

EXAMINATION TECHNIQUE

There are typically two types of questions in law examinations: essay questions; and problem-type questions. There are certain skills that are required to answer each.

There have been some useful things written on examination skills but there is not much that is specifically Scottish. However, the generic skills are discussed in a variety of places. Two particularly useful texts are:

- (a) Helen Carr, Sarah Carter, and Kirsty Horsey *Skills for Law Students* (Oxford University Press, 2009) chs 25 (on writing essays); 27 (on answering problem questions); and 28 (on revision and examination technique)
- (b) Emily Finch and Stefan Fafinski, *Legal Skills* (Oxford University Press, 2nd edn, 2009) chs 12 (on answering essay questions); 14 (on answering problem questions); and 15 (on revision and examination technique).

Why have examinations?

Examinations are used in order that you can demonstrate that you have covered, and understood the topics detailed in the syllabus for your subject. And while they do not require bibliographies and full referencing of every case or comment you use in your answers you are still expected to use legal authority (cases, legislation, or commentaries) to support your answers.

Revision technique

To begin familiarise yourself with basic information. When are the examinations? How many examinations do you have to do within the examination diet? How long are the examinations? How many questions do you have to answer? What do the examination papers look like? Are you allowed to take external material in with you to examination? To answer these questions familiarise yourself with the relevant section of the Law Society [website](#) and check it regularly.

Prepare to manage your time.

When you are working while studying you will be conscious that time is precious. You will need to work out how much time you can allocate to revision and prepare a time management schedule for the examinations. This time management schedule should be kept under regular review.

There are various approaches to revision technique. The textbooks referred to above give some. You should make sure that you adopt a technique that works for you. And if something is not working for you – change it.

Open Book Examinations

Some examinations allow you to bring in materials, such as statutes or Law Society rules. These can be consulted during the examination. Check whether the examination you are attending permits materials to be used.

Beware though that there are pitfalls when using materials. The general guidance given above on answering problem and essay questions still applies. It is not an answer to a problem question to merely repeat at length the terms of a statute or a rule. A problem question is asking for your application of the law, or a rule, to a set of facts. Merely reciting the exact terms of the law, or rule, does not tell an examiner whether you can apply the law. Similarly in an essay question you are typically asked to “consider”, or “analyse”, or “evaluate”. This involves more than merely setting out the terms of the relevant provision, as copied from your materials. It involves your critical response to the material not being able to show that you can copy it out. The materials are there to ensure accuracy in your citation, and to allow you to check the exact wording of provisions (which can help with questions of applications or analysis). When you are permitted materials in an examination they are not there merely to be copied out. Doing so will ensure a poor mark.

The examination itself

Make sure that you are there on time.

Listen to the instructions which are provided at the start of the examination.

Read the instructions carefully.

Keep an eye on your timings.

While time management is important in the preparation of your revision it is absolutely crucial within the examination itself. Poor performances can often be traced to students failing to answer all of the questions. Or answering one question in a much shorter time than had been devoted to the others (with a mark reflecting that). If you have a 2 hour examination and you have to answer 3 questions of equal value make sure you spend an equal time on each. Or if you have a 2 hour examination with one question worth 50% of the marks, and 2 questions which are each worth 25% of the final mark allocate your time proportionately. This applies within questions too.

If you have allocated 40 minutes for one answer and it has 4 parts each of equal marks spend 10 minutes on each part. It is counter-productive to spend a disproportionate amount of time on one part. You will not properly answer the other parts, and there is a strong likelihood that your long answer will contain much material that is irrelevant (and consequently fails to answer the question).

Skim read the entire paper carefully before making your selection. Often this can usefully help to identify those questions that you DO NOT want to answer. When you have then identified those you might wish to answer read each of these questions carefully at least twice before making a decision ensuring that you check what you are asked. Sometimes students have prepared an answer on a particular topic, ignoring a subtle twist in wording of the question that requires a particular focus, or invites the student to give particular consideration to a specific issue.

Once you identify the questions you are going to answer quickly make a plan identifying the main points you need to address. Your approach may differ dependent on whether you are answering a problem or an essay question (on which see below). When writing an answer ensure that you have an introduction, the main body of your answer, and a conclusion. Many students find it useful to make notes on a question before answering it. But if you do this, don't forget to cross out your notes at the end, for otherwise the examiner has to assume that your notes form part of your answer.

Remember that the examiners are looking for quality rather than quantity. You are not marked by the number of pages you have managed to fill up. Shorter answers can attract a higher mark than longer ones. But a very short answer is unlikely to do well.

Don't begin by copying out the question or narrating the facts of the problem. This is a sheer waste of time. The examiner has the question paper beside him or her while he or she marks. And don't start with a summary of the area of law with which the question is concerned. In fact, don't slide into "legal lecturing" at any point. Likewise, there is normally no point in copying out a statutory provision, unless it is very brief. In general, a simple reference is enough. Longer quotation from a statutory provision makes sense only if you need to discuss its precise wording.

The following two sentences contain examples of various problems that arise in the use of English in examination answers.

"Generally in legal writing please avoid the prolix circumlocutions that plague some of your number who begin sentences that quickly, or sometimes slowly, begin to lose fluency and coherence as they slowly, and with great time taken, meander gently through a course of unnecessary and curiously and inappropriately used adverbs and adjectives (and occasionally unnecessary and peculiar parenthetical insertions), sometimes even repeating themselves by using the same words or similar words to words used previously in the sentence to make the same point that had been made previously in the sentence earlier on, before suddenly and spectacularly pausing."

"The meaning of the sentence before having been lost in the midst of a - muddle of (badly) used punctuation - and other unwelcome digressions and diversions from your main point."

Please try to avoid these characteristics. Avoid repetition. Use punctuation accurately. Use language accurately. Don't use unnecessary adjectives or adverbs. Keep your sentences simple. When you structure a sentence in a complicated way there is a strong likelihood that the meaning of the sentence will become obscure. When writing remember the guidance of Eric Blair (George Orwell) who in an essay on "Politics and the English Language" available in his collected essays proposed five rules for clear writing,

- (i) Never use a metaphor, simile, or other figure of speech which you are used to seeing in print.
- (ii) Never use a long word where a short one will do.
- (iii) If it is possible to cut a word out, always cut it out.
- (iv) Never use the passive where you can use the active.
- (v) Never use a foreign phrase, a scientific word, or a jargon word if you can think of an everyday English equivalent."

Accompanied by a sixth that should always be remembered when considering the other five:

- (vi) Break any of these rules sooner than say anything outright barbarous. "

Problem questions

Along with essay writing the other most common form of assessment is the legal problem. Broadly, a problem question involves a given set of facts followed by an instruction to advise the respective parties on their rights and any remedies they may have. Problem questions really test students' understanding of a particular section of work. This is because problems force you to APPLY the law that you have learnt. As with essay writing, there are many varied approaches to legal problem solving and the one presented here is only one method. In general examiners want to see that you are alive to all the possibilities that a set of facts throws up thereby showing that you are able to see all the issues that arise for consideration and are able to deal with them in a legally accurate and structured way. This ability generally is what distinguishes a good student from an average or poor one. Good students tend to be able to see deeply into the set of facts and highlight all (or most) of the legal problems that might arise. Less good students tend to jump at the main issue and leave it there. The aim of this guide is to give you a suggested framework to help YOU develop your legal skills so that YOU can train yourself to become a good student and ultimately a good lawyer. If this guide seems abstract at this stage, this is only because you have not as yet had sufficient practice at solving legal problems. As you get to know more law and practice solving legal problems, these ideas will become more concrete.

This guide uses a relatively simple four step structure when approaching legal problems: issue, law, application and conclusion (ILAC). What follows is an explanation of what each of these steps entails.

1. The Issue

The first step to solving a legal problem is to work out what the issue(s) is (are) that arise out of the set of facts. Of course the better you know your law the easier it is to spot the issue(s). Indeed, it is here that reading case law is invaluable as it provides you with an insight into how judges (the good ones at least) generally set out the facts and then the legal issue(s) that arise for determination. You should not repeat the facts at the beginning of your answer but rather start with setting out the crisp legal issues that arise for determination. First, you should read the problem to get an overall idea of the area(s) of law involved. You should then pay close attention to the question that is posed at the end of the problem. In general you will be asked to advise one or more of the respective parties that appear in the problem. If that is the case, ask yourself what that party would really want to know. The answer to this question will reveal the legal issue for determination. It is vitally important for your own clarity (and it impresses the examiners immensely) if you can accurately and crisply identify the issue(s) in this way.

2. The Applicable Law

Once you have identified the issues for determination, the next step is to set out the law applicable to these issues. You MUST cite the relevant case law or statutory provisions

(or any of the authoritative sources) that represents the current legal position in respect of the issues raised. As you will see in due course, this is generally the approach taken by the courts when they give judgments. You need to cite authority for your statements relating to the law. In general this entails citing one of the authoritative sources of law. Where there is no authoritative source then you should cite one of the persuasive sources such as an *obiter dicta* or a textbook/article.

Although there is frequently a clear and settled point of law that will decide a case, this is not always so. Sometimes there is conflicting authority with the result that the law is unclear. In these situations you should acknowledge this lack of clarity and argue the point both ways when it comes to applying the law to the facts, i.e. you should apply the different conclusions as to the law to the facts of the case in the manner suggested in 3 below. Where the law is unclear, there is frequently legal literature in which authors have expressed their opinion as to what the law should be. Where this is the case, these views should be noted. Also don't be afraid to express your (substantiated) opinion if you think that one view is preferable to another.

3. Applying the Law to the Facts

After you have identified the issues and clearly set out the applicable law, you then need to apply the law to the facts of the problem at hand. Sometimes the facts of the problem will closely track a particular case and this will provide you with a clear starting point (and sometimes a suggested conclusion) when applying the law to the facts. However, where this is not the case, you will have to argue by analogy or reason from scratch and come to a decision as to how the current case should be decided. You should try and find evidence in the facts given to you which support your conclusions.

In the real world cases will frequently turn on establishing facts by one of the accepted ways. In law problems, on the other hand, you do not have the luxury of going to collect evidence and must make do with what you have been given. Thus you might (and this is frequently the case) be given an incomplete set of facts meaning that a fact necessary to decide the case is not given to you in the problem. This will make it impossible to say for certain what the outcome of a particular problem might be. In these situations you need to mount contingency arguments and canvass all REASONABLE possibilities. Say for example that it is unclear from the facts whether a party knew that a car was stolen when he or she bought it. This fact might be material in a property law question. You would accordingly have to argue the point both ways and say (a) if the party did not know that the car was stolen (and so was in good faith) then ... but you would also have to point out that (b) if it was shown that the party knew that the car was stolen (and so in bad faith) then....

Another manifestation of this problem arises where it is difficult to make a conclusion as to the outcome of preliminary legal issue. The law of contract tells us that a contract can be terminated only if a breach is material. The law also states that a breach is material if it is serious (or goes to the root of the contract). This is frequently unclear on the facts of the case and in this situation you would have to argue (a) that should the court find that the breach is material then but (b) in the event that the court should find that the breach is not material then ... (the reason that it is significant is that different remedies follow depending whether a breach is material). If the facts lean a

particular way or if you think you can substantiate one or other conclusion, then you should not shy away from saying so.

4. Conclusion

When all the dust has settled and you have identified the issue, set out the law and applied the law to the facts, you need to conclude. In general it is useful to frame the conclusion in relation to the issues that you have identified as well as in relation to the question that you have been asked. For example, if you have said that the issue for determination is whether there is a valid contract between X and Y and you have been asked to advise X, you might conclude that there is a valid contract between X and Y and accordingly, I advise X to sue Y on the contract.

Some hints on answering problem questions

- (1) In problem questions, the examiners are looking for the ability to *apply* legal knowledge, not a *recitation* of that knowledge. When you look at a law book or a statute it seems that law is a set of rules, and therefore that to learn the law is to learn those rules. In a sense of course that is true. But in reality there are far too many rules for anyone to learn. In addition, lawyers and judges don't start with the rules, but with problems. Law is largely about problem-solving.
- (2) Sometimes a problem has a clear answer, and sometimes no clear answer, and sometimes partly both. Identifying where the law is clear and where it is not is one of the skills being tested.
- (3) Sometimes a problem question will contain *irrelevant facts*. That is like real life. One of the skills of a lawyer is to perceive which facts are legally relevant and which are not.
- (4) Conversely, a problem question may leave out some vital piece of information. Again, this is like real life. One of the skills of the lawyer is to identify missing information which will enable him or her to solve a problem.
- (5) Credit is given for identifying relevant issues, even if the wrong answer is given. This is probably the single most important skill in tackling a law exam. You can know every statute ever passed by heart, and every case ever reported, and still be a bad lawyer, because legal problem-solving must begin with the identification of the relevant area/s of law. You may know everything there is to know about voidable transactions in bankruptcy, but your knowledge is useless if you cannot spot such an issue hiding in a set of facts. By contrast, you might know almost nothing about this subject, but provided you can see in practice when the issue arises, you are more than half-way home, for having identified the issue you can

then look up the law. That is why in exams we are vitally concerned to see that you can spot and identify issues. Suppose you went to the doctor with some pain in your stomach or head or whatever, and he recited to you the lecture notes he took in medical school. What would you think? I doubt if any client has ever come into a law office and asked: "What are the exceptions to the rule in *Foss v Harbottle*?" or: "In what cases is it not necessary to give notice of dishonour of a bill of exchange?"

- (6) Don't *waffle*. Irrelevancy counts against you. A lawyer must stick to the point. To put in background information is legitimate. Learning to draw the line between background information and sheer waffle is one of the skills being tested.
- (7) But if some aspect of the problem might be relevant but in your view is in fact irrelevant, you should of course say why.
- (8) *Address the question that is posed*. If you are asked whether Smith is liable to Robertson, answer that question, whether your answer is a yes or a no or a maybe. This may seem obvious, but examiners each year mark numerous essays which at no point get even near actually offering an answer to the question asked. The psychology may be a fear of giving a wrong answer. But the truth is that nothing can be worse than no answer at all. One particular word of warning is that you should beware of writing something like: "A may be able to sue." This really says very little. Anybody *can* sue anybody else. The question is always whether such an action is likely to succeed.
- (9) Don't forget presentation, especially:-
 - * spelling,
 - * grammar,
 - * punctuation,
 - * and handwriting.

These are *communication skills*. A lawyer must be able to communicate in writing, *clearly, concisely, correctly and unambiguously*. Most of all, don't forget that the examiners cannot give marks for what they cannot read.

- Poor English makes a bad impression and may make it unclear what you are saying. Thus: "The contract between A and B is subject to C's right. So he can sue. "Who can sue?"
- "Bank of Edinburgh credits a/c when they receive the cheque so b/c a banker has lien & so becomes holder if it's customer has got an overdraft, (s 2 of 1882 act) he may be able to sue, b/c he does have overdraft there is a lien therefore the chq must be paid, this is, basically an unsatisfactory scenario if they get liquidated."
 - Examiners read many sentences as bad as this, or almost as bad, every

year. Its presentation is poor. In this sentence the bank is at different points "they", "it" and "he." There are floating pronouns, as in the previous example. Among them is *this*, a word much liked by some students. There is nothing wrong with it, if its reference is clear. All too often its reference is unclear. The sentence is convoluted. We are not told who must pay the cheque. We are not told who might go into liquidation. The sentence is mispunctuated and mis spelt. If you are not confident that you can handle long sentences, use short ones. Use capital letters conventionally. (The example of e e cummings may be imitated by poets, but not by lawyers.)

- Beware of abbreviations. Conventional abbreviations are acceptable. Thus in the example "a/c" is acceptable, as is "&" for "and." But unconventional abbreviations make a bad impression and sometimes entirely baffle the examiner as to their meaning, especially if the handwriting is poor.
 - Beware of colloquialisms: you are supposed to be writing a legal brief. Write complete sentences, and not mere notes.
 - "The goods were delivered to the purchaser, Cant who has paid for them, however the title is void because the seller had stolen them."
 - We need a comma after *Cant*. Moreover, we have here two sentences, not one, and so the comma after *then* should be a full stop or semi-colon.
 - Exams are tense occasions, and time is often short. The examiners don't expect prose of the quality of Dr Johnson or Lord Macaulay. We all make mistakes sometimes. But a certain minimum standard is expected. (*Marks may be deducted.*) If your handwriting is difficult to read (ask some friends) it may help to invest in a decent pen.
- (10) In a problem question there will usually be various parties. If you mean "Jones" don't write "Smith." This may seem obvious. It is obvious. But it is too common an error, and a tragic one. The examiner can judge you only on what you have written.
- (11) It helps the examiner if you underline cases and statutes.
- (12) *Re-read your answers*, to correct blunders. Many students feel an overwhelming disinclination to do this: they can't bear to look again at what they have said. Do it. It can save many lost marks.
- (13) *Give authority*. You have to tread a middle path in this respect. An answer that looks like a page from Professor Walker's *Principles* goes too far. Excessive

citation of authority is often a symptom of irrelevance, and is often an attempt to cover up a failure to understand the issues. But equally an answer on company law which suggests that you have not heard of the Companies Act 2006 is likely to attract a fail mark. Cite authority where it is needed in the development of your argument or analysis, but not otherwise. Both case law and statutes need to be referred to where appropriate. Where your paper is an open book paper (for example, where you are permitted to take a statute into the examination) there will be an expectation that you will cite relevant authority – particularly when you have the relevant primary source of law in front of you - and failure to do so will be taken into account by the examiners in assessing your final mark.

Some hints on answering essay questions

When answering essay questions bear in mind the general advice above and note the following specific issues.

- a) Knowledge: do you know what the law is? And is your knowledge up to date? The examiner is looking for evidence of both.
- b) Relevance: you need to exercise your judgment to ensure that everything you use is relevant to the question asked. A fundamental legal skill is the ability to discard the irrelevant. When reading your answer bear in mind the question and apply what Professor WA Wilson described as the “so what?” test. If you read part of the answer and think “so what?” then it should not be there and should be discarded. For example, if there is an essay question on the remedy of specific implement as a means of responding to a breach of contract, a digression on the law of error will add nothing to your answer. It will suggest to the examiner that you have not read the question.
- c) Note what the question asks. If it asks you to “consider” or “analyse” or “evaluate” you must do that. It is not enough merely to repeat the knowledge you have acquired. If you are asked to consider/evaluate/analyse/assess then that means when writing your answer you need to identify problems and consider their significance. You therefore need to think critically about the material.
- d) Structure is crucial to a successful essay answer. You need to plan an essay – identifying the point you intend to argue, then presenting arguments in favour, address the arguments against, before concluding with a summary of the argument you have made
- e) Remember that your essay is a legal one. The arguments you make and those you critique require to be based on authority, be that primary or secondary. Doing this

will mean that you will avoid assertions with questionable foundations.

- f) If you end up using rhetorical questions in an essay this is not a good sign. Rhetorical questions suggest that you cannot think of an answer, and add nothing to your argument.
- g) Make sure that your argument flows. Too often in unsuccessful answers an examiner will see the beginning of an argument and a statement of the conclusion, but there will be gaps between the two. An argument should develop throughout a text.
- h) Try to avoid repetition of the same point. It is infuriating to read the same point made over and over again using slightly different words. In fact you should only make the point once. You should not repeat it. Repeating the point merely suggests that you do not have anything to say. And it eats into your time for the rest of your answer. So ensure you do not make the point repeatedly within your text.
- i) An interesting line of thought will often attract several additional marks even if the examiner disagrees with it. (Indeed, many cases have been won by unsound arguments.) The ability to argue is of the greatest importance to the lawyer. (If you produce a line of reasoning which indicates that you are hopelessly muddled, then of course you will lose marks, but then if you are hopelessly muddled this fact will almost certainly become obvious to the examiner however you approach the question!) So.... *argue!*
- j) Avoid non-sequiturs. Avoid self-contradictions. Maybe there is no point in preaching about this since arguably no one capable of recognising a non-sequitur or self-contradiction would be guilty of one. What all too often happens is that a student says one thing in one sentence and the opposite a few lines later. Sometimes this is because he has changed his or her mind in the course of writing. You can lessen the danger of this by making notes for an answer first. You can also save yourself by re-reading what you have written.