

Chapter 8: Rape and other sexual offences

Problem Questions

Below is an example of a problem question and a worked answer. The answer is written in bullet-point form, highlighting how the structure for answering problem questions (discussed in the 'eye on assessment' section of every chapter) can be applied in this area. Remember that when you write your essays, you should use full prose (i.e., not bullet-points).

James has been working as a medical doctor for the last 5 years and is very proud of his occupation. However, in the last month, due to a number of complaints from patients, James' licence to practice medicine has been suspended.

James attends a party of work colleagues and friends. Whilst at the party, James is approached by a young woman Yue (18 years old) who is in some distress. Yue has mistaken James for her usual doctor Barry, and proceeds to tell James that she is worried about a small lump that she has noticed on one of her breasts. James realises Yue's mistake, but does not correct her. James wants to help, and he also does not want to upset Yue any further because he finds her very attractive. James takes Yue into a private room and performs a breast examination.

Later that evening, James gets chatting to another young woman Paula (19 years old) when they are both sitting on the sofa. Both Paula and James have been drinking alcohol throughout the evening, and by this stage they are both rather drunk. Paula in particular is feeling ill, and during her conversation with James nearly loses consciousness on several occasions. After chatting for several minutes, they begin kissing one another. James suggests to Paula that they go upstairs to one of the bedrooms to have sex. However, realising that Paula is too drunk, rather than going upstairs James instead arranges to meet her the following day.

Discuss James' potential criminal liability for sexual offences.

How (if at all) would your answer differ if Paula was 15 years old?

Introduction: A brief introduction should make clear that you understand the topic of the problem question (sexual offences), and should tell your reader how you are going to structure your answer. For this question, it make sense to take the issues chronologically, and then to discuss the age variation at the end.

Step 1: The first potential criminal event arises where James (J) performs a breast examination of Yue (Y).

Step 2: The most serious potential offence would be a sexual assault (Sexual Offences Act 2003, s3).

Step 3:

- **Actus reus:** Does J touch Y sexually, and without her consent?
- There is certainly a touching, and that touching is likely to be sexual due to the circumstances of the private area touched and the fact of J's attraction (section 78). In terms of non-consent, the conclusive presumptions of non-consent (section 76) should be discussed in terms of impersonation: the fact that J does not tell Y he has been suspended is not likely to undermine consent as it relates to an attribute (qualification) rather than his identity, but the fact that J allows Y to believe he is her usual doctor may be sufficient. However, there is a question here about whether D has impersonated Y's doctor (caught within section 76), or Y has simply mistaken him (outside section 76). Because of the later possibility, it would also be correct to consider the general definition of non-consent under section 74.
- **Mens rea:** Does J intend to touch Y, and does he lack a reasonable belief that she consents to the touching?
- It is clear that J intends to touch Y. In terms of a reasonable belief in consent, the conclusive presumption will also apply here (if it applies above), and if not the standard objective standard should be applied.

Step 4: There are no likely defences, and so they need not be discussed.

Step 5: It is likely that J will be liable for sexual assault.

Step 1: The second potential criminal event relates to J's kissing of Paula (P), 19 years old.

Step 2: The most serious potential offence will again be sexual assault under section 3.

Step 3:

- **Actus reus:** Does J touch P sexually, and without her consent?
- Kissing clearly constitutes a sexual touching, but the issue is whether P lacks consent. Although P is intoxicated, the intoxication is voluntary, and P is short of unconsciousness. Therefore, the rebuttable presumptions of non-consent under section 75 will not apply, and the section 74 definition should be applied. It is unlikely that non-consent can be shown.
- **Mens rea:** Does J intend to touch P, and does he lack a reasonable belief that she consents to the touching?
- Again, there is a clear intention to touch, but the lack of a reasonable belief in consent will be harder to demonstrate.

Step 4: There are no likely defences, and so they need not be discussed.

Step 5: It is unlikely that J will be liable for an offence.

Step 1: The third potential criminal event relates to J's kissing of P where P is 15 years old.

Step 2: The offence of sexual assault would again be applicable, however it will again be difficult to demonstrate a lack of consent. Therefore, it would be more appropriate to apply section 9.

Step 3:

- **Actus reus:** Did J (18 or over – likely if J was a doctor) touch P (15 or under – which P was) sexually? There is no requirement of non-consent.
- This is very likely to be satisfied.

- **Mens rea:** Did J intentionally touch P, and did J lack a reasonable belief that P was over 15?
- J's intentional touching is clear. Whether he lacked a reasonable belief that P was over 15 is not clear.

Step 4: There are no likely defences, and therefore no discussion is required.

Step 5: Subject to J's reasonable belief in the age of P, it is likely that a section 9 offence has been committed.

Step 1: The final potential criminal event relates to J's agreement to meet P the following day, where P is 15 year old.

Step 2: J's conduct could be caught within section 10 (inciting a child to engage in sexual activity) and/or section 14 (arranging commission of a child sex offence).

Step 3: All elements of these offences are likely to be satisfied, however, D must again lack a reasonable belief that P is over 15.

Step 4: There are no likely defences, and therefore no discussion is required.

Step 5: Subject to J's reasonable belief in the age of P, it is likely that a section 10 and/or section 14 offences have been committed.

- Note: When assessing J's 'reasonable' belief, remember that the standard will be of a reasonable sober person. Thus, J's intoxication makes it less likely that his belief is reasonable.

Conclusion: It is useful to provide a brief overview of J's likely liability.

Essay Questions

There are several areas of interest for essay-type questions in relation to sexual offences. For example, the role and definition of non-consent (including related issues of

intoxication, etc.), complexity, the potential for over-criminalisation within the Sexual Offences Act 2003, and so on.

Below is an example of an essay-type question, and a bullet-point plan for a possible answer. This is for illustration purposes only. When writing an essay of this kind yourself, there will usually be alternative ways you could structure your answer, alternative points of discussion that could be raised, and you would certainly be expected to write in full prose (i.e., not in bullet-point form). The most important point to take from these plans is how they focus on identifying and discussing the subject of the debate within the question, not simply listing information about the relevant topic.

The absence of a comprehensive definition of 'consent' within the Sexual Offences Act 2003 means that the law in this area will remain uncertain and open to unfairness.

Discuss with reference to sections 74, 75 and 76 of the Sexual Offences Act 2003.

Introduction:

- You need to identify and highlight the focus of the question: the definition of consent within the Sexual Offences Act 2003. You may want to set this in context, for example, by reference to the stated aims of those drafting the Act to make such a definition clear.
- It is equally important to identify the debate within the question – whether the current law relating to non-consent is 'uncertain' and/or 'unfair', telling your reader how you are going to structure your discussion of these issues.

Body of the essay:

- It would be useful to begin a question of this kind by questioning the premise that the Act does not provide a comprehensive definition. This gives you a chance to provide an overview of the current law (sections 76, 75, and 74) whilst still engaging clearly with the debate within the question.
- It may then be useful to separate issues of clarity and fairness, discussing the law in relation to each.

- Alternatively you could focus on topical issues within the case law, for example intoxicated consent, consent where V has been deceived in some way, consent where V is mentally or physically vulnerable, and so on. If this approach is adopted, remember to reference both clarity and fairness.
- Whichever approach is preferred, it is essential to focus on the debate within the question and not to wander into other issues. It is also essential to debate, to give both positives and negatives about the current law. This provides a good opportunity to consider academic recommendations for reform: however imperfect the current law, would such reforms make the law better?

Conclusion:

- Your conclusion should summarise your discussion and reiterate the position you prefer. You may look forward, and briefly discuss whether you believe this area of the law should be reformed (and if so, how?).