

## Answers to practical exercises

### Chapter 15: Answering problem questions

#### *Page 352: The 'so what?' technique*

Use the 'so what?' technique to eliminate the unnecessary material from these sample answers based upon examples used earlier in the chapter.

1. Sheena has submitted her essay at 9.15am the day after the deadline for submission. The rules state that there is a 10 mark penalty for submission up to one day after the deadline. **An essay which is more than one day late will receive a 25 mark penalty if it is within one week of the deadline but after that it will receive zero.** It is likely that Sheena will receive a 10 mark penalty unless she can establish that she had good cause for late submission.

#### Comment

The highlighted sentence is unnecessary. As Sheena's essay is one day late, the correct rule has already been stated in the preceding sentence and there is no need to include the rules that are applicable to essays submitted more than one week late. The inclusion of an unnecessary rule is a waste of words as it has no role to play in the essay so will not attract any credit from the marker. It is a common mistake when quoting from statute to include the entirety of a statutory provision when only one element of it is relevant to the facts of the question. Make sure that your answer is focused by including only the piece of law necessary to deal with the issue.

2. Steve has punched Adam in the face causing a cut which required stitches so he may be liable under section 20 of the Offences against the Person Act 1861. The *actus reus* requires a wound or the infliction of grievous bodily harm. Grievous bodily harm is defined as 'really serious harm' and, according to the CPS Charging Standards includes serious injuries such as broken limbs. **Moreover, it has been held by the House of Lords that psychological injury can amount to grievous bodily harm if it is sufficiently serious and is established as a matter of expert evidence. It does not include mere emotions such as distress or fear but requires an established psychiatric injury.** A wound is defined as a break in the continuity of the skin and will be satisfied as a cut that requires stitches must have broken Adam's skin.

#### Comment

The highlighted section regarding psychiatric injury is unnecessary. Adam has sustained a cut to his cheek. There is nothing in the facts to suggest that he has suffered any psychological impact from the attack so this passage has absolutely nothing to contribute to the answer. It is, in essence, a waste of 50 words that could have been used elsewhere; always an important consideration in a piece of coursework with a limited word count. It is arguable that the preceding sentence that explains grievous bodily harm is irrelevant as Adam's injury does not fall within the definition but is readily established to be

a cut. However, this sentence could be argued to have a role to play in the answer as it is at least dealing with one of the manifestations of physical injury that comprise the actus reus so it is not unreasonable to include it in order to eliminate it as a basis upon which to establish the actus reus. It is one of those sentences that is not irrelevant but it not essential either so it is one that could be considered for elimination if there is a need to cut words out of the finished answer in order to comply with the word limit.

### Further Example

#### Instructions

Eliminate irrelevant detail from the sample answer.

#### Question

Jerome is a musician who played in local pubs in Cheltenham. Although he did not make a great deal of money from his music, he amassed a great fortune as a result of judicious investment in shares. He made a will in 2005 which included the following disposition:

On trust to Sebastian in the hope that he will distribute a generous part of my immense fortune to any of my loyal fans who have enjoyed my music. The residue of my estate is left to my sister, Amelia.

Jerome died in an accident six weeks ago. Fern, the landlord of the Dog and Duck where Jerome used to play on a regular basis, is seeking a payment from the estate as is Pearl, who claims to be Jerome's biggest fan. Advise Sebastian as to the validity of the disposition.

#### Lengthy Answer

Jerome has left money in his will. According to section 9 of the Wills Act 1837, a will is only valid if it is made in writing and signed by the testator in the presence of two or more witnesses. Jerome has made a will so it is presumed that this was done in writing but there is no indication of whether or not this was done properly and in the presence of the required number of witnesses. If these formalities were not present, the will is not valid and cannot give rise to a trust. If the will is not valid, Jerome's property will be distributed in accordance with the rules on intestacy so it will be as if he had not made a will at all. This is rather unfair as he clearly meant to make a will and to ensure that his fans benefited from it whereas the rules of intestacy dictate that the property will pass to his nearest relatives. This might not even be his sister Angela as Jerome may have closer relatives, such as a parent or an estranged wife who might even be living with a lover and who he would definitely not have wanted to benefit.

If the will is valid, the validity of the testamentary disposition that is the subject of the question can be considered. In order for a testamentary disposition to be valid, it must satisfy the three certainties required for a valid trust: certainty of intention, certainty of subject and certainty of object. If these certainties are not present, there is no binding trust. This is because it must be absolutely clear that the testator wanted to establish a

trust and for specific property to be held on trust for a specific person or specific people. Certainty of intention requires that the testator demonstrated a clear intention to create a trust relationship rather than to confer an outright gift. The imposition of a trust is an onerous responsibility so the courts will be reluctant to impose a trust unless it is clear that this is what was intended. In *Wright v. Atkyns*, it was held that the words used must be imperative; this means that it must be clear that the person to whom the property passes is holding it on behalf of others. It was held in *Re Kayford* that there was no need to use the word 'trust' in order to establish certainty of intention provided that the wording of the disposition was such that it was clear that there was an intention to create a trust. In this case, Jerome has stated that the property is on trust to Sebastian which is good evidence that the property was to be held by Sebastian for the benefit of someone else rather than being an outright gift to Sebastian. However, the situation is complicated by words that follow that may be taken to be precatory words that express a hope or desire that property will be used in a particular way rather than imposing a mandatory obligation to deal with the property in a particular way. Here, Jerome expresses a hope that Sebastian distributes money to his fans. In *Lambe v. Eames*, the trust failed for lack of certainty of intention as a husband left money to his wife for her to use as she thought best. This is quite complicated as the word 'trust' is used in conjunction with precatory words. In *Re Adams and Kensington Vestry*, it was held that a disposition that was expressed using the words 'in the fullest confidence that she will do what is right' did not create a trust but the court in that case said that it was important to read the disposition as a whole to ascertain the intention of the testator. Here, Jerome has used the word trust and he specifies the beneficiaries as well as what is to happen to the money that is left over (the residue to his sister) which suggests that this is intended to be a trust rather than an outright gift to Sebastian.

### Comment

The matter of determining relevance is not always straightforward. Sometimes it is not just a question of 'is this point relevant?' but 'how relevant is this point?'. This will be a particularly pertinent question when answering a problem question as part of coursework where there is likely to be a limit on the amount of words that can be used and it will be necessary to evaluate the relative contribution made to the answer by various points when deciding which points to leave in and which to take out.

The first paragraph of the sample answer above demonstrates this point very effectively. Although the question is, in general, about the validity of the dispositions made in Jerome's will, the specific focus of the question is on the three certainties needed for the formation of a valid trust. As such, if a strict approach to determining relevance was taken in order to comply with a tight word limit, the entirety of the paragraph could be omitted from the answer. This is because it deals with the validity of the will and the way in which the property will be distributed if the will is not valid. It would be perfectly permissible to omit any discussion of this point and answer the question on the assumption that the will is valid. This would ensure that the answer kept a firm focus on the key issue. This would save just over 200 words that could be used to discuss a more relevant point.

However, an argument could be made that the validity of the disposition is irrelevant if the will itself is not valid which means that some of the material in the first paragraph could be included in the answer. Take a look at it again and consider how much of it you would

want to include? There is a point where the answer moves too far away from the given facts and engages in speculation about the distribution of Jerome's property and his relationships with potential family members. It is not clear from the question whether or not Jerome has ever been married so pondering the nature of his relationship with his wife and whether or not she has a new partner has little bearing on the question so that section could be eliminated. You might then like to consider whether it is necessary to mention intestacy at all, particularly as the substance of this question concerns the three certainties so it is clear that the writer of the question intended the will to be valid. Certainly, it would be possible to provide a clear and complete answer without any mention of intestacy so there seems to be little justification for including it. As such, if some mention was wanted of the requirements of a valid will, these need only be very brief to establish a starting point for the answer prior to dealing with the key issues. The paragraph that follows is a suggestion of the material that could be taken from the first paragraph although it is important to remember that there is a strong argument that nothing at all from the first paragraph needs to be included in an answer to this particular question:

According to section 9 of the Wills Act 1837, a will must be made in writing and signed in the presence of two or more witnesses. Jerome has made a will and it is presumed, in the absence of evidence to the contrary, that these formalities were complied with and that the will is valid.

### Refined Answer

In order for a testamentary disposition such as this to be valid, it must satisfy the three certainties required for a valid trust: certainty of intention, certainty of subject and certainty of object. Certainty of intention requires that there is evidence that the testator intended to create a trust rather than an outright gift. This is important in this case because if there is no trust the property in question – a generous part of Jerome's large fortune – will pass to Sebastian as an outright gift. The wording of the disposition does include the word 'trust' which is good evidence of a trust relationship, in which the trustee holds the legal title of property for the benefit of the beneficiaries. The imposition of a trust is an onerous responsibility so the courts will be reluctant to impose a trust unless it is clear that this is what was intended. In addition to the use of the word 'trust', the disposition makes use of precatory words; that is, words that express a hope or desire that property will be dealt with in a particular way rather than indicating a mandatory requirement that is consistent with the trust relationship.