidence that within the answers to Question 4, too many candidates could not distinguish between "voluntary" and "involuntary" manslaughter which was relevant in discussing the role of *mens rea* in homicide offences.

Overall, these two questions were answered the most frequently in Section A but in most cases lacked detail to gain higher marks.

Section B

Question 1 and Question 2 were more extensively answered than other questions within the Section.

Observations in **Question 1** too many candidates wasted time by describing in detail the offence of burglary instead of criminal damage. However, most were good at recognising and describing change in law on the meaning of dishonesty.

In **Question 2**, there was not sufficient understanding that murder was an offence applying to the death of Jem or relevance and application of involuntary manslaughter in respect of the death of Colwyn.

In **Question 3**, there was little or no mention of common assault and reference to S.39 Criminal Justice Act 1988, Most answers mentioned ss.18/20 OAPA but not always correctly distinguishing between the two. Overall answers did not adequately demonstrate understanding between application of specific and basic intent to offences where a defence of voluntary intoxication may apply.

In **Question 4** Overall Q4 (a-c) were the most "challenging" in Section B of the paper.

Q4 (a) required the candidate to identify whether a potential (general) defence might be available to Arnie on the facts (not Zara, as she has not committed an offence) for the one offence of careless driving, A number of candidates succeeded in recognising that a defence of duress might be available but then went on to describe it as the defence of duress "by threats" (DBT) not by "circumstances" (DBC) which on the facts and authorities is the correct description of the defence There is a distinction on the facts which provides the correct potential arguable defence as DBC.

Candidates may well have been confused by the reference in the scenario to Zara's threats to kill herself, but that was not a threat to Arnie as would be in that case be pleading DBT. The circumstances of the case will prescribe which element of duress applies. (albeit candidates would not be penalised for discussing both subject to them applying the correct one with the appropriate explanation).

Furthermore the aim of the question was to allow the candidate to discuss whether the correctly identified possible defence might apply to Arnie on the facts eg whether as a result of his head injury his reaction to his daughter's request to give her a lift to her interview was reasonable and proportionate and whether a court might accept it as a defence to the charge.

(b) generally well answered but too many students muddled automatism with insanity

(c) generally well answered but a number did not adequately distinguish between public and private self-defence.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 3 – CRIMINAL LAW

SECTION A

Question 1(a)

Section 1(1) of the Criminal Damage Act 1971 (CDA) states that 'A person who without lawful excuse destroys or damages any property belonging to another shall be guilty of an offence.'

This seems to suggest that there would be occasions where a person may have a lawful excuse which would exonerate him from criminal liability for causing damage. The lawful excuses applicable to the CDA are contained in s5.

Section 5(2)(a) sets out that a defendant (D) may have a lawful excuse for the damage/destruction if, at the time of the act, D believed that he had or would have had the consent of the owner whose property was damaged/destroyed. Under this section D would also have a defence if he made a mistake due to intoxication.

This defence has been successfully pleaded on several occasions. In the case of Denton (1982), D pleaded a defence under s5(2)(a) after setting fire to his employer's cotton mill stating that he thought that his employer had encouraged him to burn the mill so that he could make an insurance claim. The Court of Appeal (CA) quashed the conviction and held that he did have a valid defence.

Similarly, in the case of Jaggard v Dickinson (1980) D thought she was at her friend's house. There was no one in so she broke a window to get in. She was drunk at the time and she had actually broken into someone else's house, not her friend's house as she thought. The Divisional Court quashed her conviction as she had a defence under s 5(2)(a) and 5(2)(b), in that she held a genuine belief (even though she was intoxicated) that she was breaking into her friend's house and that her friend would consent to the damage caused.

Section 5(2)(b) sets out that D may have a lawful excuse for the damage/destruction if the damage/destruction was done in order to protect property belonging to D or another.

Strangely, the CDA does not provide a defence where D believes he is acting to protect an individual from harm. In Baker and Wilkins (1997) the Ds believed that Baker's daughter was being held against her will at a property. They damaged a door trying to enter the property and were convicted of criminal damage as the defence does not include damage done to property in order to protect a person.

In both Hill;Hall (1989) and Kelleher (2003) it was held that the D's could not have honestly believed that the property was in immediate need of protection. In the case of Hill;Hall it was also held that the belief was unreasonable and in both cases it was held that when the damage was done due to political motivation and the property in question was not in need of immediate protection, the CDA would not provide a defence.
The other point for consideration, which relates to self-defence, is that in respect of criminal damage the defence is allowed when there has been a drunken mistake. The same cannot be said in respect of assault where a drunken mistake cannot be relied upon as a defence.

In conclusion it could be said that the defences under s5 are almost fit for purpose subject to some minor amendments to include the availability of a defence for the protection of individuals and a possible change to s5(3) so that the court would be able to consider that state of belief that ought to have existed as opposed to D's actual state of belief.

1(b)

Burglary is an offence under the Theft Act 1968 (TA). Section 9(1)(a) provides that a person is guilty of burglary if he enters a building or part of a building as a trespasser with intent to steal, inflict Grievous Bodily Harm (GBH) or do unlawful damage. S9(1)(b) provides that, having entered a building or part of a building as a trespasser, D steals or attempts to steal; or inflicts, or attempts to inflict, GBH.

The distinguishing feature between the two sub sections is the D's intention at the time of entry. For a s9(1)(a) offence there must be an intention to commit the offences listed. In respect of a s9(1)(b) offence, it is irrelevant what was intended but the prosecution must be able to prove that D actually committed or attempted to commit one of the offences listed.

Under the common law, an insertion of any part of the body into the building was sufficient and also there would be an entry even if D did not physically enter but inserted an instrument for the purpose of theft. Indeed, according to the case of Davis (1823) the insertion of a forefinger was sufficient. Whilst this was a broad brush approach, at least the meaning of entry was clear.

Entry, as used in the Act, has not been defined and this has led to numerous problems over the years when trying to prove that an entry has taken place.

When interpreting the word 'enters' in the Theft Act 1968, the courts took a different view to the old common law rules. In the case of Collins (1972) the Court of Appeal (CA) said that the entry had to be effective and substantial, but did not give any further guidance. In Brown (1985) the CA still decided not to apply the old common law rules. The CA modified the concept of an effective and substantial entry to effective entry which need not be substantial. The different decisions of the courts in these cases highlight the inconsistencies in their approach to individual cases.

In the more recent case of Ryan (1996) it was held that, even though he had got stuck trying to get in through the window, D could be convicted of burglary as there was evidence that he had entered the property. However, it could be argued that this was not an effective entry, as only his head and right arm were inside the property the rest of his body was outside.

The current position is that entry has to be effective but not substantial. Inserting other objects such as a small child, an animal or an inanimate object such as a pole or a hook: Horncastle (2006), when the reason for insertion of such objects would be to bring about theft, GBH or criminal damage would constitute entry for the purposes of burglary. In the case of Richardson; Brown (1998) use of a mechanical digger to steal a cash dispenser by removing it from the wall of the bank, was deemed as entry into the bank.

There still is no clear meaning of entry and as such the law is ambiguous. It is true that whilst the common law approach to entry was very wide, it could be said that it was clear.

Question 2

Insanity is a general defence and may be pleaded to any crime requiring *Mens Rea* (MR), whether tried on indictment or summarily. Quite often D will not raise a defence of insanity but will put his state of mind in issue by raising another mental capacity defence such as automatism.

The question of whether the defence pleaded really amounts to a defence of insanity is a question of law to be decided by the judge on the basis of medical evidence: Dickie (1984). Medical evidence is critical to this defence and if the judge decides that the evidence provided does support the defence then he should leave it to the jury to decide if D is insane: Walton (1978). The jury can return a special verdict if they find that D was insane at the time of committing the offence. This verdict is 'not guilty by reason of insanity'.

The present law in respect of the defence of insanity is contained in the M'Naghten Rules (1843). Whilst the rules are not binding, they have been treated as an authoritative statement of the law since Sullivan (1984*).* The rules state that at the time of committing the offence, D was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know, then he did not know that what he was doing was wrong.

Because there is a presumption of sanity, the burden of proof rests on the defence to prove that D is or was insane on the balance of probabilities There are three main elements all of which must be established before the defence can be proven:

a) Defect of reason;
b) Disease of the mind; and
c) Not knowing the nature and quality of his act or not knowing that it was 'wrong'.

The phrase 'defect of reason' was explained in the case of Clarke (1972) where the judge stated that it referred to people who were deprived of the power of reasoning and it did not apply to those who retain the power of reasoning but who, in moments of confusion or absent mindedness, fail to use their powers to the full. 'Disease of the mind' is not a medical term but a legal term. It is concerned with the mind not conditions affecting the brain. Therefore, if D suffers from a condition that affects his mental faculties but not his brain it could support a defence of insanity: Kemp (1957).

To distinguish insanity from the defence of automatism the courts have

developed a test based on whether D's 'defect of reason' was internal or external. In the case of Quick (1973) it was held that the cause of D's lack of awareness was external as it was due to his overdose of insulin not due to his diabetes *per se*, therefore this was automatism. Contrast this with the case of Hennessey (1989) where it was held that his lack of awareness was caused by the diabetes itself and was therefore an internal factor meaning that insanity was the correct verdict in this case.

'Not knowing the nature and quality of the act' requires lack of awareness of the physical nature and quality of the act and not its moral qualities. There must be a difference between D's action and what he thinks he is doing. The nature of the act concerns its characteristics and the quality of the act concerns the consequences of the act: Codere (1916). D must not be aware that his actions are legally wrong. In the case of Windle (1952) it was decided that 'wrong' meant contrary to law. The Court of Appeal (CA) was invited to reconsider the decision in Windle in the case of Johnson (2007). Whilst they felt that the decision in Windle was strict, they felt unable to depart from it.

There are numerous problems with the law on insanity as it currently stands.

The presumption of sanity reverses the burden of proof on to D. The M'Naghten Rules are based on legal definitions rather than medical/psychiatric definitions; this seems absurd when the defence has to be supported by medical evidence. It has been said that 'disease of the mind' is too widely defined and produces illogical results. The internal/external factor test means that diabetics, epileptics and sleepwalkers could potentially be found to be insane. The definition of 'wrong' has been criticised as being too narrow as it only applies to acts that are legally wrong and not morally wrong. If the defence is successful, D is labelled as insane, this is no longer a concept used in mental health law and is inappropriate where the underlying cause is a disease such as diabetes.

There has been some reform in the area to try and bring it into the 21st century. The first development came in 1957 with the introduction of the diminished responsibility defence to murder which is contained in S2 of the Homicide Act 1957 (HA). The second came in 1965 when the death penalty was abolished. The impact of these developments meant that the importance of insanity as a defence has been much reduced. Under the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 trial judges were given a wider range of disposal options which include hospital supervision orders and absolute discharge. Whilst this could make the defence more attractive the label of insanity still remains.

The Law Commission have produced the Law Commission's Draft Criminal Code (1989). The definition suggested by the Code is that a mental disorder verdict shall be returned if the D is proved to have committed an offence but it is proved on the balance of probabilities (whether by the prosecution or the defence) that D was at the time suffering from severe mental illness or severe mental handicap.

If enacted this would further update the law in this area by replacing the label of insanity with mental disorder this is a much more medical/psychiatric definition than the current definition. The legal tests of 'defect of reason' and disease of the mind' would be replaced with the more medical/psychiatric definitions of 'severe mental illness' or 'severe mental handicap'.

Taking everything into consideration it could be argued that the law in respect of insanity as it stands is out of date and out of touch. Whilst there has been some reform in the area, further reform is necessary if it is to become a modern defence.

Question 3

The general position in English Law is that a criminal act requires a positive action. The imposition of liability for an omission is the exception to the general rule. D's conduct must be voluntary and there are two further requirements that have to be fulfilled before anyone can be punished for omitting an act, they are:-

a) that the crime must be capable of being committed by omission; and

b) that D must be under a legal duty to act either at common law or under statute.

In Miller (1983), when D realised he had set a mattress alight causing criminal damage, he was under a duty to minimise the danger, he did nothing. The principles of Miller were upheld in Santana-Bermudez (2003). The most recent case in respect of the above area is Evans (2009) where a heroin addict who had self injected heroin became ill and her sister and mother were convicted of gross negligence manslaughter as they did not contact the emergency services as they thought she would recover. These are all examples of crimes that are capable of being committed by omission.

Statutory liability for an omission is not unusual and there are hundreds of crimes which can either be committed by an act or an omission or can only be committed by omission. Criminal damage is an example of an offence that can be committed by either (Miller). Examples of crimes that can be omitted by omission only are the 'failing to act' crimes, i.e. failing to submit an annual tax return, failing to display a valid tax disc on the car, and the list goes on.

The most important factor in respect of the common law is that D must be under a legal duty to act. Where a failure to fulfil a contract is likely to endanger lives, the law will impose a duty to act. The leading case in this area is Pittwood (1902) where a duty was imposed on D (a signalman) for failing to shut a level crossing gate when a train was due. In Adomako (1995) & Misra (2004) duty was imposed on a hospital anaesthetist and surgeon respectively, and in Singh (1999) a duty was imposed on a landlord. Where a failure to fulfil a contract is likely to endanger lives, the law will impose a duty to act. This duty is relevant not only for the benefit of the parties to the contract, but also to those who may be injured by a failure to perform the contract.

There is also a duty based on office, which means that when a person works in a position of public office e.g. the police, they are under a duty to act: Dytham (1979). This duty is vital to general public safety.
The main duties under common law are relationship duties and the assumption of care duties. It goes without saying that parents owe a duty of care to their children. Couples owe a duty of care to their spouses. In Gibbins & Proctor (1918) parents failed in their duty of care when they deliberately starved their seven year old daughter to death. In the more recent case of Hood (2003), D left his wife untreated at home for three weeks after a fall and only called an ambulance when she had died. It is perfectly reasonable and acceptable to expect people in relationship situations to be legally and morally bound to take of their children and/or each other.

A duty will be owed by anyone who voluntarily undertakes to care for another person for whatever reason. In Stone & Dobinson (1977), D failed in his duty of care to his 61 year old sister who lived with him and who died due to his inability to care for her. The case of Instan (1893) held very similar circumstances to Stone. In the case of Ruffell (2003), D and the victim were friends. When the victim overdosed D tried to revive him. When D could not revive the victim he left him on the victim's mother's doorstep. He did owe a duty of care as he had assumed responsibility for him when he tried to revive him. It would seem to unfair that an attempt to help someone in difficulty could lead to criminal liability should something go wrong at a later point. This could dissuade people from ever helping others for whom there was no duty to help.

There are also situations where a person, who has been under a duty to act, can be released from that duty or the duty to act could cease. In Smith (1979) it was held that as long as the person subject to the duty is rational at the time, he/she can release D from his duty to act. This was confirmed in Re. B (Consent to Treatment: Capacity) (2002). When a competent patient gives notice that he/she wishes life preserving treatment to be discontinued, anyone responsible for providing such treatment would be absolved of that duty.

The decision taken in Bland (1993) provided guidance on when a duty to act ceases. The hospital authority applied for judicial authority to cease feeding and hydrating a patient as there was no prospect of the patient getting any better. The House of Lords held it was permissible to withdraw treatment and the duty of the hospital towards the patient ceased.

The general position in English law is that there is no general duty to act. Although a person may feel morally obligated to act when there is no legal duty to act. There is a conventional approach and a social responsibility approach to whether or not criminal liability should be imposed for an omission to act.

Advocates of the social responsibility approach suggest that where rescue of a victim would not pose a danger to D, then liability should be imposed if he failed to act, even where there was no existing legal duty. There would then be a general duty to act.

The conventional approach argues that there are serious moral and practical objections to adopting this approach. Imposing liability for an offence of failing to act would be practically impossible to enforce and could impose liability on large numbers of people. How would a person be able to judge when the rescue of another would not pose a danger to him? D could genuinely misjudge a rescue situation and would potentially fail to attempt it when it was in fact an easy rescue or worse attempt a dangerous rescue which could lead to potential liability for the victim's death if it went wrong.

An offence of failing to act would conflict with the principle of autonomy; that is, we currently choose how and when to act and are individually responsible for our conduct, but should not be responsible for the conduct of others.
The existing grounds upon which liability is imposed for a failure to act are clear as to be liable for a failure to act, one must first be under a legal duty to act, either at common law or under statute and then must fail in that duty before liability for a failure to act can be imposed. This upholds the principle of autonomy and does not place an obligation to act on an individual in relation

to strangers to whom we have no responsibility.

Question 4

Literally translated MR means guilty mind. In reality, it denotes the fault element that the prosecution have to prove, beyond a reasonable doubt, in all cases. In the majority of cases this will involve proof of a positive state of mind in respect of D, but sometimes it may be enough to prove that D failed to pay attention to something that would be obvious to the reasonable person.

In respect of fatal offences, there are three main types of MR; they are intention, recklessness and gross negligence. Intention requires proof of an aim, purpose or foresight of virtual certainty. Recklessness requires the conscious, unjustifiable taking of a risk, and gross negligence requires a duty of care, which has been breached and the breach resulted in conduct so bad in all the circumstances as to amount to a criminal act or omission: Adomako (1995).

Intention can be direct or indirect/oblique. Direct intention has been defined by the case of Mohan (1976) as a person desiring to bring about the consequences of his actions, this has been approved by Gillick (1986).

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.

Prior to the case of Nedrick (1986) there were a number of cases that sought to clarify what constituted indirect/oblique intention. The case of Nedrick decided that the degree of foresight necessary to 'infer' intention is virtual certainty.

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 defined 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 somewhat confuses the current standpoint in relation to indirect/oblique intention.

Recklessness, by contrast, implies risk taking as opposed to the defendant foreseeing a consequence as a certainty. This is seen to be a lower standard of MR than intention. Until 2003 there were two types of recklessness, objective and subjective recklessness.

Objective recklessness only applied to offences contrary to the CDA. The leading case in this area was Caldwell (1982) where it was found that D could be found to be reckless by creating an obvious risk of damage, which he failed to consider which a reasonable person would have considered. This decision remained good law until the case of R v G and Another (2003) where it was found that the objective test was unfair and that subjective recklessness would

be the standard for all offences that could be committed recklessly. The Court of Appeal in Attorney General's Reference (No3. Of 2003)[2004] confirmed that R v G had set down the subjective standard to be applied to all offences.

Subjective recklessness is defined as the conscious taking of an unjustified risk and was established in the case of Cunningham (1957). The question to be asked when considering subjective recklessness is, did D foresee the risk of his actions? The key point to note about this approach to recklessness is that there would be no liability if the risk had never occurred to the defendant. This is now the only type of recklessness since R v G and Another (2003).

In respect of gross negligence, a duty of care is established by professional and contractual relationships e.g. doctor and patient or by a duty to act where a person is only liable for failure to act if he has a duty to do so Donoghue v Stevenson (1932), Khan (1998), Willoughby (2005), Wacker (2003) and Evans (2009). Duty of care is breached by performance of that duty which falls below the standard required Misra and Srivastava (2005) and Adomako (1995). Duty to act is breached by failure to act.

There is a final element which distinguishes civil negligence for causing death and gross negligence manslaughter. If the preceding steps are satisfied, D will still not be criminally liable unless his negligence was gross. D's negligence will be held to be gross if it was so bad that it amounted to a criminal act or omission. This is a question of fact for the jury Singh (Gurphal) (1999).

As a general rule, courts are reluctant to apportion blame and impose punishment on those who acted without awareness of the conduct, circumstances and consequence elements that make up the AR. Therefore, it could be said that the purpose of the MR is to attribute liability where a D consciously and advertently carried out the AR of a crime and also where D did not, but should have foreseen the result.

To establish criminal liability there must be an AR and an MR which, in the majority of cases, must coincide: this means that when carrying out the AR of the offence D must possess the relevant MR. The MR refers to the state of mind which is prohibited in the definition of the offence. To be able to prove the MR is as important as proving the AR when establishing criminal liability.

There is also a situation where D could be convicted of a homicide offence with a very low level of MR. For an offence of unlawful and dangerous act manslaughter (UDAM), D would have the AR for murder but not the MR for murder, as the MR would be that for the base offence committed eg battery. This would seem unfair as there is no requirement for the foresight of harm: DPP v Newbury and Jones (1977), and it is only necessary to prove that D had the MR of the base offence, which for battery could be intention or recklessness

The role of the MR when establishing liability for a homicide offence is vital as the law recognises that liability for criminal offences can involve stigma being attached to D as well as loss of liberty in some circumstances. This is why criminal liability for homicide offences should only result when it can be proven that D is culpable or morally blameworthy in respect of his conduct.

SECTION B

Question 1

Bottle of wine

The offence to be considered is one of Theft, contrary to s1 of the TA. Under s1 of the TA a person is guilty of theft if he/she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

The situation here relates to appropriation, s3 TA which is part of the *Actus Reus* (AR) of the offence together with dishonesty s2 TA and the intention to permanently deprive s6 TA which form the MR of the offence.

Under s3 appropriation is any assumption of the rights of an owner. An assumption of one of these rights is sufficient for appropriation, in Morris (1983) it was changing the labels on goods, which only the owner could do.

In respect of dishonesty, none of the situations set out in s1(2) 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 taking a bottle of wine from a supermarket without paying for it as dishonest. The second (subjective) limb was only considered if the first (objective) limb was satisfied.

The second (subjective) limb required consideration of whether Selena 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).

Therefore, applying the Ghosh/Ivey test, the honest and reasonable person would regard Selena's conduct as dishonest.

Under s6 it is sufficient that D has the intention to permanently deprive: Morris (1983), Wheatley and another (2006). Intention can be inferred if D intended to treat the property as his own by disposing of it regardless of V's rights: Cahill (1993), Lloyd (1985).

When Selena put the bottle of wine in her shopping bag and left the store there was no dishonesty. S3(1) TA refers to a later assumption of property by keeping or dealing with it as the owner. In this case Selena formed the MR of the offence not when she put the wine in her bag, but when she realised it was there and decided not to return it or pay for it. She kept the bottle of wine and assumed the rights of the owner. She was dishonest in that she knew that the store would not consent to her taking the bottle of wine without paying for it

and the intention to permanently deprive the store of it is satisfied by her keeping it.

Selena would be liable for theft contrary to S1(1) TA.

There appears to be no defence that would be available to her.

Cashpoint machine withdrawal

By using Omar's cashpoint card to withdraw money from a cashpoint machine Selena may be guilty of fraud by false representation under s2 of the Fraud Act 2006 (FA). She made a false representation of fact to the cashpoint machine that she had the authority to use the card in question: Doukas (1978), Stonehouse (1978) and Darwin and Darwin (2008).

Under s2(5) a representation is made if it is 'submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention)'. Thus, using Omar's cashpoint card in the cashpoint machine and inputting his PIN number will be sufficient for a false representation.

As far as the MR is concerned, Selena knows that the representation that she is making to the cashpoint machine is false and she obviously intended to make a financial gain for herself. It is irrelevant whether Omar would have consented to her use of the cashpoint card as the representation is made to the cashpoint machine not to Omar.

Potential defence

Selena could try to argue that she hadn't been dishonest and that she would have had Omar's consent to withdraw the money.

The sticking point here may be the application of the Ghosh/Ivey test. When considering dishonesty the jury/judge/magistrates might take into account the relationship between Selena and Omar and whether it was likely, in the circumstances, that Omar would have consented to Selena using his cashpoint card and whether the account was a joint one or not. However, in this case the fraud is practised against the cashpoint machine and arguably the bank, so Omar's consent could be considered to be irrelevant.

If Selena's conduct is found to be objectively dishonest then she will be liable for fraud contrary to s2 FA.

The shed window

When Selena smashed the shed window, she may 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) and the victim must be put to some expense in rectifying/repairing it: Roe v Kingerlee (1986).
Therefore, smashing the shed window would constitute damage. The window was the personal property of Maura s10(2) CDA. 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. It is quite obvious that that Selena intended to cause the damage in this case. It would appear that the offence is made out

as Selena has intentionally or recklessly damaged property belonging to another.

Potential defence

However, the AR may not be satisfied in this case as Selena could claim that she has a defence under s5(2), that of lawful excuse. If she honestly believed she would have had Maura's consent to damage the property she may be able to rely upon lawful excuse as a defence: Jaggard v Dickinson (1981), Denton (1982).

Selena has committed an offence of basic criminal damage and damage was intended therefore s5(2) applies. Selena honestly believed that Maura would consent, therefore she would not be liable even if it later turned out that Maura did not or would not have consented.

Question 2

Death of Colwyn

This question requires consideration of Kobi's potential liability in respect of the deaths of Colwyn and Jem.

As Colwyn has died Kobi could be potentially liable for murder/involuntary manslaughter. Kobi could only be found liable for the murder of Colwyn if he had the requisite intent to kill or cause GBH: Woollin (1999). This would require at least an awareness that serious injury: Cunningham (1957) was virtually certain: Woollin (1999) to result from him punching Colwyn to the face. A punch is likely to cause injury, but it is not likely that Kobi would have foreseen serious injury. Therefore, it is unlikely that Kobi would be liable for murder, this also means that voluntary manslaughter would also not be an option.

The relevant offence here in respect of Kobi would be involuntary manslaughter. The offence was defined in the case of Larkin (1994) where it was held that to satisfy the offence of unlawful/dangerous act/constructive manslaughter, there must be an intentional act, which is unlawful, objectively dangerous and which causes death. It is clear from the facts that there has been an assault which resulted in the death of Colwyn.

The criminal act here is battery contrary to s39 of the Criminal Justice Act 1988 (CJA 1988). Both the AR and MR of the criminal act must be established. Kobi intentionally or recklessly: Venna (1975) Savage; Parmenter (1989) inflicted personal violence on Colwyn: Rolfe (1952). Colwyn did not give Kobi permission to assault him therefore the contact was both physical: Ireland; Burstow (1998) and unlawful.

Kobi carried out an unprovoked battery on Colwyn. He intentionally punched Colwyn, which means he intended to inflict unlawful violence on him. This would be a sufficient base act to support a charge of unlawful/dangerous act/constructive manslaughter.
The battery was an unlawful and dangerous act: Church (1965), Watson (1989) and Newbury and Jones (1976). When he punched Colwyn, Kobi may not have intended to harm Colwyn, but he should have realised that there was the risk of some harm to Colwyn albeit not serious harm.

The chain of causation seeks to provide rules that balance legal and moral culpability so that there isn't endless liability for linked consequences. We must now consider causation and whether there was a break in the chain of causation. Involuntary manslaughter is an offence for which there must be a result. It must be proven that Kobi's conduct caused Colwyn's death both in fact and in law.

Factual causation is the 'but for' principle: Pagett(1983), White (1910). 'But for' Kobi's actions Colwyn would not have died, this is true. Legal causation is only considered if factual causation has been proved. Factors to be considered are, there must be a culpable act, the conduct must be significant and have more than a minimal effect in bringing about the result: Cheshire (1991) and the sequence of events does not affect legal causation from being established.

There can be more than one cause. The conduct does not have to be the sole cause of death, just one of the causes. Other causes can include pre-existing conditions, whether medical: Dear (1996), Carey and others (2006) and/or religious: Blaue (1975). This is known as the 'thin skull rule'. A *novus actus interveniens* or a new intervening act could also break the chain of causation. We are told that Colwyn died fairly soon after the assault, in hospital. We are not told of any intervening acts so there is no need to consider these any further.

Applying the above to the facts in this case, causation both in fact and in law is present here. Whilst he may not have intended to hurt Colwyn, Kobi satisfies the MR for the battery as he appears to have intended to inflict unlawful violence. Cunningham (1957). Kobi would therefore be liable for involuntary unlawful/dangerous act/constructive manslaughter in respect of Colwyn.

Death of Jem

In relation to Kobi's liability for the death of Jem, he may be guilty of murder as he has unlawfully caused Jem's death within the Queen's peace with the intention to kill or cause GBH: Vickers (1957).

Kobi stabbed Jem, who is a human being, this is an unlawful killing as it was not done in self-defence.

As mentioned above, murder is a result crime which means that Kobi's acts must have caused the result, which is the death of Jem. The test for factual causation is the 'but for' principle: Pagett (1983), White (1910). 'But for' Kobi's initial actions Jem would not have died, which is true. Legal causation is only considered if factual causation has been proved.

Legal causation sets out that 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. In this case Kobi's actions were the sole cause of Jem's death as there were no breaks in the chain of causation. Kobi would be liable for the murder of Jem.

The MR for murder also has to be made out, so we must consider whether Kobi intended to kill Jem or to cause him GBH. 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). In this case it could be argued that Kobi's aim or purpose was to kill Jem to stop him telling the police what he knew about Colwyn's death.

Indirect or oblique intention has been developed over a number of years and though many cases. The current leading authority in respect of indirect/oblique intention is the case of Woollin (1998). This defines 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.*

Applying Woollin to this scenario, the question would have to asked whether death or GBH was virtually certain to occur and did Kobi appreciate that this was the case. It is likely that Kobi would have foreseen at least GBH as virtually certain to occur as a result of his stabbing Jem, therefore oblique intention can be established.

Question 3
Villa's liability

GBH – s20

When Villa stood on Wayne's wrist, he committed a battery contrary to s39 of the Criminal Justice Act 1988 (CJA). Villa intentionally or recklessly: Venna (1975), Savage; Parmenter (1989) inflicted personal violence on Wayne by taking him to the floor and standing on his wrist*:* Rolfe (1952). The contact appears to be both physical: Ireland; Burstow (1998) and unlawful.

Villa could be liable for Grievous Bodily Harm (GBH) contrary to s18 or 20 of the Offences Against the Person Act 1860 (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. GBH means 'serious harm': Smith (1961), Wood 1830 and Bollom (2004). There must be foresight (or intention) of causing some harm: Mowatt (1968).

S18 OAPA is unlawfully and maliciously by any means whatsoever wounding or causing any GBH to any person with intent to do GBH. The AR of the offence is the same as that for s20 OAPA. The difference lies in the MR of the offences. For a s20 offence there must be an intention or recklessness as to some harm. For a s18 offence there must be a specific intention to cause GBH; this makes s18 a more serious offence.

When Villa stood on Wayne's wrist it was a battery. The injury sustained by Wayne was a break to the main bone in his wrist as well as a number of the small bones in his hand. This injury would substantiate an offence contrary to s18 or s20 OAPA. When Villa stood on Wayne's wrist he did not intend to cause him GBH. However, he should have been aware that there was a risk that his actions could cause some physical harm: Mowatt (1968). As Villa's actions were reckless not intentional, he could be liable for a s20 GBH against Wayne.

Common Assault

Common assault contrary to s39 of the CJA is an act by which a person intentionally or recklessly causes another to apprehend immediate, unlawful

personal violence. There does not have to be any contact, the offence can be committed using words alone: Constanza (1997). Silence can also amount to an assault: Ireland (1998).

The MR for an assault is either an intention to cause another to fear immediate unlawful personal violence, or recklessness as to whether such fear is caused. Applying this to the facts, Villa could have committed common assault against Wayne when he walked towards him in the corridor with his arms outstretched, if his actions caused Wayne to apprehend immediate, unlawful violence: Smith v Chief Superintendent of Woking Police Station (1983).

In Smith it was held that although the D was outside the window, the victim (V) was frightened by his conduct as she did not know what he would do next, but that it was likely to be of a violent nature. If Wayne was afraid when he saw Villa in the corridor and he feared that he would cause him further harm, Villa could be guilty of an assault, whether he intended to cause Wayne to fear immediate personal violence or not. When he walked towards Wayne with his arms outstretched, he was reckless as to whether he caused Wayne to fear immediate personal violence or not, given the previous assault on Wayne.

Potential defence/s

If the MR can be proved, Villa would have no defence against the s39 common assault.

In relation to the s20 GBH offence, the defence of intoxication may be relevant. 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. Villa took a dangerous intoxicant in the form of alcohol.

Next we must consider whether Villa's's intoxication was 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. Villa was voluntarily intoxicated by choosing to drink a large amount of strong cider.

Whether he can use the defence will depend on whether the crime was one of specific or basic intent. As s20 GBH is a crime of basic intent (it can be committed recklessly) the defence would not apply as Villa's act of drinking alcohol to excess was reckless in itself: Majewski (1977).

The only possible defence that Villa could plead in order to avoid liability would be consent. The general rule is that consent can only provide a defence for assault and battery and will not provide a defence for ABH or GBH unless there is good reason: Attorney General's Reference (No. 6 of 1980) (1981).

However, he could claim that Wayne's injury was caused recklessly during horseplay: Jones (1986), Aitken (1992), which is one of the exceptions to the general rule. Wayne had consented to being part of Villa's karate demonstration and Villa may argue that the injury caused was incidental reckless harm caused during the demonstration. Even though Wayne had drunk a large amount of cider and was voluntarily intoxicated, he still provided

free, informed and valid consent to the demonstration.

Question 4(a) POTENTIAL DEFENCE/S AVAILABLE TO ARNIE

Duress of circumstances

To successfully plead a defence of duress of circumstances, there must be a threat of immediate death or serious injury towards D or to someone for whom D feels responsible: Hasan (2005). Unlike duress of threats, D's actions can arise from feeling threatened by surrounding circumstances and commits the offence because it seems to be the only way to avoid the threat that he faces: Willer (1986), Conway (1988), Shayler (2001).

D's actions must be a reasonable and proportionate response to the threat of death or serious injury: Martin (1989), the threat of death or injury must come from an external source: Rodger and Rose (1998) and D's conduct can only be excused whilst the threat exists: DPP v Jones (1990), DPP v Bell (1992).

In this case, Zara has threatened to kill herself if Arnie did not drive her to her interview: R v Martin (1989). You might say that Arnie's actions in driving the car were disproportionate and not reasonable to the threat posed by Zara.

On the other hand, his actions could be considered reasonable and proportionate as Zara had been suffering with depression. Arnie may not have been thinking clearly due to his head injury and he may have believed that Zara would kill herself if she did not get to the interview in time.

It will be left to the magistrates or the district judge to decide whether the defence is made out or not.

4(b) Potential defences available to Franz

Automatism

For Franz to be able to rely on the defence of non-insane automatism he would have to be able to show that an external factor resulted in involuntary conduct by him, where he was not at fault.

None insane automatism must be distinguished from automatism arising from disease. In relation to diabetes hypogloycaemia resulting from taking insulin is seen as resulting from an external factor: Quick (1973). Lawton LJ observed that Quick's mental condition was not caused by his diabetes but by his use of insulin prescribed by his doctor which meant that the malfunctioning of his mind was caused by an external factor and not an internal disease of the mind.

Automatism requires a fundamental and not merely partial loss of control of movement: Broome v Perkins (1987). If D's automatism is self-induced but not due to intoxication he may have a defence even to a crime of basic intent, if P cannot establish that D was reckless in permitting himself to become an automaton. In Bailey (1983) it was held that the defence would not be available where the state of automatism could be regarded as self-induced i.e. where there was evidence that D was at fault in lapsing into the state of automatism.

Applying Bailey to Franz's situation, the court would have to be sure that Franz was aware of the consequences of injecting insulin and not eating in order to convict him. On the facts available, he wasn't.

He is charged with battery contrary to s39 CJA which is a crime of basic intent. On the facts presented it would seem that Franz was not reckless in injecting the insulin and not eating as he was not aware of the consequences of injecting insulin and not eating. As his condition of automatism does not appear to be self-induced the defence of automatism could be available to him in this case.

4(c) Potential defence/s available to Gail

Self Defence

The defence that may be available to Gail is self-defence which requires the consideration of the concept of reasonable force used due to a mistaken belief.

Gail 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 Gail was motivated in her actions by a need to defend herself as she feared she was going to be assaulted; she was neither looking for a fight nor was she 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. In Albert v Lavin (1981) it was held that a mistaken belief in the necessity for self-defence would only excuse if it was reasonable. The case of Beckford (1988) contradicted the aforementioned decision as it was held that the reasonableness or unreasonableness of D's mistake is material only to the credibility of the assertion that he made the mistake. If the mistaken belief was, in fact, held, its reasonableness is irrelevant: Jaggard v Dickinson (1980).

Even if Gail was mistaken in her belief that she was going to be assaulted, she is entitled to be judged on the circumstances that she genuinely believed to exist: Williams (1987), Owino (1995). A jury should be objective in deciding whether Gail's actions were 'reasonable'. It would have to consider whether Gail honestly believed that it was necessary to defend herself and, if so, on the basis of the facts and the danger perceived by Gail was the force used 'reasonable'? If the jury answers 'yes' to both points then it must acquit Gail.

However, if it accepts that, whilst her actions were to protect herself, but that

she went beyond the use of reasonable force then Gail would have no defence under common law: Clegg (1995).

The assault on Elijah clearly involved the commission of an offence. The issue for the jury will be as to whether the force used by Gail was reasonable in the circumstances. The burden of proof would be on the prosecution to prove that the actions of Gail were not reasonable in the circumstances.