

LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2009

CRIMINAL LAW AND PROCEDURE

EXAMINER'S COMMENTS

Question 1

The following issues needed to be addressed:

David

- Involuntary Manslaughter-Criminal Negligence
- Causation
- Duress

Mila

- Involuntary Manslaughter-Criminal Negligence
- Intoxication
- Insanity; or Automatism

Reverend Bill

- Complicity (accessory before the fact)

Most students discussed involuntary manslaughter, and correctly identified the importance of *R v Taktak* (1988) 14 NSWLR 226; *R v Stone & Dobinson* [1977] QB 354; and *Nydam v R* [1977] VR 340. However, some students did not discuss the categories in which the criminal law imposes an obligation to act (discussed in *Taktak*), and what constituted the failure to act which caused the death of Fiona. Many students discussed the defence of necessity in respect of David rather than duress (Mila's threats to scratch out her eyes) and failed to state that neither necessity nor duress is a defence to murder (*R v Howe* [1987] AC 417).

In respect of Mila, many students failed to discuss the elements of the defences of insanity and automatism in sufficient detail. Of those students who discussed insanity, some students failed to refer to the principle in *R v Derbin* [2000] NSWCCA 361 that self induced intoxication does not preclude the defence of insanity.

In respect of Reverend Bill, most students discussed his criminal liability on the basis of involuntary manslaughter based on an assumption that he had a duty to act. However, of the students who discussed involuntary manslaughter, few if any discussed how Reverend Bill fell within one of the categories in which the criminal law imposes a duty to act. In respect of complicity, of the few students who discussed the issue did so on the basis of ‘joint criminal enterprise’, but did not explain what the ‘joint criminal enterprise’ between David, Mila and Reverend Bill actually was. The better approach was to discuss the words of Reverend Bill as constituting assistance or encouragement, with Reverend Bill arguably having the requisite intention to assist or encourage the involuntary manslaughter (*Giorgianni v R* (1985) 156 CLR 1).

Question 2

The following issues needed to be addressed:

- Murder of Harry
- Causation
- Provocation
- Intoxication
- Aggravated Assault or Attempted Murder of Mary

Most students answered this question comprehensively. A number of students failed to address the issue of self induced intoxication. Many students failed to clearly discuss the difference between the ‘subjective’ and ‘objective’ limbs of the defence of provocation. Further, many students failed to discuss the importance of whether or not Joshua had lost self control as to have formed an intention to kill or cause grievous bodily harm in circumstances where he had “started to walk out of the house” and “after thinking about Harry’s words” had turned around and attacked Harry.

Question 3

This question was the one that most students struggled with, generally due to having spent too much time answering the first two questions. The major issues to be discussed were:

Kevin

- Aggravated robbery of Matilda
- Aggravated assault of Matilda (hitting her over the head)
- Aggravated sexual assault

William

- Aggravated robbery of Matilda
- Aggravated assault or Attempted murder of Kevin
- Extended joint criminal enterprise (doctrine of common purpose)

Most students discussed aggravated robbery and aggravated sexual assault, but many students did not discuss extended joint criminal enterprise. The reason for this may have been that insufficient time had been allocated to answering the question.

Question 4

Of the students who answered Question 4, most students answered 4 (a). The area requiring improvement was that many students simply stated the facts and ratio decidendi of the case, without giving any reasoned argument as to whether or not the case advanced the law. For example, of the students who discussed *Zecevic* (1987) 191 CLR 334, very few students discussed the effect of Sections 418-423 of the *Crimes Act 1900* (NSW), or the decision of *R v Katarzynski* [2002] NSWSC 613.

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