Model Answers to Potential Exam Questions

Chapter 6

1) Assess the ways in which incapacitated defendants are dealt with in the criminal court system.

If a person does not understand the nature of their act in criminal law then they cannot be deemed culpable for a criminal offence.

In criminal law, mental capacity is considered at three different stages: when the offence was committed, during the trial, and during sentencing.

The Home Secretary must be satisfied that two medical practitioners have certified a mental illness. According to the Report of the Royal Commission on Capital Punishment, cmd 8932 (1953), the Home Secretary can use these powers if:

“...the prisoner’s condition is such that immediate removal to a mental hospital is necessary, that it would not be practicable to bring him before a court, or that trial is likely to have an injurious effect on his mental state.”

The defendant will be brought to trial when he is well enough.

A defendant may be “unfit to plead” as a result of his mental illness (i.e. he cannot plead “guilty” or “not guilty”) and he may also be unfit to instruct his lawyers, defend himself, and follow the evidence. If he cannot do these things, the Criminal Procedure (Insanity) Act 1964 allows him to be found unfit to plead.

Once unfitness has been raised as an issue under the 1964 Act, a judge will decide unfitness without a jury, but he must have evidence from two medical practitioners that the defendant is unfit to plead. The defence must prove the unfitness to plead on a balance of probabilities and the prosecution must prove unfitness to plead beyond all reasonable doubt. Once the defendant is found unfit, a jury will be sworn in to decide whether the defendant committed the blameworthy act or omission as charged (powers lie under the 1964 Act). According to Antoine (2000): the words “did the act or made the omission” in the 1964 Act refer to the actus reus only. The mental element need not be explored.

When sentencing mentally ill defendants, the priority is to treat and rehabilitate them rather than to punish them. It is also important to balance rehabilitation with public safety. If the relevant actus reus is proved, then the judge may issue:

- a hospital order (allowing detention in hospital for treatment)
- a restriction order (detention in a high security mental hospital)
- a supervision order (to monitor the defendant)
- a community sentence with a treatment requirement
- or an absolute discharge (no further intervention).
Hospital orders may be made with or without restriction orders, depending on the seriousness of the crime, but a fixed sentence in crime (i.e. life for murder) will require a hospital order with a restriction order.

2) Examine the role of vicarious liability in criminal law.

In the law of tort, a person may be liable for the actions of another. This is known as **vicarious liability**. An employer, for example, will be liable for the actions of an employee if that employee is acting within his employment contract at the time. Relationships include employer and employee, and licensee and servant. The reasons for vicarious liability are numerous:

- the simplification of food, alcohol and vehicle laws
- prevention of pollution (i.e. companies will be vigilant)
- promoting public health and safety (i.e. extra care will be taken)
- protecting customers from unsafe practices
- easier law enforcement
- and clearer regulations placing burden on employer.

In criminal law, it is rare to see vicarious liability. In *Huggins* (1730) Raymond CJ said:

“In criminal cases the principal is not answerable for the act of the deputy as he is in civil cases; they must each answer for their own acts and stand or fall by their own behaviour.”

However, some statutory offences may impose vicarious liability upon a person or a corporation. Parliament may do this by including the terms “person, himself, his servant or agent” into a statutory offence. Words such as “sell” or “permit” in a statute may point to an employer being vicariously liable for his employee if the latter wrongly sells or permits something. A **mens rea** is not required in offences like these, so an employer will simply be **acting** through his employee and that will suffice for the offence. The employee must, however, be working **within the course of his employment** at the time of the criminal act. An “authorised act” could therefore include “selling” goods in a shop or “supplying” food to a buyer. In *Adams v Camfoni* (1929), it was held that if the employee is not authorised to do the criminal act, then his employer cannot be vicariously liable for him. In *Coppen v Moore (No. 2)* (1898) it was held that if the employee is carrying out an authorised act, the employer will be vicariously liable for him even if the employee wasn’t doing the act in quite the right way. In *Harrow LBC v Shah and Shah* (1999), it was established that if the employee is carrying out an authorised act, the employer will be vicariously liable for him even if the employer takes steps to ensure that the law has not been broken.

If a **mens rea** is required, the **actus reus** and **mens rea** of the employee can be transferred up to the employer. This is the delegation principle. However, in order to
do this, the employer must have delegated responsibility down to the employee in the first place. This rule was defined in *Allen v Whitehead* (1930) and confirmed later in *Linnett v Metropolitan Police Commissioner* (1946), which both established that the acts and knowledge of the manager were imputed to the owner, even though the owner was rarely present and took steps against commission. Ignorance was no defence for the owner in these cases — he had delegated the responsibility to the manager and that was enough. In *Vane v Yiannopoullos* (1964), it was held that any responsibility that has been delegated to the employee must be complete. Partial delegation will not allow vicarious responsibility. The rule in *Vane* suggests that only when an employer or licensee is away from the premises can responsibility be fully delegated to the staff who are left. In *Bradshaw v Ewart-Jones* (1983) it was established that a master on board a ship is still in control of the ship, so any delegation may be partial. In *Howker v Robinson* (1972) it was confirmed that the employer, licensee or principal does not have to be away from the premises at the time in order to fully delegate responsibility.

It is very difficult to enforce regulatory offences against individual employees, and it is almost impossible to prove which employee committed the criminal offence. However, it is thought that big companies who enjoy healthy profits should take responsibility for bad practice, and the threat of vicarious liability forces employers to tighten practices. Employers are more likely to train staff and control them appropriately, and licensees are less likely to delegate their significant duties onto less-experienced staff.

3) Corporations can be indicted for criminal offences the same as adults can:

(a) explain the ways in which a corporation can be found liable for a criminal offence;

A corporation is a legal person all on its own and can be punished for committing criminal offences, too. There are two ways in which corporations can be distinguished from persons in criminal law: finding the required mens rea is notoriously difficult; and a corporation can only be fined. There are three ways in which a corporation can be found liable for a crime: the principle of identification; vicarious liability, and a breach of a statutory duty.

If the offence committed by the corporation requires a mens rea, there must be a person within the company who can be identified as having the mens rea of the corporation. This is known as the principle of identification and a person must be identified within the company structure who is the “directing mind and will” of the company according to *Lennard’s Carrying Co v Asiatic Petroleum* (1915). The identification principle was established by three cases in 1944 and, in each case, a senior member of management was identified as the directing mind and will of the company. In *DPP v Kent* (1944), the transport manager’s intent to deceive was the intent of the company. In *ICR Haulage* (1944), the managing director’s intention to
defraud was taken to be the intent of the company. Finally in *Moore* (1944), a branch sales manager was taken to be the directing mind and will of the company when he made false returns with the intent to deceive. In the case of *HL Bolton v TJ Graham* (1956), Lord Denning suggested that a corporation was like a human body, and that the directors and managers who ran the company were the brains of the company. He said:

“A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company.”

In practical terms, managers will be the nerve centre of a company and employees will be the hands. The employees play no role in how a company works, they simply carry out the physical tasks. It is the managers who control the company: their *mens rea* is the *mens rea* of the company. However, it is often very difficult to locate the “nerve centre” of a company. In *Tesco Supermarkets Ltd v Nattrass* (1972), Lord Reid said:

“the board of directors, the managing director or perhaps other superior officers of a company who carry out the functions of management and speak and act as the company.”

The decision in *Tesco* means that only individuals in senior positions will be presumed to be the “controlling mind” of a corporation.

Several cases have highlighted the disadvantages to the principle of identification. In *Armstrong v Strain* (1952) it was held that the principle does not apply to groups of employees. Devlin J said: “you cannot add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind.” In *P&O European Ferries Ltd* (1991) it was held that the principle of identification does not work when the combined innocent actions of several employees lead to disaster, but individually, no one developed a *mens rea*. In *Tesco v Brent LBC* (1993) the divisional court admitted that it was impracticable to suppose that a director of a large company had the required *mens rea*. In that case, the cashier had reasonable grounds to believe that the customer was under 18, and that was enough to make the company liable. In *Meridian Global Funds Management Asia Ltd v Securities Commission* (1995), Lord Hoffman in suggested that “the rules of attribution” should be used to locate the directing mind and will of a company. In other words, who has been attributed the power of the company?

Vicarious liability is where one person is liable for the acts of another. This doctrine can apply to corporations too. This was first recognised in *Great North of England Railway Co* (1846). In *Coppen v Moore* (No. 2) (1898), the corporation was vicariously liable under trade description law for selling an inaccurately described...
item even though the transaction was carried out by as assistant. In National Rivers Authority v Alfred McAlpine Homes (1994), employees polluted a river, and it was held that to make the law an effective weapon in environmental protection, a company must be criminally liable for the acts and omissions of its servant or agents during activities being done for the company.

Statutory offences can also make corporations liable in criminal law. This will be particularly true if an “occupier” is mentioned in the statute and the corporation is an occupier of premises: the corporation will be liable for anything that happens on their premises. The Health and Safety at Work Act 1974 is an important statute in this area. It provides an alternative when common law offences (particularly those which require a mens rea) do not succeed. Statutory breaches also apply to unincorporated bodies if they have an “owner” or “occupier” status, as was held in Clerk to the Croydon Justices ex parte Chief Constable of Kent (1989). In Attorney General’s Reference (no.2 of 1999) (2000), a train crash killed seven people but the company were found not guilty of manslaughter. The company pleaded guilty of breach of statutory duty under Health and Safety at Work Act 1974 instead and were fined £1.5 million. (25 marks)

(b) examine the current law on corporate manslaughter.

Since P&O European Ferries (Dover) Ltd (1991) it has been accepted that a corporation can be liable for manslaughter. Case law developed this area of law until the Corporate Manslaughter and Corporate Homicide Act 2007 was passed. The P&O case led the Law Commission to consider reforming the law on corporate manslaughter. There were several high-profile disasters around the same time, including the King’s Cross fire in 1987 in which 31 people were killed; the Clapham rail crash in 1988 in which 31 people were killed; and the Southall rail crash in 1997 in which 7 people were killed. The Law Commission published a report: Legislating the Criminal Code: Involuntary Manslaughter (Law Com No. 237) (1996). Following the 1996 Report, the Government issued a consultation paper: Reforming the Law on Involuntary Manslaughter: The Government's Proposals.

In 2007, the Corporate Manslaughter and Corporate Homicide Act was passed. The new offence of corporate manslaughter is set out as follows: 1(1) An organisation to which this section applies is guilty of an offence if the way in which any of its activities are managed: (a) causes a person’s death; and (b) amounts to gross breach of a relevant duty of care owed by the organisation to the deceased. “Organisations” include: corporations; government departments (i.e. transport, health, defence etc); police forces and other services, and partnerships, trade unions and other associations. “Senior management” includes: those who play significant roles in making decisions; those who actually manage or organise those activities.

Individuals are not liable under the new offence, and no individual need be identified as the “directing mind or will” of the organisation. The “duty of care” mentioned in the 2007 Act is the same as that found in the civil law of negligence. This is a duty to take reasonable care for the health and safety of those in close proximity. Under s.8(2)
of the 2007 Act, the jury must consider: the evidence of failure; the seriousness of the failure; and the risk of death. Under s.8(3), the jury may consider: the evidence of policies or attitudes that encouraged failure, and health and safety guidance.