***AQA A2 Law – Unit 4A***

Introduction

A middle-grade response is provided for each of the two questions. In each case, comments have been inserted on how to improve the answer in order to get into the higher grades. For the first question there is also a higher-grade response given afterwards as a comparison. For the second question, a guide to what could be added for a higher grade follows the middle-level response.

These two questions cover most of the law in Unit 4A (this is why the question appeared at the end of the Unit, and was not split between the chapters).

Chapter 11: Defences

Question 1 [25 marks]: Key points to include

AO1 [10 marks]

In relation to the parking permit:

* an explanation of the elements of theft
* an explanation of fraud by false representation and/or obtaining services dishonestly

In relation to the meal:

* an explanation of making off without payment and/or fraud by false representation

AO2 [15 marks]

In relation to the parking permit:

* Application of the elements of theft:
  + Appropriation **s 3** – Dan assumed the rights of the owner
  + Belonging to another **s 5** – the owner would have a right to the permit even if not in possession or control of it
  + Dishonesty – application of the **Ghosh** test plus consideration of **s 2**
  + Intention to permanently deprive **s 6** – even if he intended to return the permit, the ‘goodness and virtue’ has been lost
* Application of the **Fraud Act s 2**, fraud by false representation:
  + Implied representation by conduct
  + False – he knew that it was ‘untrue or misleading’
  + Dishonesty under the **Ghosh** test
  + Intent to make a gain or cause a loss
* Application of the **Fraud Act s 11**, obtaining services dishonestly:
  + Obtaining a service by a dishonest act
  + The services were made available on the basis that payment has been or will be made
  + Dishonesty under the **Ghosh** test
  + Intent to avoid payment
* A sustainable conclusion referring to the facts and with cases in support

*An answer can be sound with only one of the two* ***Fraud Act*** *offences being discussed.*

In relation to the meal:

* Application of making off without payment under **s 3** of the **Theft Act**:
  + Making off ‘from the spot’ – the restaurant
  + A service was given by provision of the meal
  + Payment was required or expected
  + He intended permanently to avoid payment
  + Application of the **Ghosh** test for dishonesty
* Application of fraud by false representation under **s 2** of the **Fraud Act**:
  + He falsely represented himself as a paying customer
  + Application of *mens rea* – **s 2 (1)** requires that the representation must be false when it is made so he is not likely to be liable under **s 2**, unless the original representation as to payment can be said to have continued
* A sustainable conclusion referring to the facts and with cases in support

*An answer can be sound with only one of these two offences being discussed, although making off is the most appropriate.*

Middle-grade answer

Dan is most likely to be liable for theft. Theft comes under **s 1** of the Theft Act 1968. The *actus reus* is the appropriation of property belonging to another. The *mens rea* is dishonesty and an intention to permanently deprive the owner of the property.

Appropriation comes under **s 3** and is the assumption of the rights of the owner (Morris). Property (**s 4**) includes both tangible and intangible property and even land. Some things like wild animals and flowers are only property in certain circumstances. Belonging to another comes under **s 5** and this provides that belonging to another means someone else has a right in the property; it does not necessarily mean they have possession or control of it (though this is included) so this would apply here. In Hibbert & McKiernan (1948),lost golf balls were held to belong to another so could be stolen.

*The law here is accurate with good reference to the sections of the* ***Theft Act****. The problem is that there is no evidence of A02. There is no reference to the facts and virtually no application. In addition, the correct cases are cited but there is no indication as to why they support the answer.*

As for *mens rea*, first there is dishonesty. The Act does not define dishonesty but does allow certain situations where D is not seen as dishonest. D is not dishonest under **s 2 (1)** if he believes:

1. that he has in law the right to deprive the other of it
2. that he would have the other’s consent in the circumstances
3. that the person to whom the property belongs cannot be discovered by taking reasonable steps

Dan has taken reasonable steps to trace the owner by handing the permit in to the council office but it is arguable that he did not do this soon enough. The other test for dishonesty comes under Ghosh. This is whether D’s act was dishonest by the ordinary standards of reasonable and honest people and, if so, did D realise this?

*Here there is a little application as the candidate has recognised that in a ‘finding’ situation* ***s 2 (1)*** *will be relevant. However only the last one, (c), applies here and this has been incorrectly applied. It is part of the* mens rea *not the* actus reus *so it is the belief, not the act, that is important. Dan need not take reasonable steps; he need only believe that if he did so he would not trace the owner.*

The final part of theft is intention to permanently deprive and this can apply even to borrowing something as long as all the goodness has been used up. In Lloyd, D borrowed films and returned them in a condition that did not use up ‘all the goodness’ but the court made the point that had he done so he could have been guilty of theft, which is the case here.

*The law here is again accurate and the correct case is used with a little more explanation of why it is relevant. However, there is still no real application as there is no reference to the facts.*

The Fraud Act may also apply as Dan has falsely represented that he has a right to park and this is a service, so there is possible liability under **s 2** or **s 11**. Under **s 2**, fraud by false representation, there must be a representation which is not true. This can be spoken or even by conduct. Here the representation was false, as he knew that it was ‘untrue or misleading’ because it had been issued to another person.

Dishonesty – he was dishonest under the Ghosh test because he would realise ordinary people would see this as dishonest. There must also be intent to make a gain or cause a loss.

*Here there is a little application but the intention to make a gain or cause a loss should be emphasised. Gain includes ‘a gain by keeping what one has’ which is relevant to this scenario (Dan intends to keep his money by not paying to park).*

A final possible liability is under **s 11** obtaining services dishonestly. There must be a service (parking) which is made available and payment is expected because parking permits cost money. He must obtain the services by a dishonest act so the *mens rea* is dishonesty under the Ghosh test, and also an intention to avoid payment. It seems Dan is dishonest by ordinary people’s standards and he intends not to pay for the time he used the permit. He also intended to gain the money he would have spent.

*There is some accurate law and a little application but one recurring complaint from examiners is that candidates do not have an accurate enough grasp of the different provisions in the different Acts.*

*Here reference is made to payment being ‘expected’ but this applies to making off (****s 3*** *Theft Act) not to* ***s 11****. For* ***s 11*** *the services must be ‘made available’ on the basis that payment has been or will be made for them. In addition, for* ***s 11*** *there is no need to intend to make a gain or cause a loss, this applies to* ***s 2*** *not* ***s 11****.*

As regards the meal, the offence of making off without payment (Theft Act **s 3**) will apply, also **s 2** and **s 11** as above are possible. He has made off from the restaurant without paying for the service provided (the meal). In Brooks & Brooks, the CA held that makes off means ‘depart’ and the ‘spot’ is the place where payment is required which is the restaurant. He knew that payment was required or expected because it was a restaurant. He was dishonest under the Ghosh test as seen above. He intended permanently to avoid payment as required by Allen because there is no indication that he intended to return.

Dan might also be guilty of fraud by false representation, under **s 2** of the Fraud Act, (as defined above) on the basis that when he ordered the meal he was representing himself as a customer who would pay. However this may not be a successful charge because he did not intend to leave without paying when he ordered, only when he tasted the food and the representation has to be false when made. **S 11** may apply but this would be hard to prove as he did not get the meal by a dishonest act because he first intended to pay.

*The law here is more accurate and there is some application although it is a little superficial. The Ghosh test should be applied again because the facts are different. The point made about fraud is valid although it could be developed by adding that there is some argument that a representation can continue (using the earlier case of* ***DPP v Ray****), in which case it could be said he was still representing himself as an honest customer at the time he decided not to pay.*

**Overall, this is a mid-level response. The law is reasonably accurate and there are some relevant cases but there is too little application of the law and too little reference to the given facts. The definitions for theft are correct but not fully developed in relation to the facts, and all aspects are dealt with in the same way, showing the candidate has learnt the law but does not understand it well enough to identify what is particularly relevant. There is some confusion as regards the definitions of s 2 and s 11. To reach the higher grades the definitions should mirror the Acts from which they are taken as closely as possible. The wide range of material, which includes both Fraud Act offences, makes up in a small way for the lack of accuracy but not for the lack of application.**

Higher-grade answer

The first offence that Dan may be liable for is theft. Theft comes under **s 1** of the Theft Act 1968. The *actus reus* is the appropriation of property belonging to another. The *mens rea* is dishonesty and an intention to permanently deprive the owner of the property.

The parking permit is clearly property. As regards appropriation, which comes under **s 3**, this is the assumption of the rights of the owner (Morris), and according to Gomez it does not have to be an adverse assumption. Dan has assumed the rights of the owner of the permit by displaying it in his car to obtain free parking. Belonging to another means that someone else has a right to the property; it does not necessarily mean they have possession or control of it (though this is included) so this would apply here. In particular, something which has been found may have been abandoned in which case it is not property belonging to another. However, in Hibbert & McKiernan (1948),lost golf balls were held to belong to another and this would apply in the same way to the permit as it is unlikely to have been abandoned.

The *mens rea* of theft is dishonesty and intent to permanently deprive. The Act does not define dishonesty but does allow certain situations where D is not seen as dishonest. On these facts **s 2 (1) (c)** is relevant which provides that Dan is not dishonest if he believes that the person to whom the property belongs cannot be discovered by taking reasonable steps. Dan need not take reasonable steps to find the owner, as long as he believes that he could not trace the owner by doing so. However, as he later handed the permit in to the council office, it seems he must have realised that the owner could be traced in which case he cannot rely on **s 2**.

The other test for dishonesty is the Ghosh test. This is whether D’s act was dishonest by the ordinary standards of reasonable and honest people and if so, did D realise the act would be regarded as dishonest by such people? It would seem that most people would see using someone else’s permit as dishonest and Dan would most likely have realised this.

Finally, there must be an intention to permanently deprive under **s 6**. Dan intended to treat the property as his own to dispose of regardless of the owner’s rights. **S 6** can apply to something taken temporarily, like the parking permit, if it is equivalent to an outright taking. In Lloyd, the CA held **s 6** would apply if D used something so that ‘all the goodness or virtue is gone’. As the permit has now expired this would apply to Dan. As all the elements of the *actus reus* and *mens rea* are satisfied, Dan is likely to be guilty of theft.

The Fraud Act may also apply to Dan. Under **s 2**, fraud by false representation, there must be a dishonest representation which is not true at the time it is made. The representation can be spoken or even by conduct. Dan has falsely represented that he has a right to park by his conduct of displaying the permit. Here the representation was false, as he knew that it was ‘untrue or misleading’, because at the time he displayed it the permit was not his ­– it had been issued to another person. The *mens rea* is dishonesty and intent to make a gain or cause a loss. Dan is likely to be found dishonest under the Ghosh test because he would realise ordinary people would see his actions as dishonest. He also intends to make a gain because the Act provides this includes ‘a gain by keeping what one has’ and he intends to gain the cost of parking by keeping the money it would have cost him.

There may also be liability is under **s 11**, obtaining services dishonestly. There must be a service which is made available on the basis that payment has been, is being or will be made. He must know this and also must intend that payment will not be made, or not made in full. The service must be obtained by a dishonest act and I believe that his actions in displaying a permit he knows is not his would be seen as dishonest by ordinary people (this would be established as above under the Ghosh test). He intends not to pay for the period he uses the permit so this part of the *mens rea* is satisfied.

In conclusion Dan may be found guilty of all three offences, assuming that in each case the jury believe that his actions were dishonest, which is likely to be the case.

*This answer accurately deals with the matters omitted from the earlier script and there is excellent reference to the facts as each part of the actus reus and mens rea is applied to the three offences. The law is accurate with several direct quotes from the Acts. The cases which have been used are relevant and it is clear why they have been chosen to support the particular point being discussed.*

The offence of making off without payment under the Theft Act **s 3** will apply to the meal. This provides that Dan will be guilty of an offence if he knows that payment is required or expected ‘on the spot’ for the goods or services supplied, but dishonestly makes off without having paid for those goods or services. In Brooks & Brooks the CA held that ‘makes off’ means ‘depart’ and the ‘spot’ is the place where payment is required. In this case the spot is the restaurant. Dan must also intend to avoid payment of the amount due. In Allen it was established that there must be intent to permanently avoid payment. Unless Dan intends to pay later this element is satisfied, and there is no indication that he intended to return to pay the bill. He made off from the spot because he left the restaurant and he did so without paying for the service or goods he received, which was the serving of the meal. He knew that payment was required because in a restaurant you expect to pay for a meal. He was arguably dishonest under the Ghosh test because most ordinary people would view leaving without paying as dishonest. However, it can be argued he may not realise this because the meal was of such poor quality, so he may think ordinary people would see his leaving without paying as justified in the circumstances. In conclusion, he is likely to be guilty of making off without payment, although there may be some doubt as to the issue of dishonesty.

*This part of the answer deals correctly with the relevant law and applies it competently to the given facts. Although the alternative offences are not covered this will still be in the higher grades because the law is accurate, the application is sound and there is clear and consistent reference to the scenario.*

**Overall, the answer would be in the highest grades.**

Question 2 [25 marks]: Key points to include

A01 [10 marks]

In relation to the money and clothes:

* An explanation of the elements of theft
* An explanation of robbery
* An explanation of the defence of duress

A02 [15 marks]

* Application of the elements of theft:
  + Appropriation **s 3** – Ben assumed the rights of the owner
  + Money is included in the definition of property under **s 4**
  + Belonging to another **s 5** – the owner still had ‘possession or control’ of the clothes; they were not abandoned
  + Dishonesty – application of the **Ghosh** test
  + Intention to permanently deprive **s 6**
* Application of robbery:
  + Theft as above plus the use of force
  + Was the use of force in order to steal and at the time of stealing?
  + Did the appropriation continue up to the time force was used?
* Application of burglary under **s 9 (1) (a)** and **(b)**:
  + Trespass into part of a building for both **s 9 (1) (a)** and **(b)** as he was not invited to the bedroom
  + Conditional intent to steal for **s 9 (1) (a)**
  + Further *actus reus* of theft and possibly GBH for **s 9 (1) (b)**
* Application of the defence of duress:
  + Discussion and application of **Graham** and **Hasan** especially regarding the ‘immediacy’ of the threat

Middle-grade answer

Ben may have committed the three offences of theft, robbery and burglary in relation to the money and clothes that he took.

He has appropriated property belonging to another so the question is whether he used force ‘in order to steal’, which must be at the time of the theft or immediately before. This would bring it within **s 8** of the Theft Act which is robbery. He seems to have already appropriated the items before using force, however, it has been found in some cases that the appropriation may be ‘continuing’ so that force applied later will still be held to be ‘at the time’ and ‘in order to steal’. This was the case in Hale where one of the D’s had tied the woman up but after the other D had taken some jewellery. The CA held the events were one continuous act so it was force in order to steal. A similar result was seen in Lockley where D used force to escape after stealing some beer. These cases both support a finding of robbery so it is likely Ben would be convicted (subject to any defence discussed below).

*The application of the law on robbery is fine, with good reference to the given facts, but it needs an explanation and application of theft first. If there is no theft, there can be no robbery.*

He may also be guilty of burglary. Burglary comes under both **s 9 (1) (a)** and **s** **9 (1) (b)** of the Theft Act. Both sections require trespass into a building or ‘part of a building’ and he is a trespasser in the bedroom, even though he was invited into the house.

*A case could be used in support of this statement. For example, in* ***Walkington 1979****, the customer had permission to be in the shop, but not behind the counter. This would be similar to being invited to the house but not the bedroom.*

Another part that applies to both sections is the *mens rea* for the trespass. D must know, or be reckless as to, the fact that there is no permission to enter the building, or that part of it. This was stated in Collins. It would certainly seem that Ben knew there was a risk that he was trespassing, and quite likely that he intended to as he was not invited to the bedroom. Under **s 9 (1) (a)** it is enough he intended to steal so Ben could be guilty because he intended to take anything ‘worth stealing’ (again subject to any defence). **S 9 (1) (b)** may also apply. This requires theft or the committing of grievous bodily harm. He may be guilty here too because he stole the money and clothes and also because Gwen broke her arm when he pushed her.

*In order to gain the highest marks, when explaining and applying* ***s 9 (1) (a)*** *and* ***(b)****, the answer needs to be clearer about the differences between them. The first requires an* ***intention*** *(*mens rea*) to commit one of the ulterior offences* ***at the time of entry*** *as a* ***trespasser*** *but does not need the offence to be actually committed. However, for the latter the* ***commission*** *(*actus reus*) of either theft or GBH is required* ***having entered as a trespasser****, but it need not be intended at the time of entry. This is touched on here but not sufficiently explained or developed. The answer correctly concludes Ben may be guilty under either section as he intended to steal when he entered the bedroom (hoping for money to give to Reggie) and he also stole and possibly committed GBH, but in neither case is the timing mentioned.*

Ben is looking at a conviction for robbery and burglary. He may be able to use the defence of duress though. This is where someone commits an offence because someone has threatened to harm them if they do not. The test for duress was set out in Graham. There are two questions:

* Was D forced to act because there was good cause to fear serious injury or death?
* If so, would a sober person of reasonable firmness, sharing his characteristics have acted in that way?

There must be a threat of death or serious injury and it must be immediate. If he has a chance to avoid the harm that is threatened, the defence could fail. It was widely applied in Hudson and Taylor but in Hasan it was said there must not be an opportunity to escape. Ben could have avoided the threat so, unless Hudson can still be relied on, his defence will not be accepted. Also, although he may have good cause to fear serious injury or death, it may be that a person of reasonable firmness would not have done the same so he would fail the second part of the Graham test.

*The law on duress is largely accurate and it is mainly well applied. However, it needs to be developed a little and to have more reference to the given facts. In the case of* ***Hasan*** *the HL held that the first part of the* ***Graham*** *test is partly objective and that the requirement that there must be ‘good cause’ to fear harm to D or his family meant D must reasonably and genuinely believe he would suffer serious injury. This means Ben being threatened with ‘big trouble’ may not be enough. On the other hand, Reggie is known to be ‘a violent man’ so this may be relevant in applying the test. It was also made clear in* ***Hasan*** *that a threat to someone for whom you have responsibility will suffice, so a threat to Ben and his family will clearly be covered by the defence. In order to improve the grade, these facts should be referred to when applying the* ***Graham*** *test (as confirmed in* ***Hasan****). In addition, although the answer briefly covers the immediacy point, this could also be developed a little. In particular, a reference to the fact that he had left committing the offence until the ‘following day’ so had time to avoid the threat, for example by going to the police. In* ***Hasan****, the HL emphasised that the threat must be of immediate harm and held D may rely on duress only if there was no evasive action that could reasonably have been taken, putting the decision in* ***Hudson*** *in doubt.*

*Finally, a comparison of the decisions in* ***Sharp*** *and* ***Shepherd*** *could be included as there is some argument that as Ben had voluntarily associated with a violent man when borrowing the money. As to which case would be followed here, much would depend on whether he knew that Reggie was violent.*

**Overall, this answer has some accurate law and some clear application but it needs to be developed.**

Other points to discuss for a higher grade

In relation to the theft:

* An explanation and application of the law on theft
* It is acceptable to refer to Question 1 for the explanation of theft but each part of the *actus reus* and *mens rea* needs to be applied to the different facts in Question 2
* Specifically the issue of whether the clothes had been abandoned and the conclusion that Gwen still had ‘possession or control’ of them, so they had not been abandoned

In relation to the robbery:

* This was generally well done (subject to applying the law on theft stated above) but the additional *mens rea* for robbery should be mentioned
* This is an intention or recklessness to use force or the threat of it

In relation to the burglary:

* A clearer explanation of the differences between **s 9 (1) (a)** and **(b)**

In relation to the defence of duress:

* This needs to be developed as explained in the comments on the middle-grade answer
* Duress may apply to the money but arguably not the clothes because the threat of harm was made in order to force Ben to steal money only
* A possible comparison of the decisions in **Sharp** and **Shepherd** could be made