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Paper 1
Report on the Examination

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Introduction

This was the first examination in the new AS Level Law Specification and the structure of the assessment was significantly different from that adopted in previous AS Level Law Specifications.

It was evident that, though there were some very impressive answers across all the range of questions, the majority of students had a little difficulty in determining the most effective approach to adopt when answering some or all of questions 11-16.

There were some very obvious areas for attention and improvement:

- students should be careful to focus directly on the specific requirements of the question as conveyed by the instruction. For example, Question 12 directed students to deal with the ***actus reus*** of battery but, instead, many dealt with the ***mens rea***. Similarly, in Question 14, the information given to students, both in the facts of the scenario and in the instruction itself, made it abundantly clear that the focus was almost exclusively on the ***mens rea*** of the offence under the *Offences Against the Person Act 1861 s18*, yet many students spent a lot of time explaining and applying ***actus reus*** elements that could have been disposed of in a sentence. In consequence, the mens rea issues were often addressed in a very superficial manner;

- in Questions 13 and 14, students were required to deal first with the explanation and application of substantive law arising out of the facts in a scenario, and then to develop an alternative perspective about that scenario based on some aspect of the English legal system. In Question 13 in particular, a very large number of students addressed only the substantive law aspect. In Question 14, answers were a little more balanced but still concentrated predominantly on the substantive law aspect. In both cases, students were limiting the total marks to which they were able to aspire;

the respective weighting of the questions is evident in the mark allocation for each but this was often ignored by students, who might write as much or more in answering Question 13 or 14 (12 marks) as they wrote in answering Questions 15 or 16 (extended response answers worth 20 marks). There was certainly some evidence that students expending an excessive amount of time in answering the earlier questions then left themselves with insufficient time to provide comprehensive answers to later questions.

Question 1

The correct answer was statement D: D wants the consequence to result from her conduct.

Approximately two-thirds of students selected this answer, though about one quarter opted for answer C, a definition of indirect (oblique) intention.

Question 2

The correct answer was statement B: More than merely trivial personal injury.

This answer was a much more precise definition of actual bodily harm (***Chan-Fook***) than ‘cuts and bruises’ (option A), which would not have included psychiatric injury, or the much more nebulous ‘personal injury’ (option C), which could have included relatively trivial injury. Though the correct statement was chosen by more students than any other, in aggregate more students chose options A and C.

Question 3

The correct answer was statement D: It is not necessary to prove that D was negligent.

This question clearly proved difficult for students, revealing some significant lack of understanding of strict liability offences. The most popular answer was option C, suggesting that no voluntary act need be proved. This would indicate absolute liability, or the liability encountered in 'state of affairs' offences, where no conduct (act or omission) need be proved. Strict liability offences require proof of conduct (act or omission, and so voluntariness) as part of the actus reus but do not require proof of mens rea (intention or recklessness) or negligence as to all or to some part of the actus reus. Given that explanation, it was rather alarming to discover that over one tenth of students selected option A, apparently believing that recklessness must be proved.

Question 4

The correct answer was statement B: It may make it easier to prove causation.

This answer was chosen by approximately two-thirds of students. Clearly, in the absence of the 'thin skull' rule, it might be possible for the accused to argue more strongly that his/her conduct was not the true cause of the victim's injury or damage but, rather, that the true cause was an existing susceptibility ('thin skull') on the part of the victim. About one-fifth of students selected option A, believing that the rule does not apply to personal injury offences, despite commonly cited cases such as ***Blaue***.

Question 5

The correct answer was statement C: In some cases, D will be guilty of an offence of causing injury to V, even though he intended injury only to X.

Essentially, this answer is a statement of the transferred malice rule. However, it would also be perfectly accurate to translate it as a statement about recklessness, in that D might have intended injury only to X whilst foreseeing the risk of injury to V and going ahead and taking the risk. Again, around two-thirds of students selected the correct answer whilst more than one-fifth chose option B. Option B suggested that all criminal offences require proof of an 'act' (not of an 'actus reus'), a proposition clearly contradicted by liability based on omissions in cases where a duty to act can be proved.

Question 6

The correct answer was statement C: Magistrates sentence offenders up to a maximum of 3 years imprisonment for a single offence.

Overwhelmingly, students correctly selected this as the false statement, given that the sentencing powers of magistrates are much more restricted than the statement asserted, though a sizeable number did not believe that magistrates sometimes sit with a judge in the Crown Court and hear appeals (option D).

Question 7

The correct answer was statement A: The accused can always insist on being tried in the Crown Court.

Demonstrating strong understanding of the criminal process (as in Question 6 also), a very large majority of students correctly selected this answer. Around one-tenth of students selected option B (offences triable either way include all the minor offences), apparently being unaware that a large number of minor offences are triable only summarily, whilst approximately the same proportion believed, somewhat in the face of the evidence supplied by their description as offences 'triable either way', that they must be tried in a Magistrates' Court (option D).

Question 8

The correct answer was statement B: A court does not apply a precedent from an earlier case because significant facts were different.

Answers to this question suggested a very strong understanding of the operation of the doctrine of precedent, almost four-fifths of students selecting the correct statement.

Question 9

The correct answer was statement D: The Prime Minister cannot be prosecuted for minor criminal offences.

This question proved rather troublesome. One of the main tenets of the rule of law is that no person is above the law. All are governed by the same rules. Inevitably, to make concessions to the Prime Minister simply because of her/his status as Prime Minister would breach that principle. This would be exactly the situation if the Prime Minister could not be prosecuted for minor criminal offences. Of course, none of this makes any assertion about what actually happens in practice. There are many situations in which persons who commit criminal offences could be prosecuted but for various reasons are not. The important point is that they *could* be prosecuted.

Though the correct statement was chosen by more students than any other statement, it was chosen by little more than a third, with all other options gaining significant support, especially option A (judges cannot decide cases involving members of their own family). Option A clearly supports the rule of law in preventing the possibility of bias in the application of the law ('no person may be judge in his or her own cause'). Similarly, if the rule of law is to be upheld, the Government cannot be allowed to determine its interpretation and application by exercising arbitrary power over judges (option B) and nor can the law be administered unequally depending on factors such as ethnic background (option C).

Question 10

The correct answer was statement B: D knew that V was widely suspected of child abuse.

This answer was chosen by almost three-quarters of students, displaying a strong understanding of the factors which a judge would/would not take into account in sentencing. Perhaps a little surprisingly, about one-fifth of students opted for statement D (D pleaded guilty). A plea of guilty is a very strong factor in gaining a reduction in sentence. There are both statutory provisions and Sentencing Council guidelines on how judges should approach the issue.

Question 11

Strong answers concentrated on simple, efficient explanations supported by a relevant case. Though there were a number of different approaches, students writing such answers provided a

simple explanation in terms of the legal reason for the decision, expanded briefly on it by reference to its status as the binding element in precedent, or perhaps by distinguishing it from *obiter dicta*, and gave just sufficient details about a relevant case to identify the *ratio* or to show how the *ratio* formed the precedent for subsequent cases. Cases cited included ***Howe*** and ***Gotts*** from criminal law but also ***Donoghue v Stevenson*** and other cases from tort

Weaker answers were often confined to an accurate but simple statement translating the term as the legal reason for the decision or fell into some confusion between *ratio decidendi* and *stare decisis* when trying to develop explanation of the broader context and significance. There was also some tendency for students to veer away from the central issues in favour of a brief discussion of avoiding the application of precedent, utilising techniques such as distinguishing. In consequence, such answers lost sight of the requirement to discuss *ratio decidendi* and its significance. In these weaker answers, even if students cited a relevant case, there was rarely any indication of how it might serve to illustrate either the meaning or the significance of the *ratio decidendi* of a case.

Question 12

In answering this question, it was very important for students to look carefully at the instruction. Students were asked to suggest why Beth did not commit the ***actus reus*** of a battery. They were not asked to discuss *mens rea*. The logical approach would have been to identify the elements of the *actus reus* of the offence of battery and then to determine which one or more of the elements would not be present on the facts given. Adopting that approach, the *actus reus* of battery is satisfied by the infliction of at least a minor degree of unlawful force/violence by an act (the issue of battery and omissions did not arise here) which is **voluntary**. When Beth was propelled into Claire by Ade, Beth inflicted unlawful force on Claire but there was clearly no voluntary act because Beth was unexpectedly pushed by Ade. So, a crucial element in the definition of the *actus reus* of battery, voluntariness in relation to an act, was missing and there was no *actus reus* of battery. Though reference to a case was not necessary for full marks, the notion of voluntariness could easily be illustrated by reference to a case such as ***Mitchell*** and, perhaps a little less appositely, ***Hill v Baxter***.

Even stronger answers rarely approached the issues in such a straightforward and direct manner and most failed to be comprehensive in one way or another. The most common approach was to focus immediately on Ade's push and to assert that, since this was the reason that Beth fell into Claire, Beth could not be liable. Various explanations were given for this: Beth had not acted voluntarily; it was not Beth's fault; Beth did not intend to fall into Claire; everything was Ade's fault. Clearly, those answers which stressed the lack of voluntariness, perhaps supporting the argument by reference to, say, ***Mitchell***, came closest to being comprehensive in suggesting why there had been no *actus reus*. Answers which tended to be framed in terms of intention were paying insufficient attention to the requirement to discuss *actus reus*. Many answers made no reference at all to the infliction of force element in the definition of battery. Those that did often either ignored it in application or concluded that no force had been inflicted by Beth, or, at any rate, that the infliction was by Ade. An interesting approach, for which some credit was available, was that the force inflicted was not unlawful because it was no more than any person consents to in the ordinary course of daily activities. This made assumptions about the circumstances in which Beth was pushed into Claire by Ade which were not necessarily justified but it did have some credibility.

A persistent approach, either in its own right or as part of a rather tangled argument involving also notions of voluntariness and/or Beth's lack of intention, was the suggestion that Ade was guilty of battery through the principle of transferred malice. Of course, this switched the focus of the answer away from both Beth and the *actus reus* of battery but some credit was given to it when the argument was properly developed.

Question 13

This scenario-based question required students to deal with both substantive criminal law and sources of law, equal marks being allocated to both. The substantive law aspect asked students to advise Diana as to her liability for an offence of assault occasioning actual bodily harm under the *Offences Against the Person Act 1861 s47*. Students had to determine, therefore, whether Diana's conduct in sending a message to Erin saying, "Next time I see you, you are dead", caused Erin to fear the immediate infliction of personal violence (an assault if accompanied by intention or recklessness on Diana's part). If so, then the further question was whether Erin's consequent depression amounted to 'more than merely trivial hurt or injury', the definition of actual bodily harm proposed in ***Chan-Fook*** and extending to psychiatric injury.

There were certainly some strong answers in which students posed these questions and answered them successfully but it was rather more common to see answers which dealt with only some of the relevant aspects, whether in terms of explanation or application of the law. Many students simply asserted that it was clear that Erin feared immediate personal violence because of her depression and fear of going out, and so paid little attention to the 'immediacy'/imminence aspect. Others concentrated excessively on causation, though introduction of the thin skull rule was appropriate. Some students failed to connect the assault elements with the actual bodily harm requirement, or failed entirely to define actual bodily harm and the inclusion of psychiatric injury, whilst others argued that the *mens rea* required was as to the actual bodily harm rather than as to the assault. In some instances, students ignored the specific instruction to discuss the *s47* offence and dealt instead with unlawful and malicious infliction of grievous bodily harm under *s20*, on the basis that depression could be serious injury.

A different perspective on the scenario was introduced by the instruction to assess the contribution of different sources of law to the rules explained and applied in examining Diana's liability. This could have been answered relatively simply but comprehensively, first by identifying the role of statute (the *Offences Against the Person Act 1861*) in supplying the basic framework for the assault occasioning actual bodily harm offence, and perhaps mentioning the *Criminal Justice Act 1988 s39* in connection with assault; and second, by commenting on the extent to which the common law contributed the detail of the offence of assault, despite the *1988 Act*. This would have included the basic definition of assault and the interpretation of terms such as 'immediate', as well as the general notion of *mens rea* and the meaning of intention and recklessness.

Once again, some students did take this approach, though the comment on common law tended to be rather brief and often not clearly connected to the elements of the offence itself. However, many students simply presented abstract descriptions of sources of law, including custom, making little attempt, if any, to indicate their contribution to the rules explained and applied, and so failing to provide any assessment of the contribution. A rather extreme version of this approach was the lengthy account of EU law as a source of law. Some students mistakenly sought to interpret the instruction as an invitation to deal with sentencing. Unfortunately, many students made no attempt at all to provide an answer to this part of the question, which severely restricted the total marks available.

Question 14

As with Question 13, this question required students to deal with the explanation and application of substantive law to a scenario and then to make an assessment of an aspect of non-substantive law – access to legal advice and representation – arising out of the scenario. In relation to the former,

the instruction was to advise Falon on her possible liability for an offence of causing grievous bodily harm with intent to cause grievous bodily harm under the *Offences Against the Person Act 1861 s18*. Students were supplied with the further information that the injury suffered by Greg (a fractured skull) amounted to grievous bodily harm. Given that this injury resulted directly from Falon's conduct in throwing bricks down into the crowd of which Greg was a part, it seemed evident that no significant investigation of the *actus reus* was required. Rather, the issue was one of *mens rea*. Did Falon have an intention to cause serious injury?

Some students correctly perceived the main focus to be *mens rea* and were able to present a comprehensive account of both direct and indirect (oblique) intention, usually concluding that Falon would be guilty because anyone throwing numerous bricks from a roof onto a crowd would be aware first, that there was a virtual certainty of hitting someone, and second, that the most likely area of the body to be struck would be the head, with a consequent virtual certainty of serious injury. This could be interpreted as intention in itself – indirect, as arguably indicated in ***Woollin*** – or as overwhelming evidence of intention as held in ***Matthews and Alleyne***. Many students, however, treated it as a case of direct intention, which was equally arguable, though it should have been supported by at least some discussion of indirect intent. Some students took the view that Falon's *mens rea* was most likely to be categorised as recklessness, so that the offence would be unlawful and malicious infliction of grievous bodily harm under *s20* of the *1861 Act*. The amount of credit awarded to such answers inevitably depended significantly on whether the debate about recklessness was a development of an argument about intention, or was the exclusive focus of the answer. A much weaker variant was to compare Falon's conduct with that of a reasonable person, introducing, in effect, the notion of negligence. A broad range of answers appeared to adopt an approach more suited to consideration of an offence in Question 15, apparently assuming that all elements of the offence had first to be explained and then applied. These answers began with the definition of grievous bodily harm (relevant, nonetheless, because of the need to prove intention to cause grievous bodily harm) but then unnecessarily pursued, often at great length, issues of causation. This left little time to explore the true focus of the question in *mens rea*.

In relation to the necessity for Falon to obtain legal advice and representation in the event of investigation and prosecution, the options available to her would turn crucially on her financial circumstances. Anyone with sufficient money can arrange for advice and representation to be provided by solicitors and barristers at all stages of the process, from initial arrest and detention, through the investigation by police to the actual trial, and any possible appeal thereafter. Those with more limited finances, as Falon might well be supposed to have been, would seek to rely on some form of state provision or, perhaps, some advice and representation provided *'pro bono'* because of some special feature of the case or of Falon herself. Whilst detained at a police station, Falon would have been able to take advantage of the duty solicitor scheme to receive advice from a solicitor either face to face or by telephone. For representation in court, she would have to meet the 'interests of justice test' as well as satisfy the means test for Crown Court cases (*s18* being an 'indictable only' offence). Given the seriousness of the charge, a conviction would definitely threaten her liberty, though a disposable income in excess of £37,500 would still render her ineligible for aid for representation.

There were some very good answers to this part of the question, in which students displayed considerable knowledge of the duty solicitor scheme and of the details of both the 'interests of justice' test and the financial eligibility criteria. Yet the majority of answers tended to be a mixture of accurate and inaccurate or irrelevant points, or dealt with the issues in a rather vague manner which lacked specific detail. So, there were frequent references to providers such as CABx, which would be much more concerned with civil law cases, and inaccurate suggestions that Falon would be able to negotiate a conditional fee agreement. The only credit available for many answers derived from simple statements that Falon could employ her own lawyers. Though not so evident

as in relation to the corresponding part of Question 13, nonetheless there were still many answers which contained no, or no significant, attempt to deal with this part of the question.

Question 15

The instruction in this question was in open form, requiring students to decide what offences may have been committed by Hasan, and which elements in those offences required detailed explanation and application. The 'bad damage' to Ivan's lungs suggested grievous bodily harm (***DPP v Smith***), whilst the cuts to Jon's arms and legs indicated wounding (***JCC v Eisenhower***) or, perhaps, a further instance of grievous bodily harm in the aggregate (***Brown and Stratton***). Since it was difficult to view *mens rea* in terms of intention on Hasan's part, resort to proof of recklessness would identify the offence(s) as being within the *Offences Against the Person Act 1861 s20*. The basis of the *actus reus* for both offences was Hasan's failure to alert the emergency services and/or Ivan and Jon to the danger when he returned and discovered the fire (it was not Hasan's earlier failure to switch off the iron since, at worst, that failure was merely negligent). As should be well understood, an omission gives rise to liability only where there is a duty to act. Here, that duty derived from Hasan's conduct in creating a dangerous situation by leaving the iron switched on close to flammable material (***Miller***) and, once he knew of it, his failure to respond appropriately was the breach. Establishing the chain of causation between that breach and Ivan's badly damaged lungs was unproblematic. By contrast, the most immediate cause of Jon's cuts was his own action in seeking to escape by climbing through the window. This meant that proof of causation would rely upon proof that Jon's response in seeking to escape in that way was a reasonably foreseeable consequence of the danger to which Hasan had exposed him (***Roberts***, ***Marjoram***, ***Williams and Davis***). The final element was proof of *mens rea*, requiring that, at the time when Hasan saw the fire, panicked and ran out, he at least foresaw the risk of some harm to Ivan and Jon. Hasan's state of panic might have argued against such foresight but it is difficult to believe that he was not aware of the danger to them.

A small proportion of students dealt with the full range of issues in the way outlined above, though not necessarily in the precise sequence indicated, and were highly rewarded for doing so. More commonly, answers adopted a rather weak structure which inhibited comprehensive consideration of the issues and made it difficult to maintain a sustained and well-developed line of reasoning, with inevitable consequences for the coherence with which conclusions could be derived from explanation and application of the law.

As indicated above, the issue of liability for an omission was central to the analysis and application of the law to the facts in the scenario but the quality of treatment of the issue was highly variable. Surprisingly, many students did not recognise it at all, or addressed it superficially and inaccurately. One particular deficiency here was to identify the omission as the failure to switch off the iron, rather than the failure at the later stage to raise the alarm. This inevitably distorted subsequent discussion of both causation and *mens rea*, since students often then confused the two different possible omissions, inextricably weaving together accurate and inaccurate explanation and application. Students were generally more adept at identifying the two different versions of the offence under *s20*, and explaining and applying the wounding and grievous bodily harm elements, though some did not differentiate at all between the injuries to the two victims, or even acknowledge that there were two different victims. This failing, in itself, generally made it difficult for answers to reach beyond band 3 on the mark scheme. Some students treated either or both sets of injuries as amounting only to actual bodily harm, and so identified the offence(s) as assault (battery) occasioning actual bodily harm under the *1861 Act s47*. Clearly, both did satisfy the definition of 'more than merely trivial hurt or injury', making this approach creditworthy but at a lower level than was available for exploration of the more serious offences.

Students almost invariably addressed the issue of causation and there were some very good explanations of the general approach of the law based on the dual test of causation in fact and causation in law. However, whilst this certainly provided a sound framework for application to the case of Ivan, it was insufficient to provide a solution in the case of Jon, as explained above. Stronger answers went on to develop explanation and application of the rules concerning a break in the chain of causation related to the victim's own act, though many simply treated the cases of Ivan and John alike and relied on the standard proposition for causation in law that the accused's conduct must make a significant (more than minimal) contribution to the consequence. Alternatively, answers often sought the explanation in what was effectively simply an application of causation in fact rather than moving from that to causation in law. As suggested earlier, a common error in discussing causation was to trace the chain from the setting fire to the papers, and thence to the house, rather than from the relevant breach of duty in failing to raise the alarm.

Once again, the treatment of the *mens rea* element was of very variable quality. Many answers correctly defined the *mens rea* for *s20* as an intention to inflict some harm, or subjective recklessness as to doing so. However, many others defined it in terms of intention or recklessness as to serious injury or a wound. Those who opted to discuss the *s47* offence of actual bodily harm generally defined the *mens rea* accurately as being that of the *mens rea* for an assault or battery. Application tended to be more precise and perceptive when the *mens rea* issue was addressed towards the end of, rather than early in, the analysis of the liability arising out of the scenario. Answers which plunged immediately into the elements of the offence and sought to discuss *mens rea* at that point were likely to assert recklessness in an unspecific way and were unable to relate Hasan's foresight of possible consequences to the precise moment at which that foresight was required to be present (the moment when, in his panic, he ran out of the house and broke his duty to raise the alarm). Even stronger answers paid little attention to the evident shock and panic experienced by Hasan at his realisation that he had been responsible for starting the fire, and to the implications for his capacity for rational thought and foresight. This observation applies all the more strongly to those answers which sought to argue that Hasan could be proved not merely to have been reckless but actually to have intended either some harm or very serious harm. On this basis, some answers concluded that Hasan was guilty of the much more serious offence(s) of wounding or causing grievous bodily harm with intent to cause grievous bodily harm (*s18*), a highly dubious proposition that could have been sustained only by relying on proof that serious harm was a virtually certain consequence of Hasan's conduct and that he foresaw it as such (indirect/oblique) intention. Though worthy of some credit, more considered reflection might suggest that it would be very difficult to satisfy the requirements for *near certainty* of *serious* injury, let alone Hasan's foresight of them.

Question 16

This question dealt with the respective roles of judge and jury in a criminal trial. The first part of the answer required an *explanation* of the role of the judge, whilst the second part required an *evaluative* discussion of the role of the jury, based upon an assessment of the strengths and weaknesses of jury trial.

The major factor which seems to have restricted marks for answers to this question was the apparent lack of any breadth or depth of knowledge of the role played by the judge in a criminal trial. It is true that there were some very strong answers where students were able to explore aspects of that role, such as controlling the conduct of the trial, ensuring that each side has an opportunity to present its case fully, directing the jury on points of law and ruling on the admissibility of evidence, summing up and sentencing. Yet it was much more likely that the answer would mention only sentencing, whether briefly or at greater length, or assert that it is the duty of the judge to 'listen to all the evidence' without necessarily indicating whether the judge might do

anything in consequence of hearing all or any of it. A surprising number of students stated confidently, but wholly inaccurately, that the role of the judge is to hear all the evidence and then decide on guilt or innocence. Occasionally, this was explicable by an interpretation of a 'judge' to include a magistrate but that was not necessarily evident in the way in which the explanation was presented. Some students chose to ignore the instruction to explain the *role* and concentrated instead
on matters of selection, appointment and dismissal. This is a focus not demanded by the Specification.

By contrast, students were usually able to present a range of advantages and disadvantages of trial by jury, and to support them, where appropriate, by reference to legal authority and other evidence. Prominent among the advantages were public confidence in the system, impartiality, secrecy and jury equity. Disadvantages often mirrored the advantages. For example, perverse decisions, prejudice and bias, and secrecy preventing true understanding of decision making. Stronger answers succeeded in developing a little detail on each argument, whilst weaker answers tended to be little more than lists. Where case authority was cited in weaker answers, it was often not used in any perceptive way to support or illustrate the argument. Answers might also be weaker simply because they dealt with only one or two arguments. Though issues surrounding jury selection could be relevant and creditworthy if related to possible advantages and disadvantages of the use of juries, some students spent far too much time on the details of selection, often exhausting the time available to them to complete the evaluation. Some students appeared to see the higher rates of acquittal in jury trials as an advantage of using jury trial. Whatever the reason for statistics of that kind, it does not seem to be an advantage of the use of juries in trials, though it is no doubt welcomed by those who are acquitted by juries. There were also students who developed answers which, essentially, drew on advantages and disadvantages of laypersons in general (usually taken to include lay magistrates), so that advantages of lower cost and use of local knowledge appeared. They are traditionally associated not with juries but with lay magistrates.

Mark Ranges and Award of Grades

Grade boundaries and cumulative percentage grades are available on the Results Statistics page of the AQA Website.