A-LEVEL LAW

LAW03 Criminal Law (Offences against the Person) Or Contract Law
Report on the Examination

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Criminal Law (Offences against the Person)

Scenario 01

Question 01

In answering this question, students were required to consider the criminal liability of Adam for his actions in relation to Brandon and to Calvin and the criminal liability of Calvin, in relation to Adam. Clearly, Adam had taken advantage of his physical superiority over Brandon in order to bully Brandon by deliberately aiming tennis balls at him during a game in the park. Students had no difficulty in recognising this conduct as disclosing multiple instances of possible battery, although not all went on to consider that the resulting ‘red and painful … stinging blows’ could be injuries ‘not so trivial as to be wholly insignificant’ (Chan-Fook) and so could amount to the possible offence of assault occasioning actual bodily harm under s47 Offences Against the Person Act 1861. Some students chose to discuss assault rather than battery. After Adam repeated his conduct in deliberately striking Brandon with the ball, it is true that Brandon must have anticipated further instances and so feared immediate, personal violence. It must be noted that it seems bizarre to focus on the fear of violence and to ignore the actual violence. Moreover, students who extended their analyses into the offence under s47 usually fell into the error of alleging a non-existent causal connection between the fear of violence and the actual injury; since the injury resulted from the actual blows and not from fear of the blows. The fact that these events took place in the context of a game of tennis raised the possibility that Adam could argue that Brandon consented to the risk of injury naturally arising from the nature of the game. If the offence amounted to no more than battery, then consent could be a defence. If the offence was one of a slightly more serious nature, under s47, then consent could be a defence only if the facts of the case fell within one of the recognised exceptions. Most students addressed this issue, suggesting both rough horseplay and play within the rules of a sport as recognised exceptions. Both approaches were acceptable since there was a lack of clarity as to exactly how the game of tennis was being played. In either case, students usually argued perceptively that the defence would fail because Adam was deliberately targeting Brandon. Brandon would probably have consented to the risk of injury as a natural incident of the game but would not, and could not legally, have consented to injury deliberately inflicted. In general, students presented strong explanation and application, well supported by authority, of any issues which they addressed. Consequently, variations in quality of answers turned almost entirely on their recognition of the need to discuss the three issues: battery; actual bodily harm; and consent. The weakest answers were those which dealt only with battery. Returning to battery itself, there was a persistent misconception about ‘direct’ and ‘indirect’ battery; although it was of little significance to this answer. A direct battery occurs when there is a simple and direct causal connection between the conduct of D and the application of force to V. For instance, when D strikes V with a fist or a weapon, whether the weapon is held or thrown (such as the tennis balls, in Adam’s case). An indirect battery occurs when there is some event interposed between the conduct of D and the application of force to V, such as in the facts of DPP v K. In Adam’s case, the contact between himself and Brandon was not direct, but the battery certainly was.

When Calvin responded to Adam’s bullying by shouting, “If you hit him again, I’ll come over there and knock you out”, it was possible that he committed the offence of assault; in that he may intentionally have caused Adam to fear immediate, personal violence. Indeed, on the surface, this seemed to be a very simple example of assault, and it was so treated by many students. On the other hand, many students perceived that a more careful reading of the facts might reveal a rather
more complicated story. Firstly, Adam was known to be physically big and strong (at the very least, much more so than his friend, Brandon); a youth of 15 years old and potentially full of energy and daring. By way of contrast, Calvin ‘often slept rough in the park’ and so may well have been homeless and possibly in poor health. Secondly, Adam clearly did not choose to stop playing or to leave the park after Calvin made his threat. Conversely, Calvin fell asleep shortly after making the threat. Although it was not necessary to prove that Adam actually was ‘in fear’ of immediate, personal violence, rather than that he ‘apprehended’ it, these facts certainly cast doubt on whether Adam took the threat seriously. Equally, it was questionable whether a man who fell asleep shortly after apparently making a threat had been serious in making it or had given any thought to its being taken seriously. More technically, if this were serious, then the conditional nature of the threat, “If you hit him again”, generally, would not have been a barrier to conviction. It was a qualification of the kind expressed in Logdon v DPP rather than in Tuberville v Savage. Some students made the case that Adam’s action in pushing Calvin from the bench after he had fallen asleep, was powerful evidence that Calvin’s threat did cause him to fear immediate, personal violence. Obviously, this was creditworthy, although it was equally explicable as evidence simply of vengeful, uninhibited, opportunistic violence. Students were not expected to extend the analysis beyond the discussion of assault itself. Nevertheless, many of those who saw the threat as serious, did go on to examine a possible defence of self-defence/prevention of crime (to protect Brandon from further injury), for which they gained appropriate credit. This argument was rarely developed in any detail but was usually concluded with some justification that there was some evidence of the necessity of an intervention and that a threat of violence, rather than the actual use of violence, could be regarded as proportionate. An interesting alternative which, unsurprisingly, was not recognised by students, might have been found in a re-appraisal of the conditional nature of the threat. The reason why the Logdon v DPP kind of qualification does not usually undermine the illegality of the threat is that the threat compels V to behave in a way in which V would otherwise be legally free to avoid. In Adam’s case, the threat, if serious, was to compel him to stop behaving in an unlawful way (committing an offence against Brandon).

When Adam pushed Calvin off the bench, causing him to strike his head and become unconscious, clearly he committed a s47 offence. Some students contented themselves with this conclusion; often choosing to present a general explanation of the s47 offence and to then apply it, in turn, to the injuries to Brandon and the injuries to Calvin. In itself, this approach was insufficient to reach a classification of ‘clear’, because it completely ignored the indicators that the injury sustained by Calvin was much more severe than that which was sustained by Brandon. The facts revealed that Calvin had been unconscious for at least 30 minutes before he was subjected to the attack by the gang. Taking into account his possible physical state, both as a ‘thin skull’ issue and also in the light of the Bollom interpretation, this was powerful evidence to suggest that he had suffered serious injury even before he was kicked. Of course, it is true that in T v DPP momentary unconsciousness was regarded as actual bodily harm but it was a little surprising that some students used this to emphasise the conclusion that Calvin had suffered merely actual bodily harm where they might, instead, have argued the contrast between momentary unconsciousness and unconsciousness lasting for 30 minutes with no signs of recovery. Though some students stated incorrectly the mens rea of the offence of unlawful and malicious infliction of grievous bodily harm under s20 Offences Against the Person Act 1861, most students who addressed this issue argued correctly that Adam was almost certainly guilty; although generally they stopped short of any conclusion that he was guilty of the more serious offence under s18. If there were any doubt about grievous bodily harm in relation to the initial unconsciousness, there could be none about the subsequent permanent disability. Students recognised that this raised crucial issues of causation but many failed to really understand how to progress from causation in fact, to causation in law. In truth, the argument would have to depend on proof that the disability resulted purely from the injuries caused by the push and fall, or from a combination of those injuries and the subsequent
kicks by the gang (Benge); because it was surely impossible to sustain an argument that the actions of the gang were a reasonably foreseeable consequence of Adam’s actions (Pagett). Many students who took the view that Calvin’s threat to Adam was serious also debated the possibility that it provided Adam with a plea of self-defence. Such debates almost invariably concluded that the defence would fail because Calvin was fast asleep at the time of Adam’s attack; although this was not always attributed, as it should have been, to lack of necessity for the use of any force rather than to lack of proportion in the force actually used. Based upon the fact that the defence was certain to fail, students were not required to discuss it; even so, those who did so gained some credit.

Question 02

This question required students to consider Deon’s liability for the murder of Ella and Felipe’s liability for gross negligence manslaughter. As universally recognised by students, when Deon strangled Ella and caused her to become unconscious, he apparently displayed an intention to kill or, at the very least, to cause really serious injury. Since either state of mind is sufficient to satisfy the mens rea requirements of murder, students correctly concluded that, prima facie, there was no difficulty in proving malice aforethought. This should have led to the conclusion that Deon’s liability for murder depended on whether his conduct had caused Ella’s death and, if so, whether his hallucinations and the circumstances in which they were induced, provided him with any defence. On the whole, the discussion of the causation issue was very disappointing. Most students addressed it in some form but few succeeded in explaining and applying the rules in any convincing way. Perhaps the most favoured approach was to argue, initially, that causation in fact was satisfied because Felipe would not have buried Ella if Deon had not strangled her and caused her to be unconscious and then to argue that causation in law was satisfied for the very same reason. Alternatively, students attempted to argue causation in law by reference to the general requirement that D’s conduct must make a significant contribution (Pagett, Cheshire). However, the confident assertion that it did make a significant contribution was rarely supported by any sound reasons, such that, ultimately, the analysis did not get much beyond that which was evident in the first approach. Clearly, the causation issue was crucial and demanded careful consideration. The evidence strongly suggested that Ella had died because she was buried by Felipe. Even had she been so badly injured that she would not have survived anyway, the most immediate cause of her death would have been the burial, not the injuries inflicted by Deon (compare, say, V who is dying from a serious illness and has probably only minutes to live but who is then shot and killed by D). This did not mean that it was impossible to establish a causal connection between Deon’s conduct and Ella’s death, but it certainly made it more problematic. If Ella had died in spite of the fact that there had been no burial, the prima facie case of murder against Deon would have been overwhelming. However, when Deon strangled Ella, he had the mens rea of murder but he did not commit the actus reus because she did not die. When he colluded with Felipe in the disposal of Ella’s ‘body’, the actus reus of murder was committed but without mens rea. As was recognised by surprisingly few students, this was the province of theories of coincidence of actus reus and mens rea, depending on the notion of a ‘continuing transaction’ (or a similar description) and relying on a case such as Thabo Meli. Alternatively, an equivalent approach was to be found in the case of Le Brun. Unfortunately, students who did perceive that this was a fertile approach frequently dealt with it simply by mentioning coincidence, without pausing to develop explanation and application.

Assuming that the causal connection between Deon’s conduct and Ella’s death could be established, the focus of attention would then turn to Deon’s mental capacity at the time of strangling Ella. The facts suggested possible pleas of diminished responsibility, automatism/intoxication and insanity; discussion of any one of which would merit maximum marks. In reality, students very sensibly concentrated on diminished responsibility, which in a very real
sense incorporated all the other elements; although often supported by a briefer analysis and application of automatism/intoxication. There were many excellent explanations of the elements of the modified defence under the s2 Homicide Act 1957, with a noticeable tendency for much more comprehensive discussion than has often been observed in past series of examinations. In particular, students extended the analysis into explanation of the meaning of ‘substantial’ impairment (although the preference expressed in Golds [2014] for the Simcox approach over that adopted in Lloyd does not yet seem to have filtered through) and of the requirement for the abnormality of mental functioning to provide an explanation for the acts and omissions. Though application was generally strong, when examining the concept of a ‘recognised medical condition’, students were often surprisingly hesitant in dealing with the significance of Deon’s history of drinking alcohol and with his experience of ‘vivid hallucinations’. Most recognised that there was some significance but few were able to distinguish clearly between simple intoxication, which must be discounted (Dietschmann, Dowds), alcohol dependency syndrome, which can be a recognised medical condition and provide the foundation for the abnormality of mental functioning (Wood, Stewart) and degenerative changes to the brain resulting from prolonged abuse of alcohol, which can equally qualify as a recognised medical condition. The facts hinted strongly at alcohol dependency syndrome, if not actual degenerative changes, which had caused the hallucinations. They suggested that Deon’s perception of reality had become severely distorted during the playing of the violent video game, such that he had been unable to distinguish between Ella and characters in the video game. If alcohol dependency syndrome were argued, rather than simple intoxication, then the issue would be whether the severe distortion in the perception of reality was the consequence of consumption of alcohol, which satisfied the requirements of the dependency, or of consumption which went beyond those requirements. However, most students simply stated that alcohol dependency syndrome is a recognised medical condition and then moved on to examine how the abnormality had substantially impaired his capacity to understand the nature of his conduct and/or form a rational judgment. Some students tried to argue that the hallucinations were evidence of schizophrenia. This could not be entirely discounted but it was an interpretation which displayed a very strange unwillingness to attribute them to the much more obvious cause of alcohol abuse. Rather oddly, some students treated the hallucinations as the recognised medical condition itself, not merely a symptom of it and evidence of an abnormality of mental functioning. Additionally, or alternatively, students argued that Deon could rely on a plea of intoxication to reduce the crime to manslaughter. The quality of this response depended entirely on the detail employed in explanation, with many answers being disappointingly superficial. Surprisingly few students suggested that Deon’s condition amounted to automatism, although it is true that such an approach would inevitably have returned to intoxication as the basis of any fundamental loss of control. There were also few attempts to treat the facts as raising the defence of insanity. Where it did appear, insanity was often confused with the elements of diminished responsibility.

The final issue was the possible liability of Felipe for gross negligence manslaughter, arising from his conduct in burying Ella’s ‘body’. The case against Felipe was so overwhelming that students had little difficulty in making the argument. Therefore, once again, therefore, the variation in quality of answers was related simply to the extent and depth of the analysis and application of the offence. Most students considered that Felipe’s duty was derived from his voluntary assumption of responsibility for Ella (Stone and Dobinson), although some made the additional suggestion that Felipe must have been friendly with Ella because of his friendship with Deon and that this satisfied the requirements of a duty test as proposed by a case such as Evans. Others argued that Felipe’s duty, derived from his creation of a dangerous situation in burying Ella (Miller). Ironically, none of these rather tortuous explanations were necessary and nor was there a need for any complicated debate about acts and omissions. Without any legal authority, Felipe performed acts which would almost certainly kill Ella if she were not already dead. No prior relationship, or artificially constructed relationship (voluntary assumption of responsibility/creation of a dangerous situation),
was necessary to impose a duty on Felipe within the general requirements of a simple *Donoghue v Stevenson* test. Equally, as invariably emphasised by students, his brief, non-expert examination of her condition and conclusion that she was dead, rather than an attempt to summon professional help, was devastating evidence of breach of the duty. Students often omitted the requirement for the breach of duty to create a risk of death, although it was unquestionably satisfied in Felipe’s case. Since students had usually concluded that Deon caused Ella’s death when strangling her, some doubted whether Felipe’s conduct in burying Ella was the cause of her death. Most, however, either overlooked their earlier conclusion and attributed death to the burial, or argued, quite correctly, that there can be more than one legal cause; whereby two or more persons who are held independently to have caused a single death. Most students addressed the issue of the ‘grossness’ of the negligence, citing the *Bateman* test as modified by *Adamako*; although they often developed little application. The most obvious instances of this, were those answers in which students were content simply to state that it would be a matter for the jury to determine. Many students seemed to consider that the ‘risk of death’ which must be created by the conduct, is actually simply an aspect of the test for ‘gross’ negligence, ‘having regard to the risk of death’ and so emphasised it at this stage, rather than when discussing the consequences of the breach.

**Question 03**

It is now 23 years since the Law Commission published its major review of the non-fatal offences against the person, 18 years since the Labour Government, elected in 1997, indicated its intention to substantially implement those proposals and nearly a year has passed since the Law Commission published its further conclusions, after yet another review. However, there still seems to be no prospect of any early action to reform the law. Of course, this means that the major criticisms of the current law and possible reforms to it, are by now very well-rehearsed. As such, it is hardly surprising, that typically, students were very familiar with both criticisms and reform proposals, even if the range and depth of analyses varied enormously. However, what continues to be a little disappointing is that answers were often very formulaic and that more subtle criticisms and proposals for reform were sometimes advanced without any real evident understanding. It is also a little disappointing that so few students took the opportunity to extend the range and depth of their analyses by introducing some of the very substantial and very interesting criticisms of the current law on consent, as it applies to the non-fatal offences against the person. Exploration of such criticisms was not a requirement but it certainly would have added a little to some answers.

The emphasis tended to be on criticisms of the structure of the provision for non-fatal offences, in terms both of lack of codification and of the alleged chaotic organisation of the Offences Against the Person Act 1861; the antiquity of many of the offences contained therein and the antiquated language and concepts it employs and embodies. Stronger answers examined language in detail and did not merely use words such as ‘malicious’, ‘actual’ and ‘grievous’ to illustrate antiquity without further explanation; which was a failing of some of the weaker answers. There was also some extensive analysis of developments in the meaning of ‘bodily harm’, as the law seeks to keep pace with changes in society; related, say, to developments in technology, or to the consequences of changing habits and lifestyles. This was often illustrated by reference to cases such as *Ireland [1997]* and *Burstow [1997] on ‘stalking’; by cases such as *Chan-Fook and DPP v Smith* on varieties of bodily harm; and by *Dica [2004] and Konzani [2005]* on consent and transmission of sexually transmitted diseases. These developments were sometimes cited as evidence of the failure of formal processes of reform of the law. Conversely, some students argued that they represented a considerable success story, in which enterprising judges had stepped in to ensure that case interpretation kept the law appropriately up to date. Students were also very adept at revealing sentencing anomalies and in relating them to comparisons between the *actus reus* and
mens rea requirements of the offences themselves. For example, assault and battery are punishable with far lower terms of imprisonment than actual bodily harm under s47, although the mens rea for s47 is just that of the mens rea for assault or battery. The offences under s47 and s20 share the same maximum sentence of imprisonment of five years, although s20 is clearly regarded as a far more serious offence, whilst the disparity between the maxima for s20 and s18 of life imprisonment seems excessive. As students frequently emphasised, the concept of a ‘wound’ in s20 and s18 serves to obscure comparisons based on level of injury inflicted and so contributes to the sense that anomalies abound. There were other strong criticisms of the elements of all of the offences and especially of the breach of the principle of correspondence evident in the s47, s20 and s18 offences. Some students sought to argue that, though an offence such as assault might seem ill-adapted to current forms of unpleasant and aggressive behaviour, the law has not stood still, citing legislation such as Protection from Harassment Act 1997 and more recent amendments. These were certainly interesting and creditworthy additions to the more familiar forms of analysis, but they tended to remain at a rather superficial level.

In making suggestions for reform, students mainly drew on the proposals of the Law Commission in 1993 and the Government’s Draft Bill of 1998. The strongest answers accurately detailed the proposed offences, their associated sentences, the supporting definitions and the way in which the whole was intended to meet the extensive criticisms. Weaker answers were less detailed and less comprehensive in the range of proposals considered and sometimes inaccurate (for example in continuing to refer to aspects of current terminology such as ‘harm’ rather than ‘injury’, and in misstating some of the sentencing proposals). At their weakest, answers suggested little more than that changes to particular aspects were necessary, without ever attempting to supply any indication of what form those changes might take. Students were not expected to be familiar with the Law Commission’s latest proposals on non-fatal offences, published in November 2015 as Offences Against the Person (Law Com 361). Nevertheless, some students were aware of the proposals and were able to gain credit for incorporating them into the discussion. The main addition, here, was the proposal to create an offence of ‘aggravated assault’; meaning any assault which in fact causes an injury, to sit between the offence of intentionally or recklessly causing harm and the assault offences and carrying a maximum sentence 12 months’ imprisonment. Some students also pointed out that the proposals depart from earlier proposals, in relation to transmission of disease (no longer to be confined to the offence of intentionally causing serious injury) and the definition of general elements of intention and recklessness (to be left to be determined in accordance with the general law).

Scenario 02

Question 04

This question concerned a possible offence committed by Genna against Helen, and, in response, possible offences committed by Helen against Genna. Genna’s possible liability arose out of her deceitful report to Helen that Helen’s boyfriend, Ivo, was angry and was coming round to ‘get’ Helen on account of suspicions about her interest in Genna’s boyfriend conveyed to Ivo by Genna herself. Students had no difficulty in determining that the facts revealed a possible offence of assault committed by Genna and most were able to present a strong explanation of the elements of the offence. Differentiation in quality of answers was attributable mainly to the way in which students applied the rules to the facts. Few remarked on the rather unusual nature of the basis of the assault, namely that Genna was not herself threatening Helen with violence but, rather, was purporting to pass on information which suggested that the threat was posed by an imminent visit from Ivo. Given that Genna’s purpose in telling the lies about Ivo to Helen was clearly to cause her
anxiety, it seemed that these unusual circumstances did not undermine the strength of the argument for an assault. As many students recognised, there was ample evidence to justify the assertion that Genna’s statement had caused Helen to fear immediate personal violence. Ivo was short-tempered and had a history of violence towards Helen. He was said to have been in a ‘nearby bar’, and was angry and coming round. Helen’s response was to ‘panic’ and to lock doors and windows. The technical issue of fear of ‘immediate’ personal violence was easily disposed of by reference to cases such as Ireland and Constanza, with the interpretation that fear of ‘immediate’ personal violence extends to fear of violence at some time “not excluding the immediate future”. Some students also cited Helen’s response to Genna’s attempts to unlock the doors and windows as further clear evidence of her fears about Ivo’s impending arrival. Genna’s motive for her behaviour may have been revenge, or an attempt to deter Helen from expressing any further interest in Genna’s boyfriend, or a combination of both. Whatever lay behind it, her purpose in lying to Helen about seeing Ivo, and about Ivo’s intentions, was undoubtedly to create anxiety and fear in Helen. Once again, students usually seized upon these facts to argue that Genna had a direct intention to cause the fear, and so to commit the offence of assault. Some students considered that Helen’s anxiety might be sufficient to elevate the offence into one of assault occasioning actual bodily harm. Since the events described took place over an extremely short time, there was no basis for an argument that Helen’s immediate response of fear and panic could satisfy the requirements of moderate psychiatric injury. However, students adopting this approach had already gained the credit for the consideration of the assault aspect of the offence, the further discussion of actual bodily harm merely being unnecessary.

Helen reacted with horror to Genna’s apparent attempts to stop her securing doors and windows. Her first response was to kick Genna hard in the shin (not ‘chin’, as students occasionally suggested). This was correctly treated by most students as a prima facie instance of battery. Some wasted little time in making the assertion that a hard kick to the shin was inevitably infliction of personal force or violence, and that it was clearly delivered with a direct intention. Others took the opportunity to expound at rather unnecessary length the various ways in which a battery may be committed, accurately recording that any unlawful touching suffices, and frequently referring to the case of Thomas in support of the proposition that even touching of clothing alone may be included. As in the discussion of Genna’s possible assault detailed above, some students approached Helen’s conduct as evidence of assault (battery) occasioning actual bodily harm. They relied in particular on the description of the kick as being ‘hard’. There was much more substance in this argument in relation to Helen than in relation to Genna, though it is still unlikely that, without some significant bruising, the injury would be regarded as ‘more than merely trivial’ (Chan-Fook). However, as with the assault discussion in relation to Genna, so a comprehensive discussion of the actual bodily harm offence in relation to Helen would inevitably encompass an explanation and application of the constituent offence of battery (rather than assault, here, of course). Apart from taking up some valuable time, then, the discussion of actual bodily harm was not detrimental unless students focused primarily on the actual bodily harm as such, and paid little attention to the need to prove a battery. A significant proportion of students ignored the kick on the shin altogether, or treated it merely as an unremarkable incident in the greater struggle that culminated in the more serious injury to Genna. This omission not only reduced the quality of this part of the answer but also had an impact on the quality of the analysis of Helen’s possible plea of self-defence (see below). Students usually recognised the injury suffered by Genna when Helen pushed her face into the mirror as a wound, or, at any rate, as serious (grievous) bodily harm. This gave them the opportunity to explore the unlawful and malicious wounding or infliction/causing of grievous bodily harm offences under the Offences Against the Person Act 1861 s20 and s18. As always, students demonstrated strong understanding of the actus reus elements of these offences, citing Eisenhower for the meaning of ‘wound’ and Smith for that of ‘grievous’ bodily harm. Some also referred to the proposition that an accumulation of injuries can amount to grievous bodily harm.
(first argued in Grundy, but usually attributed here to Brown and Stratton), though there was little evidence to suggest that the kick contributed anything to the seriousness of the facial injury. Answers were less accomplished, both in explanation and application, when the focus turned to mens rea. Though many students did accurately define and explain the mens rea for both offences, many fell into the error of stating that s20 requires intention or recklessness as to a wound and/or grievous bodily harm, whilst others correctly stated the s20 mens rea but insisted that recklessness as to grievous bodily harm suffices for s18. Most interpreted the phrase, “Helen pushed Genna’s face into a glass mirror” as clear proof of an intention to cause some harm, and often as an intention to cause serious harm. This could certainly have been the case but it did rather ignore the fact that the ‘push’ occurred during a ‘struggle’ in which Helen was in a panic and highly anxious to preserve her security. There was an equally strong argument that the push was intended but its consequences were not, so that recklessness might be the appropriate state of mind, and s20 the more likely offence.

The final element in the answer was the possibility that Helen could raise the defence of self-defence to justify the injuries inflicted by her on Genna. Most students addressed this issue but a significant number failed to identify the possible defence. Just as Genna was threatening violence to be committed not by herself but by Ivo, so Helen was trying to defend herself from that potential violence, not by using force on Ivo, but by using force on Genna. Once again, this unusual circumstance mostly went unremarked by students, though it is clearly no barrier to a successful plea of self-defence (Hichens [2011]). There was a wide variation in quality of responses, both in explanation and application. The simple proposition that D may use such force as is reasonable in the circumstances in self-defence or prevention of crime was analysed in depth by stronger students, who recognised that it requires proof that the use of some force was necessary, and that the force actually used was proportionate to the threat posed. This provided a clear framework within which those students were able to explore the interpretation of the defence originally developed by the common law and now re-stated (with slight amendments) in the Criminal Justice and Immigration Act 2008 s76. Particular issues examined were the rule that both the necessity for use of force and, so, the degree of force considered proportionate, must be determined on the basis of the facts as D genuinely believed them to be, however mistaken (Criminal Justice and Immigration Act 2008 s76(3)-(4), Gladstone Williams, Beckford), the rule that D is not expected to weigh to a nicety the exact measure of any action (s76(8)(a)), and the rule that evidence that D did only what she honestly and instinctively thought was necessary constitutes strong evidence that what she did was reasonable (s76(8)(a)). Applying these rules to the facts, students argued that the ‘facts’ as known to Helen, including the mistake as to Ivo’s intentions prompted by Genna’s lies, clearly established that it was necessary to use some force to stop Genna unlocking doors and windows. The kick on Genna’s shin was then seen as eminently proportionate in view of the degree of violence that Ivo might inflict. On the other hand, students usually argued that the wound inflicted on Genna during the struggle was disproportionate. This conclusion was consistent with the common view that Helen’s action was deliberate, and may even have been intended to cause serious injury. If it were not so, and may at worst have been recklessness as to some injury, then the conclusion that the force was disproportionate was not nearly so secure. Weaker students often failed to distinguish between necessity and proportion and presented fragmented aspects of the analysis detailed above, with little or no reference to the substance of the rules, whether derived from common law or attributed to statute. Students also often failed to distinguish between the initial kick, and the subsequent wound. Some students raised the interesting possibility that, as a ‘householder’, Helen was entitled to use force that was not grossly disproportionate (s76(5A)). Unfortunately, this argument was probably rendered invalid by the provision in s76(8A)(d) that “at that time D believed V to be in, or entering, the building or part as a trespasser”. Obviously, Genna was not a trespasser since she and Helen were flatmates.
Question 05

This question caused a little confusion amongst students, particularly in relation to Jayson’s liability, so it is perhaps appropriate to provide a clear analysis of the relevant law and its application. Kelsie, Jayson’s wife, had been in a relationship with Ivo. Kelsie had insulted and humiliated Jayson, and had indicated her intention to leave and take the children with her. Jayson was subjected to further insult and humiliation when, encountering Jayson in a bar one night, Ivo laughed at him about the situation with Kelsie and the children. Jayson was with his friend, Lucas. Lucas threatened Ivo with a knife and chased him out of the bar, followed at a little distance by Jayson. Ivo slipped and fell into very cold, dark canal water and became wedged between a boat and the canal bank. Lucas ran straight past without noticing but Jayson saw what had happened and upon suddenly feeling a wave of anger, deliberately walked away, leaving Ivo to his fate.

Students were instructed to discuss Jayson’s possible liability for murder and Lucas’s possible liability for involuntary manslaughter. The instruction to discuss Jayson’s possible liability for murder meant exactly what it said. It did not require students to address his liability for murder briefly and then go on to examine his liability for gross negligence manslaughter. Nor did it mean that students ought to ignore his liability for murder entirely and, instead, discuss his liability for gross negligence manslaughter. Often, those students who were convinced that there could not be liability for murder and instead sought to establish gross negligence manslaughter, immediately and unwittingly disproved a large element in their own assumptions about murder, by establishing the actus reus of unlawful homicide in a way equally applicable to murder and manslaughter. Had this been understood, students could then have gone on to consider whether malice aforethought would be evident in Jayson’s behaviour in walking away and, as such, have fulfilled the requirements of this part of the question. Jayson’s conduct was an omission, as students invariably recognised. As many also recognised, murder (just as with gross negligence manslaughter) can be committed by an omission (Gibbins and Proctor). This should immediately have triggered the standard list of questions associated with liability based on omissions: was Jayson under a duty to act; if so, did he breach that duty; if so, did the breach ‘cause’ Ivo’s death? Yet it was surprising to note that, when students identified the omission in the context of murder, they almost invariably did not ask any questions about duty and breach but simply moved on to discuss causation and mens rea. However, when students viewed it as gross negligence manslaughter, they almost inevitably did ask the duty and breach questions. In reality, this would have been the weakest link in an attempt to prove Jayson guilty of any offence of unlawful homicide; whether of murder or gross negligence manslaughter, between which there would have been no difference for these purposes. Even so, there was a perfectly credible basis for imposing a duty on Jayson. Although Lucas drew the knife and began the chase, Jayson certainly participated in the chase. As such, Jayson bore joint responsibility with Lucas for creating a dangerous situation (Miller) in which, in fear of serious injury, Ivo had fled for his life along a dark and slippery canal path, had fallen into the water and became at serious risk of drowning if not rescued. It is important to note, that any responsibility of Jayson for Ivo’s murder related to his conduct in not rescuing Ivo, or in failing to enlist help in rescuing Ivo. Beyond establishing a basis of his duty to do so, his participation in threatening Ivo was not the relevant conduct. It would have been different had the instruction been to discuss Jayson’s possible liability for unlawful act manslaughter. However, that task was reserved for a discussion of the liability of Lucas. Lucas could not be guilty of murder, nor, possibly, of gross negligence manslaughter on the basis of a failure to rescue Ivo, because he had no idea that Ivo had fallen into the canal. Once the duty, breach and causation hurdles were surmounted (there was every reason to suppose that Ivo would not have died if timely assistance had been provided), liability for murder resolved itself into a question of direct or oblique intention to kill or cause serious injury. In view of the context, Jayson’s obvious anger and the clear statement that he ‘deliberately walked off’, it could hardly be
doubted that there was a strong *prima facie* case for, at the very least, an oblique intention to kill. As previously indicated, students who observed the instruction to discuss murder, usually: passed rapidly over the omission aspect without discussing the key issues of duty and breach; accurately asserted the causal link; and frequently argued the *mens rea* as direct or oblique intention to kill (though in varying degrees of detail in both explanation and application). Students who discussed duty, breach and causation, albeit in the context of gross negligence manslaughter, were able to gain some credit; since the discussion related more generally to the *actus reus* of unlawful homicide. Of course, the credit did not extend to any element specific to gross negligence manslaughter itself; most obviously to any discussion of the meaning of ‘gross’ negligence.

Students who ignored the instruction to discuss Jayson’s possible liability for murder were also very likely to ignore all the evidence that his decision to leave Ivo to his fate was prompted by a loss of self-control. The evidence strongly suggested that Jayson might raise a credible defence of loss of control under the Coroners and Justice Act 2009 sufficient to reduce the crime to manslaughter. Fortunately, most students were alert to this possibility and stronger students presented excellent explanation and application of the three core elements of the defence, namely: loss of self-control, attributable to a qualifying trigger; such that a person of D’s sex and age, possessing a normal degree of tolerance and self-restraint; and in the circumstances of D, might have reacted in the same or in a similar way to D. The characteristics of these stronger answers were that they were that they provided a comprehensive, detailed and accurate examination of the three requirements. In particular, in considering the ‘anger trigger’, stronger students emphasised the extent of the objective nature of the tests to determine whether the ‘things done and/or said’ constituted circumstances of an ‘extremely grave character’, causing D to have a ‘justifiable sense of being seriously wronged’ (*Dawes and others*) and explored the limits of the sexual infidelity exclusion, as interpreted by the Court of Appeal in *Clinton*. In so doing, some students also recognised that the exclusion does not apply when D’s ‘circumstances’ are considered in the application of the comparison with a person of a normal degree of tolerance and self-control. In application, students argued that there was a loss of self-control sufficiently spontaneous to eliminate any possibility of a ‘considered desire for revenge’ and relied upon the ‘cumulative impact’ (*Dawes*) of things previously done and said by Kelsie and Ivo; and said by Ivo at the time of the encounter in the bar. Students usually asserted that the sexual infidelity exclusion would not be fatal to the defence, because Jayson would not rely solely on the sexual infidelity but, additionally, could cite insults and humiliation and the threat to remove the children. Even so, many still found it difficult to accept that a person of Jayson’s sex and age, possessing a normal degree of tolerance and self-restraint, might have reacted in the same or in a similar way to Jayson. This was despite the fact that such a person would have found himself in Jayson’s ‘circumstances’, including all of his experience of Kelsie’s sexual infidelity and the associated behaviour of Kelsie and Ivo. Usually, weaker answers were not inaccurate in any significant way. Rather, explanation tended to be either less comprehensive and/or less detailed; with application being less perceptive and often rather unspecific. However, it remains evident that some students still do not understand that the rules on the defence of loss of control are now to be found exclusively in the Coroners and Justice Act 2009 and its current interpretation; rather than in the rules derived from cases which were decided under the former common law defence of provocation, regardless of the similarity between any of those rules (*Gurpinar, Kojo-Smith*).

When Lucas threatened Ivo with the knife and chased him out of the bar and along the canal path, he clearly caused Ivo to fear immediate, personal violence. Given that Lucas knew that this would be the consequence of his actions and that it was almost certainly his purpose (in addition, probably, to a desire to inflict personal violence on Ivo), he committed the crime of assault. In the course of the commission of that crime by Lucas, Ivo died and this inevitably raised the possibility that Lucas was guilty, not merely of assault but also of unlawful act manslaughter. The crime of
assault was clearly ‘of a dangerous kind’ within the test in Church, since “all sober and reasonable people would inevitably recognise [that it] must subject [Ivo] to, at least, the risk of some harm resulting therefrom.” However, it is important to note that the risk of harm was not from the wielding of the knife or its potential use against Ivo; this was not a case of a knife being waived about in a confined space (Larkin). Rather, the fear of immediate, personal violence prompted Lucas to seek to escape in circumstances which posed a risk of much more than merely falling over or running into obstructions. He was running along a wet canal path, in the dark and risked falling into the canal; a risk which, in fact, materialised. In that case, the question had to be asked: did Lucas ‘cause’ Ivo’s fall into the canal and, ultimately, his death by drowning? In terms of causation in fact, Ivo would not have been running and so would not have fallen, ‘but for’ the conduct of Lucas. In terms of causation in law, the conduct of Lucas would clearly be a significant contribution to Ivo’s death, unless Ivo’s response in fleeing as he did was not a reasonably foreseeable consequence of that conduct (Roberts). In a panic, with a potentially lethal attack about to be made on him, Ivo’s response seemed eminently ‘reasonably foreseeable’.

Subsequently, Jayson had the opportunity to assist Ivo. Had he done so, Ivo would probably have survived and Lucas could not possibly have committed an offence of unlawful homicide. However, for obvious reasons, Jayson’s failure to intervene could not break the chain of causation between the conduct of Lucas and the death of Ivo; a break in the chain requires a positive intervention. However, as discussed above, Jayson’s failure (omission) amounting to a breach of duty could render Jayson independently liable for Ivo’s death in accordance with his own mens rea. Students usually discussed this aspect of the question in some depth, identifying and explaining the required elements of unlawful act manslaughter, and applying them accurately and confidently.

Occasionally, the test for ‘dangerous’ was not fully articulated. Surprisingly few students emphasised the ‘attempted escape’ aspect. Instead, students tended to rely on the proposition that the causal connection was self-evident, so that cause in fact inevitably mutated into cause in law with not even a token reference to the demands of reasonably foreseeability and little reference to a case such as Roberts. Alternatively, or additionally, some students sought to argue that Lucas was liable for gross negligence manslaughter, based on his failure to stop and rescue Ivo from the canal. As pointed out above, this was a very tenuous argument, because Lucas did not realise that Ivo had fallen into the water and ran straight past him. Consequently, a duty of rescue imposed on him would depend on the proposition that, in law, the ‘creation of a dangerous situation’ duty can arise when D ought to know (rather than does know) that D has created a dangerous situation, and that, in fact, Lucas ought to have known it here. The legal basis (ought to know) may be justified by the decision in Evans. The factual basis (ought to know) would be much more problematic. These arguments were at a level of sophistication rather beyond anything expected of students, for whom unlawful act manslaughter was by far the simpler option.

**Question 06**

For comments on answers to this question, see the comments on answers to **Question 03** (above).
Law of Contract

Note that there were few answers to the Contract questions. Any comments below on answers by students should be treated with a considerable degree of caution, since they may represent approaches taken by a very small number. Terms in relation to students such as ‘many’ and ‘most’ should be interpreted as meaning merely ‘many’ or ‘most’ of relatively small numbers when compared with the number of those choosing the Crime option. Where appropriate, the main focus of the comments below is on providing an outline of the answers that might have been expected.

Scenario 3

Question 07

In this question, the facts of the scenario indicated that Nirmal sought to boost sales of a weekly magazine by offering to include a ‘free gift’ every week. The gift was a model aeroplane part and purchasers of the magazine, including Owen, could collect all parts for 50 weeks and ‘build and fly’ their own model aeroplane. From Owen’s perspective, each time he bought the magazine, he expected to receive the next part of the model. Moreover, he expected that this would be the case for 50 weeks, until all of the parts had been made available. Perhaps some of the individual parts were more vital than others to the prospects of building a model that would fly, but it would seem unlikely that a working model could have been built from the supply of less than half of the parts promised. Nirmal stopped supplying the parts after 20 weeks, although he continued to supply the magazine. The facts also indicated that, from the outset, it may have been Nirmal’s intention not to supply parts for the whole of the 50 weeks. There is no doubt that, at the very least, a contract was formed between Nirmal and Owen every week when Nirmal sold and Owen bought, the magazine. Despite the reference to a ‘free gift’, it is arguable that, given the business context (intention to create legal relations), the contract for the magazine also included the model aeroplane part, either directly or via a collateral contract (Esso Petroleum Ltd v Commissioners of Custom and Excise). Yet this would not have guaranteed Owen a right to a complete supply of the parts. This could only have been achieved either by a contract for supply over 50 weeks, or by a device which prevented Nirmal from withdrawing his offer of supply of the ‘free gift’ each week once Owen had embarked on buying the magazine and for so long as he continued to do so. The indication that ‘Owen bought the magazine each week’ undermined any argument that he had entered into a contract for purchase and supply for 50 weeks. Consequently, the most convincing analysis of the contractual structure was that Nirmal invited offers for the purchase of the magazine and the accompanying ‘free gift’; the offer was made by Owen by tendering the money and the acceptance was made by supply by Nirmal. However, entry into that contract also formed the consideration for an associated promise by Nirmal to continue to supply the magazine and free gifts for 50 weeks, so long as Owen continued to buy the magazine each week (Shanklin Pier v Detel Products, Evans & Sons Ltd v Andrea Merzario Ltd, Errington v Errington and Woods, Daulia Limited v Four Millbank Nominees).

Students could have achieved very high marks in answering this question without engaging in the full analysis outlined above, provided only that they addressed key issues in a reasonably convincing manner. Ideally, they would have discussed intention to create legal relations, offer and acceptance and, particularly, acceptance and withdrawal of offers in unilateral contracts. A conclusion might well have been that Nirmal was in breach of contract and that Owen was entitled to damages based on either expectation or reliance loss. Additionally, or as a completely alternative approach, students could have argued that there was evidence of a fraudulent
misrepresentation, entitling Owen to claim damages on a tortious basis. Actual answers revealed all three approaches (offer and acceptance only, misrepresentation only, and a combination), though the offer and acceptance approach was sometimes confused and rarely incorporated any discussion of intention to create legal relations. Students adopting the misrepresentation approach usually explained and applied the law more confidently; albeit that they often failed to explain and apply the remedies in any detail.

Question 08

The answer to this question resolved itself into two distinct parts. First, the question of whether or not Pavel have any rights in connection with Owen’s promise to give him a lawnmower, in recognition of Pavel’s help in demolishing and removing his old garden shed. Second, the question of whether Owen have any rights and remedies against Ray, in connection with the supply and erection of the new garden shed.

Pavel faced two difficulties in pursuing a claim: first, since this was a very informal arrangement between neighbours, it was highly likely that there would be no intention to create legal relations; second, Owen’s promise to give Pavel the lawnmower appeared to be a spontaneous gesture prompted by gratitude for assistance already provided by Pavel, such that it might not be possible to describe that assistance as consideration. Students recognised both aspects but answers contained varying degrees of explanation and application. In discussing intention to create legal relations, students usually dealt with cases such as *Balfour v Balfour*, *Merritt v Merritt* and *Simpkins v Pays*. However, they often failed to make it clear that those cases deal with a *presumption* about intention to create legal relations in domestic and social relations, not a mandatory proposition. Consequently, they did not necessarily explore the arguments for upholding or rebutting the presumption. In discussing the consideration aspect, students usually explained the necessity for proof of consideration, and recognised that ‘past’ consideration is invalid, citing a case such as *Re McArdle*. Some, but by no means all, further analysed the rules and explained that it may be possible to link an express or implied prior request with a subsequent promise so that the consideration is not described as past but is regarded as perfectly good consideration (*Lampleigh v Braithwait, Re Casey’s Patents*). However, once again, students did not usually examine the facts very carefully in order to determine whether any prior request might be detected, so that application was very superficial.

Owen paid Ray £1,200 to erect the new garden shed. It was permissible to treat this agreement either as a single contract for the supply of goods and services, subject to the provisions of the Supply of Goods and Services Act 1982, or as two contracts: one for the sale of the shed, governed by the Sale of Goods Act 1979, and the other for services in erecting the shed, governed by the 1982 Act. The statutory implied terms concerning satisfactory quality and fitness for purpose of the shed, to be found in the s14(2)-(3) 1979 Act are essentially identical to those to be found in the s4(2) and s4(5)1982 Act; as are the statutory remedies. In either case, clearly s13 1982 Act would govern the provision of reasonable care and skill in the erection of the shed. Students succeeded in identifying and explaining the terms, whichever of the two approaches they took, but sometimes lacked precision in so doing; sometimes confusing the two statutes. Additionally, they sometimes entirely omitted consideration of the term as to reasonable care and skill in the provision of the service. The facts were not at all clear as to the reason why the shed door would not open properly and why the shed leaked in heavy rain. In either or both cases, it could have been because the materials and/or construction of the shed were defective, or because the shed was poorly assembled by Ray, or a combination of both. At the very least, Ray should have been aware that the door would not open properly after he had erected the shed and should have taken appropriate steps to remedy the defect; whether it was due to materials or his own
workmanship. If the roof was not obviously defective in construction or erection, then Ray might only have become aware of its propensity to leak after having been informed by Owen. However, yet again it must be noted that he would be under an obligation to remedy the defect in some appropriate way.

Application by students tended to be rather unspecific, with little attention paid to the alternatives outlined above, and so to the particular terms which might have been broken. For example, students frequently adopted the unexplained assumption that the materials were defective and barely bothered to consider whether the workmanship was poor. Analyses of the various possible remedies and especially of the relationships between them, were also very superficial; often being little more than a list disposed of in no more than a sentence or two. Consequently, little sense emerged in relation to whether Owen could call off the deal entirely and recover his money, or would have to be satisfied with some form of repair, replacement or reduction in price. Students wrote more extensively on the effect of the exclusion clause, sometimes devoting almost the whole of the consideration of remedies to this aspect (and often doing so before making any attempt to examine what remedies were available in the absence of the effect of the exclusion clause). Students were usually stronger in describing the common law approach to the control of exclusion and limitation clauses, than in being precise about the effect of the Unfair Contract Terms Act 1977. Most cited L'Estrange v Graucob for the proposition that a party is bound by terms to which he has assented by signature, although many questioned whether the documents were 'contractual' documents (Chapelton v Barry UDC). There was confusion over the absolute prohibition in the 1977 Act on terms excluding liability for breach of the statutory implied terms on satisfactory quality and fitness for purpose and the qualified prohibition in that Statute in relation to reasonable care and skill; where every possible combination, whether correct or incorrect, seemed to emerge.

Question 09

In this question, students were invited to write a critical evaluation of contractual terms and to make suggestions as to which reforms might be desirable. The question expressly provided that the discussion could be about terms in general, specifically about terms excluding or limiting liability or a combination of both. In practice, all three variations were encountered. Where the answer concentrated on discussion of terms in general, it usually began with an examination of the way in which the common law has developed rules on incorporation of terms and then went on to examine the traditional distinction between conditions and warranties and the impact on that distinction of the evolution of the concept of the innominate term. Students often criticised the inflexibility of the rule derived from L'Estrange v Graucob that a party is bound by any term contained in a written agreement signed by that party, though some praised the certainty thereby created. Similarly, many welcomed the greater flexibility in categorisation of terms, consequent on the introduction of the innominate term; whilst others lamented the subsequent failure to develop the concept. Students who also discussed excluding or limiting terms, or who discussed only such terms, usually considered the success of the common law in controlling the terms by rules on incorporation; as well as by the development of methods of restrictive interpretation, such as the contra proferentem rule. Weaker answers tended to be characterised by description rather than explanation and critical evaluation.

The latter tendency was still more evident when students attempted to discuss statutory implied terms to be found in the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982. Answers often merely outlined the content of the terms with any criticism being focused on lack of knowledge of rights and remedies and so on an inability of consumers to enforce them, rather than on the substance of the provisions themselves. Students were a little more confident when
discussing the control of excluding and limiting terms by the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. Here, there were strong analyses of the deficiencies of the 1977 Act in respect of its narrow scope (its failure to deal with ‘unfairness’ as such) and its complexity; as well as its complicated relationship with the 1999 Regulations. Students who treated the question more narrowly by reference to excluding and limiting terms developed these criticisms in greater detail.

For the most part, suggestions for reform were very general and superficial, especially in the case of common law issues concerned with terms. However, in contrast, there were more perceptive suggestions in connection with the approach to the statutory control of excluding and limiting terms, which revealed some knowledge and understanding of the Law Commission’s 2005 Report on Unfair Contract Terms. Consequently, it was strongly suggested that there was a need for legislation of greater clarity, which would not be undermined by the confusing overlap and conflict in approach characteristic of the 1977 Act and the 1999 Regulations.

Scenario 4

Question 10

This question required students to examine the rights of Aisha and Bilal against Campstore in circumstances where Aisha had bought boots described as ‘tough, hard-wearing work boots’ for Bilal; only to discover that one began to fall apart after two weeks, in spite of the fact that Bilal had merely kicked a light football on most days with his young son. As in answers to Question 08, students had little difficulty in recognising that the facts raised the issue of implied terms under the s13, s14(2) and s14(3) Sale of Goods Act 1979 and associated remedies for breach, including the effect of an exclusion clause. Most also understood that there was an issue of privity of contract, and that Bilal would probably be unable to take advantage of the statutory implied terms unless he could rely on the provisions of the Contracts (Rights of Third Parties) Act 1999. Describing the obligations imposed by the implied terms did not prove particularly onerous, although students tended to present rather superficial explanation, often devoid of any reference to case interpretation. For example, there was little attempt to indicate the factors listed by the 1979 Act as being relevant to the issue of ‘satisfactory quality’. Students found it a little more difficult to apply the descriptions/explanations in any detail and frequently paid little attention to the issue of the use to which ‘tough, hard-wearing work boots’ were expected to be put and whether regular games of football (even with a young son and a light football), fell within that use. It was at least arguable that Campstore could resist a claim that the boots were not of satisfactory quality or fit for purpose, when one boot had proved unable to stand up to a use for which, presumably, it was not designed. Of course, the information that Bilal played with his young son and a light football made it difficult to reach a definite conclusion on this point. As in answers to Question 08, students were far less adept at explaining and applying the remedies that would be available for breach, though they often expounded at length on rules concerning the effect of the purported exclusion of liability. It seems highly unlikely that any kind of repair would have been envisaged, so that a full refund or replacement would have been the preferred options and students could profitably have focused on whether the statutory or common law rules imposed such obligations on Campstore. Once again, students were very adept at explaining and applying the common law rules which developed to control exclusion clauses and often questioned whether a statement at the bottom of a receipt, albeit in large writing, could be a term in the contract of which sufficient notice had been given to Aisha prior to the time when she entered into the contract. Students who understood the absolute prohibition by the Unfair Contract Terms Act 1977 of terms purporting to exclude rights and duties implied by ss13-14 of the 1979 Act were able to conclude that, ultimately, it did not matter whether
the exclusion clause had been incorporated as a term of the contract, since it would be rendered wholly ineffective by the 1977 Act. Weaker students displayed the same confusion already reported in comments on answers to Question 08 dealing with equivalent issues.

Those students who dealt with the privity issue usually began with a general statement of the privity doctrine, frequently supported by a case such as Tweddle v Atkinson or Dunlop v Selfridge. Many then identified traditional exceptions to the doctrine; some engaging in unnecessarily extended explanation, given the inapplicability of any of them to the facts in issue. Most students argued, alternatively or additionally, that Bilal would have to attempt to rely on the provisions of the Contract (Rights of Third Parties) Act 1999. However, in so doing, students often failed to explain those provisions with sufficient care and precision to permit convincing application. Bilal would only be able to take advantage of the 1999 Act’s provisions if the contract expressly provided for him to do so, or if the contract purported to confer a benefit on him. Moreover, Bilal would have to be ‘expressly identified in the contract by name, as a member of a class or as answering a particular description’ (s1(3)). If the requirements were satisfied, then Bilal would be able to enforce any term and take advantages of any remedies for breach, exactly as if he were Aisha. This applied also to the 1977 Act prohibition on exclusion of liability for breach of relevant statutory implied terms. The scenario did not indicate exactly what was said and done by the parties at the time when Aisha bought the boots. Consequently, students should briefly have speculated on different (credible) possibilities and should have suggested alternative applications relevant to those possibilities. In reality, confusion over the precise requirements of s1 and unwillingness to speculate a little on the facts, ensured that most answers on this aspect of privity were very superficial.

Question 11

This question concerned termination of a contract by frustration and by breach. There were two contracts in issue: a contract between Campstore and David by which David, a famous sportsman, had agreed to attend the formal re-opening of Campstore’s newly modernised and extended superstore and to participate in various games and competitions for a fee of £5000; and a contract between Campstore and Safehands by which Safehands agreed to perform security services at the re-opening for a fee of £6,000. When David was unable to perform his obligations under the contract because he was arrested and detained on suspicion of committing a serious criminal offence, the contract was terminated; either because he had broken a condition (his presence and participation) or because the contract was frustrated by his non-availability (Condor v The Barron Knights). In view of the fact that David appeared to be the author of his own misfortune and so of his unavailability, it was strongly arguable that this was breach rather than frustration (Maritime National Fish v Ocean Trawlers).

However, the failure of the contract between Campstore and David had a severe effect on the contract between Campstore and Safehands because Campstore took the view (correctly, as subsequent events seemed to prove) that the re-opening would be significantly less popular without David’s presence. Campstore reacted by ‘cancelling’ the contract with Safehands and going ahead with the re-opening on a much more modest scale. Since the contract with Safehands was for Safehands to provide security at an event which actually went ahead, Campstore would be faced with considerable difficulty in arguing that the contract was frustrated because it had become something wholly different in kind from what was envisaged; in other words, that there had been frustration of the common venture (Krell v Henry, Herne Bay Steam Boat Company v Hutton). It might not even have been possible for Campstore to argue that the likely reduction in profits from the re-opening had made the contract with Safehands much more expensive to perform (a fact insufficient in itself to result in frustration of the contract Davis
Contractors v Fareham UDC), in view of the fact that no fees would have been owing to David. Once again, then, the stronger argument was probably that Campstore broke its contract with Safehands, rather than that the contract was frustrated.

These conclusions notwithstanding, the better strategy was for students to consider the remedies available both for termination by frustration in both instances, and for termination by breach. In respect of frustration, the consequences would be determined by application of the provisions of the Law Reform (Frustrated Contracts) Act 1943, which would dictate that any money paid to David (£5,000) would be recoverable by Campstore and that any money yet to be paid would cease to be payable (s1(2)). This would be subject to the discretion of the court (if it considered it ‘just to do so’) to allow David to retain or recover the whole or part of any expenses incurred in preparation for performance before the date of the frustrating event, not exceeding the sums paid or payable before that event. The same would apply to the contract between Campstore and Safehands, though any expenses could only be recompensed under s1(2) from the £2,000 paid before the frustrating event (since the remaining £4,000 was not payable until the end of the event). Recovery of any further amount would require Safehands to show that they had conferred a valuable benefit on Campstore by reason of anything already done in performance of the contract before the frustrating event (s1(3)). In reality, there was no evidence of any such valuable benefit.

Considering the contracts as terminated by breach, David would be liable to pay damages which might take into account the loss of profits suffered by Campstore, whilst, in turn, Campstore would be liable to compensate Safehands for their loss of profits.

Students usually engaged in part of the analysis outlined above but rarely presented a comprehensive consideration in which both frustration and breach were examined and the consequences were clearly explained and applied. In particular, students often recognised the possibility of frustration in the case of the contract between Campstore and David, presumably because his non-availability evoked notions of ‘destruction of the subject matter’, Taylor v Caldwell being the most frequently cited, though not directly apposite, case. Yet they rarely recognised that the consequences of the termination of that contract may have been to produce such a change in the fundamental nature of the contract between Campstore and Safehands that it amounted to frustration of the common venture. Some students concentrated almost entirely on breach, taking the opportunity to contrast breach of condition with breach of warranty. In the case of David, this allowed them to rehearse the distinction between Poussard v Spiers and Pond and Bettini v Gye, whilst the seriousness of the breach in the case of Campstore and Safehands was generally regarded as self-evident. In discussing the consequences of frustration, students usually found it difficult to explain the provisions of the Law Reform (Frustrated Contracts) Act 1943 with any precision. They were especially hesitant in dealing with the circumstances in which expenditure on expenses can be recompensed and money can be recovered when a valuable benefit has been conferred. Discussion of damages for breach was generally accurate, though rather superficial.

Question 12

For comments on answers to this question, see the comments on answers to Question 09 (above).
Mark Ranges and Award of Grades

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Converting Marks into UMS marks

Convert raw marks into Uniform Mark Scale (UMS) marks by using the link below.

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