

A LEVEL

Candidate Style Answers

LAW

H415

For first teaching in 2017

H415/01 Criminal law - Section B

Version 1

Contents

Introduction	3
Section B Question 5: Level 4 answer	5
Commentary	6
Section B Question 6: Level 4 answer	7
Commentary	8
Section B Question 7 and Question 10: Level 4 answer	9
Commentary	10
Section B Question 8: Level 4 answer	11
Commentary	12
Section B Question 9: Level 4 answer	13
Commentary	13

Introduction

Please note that this resource is provided for advice and guidance only and does not in any way constitute an indication of grade boundaries or endorsed answers. Whilst a senior examiner has provided a possible level for each response, in a live series the mark a response would get depends on the whole process of standardisation, which considers the big picture of the year's scripts. Therefore the level awarded here should be considered to be only an estimation of what would be awarded. How levels and marks correspond to grade boundaries depends on the Awarding process that happens after all/most of the scripts are marked and depends on a number of factors, including candidate performance across the board. Details of this process can be found here: <http://www.ocr.org.uk/Images/142042-marking-and-grading-assuring-ocr-s-accuracy.pdf>

The sample assessment material used in this resource is here: <http://www.ocr.org.uk/Images/315217-unit-h415-01-the-legal-system-and-criminal-law-sample-assessment-material.pdf>

SECTION B**Criminal law**Choose **Part 1** or **Part 2**.**Part 1**Answer the **three** questions below.The first two questions are based on the scenarios below. The scenarios are **not** related.

Katya is speeding along a quiet road when she receives a text from her boyfriend. She replies as she drives along and does not notice an elderly runner, Peter, in front of her. Peter jumps out of the way and breaks his leg. Katya swerves to avoid Peter and drives away at speed. As she goes round a bend Katya loses control and the car skids, hitting Donald as he is walking his dog. Donald is unconscious and he and Peter are taken to hospital. Doctor Teal, who has been on duty for 18 hours, examines Donald and says he needs an urgent blood transfusion to save his life. Donald has a rare blood condition but Doctor Teal does not check for this. Donald is given the wrong blood and dies. Peter has a fear of hospitals and as his broken leg is being set he has a massive heart attack and dies.

Maria was engaged to Frank, a climber. Frank and his friend Gavin were climbing when Frank fell and died. Gavin survived and Maria believes he could have saved Frank. Maria is depressed and her doctor has prescribed medication. The doctor says she must only take one pill at a time and not drink alcohol. At a lunch in Frank's memory Maria is wearing a necklace he gave her. She hears Gavin say that Frank was a dangerous climber who got what he deserved. Maria is upset and takes a pill the doctor prescribed washed down with a glass of red wine. An hour later, Maria is drinking a glass of lemonade when Gavin comes and hugs her. She runs off and falls, breaking her necklace. Maria sees Gavin laugh. She grabs a sharp knife from the lunch table and stabs Gavin several times, killing him.

- 5** Advise whether Katya is liable for the unlawful act (constructive) manslaughter of Peter **and** whether Dr Teal is liable for the gross negligence manslaughter of Donald. **[25]**
- 6** Advise whether Maria can avoid liability for murder by using the defences of loss of control or diminished responsibility. **[25]**

Essay question on criminal law

- 7*** 'The defence of intoxication is not fit for purpose and needs to be reformed urgently.'
Discuss the extent to which this statement is accurate. **[25]**

Section B Question 5

Advise whether Katya is liable for the unlawful act (constructive) manslaughter of Peter and whether Dr Teal is liable for the gross negligence manslaughter of Donald. [25]

Level 4 answer

If the accused commits an unlawful, dangerous act, which a reasonable person would realise creates at least a risk of harm and death results, the person is guilty of Constructive (as liability for death is built from the unlawful and dangerous act) or Unlawful Act Manslaughter (UAM).

In Larkin, there was an unlawful and dangerous act when the defendant threatened a man with an open cut-throat razor in order to frighten him and a woman died. The Church test helps a jury decide if an act is objectively dangerous. C knocked a woman unconscious and then threw her into a river where she drowned – this was an unlawful act which all sober and reasonable people would recognise as creating a risk of harm. In Dawson it was held that there had to be an awareness of all the facts for the element of dangerousness and so an attempted robbery was not a dangerous act as Dawson did not know of the victim's heart condition. In Watson it was held that the reasonable man would only know what the defendant knew. When an 87 year old man died of a heart attack after a burglary, W's conviction was quashed because it was not proved that the shock of the burglary was a significant cause of the heart attack and death because of the other contributory factors. The positive act needs to be done with the mens rea for that offence, as in Newbury and Jones and in Goodfellow.

The chain of causation must create a direct link between the defendant's actions and the result. Factual causation is based on the but for test (but for D's actions would V have survived) as seen in White and on the de minimis rule where D's actions made more than a minimal contribution to the consequences, as in Kimsey.

Legal causation means that D's act must be the operative and substantial cause of harm, as in Pagett, Cheshire and Jordan. Also important is the thin skull rule, as seen in Blaue, where it was held that D cannot rely on a deficiency in the victim that makes them different to break the chain.

Gross Negligence Manslaughter (GNM) applies where D has failed in their duty of care to such an extent that it is considered criminal and the victim has died. A test comes from Adomako:

- D owes a duty of care to the victim
- D breaches that duty
- there was a risk of death and death was caused
- the breach was so grossly negligent as to be criminal in the eyes of the jury.

Applying the law to the scenario, in the case of Katya and Peter there is an unlawful and dangerous criminal act by Katya as she is using her mobile whilst driving. She has the mens rea for this offence, not least because she uses her phone intentionally. It is likely that a reasonable man would see a risk of at least some harm from Katya using her phone as she is not focusing on her driving. It could be argued that Katya is both the factual and legal cause of death and using the thin skull rule Peter must be taken as he is found, making her liable for UAM. However, if Watson is applied then even though Katya sees Peter is elderly she does not know he has a fear of hospitals and the chain of causation may be hard to prove so Katya would not be liable.

In the case of Dr Teal and Donald, it is clear using the Adomako that Dr Teal owes a duty of care to Donald and breaches it when he does not check Donald's blood before the transfusion. There is a risk of death and Donald dies. Applying the decision in Blaue Dr Teal has to take Donald as he finds him. A jury may well decide that Dr Teal's act is so grossly negligent as to be criminal because checking blood before transfusion is a really basic thing to do and so he will be liable for GNM.

Examiner commentary

The structure of this answer follows the traditional method of problem solving by firstly explaining the law and then applying it to the scenario. This is only one way to answer such a question and alternative ways include explaining part of the scenario and stating the relevant law that applies to it or stating part of the law and applying it to the scenario bit by bit.

What is important is to move up both the AO1 and AO2 mark bands which this candidate does by stating relevant law with reference to cases and then applying it. It may well be that different interpretations of the law lead to different conclusions and this can be credited as long as it is accompanied by clear reasoning.

Section B Question 6

Advise whether Maria can avoid liability for murder by using the defences of loss of control or diminished responsibility. [25]

Level 4 answer

When committing murder, specific and partial defences may reduce liability to voluntary manslaughter. These defences are found in the Coroners and Justice Act 2009 where s52 updates the law on Diminished Responsibility (DR) and s54 and s55 create a new defence of loss of control.

In relation to loss of control (LoC), s54(1) says the defendant must lose their self-control but it need not be sudden under s54(2). Under s55(3) a qualifying trigger can be fear of serious violence of a thing or things done or said which, under s55(4), constitutes circumstances of an extremely grave character and cause D to have a justifiable sense of being seriously wronged as in *Hatter, Bowyer and Zebedee*. Under s54(3) the normal person test takes account of age, gender and D's circumstances but a normal degree of tolerance and self-restraint is expected and all characteristics are relevant but not those which bear on D's general capacity for tolerance or self-restraint.

In relation to diminished responsibility (DR) under s52(1) there must be an abnormality of mental functioning, supported by medical evidence, which is defined in *Byrne* as 'a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal'. Under s52(1)(a) this must be a recognised medical condition, such as depression as in *Seers or Dietschmann* or *Aspergers*' in *Jama*. Under s52(1)(b) D must have been substantially impaired and so be unable to understand the nature of their act, or form a rational judgment, or exercise self-control. Under s52(1)(c) this abnormality must provide an explanation for D's acts and omissions and be a causal link as well as providing an explanation for D's conduct if it causes or is a significant contributory factor in causing D to carry out the conduct.

Intoxication alone cannot support a defence of DR. In *Dietschmann* it was held that the recognised medical condition would need to act as a substantial impairment without the intoxication.

When applying the law to the scenario in the case of LoC, Maria does lose her self-control. There has been something said as she hears what Gavin says about Frank and he laughs when she falls which is something done. Gavin's words may be a qualifying trigger if he intended Maria to hear, as could the breaking of the necklace Frank had given Maria. Furthermore, there is no break between what caused the loss of control and the stabbing which causes death. It would also appear that Maria acts deliberately as she picks up not just a knife, but a sharp knife. It could be argued that Maria's state of mind means that Gavin's actions were circumstances of an extremely grave character to her and gave her a justifiable sense of being seriously wronged. Maria running away from Gavin could be what a reasonable person might do but in her circumstances, of being upset and depressed but having drunk alcohol against medical instruction, a reasonable person would have shown some tolerance and self-restraint rather than stabbing Gavin several times. As a consequence it seems unlikely Maria would succeed with the defence of LoC.

In relation to the defence of DR the fact that Maria is taking pills prescribed by a doctor for depression suggests an abnormality of mental function. Depression is classed as a recognised medical condition and Maria is depressed because she believes Gavin could have saved Frank. The fact that Maria had taken one of her tablets washed down with alcohol, going against her doctor's express instructions, may have little bearing on her defence as she is depressed before she drinks and this would be in line with the decision in *Dietschmann*. Hearing what Gavin says about Frank and the fact that Gavin laughs when Maria falls may, because she is depressed, substantially impair her ability to understand the nature of her conduct, or form a rational judgment, or exercise self-control. It would seem that Maria's mental state and Gavin's actions provide an explanation for her act. Medical evidence would be required but it appears likely that Maria could succeed with a defence of DR and be convicted of voluntary manslaughter instead of murder.

Examiner commentary

A standard type of answer that introduces the areas of law relevant to the question and then attempts to apply them. In this question the nature of the topic area means there is a greater emphasis on statute law and AO1 marks can be awarded for this type of knowledge just as for relevant case law. It is also worth remembering there are more marks available for AO2 than AO1, a point candidates must take into consideration. In this type of problem question the instruction is to 'Advise whether'; this may be interpreted as suggesting and in this response there is logical application of each of the defences, reaching an overall conclusion.

Section B Question 7 and Question 10

'The defence of intoxication is not fit for purpose and needs to be reformed urgently.' Discuss the extent to which this statement is accurate. [25]

Level 4 answer

The common law defence of intoxication has evolved on a case by case basis and so is arguably fit for purpose. Legal principle suggests there should be a defence for those who commit crimes when their thinking is impaired due to alcohol, drugs or other substances. For public policy reasons the defence is restrictive or it would be an easy excuse for criminality. There are complicated divisions in the law which cause problems, such as between crimes of specific and basic intent in voluntary intoxication. Arguably intoxication is not a true defence as it applies if the defendant has no mens rea so one of the basic elements of the crime is missing. Critics want urgent reform but this has not happened.

Voluntary intoxication is when D chooses to be in that position. The case of Sheehan and Moore says a drunken intent is still an intent. For crimes of specific intent crimes such as murder, theft and s18 OAPA 1861, intoxication drops liability to a lesser included offence (Beard). In Lipman, L did not have the mens rea for murder because he had taken LSD but he was liable for manslaughter. Arguably the defence is fit for purpose as the defendant is not thinking like sober people but they remain guilty of an offence. Critics say this does not help much as few crimes require specific intent. Theft is problematic as there is no offence to drop down to, making the law inconsistent and needing reform.

If the crime is one of basic intent, the law is clear and there is no defence, as in Majewski where a combination of drink and drugs led to M committing several different basic intent offences. Recklessness was enough mens rea and M had voluntarily taken drink and drugs over a 24 hour period. As more crimes are satisfied by recklessness the defence meets public policy concerns by being tight. Although we all take risks it also shows that some cross the line into criminality. However, critics say the law needs reform urgently as it is not fair to punish those who do the actus reus without the key element that allocates blame and justifies punishment. Even worse, intoxication is often seen as an aggravating factor in sentencing. It is also problematic that intoxication may have occurred sometime before the offence, when there was no thought of commission, which is unjust.

If intoxication is used to gain the courage to commit a crime this is Dutch Courage and is no defence, as in Gallagher. This is good and works well.

Involuntary intoxication occurs through no fault of the defendant and is a complete defence, making it very tight and hard to succeed with. There must be no awareness of the intoxication, which can be hard to prove. The case of Kingston shows inconsistency. At his trial K said he had been involuntarily intoxicated as his drink was drugged; he was convicted as his assault was intentional - a drunken intent was still an intent which is a public policy argument. The CA said he should have a defence as the intoxication was not his fault, a legal principle argument. The HL restored the conviction, making it clear the public policy principle was key. This shows high level courts can have different views – an advantage and a weakness of precedent. It was probably inevitable that public policy would prevail based on social paternalism but it raises uncomfortable issues and suggests reform is needed.

A curious situation arises with soporific drugs, as in Hardie. He raised involuntary intoxication at his trial but was convicted for voluntarily taking his partner's out of date Valium tablets. The CA allowed his appeal, saying his intoxication was involuntary as he expected the Valium to calm him down. Arguably this is a good decision as reasonable people would have thought the same as H so he should have a defence. However, it is reckless to take medication prescribed for someone else especially if it is out of date and a defence would be wrong. This heightens the need for reform to sort the law out.

For reform, the Butler Committee recommended an offence of dangerous intoxication whilst others say intoxication should be no defence and just dealt with in sentencing. There is no drive for reform due to Parliament's inertia. Alcohol costs the NHS lots of money but huge revenue is generated by taxes and the licensing industry has strong lobbying powers. Critics say it would be hard to create a workable statute so sticking with what already exists is good enough. The judiciary only occasionally comment that if the law is to be reformed then Parliament should act. In conclusion, the law probably needs reform but it is perhaps not urgent and unlikely to happen in practice.

Examiner commentary

This response is in Level 4 as it is fully engaged with the question throughout, there is a good balance in terms of the coverage and there is a clear conclusion. The response is in Level 4 for AO1 as it covers key cases, focusing on the principles of law that come from them rather than the factual content, which is good technique. It does not cover every area or case in the mark scheme but this is not essential as the mark scheme is designed to be indicative content rather than being prescribed and definitive material.

The response also reaches Level 4 for AO3. It deals with key issues in relation to the defence and the evaluation is not just a list of points but is developed, sometimes including counter-arguments too. It also mentions suggestions for reform and rounds the essay off with some wider remarks and reaches a conclusion, the latter being a requirement of Level 4. In this response the candidate makes AO3 comment alongside the AO1 content and this is good technique as it gives coherence and allows the candidate to move up both elements of the mark scheme quickly.

Section B Question 8

Advise whether Paula is criminally liable for theft.

[25]

Level 4 answer

S1 Theft Act 1968 says a person is guilty of theft if he 'dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it'. Paula may face liability for selling the sculpture, the £100 she spends on the scratch cards and the excess change from the sandwich.

As part of the actus reus s3 deals with the issue of appropriation. The cases of McPherson, Lawrence and Morris were consolidated in Gomez, where it was held by HL that an appropriation is any interference with any of the rights of the owner. It takes place as soon as an owner's right is interfered with and it can occur even though the owner appears to consent to the taking, as in Lawrence when the student held out his wallet so L could take the correct fare and L took more money.

The word 'property' is widely defined in s4(1) to include money and all other property, real and personal, including things in action and other intangible property.

S5 says that the property must belong to another and this has been defined as having ownership, possession or control. S5(3) covers the situation where there is an obligation to use property in a particular way, as in *Davidge v Bunnnett*. S5(4) deals with the situation where property is received by mistake but there is a legal obligation to return it as in the AG's Reference about the police officer who was overpaid and kept the money.

Moving on to the mens rea, s2 provides only a negative and partial definition. According to s2(1)(a) a defendant is not dishonest if they honestly believe they have a legal right to the property, as in *Holden*. Under s2(1)(b) a defendant is not dishonest if they honestly believe the owner would consent to the taking and under s2(1)(c) a defendant is not dishonest if they honestly believe the owner cannot be found having taken reasonable steps, as seen in *Small*. If the defendant does not fit one of these categories juries often decide dishonesty using common sense. If they need help they are given the *Ghosh* direction – was the defendant dishonest by the standards of reasonable people and did they know they were dishonest by those standards? The recent case of *Ivey* suggests that the second part of the test is purely objective.

S6 deals with the intention to permanently deprive and this means an intention to take forever or for a period equivalent to outright taking. In effect the defendant intends to treat the property as his own to dispose of.

In relation to Paula taking and selling the sculpture there is a clear appropriation of personal property. She also meets s5 as the sculpture belongs to Omar. Paula does not meet any of s2 and she is clearly dishonest, whether using common sense or the *Ghosh* test. There is no help for Paula under s6 as she appears to intend to permanently deprive as she treats the property as her own to do with as she wishes. It would seem likely that Paula is liable for theft.

When Paula takes the £500 from Omar's wallet, there is no offence as she is taking the money at his direction. However, it is different when she spends £100 on scratch cards as she was told to use all the money for a gift. There is a clear appropriation of property and s5(3) is relevant as Maria was given the money for a specific purpose and so she satisfies the actus reus of theft. Paula might try to argue that she is covered by s2(1)(b) and that Omar would not mind her spending the left over money but there is no evidence that he authorised it. By using the money to buy shoes Paula is in breach of s6 by treating the money as her own. It would seem likely that Paula is liable for theft.

In the case of the change from the £10 note used to buy the sandwich Maria is arguably still appropriating property which belongs to another as the £10 may belong to Omar. Of special importance here is s5(4) as Paula realises she has been given too much change and says nothing. She is under an obligation to restore the property to its rightful owner and Paula does not do so even though she realises at the very moment she is given too much money. As a consequence she is clearly dishonest and her silence would bring her within s6. It would seem likely that Paula is liable for theft.

Examiner commentary

Theft is a fact heavy topic and care will have to be taken by candidates that they do not get dragged into a full explanation of how the five elements have been interpreted by the courts and applied to defendants. It may be that some centres or some candidates may wish to take the approach of meeting the application requirements head on by explaining the elements of theft relevant to one area of the scenario and then applying the law to the facts as necessary. Getting into the habit of reaching a conclusion is good practice where possible and the law of theft lends itself to this strategy. This response reaches Level 4 for both AO1 and AO2 as it deals confidently with relevant law and applies it well, using the scenario as a clear structure.

Section B Question 9

Advise whether Richard and Steve are guilty of robbery and burglary, including any defences they may raise. [25]

Level 4 answer

In relation to Kenji's camera the relevant offence is robbery which is defined in s8 Theft Act 1968 as theft with force or the threat of force before or at the time of stealing and in order to steal. For the actus reus force need only be very minor as in Dawson and James where it was jostling, so Steve knocking Kenji to the ground would be enough. There is also a threat of force as Richard makes his fingers look like a gun and he wants Kenji to be scared so Steve can take the camera. The force is clearly used in order to steal as it allows Steve to take the camera and the offence occurs at the time the theft is complete, as decided by *Corcoran v Anderton*. This would actually be at the point Steve touches the camera if he meets all the other elements of theft. The theft can also be a continuing act, as in *Hale and Lockley*, and so Richard pointing his fingers and Steve pulling the camera as well as the assault on Richard would meet the actus reus requirements, especially as they get away with the camera.

The mens rea of robbery is the intention to steal and intention or recklessness as to force in order to do so. There is evidence of intention as Richard is in debt and needs to get money. He also deliberately uses his fingers to look like a gun. Steve also shows intention when he struggles with Kenji and then knocks him over. It seems likely that Richard and Steve are liable for robbery.

In relation to the laptop the relevant offence is burglary under s9(1)(a) Theft Act 1968 where there must be entry of a building or part of a building as a trespasser with the intention to commit theft, GBH or criminal damage. Entry is now defined by Ryan as simply being what is needed to be a trespass. It is clear that this requirement is met as Richard and Steve go into the flat. The flat would be a building in its own right, or possibly part of a building if it is part of a larger block and this is sufficient as in *Walkington*. Trespass can mean having no permission to be in the building but it can also mean having permission and exceeding it, as in *Jones and Smith*. Richard has a key which implies permission to enter but presumably not to steal so even if he raises a defence of consent it will not work. The offence is complete at entry if the mens rea is present and here Richard enters with the intention to steal the laptop. It does not matter that the laptop is missing and Richard is likely to be liable for burglary under s9(1)(a).

In relation to the wine the relevant offence is s9(1)(b) where having entered a building or part of a building as a trespasser there is a theft or attempted theft or GBH or attempted GBH. When Steve drinks the wine he is a trespasser as he exceeds any consent he might have had to be in the flat. He has committed theft as he has treated the property of Richard's father as his own, he has been dishonest as it is clearly wrong to drink someone else's wine and his intention to permanently deprive is clear as he drinks the whole bottle. It appears likely that Steve is liable for s9(1)(b) burglary.

Examiner commentary

This is a popular area of law for scenario questions and shows that candidates need to work efficiently given the time restraints of the exam. Here there is good statutory reference and the response shows that a definition can be expressed effectively without having to learn whole sections of the Theft Act 1968 which are then regurgitated. The cases used in support are relevant to the sections. The response also applies the law as it goes along. This can be a good approach, especially when the law can be broken down into elements. It can help to ensure that nothing is forgotten and since application is an AO2 skill it allows a candidate to move up both sections of the mark scheme quickly. It would be equally acceptable to use the formula seen in earlier responses where the relevant law is defined and explained in a block and then applied to the facts.



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