Exam skills for success in evidence

1

Evidence is often regarded as one of the more complex subjects studied in undergraduate law courses. It is a mixture of arcane old rules and opaque new statutes and sometimes seems to offend common sense. Technical precepts are intermingled with judicial discretion and matters of high constitutional principle. The subject covers such wide-ranging areas as the defendant's right to silence, the treatment of the presumed victim in the trial process, and whether or not intercept evidence should be used in court.

Until the early years of this century, less so since 2003, there has been much legislative activity in the field of evidence, some dealing with questions which are or were politically controversial. The courts struggled to digest complex new law while upholding the human rights of the various parties to litigation, both criminal and civil. The **Human Rights Act 1998** and the application of **Art. 6** has had a powerful impact on defendants' rights in areas such as the admissibility of improperly obtained evidence and the allocation of the burden of proof. On the other hand, there has been a parallel advance in making prosecutors protectors of victims. Indeed, the Government in 2002 proclaimed its aim to put victims 'at the heart' of the criminal justice system (Home Office, *Justice for All* (Cm 5563, 2002), para. 0.2). One outcome was the wide-ranging **Criminal Justice Act 2003**, notably the provisions on character and hearsay evidence. As well as absorbing his or her course material, the alert student will follow the contemporary debates over these developments both in the general media and in legal journals. In this way students will appreciate the intellectual richness of the subject.

Preparing for the examination

Question and Answer books are not a substitute for learning the law from your lectures, seminar discussions, and recommended readings. They are a supplementary resource in that they enable students to practise answering questions as revision for examinations and coursework. These are not model answers to be slavishly imitated (of course, this could constitute plagiarism), but rather examples to help the student understand the topic and see how it might be approached. You can test yourself throughout the course by comparing your answers to questions with those suggested in this book.

Unseen examinations

The questions in this book are for the most part designed to help you prepare for unseen examinations, usually lasting two or three hours, consisting usually of assessments where you do not know the actual questions in advance. The last chapter in the book however gives guidance on coursework questions although of course the answers in all the chapters will help prepare you also for these. Examinations and coursework assessments may have a mixture of problem and essay questions but you will usually in the coursework be expected to produce a more sustained and well-referenced analytical submission.

Put crudely, the examinee's objective in any examination is to accumulate in the time allowed as many marks as possible. To be manageable, this task needs to be broken down into three stages: planning, execution, and review.

Planning for the examination

It goes without saying that you must organise yourself well in advance to prepare for the examination. Ideally you will have completed all the formative work throughout the year, sought and acted upon feedback from your tutor, and tested yourself by answering previous examination questions or MCT tests (you will find a range of these in the companion *Concentrate* volume). You will have learnt that an important skill in answering Evidence questions involves addressing yourself directly to the practical or abstract theoretical question set in both problem and essay questions.

Problem questions

Briefly, in answering problem questions, the student must first identify the areas of law in which the problem falls. Almost invariably, there will be more than one issue and it is important that you identify them at the start. Having done so, you should be able to outline the legal principles which are relevant to the issues in the problem, citing the relevant cases and statutes. The next stage is to apply these authorities to the facts. This involves discussion of the facts in the light of the relevant principles, analysis of the facts to select which are significant, and, where appropriate, a comparison of the problem's facts with those of the authorities, in such a way as to support your argument. Finally, come to a practical conclusion, which need not be a definitive answer, may suggest more than one alternative, and should where necessary indicate what additional factual material would be required to give a definitive response. Although the sources and authorities for your answer will largely be case law and statute, you will also gain credit for, where appropriate, referring to academic debate on the particular topic. This is particularly relevant where the case law reveals conflicting authorities.

You will find the IRAC method (*Identify* legal issues, state *Relevant* law, *Apply* the law to the facts, come to a *Conclusion*) which is employed in this book a good guide to structuring your answers. In problem questions it is vital to focus on the actual issues you are asked and avoid irrelevant diversions which will not impress the examiner. To give one example, if the question is about the admissibility of confessions and there is no suggestion in the facts of oppression having been exercised do not waste time on **s. 76(2)(a) of the Police and Criminal Evidence Act 1984** but go straight to **s. 76(2)(b)** and **s. 78**. Be driven by the specific factual scenario in the question.

Essay questions

A different approach is required when answering essay questions. Essay questions will usually be centred on an area of controversy or ambiguity in the law. Your preparation here will be largely reading

widely not just your set textbooks, weighty though they are, but also articles from the leading journals. Thus the approach required to answering questions will vary with the type of question. It is important in essay questions to show understanding of the academic debates particularly over the controversial areas of the law such as the erosion of the right to silence. Good students will have spent time during the year researching such publications as the *International Journal of Evidence and Proof*, *Criminal Law Review*, *Law Quarterly Review*, and *Public Law*. Even if you have not done so throughout, it is well worth spending a few hours of revision time before the examination in the library, including of course its online version, looking through recent issues and making a note of evidence topics which have drawn academic comment. In many cases this is where the examiner will have looked when drafting the exam paper. Background reading will help you to see what the question-setter is looking for in answer to essay questions. Ensure you have answered the question which, given that Evidence is usually a second- or third-year option, requires a deep analysis of a legal practice or principle. Avoid a narrative account since to do well requires a high level of abstract thinking and a capacity to make connections between concepts. To give one example, if you are asked to comment on the operation of the exclusionary discretion under **s. 78 of the Police and Criminal Evidence Act 1984** you will gain a good grade if you demonstrate you have a theoretical framework around which to structure your answer. This might include preserving the legitimacy of the criminal justice system as the House of Lords analysed it in the landmark case of ***R v Looseley*** [**2001] UKHL 53**.

The examiners are not expecting identikit answers. Rather they are looking for indications of a well-structured, well-evidenced analysis which succinctly responds to the question they have set. A small tip is to make sure your first paragraph is impressive. This will make the examiner sit up and relish reading the thoughtful argument you are presenting to her. All lecturers are delighted when they find signs at the beginning of an answer of an intellectually curious student who is sure of her ground and scholarly in her exposition.

Examination day arrives

When you are given the examination paper, read it, read the rubric (the instructions at the top of the paper) carefully. Then take five minutes to read the paper itself right through before you start answering a question. You will usually be required to answer a set number of questions (say, four out of ten). You must answer the number of questions required and manage your time on each according to their weighting in marks. A surprising number of candidates fail because they answer fewer questions than required. Check whether there are compulsory questions.

Having chosen the required number of questions, sketch out in telegraphic note form your answer to each. In problem questions in law examinations this is very often a matter of spotting the issues, as several different areas of the subject are mixed together. The table at the end of this chapter will help you spot the variety of legal issues in mixed questions. If at this point you can recall the names of the cases which are authority for particular propositions in the area concerned, all the better. If you can't, pass on to the next of your chosen questions. By the end of this process, which should not take more than perhaps 15 minutes, you will have sketched out in rough form your answer to each of your chosen questions. Many of your fellow examinees will already be scribbling frantically. Don't panic. Before you go to the stage of execution, make a simple calculation. Take the length of the examination in minutes (180 minutes for the classic three-hour examination). Subtract the time you have spent on the planning stage (perhaps 15 minutes) and allow five minutes review time for the end of the examination. Then divide the remainder equally between the questions you have chosen.

Writing and review

Now you can start writing your first answer. Bear in mind that there is often no obvious right answer to a practical question. The authorities may conflict, or you may need to point out that more information is needed than the question provides. What is important is not so much arriving at a conclusion as demonstrating clearly in your reasoning that you appreciate the complexities and sometimes ambiguities of the law. Break your answer into paragraphs, underline the names of cases, and avoid writing between the lines or in the margins.

It is very important to remember that the examiner is interested in what you do know, not what you don't know. So if you are uncertain about a particular point, it is generally better to put down what you think is the answer, provided it is relevant to answering the question. If you are right, you will gain marks; if you are wrong, you will usually not have marks taken away. Don't be tempted to exceed your time limit. You are more likely to pick up marks at the beginning of your answer than at the end. Once your self-imposed time limit is up, stop writing and go on to the next question.

About half way through the examination your concentration may start to sag. It is at this point that you will appreciate having made your sketch answer to your third question at the beginning of the examination period. Your fellow examinees who rushed to get pen to paper at the start of the examination will be flagging too, but they won't have tried to think through the issues in the question when they were fresh. Your aim will be to get as many marks for your last answer as for your first.

You should analyse the question to establish whether you are asked to discuss, explain, or criticise a particular area of Evidence law or comment on the state of the law more generally.

Textbooks and sources

The suggested answers in this book frequently make reference to the leading textbooks on Evidence. These are listed in the next section. They have different features and virtues. Some give more attention to the socio-legal aspects of the law, some are more in the nature of practitioners' manuals, others are more philosophical. Your tutors will guide you on the most appropriate ones for your course. They all will convey to you the healthy debates and controversies in the world of Evidence scholarship.

Some answers in this book contain quotations from the textbooks and journal articles. Obviously in an examination you will not remember them verbatim. However, it will improve your grades if you familiarise yourself in advance with at least some of the arguments of these leading scholars. One example is the criticisms Dennis has of the operation of **s. 34 of the Criminal Justice and Public Order Act 1994** (see Dennis 2013, pp. 196–209). In any case you should be guided throughout the year by accounts made by leading scholars in the field of the fascinating subject of Evidence law.

Textbooks

There are a number of excellent textbooks on Evidence. Some of these are cited in the answers in this volume. These references have not been included in the 'Taking Things Further' lists in each chapter but are set out here:

- Choo, A.L.-T., *Evidence*, 5th edn (Oxford: OUP, 2018).
- Dennis, I., *The Law of Evidence*, 4th edn (London: Sweet & Maxwell, 2013).
- Doak, J. and McGourlay, C., *Evidence in Context*, 5th edn (Abingdon: Routledge, 2018).
- Durston, G., *Evidence: Text and Materials*, 2nd edn (Oxford: OUP, 2011).

- Emson, R., *Evidence*, 5th edn (Basingstoke: Palgrave Macmillan Law Masters, 2010).
- Glover, R., *Murphy on Evidence*, 15th edn (Oxford: OUP, 2017).
- Keane, A. and McKeown, P., *The Modern Law of Evidence*, 12th edn (Oxford: OUP, 2018).
- Munday, R., *Evidence. Core Text Series*, 9th edn (Oxford: OUP, 2017).
- Roberts, P. and Zuckerman, A., *Criminal Evidence*, 2nd edn (Oxford: OUP, 2010).
- Tapper, C., *Cross and Tapper on Evidence*, 10th edn (London: LexisNexis, 2010).
- Zuckerman, A.A.S., *The Principles of Criminal Evidence* (Oxford: Clarendon Press, 1989).
  Now out of date but contains a most perceptive theoretical analysis.

Guide to areas of Evidence law covered in questions

Area of evidence	Comment on application in problem questions
1. Relevance	The pre-condition of all admissibility. It may be appropriate to show your powers of logical analysis and fact management by explaining why a particular piece of evidence is relevant to the trial, the test being whether it increases or decreases the probability of a fact in issue.
2. Burden and standard of proof	This is implicit or explicit in every trial-based question and you are generally expected to comment. You might be given an extract from a statute, possibly an imaginary one, which refers to the need to 'prove' and be required to construe the wording in the light of the changes brought about by the **Human Rights Act 1998** to the allocation of legal and evidential burdens.
3. Confessions/silence of defendant	Bear in mind that confessions can be made to non-state agents, may be ambiguous, and could even, under the common law, involve silence if the parties are on 'even terms'. However, only apply the **CJPOA, ss. 34, 36, and 37** if the silence is in the face of questioning by constables charged with the duty of investigating offences or charging offenders.
4. References to spouses, co-defendants who are reluctant to testify, defendants who are undecided about testifying, or witnesses who are very young or mentally incapacitated	These are indications that competence and compellability may be in issue.
5. Character evidence	Usually only included in questions concerning crime, but be aware also of similar fact in civil cases. Note the different rules on the admissibility of character evidence for defendants and non-defendant witnesses in criminal trials.

(*continued*)

Area of evidence	Comment on application in problem questions
6. Improperly obtained evidence	Usually only raised in criminal evidence questions with suggestion of impropriety or illegality including entrapment. **Section 78 of the Police and Criminal Evidence Act 1984** may apply to exclude prosecution evidence or there may be a stay of prosecution.
7. Supporting evidence	The formal rules here have now been either abolished or simplified but you should still be prepared to comment on the desirability of supporting evidence, particularly in relation to identification evidence, lies told by the defendant, admissible hearsay, and inferences from silence of the accused.
8. Examination and cross-examination	There are many procedural rules here. The special rules relating to vulnerable witnesses, such as alleged victims in sex cases, are perhaps the most significant. Make sure you know the details of Special Measures Directions.
9. Out-of-court statements	When there is a reference to an out-of-court oral or written statement, including one made by a witness who is testifying, consider whether the hearsay rule applies. But bear in mind that the important question is not only the *form* the statement is in but also the *purpose* for which it is being tendered in evidence. Note that civil and criminal rules are different.
10. Communications with lawyer	This raises legal professional privilege. In civil cases, communications with a third party may also be privileged if there is pending litigation. In criminal cases, bear this in mind in considering **ss. 34–38 of the Criminal Justice and Public Order Act 1994**.
11. Public interest immunity	This may come up in questions on civil or criminal evidence, more usually the former. In criminal evidence a frequently raised issue is disclosure of the identity of police informers.
12. Opinion evidence	This usually refers to expert evidence and is easily recognised. The grey areas include the admissibility of expert evidence in relation to psychology