A-LEVEL
LAW
LAW 03 Criminal Law (Offences against the Person)
or Contract Law
Report on the Examination

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Criminal Law Scenario 1

Question 01

In answering this question, students generally recognised that Alvin’s conduct in expressing his rage by shouting loudly at Bela in the café gave rise to a possible offence of assault, in that he had intentionally or recklessly caused her to apprehend immediate unlawful personal violence, as evidenced by her fainting. Most answers dealt well with the *actus reus* of this offence, noting that the ‘shouting’, though perhaps ‘words alone’, would fall within the interpretation set out in *Ireland* and *Constanza*. Of course, it was also arguable that his ‘turning towards her’ was in itself a menacing gesture, and certainly so in combination with the shouting. Since even a person who was not ‘very timid and anxious’ might have been alarmed by Alvin’s behaviour, her possession of those characteristics probably made little difference, though most students addressed this aspect by relying on the ‘thin skull rule’. Discussion of the *mens rea* was more variable in quality. In truth, even without reference to the drink and drugs consumed by Alvin, his precise aims or awareness when shouting at Bela were difficult to determine. So, though there were many strong assertions that Alvin must have intended the apprehension of immediate unlawful violence, some of which relied on a rather improbable application of indirect/oblique intention (courts would be highly unlikely to engage with that debate in relation to an offence of assault), the more convincing answers argued for recklessness rather than intention. However, even there, weaker answers failed to give a clear explanation of the meaning of subjective recklessness, and how it might be applied.

Most, but by no means all, students correctly extended the analysis from assault to assault occasioning actual bodily harm under the Offences Against the Person Act 1861 s47, recognising that the elements of the offence are the *actus reus* and *mens rea* elements of an assault which causes actual bodily harm. Stronger answers gave a clear explanation of the meaning of actual bodily harm, using *Miller* and *Chan Fook*. Many located the actual bodily harm in both the fainting, as a loss of consciousness (*T v DPP*), and psychiatric injury beyond mere emotions such as fear, distress or panic. However, it is worth remarking that many answers discussed the harm as psychological, contrary to the insistence of the Court of Appeal in *R v D* [2006] that the requirement is for psychiatric injury. The Court was adamant that not all psychological conditions can be described as psychiatric injury. Weaker answers did little more than identify the s47 offence and, occasionally, incorrectly specified the *mens rea*. Some students attempted to argue that the psychiatric injury was sufficiently serious to amount to grievous bodily harm under s20. Though this may well have been true, and was creditworthy, the answers rarely presented any convincing case for the required *mens rea* (intention or recklessness as to *some harm*) in the shouting in rage.

Students usually argued that the broken ankle suffered by Claire was grievous bodily harm, accounting for the contribution of Claire’s weak bones by reference to the ‘thin skull rule’ and *Blaue*, and often cited *Bollom* as indicating that circumstances particular to the victim must be taken into account. Given that Alvin had kicked out ‘wildly’ at Claire in his continuing rage, students should have been alerted to the possibility that Alvin’s *mens rea* extended beyond intention or recklessness as to *some harm* (s20) into intention as to *serious harm* (s18). Yet, on the whole, answers on this aspect were often very disappointing. Most students concentrated on the s20 offence and many never mentioned s18 at all. More perceptive students did seek to assess the significance for *mens rea* of the likelihood of breaking an ankle when kicking out ‘wildly’, and of the fact that Alvin could not have been aware of Claire’s especially susceptible condition. However,
incomprehensibly, many students seemed convinced that kicking out ‘wildly’ at ‘the first person that he saw’ not only was positive proof that Alvin did not intend serious injury but was proof that he did not intend at all. Instead, they asserted, Alvin would be reckless, at best. As always in the analysis of these offences, a significant number of students incorrectly specified the mens rea required for s20, inevitably resulting in inaccurate application to the facts. Oddly, many students discussed battery before going on to grievous bodily harm. Though this was not wrong, it added little and simply absorbed time better spent on the more serious offences. The decision of some students to argue for assault (battery) occasioning actual bodily harm was more understandable, though this was inevitably a lesser treatment than that represented by the grievous bodily harm offences.

Of course, Alvin had taken prescription drugs and had drunk whisky before the incidents with Bela and Claire, and most students interpreted this as raising the possibility of intoxication. However, there were enormous variations in the quality of explanation and application of the rules on intoxication, with many students failing to explain the key elements of the rules (the distinction between voluntary and involuntary intoxication, the meaning and significance of specific and basic intent in the case of voluntary intoxication) and so inevitably making a weak application. In the application to Claire, students who had not discussed the s18 offence were unable, of course, to demonstrate how the specific intent offence could be reduced to the s20 basic intent offence if the intoxication had prevented formation of the required intention. However, students who had earlier debated s18 and eliminated it for sound reasons were able to gain maximum credit for an application of the basic intent analysis to s20. Creditworthy alternative or additional approaches taken by some students involved exploration of the (faint) possibility that the intoxication was involuntary, and that Alvin’s inability to remember anything after the incident with Bela suggested the possibility of automatism in relation to Claire’s injury. In this latter case, students usually concluded, probably correctly, that any plea of automatism would fail because it was self-induced by the intoxication.

Question 02

Students were invited to discuss Deepak’s possible liability for the murder of Erik. Most correctly did so by analysing and applying the elements of the offence of murder, and of one or both of the partial defences of loss of control and diminished responsibility, so as to consider conviction for the lesser offence of (voluntary) manslaughter. Yet some students confidently, but very unwisely, dismissed murder out of hand, and discussed involuntary manslaughter instead. This usually meant that they gained credit only for discussion of the common elements, most noticeably causation, in the actus reus requirements of the two offences.

On the whole, students did not quite succeed in explaining and applying the relevant rules on causation in seeking to establish the actus reus of murder. They were usually stronger on explanation of the appropriate rules on the mens rea (malice aforethought) but, again, were often weak in application. Clearly, Deepak’s conduct in striking Erik on the back of the head was a cause in fact of the manner in which he died. The key issue was whether it was a cause in law. Did the blow make a significant contribution, or was the dangerous driving at excessive speed a novus actus interveniens? The causal connection could not be established by a simple assertion that the blow was an ‘operating and substantial cause’, or ‘made a significant contribution’, or was ‘more than minimal’, though that was the approach that many students adopted. Rather, students had to explain what test would be used to connect Deepak’s conduct to the actual immediate cause of death (the impact with the speeding car), so as to preserve the chain of causation from the blow, through the initial contact with the slow moving car, to the fatal impact with the speeding car. Essentially, this was an example of death caused most immediately by the conduct of a third party,
as in a case such as Pagett. Consequently, the most appropriate test to use was reasonable foreseeability. Viewed in that way, the effect of the blow in propelling Erik into the road where he was struck by the first car was entirely foreseeable, as was the fact that he might then be thrown further into the road. Though the second driver was himself committing a criminal offence, and could well have been prosecuted independently both for driving offences and for causing Erik’s death, it remained reasonably foreseeable that the collision could occur, since it is evident that drivers do not always adhere to speed limits nor drive carefully. In discussing mens rea, most students asserted that this was a case of ‘implied malice’, an intention to cause grievous bodily harm, rather than of ‘express malice’, an intention to kill. In doing so, some confused implied malice with ‘indirect’ intent, a totally different concept involving foresight of virtual certainty, whether of death or grievous bodily harm. However, the common assertion was that Deepak obviously intended serious injury just by striking Erik a hard blow to the back of the head, apparently a ‘very vulnerable’ area. In truth, this was a very difficult argument to sustain. Had Erik died from the blow itself, it would probably have been because he fell and cracked his skull on the kerb, or because the injury was unluckily much more serious than would ever have been expected (a ‘one punch manslaughter’ kind of case). By far the strongest argument presented was that Deepak had chosen to deliver this blow when Erik was standing at a busy junction, where being propelled into the road and subjected to a collision with vehicles might well have fatal consequences. So, the most convincing explorations of mens rea examined the possibility that Deepak aimed to subject Erik to a collision or that he foresaw the virtual certainty of a collision, whether this was evidence of an intent to kill or of an intent to cause grievous bodily harm. To emphasise, students could only comprehensively apply the actus reus and mens rea of murder if they made careful use of all the relevant facts in the scenario.

It was abundantly clear that Deepak’s actions were grounded in his distress over Bela’s experiences and his reaction to his family problems. This prompted almost all students to consider the possible defence of loss of control, and most also to consider diminished responsibility. Even so, perhaps the most surprising aspect of this was the number of students who did not recognise the possibility of a plea of diminished responsibility. Answers generally provided very encouraging evidence that students have begun to come to terms with the greater detail and precision required by the statutory provisions which define the new defence of loss of control and the amended defence of diminished responsibility when compared with their respective predecessors. Yet there were still hints of confusion with the old law. For example, students often continued to attribute rules on time delay and ‘revenge’ in loss of control to cases such as Baillie and Ibrams and Gregory rather than to the very specific statements in the Coroners and Justice Act 2009. Such cases can now only be factual examples raising interesting issues of how the new law would have applied. Similarly, the ultimate objective test in loss of control no longer cites a comparison with the ‘reasonable man’, and nor is the new test of a person ‘of D’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D’ attributable to cases such as Camplin and Luc Thiet Thuan, no matter to what extent derived from them. For the future, it may be advisable to note the words of Lord Thomas CJ in Gurpinar, Kojo-Smith [2015], “It should rarely be necessary to look at cases decided under the old law of provocation. When it is necessary, the cases must be considered in the light of the fact that the defence of loss of control is a defence different to provocation and is fully encompassed within the statutory provisions. As has been frequently observed, the law does not develop in an accessible and coherent manner if reliance continues to be placed on cases that arise under a repealed or superseded law, unless there is good reason to do so.”

However, these observations aside, students generally demonstrated a good, often outstanding, awareness of the rules on both partial defences and how they could be applied to the facts. In discussing loss of control, most recognised the issue with the time-delay and loss of self-control,
and the possible interpretation of Deepak’s actions as a ‘considered desire for revenge’. All focused on the anger trigger, though few really seemed to appreciate the extent to which the requirements are objective rather than subjective (Dawes, emphasising views first expressed in Clinton). Again, most identified, and easily dealt with, the sexual infidelity exclusion, relying on the Clinton interpretation that evidence of sexual infidelity is only excluded where it is the sole evidence for the anger trigger. Here, there was ample additional evidence in the hurtful comments made by Erik on the telephone. On the other hand, few acknowledged that it also constituted one of the ‘circumstances’ in the objective test, irrespective of whether it was excluded from the anger trigger. Most students could reproduce the elements of the objective test but a surprisingly large number did not consider whether Deepak’s depression would be an excluded ‘circumstance’. Many concluded that ‘no reasonable person’ would have killed for these reasons, so lapsing into familiar but outdated terminology, as well as relatively ill-considered application. In discussing diminished responsibility, most identified depression or some similar illness as the ‘recognised medical condition’ and identified the ‘substantial impairment’ as being of the ability to exercise self-control and/or to form a rational judgment. Perhaps the weakest area in the treatment of the defence was in the discussion of the requirement for the abnormality of mental functioning to ‘provide an explanation for D’s acts and omissions in doing or being a party to the killing’. There was often no reference to s2(1B) of the amended 1957 Homicide Act (‘For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D’s conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct’) and little real attempt to consider whether Deepak’s conduct may have been explained by factors other than his abnormality of mental functioning because of his depression, even though students may have just provided an extensive analysis of his perhaps understandable anger about Erik’s behaviour.

Question 03

This question asked students to write a critical analysis of the law on murder and voluntary manslaughter, and to discuss any desirable reforms. ‘Critical analysis’ certainly left scope for arguments in praise of aspects of the current law, even if most students concentrated on identifying and explaining deficiencies. 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 invite an assessment in which the balance between breadth and depth would be in issue. 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 weaker answers rarely failed to present some substantial argument, though, inevitably, the arguments were more limited in number and/or in development. There was also much more evidence of knowledge and understanding of possible reforms than has often been apparent in answers on the evaluation questions in previous years. Nonetheless, identification and explanation of reform proposals remained by far the most significant weakness in the answers.

In discussing murder, students concentrated very heavily on the ‘fair labelling’ principle, whether or not they specifically introduced that concept. Consequently, the role of the mandatory sentence of life imprisonment came in for intense scrutiny in the context of ‘murderers’ with spectacularly different motives (mercy killer v brutal and sadistic serial killer, for example) and the equation of an intent to kill with an intent to cause serious injury. Additionally, the mandatory sentence of life imprisonment was often blamed for the need to have partial defences at all. Answers varied enormously in the depth and quality of analysis of the criticisms but all had something of value to say. Less creditworthy were those attempts to explore sentencing as such, divorced from the
exploration of the extent to which the labelling implications of the imposition of a mandatory life sentence can be moderated by variations in the tariff. The focus of the specification is the substantive law, so that sentencing is relevant mainly in respect of the impact on that law. Students also wrote perceptively about the continuing uncertainty over the status of oblique/indirect intention, the exclusion of the defence of duress, and the problem of 'excessive self-defence'. In this latter case, answers were always more impressive when they acknowledged that some attempt to address it, however imperfect, had been made in the provision of the 'fear' trigger in the defence of loss of control created by the Coroners and Justice Act 2009. Some students also introduced criticism of the \textit{actus reus} of murder by reference to the notions of the definition of death and of a human being. Though students often expended a lot of time and words on these aspects, the criticisms were of dubious strength. For example, though Malcherek was undoubtedly a little unclear about exactly what definition of death was being used, it seems clear that the test currently applied is that of brain stem death. Similarly, though there are puzzling aspects of the somewhat difficult decision in AG's Reference (No 3 of 1994) concerning liability for homicide of an unborn child who died after premature birth following an attack on the mother, students were unable to articulate them. Instead, the inaccurate comment was usually that the unborn child was left totally without protection, rather than that the protection lies in other offences and even, conceivably, in manslaughter, even if not in murder. On the other hand, there were some interesting comparisons and contrasts drawn between the law on mercy killing/assisted suicide and withdrawal of life-sustaining treatment as in \textit{Bland}. Some students sought to introduce criticisms based on the general rules of causation, or on the defence of insanity, and even, on occasion, on the rules on intoxication. There was no merit in these critical analyses since they had no particular relevance to the offence of murder, unlike, say, the exclusion of duress as a defence to murder, or the peculiar problems of excessive self-defence in murder.

Given that the partial defences were very recently reviewed and substantially revised, students nevertheless succeeded in identifying a large range of criticisms of the current law. Once again, 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. Indeed, many students were able to combine breadth with depth to write very strong answers. On loss of control, students criticised the lack of a clear definition of loss of self-control (though this has been addressed in 2014 in the case of \textit{Jewell}, in which Lady Justice Rafferty stated, “Loss of control is considered by the authors of Smith and Hogan 13th Edition to mean a loss of the ability to act in accordance with considered judgment or a loss of normal powers of reasoning. The [trial] judge readily accepted that definition and so do we”. The very requirement 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. Even when it was evident that not all of these criticisms were fully understood, there was still much that was creditworthy. 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 first and second degree murder, and manslaughter. Unfortunately, very few students gave an accurate and comprehensive explanation of what would distinguish first from second degree murder. This was significant, and a little disappointing, because students had often presented extensive and eloquent criticisms of the current requirements of malice aforethought but were then unable to suggest exactly how the law might be changed to meet those criticisms. A common, inaccurate version of the proposals was that they distinguished simply between an intention to kill and an intention to cause serious injury (gbh). A much weaker version failed entirely to give any detail of what would be allocated to the two tiers of murder, and merely identified the tiers (or degrees) themselves. 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 a rather unnecessary complication given the existence of the WHO classification and the flexibility adopted by the Courts to the acknowledgement of new conditions.

**Criminal Law Scenario 2**

**Question 04**

Answers to this question were very varied, both in the content and in the depth of the analysis. Most students recognised that Francesca had probably committed an offence of battery when she threw the beer in the direction of Haley and hit the sleeve of her jacket. However, on the crucial issue of force applied against clothing rather than against the body as such (Thomas), few noticed that Haley was already removing her jacket, so that a property offence (not required, of course) might have been indicated, rather than a personal injury offence. Equally, many students seemed obsessed with the distinction between direct and indirect battery, to the detriment of a discussion of the throwing of liquids as a potential battery (Savage). It is difficult to describe this as anything other than a direct battery, and wholly different in nature from the oft-cited DPP v K. In relation to Francesca’s mens rea, there were arguments in favour both of intention and of recklessness, though it seems more likely that Francesca simply knew perfectly well that the beer might hit either Haley or Giles but did not care. Some students fell into the error of identifying a preceding assault, usually in addition to the discussion of battery, but most either ignored the issue entirely or correctly recognised that Haley probably had no chance to see the beer being thrown since she had turned away. Occasionally, students failed entirely to address the battery issue. However, by far the biggest deficiency in answers to this part of the question was the failure of many students to detect the possible offence of assault when Francesca ‘thrust’ the glass at Haley’s face, causing Haley to duck. This failure was all the more remarkable because many students pursued instead the idea that Francesca had committed assault when agreeing with Haley that they should ‘sort it out outside’. To some extent, this was based on a commonly held misconception that Francesca had shouted at Haley, when the facts in the scenario made it clear that the reverse was true. Additionally, it should have been almost impossible to detect the elements of an assault in the
agreement itself, a difficulty compounded by the probability that, though any injuries resulting from a subsequent fight would not have been within the scope of lawful consent, the ‘invitation’ itself to fight almost certainly was. By contrast, there was overwhelming evidence that Haley, very understandably, feared immediate personal violence when the glass was thrust at her, as students who discussed it had no difficulty in emphasising. Yet even those students rarely acknowledged that proof of mens rea as to the assault was far from straightforward. Francesca’s aim was almost certainly to strike Haley with the glass, the mens rea of battery or far worse, not to cause Haley to fear immediate personal violence. It is doubtful if that latter consequence ever crossed her mind, rendering arguments about even foresight of virtual certainty (‘oblique intention’) or foresight of some risk (recklessness) problematic.

Students usually argued that the cut to Isaac’s neck inflicted by Francesca when she thrust the glass at Haley represented a ‘wound’, and so raised the possibility of wounding offences under s20 and s18. Alternative, or additional, approaches were to treat the injury as actual bodily harm (which it certainly was) or as grievous bodily harm (which it might have been). Discussion of the s47 actual bodily harm offence was certainly creditworthy but the description of the injury as a ‘cut’, caused by broken glass, should have alerted students to the need to consider a more serious offence. Since the cut was much more obviously described as a wound than as grievous bodily harm, to treat it as the latter gave rise to unnecessary complications which students had to surmount if they were to gain the level of reward more easily attainable by the wound route. In discussing the mens rea, some degree of confusion arose out of a common misinterpretation of the meaning of the word ‘thrust’. Many students actually re-wrote this as ‘threw’, a significantly different action with a much more uncertain outcome than a ‘thrust’ (keeping hold of the glass) at Haley’s face. Correctly interpreted, it provided overwhelming evidence of an intention to cause at least some injury, and very strong evidence of an intention to cause serious injury. A ‘glassing’ of this kind commonly results in the glass breaking against the victim while the momentum of the thrust continues since the glass is still being held. Aimed at the face, it could threaten eyesight, and will probably cause jagged cuts which could result in potentially disfiguring scars. Such injuries are far less likely when a glass is thrown, and the action perhaps speaks more of recklessness as to injury than of intention. So, many students dealt only with s20, or disposed of s18 in a few inadequate words. Of course, if Francesca did intend injury or serious injury, then she intended it against Haley rather than Isaac. Most students dealt with this by reference to transferred malice, citing Latimer and Mitchell, though many did not think it worthwhile to explain the rule properly. In some instances, students argued convincingly, though on the whole unnecessarily, that Francesca was reckless as to injuring Isaac because, when she attacked Haley, she must have foreseen the risk of injury to him since he was ‘close behind’. Ironically, students who missed the possibility of the assault on Haley discussed above often found it easier to deal with Francesca’s liability for the injury to Isaac than did those more perceptive students who did address the assault. The explanation for this is that students who discussed the assault often brought their understanding of that offence to the injury to Isaac, confusing the mens rea of the assault with the mens rea required for the battery occasioning actual bodily harm or with that required for the unlawful and malicious wounding. In consequence, strange hybrid offences sometimes emerged where, say, the actual bodily harm was inflicted by way of a battery but the mens rea was that of an assault. As pointed out above, whatever Francesca’s mens rea in relation to the assault on Haley, her separate, and much more significant mens rea in relation to Haley (and so, by way of transferred malice, in relation to Isaac), was an intention to cause harm or serious harm. In some instances, students raised the issue of consent, relying on the agreement made between Francesca and Haley to ‘sort out’ their disagreement. This was an interesting argument but it was rarely explained and applied in any coherent manner. Had consent been valid, then it would have absolved Francesca (and Haley) from liability for any injuries inflicted during the course of a fight. Presumably, this would have extended to cover the ‘accidental’ and unforeseen infliction of injury on any third person. However,
it seems unlikely that Haley consented to the risk of injury from a ‘glassing’ and, in any case, consent to injuries suffered in an ordinary fight was prohibited by AG’s Reference (No.6 of 1980).

Having dealt with prima facie liability for the offences, students usually went on to consider whether or not intoxication would be a defence. As in the answer to Question 01, there were enormous variations in the quality of explanation and application of the rules on intoxication, with many students failing to explain the key elements of the rules (the distinction between voluntary and involuntary intoxication, the meaning and significance of specific and basic intent in the case of voluntary intoxication) and so inevitably making a weak application. Answers were stronger in addressing the effect of intoxication on the offences against Haley than on the offences against Isaac. This was simply because the battery and assault offences against Haley were clearly basic intent offences. By contrast, the wounding offences against Isaac were potentially both basic and specific intent offences. The many students who considered only the s20 offence (or, of course, the s47 offence), lost the opportunity to consider the effect of intoxication on the s18 specific intent offence, including reduction of liability to an associated basic intent offence.

Question 05

Students answering this question had little difficulty in determining that Francesca might be guilty of unlawful act manslaughter, and Kwame of gross negligence manslaughter. Most students were able to identify all or most of the relevant elements of the two kinds of involuntary manslaughter but there were persistent weaknesses in the discussion of causation in both, and of the basis of any duty on Kwame in gross negligence manslaughter. Additionally, students often failed to recognise that Francesca might be able to plead self-defence to avoid liability for manslaughter. In dealing with Francesca’s liability, students usually demonstrated a strong understanding of the need for an unlawful act, in the sense of a crime, which was dangerous. The crime was identified, variously, as battery, battery occasioning actual bodily harm, and unlawful and malicious infliction of grievous bodily harm. Students who went still further and argued for s18 grievous bodily harm did not seem to realise that this would have moved the offence from manslaughter to murder. It was pleasing to note that, by contrast with many answers in the past, most students understood the need to define ‘dangerous’, and did so correctly by reference to the Church test. As in the answers to Question 02 on the offence of murder, students usually dealt rather superficially or inappropriately with the causation issue. Clearly, Francesca’s acts were a cause in fact of Jordan’s death whilst, in terms of cause in law, there was no break in the chain of causation between her kicking him and his falling and breaking his skull. Therefore, the crucial aspect was the effect on causation of Kwame’s error in sending the ambulance to the wrong location, and so delaying potentially life-saving treatment. The simple answer here, though apparently so difficult for many students to articulate, was that no intervention had taken place, so that there could have been no break in the chain. Though prompt medical treatment might have saved Jordan’s life, his death was entirely the result of the injuries inflicted by Francesca. So, the relevant authorities were cases such as Smith and, especially, Blaue. Cheshire would also have been of considerable assistance, though more difficult to interpret and apply than Blaue. It is important to note that, though two of those cases dealt with possible medical negligence, there was no issue of medical negligence here. Just as in Blaue, for example, there is no doubt that the victim died from the stab wound, whatever the chances that she would have survived had she consented to appropriate medical intervention, so here Jordan died from the injuries. When the possibility of a plea of self-defence was recognised, analysis ranged from the very detailed and accurate to the extremely superficial. Stronger answers explained the requirements for the use of some force to be necessary, and for the actual force used to be proportionate to the risk of harm actually, or genuinely perceived to be, present, and cited the provisions of the Criminal Justice and Immigration Act 2008 s76. Opinion was divided on whether the plea would succeed, many believing (quite reasonably) that much of the blame lay
with Francesca for ‘stealing’ the bicycle and that she could have avoided the necessity for the use of any force simply by relinquishing it. Weaker answers did not make the distinction between necessity and proportion clearly, and often rejected the defence entirely on the basis of Francesca’s prior fault without any investigation of how that conclusion might be justified.

As indicated above, students succeeded in identifying the elements of gross negligence manslaughter as duty, breach, foreseeable risk of death, causation and ‘grossness’ of the negligence. They were generally very adept at explaining and applying all but the duty and causation aspects. In relation to duty, one common approach was to rely on the notion of voluntary assumption of responsibility, most often citing the case of Stone and Dobinson. Obviously, this was a potentially fruitful avenue to explore but it was largely taken for granted that Kwame’s very intervention by way of the telephone call to the emergency services would be enough in itself to attract the duty. This ignores the fact that the law seems to have moved on significantly. Cases such as Evans, for example, resulting from drug-induced deaths, suggest that rather more would be required to create a duty than a telephone call from a concerned and responsible citizen (so that some more extensive rationale might now have to be found to uphold the liability of Dobinson, at least, were the facts of Stone and Dobinson to recur). Even more problematic were the attempts to rely solely on application of the Caparo three part test. Of course, it is true that Lord Mackay referred to the ordinary rules of negligence when giving his opinion in the case of Adomako, so that it cannot be wrong to mention the Caparo approach. Yet, the simple fact is that, however much courts ritualistically quote that opinion as a prelude to analysis, in reality they rarely go on to make any significant use of the Caparo approach in criminal cases. When students attempt to apply it, it often leads them into errors such as that Kwame was in physical proximity to Jordan and that it was foreseeable that Jordan may die if Kwame did not intervene, so that he must be under a duty. Given that the law has always been clear that there is no general duty to intervene, even a duty of ‘easy rescue’, the elements of the Caparo test, including the ‘fair, just and reasonable’ aspect, would require rather more detailed analysis than this. Somewhere, there must be an equivalence between the answer which would be given by application of, say, familiar omission/duty notions in criminal law, as represented by Stone and Dobinson, Evans and the like, and the answer that would be given by application of the Caparo test, albeit a test developed to deal with significantly different issues of civil law liability. In general then, it is advisable for students to rely on the rules derived from cases which have developed specifically criminal law notions of duty, rather than to try to interpret rules which have been developed in the civil law context. The second area of liability for gross negligence manslaughter which has traditionally troubled students is how to deal with the issue of causation where the facts can be interpreted as a breach of duty by an omission. In Kwame’s case, it may be argued that he ‘failed to get help’ for Jordan. It has already been explained that this failure did not break the chain of causation between Francesca’s conduct and Jordan’s death. Students generally understood that, even so, this did not in itself absolve Kwame from responsibility for causing Jordan’s death. However, they were much less certain about what rule should be applied. Though there is no definitive decision on the test to be applied in such a case, it is likely that an accused will be held to have caused a consequence by an omission only when, had he/her fulfilled his/her duty, the victim would not have died or, at any rate, it is highly probable that the victim would not have died. Applied to Kwame and Jordan, no certain answer could be given since the facts in the scenario did not reveal whether there was any significant prospect that Jordan would have survived had he received prompt medical treatment. In discussing the ‘grossness’ requirement, many students perceptively doubted that a person such as Kwame, a stranger to the area who might be said to have done his best in difficult circumstances, could be regarded as having engaged in conduct which should be treated as criminal. On the other hand, another large group of students was much less sympathetic and clearly expected that he should have done much better. This disagreement simply reflected the inevitable variation in views that may be present in a jury.
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 relation to Maya’s rights against Lightbloc in connection with the blinds, it is suggested that the contract was better understood as a contract for the supply of goods and services, and so subject to the provisions of the Supply of Goods and Services Act 1982, than as two separate contracts, one for the sale of goods and the other for the supply of services. However, the distinction was of little significance in respect of the supply or the sale of the blinds, since the terms implied by the 1982 Act as to description, satisfactory quality and fitness for purpose, would be essentially the same as those implied by the Sale of Goods Act 1979. The distinction became significant in respect of the obligation to supply services with reasonable care and skill, where only the 1982 Act was engaged. Though there were notable exceptions, on the whole students analysed and applied the law in a very superficial manner. Typically, answers identified relevant terms and then merely asserted that they had been broken without presenting any explanation and illustration of the meaning of the terms that would lend greater substance to the conclusions. This extended to ignoring even the further explanation of the requirements of the terms to be found in, say, the Sale of Goods Act 1979 s14(2A)-(2C) and the Supply of Goods and Services Act 1982 s4(2A) and (2D). Surprisingly, many students dealt only with the terms relating to goods and entirely missed the significance of the supply of the service in fitting the blinds.

Students were a little more adept at discussing the remedies that might be available for breach of the terms. They often gave very strong explanations of the difference between conditions, warranties and innominate terms, and accurately identified description, satisfactory quality and fitness for purpose as conditions, and reasonable care and skill as an innominate term (when, of course, they actually recognised that term). However, praiseworthy though this was, it tended to be evidence of a rather unfocused approach in which it was asserted merely that Maya/Nirmala would have remedies of rescission and damages. There was rarely any significant effort to extend the analysis into specific statutory remedies. In particular, there was little reference to the additional statutory remedies available to consumers by virtue of s48A-F of the 1979 Act and s11M-S of the 1982 Act. Even when they were mentioned, they were usually disposed of in a sentence such as ‘Maya/Nirmala would have the right to repair, replacement or reduction in the price of the blinds’, with no explanation of the relationship between those remedies and the circumstances in which they might apply. In dealing with the possible effect of the limitation clause, students usually demonstrated strong understanding of the common law rules on notice and incorporation, citing cases such as Olley v Marlborough Court Hotel and Chapelton v Barry UDC, but were often uncertain about the precise effect of the Unfair Contract Terms Act 1977. Obviously, stronger students were able to explain that, by virtue of s6 of the 1977 Act (Sale of Goods Act 1979) or s7 of the 1977 Act (Supply of Goods and Services Act 1982) liability for breach of the implied terms as to description, quality and fitness for purpose could not be excluded or modified. They were able to contrast this with the position in relation to the 1982 Act term as to reasonable care and skill, explaining that, by virtue of s3 of the 1977 Act, any attempt to exclude or limit liability for breach of that term would be subjected to a requirement of reasonableness, as explained in s11 of the 1977 Act. Weaker students asserted that there could be no exclusion or limitation of liability for breach of any of the implied terms or, by contrast, that any attempts at exclusion or limitation of liability would be subjected to the reasonableness requirement in all cases. At times, there was also some
evidence that students did not really understand the general relationship between the provisions of the 1977 Act and liability for breach of contract. So, it was not unusual to read that Lightbloc would be liable under the 1977 Act, rather than that the attempt to limit liability for breach of obligations imposed by the implied terms would fail, or be subject to the reasonableness test.

Of course, the contract had been agreed between Maya and Lightbloc, albeit obviously for the benefit of Nirmala. Students understood that this raised the issue of privity of contract but they were rarely able to deal with it in any substantial way. Most students attempted to place the current position in historical context by citing the privity rules derived from cases such as Tweddle v Atkinson and Dunlop v Selfridge, and then went on to assert that Nirmala would be able to rely on the contract between Maya and Lightbloc by virtue of the provisions of the Contract (Rights of Third Parties) Act 1999. However, students were usually unable to specify the requirements of s1 of the 1999 Act with any precision, and this resulted in frequent errors, particularly about the extent to which the third party must be expressly identified in the contract. Moreover, students did not specify exactly how the 1999 Act deals with third parties where the requirements of s1(1)(a) or (b) and ss2-3 are met. In particular, they did not explain clearly that not only may the third party enforce terms and take advantage of any remedies for breach (s1(1) and s1(5)) but that those rights and remedies may be subject to any defences that the other party could raise (s3). In the case of Nirmala and Lightbloc, therefore, even if Nirmala was a third party expressly identified in the contract and on whom the terms purported to confer a benefit (doubtful), she would not only enjoy the rights and remedies but would be subject to any enforceable exclusion or limitation of liability.

**Question 08**

Students readily understood that this question raised the issue of whether or not the contract between Oliver and Lightbloc had been frustrated by virtue of the unavailability of the specific hardwood because of the ban on importation that had been imposed. However, students also understood that, if the rules of frustration did not apply, then there must have been a breach of contract. Consequently, answers to this question were a little more rounded than answers to questions raising similar issues in the past. Most students gave some account of the meaning of frustration, though the explanations varied very significantly in depth. They illustrated the different categories – illegality, impossibility, frustration of the common venture - by reference to cases such as Denny, Mott and Dickson v Fraser, Taylor v Caldwell and Krell v Henry. Placing the termination of the contract between Oliver and Lightbloc into the appropriate category caused a little more difficulty. Many opted for the superficially obvious choice of illegality, relying on the illegality of the importation of the hardwood. Others pointed out that, not only was the contract not about importation, but also stocks of the wood were available which it was certainly lawful to use. Thereafter, both impossibility and frustration of the common venture were canvassed in equal measure. Some students were content to end the analysis there, and to conclude that the contract was frustrated. In doing so, they failed to observe that there were serious doubts about whether the contract was truly frustrated. Stronger answers went on to explore the possibility that the conditions for frustration were not met, either because the ban on importation could have been foreseen in view of the well-known environmental concerns, or because, in choosing to allocate the existing stocks of the hardwood to other contracts, Lightbloc’s inability to fulfil the contract with Oliver was self-induced. Students supported these arguments by reference to cases such as Davis Contractors v Fareham UDC (making the point that a contract is not frustrated merely by being more expensive to complete than expected) and Maritime National Fish Ltd v Ocean Trawlers Ltd. Students also sometimes raised a further issue, namely that both had been responsible for delays in starting the work, without which it might have proceeded before the ban on importation
was introduced. They argued that this also suggested that either or both were at fault and so could not rely on frustration.

Even when they doubted whether the contract had been terminated by frustration, most students proceeded to assume that it had been and considered the legal implications of termination by frustration, as well as analysing the alternative as a breach. Inevitably, students who did not recognise the doubts about termination by frustration were much more likely not to explore the alternative possibility of breach. Unfortunately, as past reports have often observed, students do not really seem to have a clear understanding of how the Law Reform (Frustrated Contracts) Act 1943 directs that the consequences of termination by frustration are to be resolved. Most students correctly asserted that all money paid is recoverable, and all money yet to be paid ceases to be payable but few gave a correct explanation and application of the additional provisions in the statute dealing with expenses incurred, and benefit conferred by, the other party. The most common errors were to assert that Lightbloc was entitled to be paid £2,000 in expenses, and that Oliver would have to pay for any benefit that he had obtained from performance of the contract up to the moment of the frustrating event. These assertions did not recognise that any order in favour of the other party to reimburse expenses can be made only in respect of ‘sums paid or payable’ before the time of the frustrating event (1943 Act s1(2)). This would mean that, of the £2,000 incurred by Lightbloc in expenses, only a maximum of £1,500 could be recovered under s1(2), since only £1,500 was paid and payable before termination by frustration, the remainder being payable upon completion. Nor did students recognise the more general point about any orders made under s1(2) and s1(3) in relation to sums of money to recompense for expenses incurred and benefits conferred, namely, that they are entirely at the discretion of the Court, having regard to what is ‘just’ in ‘all the circumstances’. In some instances, students treated the provisions as if they were dealing with a breach, and so discussed them inappropriately in terms of ‘rescission’ and ‘damages’.

Students who went on to discuss possible breach were sometimes confused about who had committed the breach, given that both Oliver and Lightbloc bore some responsibility for the delays which had proved fatal to the completion of the contract. However, most decided that Lightbloc would be in breach for refusing to supply and fit windows made from the hardwood specified in the agreement. Students usually considered that there was an express term amounting to a condition in relation to the hardwood, enabling them to discuss remedies of rescission and damages. However, they were not so adept at explaining exactly how damages would be calculated to put Oliver in the position that he would have been had the contract been performed. Some students argued perpectively that, in the absence of any indication as to a date for completion of the work, any breach must be regarded as anticipatory. This afforded them the opportunity to discuss the rules on anticipatory breach, including the options available to Oliver of continuing in the expectation of performance ([White and Carter (Councils) Ltd v McGregor](https://www.mcdonaldkettlewell.com/a-level-law-aqa/law03/text-exam-report-june-2015/#) and being ready to perform himself, or treating the contract as ended and suing immediately for damages. On the whole, discussion of the consequences of termination by breach was far more accomplished than discussion of the consequences of termination by frustration.

**Question 09**

Most students were able to present some critical analysis of the law relating to terms which purport to exclude or limit liability for breach of contract (for simplicity, ‘exclusion clauses’ hereafter) but few succeeded in combining depth and breadth of analysis and evaluation. The common approach was to explain, in varying degrees of detail and accuracy, the common law rules on incorporation, and the statutory approach by reference to the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. Any suggestions for reform were usually
presented immediately after a criticism was advanced, rather than deferred until the end of the answer, when a more coherent treatment might have emerged. There was heavy emphasis on the rule derived from \textit{L'Estrange v Graucob} that a signatory to a document cannot deny that he had knowledge of its contents even if, in truth, he/she has not read the document in full or at all. This was subjected to some criticism, the most telling of which related to the length and complexity of many modern documents, especially those to be found in online deals, and the tendency to 'bury' awkward terms deep in the document. In stronger answers, some specific examples of such documents were provided. In weaker answers, the assertion was made without evidence, or there was a more general complaint that the decision in \textit{L'Estrange v Graucob} was simply 'not fair'. Students also commented on the complexity of determining what is a contractual document in which parties may expect to find important terms, and what is not, such as a simple receipt (\textit{Chapelton v Barry UDC}), and on other notification difficulties revealed by cases such as \textit{Olley v Marlborough Court, Curtis v Chemical Cleaning and Dyeing Company Ltd}, and \textit{Thornton v Shoe Lane Parking Ltd}. Some students discussed the difficulties of determining the effect of a course of dealing. Surprisingly, few students commented on the application of the \textit{contra proferentem} rule, though those that did usually displayed a reasonable understanding of its effect. Undoubtedly, clear example and illustration would have helped here.

In discussing the statutory control of exclusion clauses, many students did little more than praise (or, sometimes, criticise) the operation of, say, ss6-7 of the 1977 Act in rendering void any terms purporting to restrict liability for breach of the implied terms in ss13-15 of the Sale of Goods Act 1979, and equivalent terms in the Supply of Goods and Services Act 1982, though some did challenge the complexity of the 1977 Act provisions in drawing distinctions between exclusion clauses which have no effect and those which are subjected to a test of reasonableness. In that case, they also sometimes criticised the notion of reasonableness itself. Additionally, there was sometimes adverse comment on the difference in protection afforded to consumers and businesses, particularly 'small' businesses. Stronger students were able to comment on the confusing duplication and overlap evident in the provisions of the 1977 Act and the 1999 Regulations, and the different philosophies underlying their respective approaches. Weaker students were often aware of these potential criticisms but were able to express them only in the most general terms, so that it was impossible to discern the precise points at which overlap, gaps and conflicts arose. Suggestions for reform of the common law approach were usually rather general and superficial, often emphasising aspects such as more clarity and brevity in documents and greater honesty in drawing attention to potentially onerous terms such as exclusion clauses. Many of these suggestions have been addressed both at common law and by statute, though enforcement remains problematic. In dealing with suggestions for statutory reform, stronger students demonstrated knowledge and understanding of the Law Commission's 2005 Report on Unfair Contract Terms, and echoed the Law Commission's call for consolidated legislation of greater clarity. Consistently with their inability to specify precisely the problems with the 1977 Act and the 1999 Regulations, weaker students were generally unable to do much more than state that there should be a new statute. Others ignored the issues entirely.

\textbf{Law of Contract Scenario 4}

\textbf{Question 10}

This question required students to deal with three aspects of formation of contract; the first concerning the phenomenon of agreement, the second existing duty as consideration, and the third the status of 'past' consideration (but also, conceivably, raising an issue of intention to create legal relations). Apart from the analysis of the offer and acceptance issues involving Peter and Ray,
students appeared to find it difficult to write substantial answers, with the dispute between Peter and Sara causing most problems. Most students perceived that there might be an application of the special rule on postal acceptance (*Adams v Lindsell*) in discussing whether Ray was entitled to the subscription at a price of £100. However, though they displayed strong understanding of the simple proposition that, where the postal rule applies, acceptance occurs when the letter is posted, they often failed to consider other significant aspects which bore on the possible rights and duties. So, many did not take the trouble to determine whether Peter’s advertisement was an offer or merely an invitation to treat. This, of course, was a crucial first step since, if it was merely an invitation to treat, then Ray’s order would itself have been an offer, which Peter could only accept in its entirety, or reject and make a counter offer. Stronger students did take this step, contrasting cases such as *Partridge v Crittenden* and *Carlill v Carbolic Smoke Ball Co*. Some simply then opted to classify the advertisement as an offer rather than an invitation to treat, whilst others more sensibly considered both possibilities. The second significant issue was whether or not the postal rule was excluded by the requirement to return the order by 30 April. This possibly carried the implication that only receipt would constitute acceptance (*Holwell Securities v Hughes*). In that case, though Ray could not insist on the £100 deal, it is doubtful whether Peter could insist on the additional £50 payment. This would have raised a complicated issue of the exact interpretation of the original offer, perhaps a little beyond the scope of the answer expected.

Many students recognised that the demand made by Peter to Sara for an additional £15 raised the issue of existing duty as consideration. Stronger students explained that this was a case in which Peter was trying to rely on fulfilment of a duty which he already owed to Sara in order to compel Sara to pay the extra sum of money. They challenged his right to do so by reliance on the case of *Stilk v Myrick*. Yet only a surprisingly small proportion of those students extended the analysis to enquire whether there might be anything in the circumstances to suggest that the established and traditional rules might be circumvented. It is difficult to see how Peter could have relied on the exception recognised in, say, *Hartley v Ponsonby*. On the other hand, *Williams v Roffey Bros* might have provided more fertile ground for pursuing the dispute. Even when students explained and applied the consideration rules with some accuracy, they tended simply to argue that Peter could not claim the additional money, instead of speculating on different possibilities, such as the implications for breach and remedies if Peter should persist in his refusal to supply any more magazines. Unfortunately, some students displayed no understanding at all of what rules of formation of contract were engaged and cast around desperately for anything that might relate to contract.

In discussing Tom’s complaint that he had received no magazines, despite Peter’s promise of a year’s free subscription, most students argued that the unpaid reviews written by Tom were nothing more than past consideration, so that Peter’s promise was *prima facie* unenforceable. They cited cases such as *Roscorla v Thomas* and *Re McArdle* for this proposition. For some, that was the end of the matter, and they disposed of the issue in a rather brief answer. More perceptive students understood that the courts have been prepared to search for evidence of a possible prior implied promise in the context of which the alleged ‘past’ consideration was supplied. In that case, the subsequent express promise has been regarded as merely particularising the obligations implicit in the earlier promise (*Lampleigh v Brathwait, Re Casey’s Patents*). Students who did investigate this aspect tended to be content merely to raise it, and did not really attempt to enquire whether there could have been an implied promise to which the subsequent express promise attached. Crucially, was there any request by Peter that prompted the writing of the reviews? Either additionally or alternatively, some students explored the possibility that there might be a doubt about whether there was any intention to create legal relations. Though not the main focus of the issues, this was certainly a creditworthy approach, even if analyses tended to be rather superficial.
Question 11

Remarkably, this question seemed to cause students even more problems than Question 10. There were two groups of issues. First (though this was rarely the sequence in which students tackled the question), there was the contract between Vicki and Tom for personal fitness training. This raised issues of the implied terms under the Supply of Goods and Services Act 1982 s13 and s14 concerning reasonable care and skill and performance within a reasonable time. Tom had certainly attempted to exclude any liability for breach leading to personal injury, so that the Unfair Contract Terms Act 1977 s2 was also engaged. He had also possibly attempted to exclude liability for delays in performance, though that was a little more questionable. Second, there was the contract between Vicki and Tom for the purchase of the recovery drinks. Given the truth about those drinks, Tom’s claim that they would significantly aid recovery times looked suspiciously like a misrepresentation. In addition, there was a strong argument that they were neither as described nor fit for purpose, and so in breach of the implied terms in s13 and s14 of the Sale of Goods Act 1979.

Very few students dealt with the full range of issues and many became very confused about which rules to apply to which contract. For example, some students thought that the misrepresentation was Tom’s description of himself as a personal trainer. There was no evidence to suggest that he was not, other than the fact that he did not seem to have been very alert to the possible injury to Vicki. Other students tried to argue that s14(2) of the Sale of Goods Act 1979 could be deployed because Tom’s ‘services’ had not been of satisfactory quality, a claim that ignored the fact that the statute is about ‘sale of goods’! Students also often omitted whole areas of analysis entirely. So, for example, students might deal competently with the implied terms under the Supply of Goods and Services Act 1982 s13 and s14 but fail to discuss the exclusion clause(s), or focus immediately on the exclusion clause(s) without ever properly considering what potential liability Tom was seeking to avoid. Similarly, in discussing the recovery drinks, it was a rare student indeed who considered both misrepresentation and the Sale of Goods Act 1979 provisions. A still more spectacular example of failure to canvass the whole range of issues was evident in the significant proportion of answers which dealt with only one of the contracts and seemed to forget about the other entirely.

More positively, when students identified the correct rules to apply, they usually displayed very strong knowledge of those rules. For example, there was some good explanation and application of the Supply of Goods and Services Act 1982 s13 and s14 terms, and equally good explanation and application of the effect of the Unfair Contract Terms Act 1977 s2 on the purported exclusion clause in relation to the personal injury, though some students forgot that it deals with personal injury caused by negligence. However, students did not explore whether the contract had fixed ‘a time for the service to be carried out’ by stating that ‘precise start and finish times could not be guaranteed’. If the answer was ‘probably not’, then it may be that this was also an exclusion clause subject to the requirement of reasonableness under s3 of the 1977 Act. Students also displayed very strong understanding of misrepresentation, dealing very well with meaning, kinds and remedies, so that they were well rewarded when they applied it correctly to the contract for the recovery drinks.

On the other hand, as in the answers to Question 07, students usually dealt very superficially with the remedies for breach of the implied terms, particularly in respect of the Sale of Goods Act 1979.

Question 12

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

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