Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2011 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners’ reports which provide feedback on student performance in the examination.

Note

The implementation of the Coroners and Justice Act 2009 which affects the meaning of provocation (now loss of control) and diminished responsibility affects the content of this paper. However because of the ‘6 month rule’ candidates were given full credit for dealing with the law as it stood before the Act: suggested answers are drafted accordingly. However candidates who addressed the new law were also given full credit. The suggested answers merely note the changes.

SECTION A

Question 1

There are principally two defences which reflect the law’s approach to mental disorder. These are: the general and complete defence of insanity (which includes insane automatism, though this will be separately examined below), and the partial special defence to murder only of diminished responsibility.

The general approach of the law is to excuse in whole (insanity) or in part (diminished responsibility), those who are acting under a mental disability. This approach is in line with the general approach of the law not to criminalise those who lack of culpability (in this instance because of lack of understanding) and because in such circumstances that law is unable to deter conduct. There is no purpose criminalising what the defendant does not understand or cannot control. However the law also seeks to protect society or individuals within it from harm/danger, and thus the law must find a way to protect others from harm that might be done by those who do not understand, cannot control or cannot be held responsible for their actions.

The conundrum is largely responded to by the series of orders, for example a hospital order, that can be made on a finding of insanity or diminished responsibility.
responsibility, but this essay will be concerned with the legal approaches that give the court the framework for making or not making such an order.

Insanity is a complete defence which results in a finding of not guilty by reason of insanity, which is itself a problematic concept. It allows a court to make disposals including incarcerative and/or therapeutic ones. There are also procedures which allow a court to determine whether the actus reus of an offence was committed, to avoid imposing penalties on a defendant who had not been proved to have committed the actus reus, but simply was proved to be insane.

Insanity is defined in a legal, not medical way, (Sullivan 1984, Hennessy 1989) though will usually (and in some cases, must) be evidenced by the certification of medical practitioners and the test to be applied was laid down in the case of M'Naughten 1843. This states that a person is insane if at the time of the act in question he was labouring under such a defect of reason from a disease of the mind that he did not know the nature and quality of his act, or that if he did know the nature and quality, did not know that it was wrong. The point made above that this is a legal not a medical test is underpinned by the case of Kemp 1957 involving an accused suffering from arteriosclerosis, in which Devlin J stated that a disease of the mind referred to 'faculties of reasoning, memory and understanding'. Whilst this means that the definition of insanity is somewhat tautologous, it nevertheless points to the effect of the condition on lack of responsibility, rather than its medical cause.

In the case of Bratty 1963 Lord Denning suggested a disease of the mind referred to mental disorders which are prone to recur and which manifested themselves in violence. Whilst both these criteria have fallen into abeyance (Burgess 1991, for example), they do flag up the courts’ concern with protecting the public from harm.

It is also clear that no disease needs to be present, in medical terms (Bell 1984), the concentration is on ability to rationalise and therefore to be culpable.

Before moving to consider diminished responsibility, it is useful to examine the issue of automatism, which is, in itself, problematic, being involved as it is with the lack of voluntariness of an actus reus, and thus with lack of responsibility (Hill v Baxter 1958, Quick 1973 etc). Where the cause of the lack of voluntariness is an internal cause, such as a physical or mental disease, the automatism is classed as insane automatism, and the definitions for and consequences of an insanity verdict will apply. Where the cause of the non-voluntary state is an external cause, then simple or sane automatism applies and a successful argument will result in a not guilty verdict.

Diminished responsibility is defined under s 2 Homicide Act (* replaced by s 52 Coroners and Justice Act 2009 and thus an amended definition) and applies only to those who have killed or been party to a killing. The section provides that a defendant will not be found guilty of murder but of manslaughter if at the time of the killing they were suffering from such an abnormality of mind which arose from a arrested or retarded development, inherent causes, or induced by disease or injury as substantially impaired the defendant’s responsibility for the killing.
Thus the definition attempts to combine some element of a medical approach (the cause of the condition) with a legal or indeed common sense understanding of abnormality of mind.

This was emphasised in the case of Byrne 1960, where a somewhat circular test was applied to the meaning of abnormality of mind, abnormal was what a jury would consider to be so out of the ordinary that it ought to be classified as abnormal. Byrne has an ‘irresistible impulse’ to kill and mutilate his female victims. The case was significant in establishing that irresistible impulse fell within this defence despite a defendant being aware of what he was doing.

Whilst the law has taken a number of circuitous routes to address deficient mental functioning, on the basis of lack of responsibility partly reflected in the definitions referred to above, the desire to protecting society from dangerous individuals has affected what should be done. The legal rules tend to look at cause not consequence or dangerousness.

Question 2

(a)

The defence of duress reflects the law’s (or rather society’s) understanding that faced with certain types of threat, individuals should not be regarded as culpable for committing a crime, when in fact in a sense they could not do otherwise: their will was overborne by the threat. However at the same time, society cannot offer criminals a ‘defence on a plate’ to escape liability at will by relying on such threats. As Stephens said the law seeks to balance two conflicting principles, allowing an understanding of human fear but not conferring impunity on criminals. Thus the law seeks to create a balance between allowing a defence within limits, for example, the threat must be of significant (only a (perceived) threat of death or serious injury (ie grievous bodily harm) will suffice) and the defence is not available for certain offences in particular murder and attempted murder: society cannot condone one death in exchange for another. However, in other circumstances society is entitled to except reasonable fortitude, but not heroic resistance.

The defence within the limits referred to, and described further below, thus provides a complete defence, in circumstances constrained (perhaps artificially in some respects) but where a balance is sought between expecting a measure of fortitude in the face of threats, without expecting too great courage. Duress tends to be regarded as having two forms (*quaere* whether necessity (see below) is part of duress). These are duress by threats: where the accused pleads that he committed the crime because someone else threatened that if he did not he would be seriously hurt or killed, and duress of circumstances, where the accused pleads that he did the crime (often a driving offence) to evade being seriously injured or killed by another: to escape a consequence. The limitation on the defence (see below) seeks to impose a rough and ready balance between the seriousness of the threat and the offence excused.

(b)

In order to address the question it is necessary to define both concepts and to seek to explore differences in ambit of the defences of duress and necessity. Though it will be argued, contrary to some academic and judicial statements,
that these are separate defences, it should be noted that there are some suggestions that necessity is an extension of duress of circumstances.

For the defence of duress to operate, the threat perceived by the accused must be of death or grievous bodily harm either to him or to someone for whom he feels responsibility (this seems to be a fairly extendible test). The accused must believe the threats will be carried out (Graham 1982) and his belief in the threats must be reasonable (Safi 2003) and that there is no reasonable opportunity to avoid the threat (Hasan 2005, Hudson and Taylor 1971.) The belief must be subjectively and reasonably held, (Safi 2003 Hasan).

Threats from a criminal gang with whom the accused has voluntarily associated with or other situation where he puts himself in harm's way will not allow the defence to lie (Hasan).

Duress is not a defence to murder, attempted murder or some forms of treason (Gotts 1992 Graham 1982 Howe 1987, Shayler 2001).

The above all effectively relate to the subjective part: the objective part of the defence then asks whether a sober reasonable person sharing the physical characteristics of the accused (e.g. age, sex race and presumably physique etc) but not characteristics in relation to strength of character and fortitude would have reacted in the same way as the defendant (Graham, Bowen 1996). Only if this objective test is also satisfied does the defence lie.

The above principles all apply equally to duress by threats or circumstances (Pommel 1995). The defence of duress by circumstances is sometimes said to equate with necessity, but necessity has taken a more specific turn of late. In Dudley and Stephens (1884) (the cabin boy case), it was held in rather unusual circumstances that necessity does not apply to murder. However the defence gained a ‘make over’ in the case of Re A (conjoined twins) where it was held, albeit obiter, by the Court of Appeal that necessity could be a defence to murder in a choice of evils situation, provided a 3 fold test was met:

- The act (of killing for example) was necessary to avoid an irreparable and inevitable evil
- No more was done than was reasonably necessary for the purpose to be achieved
- The evil done was not disproportionate to the evil avoided

It therefore now seems clear that necessity is a separate defence from duress. (Although there are some suggestions that this arises only in medical cases.) Unlike duress it is applicable to murder (and presumably other excluded offences); the danger that gives rise to the necessity arises not from a threat nor from a need to escape but from the irreparable evil situation arising.

**Question 3**

Intention as a form of mens rea has had a chequered understanding. In order to understand its current meaning it is necessary to briefly consider the history and context. To deal with the context it is perhaps useful to take the example of the offence of murder. The mens rea of murder is the **intention** to kill or cause grievous bodily harm (gbh) (Cunningham 1981).
In many cases the intention of the accused will be clear both as a matter of common sense and law. If the defendant desires to bring about the consequence of death or gbh, by his action, then he intends that consequence.

The next stage however is to consider the effect of the Criminal Justice Act 1967 s 8 which as a matter of general interpretation provides that a jury shall not be bound to infer that a result was intended just because it was a natural and probable consequence.

However as a matter of common sense, the more probable a consequence the more probable it was expected (foreseen) and the more likely therefore it was intended by the perpetrator. This is the approach taken to the evidential implications of what is called oblique intent. Cases such as Hyam 1975, Moloney 1985, Hancock and Shankland 1986, Nedrick 1986 and finally Woollin 1998 all canvassed a variety of scenarios when the accused arguably anticipated (foresaw) that the consequence of his actions would be to bring about the death or gbh of his victim (sometimes as in Hyam, not the intended victim) but argued that the consequence was not in fact his intention.

The question for the courts in each case was to analyse the test which should be applied by the jury, in other words what the judge’s direction should be, on the inferences the jury were entitled or even had a duty to draw if they found that the defendant must have been aware of the likely consequence.

All cases turned on the level of awareness of the consequence the accused had or must have had in order to either permit or require the jury to determine that the outcome (of death in each case) was intended.

The final test elicited from Woollin is that only if the jury was sure that the consequence of death or gbh was a virtually certain consequence of the defendant’s action and the defendant was aware the outcome was virtually certain did that entitle the jury to find that he intended that outcome.

However this only applies in cases of so called oblique intent, not in cases where the defendant clearly desired the outcome.

The significance of Woollin or indeed Nedrick, with which the HL agreed save for the substitution of ‘find’ for ‘infer’ in the model judicial direction, may not seem significant until one examines the previous authorities, in which a variety of levels of awareness or of probability of an outcome, were suggested as being the equivalent of intention

For example, if the judge asked the jury to consider whether the outcome was a natural consequence of the defendant’s actions, or whether he foresaw a high level of probability of its occurrence, the mens rea was placed at a lower level and, as was stated by the HL effectively blurred recklessness and intention.

The second issue clarified, (it is now thought, Mathews and Alleyne 2003) in Woollin, is that virtual certainty of outcome is evidence of intent not equivalent to intention. What is still uncertain is whether juries may infer intention even where there is less than virtual certainty. It is however likely that this will relate to a hoped for outcome: oblique intention will therefore be irrelevant.
In conclusion it is now clear that the Matthews/Woollin clarification does indeed indicate that the common sense approach outlined above is the basis (if not the full explanation) of the law.

(b) A strict liability offence is an offence for which there is no requirement of mens rea for at least one part of the actus reus. Often such offences are referred to as absolute offences, but neither nomenclature is terribly helpful. No fault liability may be preferred in terms of a more pragmatic explanation, but this formulation also is misleading in the sense that it may be a defence in many such cases to show that all reasonable steps were taken to prevent the offence (due diligence). Only in such cases could it be truly said that there was no fault and in such cases the defendant is not guilty.

Most of the strict liability offences (which run into thousands in number) are regulatory in format and with very few exceptions are statutory mostly created for welfare or business regulatory reasons. Within the relevant statute creating the offences there is usually a statutory defence of ‘taking reasonable steps to avoid the offence’ (the due diligence defence). All of this contributes to that fact that strict liability offences, because they have ‘no fault’ and because of their context, tend to carry little social stigma. Indeed if the offence is stigmatic or carries a substantial punishment, courts will tend to assume that mens rea is implicit (Sweet v Parsley 1970, Gammon) unless there is very clear intention that no mens rea is required.

The offences can be justified in terms of business regulation; protection of the public from a risk engendered; the encouragement of a risk management approach; the practical issues of proof of mens rea in this area, and thus the simplification and shortening of trials; and the ability to indicate public disapproval without a high level of stigma. In short the law takes a largely deterrent approach.

**Question 4**

The quote refers to the vexed question of causation in criminal law. The point arises in relation to result offences, where a matter for analysis may often be whether the defendant caused (i.e. brought about) the result specified in the actus reus.

This should be, and often is, essentially a matter of simple fact to be determined on the basis of evidence, but there are also somewhat complex (if not quite metaphysical) issues to be considered. These relate primarily to situations where the defendant was the initial cause of a consequence which then led to an unexpected outcome, put the victim into danger of succumbing to another event, or where there are multiple causes. What the law seeks to do in these circumstances is to seek to provide practically applicable rules that balance legal culpability with moral culpability and enable some limit on endless liability for a linked consequence.

The approach developed has in fact been to examine causation in two stages, firstly factual causation. Did the defendant’s action actually bring about the resultant actus reus? This is rarely problematic save as matter of evidence, but in marginal cases the so-called ‘but for’ test is used. (White 1919) This is posing
the question whether ‘but for’ the conduct of the defendant the result would not have happened when and where it did. (In White, the proposed victim of an attempted poisoning died before it could take effect. But for the conduct of the defendant, the victim would still have died. He was not the factual cause of the death.)

Once factual causation is confirmed, nevertheless there are occasions where legal rules will intervene and exclude liability. Although the rules, as often is the case in criminal law, may seem arcane, they are, especially since Kennedy No 2 (2007), based on common sense principles of limiting liability.

Many of the problematic cases have arisen in the context of murder or manslaughter charges, where multiple or supervening causes arise (novus actus interveniens). These can range from the victim’s response to an initial act, making it potentially worse in outcome (e.g. Roberts 1971) the victim refusing medical intervention (Blaue 1975), medical intervention making an initial injury more serious (Cheshire 1991, Jordan 1956, Smith 1959) the action of third parties (Pagett 1983), and more recently the vexed question of responsibility in drug induced deaths (Kennedy).

There are two relevant tests for legal causation: firstly whether the initial injury was an operative and significant cause of death, or whether the supervening injury reduced the original into mere background.

Thus one can compare Smith and Cheshire, (where in both cases significantly poor or negligent medical treatment was given to people with significant injuries, but from which they could have recovered, but in fact died) with Jordan where the original wound had almost healed and the victim died from ‘palpably wrong’ treatment when the wound was no longer an operative cause. In the former two cases, the defendant continued to be liable despite the medical treatment. In Jordan, the novus actus intervened to break the chain of causation between the defendants act and the resulting death.

The second matter relates to the so called thin skull rule, that a defendant takes the victim as they find them. This means that if a victim has a special weakness thus making the result far more significant than would be normally expected (e.g. a minor blow to the head causes death because of a ‘thin skull’) and was extended in Blaue, to personality traits that made the victim more vulnerable. In that case a Jehovah’s Witness refused a blood transfusion and thus died on injuries inflicted by Blaue that would not have otherwise caused death. It was held that the act of the victim in such circumstances did not relieve the defendant of liability.

The same approach was taken, with one caveat in the case of Roberts, where the victim’s action in seeking to escape the sexual attentions of Roberts by jumping out of a moving vehicle, did not break the chain of causation between Roberts’ act and the resulting abh. The courts held that only if the victim’s action was ‘daft’ would it break the chain. (It is noteworthy that in that case only s 47 abh was in issue: would it have been daft to jump from a moving car if the result had been, or was likely to be death? Presumably the action of the victim has to be in proportion to the threat.)

The approach of the law is as suggested above very affected by moral culpability issues. This was demonstrated in the case of Pagett where the defendant was
held liable for causing the death of his girlfriend after he used her as a human shield and she was shot as a police officer returned the defendant’s gun fire.

Finally on the same theme the case of Kennedy resolves many issues that have perplexed courts when trying to align legal with moral culpability. This was a case which discussed various conflicting previous decisions about liability for prohibited drug induced deaths, where a ‘friend’ had helped the victim to administer drugs or supplied them to him. The HL in Kennedy held that the free and voluntary act of the victim in administering drugs broke any criminal link between the act of supply and the death.

Thus it would seem that the rules are indeed a practical common sense approach to the allocation of legal liability.

SECTION B

Question 1

(a) In order to consider Charles’ liability for the death of Betty, we will need to consider murder and constructive manslaughter (unlawful and dangerous act manslaughter).

It is unlikely that Charles would be liable for murder, which is defined as causing the death of a person (in being) intending to cause death or gbh. (Smith, Cunningham 1981) It would appear that although Charles may have caused the death, he did not desire that consequence, nor gbh. If he realised that death or gbh was a virtually certain outcome of his slap, then that could be evidence from which the jury would be entitled find intent (Woollin). It seems unlikely here.

However Charles could be liable for causing the death in terms of a manslaughter offence. The relevant type of manslaughter would be unlawful and dangerous act manslaughter. This arises when a criminal act (such as assault, which appears to be committed here: see below) which is objectively dangerous (Church) causing the death of the victim. An assault is the intentional or reckless causing of the victim to apprehend immediate unlawful violence, or a battery: intentional or reckless infliction of unlawful violence on the victim. Whilst both are common law offences, they are deemed contrary to s 39 CJA 1988. (Little)

The action of slapping Betty was objectively dangerous in that it was obvious to a reasonable sober individual that some harm (from the slap) could result (Dawson 1985, Ball 1989). It is not necessary that the defendant foresees the harm, not that the objectively foreseeable harm is serious.

It would appear therefore that Charles may be liable for constructive manslaughter.

(b) In this case it would appear that Charles is prima facie liable for murder (see above presuming he has the relevant intent, which seems indicated) unless his liability is mitigated to manslaughter by virtue of diminished
responsibility by virtue of s 2 Homicide Act 1957 or by provocation under s 3 (*now modified by the C and J Act 2009).

Although Charles is suffering from depression, there is nothing that suggests that he is able to avail himself of the defence of diminished responsibility which requires an abnormality of mind arising from arrested or retarded development, inherent causes, or induced by disease or injury as substantially impaired the defendant’s responsibility for the killing. (*now modified definition)

Provocation arises when the accused is (actually) provoked to lose his self control by things said or done or both. This is a subjective test, and the test always relies on whether the defendant was out of control (actually) not whether he should have been. The cause of the provocation is irrelevant under the current common law, and need not be an illegal act (Doughty 1986), but there must be some evidence of something said or done (Acott 1997). It is not clear whether Charles in this scenario has lost his self control or is merely at the end of his tether. If the latter the defence will not avail. If however he is out of control as a result of something said or done, the loss of control has to be sudden and temporary (Duffy 1949, Ahluwahlia 1992) (*Now loss of control, requiring a specified qualifying trigger, which seems unlikely here)

However we will consider the objective part of the test, whether a reasonable man would have done what the defendant did under the provocation. The issue that has troubled the courts is how the reasonable man should be envisaged.

The reasonable man is expected to have normal powers of self control, of a person of that age and sex. The question therefore becomes whether a person of the defendants age and sex would have done what the defendant did when faced with the same provocation. (Camplin 1978 Holley 2005, Karimi 2006) Depression is not a relevant characteristic.

It is likely therefore that Charles may be guilty of murder unless the provocation defence will apply.

(Under the Coroners and Justice Act 2009, s 54 provocation only lies is there is a qualifying trigger, within s 53 and it will not matter if the loss of self control is sudden)

Question 2

In order to discuss the criminal liability of Ethan it is necessary to discuss burglary, robbery and criminal damage, and the possibility of fraud or dishonestly obtaining services. In relation to Fred, fraud and theft will be considered.

Burglary has two distinct forms under s 9 (1)a and (1) b of the Theft Act 1968.

S 9(1)(a) states that burglary is committed when someone:
exters any building or part of a building as a trespasser and with intent to steal anything in the building or part of a building in question, inflict grievous bodily harm, and commit unlawful damage to the building or anything therein.
S 9(1)(b) is the offence of having entered any building or part of a building as a trespasser, stealing or attempting to steal anything in the building or that part of it or inflicting or attempting to inflict on any person therein any grievous bodily harm.

Theft has the meaning attributed to it by s 1 of the same Act: a person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

As far as Ethan is concerned, his first act is to enter 'to see if he could take anything'. This conditional intent is sufficient to demonstrate the intent to steal (AG reference 1 and 2 of 1979). The issue here is whether he enters as a trespasser, although the shop clearly permits him to enter, under the view expressed in Jones and Smith 1976, entering with a nefarious intent may turn an invitee into a trespasser: his permission is exceeded. It is possible therefore that Ethan commits a burglary on his initial entry.

His second act relates to his again speculative as to outcome, entry to the stock room. Whether or not the trespassing issue arises has already been canvassed: on entry into the stockroom he is clearly a trespasser, on entry to part of a building (Walkington). If he enters with the intent to steal what is in the stockroom, he commits a 9(1)(a) burglary. If his desire to steal is formed after entry, then he actually steals thereafter and commits a 9(1)(b) burglary.

The fact that CDs were dropped does not prevent the theft and thus the burglary having been completed. Theft is complete on appropriation with the relevant intent (Gomez 1993). Appropriation is any action which assumes the rights, or any right, of the owners. (s 3 Theft Act, Morris 1984, Gomez)

Ethan then seeks to make good his escape by hitting a store detective. Ethan may thus be liable for either batter or s47 abh.

If criminal damage was intended on entry, the damage to the CDs would constitute another example of a 9(1)(a) burglary, but it appears that this was not the case. Simple criminal damage under the CDA 1971 may have been committed if the damage was intentional or reckless, and caused by Ethan. Recklessness means being aware of the risk (of damage) and going on to take that risk (R v G and others 2008).

The assault on the store detective may be an additional s 9 (1)(b) burglary if really serious injury (gbh -Smith) is inflicted. Otherwise it is a battery or assault occasioning actual bodily harm s 47 OAPA as appropriate.

Fred may be guilty of fraud by false representation under s 2 Fraud Act 2006 if he knows that the statement he makes about the CDs being demonstration discs is untrue (which apparently he does) and he intends to make a gain (the proceeds of the sale: the gain must be in money or property) for himself. Arguably Fred also commits theft under s 1 Theft Act (see above) when he appropriates the property (by removing the security tags), providing that he acts dishonestly. The very facts of the security tags being present may well suggest knowledge of an improper provenance and thus dishonesty. Whilst dishonesty is only defined by exclusion in the Theft Act (i.e. what is NOT dishonest in s2) none of the exception would appear to apply here.
Finally, if Ethan has resolved to obtain the meal without intending to pay from the outset, he would have committed the offence of obtaining services dishonestly under s 11 the Fraud Act 2006 or fraud by false representation under s 1, by an implicit representation he would pay. If however his intention was formed after the event, neither of these offences applies.

**Question 3**

This scenario involves a range of offences against the person, and a consideration of defences that are available

The initial incident is a potential assault by Ivan (I) under s 39 Criminal Justice Act. An assault is the intentional or reckless causing of another to apprehend immediate unlawful violence/contact (Venna 1975). There are two issues which are linked: did I intend or was he reckless (R v G: was he aware of the risk of fear of immediate violence?) as to whether George (G) would apprehend contact and the question whether the ‘If you were not....’ words remove the possibility of the apprehension (Tuberville v Savage 1669). If either applies, there is no assault.

The next stage is a battery being the intentional or reckless infliction of unlawful contact/violence, by G on I. It is irrelevant that the contact was with clothing. (Haystead) However, if G had been assaulted by I, or if G genuinely though mistakenly believed (Williams 1984, and s 76 Criminal Justice and Immigration Act) he was going to be assaulted, he is entitled to use a reasonable amount of force to defend himself. The CJAI effectively puts into statutory form what the previous common law of self defence (whether of the defendant or others) had established.

In turn I then assaults G (subject to him acting in self defence) and is probably committing an offence under s 47 Offences Against the Person Act 1861 (OAPA). Under Parmenter 1992 it is clear that the offence is made out by an assault or battery which happens to be followed by abh. (Any hurt or injury calculated to interfere with the comfort of the victim, an injury which is more than transient or trifling (Miller, Donavan)).

I can also be held liable for the assault on Harry (H), (Haystead)

H’s response may be deemed to be an assault unless he is acting in legitimate self defence (of himself or others) provided it is a proportionate response to the perceived threat. It is an alternative defence (public defence) if he is acting in the prevention of crime under s 3 of the Criminal Law Act 1967, provided is it a reasonable response. The explanation of reasonable, or proportionate response is, as in the case of private defence re-clarified in the Criminal Justice and Immigration Act s 76.

Ken and Liam appear to consent to a fight and any consequences. Consent can be a defence if no injury of the level of abh or above are intended or caused (Brown 1993, AG reference No 6 of 1980). Where such injuries are caused or intended, consent is only a defence if the circumstances of the injuries fall within an ‘approved list of socially acceptable activities’. Whilst properly conducted games and sports including boxing, and dangerous exhibitions are included, unregulated fist fights are not and so consent in those circumstances will be of no avail.
Finally a word must be said about intoxication. Some or all of the above participants may be in fact intoxicated so that their ability to form the relevant mens rea is impaired. This is a matter of fact. However the relevance of what is voluntary intoxication is only an issue where there is a specific intent. Thus if injuries of the level of gbh were involved: s 18 OAPA, then intoxication could be a relevant consideration to examine whether in fact the mens rea required for a specific offence was formed. If the mens rea is only that of recklessness, then voluntary intoxication cannot be a relevant consideration (Majewski 1977, R v G 2008).

**Question 4**

a)

In this scenario the question arises whether Nathan and Mick commit a conspiracy (to cause a named offence).

Conspiracy has two forms a common law and statutory conspiracy. The relevant possibility here is a statutory conspiracy under s 1(1) of the Criminal Law Act 1977 which provides that a conspiracy is committed when a person agrees with any other that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, (or would do so but for the existence of facts which render the commission of the offence or any of the offences impossible).

The issue here is whether in fact Nathan agreed and intended the arrangement would be carried out (Saik 2006). It seems likely that Nathan did not so intend at the time. At least his subsequent behaviour suggested it was a light hearted conversation. But if at the time he had intended the plan would be carried out even if only by Mick (Siracusa, Yip Chiu-Cheng), the conspiracy is complete even though abandoned by him.

b)

In the second scenario the point at issue will be whether Mick has committed an attempted offence.

An attempted offence is defined in the Criminal Attempts Act 1981. If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

The only substantive issue is whether Mick’s actions go beyond the merely preparatory to the commission of the relevant offence. Various tests have been used to draw a demarcation line: it would appear that Mick has done the last act and embarked on the crime proper (Geddes 1996, Gullefer 1990 Campbell 1991) However a caveat should be issued in that consideration would need to be given to the exact offence attempted: presumably an offence in relation to causing explosions.
c)

In this scenario the issue is the liability of Peter for Stephen’s activities. In other words can Peter be held liable under the principles of accessorial liability or joint enterprise for the death? Under s 8 of the Accessories and Abettors Act 1861 a secondary party is liable for aiding and abetting counselling or procuring the offence committed by the principal offender (here Stephen). It is not clear from the facts whether Peter actually assists Stephens’ offence in any direct way which would amount to one of the accessorial verbs. The limitation of accessorial liability is somewhat remedied by the principles of joint enterprise expounded in Powell and English. In that case to be liable under a joint enterprise approach of murder, the secondary party must have realised there was a risk of the principal killing. This was expanded a little in the case of Rahman 2009.

If Peter realised that Stephen may kill or intentionally inflict gbh and continues to participate in the venture then Peter may be liable for the resulting murder. The issue would turn in the current case on the stage at which Peter knew Steven had a weapon and might use it. The weapon in being a cricket bat is ambiguous: it is not an inevitably fatal or even serious weapon, but could be used in such a way. In the current scenario the outcome would therefore turn on the proven facts. It is entirely possible that Peter may be jointly liable with Stephen for the death.