AQA AS

Law

CD-ROM for students
Question and Answers

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Introduction

The new AQA specification for AS law will be examined for the first time in January 2009. This CD contains samples of questions that might be asked in the examinations, together with the sort of answers that an A-grade candidate should give. The answers are accompanied by examiner comments, preceded by the icon e. These explain the elements of the answers for which marks can be awarded, and are intended to help you understand what the examiners are looking for.

The sample questions are not intended to typify real papers, only the sorts of questions that could be asked. Together with their answers, they provide a useful resource in the important matter of exam technique. After attempting the questions first, you should study the answers carefully — they provide an insight into how you can:

- explain the relevant legal topic/rules fully
- use case authorities effectively, whether dealing with 'explanatory' or 'problem-solving' questions
- answer 'evaluative' questions — not simply by considering advantages and disadvantages of a particular topic, but also by being able to provide a reasoned conclusion or argument

The sample answers are those that examiners expect from a grade-A candidate. They are not 'model answers' and should not be learnt parrot fashion. You need to respond to the question set and not the one you would like to answer. The answers should be used as a benchmark against which you can compare your own work and discover ways of improving it.

The new specification

There are differences in question style between previous examinations and the new ones. You should bear these differences in mind if you have to work through past papers based on the previous specification.

Unit 1: Law Making and the Legal System

The new Unit 1 examination paper lasts 1 hour 30 minutes and carries 50% of the marks for AS, or 25% of the total A-level marks. The paper contains two separate sections: Section A, 'Law making', and Section B, 'The legal system', with four three-part questions in each. The total marks available on this paper are 95.

You are required to answer three questions — at least one each from Sections A and B. The first part-question is usually a straightforward 'explanatory' question that calls for a clear description of the main facts of the topic. The second part-question is another 'explanatory' question on another issue within that topic. Part (a), for example, could be 'Describe how solicitors qualify and are trained' and (b) could be 'Explain how a claimant in a civil action may fund their claim'. Part (c) will require analysis and evaluation.

Unit 2: The Concept of Liability

As with Unit 1, the new Unit 2 examination paper lasts 1 hour 30 minutes and carries 50% of the marks for AS, or 25% of the total A-level marks. The paper contains three separate sections: Section A, 'Introduction to criminal liability'; Section B, 'Introduction to tort' and Section C, 'Introduction to contract', with one question in each. The total marks available on this paper are 95.

In Unit 2, you are required to answer two questions, one from Section A and one from *either* Section B or C.

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Introduction

Planning your answers

It is essential that you learn the definition of the descriptors that form the basis of the mark schemes — 'limited', 'some', 'clear' and 'sound'. As a general rule, answers that are 'some' will achieve C or D grades, answers that are 'clear' will achieve B or A grades, and 'sound' answers will always be A grade.

Note that the sample A-grade answers given here have a clear structure. This is usually demonstrated by a simple, accurate and relevant opening sentence and by the sequencing of the material. You are strongly encouraged to spend some time at the beginning of the examination planning all your answers.

First, read the question carefully. Are you required to outline, explain, discuss, analyse, compare, or evaluate? Next, brainstorm the material that you consider relevant to answer the different issues. Note your ideas down in the form of a spider-diagram or a set of headings and sub-headings. This should help to prioritise the points and to indicate the links between them. An important stage in an ideal plan is to assess how much needs to be written on each component. Finally, ensure that your answer refers to case law and/or statutory authorities.

As you study the sample answers, you will see that each answer contains clear case and/or statutory references. The references are important: the mark schemes usually state an explicit requirement for such authorities. If there are no references, you will not get into the top mark band, and the answer will only be graded as 'some' or 'limited'.

Problem-solving questions

'Problem-solving' questions require a different technique from 'explanatory' questions. The sample answers cover most of the topics in Unit 2. Study them carefully along with the examiner's comments to see why high marks would be given. Remember the importance of using cases effectively — failure to use cases is one of the most significant differences between A- and C-grade answers.

For 'problem-solving' questions based on a short scenario, the mnemonic **IDEA** may help:

I **Identify** the appropriate offence or tort or contract element.
D **Define** the specific offence or key element or contract.
E **Explain** the various rules.
A **Apply** the facts of the case to the rules explained, using **authorities** — both cases and statutes — to support your answers.

To acquire the necessary skills and become more familiar with this style of examination question, it is a good idea to practise adapting the sample answers for different scenarios.

For further questions and answers, with examiner comments, and specific content guidance on each unit, see our *Student Unit Guides* for AS law (available from autumn 2008). For more information and to order copies online, visit www.philipallan.co.uk, or contact Bookpoint on 01235 827720.

AQA AS Law Student Unit Guides
AQA AS Unit 1: Law Making and the Legal System 978-0-340-95801-8
AQA AS Unit 2: The Concept of Liability 978-0-340-95802-5

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Unit 1

Law Making and the Legal System

Question 1

Parliamentary law making

Describe the formal process used in creating a statute. (10 marks)

Answer

The formal process of creating a statute always involves both the House of Commons and the House of Lords. All statutes start life as a bill, and although important bills are nearly always introduced first in the Commons, bills can start their life in either House. There are two main types of bill. Public bills, the most common, are usually introduced by the government, but some are private members' bills, which are introduced by backbench MPs. The best-known example is the Abortion Act 1967. Public bills have general effect and are concerned with public policy that affects the law of the country. Private bills are usually concerned with local matters and promoted by such bodies as local authorities or statutory bodies seeking special powers.

All public bills have to undergo a formal procedure in both Houses that can start in either House. At the first reading, which is purely formal, the title of the bill is read out. At the second reading stage the bill is proposed by the government minister responsible and the House holds a full debate on the general principles of the bill. A vote to see if the bill should go further is taken at the end of the debate. The bill then passes to the committee stage, where the committee, consisting of MPs from all the political parties, examines every clause in detail. Amendments can be made at this time. Once this is completed the committee then reports back to the whole House, the report stage. Further amendments may be proposed and voted on. A third reading then takes place when the bill in its final form is presented to the House and the final vote is taken. If the vote is in favour of the bill, it then passes to the other House (the House of Lords if it started in the House of Commons) and the same stages are repeated there. The difference is that in the House of Lords the whole House acts as a committee and all the amendments are debated and voted on. If the House of Lords makes amendments to a bill which started in the Commons, it is referred back to them to consider the amendments. If disagreements between the Commons and Lords remain, these are usually resolved through negotiation or compromise, but ultimately the Commons has the power under the Parliament Acts 1911 and 1949 to ignore the objections of the Lords. This power is rarely used, but it was used to pass the Hunting Act 2004.

Once a bill has successfully passed through all the stages in both Houses it receives the royal assent, after which it can become law. This royal assent is no longer given in person and the last time it was refused was in 1707. Without royal assent the bill could not become law. At this point the bill becomes an Act of Parliament.

e The candidate shows sound knowledge of the roles of both Houses of Parliament and the Crown in the creation of an Act of Parliament. The difference in the procedure at the committee stage in the House of Lords is mentioned and so are the powers under the Parliament Acts. This answer would earn 9/10 marks.

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Question 2

Delegated legislation

Explain how delegated legislation is controlled by Parliament and the courts. (10 marks)

Answer

Parliament has some limited control at the time the enabling Act is made, as it sets out the extent of the delegated powers in the Act. The Delegated Powers Scrutiny Committee in the House of Lords also looks at all legislation which delegates powers to see if they are inappropriate. All delegated legislation has to be laid before Parliament before it can come into force. Delegated legislation is subject to either an affirmative resolution, where both Houses of Parliament have to vote, approving the legislation within a certain time period; or a negative resolution, where the legislation is laid before Parliament and if no member puts down a motion to annul it within a specified period (40 days), it becomes law.

The Joint Committee on Statutory Instruments, the Scrutiny Committee composed of members from both Houses of Parliament, reviews all statutory instruments. It can draw Parliament's attention to any which need special consideration. If a statutory instrument imposes a tax, is defective, needs clarification or exceeds the powers granted in the Act, it will be referred back to Parliament. Parliament itself holds the ultimate safeguard because it can withdraw the delegated powers and revoke a piece of delegated legislation at any time.

e All aspects of the controls that Parliament has over delegated legislation are covered well.

Delegated legislation can be challenged in the courts. Any person who has a personal interest in the delegated legislation (i.e. is affected by it) may apply to the court under the judicial review procedure. This is on the grounds that the delegated legislation is *ultra vires*, it goes beyond the powers granted by Parliament. This can be in the form of either procedural *ultra vires*, where a public authority has not followed the proper procedure set out in the enabling Act (as in *Agricultural, Horticultural and Forestry Training Board* v *Aylesbury Mushrooms Ltd*, where the ministry failed to consult the interested parties) or substantive *ultra vires*, where the delegated legislation exceeds the powers in the enabling Act. In *R* v *Home Secretary ex parte Fire Brigades Union* (1995), where the Home Secretary made changes to the Criminal Injuries Compensation Scheme, he was held to have exceeded the power given in the Criminal Justice Act 1988. Another example is *R* v *Secretary of State for Education ex parte National Union of Teachers*. The High Court decided that rules for teachers' appraisal went beyond powers given in the Education Act 1996.

e The grounds for judicial review are explained well, covering both procedural and substantive *ultra vires*. Relevant cases are given in support. This answer would earn 9/10 marks.

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Question 3

Statutory interpretation

Briefly describe two external aids which judges can use to interpret Acts of Parliament. (10 marks)

Answer

External aids are those outside the Act itself. Dictionaries of various kinds are the most obvious external aid and they are used frequently as a means of discovering what words mean. For example, in *Vaughan* v *Vaughan* (1973), where a man had been pestering his ex-wife, the Court of Appeal used a dictionary in order to define 'molest' and concluded that the definition was wide enough to cover his behaviour. However, the use of dictionaries does not always produce unanimity. In *Coltman* v *Bibby Tankers* (1987) reference to dictionaries did not result in unanimous views on whether the word 'equipment' could include a ship. The majority in the Court of Appeal, referring to the *Oxford English Dictionary*, said that it could not, whereas Lord Oliver in the House of Lords said that there was nothing in the *OED* definition which prevented a ship being included.

A second external aid is *Hansard*, the official report of what is said in Parliament. In *Davis* v *Johnson*, Lord Denning argued that not to refer to *Hansard* was like groping around in the dark without putting the light on. The House of Lords rejected this view, but Lord Denning's view was eventually accepted, subject to strict conditions, by the House of Lords in *Pepper* v *Hart* (1993). *Pepper* v *Hart* overruled *Davis* v *Johnson* and allowed reference to *Hansard* when wording in a statute is ambiguous, obscure or leads to an absurdity; the material relied upon consists of one or more statements by a minister or other promoter of the bill, together if necessary with such other parliamentary material as is required to understand such statements and their effect; and the statements relied upon are clear.

Recent cases have suggested that the courts may limit the use of *Pepper* v *Hart* to those cases against the government. Lord Hope said in *R* v *A* (2001) that essentially reference to *Hansard* 'is available for the purpose only of *preventing* the executive from placing a different meaning on words used in legislation from that which they attributed to those words when promoting the legislation in Parliament'.

When dealing with cases involving Acts that have introduced into English law an international convention or European directive, a wider use of *Hansard* is permitted. It was held in *Three Rivers DC* v *Bank of England* (1996) that the *Pepper* v *Hart* principle did not have to be applied so narrowly because it was important to construe the statute purposively and consistently with any European materials like directives.

e This answer makes detailed comments about both the aids selected and uses relevant cases that illustrate effectively the way the aids work in practice.This answer would earn 10 marks.

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Question 4

Precedent

Briefly explain the main features of precedent. (10 marks)

Answer

The doctrine of judicial precedent requires judges, when the facts in the case are the same as those in a previously decided case, to follow those decisions. This is known as *stare decisis* (let the decision stand). The judge's written decision sets out the facts and the legal principles used to reach the decision. The legal principles are known as the *ratio decidendi* (the reason for deciding) and form the binding precedent to be followed in later cases. An example of *ratio decidendi* is the rule in *R* v *Nedrick* (1986), confirmed in *R* v *Woollin* (1997), that if a jury considers that the defendant foresaw death or serious injury as a virtual certainty, oblique intention may be inferred and the jury may find the defendant guilty. Another example is the judgement in *R* v *Cunningham* that to be reckless you have to know there is a risk of the unlawful consequence and decide to take the risk.

Not all of the legal principles form the binding precedent. Sometimes a judge will state what he thinks the law would be if the facts were slightly different. This is known as *obiter dicta* and can form persuasive precedent. This happened in *R* v *Howe*, which was a murder case. The House of Lords commented that duress was not a valid defence (*ratio*) but it also said that it would not be a defence to someone charged with attempted murder either (*obiter*). Persuasive precedent may also result from dissenting judgements, when a case is decided by a majority of judges, or from decisions of the Privy Council as in the *Wagon Mound* case (the principle of remoteness of damage in tort).

To make sure that the doctrine works, a court hierarchy has developed whereby the lower courts are bound by the decisions of the ones above them. If the case concerns EU law, then the courts are all bound to follow previous judgements of the European Court of Justice. Otherwise the highest court is the House of Lords (HL). All the other courts in England have to follow its decisions. The case of *London Street Tramways* v *London County Council* (1898) established the fact that the HL was bound by its own previous decisions, but the Practice Statement made by the HL in 1966 allows it to depart from its own previous decisions when it appears right to do so. For example, *Pepper* v *Hart* (1993) overruled the previous House of Lords ruling in *Davis* v *Johnson*, which banned the use of *Hansard* in statutory interpretation.

The court below the HL is the Court of Appeal (CA), which is bound to follow the decisions of the HL. The CA consists of two divisions, the Civil Division and the Criminal Division. The Civil Division is also bound to follow its own previous decisions, but in *Young* v *Bristol Aeroplane Co Ltd* (1944) three exceptions were listed. These are where a previous decision was made *per incuriam* (in error); where there are two conflicting decisions; and where a later decision of the HL overrules a previous decision in the CA. The Criminal Division is bound by its own previous decisions, with the exceptions listed in *Young*'s case and also if someone's liberty is in issue (*R* v *Spencer*, 1985) or to ensure justice (*R* v *Simpson*, 2003).

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The next court in the hierarchy is the High Court, which is composed of the divisional courts and the ordinary High Court. These courts are bound by the HL and the CA. The Chancery and Family Divisions are bound by their own previous decisions. These decisions are also binding on the ordinary High Court, but this court is not normally bound by its own decisions.

The crown court, county court and magistrates' court are all bound by the decisions of all the courts above them. They are not bound by their own previous decisions.

With so many cases being heard every year, there has to be some way in which the lawyers/judges can find out which decisions they must follow. To make sure that this is achieved, a comprehensive system of law reporting has been established. In every case that is decided in the courts which set the precedents, the judgement is written down and published in these reports, e.g. the All England Law Reports, the Weekly Law Reports.

e An adequate, accurate explanation of the hierarchy of the courts is essential when answering a question on how precedent works, and the question also requires a description of *ratio decidendi*. For the higher marks it is not sufficient merely to identify and define it. There must be some explanation with case material in support. As precedent is based on decided cases, the use of cases is essential in the answer. Another important feature that is often overlooked is the necessity for a system of law reporting. This answer would earn 10 marks.

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Question 5

Juries

Describe the selection of juries for crown court trials. (10 marks)

Answer

The selection of juries is laid down in the Juries Act 1974, which requires jurors to be aged 18–70 (the Criminal Justice Act 1988 increased age eligibility to 70 from 65), to be on the electoral register and to have been resident in the UK (including the Channel Islands and the Isle of Man) for 5 years from the age of 13. Jurors are summoned by random sampling carried out initially by the Central Jury Summoning Bureau. From the number summoned for jury service, after excusal or deferral the clerk will randomly select 20 as 'jurors in waiting', then the final 12 jurors are chosen.

There are, however, certain people who are either disqualified from, or ineligible for, jury service. Those with a serious criminal record who have served a prison sentence within the previous 10 years or who have served any community sentence within the previous 5 years are disqualified. Those ineligible are now only the mentally ill under the Criminal Justice Act 2003. Judges, lawyers and police officers are now eligible for jury service. Only those over 65 may be excused from jury service as of right. Some people may be excused at the discretion of the court, e.g. nursing mothers, students sitting public exams or those with a poor command of English, but most such people are now likely to have jury service deferred until a later date.

Jurors may be vetted and challenged. Peremptory challenge by the defence (i.e. challenging without cause) was ended by the Criminal Justice Act 1988. Defence may now only challenge a juror with cause. The prosecution may require a juror to 'stand by for the Crown', but this is rarely employed and it is usual for a reason to be given. More detailed checks on a juror's background may only be carried out with the approval of the Attorney General, and this will be given only in security or terrorist trials.

e All the relevant materials — statutory criteria for jury service, random selection, the major changes introduced under the Criminal Justice Act 2003 — are included in this answer. Although the question is worth only 10 marks, the answer still covers the issues of challenges and vetting. This answer would receive the full 10 marks.

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Question 6

Magistrates

Outline the criminal jurisdiction of magistrates in the English legal system. (10 marks)

Answer

Magistrates play by far the largest role in the criminal justice system, as they try about 97% of all criminal trials — all summary offences and most 'either-way' offences. For 'either-way' offences, there will be a preliminary hearing called 'Plea before venue', where the accused person is given the choice of summary trial by magistrates or trial before judge and jury in the crown court. Sentencing powers of magistrates in adult courts are a maximum fine of £5,000 and/or a prison sentence of 6 months.

Magistrates also try most offences committed by young offenders (aged 10–17), in the youth court. The only offence which cannot be tried here is murder. The youth court is less formal than the adult court and magistrates have to have received additional training for this work. The maximum sentence available in this court is a 2-year training and detention order.

Other functions within the criminal justice system include bail applications (under the Bail Act 1976), applications for legal aid, and the issue of search and arrest warrants.

Finally, lay magistrates continue to sit with a circuit judge in appeals to the crown court against conviction.

e This is a brief but accurate description of the criminal jurisdiction of magistrates in which the key responsibilities of adult courts — summary and 'either-way' offences — and youth courts are dealt with effectively. Mention is made of the other duties — bail and legal aid applications, warrants and dealing with appeals. This answer would obtain 8 or 9 marks.

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Question 7

Legal professions

Outline recent changes to the legal profession and comment on the suggestion that it is no longer necessary for there to be two distinct professions of solicitor and barrister. (15 marks)

Answer

During the last 12–15 years there have been many changes to the legal profession: solicitors lost their monopoly over conveyancing in the Administration of Justice Act 1985, but under the Courts and Legal Services Act (CLSA) 1990 they obtained higher-court rights of audience as solicitor-advocates and there are now over 2,000 of these. Other changes under CLSA 1990 have seen solicitors become High Court judges and the growth of large, even multinational, firms of solicitors, which has led to increasing specialisation in law firms.

Barristers, too, have seen many changes in their profession — they can now advertise their services, and professional clients can consult directly with barristers. Direct Public Access now permits ordinary people to obtain advice from barristers for certain types of civil law. Sets of chambers have merged in recent years, and cities such as Birmingham and Leeds have flourishing sets of barristers' chambers and large firms of solicitors.

These are just a few of the changes that have occurred recently. In the Access to Justice Act 1999, employed barristers acquired rights of audience for the first time, and the Act made it easier for solicitors to obtain higher-court rights of audience.

Because of these changes, especially the opportunity for solicitors to advocate in the higher courts and to become senior judges, the question has been raised as to whether it is necessary to have two quite separate branches of the legal profession.

However, to answer this particular question, it is also essential to consider the very different tasks which each branch — solicitors and barristers — perform. Here, a comparison with the medical profession may be helpful. If we are ill, we go to see a GP. Only if our GP considers there is something seriously wrong will we be referred to a hospital consultant, who may decide that an operation is necessary. The situation is the same with legal problems. For most of us, the only time we see a solicitor is when we are buying or selling our house, making a will, checking a contract or setting up a company. It is very rare for such 'administrative' tasks to require a referral to a specialist barrister. On these rare occasions a solicitor asks for a 'second opinion' by way of counsel's opinion.

If a decision is taken by a client to pursue or defend a case in court, the solicitor will instruct a barrister or solicitor-advocate to represent the client in court. In such circumstances, it is necessary also to appreciate that while the barrister may be the courtroom specialist advocate, the solicitor, too, is a specialist — in issuing the proceedings in court to start the action and dealing with the pre-action protocols such as discovery and organising witness statements. The process of litigation has to involve both solicitors and barristers. A recent Bar Council survey actually confirmed that for most county court actions (where solicitors already have rights of audience) it is cheaper and more cost-

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effective for the client to employ a solicitor, who will in turn instruct a barrister, than for the solicitor to carry out all the different tasks of litigation.

Given that most people's legal 'problems' can be and are dealt with successfully by solicitors, and that on the relatively rare occasions where court action is necessary both 'office-based' and 'court-based' lawyers are used, it seems unarguable that the public interest is best served by having two separate sets of lawyers.

e This question creates many problems for candidates. It illustrates the need for detailed planning, as candidates are required first to identify various changes that have affected both solicitors and barristers and only then to discuss whether two separate legal professions are needed. The key to answering this question lies in understanding the relationship that exists between solicitors and barristers. Too often students appear to learn only the differences that exist between the two branches without appreciating the way in which they work together. A particular problem is that too many students fail to realise how much legal work is non-contentious (such as conveyancing) or how much litigious work solicitors perform themselves in magistrates' and county courts, and, finally, that even if a barrister is instructed there is still much specialised work to be undertaken by the solicitor. All these individual points are covered well in this answer. The comparison with the medical professions of GP and hospital consultant reinforces the general level of understanding in this answer and it would be awarded the full 15 marks.

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Question 8

Alternative dispute resolution

Briefly explain the alternatives to the courts in the resolution of civil disputes. (10 marks)

Answer

At present, there are many options available in dispute resolution: these include administrative tribunals, arbitration, mediation and conciliation. Considerable impetus has been given to arbitration and mediation under the Civil Procedure Rules (CPR), which gave effect to Lord Woolf's civil justice reforms. Courts are now required to ask parties to litigation to consider the possibility of alternative dispute resolution (ADR), and if one party unreasonably declines to consider ADR, the court may refuse to award costs if that party succeeds in the action (*Dunnett* v *Railtrack*).

Taking tribunals first of all, these have been established over the last 50 years in particular to deal with many different types of problems — employment, social welfare benefits, immigration, fair rent etc. They have a very limited jurisdiction, unlike courts, and are presided over by a panel comprising a legally qualified chairman and two assessors, who, although not legally qualified, are experienced in the area of the dispute. These tribunals now play the largest part in civil dispute resolution as, between them, they hear over 1 million cases a year.

Arbitration has been described as 'privatised litigation' and is the process whereby both parties agree to the appointment of an arbitrator to settle their dispute. This procedure is governed by the Arbitration Act 1996. In many commercial contracts, there is a 'Scott-Avery' clause which effectively compels the parties to resolve any contractual dispute through arbitration. There are three different forms of arbitration: small claims with a limit of £5,000 in the county court; consumer arbitration, using schemes approved by the Office of Fair Trading, involving various trade associations (such as ABTA); and commercial arbitration.

Mediation has become much more popular in recent years, having proved its value in the USA. This process involves a neutral mediator working with both parties to assist the parties themselves to reach an agreed solution. No decision is imposed and the parties retain the right to litigate if mediation fails. It is said that while court-based litigation, and to a certain extent arbitration too, is 'rights-based', mediation allows the parties' individual interests to be better represented.

Conciliation can be described as a kind of 'halfway house' between mediation and arbitration. Here, the conciliator, a neutral third party, after discussing the problem between the parties, offers a non-binding opinion to try to resolve the dispute.

e This is a strong answer. It has an effective introduction, followed by a full description of each type of dispute resolution with good illustrative examples. It contains clear legal references, and the candidate has described each procedure clearly and accurately throughout. This answer would receive the full 10 marks.

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Unit 2

The Concept of Liability

Question 1

Crimes of omission

***Actus reus* is usually a positive action; however, there are occasions where omissions (failures to act) can incur criminal liability. Explain how omissions can result in a crime being committed.** (10 marks)

Answer

The general rule in English law is that an omission or failure to act will not usually result in criminal liability being imposed — there is no 'Good Samaritan' law — but there are situations where a crime will have been committed because the defendant failed to act. These are as follows:

(1) Where there is a contractual duty to act — in *R* v *Pittwood*, the level-crossing gatekeeper failed to close the gate to an oncoming train and a person crossing the line was killed. His contract of employment clearly required him to ensure this could not happen. He was convicted of manslaughter.

(2) Statute can make it an offence in defined circumstances to fail to act — e.g. failing to wear a seat-belt or crash helmet.

(3) Someone can be made liable where there is an assumed responsibility for the care of an aged or infirm person — *R* v *Stone and Dobinson*. Here the defendants wanted Stone's middle-aged sister to live with them. This sister then 'assumed an eccentric, withdrawn and bed-ridden existence'.

(4) Where the defendant does an act which puts another person in peril or endangers that person's property or liberty, and the defendant is aware that he or she has created the danger, there is a duty to take reasonable steps to eliminate the danger. The act may be done without any kind of fault, but if the defendant fails to intervene, he or she is responsible. This is illustrated in the case of *R* v *Miller*, where a squatter accidentally set fire to his bed. He did nothing to put it out and went to sleep in another room. He was convicted of arson (deliberate fire-raising) — the judge ruled that when he woke up to discover the fire, he was under a duty to try to put it out, or at least to warn neighbours.

(5) Where an official fails to perform his duty — in *R* v *Dytham* a police officer was found guilty when he failed to protect a citizen who was being kicked to death. This would also deal with the hypothetical case of a lifeguard who, having seen a bather in distress, failed to go to his or her rescue.

e This is an excellent answer in every respect. The candidate begins by noting that in general there is no liability for failing to act, and then describes in detail the exceptions whereby criminal liability is imposed for omissions. In the key areas, the relevant case is used effectively to illustrate the legal rule. This answer addresses all the potential content of the mark scheme, and would score 9 or 10 marks.

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Question 2

Non-fatal offences

Richard and his girlfriend Alison had a serious argument, at the end of which Alison, in her rage, picked up a kitchen knife and threw it at Richard. It struck him in the shoulder and caused a bad cut and damaged tendons.

With respect to the injuries suffered by Richard, Alison may be charged with an offence. Using examples, explain the *actus reus* and *mens rea* of an appropriate offence. (10 marks)

Answer

Given the cut to the shoulder and the damaged tendons, under the Joint Charging Standard, Alison would be liable to be charged under s.20 of the Offences Against the Person Act 1861. This offence is malicious wounding and/or inflicting grievous bodily harm (GBH).

The *actus reus* comprises wounding, which is defined in *C (a minor)* v *Eisenhower* as a breach in the inner and outer layers of the skin, or grievous bodily harm, which was described in *DPP* v *Smith* as 'really serious harm' and in *R* v *Saunders* as 'serious harm'. The cut to Richard's shoulder would certainly qualify as a wound, and damaged tendons could be regarded as sufficiently serious to be GBH.

The *mens rea* of s.20 is intention or recklessness as to causing some harm, not necessarily wounding or GBH. This was laid down in the case of *R* v *Mowatt* and confirmed in *R* v *Grimshaw*. Recklessness here is 'Cunningham' or subjective recklessness — conscious taking of an unjustified risk.

While Alison may deny having intended to cause such injuries, her conduct was certainly reckless when she threw a kitchen knife at Richard. The prosecution would not find it too difficult to establish the necessary *mens rea* for s.20 in terms of the *Mowatt* direction.

Because the *actus reus* of the more serious offence — s.18 wounding or causing GBH with intent — is identical to that of s.20, it is possible for Alison to be charged with this offence. The only difference between the two offences is in the issue of *mens rea*. Section 18 is a specific intent offence — the prosecution must prove that the defendant intended to cause GBH. As Alison used a weapon, this would be easier to prove. Intent here could be either direct intent or oblique intent, whereby the jury would have to believe that Alison foresaw serious injury as being 'virtually certain' in order to convict her under s.18.

e Note that this answer refers at the beginning to the Joint Charging Standard in order to identify correctly the most appropriate offence — s.20. Both the *actus reus* elements of wounding and GBH are defined correctly, using the relevant case authorities. The *mens rea* is explained accurately too. Many students fail to note the *Mowatt/Grimshaw* rule about intent or recklessness as to causing some harm. The candidate then sensibly applies these rules to the facts of the scenario. It was not necessary to continue into s.18 GBH with intent, as this answer would already have received a high grade A, but the key point here is that if there is time to include material on s.18, it is worth doing so. The answer would score 9–10 marks.

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Unit 2 The Concept of Liability

Question 3

Tort (I)

Fred is driving his car along a busy high street when his mobile phone rings. While reaching out for his phone he loses control of the car and crashes into a lamppost. His passenger, Kate, suffers severe whiplash injuries. These injuries lead to a rare condition affecting the central nervous system, which causes Kate to experience partial paralysis to her left side.

The first test for the tort of negligence is whether a duty of care is owed to the claimant by the defendant. Explain whether, in the above scenario, Fred owes a duty of care to Kate. (10 marks)

Answer

The issue of whether a duty of care was owed by Fred is the first test to be established in the determination of whether he is liable under the tort of negligence. The major case of *Donoghue* v *Stevenson* initially laid down the criteria for imposing a duty of care — this was the 'neighbour test', where Lord Atkin held that 'one must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour'. He proceeded to define a 'neighbour' as 'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions'.

From this principle, it can be seen that in order for a duty of care to be owed there must be reasonable foresight of harm to persons whom it is reasonable to foresee may be harmed by my acts or omissions. This rule was modified by the 'two-stage' test introduced in *Anns* v *Merton London Borough Council* which in turn was overruled in *Caparo Industries plc* v *Dickman*. This case laid down the present three questions which must be addressed in order for a duty of care to be imposed:

(1) Was damage or harm foreseeable?

(2) Is there sufficient proximity (close relationship) between the wrongdoer and the victim?

(3) Is it just and reasonable to impose a duty of care?

A good case to illustrate the issue of proximity is that of *Bourhill* v *Young*, where it was held that 'a duty of care only arises towards those individuals of whom it may reasonably be anticipated that they will be affected by the act which constitutes the alleged breach'. In that case, it was decided that the motorcyclist did not owe a duty of care to Mrs Bourhill, who at the time of the crash was standing behind a solid barrier and not within his field of vision, and was in no way at risk from his speed.

In this question, it can be argued that harm to Kate was foreseeable as a result of Fred's poor driving and that, unlike Mrs Bourhill, Kate was proximate to Fred because she was his passenger.

The final question — is it just and reasonable to impose a duty of care? — relates to the issue of policy. This question has arisen in the contexts of nervous shock, pure economic

loss and statutory duties, where judges have taken on board the difficulties which might be caused were there no rules to limit potential liability. In the present case, there would appear to be no difficulty in holding that it is 'just and reasonable' to impose a duty of care on Fred, and indeed such cases of negligence are all too common in the courts today.

It may reasonably be concluded that on the facts provided in the scenario, Fred did owe a duty of care to Kate, on the basis of both the 'neighbour' and *Caparo* three-stage tests.

e Most of the first part of this answer is given over to a full explanation of the relevant rules of duty of care, and only when these have been fully explained does the answer consider the circumstances of the scenario and apply the rules to the facts of the case. Note that with the exception of *Bourhill* v *Young*, none of the facts of the cases cited are described. These are two of the most common and serious weaknesses in examination answers. Many candidates answer such questions almost exclusively in terms of the facts of the scenario, and waste time describing the facts of cases, such as the 'snail in the bottle' case. Herein lies the main key to answering these 'problem-solving' questions. Most marks are given for a full and accurate explanation of the relevant legal rules — fewer marks are given to candidates who deal mainly with the facts of the case.

This answer has a clear structure related to the rules, starting with the 'neighbour principle' from *Donoghue* v *Stevenson*, then going on to *Caparo Industries plc* v *Dickman*. The issue of proximity needs more detailed discussion and here *Bourhill* v *Young* enables this matter to be clarified. Finally, the 'fair and reasonable' test is covered with good examples of 'policy' tests. This is a comprehensive answer that would receive full marks.

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Question 4

Tort (II)

Look again at the scenario outlined in question 3. Assuming that Fred did owe Kate a duty of care, discuss whether or not Fred was in breach of that duty of care. (10 marks)

Answer

To decide this question, the traditional formula which the courts employ is to ask whether the defendant has observed the requisite standard of care in all the circumstances. The standard of care of 'the reasonable man' is what is usually expected. Failure to act as a reasonable person would have been an indication of negligence. This test is objective and requires a judge to measure the conduct of the defendant against that of the 'reasonable man' and what 'he' would have done in the circumstances. Alderson B. in *Blythe* v *Birmingham Waterworks* stated that 'negligence is the omission to do something which a reasonable man…would do, or doing something which a prudent and reasonable man would not do'.

There are a number of separate tests which provide some guidance as to how the 'reasonable man' question is to be decided. These are as follows:

- **The risk of harm.** In *Bolton* v *Stone* it was held that the defendant had not acted unreasonably in failing to guard against the remote risk involved — here evidence proved that a cricket ball had been hit out of the ground about six times in the previous 30 years. This case can be contrasted with *Haley* v *London Electricity Board*, where the defendants were held liable to pay damages to a blind person who had fallen into a hole, on the grounds that a large number of blind people live in London.
- **The magnitude of potential harm.** The leading case here is *Paris* v *Stepney Borough Council*, where the defendants were held to have been unreasonable in failing to supply safety goggles to a one-eyed workman who, when a chip of metal flew into his one good eye, was totally blinded.
- **The expense of taking precautions.** It would not be negligent to fail to take a precaution which is prohibitively expensive in the light of a risk which is not very great. In *Latimer* v *AEC* the factory owner was held not to have been negligent by covering slippery areas with sawdust. The only alternative would have been to close the factory. This extreme measure was held to have been unnecessary, and the claim failed.

To apply each of these tests in turn, first of all the risk and magnitude of harm: if a driver of a car allows his or her attention to slip, even for a moment, there is an obvious risk of harm, and in a road traffic accident there is always the potential for serious injuries or even death, especially to a passenger. It could also be argued that using a mobile phone while the car is in motion is a breach of the Highway Code, which would suggest breach of a duty of care. The final test, the cost of taking precautions, would seem to have little relevance here. It could therefore be strongly argued that Fred is in breach of his duty of care.

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e This is another illustration of a good approach to answering problem-solving questions. The answer concentrates on the relevant legal rules and, at the end, applies these rules to the facts given in the scenario. There is an excellent introduction stating and explaining the 'reasonable man' test. The candidate goes on to identify and explain the various tests that courts use to determine whether the defendant has acted as a reasonable person would in the same circumstances. In each of these, the relevant case authorities are used effectively to demonstrate a sound understanding of the rules. Finally, the candidate briefly but effectively applies these rules to the scenario. The answer would receive full marks.

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Unit 2 The Concept of Liability

Question 5

Contract

A valid contract requires both an offer and an acceptance. Explain the meaning of both offer and acceptance. (15 marks)

Answer

An offer could be defined as an expression of willingness to contract on certain terms, made with the intention that it will become binding on acceptance. It can be specific — made to one person or group of people — or general and not limited in who it is directed at. An offer of a reward as in *Carlill* v *Carbolic Smoke Ball Co.* would be a good example of an offer that could be accepted by anyone who met the conditions.

It must be distinguished from an invitation to treat, which is where someone is invited to make an offer. Goods on display in shops (*Fisher* v *Bell*) or supermarkets (*Boots* v *Pharmaceutical Co.*) are invitations as are most advertisements (*Partridge* v *Crittenden*).

An offer must be certain, which means that its terms must be clear and definite without any ambiguity. For example, in *Guthing* v *Lynn* (1831) a promise to pay an extra £5 'if the horse is lucky' was considered too vague to constitute an offer. But an offer may be made by any method. It can be made in writing, verbally or by conduct (e.g. by picking an item up and taking it to the cash desk).

Another rule is that it must be communicated. A person cannot accept what they do not know about and it must still be in existence when it is accepted.

An offer can be brought to an end at any point before acceptance. It can be ended in a number of different ways. A refusal will end an offer and the case of *Hyde* v *Wrench* illustrates the fact that a counter-offer will also terminate an offer.

An offer can be revoked (withdrawn) at any time, but this must be before acceptance. The revocation must actually be received before the acceptance is made. In *Byrne* v *Van Tienhoven*, Van Tienhoven wrote to Byrne on 1 October, making an offer, but changed his mind and wrote again to Byrne on 8 October, withdrawing the offer. As Byrne accepted the offer in a telegram on 11 October, before he received the revocation letter, the acceptance was valid.

Revocation could be communicated through a third party as in *Dickinson* v *Dodds*.

Acceptance is unqualified and unconditional agreement to all the terms of the offer by words or conduct. If conditions or qualifications are added then a counter-offer is created.

Acceptance must be communicated (*Felthouse* v *Bindley*), though it can be inferred from conduct. The principle seems to be that when you start to implement what is in the offer, you have accepted it.

If a method of acceptance is specified, it must be complied with, but *Tinn* v *Hoffman* shows that in some circumstances another method, equally good, might suffice. If no method is specified, any method will do as long as it is effective. If acceptance is by post, the rule is that acceptance is valid when posted, even if the letter is lost in the post.

Revocation is valid when received. In *Household Fire* v *Grant* a letter was lost in the post and, nevertheless, there was a proper acceptance and a binding contract.

When instantaneous methods are used, such as phone or e-mail, acceptance is immediate as long as it gets through (*Entores* v *Miles Far East*). But if a telex or e-mail is received when an office is closed, the House of Lords in *Brinkibon* v *Stahag Stahl* held that the acceptance could only become effective when the office reopened.

e This question requires description rather than application and the response clearly outlines the main elements of both offer and acceptance. A variety of cases are used to illustrate how the rules work. Notice that some are explained in some detail, while others are simply named as relevant authorities, but they are used in such a way that the examiner can see that their relevance is understood. The answer is stronger on offer than on acceptance and would be awarded 13 or 14 marks.

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