COURSE NOTES CRIMINAL LAW

Model Answers to Potential Exam Questions

Chapter 8

1) Define the components of the offence of murder using legal authorities

The classic definition of murder is the unlawful killing of a human being with malice aforethought. There are several different components to murder.

In terms of the *actus reus*, the victim of murder cannot be a foetus — there are other offences for that purpose under the Offences Against the Person Act 1861) A baby must be fully expelled from the mother to be a human bring in law as held in the old case of *Poulton* (1832). A baby must also have a separate existence from its mother, as held in the equally old case of *Enoch* (1833). If a baby is stabbed during pregnancy and dies after birth, this is not murder but may be manslaughter as discussed in *Attorney-General's Reference (No.3 of 1994)* (1997). This is because an unlawful act caused its death, but at the time of the stabbing, it was not a person. It follows from this that a dead person cannot be the victim of murder, even if the defendant believes him to be alive (the defendant would be charged with attempted murder instead). Switching off a life-support machine is also not the *actus reus* of murder because the operating cause of death (e.g. the stab wound) will be instead as held in *Malcherek and Steel* (1981). A killing which takes place under the Queen's Peace will be prosecuted, but killings during the course of war will not be. There was an old rule that if the victim survived for a year and a day after the attack, charges of murder could not be brought as seen in *Dyson* (1908). This rule was abolished by s.1 of the Law Reform (Year and a Day Rule) Act 1996.

In terms of the *mens rea*, the old term used to be "malice aforethought". In modern terms, the defendant must intend to kill or cause grievous bodily harm to satisfy the *mens rea* for murder as held in *Moloney* (1985). This means that the defendant does not have to simply intend to *kill* to be charged with murder — he can intend a lesser offence and still be charged with murder if death results. Grievous bodily harm simply means "really serious harm" and no elaboration beyond sections 18 and 20 of the Offences Against the Person Act 1861 is required, as confirmed in *DPP v Smith* (1961), *Saunders* (1985) and *Janjua* (1998). If direct intention is not present, the jury can ponder whether the defendant *foresaw* death as a *virtually certain consequence* of his actions (also known as "oblique intention") as held in *Woollin* (1998). Manslaughter can be considered as an alternative verdict — *Coutts* (2006). Clause 54(1) of the Law Commission's Draft Criminal Code (1989) attempted to put the common law offence of murder on a statutory footing and states the following:

"A person is guilty of murder if he causes the death of another (a) intending to cause death; or (b) intending to cause serious personal harm and being aware that he may cause death."

This definition of murder is simply a codification of the current common law principles.

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2) Analyse the updated law on diminished responsibility

The defence of diminished responsibility was introduced into English Law by s.2 of the Homicide Act 1957. The definition reads similar to that of insanity. It provides a defence in instances when a person cannot, as a result of abnormal mental functioning, take full responsibility for his actions. This is even when the killing was premeditated, as held in *Matheson* (1958). The defence of diminished responsibility was updated by s.52 of the Coroners and Justice Act 2009. This update was a result of the Law Commission's 2006 Report entitled *Murder, Manslaughter and Infanticide*, which described the defence as *"badly out of date"*. Most of the case law that built up around the old version of s.2 of the Homicide Act 1957 will still be relevant. For example, in *Campbell* (1997) it was established that diminished responsibility was not available to a charge of attempted murder.

The reformed definition of diminished responsibility from s.2 of the Homicide Act 1957 is provided in a four-part test:

(1) there must be an "abnormality of mental functioning";
(2) it must arise from a "recognised medical condition";
(3) it must have "substantially impaired" the defendant's ability to "understand, rationalize or exercise self-control"; and
(4) the "abnormality" must provide an "explanation" for the defendant's acts and omissions when killing the victim.

The new phrase "mental functioning" alludes to expert medical opinion. The repealed phrase "abnormality of mind" was interpreted widely by case law. In *Byrne* (1960) an abnormality of mind was *"a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal"* (according to Lord Parker CJ). The abnormality did not have to be permanent. There is also no requirement that the abnormality should be present since birth, as established by *Gomez* (1964).
The requirement of a "recognised medical condition" is also a new addition to the definition of diminished responsibility, replacing the words "arrested", "retarded", "inherent" and "disease or injury". No further definition of this phrase has been provided, but the old case law provides some clues. It may include Alcohol Dependence Syndrome as held in *Tandy* (1989) and *Wood* (2008). It may also cover depression, as held in *Gittens* (1984), *Seers* (1984), *Ahluwalia* (1992) and *Swan* (2006). It may also include schizophrenia as held in *Moyle* (2008), *Erskine* (2009) and *Khan* (2009). If there are several medical conditions, this will strengthen the defence according to *Reynolds* (1988). If one of the conditions is not a medical condition, however, it must be discounted. Juvenile mental health is included under the term "recognised medical condition" and will include learning disabilities and autism.

The repealed phrase "substantially impaired his mental responsibility" was thought to be too vague, and so the defendant must now prove that his abnormality substantially impaired his understanding, rational judgment and/or self-control. The word "substantial" is a jury question according to *Byrne* (1960) and *Eifinger* (2001).

Despite the advances in science, there is no accurate scientific measurement for "impairment" and so that term also remains a jury issue according to *Khan* (2009). In *Lloyd* (1967) Ashworth J said:

"Substantial does not mean total, the mental responsibility need not be totally impaired. At the other end of the scale substantial does not mean trivial or minimal. Parliament has left it to juries to say on the evidence, was the mental responsibility impaired and if so, was it substantially impaired?"

The jury, therefore, have significant freedom when deliberating this criteria.

A new requirement to the definition of diminished responsibility is that the defendant must prove that his substantial abnormality provides "an explanation for his acts and omissions". This ensures that the defendant's state of mind is directly linked to his actions, and that he is not just using his mental health problem as an excuse. The defendant's abnormality does not have to be the *sole* cause of the killing. There is no case law on this part of the test yet.

When it comes to an intoxicated diminished responsibility, intoxication is not considered to be diminished responsibility because it does not create an abnormality of mind on its own, as held in *Fenton* (1975). Similarly, if the defendant does have a recognised medical condition constituting an abnormality of mental functioning, but kills whilst intoxicated, the jury must *ignore* any effect of alcohol or drugs as established in *Gittens* (1984). The jury must therefore consider whether the defendant had an abnormality of mind, "drink or no drink" as held in *Egan* (1992). In *Dietschmann* (2003), the defendant attacked a stranger whilst intoxicated. He was suffering from a depressed grief reaction to the death of his girlfriend. Lord Hutton said:

"Has the defendant satisfied you that, despite the drink, his mental abnormality substantially impaired his mental responsibility for his fatal acts, or has he failed to satisfy you of that? If he has not, the defence of diminished responsibility is not available to him."

Brain damage and a psychopathic disorder will be separated from intoxication as seen in *Hendy* (2006), an acute stress disorder will be separated from intoxication — *Robson* (2006) — and depression will also be separated from intoxication — *Swan* (2006).

The issue of intoxication is treated quite differently to that of alcoholism. A defendant may argue that his Alcohol Dependence Syndrome constitutes the required "recognised medical condition". Alcohol Dependence Syndrome will usually be accepted as diminished responsibility if the defendant had injured his brain through years of abuse or could not resist alcohol at all. This was the case in *Tandy* (1989) and *Inseal* (1992). In *Tandy* (1989), a two-part test was devised. It must be established that:

(1) the defendant's alcoholism must reach the level at which her brain had been injured by the repeated insult from intoxications so that there was a gross impairment of judgment and emotional responses; or
(2) the defendant's drinking had become involuntary (i.e. she was no longer able to resist the impulse to drink). These accepted criteria were recently updated by *Stewart* (2009).

A defendant may plead guilty to diminished responsibility and simply be sentenced without trial as seen in *Cox* (1968). This will only be acceptable on "clear evidence" that diminished responsibility is met as held in *Vinagre* (1979). A jury is free to disregard the medical evidence as "not entirely convincing" according to *Walton* (1978) and even though there is no statutory requirement, the abnormality of mind should be proved by medical evidence — *Byrne* (1960). If a medical condition becomes recognized by psychiatrists, murder convictions with evidence of that condition may be quashed, as established by *Hobson* (1998).

3) Jane and Freddy took their son, daughter and their two school friends to the countryside for a picnic. They squeezed through a disused security gate and settled in a large meadow next to the power station. Jane and Freddy did not watch the children and the children wondered off to explore the power station. The two friends found a large electric pylon. All four children played under it. All four of them were electrocuted. Jane and Freddy are charged with gross negligence manslaughter. You are one of the jury members. Apply the relevant laws. Are they liable? Give reasons for your answer.

Gross negligence manslaughter is a common law offence that originates from the civil law of tort. Gross negligence manslaughter has four components which must be satisfied:

(1) there must be a duty of care;
(2) there must be a breach of that duty;
(3) the breach must cause the death; and
(4) the breach was so gross that it is criminal.

These four components will be applied to Jane and Freddy in turn.

There must be a duty upon the defendants to care for the victim. This duty is derived from *Donoghue v Stevenson* (1932). This duty may be contractual, professional, familial, assumed or arising out of a dangerous situation. In *Donoghue v Stevenson* (1932) Lord Atkin said:

"You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour... persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation."

The civil law duty of care as described by Lord Atkin is applied in criminal law cases of gross negligence manslaughter as confirmed in *Wacker* (2003). The jury must decide whether a duty of care existed as held in *Litchfield* (1998). Establishing a duty in many situations is incredibly difficult because there are so many grey areas (i.e. between cousins, etc), but small factors in conjunction may give rise to a duty of care, as held in *Willoughby* (2005). Failing to contact the emergency services for a half-sibling may give rise to a duty of care as was seen in *Evans* (2009). Jane and Freddy have a parental duty of care over their son and daughter. They have also voluntarily assumed a duty of care over the two other children when they offered to take them out for the day, as established by *Stone and Dobinson* (1977), and these two children may not be blood relatives but they are "neighbours" as requested by *Donoghue v Stevenson* (1932). As a result, a jury may be inclined to find that a common law duty of care existed between Jane and Freddy and the four children.

Once a duty of care is established, the duty must be breached. In civil law, a person who falls below a *reasonable standard* of care can be sued for negligence, this was held in *Andrews v DPP* (1937) and *Nettleship v Weston* (1971). In criminal law, the standard is *gross* negligence — *Adomako* (1995). This is a grave level of grossness. Jane and Freddy did not just fall below a reasonable standard of care when they left the four children to play near the electric pylons. The risk of serious injury or death is such that a jury would find this to be grossly negligent behaviour in their care of the children.

A chain of causation must be present between the defendant's grossly negligent conduct and the victim's death. This is the third criteria: a chain of causation must be present and to give an example of how important it is, only gross medical practice will ever break the chain, as established in *Jordan* (1956) and *Cheshire* (1991). Causation is a jury question, and a jury will consider, looking at the location of Jane and Freddy and the children and the circumstances surrounding Jane and Freddy and the children, whether their gross breach of duty caused their deaths.

The final criteria requires the breach to be gross. A breach of duty that falls below a "reasonable" standard is usually dealt with through civil law, but "gross" breaches are dealt with by the criminal law. The level of grossness required for a criminal law conviction has been described as *"culpable negligence of a grave kind"* by *Doherty* (1887). In *Bateman* (1925), a leading case in this area, Lord Hewart CJ said:

"The negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment."

The breach of care must clearly be so grave that it deserves criminal punishment. In *Andrews v DPP* (1937) Lord Atkin supported this rule by saying:

"Simple lack of care as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved - the grossest ignorance or the most criminal inattention."

A structured direction was established in *Adomako* (1995), in which an anaesthetist failed to notice that the oxygen supply became detached. Lord Mackay said:

"the essence of the matter, which is supremely a jury question, is whether, having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission."

The jury may therefore consider the risk of death when deliberating whether the negligence was gross, and this was applied in *Misra and Srivastava* (2004), in which Judge LJ said:

"The question for the jury was not whether D's negligence was gross and whether, additionally, it was a crime, but whether his behaviour was grossly negligent and consequently criminal".

Applying this final test to Jane and Freddy, the jury will decide whether their breach of duty was not only so gross that it was criminal, but that it presented a risk of death. It is reasonable to conclude that when the four children played near the electric pylons, there was a risk of death, and by failing to usher the children to safety (or even acknowledging what the children were doing at all) is a breach of duty that is so gross it is criminal. This is compounded by the fact that the breaches ended in death.

