

## Guidance on how to answer problem questions

Alongside writing essays, answering legal problem questions is likely to be one of the primary ways you are assessed while doing a law degree. A problem question usually takes the form of a factual scenario describing some event or events that have occurred. You are asked to 'sort out' this scenario in a legal sense – often by being asked to 'advise' one of the parties. This, in a way, is 'practice' for the real world of law, where you may be engaged in this sort of thing on a daily basis, so is probably one of the best forms of early legal training.

### What are problem questions for?

Answering problem questions requires a wholly different approach to essay writing and employs a different set of skills. It helps if you understand what a problem question is for, i.e. what is it trying to achieve (or what is the person who set the question trying to get you to achieve?)? Problem questions are where you apply your knowledge of the law to supposedly real-life factual situations, such as a dispute between X and Y, or a crime that might have been perpetrated on A by B. What this means is that you need not only to know the law you have been studying, but also how to use it.

Imagine yourself as a professional lawyer, being asked by a client who comes to you with a problem. They explain their situation to you: what happened when, who said what, who did what, etc. It would then be your job to advise this client about how the law would treat their problem. If it's a criminal case, would they be acquitted of the crime they have been accused of? And if so, why is this? Is it because there is a flaw in the case against them, or because they have an adequate defence? What cases (or parts of legislation) can you use to support this? Or, if it is a civil dispute, are they likely to win? If so, might they receive any compensation? And, is the case actually as clear cut as this? That is, is there actually 'an answer' or might there be more than one possible outcome? Again, what cases/legislation can you use to support the outcome(s) that you come up with? Problem questions are often designed like this – to get you to see the various alternative outcomes or pathways through the problem and debate with yourself which is the most likely and why.

These are also the real-life everyday tasks of lawyers, and possibly what you intend to be doing in the future. A big part of being a lawyer is constructing convincing or winning arguments by using and manipulating the law – and also being aware of the arguments that will come at you from the other side. Even if you don't intend to practise law, however, this type of exercise helps you to develop some essential skills in constructing and supporting convincing arguments of any type.

As indicated previously, unlike in real life, problem questions are unlikely to be a clear-cut sequence of events that indicate an obvious answer (not that this is always the case in real life!). If they did this, they would not be 'problem' questions! There will be twists and turns and complications built into the question, put there by the person writing it to assess the following:

- Can you identify all the issues arising from the question? There may be more than one issue to deal with and many more 'sub-issues'. Being able to spot all of these is a skill in itself.
- Can you select the appropriate legal sources to help you deal with the issues that you have identified? You can't just say what you think the law would do. Instead you have to work out what

would happen by using cases and statutes etc. to support your contentions, as you would have to do in front of a judge.

- Can you evaluate the way the law applies to the scenario and come up with good 'advice' at the end? As well as identifying and using the law you ought to know how good your own arguments are – i.e. what the likelihood of success might be – as well as the counter-arguments.

### Example – contract law

X agrees to fit new windows in Y's block of flats for £50,000. After X has done half the job she tells Y that she has run out of money and will not be able to complete it. Y promises X an extra £5,000 if the job is finished. X then finishes the job, but Y refuses to pay more than £50,000. Advise X.

### The kind of response expected

'Advise X' is the classic way a problem question is posed. It has a conventional and restricted meaning in the context of legal education, and it is important that you realise what is meant by it. In essence, you are expected to offer a reasoned application of relevant law to the facts – effectively, this a prediction of how a court might decide the matter. You are **not** expected to do any of the following: debate the morality of the protagonists' behaviour; debate matters of proof (you must take the facts as given) or give X tactical advice (e.g. about how to avoid legal action)! Nor should you, despite the use of 'advise', present an account of what a lawyer would actually say to a client. You are simply expected to state the arguments likely to be made and to carry weight before a court if the case were litigated, bearing in mind the interests of the parties in the situation. And, where there is more than one possible argument, or 'route', that could be adopted to reach the 'client's' goal, you are expected where possible to suggest the best route, based on an assessment of their relative chances of success, as well as to take into consideration, when advising X, 'what will Y argue?'. Imagine your task is to provide X with a full account of all the legal arguments on both sides of the equation – giving them the full picture so that they are aware of the potential pitfalls and risks of their own argument, as well as its strengths, and vice versa in respect of Y's arguments.

### The steps in the analysis

Problem questions are designed to probe particular points of law, and the key to them is identifying what the issues are and assessing how they would be resolved in a court. It is useful to break this down into five steps when planning your answer:

1. What remedy/outcome is the litigant likely to want? Here, this is clear – the payment of the extra £5,000. In other situations you will need to think about what the parties might want and to have knowledge of the range of available remedies.
2. What are the factual and legal issues on which the availability of the remedy hinges? The issue here that needs to be identified as relevant is whether the promise by Y of the extra £5,000 (fact) is supported by 'consideration' (legal issue), i.e., roughly, whether the law treats X as having given anything in return for the promise. Without consideration, Y will not here be held to her promise.
3. What are the legal principles or rules at stake? This involves stating the relevant 'ingredients' of consideration, from case law.

4. How can the relevant ingredients be assessed to determine whether there is anything here which is likely to count as consideration? This is where one considers whether, on the facts given, X did provide any consideration for Y's promise.
5. Finally, which way is the 'hinge' issue likely to go, and why? What will the likely outcome of the litigant's claim be?

Note: This example is a relatively simple problem with only one 'hinge' issue. Usually, the problems set for assessment in exams and coursework have more than one such issue, and these may interrelate in quite a complex way.

This five-step structure is offered as a guide to teasing out the issues from a problem. Although other ways of teasing these issues out can be used, it is essential that you think in a structured and systematic way about how the law applies to the facts.

### Things to avoid

- Don't jump straight to applying a concept (stage 3) without first establishing why the concept is relevant. This is one of the most common causes of irrelevance in legal analysis. At best, this results in a discussion of the correct issues which is not adequately grounded because the relevance of the issue has not been explained. At worst, it results in striding off vigorously on completely the wrong track where some concept looks at first blush to be relevant but with a bit of thought is not.
- Do not assume that, because the facts of a problem resemble a well-known case, the problem must be resolved the same way as the case. Very often, the author of the problem deliberately tweaks the facts so that it is different from the leading case. What is then needed is an analysis of the law discussed in the case (and other related cases) to assess how it would be applied to the different facts of the problem.
- Do not assume, either, that a leading case that factually resembles the problem is necessarily relevant to the problem at all. Different legal issues can arise on the same facts, and you need to work out from steps 1 and 2 what the relevant issue is.

### Structuring your answer

Because it is a legal problem with a legal answer, there is usually a pretty clear structure that can be followed when answering problem questions. As with all writing, you should start by carefully **planning** what you are going to say using the analytical steps outlined above and by following the structural steps outlined below, before you even begin to write your full answer. Like an essay, problem questions need an introduction and conclusion – but these are usually a bit easier to manage in a problem question than in an essay. In a sense, they (certainly the introduction) are the easiest bit of your answer to write. Why is this?

**The introduction** – as this is a 'real life' situation, and you are being asked to 'advise' your 'client', the first question to address is 'what does my client want to get out of this?' Therefore, summarising this succinctly at the beginning of your answer, alongside a short statement about what the contentious area of law is, operates as a good, clear introduction.

Everything else that goes in your problem question will come after this stage and before your conclusion – or your ‘advice’. This – the main bulk of your answer – is where you demonstrate your knowledge of the law you have learnt and also your ability to apply it to a set of given facts. Following the guidelines below will help you to construct a good answer.

### Identifying the issues (legal and factual)

When you first see them, problem questions can look quite daunting. It seems like you are being given a lot of information (you are) and you may not know where to start. While an essay question may only be one or two lines long (or even shorter!), problem question scenarios **can** take up to a side of A4, although they are not usually this long. Whatever the length, the first step in any problem question is to **identify the issues** at hand.

In all problem questions there will be both factual and legal issues to spot. When you first read a problem question scenario, your task is to ‘spot the issues’. First, read through slowly, pausing after each sentence or paragraph to think about what it has said and any potential **factual** issues that might be raised. Use a highlighter on particular passages, or underline key words and phrases so you know what to come back to and analyse later. Of course, there will be a lot of **facts** – but what you are looking for are **factual issues**. These are facts that you are obviously being told for a reason, rather than just those that you have to be told in order to make the scenario make sense, or seem like a real story, or ‘set the scene’.

You should note that it is rare in a problem question for all the salient facts to be given – you may have to construct some ‘what ifs’ for yourself. You should ask the question: ‘Are there any other relevant facts that I need to inform my legal analysis?’ For example, if someone is injured in a road accident, the age of the victim may be critical in establishing issues of duty and breach in negligence. If the age is not given, you would need to consider alternative outcomes, clearly articulating the legal reasoning and citing relevant case law.

Some points on identifying factual issues:

- Look at **what** the facts are telling you and ask **why** you would need to be told this – for example, if you are told that a contract was made over the phone, ask why you might need to know this. It is likely that it will be relevant to a later legal issue and become something you need to analyse.
- Many of the facts in a problem question may seem unrealistic but remember that the writer of the question has to design it to raise legal issues that you can analyse, so some of the situations may be a bit beyond belief!
- Look out for ‘red herrings’ – facts that are either not relevant or inserted to lead you off the right track. These are a valid technique designed to see if you know what you’re talking about and what is and is not relevant.
- Don’t ‘make up’ any facts that aren’t there. You can’t make any assumptions and can only discuss the facts as they are given to you.

### Identifying the relevant law

Once you have identified the issues that you are going to consider, you then need to work out what law actually needs to be applied. Remember that many of the factual issues will be 'signposts' to legal issues – and therefore possibly also signposts to point you in the direction of the actual law (cases and/or sections of a statute) that you need to **use** in order to be able to answer the question. The key part of this is to find the **relevant** law – many students fall into the trap of identifying and stating **all** the law on a particular topic, without stopping to think about which bits of that are actually relevant to the actual issue at hand and which are not (similar problems crop up in essay writing – just think, it is highly unlikely that you would ever get an essay title asking you to 'Write all you know about misrepresentation' or 'Discuss everything about defences to murder'. Similarly, a problem question would not require this).

### Applying the law to the facts given

This is the part of answering a problem question that a lot of students have the biggest problem with – and is often where they fail to pick up marks, even if they identify the issues correctly. Many students don't immediately grasp what it means to **apply** the law – many will simply stop at stating what law is relevant to the facts and issues at hand, without going on to do something with it. Being able to describe the law and how it has been used in previous cases does demonstrate a degree of knowledge, but it doesn't really show understanding. To show that you understand the law you must be able to apply it. Applying the law means exactly that: to **do** something with it. What is it that the case you are using actually does to your 'case'? How is the section of the statute you are using going to affect it?

If you can apply the law to the problem, you demonstrate a higher level of understanding than simply being able to identify the issues and the relevant law – and this is where you start to gain higher marks. If you can demonstrate that you can build a convincing legal argument – one that is supported by the law – you will be doing exactly what is required of you. Anything less than this falls short of what is required.

### Description, analysis and case support – why you should refer to cases

Compare the following statements:

- 'Sneezy is not a primary victim'.
- 'Sneezy is unable to claim as a primary victim as he was not in the zone of danger, that is he was not in danger of suffering personal injury – he was too far away from the accident'.
- 'Sneezy is unable to claim as a primary victim as he was not in the zone of danger, that is he was not in danger of suffering personal injury – he was too far away from the accident (*Page v Smith*)'.

While the first is purely descriptive, the second includes analysis. However, the final sentence includes case support for the description and analysis. This is important. Where possible, you should support a proposition of law by reference to the correct case authority.

### **Some dos and don'ts**

- Don't bother restating the facts given to you in the question.
- Do make sure you clearly state what the relevant law is and why it is relevant.
- Don't stop at merely stating what the relevant law is.
- Do use cases and/or statutes as authority to back up your statements on the law.
- Do apply these directly to the facts and issues at hand.
- Don't write out all the facts of any case you use.
- Do mention any facts that are directly pertinent, for example if they are comparable to your 'case'.
- Do draw conclusions (or potential conclusions) from your application of the law.
- Don't forget there may be counter-arguments to your contentions and that you should bear these in mind as well.

### **Advise X**

In a sense, this is your conclusion. Your 'advice' is a summary of the law you have applied and the result of applying it. Be aware that there is not necessarily one 'right answer'. As long as you have constructed your answer by using the law to support your contentions and analysis, you will be right, even if someone else may have come to a slightly different conclusion than you (or even the exact opposite!).