

Mark Scheme for June 2010

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This mark scheme is published as an aid to teachers and students, to indicate the requirements of the examination. It shows the basis on which marks were awarded by Examiners. It does not indicate the details of the discussions which took place at an Examiners' meeting before marking commenced.

All Examiners are instructed that alternative correct answers and unexpected approaches in candidates' scripts must be given marks that fairly reflect the relevant knowledge and skills demonstrated.

Mark schemes should be read in conjunction with the published question papers and the Report on the Examination.

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- 1* Discuss the significance of the decision in the joined appeals of *R v Ireland; R v Burstow* [Source 3 pages 3 and 4 Special Study Material] to the development of the law on non-fatal offences. [16]

Mark Levels	AO2
Level 5	11-12
Level 4	9-10
Level 3	7-8
Level 2	4-6
Level 1	1-3

Mark Levels	AO3
Level 4	4
Level 3	3
Level 2	2
Level 1	1

Potential answers **MAY**:

Assessment Objective 2 (12)

- CP1** Recognise the major question for the court – whether a psychiatric illness can amount to ‘bodily harm’ - discuss the fact that the court accepted that “bodily harm” must be interpreted so as to include recognisable psychiatric illness; discuss the fact that the court accepted that the legislator in 1861 would not have had in mind psychiatric illness because psychiatry was in its infancy;
- CP2** Identify that the court accepted (in *Ireland*) that the making of silent telephone calls causing psychiatric injury was capable of constituting an assault under section 47; And that the court felt that to say words or silence could never amount to an assault was unrealistic and satisfied the definition of immediacy under the definition of assault (*Ireland*); Consider the meaning of inflict in section 20 and whether it could result in a conviction if there was no direct/indirect application of force (*Burstow*); consider the issue that Lord Steyn argued that cause and inflict are interchangeable (*Burstow*);
- P4** Contrast with any relevant case for development eg *Constanza/Chan-Fook*;
- P5** Any other relevant point.

Candidates will not satisfy the level 5 descriptor without discussion of the critical point (**CP**). Candidates will be unable to achieve maximum marks without linking to a relevant case for development nor reaching a logical conclusion.

Assessment Objective 3 (4)

Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.

- 2* In Source 6 [page 7 lines 36–38 Special Study Material] Susan Nash argues that “Public policy and public interest considerations will become increasingly important in deciding whether it is appropriate to criminalise consensual activity, giving rise to even greater uncertainty in the area.”

Discuss how accurately the above statement reflects the way in which the courts have developed the defence of consent in non-fatal offences against the person.

[34]

Mark Levels	AO1	AO2
Level 5	14-16	13-14
Level 4	11-13	10-12
Level 3	8-10	7-9
Level 2	5-7	4-6
Level 1	1-4	1-3

Mark Levels	AO3
Level 4	4
Level 3	3
Level 2	2
Level 1	1

Potential answers **MAY**:

Assessment Objective 1

(16)

Explain that consent is a defence that is particularly appropriate to non-fatal offences eg common assault, section 47, section 20 and section 18;

Explain that consent can be either expressed by the parties or implied through custom eg we impliedly consent to the ‘ordinary brushes of life’;

Explain, however, that consent can lead to difficulties when applied to the young or to the mentally disordered for whom special rules often apply Lord Goff in *Re F*;

Explain that as a result people who cannot understand the nature of the act they are consenting to can generally not provide the defence of consent for the defendant *Burrell v Harmer*;

Explain that consent is not generally removed by fraud except if the fraud is as to the nature or quality of the act or to the identity of the accused (*Tabassum, Dica, Richardson*);

Explain that there are certain types of behaviour which the law has had to consider with respect to the defence of consent:

For example:

- prize fighting *Coney* (though more severe injuries may be lawfully sustained in boxing under proper rules);
- sado-masochistic activities for sexual pleasure *Brown* – this tends to reiterate the position in *Donovan [1934]* on inflicting harm for sexual purposes;
- ritual mutilation is generally considered unlawful and beyond consent eg Prohibition of Female Circumcision Act 1985;
- consent to childish ‘horseplay’ has been accepted for some time *Jones [1986]* this principle has also been extended to adult horseplay *Aitken*;
- the position on transmission of a sexual disease *Clarence/Dica/Konzani*;
- Surgery;
- Ritual circumcision/body piercing/tattooing;
- Contact sports including boxing (where severe harm is possible, wrestling, martial arts and judo, football, rugby etc).

Candidates will be unable to satisfy the level five descriptor without a wide ranging and confident understanding and without well done definition(s) of consent; without a minimum of eight cases well done and without discussing four examples (or species) of consent (with a minimum of three well done).

Candidates will be unable to satisfy the level three descriptor without adequate knowledge; without a minimum of four cases and a discussion of two examples (or species) of consent (both adequate).

Assessment Objective 2

(14)

Discuss that there are numerous activities where the law allows the defence of consent even though it can cause some harm due to public policy considerations:

- Surgery involves intentional violence resulting in actual or sometimes serious bodily harm but surgery is a lawful activity;
- Ritual circumcision and body piercing;
- Tattooing (said to be similar to *Wilson*);
- Contact sports including boxing (where severe harm is possible, wrestling, martial arts and judo, football, rugby etc).

Discuss the fact that in *Brown* Lord Templeman stated that in some circumstances the accused would be entitled to an acquittal although the activity resulted in the infliction of some injury – and consider the nature of the injuries;

Identify the contrast in the decision in *Wilson* – as Susan Nash states it rekindles the debate regarding the extent to which the criminal law should be concerned with the consensual activities of adults in private (*Emmett*);

Discuss the fact also that the decision in *Brown* has been described as ‘unprincipled and incoherent’ – contrasting protections of women and homosexuals;

Discuss the importance of ‘what is in the public interest’;

Discuss the fact that the courts have held that the line where consent becomes immaterial is where there was a realistic risk of permanent harm;

Consider the Law Commission’s suggested reforms;

Reach any logical conclusion.

Candidates will not satisfy the level five descriptor without engaging in a discussion with some clear focus on the quote.

Assessment Objective 3

(4)

Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.

- 3 Consider whether or not a conviction for a non-fatal offence against the person is possible in each of the following situations:
- (a) Arnie and Buster are in a professional boxing contest. Arnie gets angry because he is losing the match and he bites off Buster's ear. (10)
- (b) Connor and Daisy, a married couple, regularly bite each other during sexual activity as they say it adds to the excitement. They never actually pierce the skin but they often suffer bruising as a result. (10)
- (c) Eric and Frank decide to settle an argument about who is the toughest by arm wrestling over broken glass. Eric forces Frank's arm onto the glass, and Frank suffers cuts as a result which require a few stitches. (10)
- [30]

Mark Levels	AO1	AO2	(a), (b) or (c)
Level 5	9-10	17-20	9-10
Level 4	7-8	13-16	7-8
Level 3	5-6	9-12	5-6
Level 2	3-4	5-8	3-4
Level 1	1-2	1-4	1-2

Potential answers **MAY**:

Assessment Objective 1 (10)

Explain that actual bodily harm means some injury 'not so trivial as to be wholly insignificant' *Chan-Fook* and can include bruises *Jones*;
 Explain that the *mens rea* is either intention or recklessness *Spratt, Parmenter, Savage*;
 Explain section 20 'Whoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty' – so includes wounding *JCC v Eisenhower* (a piercing of both layers of skin) and GBH (identified in *DPP v Smith* as serious harm);
 Explain the *mens rea* – uses the word 'maliciously' meaning intention or recklessness;
 Explain section 18 – 'Whoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person with intent to do some grievous bodily harm to some person or with intent to resist or prevent the lawful apprehension or detainer of any person shall be guilty';
 Explain that the *mens rea* is: intending to cause GBH or to resist or prevent lawful apprehension; or intentionally or recklessly wounding with intent to cause GBH or to resist or prevent lawful apprehension;
 Explain that section 18 requires ulterior intent, so the *mens rea* is: malice (meaning intent or recklessness); as well as the intent either to cause grievous bodily harm, or to resist or prevent arrest – intent requires desire or foresight of serious harm as virtually certain;
 Explain the application of consent as a defence in boxing *Coney*, in marital relationships *Wilson* – and possibility that consent is not available for wounding and GBH *Brown*.

Assessment Objective 2**(20)**In the case of **(a)**:

- P1** • Identify that the likely charge is section 18 – because there is really serious harm/wound – although section 20 is possible too;
- P2** • Identify intent is required for section 18 – or alternatively intent/recklessness for section 20;
- CP3** • Identify that consent is not possible as a defence because Arnie has gone well beyond the accepted behaviour in the sport – so a conviction is likely;
- P4** • Credit reference to consensual battery- *Barnes/Billinghurst*.

In the case of **(b)**:

- P1** • Identify section 47 as the most likely charge (battery is a possibility but bruising has been accepted for section 47 *Jones*);
- P2** • Identify that recklessness suffices for the *mens rea* and Connor and Daisy must be aware of the harm they are doing each other but continue anyway;
- CP3** • Consider whether consent is available – as a result of *Wilson* it is unlikely that the court will wish to interfere in a marital relationship – and so a conviction is unlikely;
- CP4** • Credit any reference to sexual activity (*Brown/Emmett*). Injury for sexual purposes not permitted.

In the case of **(c)**:

- P1** • Identify section 20 as the most likely charge, identify that since the cuts require stitching this indicates that both layers of skin are pierced – so that the definition of wounding from *JCC v Eisenhower* is satisfied;
- P2** • Identify that recklessness suffices as *mens rea* for section 20 and the behaviour of both men appears reckless;
- CP3** • Consider whether the defence of consent is possible – *Brown* suggests that this is unlikely in the case of wounding or GBH – but this may be viewed as a sporting contest/horseplay (*Jones*);
- CP4** • Credit any reference to fighting/public policy (*Att-Gen's Reference No6 1980/Coney*).

Candidates will not satisfy the level 5 descriptor without including analysis of the critical point(s) (CP) in each of their answers.

Annotations

Questions 1 and 3

P1, P2 etc	to indicate the point identified
CP	to indicate the critical point identified
P1p	to indicate that a part of the point has been identified
R	repetition
}	irrelevant (use for more than a couple of lines of text otherwise use the following)
N/R	not relevant
N/Q	not quite
S/O	sort of
S	significant (as per question 1)

Question 2

✓	knowledge (AO1)
def	definition (AO1)
def/s	definition / statute (AO1)
C1 etc	to indicate cases (AO1)
C1+	to indicate a case which has been well developed
AO2	to indicate a bold comment
AO2+	to indicate developed comment / discussion
AO2(LTQ)	to indicate a bold comment that is linked to the quote
AO2(LTQ)+	to indicate a developed comment / discussion that is linked to the quote
(AO2)	vague comment
LTS	indicates either AO1 / AO2 comment that is linked to the source
R	repetition
}	irrelevant (use for more than a couple of lines of text otherwise use the following)
N/R	not relevant
N/Q	not quite
S/O	sort of

Advanced GCE Law Levels of Assessment

There are **five** levels of assessment of AOs 1 and 2 in the A2 units. The first four levels are very similar to the four levels for AS units. The addition of a fifth level reflects the expectation of higher achievement by candidates at the end of a two-year course of study. There are **four** levels of assessment of AO3 in the A2 units. The requirements and number of levels differ between AS and A2 units to reflect the expectation of higher achievement by candidates at the end of a two-year course of study.

Level	Assessment Objective 1	Assessment Objective 2	Assessment Objective 3 (includes QWC)
5	Wide ranging, accurate, detailed knowledge with a clear and confident understanding of relevant concepts and principles. Where appropriate candidates will be able to elaborate with wide citation of relevant statutes and case-law.	Ability to identify correctly the relevant and important points of criticism showing good understanding of current debate and proposals for reform or identify all of the relevant points of law in issue. A high level of ability to develop arguments or apply points of law accurately and pertinently to a given factual situation, and reach a cogent, logical and well-informed conclusion.	
4	Good, well-developed knowledge with a clear understanding of the relevant concepts and principles. Where appropriate candidates will be able to elaborate by good citation to relevant statutes and case-law.	Ability to identify and analyse issues central to the question showing some understanding of current debate and proposals for reform or identify most of the relevant points of law in issue. Ability to develop clear arguments or apply points of law clearly to a given factual situation, and reach a sensible and informed conclusion.	An accomplished presentation of logical and coherent arguments and communicates relevant material in a very clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.
3	Adequate knowledge showing reasonable understanding of the relevant concepts and principles. Where appropriate candidates will be able to elaborate with some citation of relevant statutes and case-law.	Ability to analyse most of the more obvious points central to the question or identify the main points of law in issue. Ability to develop arguments or apply points of law mechanically to a given factual situation, and reach a conclusion.	A good ability to present logical and coherent arguments and communicates relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.
2	Limited knowledge showing general understanding of the relevant concepts and principles. There will be some elaboration of the principles, and where appropriate with limited reference to relevant statutes and case-law.	Ability to explain some of the more obvious points central to the question or identify some of the points of law in issue. A limited ability to produce arguments based on their material or limited ability to apply points of law to a given factual situation but without a clear focus or conclusion.	An adequate ability to present logical and coherent arguments and communicates relevant material in a reasonably clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.
1	Very limited knowledge of the basic concepts and principles. There will be limited points of detail, but accurate citation of relevant statutes and case-law will not be expected.	Ability to explain at least one of the simpler points central to the question or identify at least one of the points of law in issue. The approach may be uncritical and/or unselective.	A limited attempt to present logical and coherent arguments and communicates relevant material in a limited manner using some appropriate legal terminology. Reward grammar, spelling and punctuation.

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