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 2014 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.

SECTION A

Question 1

Result crimes are those requiring a proof of consequence, e.g. murder and manslaughter. The prosecution must be able to prove that the defendant’s (D) act or omission (conduct) caused the resulting consequence. The jury must decide whether there is a causal link between D’s conduct and the resulting consequence.

There are two main legal principles that the jury have to consider when deciding whether causation is proven. They are:-

- They must be satisfied that D’s conduct was a factual cause of the victim’s (V) death or injuries; and
- They must be satisfied that D’s conduct was a legal cause of V’s death or injuries.

Both must be established before D can be found liable for the offence/s for which he has been charged.

Factual causation is very straightforward and is determined by the application of the ‘but for’ test which was established in the case of White (1910) and is still good law. The ‘but for’ test sets out that the resulting consequences would not have occurred but for D’s conduct. If the resulting consequence would have happened anyway then D will not be liable.

Legal causation requires an unbroken chain of causation leading to the resulting consequence. This means that, whilst the D need not be the sole, or even the main cause of death, legal causation can be shown provided he makes a significant contribution to the result: Pagett (1984).

Prior to Pagett, the case of Smith (1959) defined legal causation as the operating and substantial cause of the consequence. In some cases, even where factual
and legal causation can be proven, a *novus actus interveniens* (a new intervening act) can break the chain of causation and absolve the D of liability for the resulting consequence.

Intervening acts fall into three categories:

i) acts of the victim;

ii) acts of third parties; and

iii) medical negligence

Acts of the victim will break the chain of causation where they are ‘daft’ or ‘unexpected’ or ‘unreasonable’: Marjoram (2000), where V jumped out of a window as D was kicking open the door to his room; Corbett (1996), where V, whilst trying to get away from D who was assaulting him, tripped and fell into the path of a passing car; Roberts (1972), where V jumped out of a moving car to escape what she perceived to be a threat from D and Williams and Davis (1992), where V again jumped out of a moving car to avoid being robbed. In all the above cases the V was attempting to escape harm or injury and it was held that the Vs’ reactions were not so daft or unreasonable as to break the chain of causation.

The thin skull rule provides that a pre-existing condition of the V which renders the V particularly vulnerable to the injury inflicted or death will not serve to absolve D of liability. The leading case in this area is Blaue (1975) in which V, having been stabbed by D, died after refusing a blood transfusion due to religious beliefs. The principle that D must take his V as he finds him is not confined to pre-existing physical or physiological conditions but includes religious beliefs.

A deliberate act by V will also break the chain of causation. In the case of Cato (1976) D injected V with heroin and V died. Causation was proven; D had caused V's death. However, in the cases of Dalby (1982), Dias (2002) and Kennedy (2007), D handed the syringe to V who self injected the heroin and died. The chain of causation had been broken by V's deliberate and voluntary act.

V’s neglect or mistreatment of any injuries caused by D will not break the chain of causation: Wall (1802), Holland (1841). In the more recent case of Dear (1996) D slashed V several times with a Stanley knife. V did not seek medical treatment and died two days later. It was held that D’s conduct was the operating and substantial cause of V’s death.

In the case of Benge (1865) it was held that the actions of third parties could break the chain of causation. This was supported by the case of Pagett (1983) where it was held that, where a third party’s act is a reasonable response to D’s initial act, the chain will not be broken. In the case of Watson (1989) V suffered a heart attack 90 minutes after being burgled by D. D’s conviction was quashed on the basis that the chain of causation could have been broken by a third party intervention – the police boarding up a broken window.

The starting point in respect of cases where medical negligence could break the chain of causation is Smith (1959), where it was held that the chain of causation would only be broken if the medical negligence was so overwhelming that the original wound would merely be part of history and death did not result from the original wound.

A new test was proposed in the case of Cheshire (1991) where it was held that medical negligence would not break the chain of causation unless the medical treatment was so independent of D’s acts and so potent in causing death that it
would render D’s acts insignificant. This approach has been followed in Mellor (1996), Gowans and Hillman (2003) and Warburton and Hubberstey (2006). It was also suggested in Cheshire that it was only in the most extraordinary and unusual cases that medical treatment would break the chain of causation and as long as D’s conduct was a significant contribution to death then a jury could convict on that basis.

In conclusion, it would seem that the legal principles relating to the chain of causation and *novus actus interveniens* are satisfactory. Generally a voluntary or foreseeable act of the V or a third party will not break the chain of causation and D will still be liable. However, there are circumstances where this could be the case and each case should be judged on its own circumstances. An unforeseeable and/or involuntary act of the V may break the chain of causation.

Generally, medical intervention will not break the chain of causation, unless it can be proven that the medical treatment was the operating and substantial cause of death not D’s original act. However, it has been argued that negligent medical treatment is not in line with the rest of the law relating to causation and there should be a test based on foreseeability of the outcome as with other authorities relating to *novus actus interventions*, which would clarify the law in this area.

**Question 2**

a) Burglary is an offence under the Theft Act 1968. S9(1)(a) provides that a person is guilty of burglary if he enters a building or part of a building as a trespasser with intent to steal, inflict Grievous Bodily Harm (GBH) or do unlawful damage. S9(1)(b) provides that, having entered a building or part of a building as a trespasser, D steals or attempts to steal; or inflicts, or attempts to inflict, GBH.

The distinguishing feature between the two sub sections is the D’s intention at the time of entry. For a s9(1)(a) offence there must be an intention to commit the offences listed. In respect of a s9(1)(b) offence, it is irrelevant what was intended but the prosecution must be able to prove that D actually committed or attempted to commit one of the offences listed.

Under the common law, an insertion of any part of the body into the building was sufficient and also there would be an entry even if D did not physically enter but inserted an instrument for the purpose of theft. Indeed, according to the case of Davis (1823) the insertion of a forefinger was sufficient. Whilst this was a broad brush approach, at least the meaning of entry was clear.

Entry, as used in the Act, has not been defined and this has led to numerous problems over the years when trying to prove that an entry has taken place.

When interpreting the word ‘enters’ in the Theft Act 1968, the courts took a different view to the old common law rules. In the case of Collins (1972) the Court of Appeal (CA) said that the entry had to be effective and substantial, but did not give any further guidance. In Brown (1985) the CA still decided not to apply the old common law rules. The CA modified the concept of an effective and substantial entry to effective entry which need not be substantial. The different decisions of the courts in these cases highlight the inconsistencies in their approach to individual cases.

In the more recent case of Ryan (1996) it was held that, even though he had got stuck trying to get in through the window, D could be convicted of burglary as
there was evidence that he had entered the property. However, it cannot be said that this was an effective entry.

The current position is that entry has to be effective but not substantial. It is also unclear whether insertion of other objects such as a small child or an animal or an inanimate object such as a pole or a hook would be sufficient to constitute an entry.

There still is no clear meaning of entry and as such the law is ambiguous. It is true that whilst the common law approach to entry was very wide, it could be said that it was clear.

**b)** Inchoate offences have been described as incomplete offences when really they are offences in their own right which anticipate a complete offence. Inchoate offences refer to those offences where D has not actually committed the substantive crime but has either made an attempt to do so, or has entered into a conspiracy with someone else to do so.

Inchoate offences have a role in crime prevention or deterrence and are designed to allow for liability to be imposed on those who are in the preparatory stages of committing an offence, without waiting for the substantive offence to be committed. They have an important role in public policy and make a contribution to public safety.

They also specify and penalise the crossing of the line between criminal intent and conduct which is sufficient to justify criminalisation. The offence of attempt is contained in s1 of the Criminal Attempts Act 1981 (CAA) which states that ‘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 Actus Reus (AR) requires D to commit an act which is more than merely preparatory to the commission of the offence. This is usually a question of fact for the jury and the test is to look forward and decide whether D’s act has gone further than the preparatory acts. Prior to the CAA there were a number of common law tests.

The most recent test, and the one generally followed, is that set down in Geddes (1996) where it was decided that an act would be more than merely preparatory if there was acceptable evidence to show that D was actually trying to commit the substantive offence. This approach has been applied in Tosti and White (1997) and in Nash (1998).

A conspiracy is identified at the moment of agreement with the intention to carry out the crime as the defining point. The offence of conspiracy is contained in s1 of the Criminal Law Act 1977 (CLA) which states that a person will be guilty of conspiracy if he ‘agrees with any other person or persons that a course of conduct will be pursued which, if the agreements 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 parties to the agreement.’

The offence of conspiracy is complete as soon as an agreement has been reached to commit a crime Saik (2006). The offence of conspiracy exists to allow for the prosecution and conviction of those who agree to commit a crime, even if they do not actually succeed in committing it.
Inchoate offences have a very important role in criminal law, as they identify criminal conduct prior to an offence being committed, thus enabling the police to intervene and stop that offence from occurring e.g. group criminal activity.

**Question 3**

Prior to the Fraud Act 2006 (FA), there had been various attempts at creating laws which covered situations of fraud. The Theft Act 1968 (TA 1968) involved a major reform of the law and abolished all earlier offences involving deception or fraud. S15 TA 1968 created an offence of obtaining property by deception and s16 created an offence of obtaining a pecuniary advantage by deception. The problem with these offences were that they were fragmented, narrowly defined and difficult to apply.

Due to problems with the execution of s16, part of it was repealed by the Theft Act 1978 (TA 1978) which created the offences of obtaining services by deception – s1 and securing evasion of liability – s2.

The Actus Reus (AR) required proof that deception had been caused and that either property, services, a pecuniary advantage or a money transfer had been obtained. This over-particularised the law and meant that a defendant could face the wrong charge or too many charges and end up being acquitted.

The case of Preddy (1996) highlighted a problem with the law in that money transfers obtained by deception were not covered by the law as it stood. A new offence of obtaining a money transfer by deception was created under s15A of TA 1968. Pre FA offences also required proof of causation, as if a causative link between the obtaining and the deception could not be proved, no conviction could result.

The law was also unclear on some points. The case of Firth (1989) highlighted a problem with whether an omission would suffice or whether the conviction was dependent upon an act. This is now clear under s3 FA. The case of DPP v Ray (1973) raised the question of whether silence could be a deception. This area has also been clarified, by s11 FA. The old law did not allow for a deception to be against a machine e.g. a cashpoint; it was only possible to deceive a person: Lambie (1981), Davies and Flackett (1974). This has also been clarified by s2(5) FA which allows a representation to be made to a machine. There were also problems highlighted by jurors as they struggled to understand the elements of the offences, this ran the risk of unfair trials and potentially compromised the integrity of the criminal justice system.

In 1999 the Law Commission published a consultation paper No 155, Legislating the Criminal Code: Fraud and Deception. They followed this in 2002 with a report, Fraud (Law Com No 276) which included a draft bill. In 2004 the Government consulted on the report and this led to the passing of the FA which came into force on 15th January 2007.

The FA eliminated the aforementioned problems by creating four offences which repealed s’s 15, 15A, 15B, 16 and 20(2) of TA 1968 and s’s 1 and 2 of the TA 1978.

Under s1 FA, fraud can be committed in a number of ways. s2 provides for fraud by false representation, s3 provides for fraud by failing to disclose information, s4 provides for fraud by abuse of position and s11 provides for obtaining services dishonestly. Although these are four distinct methods of committing fraud, dishonesty is a Mens Rea (MR) element that is applicable to all methods and the
Ghosh (1982) test should be applied, together with a requirement that the D either intended to make a gain for himself or another, or to cause loss to another.

The current offences under the FA have moved away from the old requirements of proof of the AR elements of the offence and concentrate instead on proof of conduct e.g. making a false representation as opposed to having to prove that someone had been deceived or that property had been obtained.

Under s2 FA a false representation can be express or implied by conduct: Barnard (1837). Past cases such as Lambie (1981) and DPP v Ray (1973) would now be seen as implied representations to pay. The FA has also sought to clarify the position that a false representation can be made to a person or to a machine. S3 FA states that an offence is committed when D is under a legal duty to disclose certain information: Rai (2000). There has been criticism that this section is not clear in respect of a definition in relation to a legal duty to disclose. S11 requires a positive act to obtain services with no intention of paying at all or no intention of paying in full. The services have to have been obtained on the basis that payment will be made and that D knew this at the time of obtaining them.

To conclude it could be said that, whilst the objective of the FA was to expand the scope of fraud, it may have gone too far. It could be said that the offence of fraud overlaps with theft and some offences could be caught within it which are not truly fraud offences. It has been argued that the wide scope of the Act created a lack of clarity in the law as opposed to clarifying it.

On the other hand, the FA has created a consistency of definition across the offences. It has removed the need to prove that anyone was deceived or that anything was obtained (save for s11). It could be argued that s2 is a more sensible way of covering the misuse of credit cards and it is forward thinking by including an offence of deceiving machines as well as people. The main and possibly the most important change is that fraud offences relate to the D’s state of mind as opposed to proving that he acted in a certain way.

**Question 4**

Duress of circumstances has only been recognised by the courts for the last 25 years. To successfully plead a defence of duress of circumstances the defence must be able to show that at the time of the act there was an immediate and imminent fear of death or serious injury or a reasonable belief that there was an immediate and imminent fear of death or serious injury, and that the circumstances were such that a person of reasonable firmness, sharing D’s characteristics, would have responded as D did.

D must have felt threatened by the circumstances that he found himself in. This could be driving in extreme ways to escape a situation: Conway (1988), Bell (1992), Davis; Pittaway (1994).

It was initially thought that the defence would only apply to driving offences, but in Pommell (1995) it was decided that the defence was of general application. It has since been pleaded in the cases of Abdul-Hussain (1999), Safi and others (2003) and Shayler (2001).

It has been suggested that the defences of necessity and duress of circumstances are interchangeable. By that it is meant that some courts have decided that, where duress of circumstances was established, D should be
allowed to plead necessity: Conway (1989). More recently in Shayler (2001), a strong indication was given that the defences are interchangeable. In that case, Lord Woolf CJ stated that the distinction between the defences has (correctly, in his view) either been ignored or become blurred by the courts.

In the case of Re A (2000) it was decided that there were three requirements for necessity: the act was needed to avoid inevitable and irreparable evil, no more should be done than is reasonably necessary for the purpose to be achieved and the evil inflicted must not be disproportionate to the evil avoided. This was upheld in Shayler.

It could be said that this definition is quite different from that regarded as the classic test for duress of circumstances.

Necessity as a stand alone defence is not always supported. In the case of London Borough of Southwark v Williams (1971) Lord Denning said, “Our English law does not admit the defence of necessity...Necessity would open a door that no man could shut”. This case applied to a situation where homeless people occupied local authority houses without permission and claimed necessity. It was not suggested that necessity did not exist as a defence at all, only that it was an unsuitable defence to use in this case. In the case of Dudley and Stephens (1884), whilst the defence failed, it was not suggested that it did not exist.

There are differences between the defences which could support the existence of both of them as separate defences.

It is submitted that whilst the recent cases of Quayle and others (2005) and Altham (2006) are authority for the proposition that necessity exists as a separate defence from duress of circumstances, it should also be noted that in both of these cases, which involved the possession and cultivation of cannabis for pain relief, the D’s were unable to use the defence of necessity and were convicted of the offences. The convictions were further upheld by CA. It has been said that a plea of necessity avoids many of the restrictions which constrain duress of circumstances: there is no requirement of a fear of death or serious injury, the defence is potentially available for all crimes and there is no requirement for immediacy.

If recommendations made in the Law Commission’s Report, Murder, Manslaughter and Infanticide (Law Com No 304, 2006) in respect of the defence of duress are adopted, this would further blur the distinction between the two defences as the defence of duress would become available as a full defence to murder and attempted murder, together with all other crimes. Controversially, the report also proposes to reverse the burden of proving the defence of duress, placing this on the D, which some consider would be a breach of Article 6(2) ECHR.

If necessity is to be considered as an independent defence, it has to have a definition and boundaries, which are not clear at present. The three stage test set down in Re A could be used as a definition. It is clear that the defence of duress, whether by threats or by circumstances cannot, at present, be a defence to murder (or attempted murder). However, according to the case of Re A, necessity could be a defence to murder.

Duress exists only where D or someone he is responsible for is in danger of death or serious injury. This will not always be the case in respect of the defence of necessity: Re A. Therefore, it could be said that duress reflects an urgent act to avoid a perceived threat of immediate death or serious injury whilst necessity
reflects an act which is necessary to avoid inevitable and irreparable evil or harm.


As it stands, there appears to be strong argument that both defences should exist separately.

**SECTION B**

**Question 1**

Here we must consider Angela’s potential criminal liability for Jayne’s death and whether any defences would be available to her. Angela has caused the death of Jayne in both fact and law. ‘But for’ Angela’s actions, Jayne would not have died: *White* (1910) and Angela’s actions were the operating and substantial cause of Jayne’s death: *Smith* (1959).

The first offence to consider would be murder. The definition of murder is the unlawful killing of a human being with malice aforethought. There is no problem here with the AR being satisfied as Angela caused the death of Jayne. The problem for the prosecution would be proving that she did it with malice aforethought which means an intention to cause death or GBH: *Vickers* (1957).

Angela’s act of throwing the crystal vase directly at Jayne could provide evidence of an intention to cause GBH, this would be sufficient MR for murder.

The prosecution may also consider a charge of voluntary manslaughter. This is the term used for killings where the defendant has the requisite MR for murder but has a partial defence which would reduce the charge from murder to voluntary manslaughter.

The final offence that may be relevant here is involuntary manslaughter. This is where the defendant does not have the requisite MR for murder. Angela would not be charged with involuntary manslaughter as her actions satisfy the AR and MR of murder.

It is likely that Angela will be charged with murder. However, due to the domestic abuse that she has suffered at the hands of Jayne, she may be able to plead the partial defences of loss of control or diminished responsibility. If Angela successfully pleads either of these defences she will be convicted of voluntary manslaughter instead of murder.

The defence of provocation under s3 Homicide Act 1957 (HA) has been repealed and replaced with the defence of loss of control under ss54 and 55 of the Coroners and Justice Act 2009 (C&JA).

Loss of control under s54(1) C&JA requires a loss of self-control caused by a qualifying trigger; and that a person of the defendant’s (D) age and sex with the normal degree of tolerance and self-restraint as him, and of the same age and sex as him might have reacted in the same or similar way to him. Under s54(2) C&JA the loss of self control need not have been sudden as in *Ahluwalia* (1992).
The central issue to this defence is loss of self control and one of the main differences between the defences is that the loss of control in the new defence need not be sudden, whereas under the old law the loss of self control had to be sudden: Duffy (1949). The new defence however, provides that there must be a qualifying trigger to the loss of self control: Pearson (1992).

Whether or not Angela suffered a loss of self control would be subjectively assessed. On the facts there is evidence of loss of control as there is no delay between the trigger and Angela throwing the vase. There is no evidence that Angela was acting in a considered desire for revenge. If there was evidence of this, the defence would be negated under s54(4) C&JA.

The two qualifying triggers are set out s55 and are fear of violence or anger by things done or said (or both) in circumstances of an extremely grave character that caused D to have a justifiable sense of being seriously wronged. Angela could claim that both triggers were present here. Due to the verbal and mental abuse she had suffered, she could claim that she had a justifiable sense of being wronged.

The final element of this defence requires that someone of the same age and sex as Angela, with a normal degree of tolerance and self restraint and in the same circumstances as Angela, might have reacted in the same or similar way. This element is objectively assessed which means that the fact that Angela is suffering from depression will not be a relevant consideration, as she is expected to exercise the level of control of a person of her age and sex of normal tolerance and self restraint.

Angela could successfully plead loss of control as she satisfies the requirements for the qualifying triggers, and that the triggers caused her to lose her self control and kill Jayne. It will be for the jury to decide whether a person of Angela’s age and sex with a normal degree of tolerance and self restraint might have reacted in the same or similar way.

The other defence that may be available to Angela is diminished responsibility. The defence of diminished responsibility under s2 HA has been amended by s52 of C&JA. Diminished Responsibility under s2 HA occurs when, at the time a person kills another he was suffering from an abnormality of mind, arising from arrested or retarded development of mind or any inherent causes or induced by disease or injury, which substantially impaired his mental responsibility for the killing.

Under s52(1)(1A) it is an abnormality of mental functioning arising from a medical condition which substantially impaired his ability to understand the nature of his conduct or form a rational judgement and/or exercise self control.

Under the new law, the abnormality of mental functioning must have arisen from ‘a recognised medical condition’. This includes psychiatric, psychological and physical conditions.

In the original defence it was D’s general responsibility that had to be substantially impaired. In the amended defence the substantial impairment has to be of D’s ability to understand the nature of his conduct or form a rational judgement and/or exercise self control. S52(1)(1)(c) adds that the abnormality for mental functioning provides an explanation for acts and omissions.
Angela is suffering from severe depression, which is likely to constitute an abnormality of mental functioning arising from a medical condition: Seers (1984). The defence should be able to prove that this substantially impaired Angela’s judgement or ability to exercise self control. This will provide an explanation for Angela’s actions if it causes, or is a significant contributory factor, in her carrying out the actions.

She could successfully plead diminished responsibility, although, again, it would be for the jury to decide whether her severe depression caused, or was a significant contributory factor in causing, her to throw the vase at Jayne. The burden of proof would lie with her on the balance of probabilities.

Angela could also consider a defence of insanity. The definition for insanity is founded on the M’Naghten Rules (1843) and their subsequent interpretation by the courts. To satisfy the defence of insanity Angela would have to be able to prove that on the balance of probabilities she was suffering from a defect of reason caused by a disease of the mind and that she did not know the nature and quality of her act or that it was wrong, and that she was insane at the time of the commission of the offence.

The disease of the mind must be internal to D: Sullivan (1984). The case of Hennessey (1989) found that hyperglycaemia due to diabetes was a disease of the mind together with epilepsy: Sullivan (1984), sleepwalking: Burgess (1991) to name but a few.

A defect of reason means an impairment of D’s powers of reasoning as opposed to a failure to use such powers: Clarke (1972). Nature and quality of an act relates to an awareness of its physical nature and quality not its moral quality: Codere (1916). Johnson (2007) confirmed the position that D can only rely on the defence of insanity if he did not know the act was legally wrong, even if he knew it was morally wrong.

Angela can supply medical evidence to support her claim that she suffers with severe depression. This is deemed to be a disease of the mind and an internal factor: Sullivan (1984). For a plea of insanity to be successful she must also be able to show that either she did not know the physical nature of the act she was doing, or that she did not know that the act was legally wrong.

If Angela is successful in her plea of insanity, the result would be a verdict of not guilty by reason of insanity and could lead to either a supervision order, a hospital order or an absolute discharge.

**Question 2**

**a)** Under s1 of the Theft Act 1968 (TA) a person is guilty of theft if he/she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

Under s3 appropriation is any assumption of the rights of an owner. An assumption of one of these rights is sufficient for appropriation: Morris (1983). When Helen took possession of the money she appropriated it. She then assumed a further right of the owner when she decided to keep it.

The £50 is property under s4(1) TA but it is property that belongs to her employer because, under s5(4), when an overpayment is mistakenly received by an employee, she has a legal obligation to make restoration to her employer: A-G’s Reference (No.1 of 1983)[1985]. Thus, the AR of theft is satisfied.
Turning to the MR for theft, s5(4) also states that an intention not to restore shall be regarded as an intention to permanently deprive. When Helen decided not to pay the money back, she formed the intention to permanently deprive her employer of the overpaid money. The only question is whether Helen acted dishonestly.

For the purposes of the offence of theft, s2(1) TA 1968 specifies three instances of states of mind which, as a matter of law, are to be regarded as honest. Therefore, D is not dishonest if:

i) he honestly believes that he had a right in law to the property;
ii) he honestly believed that he had or would have had the owner’s consent had the owner known about the circumstances; or
iii) he honestly believed that the owner could not be found even if all reasonable steps had been taken to try and find him.

None of these would apply to Helen’s case. Next we must consider Ghosh (1982) which provided a positive aspect to the determination of dishonesty. The Ghosh test has two limbs. The first, objective limb requires the jury to consider whether the honest and reasonable person would regard what D did as dishonest. Only if the answer is ‘yes’ to this question can the second limb be considered.

The second, subjective limb requires the jury to question whether D himself realised that the honest and reasonable man would regard what he did as dishonest. Whilst this is referred to as the subjective limb, it contains an objective element and calls for D’s recognition of his objective dishonesty. Only if the answer is ‘yes’, to both the objective and subjective questions, can D be found to be dishonest.

Helen’s conduct is likely to be dishonest according to the Ghosh test because the honest and reasonable person would regard keeping the money as dishonest and the fact that Helen initially was going to inform her line manager about the mistake and offer to pay it back indicates that she must also realise that she has acted dishonestly.

Helen is guilty of the theft of £50.

b) In respect of the magazine, Chun-Tao appears to have appropriated the magazine as she intends to keep it. Therefore she has assumed a right of the owner – possession: s3(1) Morris (1983). Under s4(1) the magazine is property and under s5(1) it belongs to the convenience store. Chun-Tao would not have had the convenience store’s consent to the appropriation: Gomez (1993). The AR of theft is made out.

She obviously intends to permanently deprive the convenience store of the magazine as she is unlikely to return it. However, under s2(1)(a), Chun-Tao will not be dishonest if she honestly believed she had a right to take the magazine. She may be found to have such a belief if she honestly thought that the magazines were free for customers to take.

Alternatively, under s2(1)(b), Chun-Tao will not be dishonest if she honestly believed she had the consent of the shop to take the magazine. It is likely that in Chun-Tao’s case one of these provisions will apply. If they do not, the jury will determine dishonesty using the Ghosh test and it is unlikely that a jury would conclude that she was dishonest.
In respect of the £30, Chun-Tao has once again appropriated the money and assumed the right of possession: *Morris* (1983). The money obviously belongs to someone else but we do not know who it belongs to. The AR appears to be satisfied. Chun-Tao clearly intends to permanently deprive the rightful owner of the money as she put it in her purse and went home. The question is whether Chun-Tao has been dishonest in her actions. She could potentially argue that she honestly believed that she had a right in law to the money (s2(1)(a)) or more likely that she honestly believed that the owner would not be able to be found even if all reasonable steps were taken to find him/her (s2(1)(c)).

If either of the defences above apply, she will not be dishonest. If they do not, then the jury will apply the *Ghosh* test and, if they think that the honest and reasonable man would regard keeping the £30 as dishonest, and Chun-Tao knew this, she will be found guilty of theft of the £30.

c) In respect of the £1,000, Karl appears to have appropriated the money as he intends to keep it. The problem here is whether Karl's elderly aunt Betty consented to the appropriation of the money as she gave it to him as a gift.

According to the leading case of *Hinks* (2000) it is possible to dishonestly appropriate a valid gift. Prior to *Hinks* it had been decided in the cases of *Lawrence* (1971) and *Gomez* (1993) that consent obtained by deception was not true consent. *Hinks* further clarified the law in this area by stating that D is guilty if he dishonestly accepts the gift.

In this case it could be said that Karl has dishonestly accepted the gift as he has told Betty that he has been made redundant when he has not, he has accepted £1,000 for helping her when it probably was not worth that much and he took it thinking that she would have been confused as to how much money she had given him.

Karl intends to permanently deprive Betty of the money as he intends to keep it. He could argue that under s2(1)(a) that he honestly believed that he had a right in law to keep the money as it was a gift. If this is the case then he is not dishonest. If s2(1) does not apply, the *Ghosh* test will be applied. If both parts of the test are met then Karl will be guilty of theft.

**Question 3**

Calvin may be liable for numerous offences including non fatal offences against the person, criminal damage and theft.

**Assault on Levi**

Calvin carried out an unprovoked assault on Levi. He punched him, which means that he intended to cause unlawful violence, but was reckless what the result would be. Due to the level of injury this would probably be an offence under either s47 or s20 of the Offences Against the Person Act 1861 (OAPA).

S47 OAPA concerns an assault occasioning Actual Bodily Harm (ABH) and is the intentional or reckless infliction of unlawful violence upon someone: *Savage; Parmenter* (1991). ABH refers to an assault which interferes with the comfort of the victim and is more than transient or trifling: *Miller* (1954) and *T v DPP* (2003), and there has to be an injury: *Chan-Fook* (1994).

When Calvin punched Levi it was an assault. The injuries sustained by Levi were a lost tooth, a swollen cheek and a black eye. This would constitute an injury
which was more than transient or trifling and would interfere with his comfort. Calvin should have been aware that there was a risk that his actions towards Levi could cause him injury.

S20 OAPA is the unlawful and malicious wounding or inflicting of GBH upon any other person as detailed above. The injury sustained by Levi would probably not be an assault under s20 OAPA as the level of harm is not serious enough. Calvin would therefore be liable for an offence of ABH under s47 OAPA in respect of the assault on Levi.

Calvin could consider a defence of intoxication. There are two types of intoxicants that need to be considered: dangerous and non-dangerous: Bailey; Hardie (1984). Dangerous intoxicants such as alcohol, heroin and amphetamines, are those that are known to cause the taker to become aggressive or unpredictable. Non-dangerous intoxicants are those that are expected to be merely soporific or sedative. We know, therefore, that Calvin took a dangerous intoxicant in the form of alcohol, which made his actions unpredictable.

Next we must consider whether Calvin’s intoxication involuntary or voluntary. Involuntary intoxication occurs when a drink is spiked, prescribed drugs are taken in excess or non-prescribed but non-dangerous drugs are taken: Bailey; Watkin Davies (2001). This is not the case here. Voluntary intoxication occurs when there has been voluntary taking of dangerous drugs or drinking alcohol to excess. Calvin was voluntarily intoxicated by choosing to drink alcohol to excess.

Whether he can use the defence will depend on whether the crime was one of specific or basic intent. In this case the offence is s47 OAPA 1861 which is a crime of basic intent. This means that the defence of intoxication would not be available to Calvin as he was reckless in drinking the alcohol: Majewski (1976).

Theft of the bike

Under s1 of the Theft Act 1968 (TA 1968) a person is guilty of theft if he/she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

Calvin appropriated the bike as he assumed one of the rights of the owner – possession. The bike would be defined under s4(1) as property and did not belong to Calvin. Therefore, the AR of theft is satisfied.

Again Calvin could plead intoxication in an attempt to negate the MR of the offence. As already mentioned he was voluntarily intoxicated with a dangerous intoxicant. Calvin will need to show that the intoxication prevented him from forming the MR for theft: Kingston (1994). Theft is a specific intent offence which means that Calvin may be able to plead intoxication in his defence of his actions.

Arson

In respect of setting fire to the waste paper bin, Calvin would be liable contrary to s1(1) and (3) of Criminal Damage Act 1971 (CDA) of causing simple criminal damage by arson. The AR and MR are the same as for s1(1), the difference is that for this offence the damage has to be caused by fire.

Causing damage to the waste paper bin and surrounding carpet will constitute the damage of property by fire. The bin is the personal property of Levi s10(2) CDA 1971. It is highly unlikely that Calvin would be able to argue that he honestly believed that Levi would consent to the damage s5(2)(a) CDA 1971.
The MR would be satisfied as Calvin obviously intended to damage/destroy the waste paper bin.

He may, however, be able to negate the MR by pleading intoxication. In this case Calvin could be involuntarily intoxicated by the Valium tablets given to him by his wife. Valium is a non-dangerous intoxicant and involuntary intoxication occurs when a drink is spiked, prescribed drugs are taken in excess or non-prescribed but non-dangerous drugs are taken: Bailey; Watkin Davies (2001). Calvin’s situation could be compared to that in the case of Hardie (1985) where a D set fire to a wardrobe after becoming involuntarily intoxicated by Valium tablets. In that case the D was acquitted and Calvin probably would be too.

Calvin would probably only be liable for s47 ABH on Levi.

**Question 4**

This question requires consideration of the availability of general and mental capacity defences.

**Duncan**

**Assault on Rachel**

Duncan may have a defence of implied consent in respect of the assault on Rachel.

The law dictates that we impliedly consent to physical contact in everyday life: Collins v Wilcock (1984), where touching someone to get their attention was held to be ‘everyday’ contact.

The general rule is that consent can be a defence to assault or battery: Donovan (1934), A-G’s Reference (No 6 of 1980) (1981). These are both offences which require no proof of any harm being caused to the victim.

However, the courts are stricter when a degree of harm is caused, therefore consent is no defence to charges of assault occasioning actual bodily harm (ABH), inflicting grievous bodily harm or causing grievous bodily harm with intent (GBH): Brown (1993), unless it falls within a socially acceptable situation which is in the public interest.

There are some socially acceptable situations where the law allows consent to the deliberate infliction of harm when it is in the public interest: A-G’s Reference (No 6 of 1980). These situations include medical intervention and cosmetic surgery: Corbett v Corbett (1971), Bravery v Bravery (1954). The same applies to tattooing and piercing. They are also permissible to protect individual autonomy: DPP v Smith (2006), Wilson. Injuries caused during properly regulated contact sports are not subject to criminal sanction because sport per se is a socially acceptable hobby which is in the greater public interest: Barnes (2004). Similarly, unintentional injuries sustained by willing participants to rough horseplay are deemed to be consented to: Jones (1986), Aitken (1992).

Given the circumstances of this case, it would not appear that Duncan would be able to use the defence of implied consent in relation to the assault on Rachel.

**Theft of the rucksack**
Automatism would be the relevant defence to consider here. For Duncan to be able to rely on the defence of automatism he would have to be able to show that an external factor resulted in involuntary conduct by him, where he was not at fault.

Automatism must relate to external factors and to temporary disturbances which cannot be related to any notion of disease. In Quick (1973), LJ Lawton observed that Quick’s mental condition was not caused by his diabetes but by his use of insulin prescribed by his doctor which meant that the malfunctioning of his mind was caused by an external factor and not an internal disease of the mind.

Automatism requires a fundamental, and not merely partial, loss of control of movement, Broome v Perkins (1987), Bratty (1963). The case of Bratty established that an act done whilst suffering from concussion could be automatism. Theft is a crime of specific intent which means that if Duncan is successful in pleading automatism he will be acquitted of the theft of the rucksack.

It would be for the defence to prove on the balance of probabilities, and with supporting medical evidence, that Duncan was suffering from automatism at the time of the offence.

The defence will only apply if D’s automotive state was not self induced. It is clear in this case that Duncan’s semi-conscious concussed state was not self induced. In this case there was an external factor – a blow to the head causing concussion - which led to involuntary conduct by Duncan as a result of impaired consciousness, and his impaired conscious state was not self induced. Duncan may be able to plead automatism in relation to the theft of the rucksack.

Criminal Damage to conservatory

It would appear that the offence is made out as Duncan has intentionally or recklessly damaged property belonging to another.

The MR may not be satisfied in this case as Duncan could claim that he has a defence under s5(2), that of lawful excuse, if he honestly believed he would have had his wife’s consent to damage the property. In this case, he honestly believed that it was his own house that he was breaking in to. Despite the fact that he made a mistake due to his intoxication, he may still rely upon lawful excuse as a defence: Jaggard v Dickinson (1981). Even though this is a basic intent offence, in cases such as this, where the D did intend to damage the property but thought that the owner would consent, he is not liable, however drunk he is.

Sanjeet

Sanjeet could potentially rely on the private defence of self defence and/or possibly a public defence under s3(1) of the Criminal Law Act 1967 (CLA 1967). Both of these defences are now governed by the guidelines established under s76 of the Criminal Justice and Immigration Act 2008 (CJIA 2008).

Self defence permits a person to use reasonable force in protection of himself or others: Rose (1884), Duffy (1967), Palmer (1971). The issue with this defence is usually whether the force was ‘reasonable’ in the circumstances. The evidence indicates that Sanjeet was alarmed and was motivated in his actions by a desire to defend Rachel from any further possible attack from Duncan; he was neither looking for a fight nor was he motivated by any desire for revenge.
Even if Sanjeet was mistaken in his belief that Rachel was going to be further assaulted by Duncan, he is entitled to be judged on the circumstances that he genuinely believed to exist: Williams (1987), Owino (1995). A jury would be objective in deciding whether Sanjeet’s actions were ‘reasonable’. They would have to consider whether Sanjeet honestly believed that it was necessary to defend Rachel and, if so, on the basis of the facts and the danger perceived by Sanjeet was the force used ‘reasonable’? If the jury answer “yes” to both points then they must acquit Sanjeet of GBH.

However, if they accept that his actions were to protect his friend but that he went beyond the use of reasonable force then Sanjeet would have no defence under common law: Clegg (1995).

The public defence created by s3(1) CLA 1967 permits the use of reasonable force to prevent the commission of an offence. CJIA 2008 confirms that the same principles apply to both the private and public defences in relation to the concept of reasonable force and mistaken belief.

The assault on Rachel clearly involved the commission of an offence. The issue for the jury will be as to whether the force used by Sanjeet was reasonable in the circumstances. The burden of proof would be on the prosecution to prove that the actions of Sanjeet were not reasonable in the circumstances.