LEGAL PRACTITIONERS ADMISSION BOARD
CRIMINAL LAW AND PROCEDURE
MARCH 2020 EXAMINER’S COMMENTS

General Comments

Overall, the standard of the answers was similar to previous semesters, as reflected by a similar percentage failure rate to previous semesters. There was an increase in the number of students who sat the exam this semester compared to last semester.

Most students were able to identify the major issues in the questions and set out the elements of the offences and defences identified. However, in an open book exam, this, of itself, is not regarded as laudable. Considering that students were able to take into the exam their lecture notes and copies of the materials provided on Web campus that clearly set out the elements of the offences and defences that are covered in the course, the minimum standard expected is that students identified the major issues in each question and set out the elements of the offences being discussed.

The students who failed the exam usually demonstrated poor exam technique by answering some questions in detail, but failing to answer one or more the questions at all, thus being allocated no marks for that answer. At both the weeknight lectures and the second weekend school exam technique was discussed, and it was emphasised that students should allocate an equal amount of time to answering each of the questions. For the students who unfortunately failed the subject, it is hoped that they reflect upon their preparation for the exam and the manner in which they allocated their time during the exam.

The students who obtained higher marks were the students who discussed in detail the application of each element of the offence or defence being discussed to the facts of the problem, rather than just setting out the elements with little or no discussion of how the elements applied to the facts of the problem.

Question 1

The key offence to be discussed was murder. Most students identified this offence and set out the elements. Some students identified the offence as aggravated assault and identified such elements without discussing murder.

The challenging component of the question was discussion of defences. The facts gave rise to a number of potential defences. As Peter suffered from post-traumatic stress disorder; was taking anti-depressant medication; being treated by a psychologist and subsequently said after the stabbing: “...I just went into combat mode and stabbed the guy...I knew what I was doing but it was weird like I was a machine” the defences to murder relevant to Peter’s psychological condition (insanity; automatism; and substantial impairment by abnormality of the mind (s 23A Crimes Act 1900 (NSW) required discussion).
Of the students who discussed automatism, some students only discussed the decision of Mason CJ, Brennan and McHugh JJ in *Falconer v The Queen* (1990) 171 CLR 90 (‘Falconer’) that the condition must be transient; not prone to reoccur; and be due to extraordinary stimuli that the mind of an ordinary person would not be able to withstand and identified that as the legal test of automatism. That is incorrect, and the correct legal test is whether Peter had an underlying pathological infirmity of the mind reacting to its own delusions or external stimuli (insanity) or a healthy mind reacting to extraordinary stimuli (Toohey J; Gaudron J; and Deane and Dawson JJ in *Falconer; Woodbridge v R* [2010] NSWCCA 185)

Some students also discussed self-defence, which was a relevant issue considering the facts of the problem. However, many students who discussed self-defence only did so very briefly and did not clearly set out the test of self-defence in NSW (*Katarzynski* [2002] NSWSC 613) or clearly explain that it would not be difficult for the prosecution to prove beyond a reasonable doubt that Peter did not genuinely believe that what he did was required to defend himself; and that the response was not a reasonable response to the danger as he perceived it. Further, few students discussed manslaughter by reason of ‘excessive’ self-defence under s 421 of the *Crimes Act 1900* (NSW).

**Question 2**

The relevant issues to be discussed were:

- Aggravated Robbery (Andrew)
- Complicity (including the issue of withdrawal) (Mitchell)
- Robbery and the defence of Duress (Ben)

Most students correctly identified the relevant issues, but the quality of the answer depended upon the depth of the analysis of the elements to the facts. Some students only discussed complicity briefly; and did not discuss joint criminal enterprise (*Osland v R* (1998) 197 CLR 316; *McAuliffe v R* (1995) 183 CLR 108; nor was the issue of withdrawal discussed (*White v Ridley* (1978) 140 CLR 342).

In respect of Ben, a number of students failed to discuss any defences; or discussed the defence of necessity rather than the defence of duress. The defence of duress clearly needed to be discussed, as Ben was responding to a threat of death or grievous bodily harm to his wife, rather than circumstances generally. Of those students who discussed duress, a number failed to discuss the fact that Ben had an opportunity to contact the authorities (*Abusafiah v R* (1991) 24 NSWLR 531).

**Question 3**

The relevant issues to be discussed were as follows:

- Involuntary Manslaughter by Criminal Negligence
- Insanity (including the issue of the effect of self-induced intoxication on the defence of insanity)
- Psychic Assault (Mollie’s threat to David)
In respect of involuntary manslaughter by criminal negligence, the relevant negligence was Mollie’s omission to get medical assistance for Greg. A number of students did not discuss whether or not the relationship between Mollie and Greg imposed a duty to act (Taktak (1988) 14 NSWLR 226; Burns v R (2012) 246 CLR 334).

Most students discussed the defence of insanity. Many didn’t discuss in any detail the application of the elements of insanity to the facts; and a number of students did not discuss that the self-induced intoxication of Mollie could have triggered her delusions (R v Derbin [2000] NSWCCA 361).

A number of students did not discuss whether Mollie had committed a common assault (s 61 Crimes Act 1900 (NSW)) under the principles of psychic assault.

**Question 4**

The relevant issues to be discussed were:

- Sexual Assault (Sam)
- Aggravated assault (Paul)

In respect of aggravated assault, most students discussed assault occasioning actual bodily harm (Section 59 Crimes Act 1900 (NSW)). As Paul broke Sam’s nose with the assault, it was also appropriate to discuss reckless infliction of grievous bodily harm (Section 35 Crimes Act 1900 (NSW)).

In respect of sexual assault, most students identified the issue. Many students only briefly set out the elements of sexual assault (Sections 61HA and 61HE of the Crimes Act 1900 (NSW)), and did not discuss in sufficient detail the application of the elements to the facts; including the issue of intoxication of both Sam and Lily; and the fact that Lily was lapsing in and out of consciousness.

G.J. SARGINSON

EXAMINER

APRIL 2020