

Video transcript

Video Tutorial (b): Problem questions - incorporating academic materials

Hello. In this video I'm going to talk to you about problem questions and really about a very common question and a very common area of concern for students, which is how you can incorporate academic material academic journal articles or monographs into your answer of a problem question. Now, in relation to essay type questions this is comparatively straightforward. Essay questions will often ask you to critically evaluate the law in some way or another or even to consider reforms. In that way of course, it lends itself quite nicely to journal articles because that's usually what most academics are doing, either drawing attention to particular problems in the law, or suggesting potential reforms.

However, within problem questions, of course, your focus isn't generally to evaluate the law, but rather your focus is to discuss the potential for liability in relation to a particular set of facts, and so it is much less obvious of course how we would then be able to incorporate, and even if we want to incorporate academic material. This isn't true of all problem questions. Certain problem questions in different institutions may well ask you both to discuss and critically evaluate laws you apply in that kind of situation. It is actually pretty straightforward. Of course you can do your application of the law and you can also then take a sideways look and say "as so-and-so has demonstrated within so-and-so Journal article that this is actually a controversial area of law or there have been reforms by the Law Commission or recommendations for reform by the law commission". So in those kinds of questions it is more straightforward than the ones where the question simply asks you to discuss liability.

Often what happens when a question simply asks you to discuss liability, a very common approach from students, is to analyse the question in the normal way, applying the laws, discuss whether this is liability or not, and then at the end to suddenly think, I need some kind of Journal article; I read something about this by Ashworth or by David Ormerod, or whoever it might be, and this is a little quick description in the article, or the law commission has also looked into this here, and so here is a little description of what they said...

Now, you will get some credit for that it demonstrates wider reading, it demonstrates some engagement of academic material, but in terms of answering the question, it doesn't really do very much. The question asks you to discuss liability and what you're doing is something quite different. You have discussed liability and now you're telling me a story about something you've read, so ideally when you are answering a problem question, you want to incorporate further reading and you want to demonstrate that wider understanding.

There are usually three main ways that we might recommend you can do that and be able to use that wider reading and that academic material in order to help you answer the question in order to help you discuss liability. The first one is essentially to explain an unknown so there'll be a lot of times when you're answering a problem question where you will reach a certain stage in your analysis and actually you don't know the answer, and it could go either way.

A common example might be for example, the third step of Woollin intention. So intention is defined within the case of Woollin makes us look - is the result a virtual certainty? - does the defendant foresee it as a virtual certainty? And then it's up to the jury whether they find intention or not. Now when it comes to applying that third step, the answer is unknown. It's simply a jury question we don't actually have the legal criteria to help us predict what the answer is going to be. For when you're answering a problem question and you have to say whether you think there's likely to be liability or not, this creates a problem; it creates an unknown. Now to help you explain that unknown to your reader, it might be quite useful to bring in some academic commentary and say this is an unknown, acknowledge the uncertainty, but, as for example, Norrie in his article after Woollin says, this is a problem for then being able to have predictable outcomes of cases so it's not simply an unknown in the sense that you're ignorant, but rather it's an acknowledged unknown within the law which you're acknowledging and recognizing through academic material.

There are lots in areas like this, so my example I gave obviously was the Woollin definition of intention but equally I'm sure you can find many areas in relation to causation, for example, where there are unknowns within the law where you reach a stage where actually the law doesn't tell you the answer, or for example gross negligence manslaughter when we reach the final stage in what is grossness, again there's a lot of uncertainty and you can refer to the academic material to help explain that uncertainty to your reader.

Now a second way of using academic material, and this is perhaps the more common one, is where you do have an answer within the case law, but perhaps that case law is contradictory or where there's an absence of case law but you have some academic material that suggests the way the court should go now. When you have that clash of cases, so you are not sure which one will apply, or where you have an absence of case law but you have academics suggesting how the law should be taken, you can acknowledge again that uncertainty to your reader. You can acknowledge the clashes of cases and you can acknowledge the absences of cases, perhaps, but then rather than simply saying therefore we don't know, we'll have to see what the court decides, you can reference academic journal articles and say, although there is this uncertainty, if for example they follow the approach by Holder or Herring, for instance, then this is the direction they are likely to go.

An example might be in terms of uncertainty; something like transferred malice. Jeremy Holder's written article on transferred malice where he suggests there should be a remoteness principle in certain circumstances. We discuss that within chapter four of the book. It may be that if the scenario envisaged by Jeremy Holder comes up with in a problem question, you could say actually at the moment there is an absence of case law on this. However interestingly if the court chooses to follow the approach recommended by Holder this would be the likely outcome. You can then comment critically on that, you can say this is the outcome recommended by the academic, but actually for these reasons I don't think the court will go that way or even I don't think the court should go that way. Equally you could say, actually it's likely that the court will adopt that view and this is why.

So again, basically you're dealing with an uncertainty either way as I said through clashes in places or through an absence of case law, and you're using the academic material to help you answer the question to help you say whether you think liability is likely or unlikely.

Then the final one of the three is perhaps the most unlikely, but does occasionally come up. This is where you have a case on point, you have valid authority, but actually that case has been so fundamentally criticized by a host of academics or by a particularly powerful journal article that actually you begin to doubt whether that precedent is going to be followed by the courts or not. An example of this might be, the Anderson case in relation to conspiracy. So in that case most academics would agree that the case basically misinterpreted the mens rea of conspiracy in court and caused quite a lot of confusion within the law. Now that case remains valid authority but actually I think you can quite legitimately say the breadth and degree of criticism in that case means, even though it's valid authority, it's likely that in practice i.e. with your problem question that a court would either overrule it if they had the authority to do so or they would find a way of distinguishing that case and go with the more recognized authorities. So in this way again you're using the academic material to help you answer the question.

So to summarize the three ways in terms of good practice for using academic material within problem questions, firstly explaining an unknown; simply saying this is an uncertainty within the law and this uncertainty has also been highlighted by academics within so-and-so material. Secondly, finding a solution to an uncertainty or finding a solution to a clash of cases so this is an area of uncertainty, this is a clash of cases, these are a set of academic articles which have suggested routes out of that uncertainty, and we consider which one the court's going to apply. And finally, where there is authority but actually it's been so fundamentally criticized that we doubt its continuing authority.

Thanks very much.