Criminal law Scenario 1

Question 01

Students answering this question generally understood that Ellie’s actions in the café towards Alison (and Beth) in screaming insults and holding out the bottle of water could constitute the crime of assault. In terms of the actus reus, some were content with a minimal account of the requirement for conduct which causes the victim to apprehend immediate unlawful personal violence, whilst others expanded on the basic definition, sometimes excessively, to explore the significance of words alone as well as gestures (Ireland). Additionally, stronger answers dealt with the requirement for the threat to be of immediate personal violence (Smith v Chief Superintendent of Woking Police Station, Logdon v DPP, Constanza), a requirement which they had little difficulty in pronouncing to be satisfied in view of the relative proximity of all parties.

The analysis of mens rea tended to be handled less well. Students understood that intention or recklessness as to causing fear of immediate personal violence was required but frequently assumed that Ellie was directing her conduct at Beth rather than at Alison. This meant that they omitted to discuss transferred malice, concluding instead, rather simplistically, that Ellie directly intended to cause apprehension in Beth. Some referred to recklessness, often in conjunction with an argument that Ellie should have been aware that Beth would not know what was in the bottle, but rarely to argue that even if Ellie was directing her conduct towards Alison, she must have known of the risk that Beth could be equally affected. When transferred malice was introduced, students often did little more than mention it and did not seek to explain its elements clearly.

Beth’s liability for her action in throwing hot coffee over Ellie provoked a variety of responses from students. Many opted for an argument that the injuries amounted to serious harm, and so grievous bodily harm under either s20 or s18 of the Offences Against the Person Act 1861. The possibly permanent, highly visible nature of these scars was the key factor in that judgment of serious injury, though some identified the injuries as wounding, a creditworthy argument given the damage to Ellie’s skin that had obviously resulted. Others settled for actual bodily harm under s47. There was no doubt that the injuries fell within that definition but the failure to explore the possibility of a more serious offence was a clear omission. Once again, however, establishing mens rea was the crucial element distinguishing the better answers. Beth’s act in throwing the coffee was almost certainly an instinctive response to her terror prompted by her belief that Ellie was about to throw acid at her. This made it highly unlikely that she gave much thought to the precise consequences of her act, other than that it might deter Ellie. If so, then at best, Beth was reckless as to some harm and the offence was that under s20. Many arrived at that conclusion, though not necessarily by that route, opting instead for the argument that Beth intended some harm. This argument was often supported by reference to indirect (oblique) intent and extended into the further suggestion that it might be possible to prove a s18 offence. However, many students approached the mens rea issue in a rather general way, content to identify the legal requirements correctly but not exploring in any detail how they would apply to the facts. As always, a significant number of answers incorrectly identified the s20 mens rea as intention or recklessness as to serious injury, or as including as to wounding, or merely as intention or recklessness in the abstract. Some answers also confused actus reus and mens rea requirements, asserting that only some harm need be proved rather than serious harm.

Most, though by no means all, students recognised that Beth might be able successfully to argue self-defence in response to the offence against Ellie of which she was prima facie guilty. Many answers indicated clearly that the general proposition that an accused may use such force in self-defence as is reasonable in all the circumstances can be understood as requiring that the use of
some force should be necessary, and that the force actually used was proportionate. Within this framework, however, there was considerable variation in the detail in which the issues were explored. More able students explained that the common law requirements for the defence have been re-stated (with some amendments) in the Criminal Justice and Immigration Act 2008 s76, stressed that the necessity to use force must be judged on the facts as Beth genuinely believed them to be (Gladstone Williams, s76(4)), and referred to the fact that Beth believed the bottle to contain acid. In terms of proportion, they recognised that Beth could not judge her response to a nicety (s76(7)(a)) and that evidence that she had only done what she honestly and instinctively thought was necessary for a legitimate purpose was strong evidence that she had taken reasonable action (s76(7)(b)). This enabled them to conclude that, since Beth feared imminent attack with acid in a confined space, even action on her part which might result in serious injury to Ellie could be justified in self-defence as being both necessary and proportionate. Less able students omitted some or many of these elements, or failed to explain the framework, so that the argument was incomplete or not fully coherent and the conclusion was poorly supported.

Question 02

With the exception of a relatively small proportion of students who did not recognise, or at any rate did not address, issues concerning diminished responsibility, students correctly interpreted the question as demanding explanation and application of the offence of murder and of the partial defences of diminished responsibility and loss of control. There was little doubt that Chris’s acts in striking Dave twice had caused Dave serious injury, nor any significant doubt that the removal of the life support machinery represented the only possible break in the chain of causation. Consequently, extensive discussion of more general aspects of causation did not really advance the argument about whether Chris had caused Dave’s death, though many students indulged in such discussion, often at the expense of a more focused analysis of the specific issues. The key question was whether, in removing the life support, the doctors had made the considered decision that Dave was already dead (brain-stem death), so that the life support machinery was merely preserving the semblance of life. If that were the case, then Chris had clearly brought about brain-stem death, and so had caused Dave’s death and nothing done by the doctors could be a break in the chain of causation. The Court in Malcherek and Steel did not quite deal with the issues in this way, though it was unwilling to permit a challenge to the expertise of the doctors in making the decision to remove the life support, after which, on any definition of death, the victim was dead. The only possible argument for a break in the chain in Chris’s case would be if there was clear evidence that Dave might still have been alive and that the decision to remove life support was in some way grossly negligent. Students who cited Malcherek and Steel often tended just to state that brain-stem death is actually death but did not explain exactly how this proposition might be applied, whilst a significant proportion wanted to argue that Dave was a living human being when he was attacked by Chris because he had not suffered brain-stem death at that point (and so did not use Malcherek and Steel in the context of the consequences of the attack and the action taken by the doctors). Many more students simply argued by reference to cases such as Smith, Jordan and Cheshire that medical negligence does not usually break the chain of causation. This is certainly true but it did not quite address the issue. Some students sought to argue the point by reference to Bland, asserting that the doctors did not break the chain because the law permits removal of life support in such cases. This would have assumed that Dave was not dead but was in some kind of vegetative state. If so, the decision to remove life support after two weeks would have been highly premature and would have cast serious doubt on the chain of causation.

In relation to mens rea (malice aforethought), most students explained that an intention to kill or to cause grievous bodily harm suffices, and many discussed the distinction between direct and indirect (oblique) intention (Mohan, Woollin, Matthews and Alleyne). More perceptive students then went on to make good use of the facts that Chris struck Dave heavily on the back of the head,
struck him again, even more heavily, as he fell and then spoke words indicating that he had no expectation that Dave would die. All of these facts suggested that Chris intended injury, probably serious injury (whether directly or indirectly), but not death. Of course, this was still sufficient mens rea for murder. Less able students tended to assert an intention to kill or an intention to cause serious injury without exploring the key facts, so that conclusions were drawn very superficially.

In discussing the partial defences of diminished responsibility and loss of control, most students demonstrated a strong knowledge of the elements of the defences and there were many excellent answers in which the elements were convincingly applied to the facts in the scenario. It was interesting and pleasing to note that most students incorporated discussion of the causal requirement in diminished responsibility, even if they were not always entirely sure how to emphasise its application. Similarly, in discussing loss of control, many students were familiar with the definition of loss of self-control adopted in *Jewell* and with the interpretation of the sexual infidelity exclusion adopted in *Clinton*. Nevertheless, the approach to the substance of the anger trigger remained superficial and sometimes inaccurate, with little reference to the objective nature of the tests and frequent suggestions that the two-stage test (circumstances of an extremely grave character/justifiable sense of being seriously wronged) is, in fact, an ‘either or’ test. Consequently, the application to the facts was often little more than an unsupported assertion that Dave’s conduct in laughing and turning away was or was not of sufficiently grave character and did or did not give Chris a justifiable sense of being seriously wronged. Similarly, though students could quote the terms of the final objective test very accurately, few applied the requirement that the “the circumstances of D” refers to “all of D’s circumstances other than those whose only relevance to D’s conduct is that they bear on D’s general capacity for tolerance or self-restraint”, and so most students failed properly to consider whether Chris’s depression and associated suspicion and anger could be taken into account.

**Question 03**

This question asked students to consider what criticisms may be made of the current law on murder and voluntary manslaughter, and to suggest possible reforms to deal with those criticisms. The inclusion of voluntary manslaughter meant that answers on murder alone would not be adequate to attract maximum marks, though sufficient depth of treatment of either of the partial defences (loss of control and diminished responsibility) in combination with murder and suggestions for reform would do so. Of course, treatment of murder and both partial defences would be assessed slightly differently from treatment of murder and one only of the partial defences, given the need to strike a balance between depth and breadth. Students were obviously well prepared to debate the issues raised by the question and there were many answers which displayed both broad-ranging and detailed knowledge of the criticisms to which the current law has been subjected. Even less able students rarely failed to present some substantial argument, though, inevitably, the arguments were more limited in number and/or in development. Though identification and explanation of reform proposals was usually the less well developed aspect of answers, nonetheless there were still many very good responses to this part of the question which revealed considerable depth, and sometimes breadth, of knowledge and understanding of possible reforms.

In discussing murder, students expressed powerful criticisms of the role of the mandatory sentence of life imprisonment, arguing that it was entirely incapable of suggesting a distinction between the culpability of, say, the mercy killer and the sadistic serial killer. Nor could it serve the purpose of distinguishing between the guilt of a person with an intent to kill and one with an intent to cause serious injury. Further, the requirement for partial defences was often attributed to the malign influence of the mandatory sentence of life imprisonment, without which, it was alleged, the recognition of variations in culpability could have been dealt with by judges as an issue of
sentencing. Students also wrote perceptively about the actus reus of murder by reference to the notions of the definition of death and of a human being, the continuing uncertainty over the status of oblique/indirect intention, the exclusion of the defence of duress, and the problem of ‘excessive self-defence’. There were also some interesting comparisons and contrasts drawn between the law on mercy killing/assisted suicide and withdrawal of life-sustaining treatment as in *Bland*. Though, inevitably, there were variations in quality of treatment of these issues, on the whole, students demonstrated a strong grasp of the possible deficiencies in the rules of law.

Equally, students frequently succeeded in identifying a large range of criticisms of the current law on the partial defences. As always, the depth of treatment varied considerably between answers but most students were able either to present two or three criticisms in detail, or a much larger range more superficially, and many students were able to combine breadth with depth to write very strong answers. On loss of control, students questioned the very necessity for a loss of self-control even when relying on the fear trigger, the puzzling relationship between loss of self-control and the exclusion of a ‘considered desire for revenge’, the highly onerous requirements of the ‘anger’ trigger, the sexual infidelity exclusion, and the exclusion of certain of the accused’s characteristics from the ‘circumstances’ which may be considered in the application of the objective test. They wrote particularly persuasively on the anger trigger and the sexual infidelity exclusion. The criticisms of the diminished responsibility defence were understandably fewer in number, since the amended definition in the *Homicide Act 1957 s2* does seem to have resolved much of the disquiet that existed about its predecessor. The most prominent comments expressed related to the reverse burden of proof, where it was interesting to see that students often also acknowledged the arguments used by the courts to reject criticism, the difficulty in accommodating the effect of intoxication where there is evidence of some kind of addiction or dependence, and the failure to adopt the Law Commission recommendation for the inclusion of developmental immaturity as an alternative to ‘abnormality of mental functioning’ in the case of young persons. There were also more tentative criticisms about the need to prove a causal connection between the abnormality of mental functioning and the accused’s conduct in causing death, and about the increasingly similar requirements of diminished responsibility and insanity.

In discussing reform, there was almost universal reference to the Law Commission Report of 2006 (*Law Com 304*), in which a re-structured law of homicide was proposed involving three different tiers, comprising of first and second degree murder, and manslaughter. Many students gave an accurate, though not necessarily comprehensive, explanation of what would distinguish first from second degree murder. Other reforms suggested included a re-definition of the meaning of intention (though not always with any indication of what that definition would, or should, be), the abandonment of the mandatory sentence of life imprisonment, and consequently the abolition of the partial defences, the introduction of some kind of partial defence for ‘mercy’ killings, and the extension of the defence of duress to all cases of murder and manslaughter, whether under a tiered structure or not. Apart from abolishing the partial defences entirely, proposed reforms to them included removing the need for a loss of self-control, modifying the anger trigger to require only the ‘justifiable sense of being seriously wronged’, repealing the sexual infidelity exclusion so that evidence of sexual infidelity would be judged according to the ordinary elements of the anger trigger, and placing the burden of proof on the Crown in diminished responsibility. Some also suggested a specific list of ‘recognised medical conditions’ in diminished responsibility, perhaps failing to recognise the reliance on the WHO classification and the flexibility adopted by the Courts to the acknowledgement of new conditions.
Criminal law Scenario 2

Question 04

Students generally recognised that the broken leg suffered by Gianni was sufficient to amount to (really) serious harm, and so to fall within the scope of an offence of grievous bodily harm under either \textit{s20} or \textit{s18} of the \textit{Offences Against the Person Act 1861}. There were some who opted instead to discuss only the offence under \textit{s47} of assault (battery) occasioning actual bodily harm, an approach which was creditworthy, though of less value. A significant proportion of students seized upon the description of the ‘violent push’ as indicating a battery, which they then discussed at length. They then used this as the basis of an argument about liability for the \textit{s47} offence or switched away from the lesser offences to consider \textit{s20} and/or \textit{s18}. In some instances, the discussion encompassed all of the foregoing offences. Inevitably, this approach absorbed more time than was desirable and tended to constrain discussion of the key mens rea issues and/or defences of consent and intoxication. There could be no doubt that Franco’s conduct in giving Gianni a violent push from behind caused him to fall awkwardly from the roof of the car and break his leg. Consequently, answers did not need to explore the rules on causation in any detail at this point and yet many students presented a rather mechanistic, often lengthy, account of the rules before making a brief application to the facts. The principal significance of this approach was that students either spent a long time repeating the rules when they came to discuss Franco’s liability for Harriet’s injuries, where causation truly was in issue, or they seemed to have exhausted their interest in causation by the time that they reached liability for Harriet’s injuries, and so devoted little time to it at that point. In discussing mens rea, a surprising number of students argued only that Franco clearly \textit{intended} some harm (\textit{s20}) or even that he \textit{intended} serious harm (\textit{s18}). This was sometimes argued as direct intention, relying on the evidence that he knew that there was traffic in the street (which could itself have caused injury to Gianni if he fell from the roof) and that he was annoyed to be losing the race. Sometimes it was argued as indirect (oblique) intention, relying on the same facts but interpreting them to provide evidence that some injury (even serious injury) was a virtual certainty and that Franco must have known this. Though there was obvious merit in these arguments, particularly in relation to the intention to cause some harm, the more convincing arguments were supplied by those who saw it as a question of foresight of risk of harm, rather than as a question of purpose or foresight of virtual certainty, and so went on to consider \textit{recklessness} in the context of the \textit{s20} offence. For those students who were content to discuss only the lesser liability under \textit{s47}, proof of mens rea presented little difficulty since Franco clearly intended the push which was the mens rea of the battery, and itself sufficient mens rea for the \textit{s47} offence.

The cuts to Harriet’s face and arm resulting from her collision with the lamppost were almost certainly ‘wounds’ within the definition proposed by \textit{JCC v Eisenhower}. They were also clearly ‘more than merely trivial hurt or injury’ and so amounted to actual bodily harm (\textit{Chan-Fook}). Consequently, it was permissible for students to argue for liability under either \textit{s20} as unlawful and malicious wounding, or under \textit{s47} as assault (battery) occasioning actual bodily harm. It is possible that the combination of injuries was sufficient to amount in the aggregate to grievous bodily harm (\textit{Brown and Stratton}) but, given the near-certainty that the injuries were wounds, and the certainty that they constituted actual bodily harm, it was not really profitable to extend the analysis into the grievous bodily harm version of \textit{s20}. Most students chose to discuss either \textit{s20} wounding or \textit{s47} actual bodily harm or, occasionally, both. The distinction between the most able and less able lay in the way in which they dealt with causation and mens rea issues. In relation to causation, stronger answers identified two issues: first, did Harriet’s response in braking sharply to avoid hitting Gianni break the chain of causation; second, did Harriet’s failure to wear a seat belt have any effect on responsibility for causation? Many students dealt perceptively with both issues. They equated Harriet’s conduct in taking avoiding action with the ‘escape’ cases (\textit{Roberts}) and argued that, faced with the immediate risk and having to respond instantly, Harriet’s action was...
entirely reasonably foreseeable, and certainly not ‘so daft’ that it could break the chain of causation. In relation to the seat belt, they sometimes argued that it was an application of the ‘thin skull’ rule, sometimes that, whatever contribution it made to the extent of her injuries, it did not controvert the proposition that Franco’s conduct was a significant cause of the crash. Less able students tended to deal with these issues rather more generally through simple assertion that factual and legal causation could be established without being specific as to which rules would be applied, particularly in relation to the ‘escape’ issue. Surprisingly, some students barely recognised the causation issues at all. The strongest evidence in favour of proof of mens rea against Franco in connection with the s20 offence was his knowledge that there was some traffic in the street when he pushed Gianni. However, it was quite a big step from proof of this knowledge to proof that he foresaw the risk of injury to anyone other than Gianni, however obvious it might have been in hindsight. Even so, many students presented a strong argument that he must have foreseen a risk to others, either from a fall by Gianni onto another car or, more probably, by a fall which necessitated instant avoiding action in which a driver and/or passengers could be injured, as actually occurred. Less able students failed to interrogate the facts in any depth and drew conclusions which were little more than unsubstantiated assertion. Those students who argued for liability under s47 had first to establish a battery, and many did so very perceptively by reference to indirect battery in cases such as DPP v K and Haystead v Chief Constable of Derbyshire. Less able students tended simply to assert that a battery had taken place without being clear exactly how the elements could be established. Treatment of mens rea issues for battery was very similar to the treatment of mens rea in s20 explained above. Surprisingly, few students took the opportunity to argue for transferred malice. Where the argument was about s47, this would have seemed a very profitable route, since the requirement to establish the elements of battery would have been matched by the undoubted battery on Gianni committed by Franco. Where the offence alleged was s20, proof of intention or recklessness as to some harm on Gianni to be transferred to the actual injuries to Harriet might have been a significantly easier way of proving mens rea than the rather tortuous route to an independent mens rea in relation to Harriet. Of course, Franco and Gianni had embarked on their favoured childhood game of racing each other across a line of parked cars only after they had drunk a lot of alcohol. Many students understood that, as a result, Franco might possibly plead two defences: first, that Gianni had consented to run the risk of injury normally associated to the kind of ‘rough horseplay’ in which they were engaged (Jones, Aitken); second, that he (Franco) had been so affected by the alcohol that he could not form the required mens rea for any offence allegedly committed. A thorough analysis and application of either of these defences merited full credit. Where students addressed both, less detail on either or both was acceptable. The more able students explained the general framework for the defence of consent, identified rough horseplay as the most likely exception to the general rule prohibiting use of the defence in the case of an offence involving more serious injury but concluded that Franco’s actions were probably outside the scope of the implied consent given by Gianni. Less able students often omitted the general framework for the defence of consent, wrongly selected ‘sport’ as the exception, or paid no attention to the scope of the consent given by Gianni. In dealing with the alcohol issue (intoxication), better answers distinguished between voluntary and involuntary intoxication, and between offences of specific and basic intent, and usually went on to argue that it seemed unlikely that Franco would succeed with an intoxication claim. This was on the basis that, either any offence with which he would be likely to be charged was one of basic intent, or, even if a s18 offence were charged, the factual evidence did not suggest that he failed to form the required intent. Once again, less able students omitted some, or most, of this analysis and application, a common approach being simply to state that any plea of intoxication would fail because all the offences in contemplation were of basic intent without ever explaining the meaning of ‘basic intent’ and why the relevant offences should be so described. Some very perceptive students were able to make connections between the pleas of consent and intoxication, indicating the difficulties that arise from the interpretation of cases such as Aitken and Richardson and Irwin.
Question 05

Answers to this question almost always identified the possibility that Isaac may have committed involuntary manslaughter in the form of both an unlawful act and gross negligence. In dealing with unlawful act manslaughter, students invariably explained that the unlawful act must be a crime requiring proof of both actus reus and mens rea and then correctly selected assault (in the technical sense) as the crime. They explained, in varying degrees of detail, that Isaac’s conduct had caused Joan to fear immediate personal violence and that, crucially, he had either intended it to do so or must have been aware of the risk that it would do so. Some referred to the terrifying effect of the scarf obscuring his face but this was more likely designed to preserve the secrecy of his identity. The banging on the car and the shouting was more clearly the conduct which had the requisite effect.

The difficulties in the analysis tended to begin when students turned their attention to the requirement for the unlawful act (crime) to be ‘dangerous’. Most explained the Church test, though some were unable to articulate the requirement to prove that a ‘sober and reasonable person’ would have foreseen the risk of some harm resulting from the unlawful act, and there were a significant number who suggested that a risk of death must be proved, possibly confusing the elements of unlawful act manslaughter with those of gross negligence manslaughter. However, when considering reasonable foresight of some harm, many students simply argued that proof that Joan was terrified was sufficient evidence of such harm. This ignored clear case law, particularly Dawson, holding that something more is necessary. Shock, for example, can result from fear and can be regarded as physical injury. It can also generate a heart attack, though usually only in those with a pre-existing susceptibility. In Dawson there was no obvious evidence which would have led a reasonable person to realise that the victim suffered from a heart condition. As many students pointed out the evidence in Watson, by contrast, was that the victim was old, frail, and, to the actual or constructive knowledge of the accused, clearly badly affected by the accused’s conduct. So, it had to be shown that at the very least a reasonable person would have foreseen harm in the form of shock and this would be more likely to be proved where the accused had some actual or constructive knowledge of a pre-existing heart condition which could be attributed to the reasonable person. Therefore, reference to Watson was important and creditworthy but students tended to assume far too easily that Joan’s age alone was determinative. The facts did not reveal any obvious description of Joan’s state of health, and old age alone is not a guarantee of ill-health or of special susceptibility to a heart attack.

The final issue in the consideration of Isaac’s liability for unlawful act manslaughter lay in the necessity to prove that his conduct caused Joan’s death. There were two possible obstacles here: first, that Joan’s heart attack may well have depended in part on a pre-existing heart condition; second, that another prospective thief had driven the car off with Joan inside, and so significantly delayed any possibility of medical treatment that may have been available after Isaac alerted the ambulance service. Most students had no difficulty in surmounting the first obstacle by reference to the thin skull rule, usually citing Blaue. Some confused the objective requirement in ‘dangerousness’ with this separate requirement in causation, to the detriment of the explanation and/or application of either or both rules. There was a little more confusion in the treatment of the second possible obstacle, though students generally concluded, in one way or another, that the actions of the second prospective thief did not break the chain of causation. Sometimes this was argued on the basis that she may already have been dead anyway by the time that the car was driven away, sometimes that a further attempted theft was reasonably foreseeable. Sometimes, students simply asserted that nothing disturbed the conclusion that Isaac’s conduct had made a significant contribution, whatever had subsequently occurred. The most perceptive argument was probably that which suggested that the direct cause of Joan’s death was undoubtedly the heart
attack resulting from Isaac’s conduct. An omission to provide timely access to treatment, or conduct which prevented timely access to treatment, whether foreseeable or not, could not possibly break the chain. In the case of Isaac, of course, his failure to provide timely access could potentially be the basis of a further instance of involuntary manslaughter, by gross negligence. The possible liability of the second prospective thief was not in issue but, had it been, it would have depended once again on proof of duty and breach in the context of gross negligence manslaughter. Yet that would merely have created a further instance of liability. It would have had no bearing on the causal chain between Isaac’s assault and Joan’s death.

Isaac’s possible liability for gross negligence manslaughter was based upon his failure to summon medical help for Joan in a timely fashion. Consequently, all the requirements of gross negligence manslaughter had to be proved in relation to that failure, including both causation and the risk of death. This was important because some students fell into confusion by first identifying that failure but then treating Isaac's initial conduct in frightening Joan as the relevant conduct for determining causation and/or the risk of death. The first task was to establish that Isaac was under a duty to Joan to take some appropriate steps to assist her. Many students correctly argued that Isaac’s earlier conduct had created a dangerous situation for Joan of which he was clearly aware, so that a duty was imposed on him in accordance with the principle developed in cases such as Miller. This was a far more convincing argument than the ‘voluntary assumption of responsibility’ approach (Stone and Dobinson) adopted by others, since the belated attempt to summon assistance was Isaac's attempt to fulfil the Miller-based duty rather than conduct which created a wholly different duty. Many students relied more generally on Lord MacKay’s statement in Adomako that the ordinary principles of the law of negligence will suffice to establish whether a breach of duty has occurred, and so sought to locate the duty in an application of the three-part Caparo v Dickman test. This approach tended to move the focus away from the significance of Isaac's initial responsibility in the assault on Joan towards an inaccurate explanation and application of, say, the proximity requirement, which was often said to be satisfied simply because Isaac was physically proximate to Joan. Of course, this conclusion would contradict the well-established proposition that there is no general duty on anyone to intervene to assist a person in danger. The true explanation of ‘proximity’ in this case lay in Isaac’s creation of a dangerous situation, by which he had brought himself into legal ‘proximity’ with Joan. An alternative explanation is that the ‘ordinary principles of the law of negligence’ include the special requirements for establishing a duty when the conduct is an omission rather than an act, pointing once again in the direction of the creation of a dangerous situation.

Discussion of the elements of breach and causation was frequently rather superficial and the two elements were often treated almost wholly independently, as if it were not the breach which had to be the cause of the death. The alleged breach was the failure to call for assistance in a timely manner but it could also have extended to Isaac’s failure to stay with Joan which provided the opportunity for the second thief’s intervention. The facts in the scenario did not specifically state when Joan died, though her laboured breathing indicated that it was not before Isaac ran off. It is likely that the delay in calling for assistance, combined with leaving the scene, did amount to a breach. In terms of causation, it would be a matter of medical evidence whether timely medical assistance would (or it was very highly probable that it would) have saved Joan. If not, then the breach did not cause her death, irrespective of the intervention of the second thief. If it would have saved her, then the breach did cause her death unless the intervention by the second thief acted as a novus actus interveniens (note that this is a different causation issue from that discussed earlier in relation to unlawful act manslaughter since the conduct in assaulting Joan was wholly different from the conduct in not summoning assistance). Essentially, Isaac abandoned Joan to her fate for at least 30 minutes. Since Isaac was a thief himself, it could hardly be said that it was not reasonably foreseeable that that ‘fate’ would not include the possibility of a further attempted theft during which a thief might drive the car away with no knowledge that anyone was in it
(contrast this with the action of a crazed thief who stabbed Joan and threw her out of the car), and so delay still further any medical assistance for Joan.

Most students recognised that Isaac's conduct created a risk of death (Misra and Srivastava) though, as indicated above, this was often wrongly attributed to the initial conduct in assaulting Joan rather than to the breach by omission. Similarly, most students understood that the negligence had to be 'gross', and cited Adomako for the proposition that this required conduct that was 'so bad in all the circumstances' that it should be regarded as criminal, and/or Bateman for the proposition that the conduct must 'go beyond a mere matter of compensation between subjects' (civil liability) and extend into the criminal sphere. However, as is common in this area, students found it rather more difficult to pin down precisely what it was in the conduct that was so bad that it was elevated into the sphere of the criminal. Given the notorious circularity of the test, this was perhaps unsurprising and did not significantly affect the quality of the treatment viewed in the round.

**Question 06**

For comments on answers to this question, see the comments on answers to question 03.

**Law of Contract Scenario 3**

**Question 07**

In this question, the dispute between Angela and Baljeet and that between Angela and Dan raised issues of formation of contract. In the case of Angela and Baljeet, the resolution was to be found in an application of the rules on offer and acceptance. The first possibility was that Angela's first text message was an offer to sell both 'Watson' books for £100 (Carlill v Carbolic Smoke Ball Co). In that case, Baljeet's reply in which he asked whether he could buy just one of the books for £60 could have been merely a request for further information or, alternatively, a counter offer (Stevenson v McLean, Hyde v Wrench). If the former, then it was unlikely that any agreement had actually been reached because Angela's response, "Ok. That's good. The 1982 Watson is yours", would have been an attempt to impose acceptance by silence (Felthouse v Bindley). If the latter, then that response would have been a valid acceptance, creating a contract for the sale and purchase of one of the Watson books.

The second possibility was that Angela's original message was an invitation to treat rather than an offer (Partridge v Crittenden, Fisher v Bell, Pharmaceutical Society of GB v Boots Cash Chemists). Perhaps a little surprisingly, this would not have affected the subsequent analysis very significantly. As in the first possibility, the issue would then have been whether Baljeet's reply amounted to a continuation of the preliminary negotiations or could be construed as an offer. Thereafter, the elements of the analysis would have been exactly as in the first possibility. If there was a valid agreement, and so a contract (since intention to create legal relations and consideration were never in doubt), then Angela broke it when she sold both books to another bookseller. The measure of damages would have been the difference between the price for which the relevant book could have been obtained on the open market and the price agreed.

Answers generally recognised the first possibility but did not go on to consider whether Angela's first message might, instead, have been an invitation to treat rather than an offer. Some students were content simply to treat the first message as an offer, Baljeet's reply as a counter offer, and the further response by Angela as acceptance. However, many students did explain the difference between an offer and an invitation to treat, and between a counter offer and a request for further information, even if they did not then pursue the alternative possibilities. Answers adopting this
approach often scored very highly. Students who concluded that there was a contract which had been broken by Angela almost invariably discussed the remedy of compensation in a perceptive manner but sometimes also argued for the possibility of specific performance. As a discretionary remedy intended to achieve a stronger just solution than could be ensured by an award of damages, it is highly unlikely that specific performance would be awarded by a court where third-party rights had already intervened.

Rather oddly (particularly in view of the facts in the scenario dealing with Dan’s claim), some students devoted considerable time to explanation and application of the other elements in formation, namely intent to create legal relations and consideration. Since neither was seriously in issue, a very brief reference to them would have sufficed.

In the case of Angela and Dan, there were two considerable obstacles facing Dan if he were to assert any rights to the book Angela promised to give him after he had helped her to pack up her belongings in preparation for moving house. First, it seemed to be an arrangement between neighbours who were friends, and so to be classed as a ‘social’ agreement equivalent, or very nearly equivalent, to a domestic agreement. The general presumption of the law would be that such an agreement would not be intended to create legal relations, and so could not form the basis of a valid contract (*Balfour v Balfour*, *Merritt v Merritt*, *Simpkins v Pays*). This presumption is rebuttable but it was difficult to see the evidence on which Dan could rely to rebut it.

Second, Angela’s promise to give Dan the book seemed very much after the event of Dan’s help and only a recognition of what he had previously done. There seemed to be no element of bargain in which Dan would undertake the work in return for the promise of the book. That raised the issue of sufficiency of consideration, the argument being that Dan would be relying on ‘past consideration’ in order to enforce the promise. Past consideration would not normally be sufficient (*Re McArdle*) and Dan would have to be able to argue that there was a prior request by Angela that Dan should do the work. The request would have to carry an expectation of payment in some form which could then be fused with Angela’s subsequent actual promise to give Dan the book (*Lampleigh v Brathwait*, *Re Casey’s Patents, Stewart v Casey*). In the perhaps rather unlikely event that a contract did exist for ‘payment’ in the form of the book, the remedy would have been damages to the value of the book on the open market.

Students were usually very adept at recognising that issues of intention to create legal relations and consideration were raised, and most understood the operation of the presumptions in the former and the basic rule of past consideration and how it might be circumvented in relation to the latter. Less able students tended too easily to assume that the relationship between Angela and Dan was simply to be equated with a domestic relationship and did not explore the possibility that, albeit social, the relationship did not necessarily dictate a lack of intent. Similarly, the answers on consideration gave a limited account of past consideration and did not explore any possible argument that there was a prior request carrying an expectation of payment. Some of the students who devoted excessive attention to intent to create legal relations and consideration in discussing the negotiations between Angela and Baljeet now paid little attention to them in assessing Dan’s rights against Angela or, at best, simply referred to the earlier explanation of the rules but did not attempt application to the specific facts concerning the relationship between Angela and Dan.

**Question 08**

In this question, Eryk, a dealer in rare books, suggested to Angela that although he was no expert he did not think that a book he had obviously recognised as a rare edition and that he could sell for £1000 was, in fact, worth more than £10. It seems that Angela relied on his statement that he had no special expertise and was persuaded that the book was of little worth, so that she sold it to him...
for £10 (Oscar Chess Ltd v Williams, Dick Bentley Productions v Harold Smith (Motors) Ltd – for general propositions about statements by experts, rather than the difference between terms and representations). His false statements as to his status and his belief in the value of the book amounted to false representations of fact (misrepresentations) which induced Angela to make the contract (Edgington v Fitzmaurice, Attwood v Small). They were clearly fraudulent misrepresentations (Derry v Peek) entitling Angela to rescind the contract, claim back the book and to sue for any resulting damage (of which there was no obvious evidence) on the basis of the tort of deceit. Students generally identified the possibility that Eryk had been guilty of misrepresentation, so that the variation in quality of answers derived almost entirely from the detail in which the various elements were explained and applied. Some students did not develop any significant explanation of the requirements for a misrepresentation (in terms of the nature of the statement and its required effect in inducing the innocent party – Angela – to make the contract). Such students tended to assume that there was a misrepresentation and then to hurry on to an examination of the kind of misrepresentation. This often involved discussion of all three kinds: fraudulent, negligent and innocent, even though it was essentially undeniable that if there was a misrepresentation it was fraudulent. Discussion of remedies for misrepresentation was often rather excessive in dealing with all forms of misrepresentation rather than concentrating on those for fraudulent misrepresentation. Conversely, the actual remedies themselves were frequently treated in a superficial manner, both in explanation and application.

When Angela bought the bookcase from Woodblock, she was careful to explain that she would be using it to store some very heavy books. Woodblock assured her that it would be suitable for her needs and there is no evidence to suggest that they warned her that any special precautions would be necessary (such as how the books should be placed – though the reasonable expectation would be that the largest, heaviest books would be placed on low shelves – or whether the unit should be secured to a wall or could simply be left free-standing). The Consumer Rights Act 2015 implies into all contracts for the supply of goods between a trader and a consumer terms as to satisfactory quality (s9), fitness for purpose (s10) and description (s11). There may have been an issue about the satisfactory quality of the bookcase but the more apt term would probably be the term as to fitness for purpose, given that Angela had expressly made known to Woodblock the purpose for which she required the bookcase (s10(1)) and that it was not unreasonable for Angela to rely on the skill or judgment of Woodblock (s10(4)). If this term was broken, then Angela would have the short-term right to reject (s19(3)(a), as amplified in s20 and s22) but could instead choose to exercise rights of repair or replacement (s19(3)(b), as amplified in s23) and, ultimately, the right to a price reduction or the final right to reject (s19(3)(c), as amplified in s20 and s24). Angela would also be able to claim compensation for the damage to books, other furniture and household items by relying on the standard rules for breach of contract under the common law. There were many strong answers to this part of the question which displayed sound knowledge and understanding of the relevant terms implied by the 2015 Act and, very pleasingly, of the remedies available for their breach. Less able students did not properly explore the details of the terms, gave only a limited account of the possible remedies, or omitted any discussion of the common law remedy of damages in relation to the consequential damage to books, other furniture and household items.

Question 09

This question invited students to consider what criticisms may be made of the current law on formation of contract and to suggest possible reforms to deal with the criticisms. Some students dealt primarily with issues concerning agreement (offer and acceptance) whilst others attempted to develop criticisms across the whole range of formation (agreement, intent to create legal relations, consideration). In practical terms, there was little to choose between these two approaches since
students adopting the former tended to present extensive, detailed criticism which was highly creditworthy whilst those adopting the broader approach wrote more superficial, but of course more broad-ranging, answers which were roughly equivalent in quality. Though it was acceptable for students to treat some aspects of the rules on formation in a positive way, answers which did not introduce a more critical element inevitably lacked real substance, since students were often unable to isolate the positive features with any precision. Some students sought to include a discussion of terms, including terms excluding or limiting liability. Where this was related to issues of formation, such as issues of incorporation, it was possible to give credit. However, this approach sometimes resulted in answers which were simply about the various kinds of terms and not about formation in any significant way.

In discussing agreement, students usually succeeded in presenting powerful criticisms of the distinctions between offers and invitations to treat and between counter offers and requests for further information. They then turned the focus onto the rules concerning acceptance, particularly the postal rule and the refusal by the courts to sanction silence as acceptance. Some students also criticised the rules on revocation, suggesting that there was uncertainty about revocation in unilateral contracts but also in relation to the proposition that the revocation need not necessarily come directly from the offeror. Many students also perceptively discussed these issues within the framework of the ‘battle of the forms’ and/or by reference to modern methods of communication. Less able students on this aspect were characterised by a more superficial treatment, incorporating less detail and fewer examples, and by a failure fully to articulate the alleged deficiencies in the rules.

Criticism of both the rules on intent to create legal relations and those on consideration tended to be a little less substantial. Nevertheless, there were some powerful arguments to be found. Occasionally, for example, students tried to assert that there are inadequate distinctions between different forms of domestic relationships, or that there should be a sharper distinction between domestic and social relationships. In relation to consideration, there was significant criticism of the decision in Williams v Roffey Bros on account of its apparent irreconcilability with that in Stilk v Myrick. Some students argued that the courts were wrong to rule that the law does not concern itself with the adequacy of the consideration, as contrasted with its sufficiency (Chappell & Co Ltd v Nestle Co Ltd). This seemed a much weaker argument, since, obvious inequality of bargaining power or undue influence apart, it is desirable that parties should be allowed to make the bargain that they wish for.

Students were generally less successful on the suggestions for reform part of the answer. Where students had provided strong, well-constructed critical arguments, they were more likely to have been able to propose some reforms, particularly by reference to modern forms of communication in relation to the issues of agreement. So, too, there were strong suggestions about reforming the law on consideration in the Stilk v Myrick/Williams v Roffey Bros situation. This often took the form of a suggestion that the Stilk v Myrick rule should be rigorously applied but sometimes elicited the reverse proposal that, effectively, Stilk v Myrick should be abandoned and fraudulent activity controlled by other means such as economic duress. Inevitably, students who had dealt with criticisms in a superficial and/or unstructured way found it difficult to present coherent suggestions for reform and tended to make vague, unsupported proposals which amounted to little more than that the law must be changed.
Law of Contract Scenario 4

Question 10

In this question, the contract between Fawaz and Guy was subject to the terms implied by the Consumer Rights Act 2015. It was best described as a 'mixed' contract (s1(4)), in that Guy would be supplying materials (bricks, wood, glass etc) and also services in building the wall and creating a window and door. Guy’s failure to start work within 6 weeks could potentially be regarded as a breach of the implied term under s52 as to performance within a reasonable time. However, under s54(5) (as further explained in s56), the remedy for a breach of s52 is the right to a price reduction. Consequently, if Fawaz were to be able to ‘cancel’ the contract without himself being in breach, he would have to rely on common law rules in relation to breach of a condition (or a sufficiently serious breach of an innominate term). This would mean that there would have to be a term in the contract treating time as of the essence, either from the outset or as a matter of subsequent agreement. Since there was no evidence of this, it may well be that Fawaz would have to claim a price reduction under s54(5) as a set-off against any liability for his own breach (the profit that Guy might have expected to make). Students usually discussed the implied term as to performance within a reasonable time but many did not understand that the remedy was limited to a price reduction. Few went on to consider whether there was any evidence of a contractual term (other than that implied by s52) relating to time for performance, and fewer still discussed the notion of time being ‘of the essence’. Some students fell into error by asserting that Fawaz could ‘cancel’ the contract because he had ‘revoked his offer’ before Guy had begun performance. These students seemed oblivious to the fact that a contract had already been made between Fawaz and Guy, so that revocation was no longer a possibility.

The same terms in a mixed contract for supply of goods and supply of services would be implied into the contract between Fawaz and Hakan as would have been found in that between Fawaz and Guy. In this case, however, the focus was on the poor workmanship. Though the door was badly fitted, and so difficult to open, there was little evidence that its condition, or that of any of the other materials, were in breach of the implied terms relating to supply of goods (there could have been an issue with installation of the door as part of the contract under s15, but this aspect was not part of the 2015 Act with which students were required to be familiar). Consequently, the relevant implied term was that as to performance with reasonable care and skill (s49). Under s54(3)(a) and (b) (as further developed in ss55-56), the remedies provided for breach of s49 are the right to require repeat performance and the right to a price reduction. Once again, this right does not entitle the victim of a breach to treat the contract as at an end but it does not prevent the victim from exercising any such right which arises independently, as indicated above. Where answers to this part of the question dealt with the contract as a contract for services (even if as a mixed contract), they were usually very clear and accurate, in relation both to the implied term and to the remedies for its breach. Where students treated the contract as one for the supply of goods (rather than as a mixed contract), there was often some confusion about both rights and remedies.

As explained in Question 08 the Consumer Rights Act 2015 implies into all contracts for the supply of goods between a trader and a consumer terms as to satisfactory quality (s9), fitness for purpose (s10) and description (s11). The motor of the electric power saw bought by Fawaz from Irene's Power Tools should not have burnt out after only 3 months of normal usage, and it seems quite likely that terms under both s9 and s10 will have been broken. In view of the time taken for the fault to manifest itself, Fawaz would not be able to exercise the short-term right to reject. He would be able to take advantage of the rule that, if a defect implying non-conformity with terms manifests itself within the first six months, the presumption is that it was there at the time of delivery, so that the terms were broken (s19(14)). So, Fawaz would enjoy rights of repair or replacement (s19(3)(b), as amplified in s23) and, ultimately, the right to a price reduction or the final right to
reject \((s19(3)(c), \text{as amplified in } s20 \text{ and } s24)\). The attempt by Irene’s Power Tools to deny Fawaz his rights by reference to the statement in the invoice would be of no effect. Even if a term limiting those rights was incorporated into the contract by application of the relevant common law rules, \(s31(1)\) and \((2)\) prohibit any such limitation (and, to that extent, the incorporation issue becomes almost irrelevant). Consistently with answers to Question 08, answers to this part of the question were generally accurate in explaining and applying the terms and the remedies for their breach, though there was rarely any explanation of the presumption in \(s19(14)\). Some students did not address the issue of the purported limitation of rights contained in the invoice supplied by Irene’s Power Tools but those who did usually dealt both with the common law rules on incorporation and the statutory provision in \(s31(1)\) and \((2)\).

**Question 11**

When Fawaz’s car was struck and crushed by a lorry, he did not want to go ahead with his contract to buy a car from PGW, for which he had arranged to provide his own car in part-exchange. Fawaz would have attempted to rely on the rules of discharge of a contract by frustration but would have faced the possibility of being in breach of contract should frustration be held not to apply. The argument for frustration would have rested on either the destruction of the subject matter \((Taylor v Caldwell)\) or on the proposition that performance of the contract after the destruction of the car would have amounted to a significantly different venture – frustration of the common venture \((Krell v Henry, Herne Bay Steamboat Co v Hutton)\). There were two significant counter arguments: first, that the destruction of the car was, at least in part, Fawaz’s own fault, thus taking it out of the scope of application of the doctrine of frustration \((Maritime National Fish Ltd v Ocean Trawlers Ltd, Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd)\); second, that there was no obstacle to completing the contract since the part-exchange was merely one way in which Fawaz could arrange to provide the money required to pay for the car being supplied by PGW (contrast the position if the car destroyed had been the car to be supplied by PGW).

Answers analysed in some detail the possibility that the contract was frustrated, many students referring to both destruction of the subject matter and to frustration of the common venture. Many students also argued that Fawaz was at fault for the events which led to the destruction of his car and so concluded that it was very doubtful whether Fawaz would be able to rely on frustration. On the other hand, few students explored the possibility that the destruction of the car did not prevent performance of the contract by either side and did not alter performance in any fundamental way, so that, again, proof of frustration was unlikely.

If the frustration argument were to be accepted, then the consequences would be determined by application of the provisions of the \textit{Law Reform (Frustrated Contracts) Act 1943}. Under \(s1(2)\), Fawaz would be relieved of any obligation to pay any further sums of money and would be entitled to recover the £1000 he had already paid. However, PGW had done £500 worth of repairs and maintenance to the car in preparation for delivery to Fawaz and \(s1(2)\) further provides that the court would have a discretion to award a sum of money from the sum(s) ‘paid or payable … before the time of discharge’ to recognise expenses incurred. The only sum ‘paid or payable’ before the frustrating event discharged the contract was the £1000 deposit paid by Fawaz but this would give the court the opportunity to award a sum to PGW which would either fully cover the expenses of £500 or would cover part of them. There would be no need to consider the application of \(s1(3)\) since there was no evidence that either Fawaz or PGW had obtained a valuable benefit by reason of anything done by the other before the time of discharge. Students were probably least successful in dealing with this aspect of the question. Most knew that the consequences of a finding of discharge by frustration would be determined by application of the \textit{1943 Act}, and most were able to state that all sums paid would be recoverable and all sums payable would cease to be
payable. Few, however, understood exactly how the proviso to s1(2) operates (the discretionary power in the court to allow a claim for expenses out of the sum(s) paid or payable), so that, even if they mentioned it, they were unable to apply it accurately.

If the contract was not frustrated and Fawaz refused to buy the car from PGW, he would be in breach of contract. The breach would entitle PGW to treat the contract as at an end and to sue for damages. The measure of damages would be the profit that they expected to make on the deal with Fawaz (W L Thompson Ltd v Robinson (Gunmakers) Ltd). Fawaz might try to argue that, if the market was buoyant, PGW could make this same profit by selling to someone else (Charter v Sullivan), though that would deny PGW the profit from the additional sale. Given that many students successfully considered the argument that the contract was not frustrated because Fawaz was the author of his own misfortune, it was not surprising to discover that many considered the alternative possibility that Fawaz would be in breach of contract if he were to refuse to go ahead with the contract. Students who dealt with breach usually argued that the measure of damages would be the profit that PGW would have made, and they were alert to the arguments in W L Thompson Ltd v Robinson (Gunmakers) Ltd.

**Question 12**

For comments on answers to this Question, see the comments on answers to Question 09.
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