A-LEVEL LAW
Unit 3: Criminal Law (Offences against the Person) or Contract Law
Report on the Examination

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Scenario 1

Question 01

In this question, students were required to consider the criminal liability of Arron in connection with an incident concerning Bilal, and of Chan in connection with an associated incident concerning Arron. When, in the course of a pre-arranged fight between gangs, Arron instructed Bilal to get on his knees and apologise to avoid being ‘cut’ (that is, wounded with the knife Arron was holding), Arron was undoubtedly committing an assault. Arron’s conduct would certainly have led Bilal to ‘apprehend immediate unlawful personal violence’, and it was clear that that must have been Arron’s intention. Of course, a possible interpretation of Arron’s words was that Bilal had no reason to apprehend (fear) violence if he were prepared to submit to Arron’s instruction. However, this was not a statement designed to indicate that, despite his conduct in brandishing the knife, Arron had no intention of using it to inflict injury (\textit{Tuberville v Savage}). Rather, it was a statement that Bilal could avoid injury only by doing something which he was under no legal obligation of any kind to do, and which he would not freely choose to do (\textit{Logdon v DPP}). Nor could Arron hope to pray in aid a defence of consent. The gangs may have chosen to agree to a fight but the level of possible violence indicated by the possession of the knife would immediately take the conduct beyond anything recognised by the law as falling within the scope of consent, even in the unlikely event that consent would not have been rendered inapplicable by the general prohibition on consent to injuries suffered in fighting not governed by the rules of the sport of boxing (\textit{AG’s Reference (No.6 of 1980)}).

Students invariably recognised that Arron had committed an assault and usually displayed good knowledge and understanding of the elements, particularly of the combination of words and gestures, and of the need for the apprehension to be of immediate unlawful personal violence. However, one rather curious element of confusion that frequently appeared (and also in answers to Question 04) was the suggestion that the ‘unlawful personal violence’ did not have to be physical but could be by words or gestures. This confused the method used to convey the threat with the nature of the thing threatened. Clearly, the thing threatened has to be unlawful physical violence to the person. The essence of an assault is that this threat is conveyed without actual use of violence (otherwise it would be a battery). Most students settled for a very simple analysis of actus reus and mens rea and did not pursue any argument about the precise import of Arron’s words. Those who did do so often queried whether Arron’s words might enable him to escape liability within the authority of \textit{Tuberville v Savage} but rarely explored the alternative, and much more compelling, interpretation derived from a case such as \textit{Logdon v DPP}. Though discussion of consent was not a requirement, students who considered it did gain credit, especially where they recognised that it would not be available in the circumstances.

The injuries suffered by Arron when Chan struck him with the heavy branch unquestionably amounted to actual bodily harm. Since the blow was clearly a battery fully intended by Chan, there was equally no doubt that, \textit{prima facie}, Chan had committed an offence of assault (battery) occasioning actual bodily harm (\textit{Offences Against the Person Act 1861 s47}). It was more debatable whether the injuries were sufficiently serious to be regarded as grievous bodily harm (\textit{DPP v Smith}). The swelling might have been. The impairment to brain function apparent in the description of Arron as ‘confused’ might also have been sufficient but the facts in the scenario gave no indication of whether this was a very short-lived effect or might extend over a greater length of time (\textit{T v DPP}). There was also the possibility of considering the combination of injuries as satisfying the definition of grievous bodily harm (\textit{Brown and Stratton}). If the injuries amounted to grievous bodily harm, then, \textit{prima facie}, Chan committed the offence of unlawful and malicious infliction of grievous bodily harm (\textit{Offences Against the Person Act 1861 s20}), since he intended
In that case, it might also have been arguable, given the powerful blow, the use of a heavy branch, and the choice of Arron’s head as the target, that Chan intended serious injury, and so was *prima facie* guilty of unlawful and malicious causing of grievous bodily harm with intent to cause grievous bodily harm (Offences Against the Person Act 1861 s18). In view of the certainty that the injuries constituted actual bodily harm, and the doubts about whether they amounted to grievous bodily harm, students should have dealt with both s47 and, at least, s20.

In answering the question, students tended to opt either for s47 (the more common choice) or s20, often with the addition of s18, though s18 was occasionally the central focus of the answer. This meant that students generally wrote rather narrow answers which did not merit more than a classification of ‘clear’. Apart from the relatively small proportion of students who made familiar errors in explaining the mens rea of s47, s20 or s18, students generally presented thorough and accurate explanation and application of the actus reus and mens rea of the relevant offences, citing an appropriate range of cases as both authority and illustration. In arguing for the possibility of the s18 offence, stronger students drew attention to the facts identified above which suggested that Chan may well have directly intended serious injury or, at the very least, have foreseen the virtual certainty of that consequence from which a jury might find the relevant intention.

Of course, Chan seemed to act in response to hearing the threat to his fellow gang member, Bilal made by Arron. This raised the possibility that he was acting in defence of another, a defence regarded either as an aspect of self-defence at common law or as prevention of crime under the Criminal Law Act 1967 s3(1). In either case, Chan would be entitled to use such force as was reasonable in the circumstances, the common law rules as to the use of reasonable force now being re-stated (with some amendments) in the Criminal Justice and Immigration Act 2008 s76. A number of students failed to recognise the possibility that Chan could plead a defence. However, of those who did deal with it, stronger answers recognised that the issue of reasonable force resolves itself into two questions: first, was the use of some force *necessary*; second, was the force actually used *proportionate* to the threat posed? Students were then able to discuss matters such as mistakes as to the degree of threat (s76(3), Gladstone Williams) and the use of ‘pre-emptive strikes’ (s76(6A), Bird) as aspects of the enquiry into necessity, and the degree of force used by Chan in the circumstances in which the threat was made as an aspect of proportion (s76(7)(a) and (b)). Weaker answers made no clear distinction between necessity and proportion, so that the quality of explanation and application was undermined by lack of structure and by confusion between the two elements. The weakest answers were written almost entirely from a factual basis with little reference to the rules of law.

**Question 02**

In answering this question, students were required to discuss the liability of Arron for the manslaughter of Derek, and of Chan for the manslaughter of Elroy. Most students readily, and correctly, interpreted this as an instruction to discuss *involuntary* manslaughter.

Strong answers recognised that Arron might be guilty of unlawful act of manslaughter, the elements of which were explained as requiring proof of an unlawful act, of a dangerous kind which caused Derek’s death. In further analysing these elements, students indicated that the unlawful act must be a crime (*Franklin*), involving proof of both actus reus and mens rea (*Lamb*), with the actus reus based on an act rather than an omission (*Lowe*). They usually identified the crime as one of wounding under the Offences Against the Person Act 1861 s20 and were able to assert without too much difficulty that Arron had certainly inflicted a wound on Derek when slashing his arm with the knife. In view of Arron’s ‘confusion’ resulting from the blow to his head inflicted by Chan, evidence of mens rea was a little more questionable but the sensible course of action, adopted by most students, was to assume initially that some kind of intention or recklessness accompanied Arron’s rather frenzied actions. Yet a strong argument could have been made that
his confusion meant that he neither intended injury nor foresaw the risk (this argument could have been made independently of the plea of automatism discussed later). Weaker answers failed to identify one or more of these elements, or did not specify what unlawful act (crime) was involved. Most students correctly defined ‘dangerous’ by reference to the case of Church, correctly explaining that it requires that a reasonable person would foresee that the accused’s crime would create a risk of some harm to the person (albeit not necessarily to the victim). Obviously, there was no difficulty in claiming that Arron’s crime of unlawful and malicious wounding created an obvious risk of harm. However, given that some students did not attempt to define ‘dangerousness’, it is worth reiterating here what has been said in numerous previous reports. There is no ‘obvious’ meaning of the term which would justify the failure to define it. The definition in Church is not ‘self-evident’, and it probably represents a change in approach from that which prevailed in a previous era. Consequently, not to utilise the definition was a serious deficiency. It was a little more understandable that some students considered the danger to arise from the fact that Arron was whirling his arms about whilst holding the knife rather than from the actual infliction of the wound. The former, of course, suggested the crime of assault whilst the latter, the offence under s20, was the crime actually identified, and which was the crime which had to be ‘dangerous’.

Yet the elements which were most likely to reduce the quality of answers were causation and automatism. Though some students barely remarked on causation at all, most addressed it to some extent. However, the analysis of causation in law too often depended simply on the argument that Derek would not have got the infection in hospital had he not been wounded by Arron in the first place. Unfortunately, this was simply a causation in fact argument. Arguments that Arron’s conduct made a substantial or significant contribution were a little better but still failed to address the issue with any degree of precision. To address the issue fully, students had to acknowledge that there were insufficient facts in the scenario to understand precisely how the infection came about. In consequence, it was necessary to speculate on two possible versions of the facts. First, if the infection was simply a foreseeable consequence of the wound (and some students perceptively introduced age, vulnerability and the thin skull rule at this point), then the chain of causation would not be broken. Second, if there was any hint of medical negligence in the contracting of the infection, then the approach to causation and medical negligence indicated in cases such as Smith, Jordan and Cheshire would come into play. Stronger answers did introduce discussion of medical negligence but very few set the discussion within the framework of alternative possible origins of the infection.

Perhaps Arron’s most persuasive argument to avoid liability for the offence of manslaughter was that, in consequence of the blow to his head inflicted by Chan, he was suffering from automatism. If successful, this argument would have negated the actus reus, and so entitled Arron to a complete acquittal. A surprisingly large number of students missed this possibility entirely, failing to accord significance to the ‘confusion’ (supported by the description of his ‘shouting and whirling his arms about’) experienced by Arron. However, students who did deal with the issue almost invariably explained the elements of the plea in a very comprehensive manner, emphasising the need for a total loss of control (Lipman, Broome v Perkins) from an external cause and without fault on the part of the accused in becoming an automaton. In application, they recognised that the prospects of success for the plea would turn largely on whether Arron’s condition represented a total, or merely partial, loss of control. Some students also questioned whether Arron bore responsibility for becoming an automaton because of his conduct in threatening Bilal. Though creditworthy, this argument seemed a little fanciful.

Some students sought to treat Arron’s crime as, prima facie, one of murder, so that a conviction for voluntary manslaughter might emerge from a plea of diminished responsibility or loss of control. This approach ignored the instruction to discuss Arron’s liability for the crime of manslaughter and met difficulties at every turn since the facts in the scenario all pointed in the direction of involuntary manslaughter. So, though credit could be given for discussion of the actus reus and mens rea of
murder to the extent that it bore on liability for manslaughter, students invariably failed to deal with automatism, or failed to recognise that the alleged diminished responsibility was, in reality, non-insane automatism. Similarly, arguments about the defence of loss of control failed to acknowledge the confusion that Arron was suffering in consequence of the blow to his head and which made loss of self-control in response to the ‘anger’ trigger a wholly improbable explanation for his conduct.

Students had no doubt whatsoever that Chan’s possible liability for the death of Elroy lay in gross negligence manslaughter but the quality of analysis and application varied enormously. Comprehensive analysis and successful application required students to be very clear about both the nature of any duty imposed on Chan and the specific conduct which might amount to a breach of that duty. The key to any solution was to establish that the facts revealed that a duty was imposed on Chan in two different ways, analysis of which must be kept separate. As most students recognised, under traditional Donoghue v Stevenson (in their modern form, Caparo v Dickman) principles, as utilised in Adomako, Chan was under a duty to Elroy simply by virtue of the fact that Elroy was a passenger in Chan’s car. The suggestion that the duty derived from their joint membership of a gang, or by virtue of joint engagement in a criminal enterprise (Wacker) was creditworthy though unnecessary. The duty required Chan to drive with due care for the safety of Elroy and others and extended to incorporate the condition of the car. Chan undoubtedly broke this duty by driving a car with faulty windscreen wipers in heavy rain, in consequence of which he failed to see a sign warning of a road closure and could not prevent the car sliding off into the river. This breach of duty clearly created a serious and obvious risk of death (Singh) and was arguably sufficiently serious to be regarded not merely as civil law negligence but criminal negligence within the framework of manslaughter (Bateman, Adamako). However, against Chan’s advice, and fatally as it turned out, Elroy tried to escape. The argument that his attempt amounted to a break in the chain of causation could be countered with the argument derived from Roberts that his conduct was reasonably foreseeable and not ‘so daft’ that it could not be attributed to Chan’s breach. Most answers incorporated aspects of this analysis and application, the most frequent omission being of causation, but many confused it with an analysis of the second possible basis of the duty (discussed below), sometimes irretrievably so. Additionally, many students treated the requirement for the breach to create a risk of death as merely an aspect of the test for the ‘grossness’ of the negligence, rather than as an independent requirement in its own right.

As many students recognised but few explained and applied convincingly, the second possible basis for a duty imposed on Chan was that he had created a dangerous situation by the manner of his driving and that this imposed on him an obligation to do something (either in the form of direct assistance or in seeking help from others) to relieve the danger to Elroy (Miller). The possibility that it was actually Elroy who had created the danger to himself by his attempted escape went unremarked by students, who could have rejected it by reference to the analogy of causation discussed above (Roberts). Students who discussed this duty correctly argued that Chan’s failure to do anything to assist Elroy was a breach which created a serious risk of death and could be described as sufficiently gross. However, very few students explained and applied the correct test of causation associated with Chan’s omission – had Chan acted in fulfilment of his duty, would Elroy have survived?

Very few students clearly separated out these two duties so that, ironically, the strongest answers tended to be those in which the student recognised only one duty (usually that imposed on any driver to his passenger) and developed it comprehensively and coherently. More commonly, students mixed elements of the two duties, especially in relation to breach, and consequently to the grossness of the breach, where they established the initial driving as creating the duty but cited the failure to go to Elroy’s assistance as evidence of the breach. Additionally, this confusion also tended to divert attention away from consideration of other important elements, such as causation, or, at the very least, to obscure understanding of which chain of causation was in issue.
In answering this question, students were asked critically to evaluate two general defences of their choice, and to suggest possible reforms to one of them. The choice of defences were intoxication, insanity, automatism, consent, and self-defence. Though all possible combinations were observed, by far the most popular were insanity and consent, and insanity and intoxication. Indeed, it was very unusual to encounter an answer which did not incorporate critical evaluation of the defence of insanity. Students were last invited to discuss these issues in 2014 and the comments made on answers at that time bear repeating now because the answers bore most of the characteristics in evidence then. So, in general, students wrote broad-ranging and impressively detailed evaluative answers which focused heavily on criticism but certainly did not hesitate to identify positive aspects of the defences. Weaker answers tended to identify possible criticisms without really developing them, so that, instead of containing convincing analysis and evaluation, they took on the structure of lists. Weaker answers were also frequently characterised by evident lack of real understanding of the arguments being advanced, and of the way in which evidence cited (such as the decisions in cases) provided support for those arguments. For example, even in stronger answers, many students alleged anomalies in the defence of consent by reference to the comparison/contrast between cases such as *Brown* and *Wilson* and *Emmett* and *Aitken* which, at the very least, depended on questionable interpretation of the similarities between the cases. In intoxication, students often deemed it indisputable that the decision in *Kingston*—that a drunken intent is still an intent, even when resulting from involuntary intoxication—was wrong. Though this may be arguable, a more balanced view might have recognised the powerful reasons advanced by their Lordships in the House of Lords to support their decision.

Discussion of suggestions for reform was often disappointingly brief and superficial, the usual approach being to add only a couple of sentences at the end of the answer, or at the end of the evaluation of the relevant defence. At their strongest, these suggestions rarely provided a comprehensive account of the range and depth of proposals made by bodies such as the Law Commission but, instead, simply picked out one or two more prominent suggestions with a little accuracy. At their weakest, the suggestions consisted of little more than the assertion that the law should be changed without any evident explanation of what form these changes might take. Given that students often seem very well informed in respect of critical evaluation, it is disappointing that still such little progress seems to have been made in understanding in appropriate detail what changes might be introduced to address criticisms. A very specific and puzzling example of this deficiency in dealing with proposals for reform was evident in answers which discussed the defence of insanity—as indicated above, that meant the overwhelming majority of answers. The Law Commission has most recently dealt with reform of the law on insanity in the context of an enquiry into the relationship between the defences of insanity and automatism. Having published a Scoping Paper in 2010, the Law Commission then published a Discussion Paper in 2013 which, though not a formal Consultation Paper, enabled it to communicate provisional proposals for reform. Given that most answers criticised the current law on insanity for its basis in a decision of 1843, and its incompatibility with modern notions of mental disorder, it is somewhat ironic that many students failed to mention the 2013 Paper and relied, instead, on proposals going back more than 60 years, to be found in the work of the Royal Commission on Capital Punishment in 1953. It is true that these answers usually managed also to mention (relatively) more recent proposals, such as those of the Butler Committee and those contained in the Draft Criminal Code of 1989, which remain of significance and relevance. Nevertheless, it was surely important to look at proposals devised in the light of the most contemporary knowledge and understanding of the issues. A slightly odd variant on this was revealed in some answers which mentioned the Scoping Paper (without any details) but declined to say anything further on the grounds that a Consultation Paper was still awaited!
Scenario 2

Question 04

In answering this question, students had to consider the possible criminal liability of Grace for causing injury to her housemate, Isla, and of Isla for making threats against Grace. Believing that another housemate, Holly, was stealing her food, Grace had set a trap by putting glass in a packet of cheese which she had left in the fridge. The actual thief was Isla and she suffered cuts to her fingers when she took the cheese from the fridge. The cuts were almost certain to satisfy the definition of ‘wound’ in the offence of unlawful and malicious wounding (Offences Against the Person Act 1861 s20) as suggested by the case of JCC v Eisenhower. Grace’s liability then depended on whether she intended or was reckless as to causing some harm (Mowatt). In view of her reasons for putting the glass in the cheese, it was difficult to resist the conclusion that, at the very least, she would have been aware of the risk of injury to anyone handling the cheese. Though it seems unlikely that she would have intended serious injury, the possibility could not be ruled out entirely since she might have intended the suspected thief to eat the cheese and swallow the glass. In that case, the offence could have been the more serious one of unlawful and malicious wounding with intent to cause grievous bodily harm (Offences Against the Person Act 1861 s18). Relying on the application of the principle of transferred malice (Latimer, Mitchell), the fact that Grace’s actions were aimed at Holly would not have been an obstacle to her conviction for an offence against Isla. Alternatively, albeit worthy of less credit, the offence could have been argued as assault (battery) occasioning actual bodily harm (Offences Against the Person Act 1861 s47), the battery being indirect and analogous with that in DPP v K.

Most students recognised that a ‘wound’ was involved, and so discussed s20 and/or s18, though some discussed s47 in addition or as an alternative. Students usually understood the actus reus elements of the chosen offence(s), which they were able to apply convincingly to the facts, citing appropriate case authority and illustration. They were often equally adept at explaining the mens rea requirements, though a minority of students still fell into error in asserting that the mens rea of s20 requires proof of an intention to wound or cause serious injury, or recklessness as to either consequence. Similarly, students who discussed s18 sometimes asserted that an intention to wound would suffice. However, students did not speculate very convincingly on exactly what may have been in Grace’s mind when she laid the trap for Holly, so that, even if they had correctly explained mens rea, they were rather less adept at applying it. Where students argued for s18, this was either because they considered that Grace might have been expecting Holly to eat the glass (see above), or because (much less convincingly) they simply believed that fingers being cut would be likely to lead to serious injury. Most recognised the transferred malice issue (though a sizeable minority did not) but answers rarely took time to explain and apply it fully, the usual approach being little more than a one sentence statement that the malice would be transferred from Holly to Isla. Occasionally, students confused transfer of mens rea with transfer of actus reus, or treated transferred malice as a causation issue.

The facts in the scenario indicated that Grace was suffering from paranoid delusions, for which she was undergoing psychiatric treatment. This raised the possibility that she could plead the defence of insanity to any charge arising out of the cheese incident. She would be required to prove that she was suffering from a defect of reason (Clarke) due to disease of the mind (Kemp, Sullivan), such that she did not appreciate the nature and quality of her acts (Codere, Johnson) or, if she did, that she did not know that what she was doing was legally wrong (Windle, Johnson). It was certainly arguable that Grace was suffering from a disease of the mind, of which the paranoid delusions were probably a symptom, rather than the disease itself (which might be, for example, schizophrenia). Whether or not she was suffering from a defect of reason at the time is rather more questionable. After all, she was actually correct in believing that someone was stealing her food and a simple mistake as to the identity of the thief hardly seemed so significant. However, if it
was sufficient evidence of a defect of reason, the further hurdle to surmount concerned its effect. It was difficult to believe that she did not know what she was doing (‘nature and quality’), so the more profitable argument would have been that her paranoid delusions prevented her from understanding that there was anything legally wrong in what she was doing.

As in Question 01 (defence of others/prevention of crime), the defence of insanity often went completely unremarked. Where it was recognised, there was a considerable variation in quality of treatment. Stronger students explained the first two elements thoroughly but even they sometimes struggled with application, especially of defect of reason, which they often interpreted as inevitably satisfied by knowledge of the psychiatric treatment for paranoid delusions. Some argued perceptively that the defect of reason might be evidenced by the potential violence of her response. Weaker students usually identified one or both of these elements but explained them very superficially and with some confusion, often using the terminology to be found in the Homicide Act 1957 s2 in respect of diminished responsibility, and not always convincing that they understood the difference between the two defences. Indeed, occasionally, students specifically argued for that defence, forgetting that it is a partial defence only to murder. Most students made some attempt to deal with the third element but the main defects concerned the second limb (knowledge that the conduct was legally wrong). This was often omitted entirely or was identified but ignored in application in favour of the much less profitable (from Grace’s perspective) first limb (nature and quality).

Isla’s angry response to Grace’s conduct was to smash up Grace’s room and then to send her a text suggesting that she would smash her up next. Grace reacted by going to stay at her father’s house so as to avoid going back. Even so, she suffered extreme attacks of anxiety and depression. The anxiety and depression were certainly capable of falling within the definition of actual bodily harm, extending as it does to psychiatric injury (Chan Fook) but they might also have provided sufficient evidence of more serious injury, and so be regarded as grievous bodily harm (Burstow). Consequently, Isla was possibly guilty of offences under s47 and s20, and perhaps even under s18. The offence of assault had to be proved as an essential constituent of the offence under s47. Even though Grace was out at the time when Isla sent the message, the threat of immediate unlawful personal violence could still be established by relying on the approach in Constanza, whilst Isla’s intention to cause Grace to fear it seemed very clear. In that case, the remaining element was the causal connection between the assault and the actual bodily harm. Here, the thin skull rule (Blauwe) could have been relevant in view of Grace’s existing psychiatric illness. Proof of the more serious offence under s20 did not depend on proof of a technical assault but merely upon establishing a causal connection between the conduct and the serious harm, much as in demonstrating the causal connection in s47. Of course, proof that Isla intended or was reckless as to some harm in sending her text might have been a little more difficult to establish since this was not a course of conduct as in cases such as Burstow. In this context, Isla’s possible knowledge of Grace’s psychiatric condition might have supplied some evidence that she at least foresaw the risk that Grace would suffer further such harm but it was perhaps a little unlikely that this would extend to intention to cause serious injury, so rendering a conviction for the offence under s18 improbable.

The responses actually elicited ranged from the offence of assault to the offence under s18, though most concentrated on s47 and/or s20. Many students chose to explore assault in detail, and then suddenly to jump to s20 or s18, rather than to s47, so abandoning the technicalities of the assault which they had often so carefully established. This seemed to result from viewing the incident as being comprised of two distinct components (threat and later consequences) and so revealing two distinct offences rather than as one incident which could be viewed as an offence of either s47 or s20, or both. When dealing with assault, students usually stated that the threat must be of ‘immediate’ unlawful violence but often failed to develop the explanation fully or accurately, and so applied it superficially. For example, it was frequently asserted that ‘immediate’ means ‘at any
time’, as if the continuation of that phrase in the case of Constanza – “not excluding the immediate future” – was unknown to students. Students generally provided strong explanation and application of the remaining actus reus elements of s47 and of the actus reus elements of s20, identifying the extension of ‘bodily’ harm to psychiatric injury, though students very often missed the possible relevance of the thin skull rule in establishing that Isla’s conduct had caused the harm. Students were rather less convincing when they explained and applied mens rea, particularly in the s20 offence, where they did not really confront the issue that a person making a threat might expect the victim to be fearful but not to suffer psychiatric injury from one incident alone. 

Surprisingly, students usually made reference to Isla’s possible knowledge of Grace’s pre-existing psychiatric injury only when they sought to argue that Isla intended to cause serious harm sufficient for the s18 offence. They were seemingly unaware that this argument might have been equally valuable in trying to prove intention, or more likely recklessness, in relation to causing some harm for the s20 offence. Some students attempted to argue that Isla might be able to plead self-defence. Since the defence is available only when the accused uses ‘force’ in self-defence, it is extremely unlikely that the defence could apply to Isla’s threat. Even if it could, there was absolutely no evidence of the necessity for the use of force.

**Question 05**

Students answering this question were instructed to discuss Jamie’s possible liability for the offence of murder. This arose out of the death of Holly when Jamie set fire to the house which she shared with Grace and Isla in the belief that Isla was in the house but with no knowledge of whether Holly was also at home. In the event that a prima facie case of murder could be made out, the partial defences of diminished responsibility and loss of control might be raised in order to reduce the crime to voluntary manslaughter.

The facts provided little reason to suppose that Jamie could resist the claim that he had committed the actus reus of murder. He had set fire to the house inside the doorway by pouring petrol through the letter box and pushing in lighted newspapers. Though Holly did not wake from a drug-induced sleep and died from inhaling smoke, there was nothing in her conduct to break the chain of causation because it was entirely foreseeable that someone might not wake for any one or more of many reasons and it did not lie within Jamie’s mouth to place responsibility on her for failing to do so. So, the real issue was whether malice aforethought could be proved against Jamie. On one view, Jamie’s anger and concern for his daughter, the time at which he set fire to the house, and the way in which he did it, using petrol to accelerate the blaze and locating it at a major exit route, all pointed to an aim or purpose to cause death or serious injury to Isla. At the very least, it could be argued that the jury might be persuaded that a reasonable person would foresee the virtual certainty of death or serious injury and that Jamie himself did so. In that case, the jury could then be invited to ‘find’ the relevant intention (Matthews and Alleyne) and to transfer the malice from the crime intended against Isla to the crime actually committed against Holly. Yet a more benign view might have suggested that it was not difficult to be convinced that, in his current state of mind, and seriously affected by alcohol, Jamie might have had little true awareness of the potentially fatal consequences of his actions. This view might be strongly bolstered by resort to the plea of intoxication, given that murder is a specific intent offence. Of course, that plea, if successful, would condemn him to conviction for the lesser offence of involuntary manslaughter (Lipman).

Disappointingly, the majority of students wrote far too much on the actus reus of murder, to the detriment of a comprehensive analysis and application of the mens rea of murder. It was difficult to understand why so many students should consider that discussion of the meaning of a ‘reasonable creature in being’ and ‘within the Queen’s peace’, neither of which were remotely in issue, should predominate over explanation and careful application of direct and oblique intention in respect of killing and causing serious injury. It was more understandable that students should address the
issue of causation in relation to Holly’s drug-induced sleep, even though most who did so eventually concluded (often by reference to the thin skull rule) that there would be no break in the chain of causation. In dealing with mens rea though many students did explore the meaning of express (usually, and incorrectly, termed ‘expressed’) malice and implied malice, and direct and oblique intention, just as many disposed of the differences very superficially. The application was still weaker, many students simply making bald assertions that Jamie intended death or serious injury, sometimes directly, sometimes obliquely, without pausing to explain what might be foreseeable as possibility, probability or virtual certainty, and without paying any significant attention to the facts themselves. Additionally, students who did rely on oblique intention and foresight of virtual certainty often seemed to forget the Matthews and Alleyne interpretation of Woollin, that proof of foresight of virtual certainty is not intention in itself but merely very powerful evidence of it, leaving the jury with the final decision on whether to find intention. Some students missed the transferred malice aspect, though many identified it but relied upon their explanation the principle supplied in answering Question 04. Given the paucity of detail in many of those explanations, this was not always a wise decision! Conversely, some students who had ignored transferred malice in the previous answer discussed it thoroughly here. Those who explained and applied the plea of intoxication usually did so very competently, distinguishing between voluntary and involuntary intoxication and between specific and basic intent offences. Yet they were probably significantly in the minority, the majority appearing to consider that the evidence of intoxication was relevant only in the context of the defence of diminished responsibility (or as a hindrance to the defence of loss of control).

If prima facie guilty of murder, Jamie could have sought to reduce the crime to manslaughter by pleading diminished responsibility. The facts stated that he was addicted to alcohol (alcohol dependency syndrome – ADS) which caused him to suffer from depression and short temper. He had also been drinking heavily for a substantial part of the day before he set fire to the house. The defence requires the accused to prove an abnormality of mental functioning, from a recognised medical condition, such that it substantially impaired his ability to understand the nature of his conduct, form a rational judgment, or exercise self-control. It must also provide an explanation for his conduct in killing, in the sense of causing it or being a significant contributory factor to it. It might be supposed that Jamie was very drunk by the time that he set fire to the house (though his addiction would probably give him a greater than average capacity to absorb alcohol). Additionally, it may have brought on a bout of depression and/or short temper. Individually or in combination, these may have amounted to an abnormality of mental functioning. The key issue was probably whether they resulted from a recognised medical condition. Clinical depression is clearly such a condition but, in Jamie’s case, this seems to have been caused by the ADS. Consequently, the most likely recognised medical condition was the ADS itself. This meant that any of the effects of the involuntary drinking (drinking to satisfy the addiction-induced craving) could be taken into account (Wood, Stewart), whilst the effects of any voluntary drinking must be discounted (Dietschmann, Dowds). Given all the circumstances, it is possible that the abnormality of mental functioning substantially impaired his ability to form a rational judgment and/or exercise self-control. Though possibly too late for students to be aware of it, the Supreme Court in Golds [2016] ruled that a judge should not normally elaborate on the meaning of ‘substantial’ but that, if required to do so, should indicate that it is always a matter of degree but that it would never be satisfied by something which just exceeds the trivial. Provided that the abnormality of mental functioning from the ADS caused or made a significant contribution to Jamie’s conduct, the defence would be made out. It did not have to be the sole, or even a major, cause or contribution.

There were many excellent analyses of the defence, and almost all students had a strong grasp of the three elements that the accused must prove. The main weakness was in the treatment of the alcohol addiction/intoxication aspect with respect to the need to prove a recognised medical condition. Many students identified depression as the recognised medical condition, rather than the ADS. This implied that the real issue would be whether, discounting the effects of any alcohol
consumption, it could still be said that there was an abnormality of mental functioning attributable to depression which resulted in substantial impairment and explained Jamie’s conduct in the killing. Though this was arguable, it was a much more arduous route by which to establish the defence and students usually struggled to explain the requirements with any clarity. Students adopting this approach usually then dealt with intoxication only as an obstacle to satisfying the requirement for the abnormality of mental functioning to explain Jamie’s conduct in killing Holly. Those who treated the ADS as the recognised medical condition avoided many of the difficulties posed by the depression route. Nevertheless, they often merely asserted that ADS would suffice as the recognised medical condition and did not sufficiently explore the involuntary and voluntary drinking associated with it, nor fully connect it to the abnormality of mental functioning. There was some very good explanation and application of the substantial impairment of ability aspect, with students usually opting for the effect on forming a rational judgment, or exercising self-control. It was also very encouraging to see that, as in 2016, students paid significant attention to the requirement for the abnormality to provide an explanation for Jamie’s conduct, an aspect which for many years was treated very superficially or ignored entirely.

The fact that Jamie was responding to distressing information given to him by his daughter, Grace, when he set fire to the house raised the possibility that he could also plead the defence of loss of control under the Coroners and Justice Act 2009 ss54-55. Jamie would be required to introduce some evidence, or some evidence would have to emerge, to suggest that he suffered a loss of self-control caused by the ‘fear trigger’ (fear of serious violence from Isla against another identified person – Grace) or the ‘anger’ trigger (things done or said or both, constituting circumstances of an extremely grave character, and causing him to have a justifiable sense of being seriously wronged), and that a person of his sex and age with a normal degree of tolerance and self-restraint, and in his circumstances, might have reacted in the same or a similar way. In that event, the prosecution would then have to prove that the defence failed. In assessing this evidence, and interpreting the law, it was important to recognise that case law interpreting the old law of provocation is now largely irrelevant (Gurpinar, Kojo-Smith) and that it should never be cited as authority for rules which are actually laid down in the 2009 Act. Jamie may have lost self-control (Jewell), though issues of delay and revenge would no doubt be important considerations. In view of the threat of physical injury to Grace, there was certainly evidence to support an argument that he feared serious violence might be inflicted on Grace by Isla. Nothing ‘done or said’ by Isla was directed against Jamie himself. However, his concern for the mental and physical well-being of his daughter, both of which were at risk from Isla’s actions, could possibly have been considered to convert those actions into ‘circumstances of an extremely grave character’, and so give him a justifiable sense of being seriously wronged. In considering the comparison with the reactions of a person of ordinary tolerance and self-restraint, Jamie’s ‘circumstances’ would not include those relevant only to his general capacity for tolerance and self-restraint. Consequently, his ADS and his drinking would be discounted if their effect was simply to make him short-tempered or to induce depression with similar effects. Of course, Jaime did not kill Isla. He killed Holly, who had not smashed up Grace’s room, had made no threats to Grace and had played no part in the theft of her food. Yet, if the prosecution were able to rely on transferred malice for a conviction, then Jaime was equally entitled to rely on a transfer of the benefit of the defence.

As with answers on the diminished responsibility aspect, there were many very thorough analyses of the rules on loss of control, supported by reference to cases decided under the 2009 Act and providing a sound basis for perceptive application in accordance with the suggestions outlined above. Students usually wrote extensively on loss of self-control, taking into account the delay but often perceptively remarking that his brooding and drinking may have produced a build-up of tension culminating in an explosion of rage sufficient to cross the threshold for loss of self-control. Nevertheless, they usually treated this cautiously because of the possibility that it was underlain by motives of revenge which would have been fatal to the plea. However, the area which continued to represent the greatest weakness in analysis was perhaps the most crucial, namely the trigger(s).
Too often, either or both the fear and anger triggers were merely described, in varying degrees of accuracy, with little attempt to examine their content and the significance of their objective nature, and so of the demands which they impose. Almost inevitably, this resulted in equally superficial application. Rather surprisingly, many ignored the possibility that Jamie might rely on the fear trigger, or mentioned it only to dismiss it rather peremptorily. In discussing the third element (the comparison with a person of normal tolerance and self-restraint), students were usually adept at stating the requirements but often did not attempt to examine the scope of the ‘circumstances’ and tended to conclude rather too easily that no person of normal tolerance and self-restraint would ever have acted in that way. As suggested in the 2016 Report, answers by weaker students were not usually inaccurate in any significant way. Simply, explanation tended to be either less comprehensive or less detailed, or both, and application was less perceptive, and often rather unspecific. However, it remained evident that some students still do not understand that the rules on the defence of loss of control are now to be found exclusively in the Coroners and Justice Act 2009, and its current interpretation, and not in the rules derived from cases which were decided under the former common law defence of provocation, no matter how close the similarity between any of those rules. A very small number of students did recognise that the benefit of the defence could be transferred along with the transfer of the malice.

As in answers to Question 02, so here, some students chose to ignore the instruction to deal with a specific aspect of unlawful homicide, in this case murder, and opted instead to discuss unlawful act manslaughter, either exclusively or in addition to a discussion of murder. It was difficult to understand this choice, especially where it ignored murder entirely, since it does not lie with the accused to determine the offence with which he is charged and he must meet the evidence produced in support of the charge chosen by the prosecution. Of course, in discussing the elements of unlawful act manslaughter, such students inevitably dealt to some extent with elements of the offence of murder, for which they were credited. However, such answers developed a very different focus and often (not surprisingly – but rather fatally) omitted consideration of the partial defences of diminished responsibility and loss of control. Those who discussed unlawful act manslaughter in addition to murder and the partial defences probably succeeded only in reducing the time available to discuss the latter, since little was added in the involuntary manslaughter discussion.

**Question 06**

For comments on answers to this question, see comments on answers to Question 03 (above).

**Scenario 3**

**Question 07**

The facts in the scenario for this question informed students that Austin had agreed to pay Blake £1500 for Blake to supply and install some new central heating radiators in Austin’s house. Consequently, the contract between Austin and Blake was governed by the *Consumer Rights Act 2015*, the relationship being one of consumer and trader. The contract was a ‘mixed’ contract, that is, a contract for the supply of goods and supply of services. This gave Austin the right to goods which were of satisfactory quality (*s9*), fit for their purpose (*s10*) and matching their description (*s11*). Austin had the right to a service performed with reasonable care and skill (*s49*), and, additionally, any information given to Austin by, or on behalf of, Blake about himself or the service would be binding if Austin ‘took it into account’ when entering the contract (*s50*). Consequently, the radiators installed by Blake were probably in breach of *s9, s10* and *s11*. They did not supply enough heat, and so were not fit for their purpose, an aspect of satisfactory quality under *s9(3)(a)* and the essence of *s10*. Their difference in appearance from what was agreed, so that they did not match existing radiators, meant that they were not as described (*s11*). Leaks in some of the
pipework were almost certainly attributable to poor workmanship in the installation, and so amounted to a breach of s49. Blake’s false statement that he was on the ‘gas safe register’ would be binding on him, and would be a breach of s50 if Austin took it into account in entering the contract. It is possible that Austin did not know that Blake could legally do the work without being so registered. In that case, Austin may have taken it into account when deciding to employ Blake.

Consequently, Austin could seek remedies for the various breaches. Assuming that he did not want to abandon the project entirely, he would have the right under s55 to a ‘repeat performance’ in terms of the installation of the radiators, including watertight pipework. Of course, he would wish for replacement radiators of appropriate appearance and producing sufficient heat. That right would be available to him under s19 (as developed in s23). He would also have the right to a reduction in price because of the breach of s50, if that term was applicable. More drastically, he could exercise his right under s19 (as developed in s20 and s22) to reject the radiators within thirty days of installation and treat the contract as at an end (the ‘short-term right to reject’). That would require him to argue that the installation itself was also a sufficient breach to entitle him to bring the contract to an end. Should he opt instead for replacement and repair, further failures by Blake would give Austin rights of final rejection or reduction in price (s19, s23, s24). Since none of these rights and remedies can be excluded or restricted by contractual terms (s31, s57), Blake could not sustain his claim that he was free of liability because Austin had signed the invoice. His offer of repair as a matter of ‘goodwill’ was also, therefore, of little significance. Of course, it might also be argued that, in making his false statement about his qualifications, Blake was guilty of misrepresentation. This would bring into play standard remedies for what would almost certainly be a fraudulent representation. Yet difficulties of proof of misrepresentation, including specifically of reliance, and general complexity of rules on remedies compared with the simplicity of the requirements of s50 of the 2015 Act on false statements, and the availability of the other powerful rights and remedies under the 2015 Act, rendered this an unlikely route for Austin to take in seeking redress.

Answers to this question were rather disappointing. They were rarely comprehensive, revealing a considerable imbalance of knowledge and understanding between rights and remedies, and frequently very superficial in all respects. In particular, ‘discussion’ of statutory rights often amounted to little more than identification of the relevant term with no further elaboration. In discussing ‘satisfactory quality’ for instance, though some students mentioned relevant case interpretation, few quoted the provisions of s9(3). Similarly, in dealing with fitness for purpose (s10), few students considered the precise expression in s10(1) and its application to the facts. Discussion of remedies was usually devoid of any clear framework and mixed statutory and common law remedies in an extremely confusing manner, so that it was usually impossible to see any logical progression through the various stages of remedies as they are set out in the statute. Some students wrote at length on the common law rules on incorporation of terms to argue that the signed invoice deprived Austin of any rights and remedies, so that he might be grateful for Blake’s goodwill offer. More perceptive students at least realised that, incorporated as a term or not, the concession made by Austin in the signed invoice would have no legal effect. Many students concentrated on misrepresentation, on which they often wrote detailed explanation and application, though sometimes failing to acknowledge the difficulties that could face Austin in proving reliance on the false statement. Of course, this discussion was creditworthy, and was rewarded appropriately, but it tended to reveal a misunderstanding about the relative utility in a trader/consumer context of Consumer Rights Act 2015 rights and remedies when compared with rights and remedies afforded by common law and statutory rules on misrepresentation. It is, perhaps, a significant commentary on this aspect that students did not seem to be aware of s50.

The explanation of rights and remedies and comments on student responses provided above have referred throughout to the Consumer Rights Act 2015. In reality, the approach to the question was usually characterised by reference (principally) to the Supply of Goods and Services Act 1982 (and
occasionally to the *Sale of Goods Act 1979* and the *Unfair Contract Terms Act 1977*. Since the 2015 Act rights in issue were, for the most part, identical with those in the earlier statutes, this was not fatal to an accurate answer but it helped to explain why s50 was ignored and it also presented difficulties in relation to remedies, since the structure of remedies in the 2015 Act is a little different from that provided by the earlier statutes. The same point may be made about terms excluding or restricting liability. For example, the *Unfair Contract Terms Act 1977* permitted exclusion or restriction of liability for breach of the term as to reasonable care and skill in the provision of services under the *Supply of Goods and Services Act 1982* s13 if reasonable. By contrast, the *Consumer Rights Act 2015* s57 completely prohibits exclusion or restriction of liability for breach of the corresponding term under s49. Perhaps the strangest approach to the 2015 Act and preceding statutes was represented by those answers in which students relied on the *Supply of Goods and Services Act 1982* for the rights but on the *Consumer Rights Act 2015* for the remedies!

**Question 08**

The facts in the scenario explained that Clarksons, owners of a large store, had engaged Dixons to build and equip an extension to the store for a price of £75 000. However, this had proved to be impossible when the bridge providing the only access to the store was condemned as unsafe, was closed to traffic, and ordered to be demolished. By this time, Dixons had spent £15 000 in preparation for the work and had also ordered goods worth £5000 from Erdale. The task for students was to determine the effect on the contracts of the inaccessibility of the store for a period of approximately 18 months. The issue was complicated by the fact that Clarksons were aware all along that the safety of the bridge was in question. Clearly, the contract between Clarksons and Dixons could have been frustrated on account of impossibility or unavailability of the subject matter (*Taylor v Caldwell*). If so, then the issue of frustration would also have arisen in relation to the contract between Dixons and Erdale. Here, however, there was no question of impossibility. Rather, it would have been an argument that the common venture was frustrated (*Krell v Henry, Herne Bay Steamboat Co v Hutton*).

Alternatively, it could be argued that the prior knowledge attributable to Clarksons meant that, far from being an issue of frustration, the facts disclosed a simple case of anticipatory breach. Clarksons knew of the strong possibility that the bridge would be condemned and failed to make any arrangements within the contract with Dixons to deal with it (*Maritime National Fish Ltd v Ocean Trawlers Ltd*). In that case, there would also be no frustration of the contract between Dixons and Erdale but a possible breach by Dixons if they failed to go ahead. If the contracts were frustrated, the provisions of the *Law Reform (Frustrated Contracts) Act 1943* would come into play. Under s1(2), the £10 000 already paid by Clarksons to Dixons would be recoverable, subject to the discretion of the Court, as it considered ‘just’, to permit Dixons to retain any amount (not exceeding £10 000) by way of expenses incurred by Dixons. Given the £15 000 already expended by Dixons, any hope of recovering further amounts would depend on the exercise by the Court of its discretion under s1(3) to award any sum considered ‘just’ to recognise any ‘valuable benefit’ conferred on Clarksons before the frustrating event. Viewed as breach rather than as frustration, the inability of Clarksons to perform their side of the contract would have entitled Dixons to wait until the time for performance before treating it as a breach of condition bringing the contract to an end, or to act on the breach immediately. In either case, Clarksons would be obliged to pay damages for any reasonably foreseeable losses, including any reasonably foreseeable losses incurred by Dixons in connection with the Erdale contract. Of course, Erdale would equally have been able to recover damages for their losses from Dixons.

Students answering this question invariably understood that the doctrine of frustration was involved and they were generally adept at explaining the different circumstances in which it may apply. However, most did not fully understand the structure of the obligations, and their interdependence. Consequently, the tendency was to concentrate on the relationship between Clarksons and
Dixons, to the detriment of any significant analysis of the relationship between Dixons and Erdale. In the most extreme examples of this approach, the relationship between Dixons and Erdale was simply ignored entirely. In dealing with Clarksons and Dixons, students usually argued for frustration because of unavailability of the subject matter (impossibility), though some placed it within the category of frustration of the common venture. Unfortunately, as has frequently been observed in the past in these reports, students simply do not seem to understand how the 1943 Act deals with the consequences of a termination of contract by frustration. So, though there was often some discussion of the entitlement to recovery, there was little accurate explanation and application of the discretion of the court to make directions to ensure recompense for expenses incurred or benefits conferred. Still worse, some students clearly had no idea at all that the effects of frustration are determined by application of the rules found in the 1943 Act and treated frustration as some kind of breach, with associated remedies.

A minority of students recognised that, given the foreseeability of the risk of the bridge closure, the contract may not have been frustrated, and so discussed breach. Stronger answers identified anticipatory breach and explained the different courses of action open to Dixons. Weaker versions did not make the distinction between anticipatory and immediate breach, or did not pursue explanations of the consequences of anticipatory breach. As indicated above, few students dealt competently with the impact on the contract between Dixons and Erdale, though discussion of possible breach was generally more evident than discussion of frustration. On the whole, students dealt very superficially, if at all, with remedies for breach. There were also some unusual analyses of the facts. For example, some students were convinced that consideration was a significant issue, whilst others were certain that the solution lay in the law on misrepresentation. A final example of these odd approaches was that some students sought to deal with the status, rights and duties of Erdale through the rules on privity of contract.

Question 09

This question asked students to consider how satisfactory is the current law on agreement (offer and acceptance and related rules) in contract, and to consider what reforms might improve the law. The nature, quality, approach and content of the answers very much mirrored those evident in responses to similar question in earlier examination papers, the comments on which remain directly relevant and applicable. Students were always able to present some material which could be credited, but the general quality of evaluation varied enormously across the answers. Some students succeeded in developing precise and extensive accounts, whereas many tended to rely largely on recitation of rules with little evaluative comment at all. In relation to offer, the common approach was to explore the distinction between offer and invitation to treat by reference to cases such as Fisher v Bell, Partridge v Crittenden, Pharmaceutical Society of Great Britain v Boots Cash Chemists, and Carlill v Carbolic Smoke Ball Co. What was very evident was that students found it difficult to identify any underlying rationale in decisions such as those in, say, Partridge v Crittenden and Carlill v Carbolic Smoke Ball Co. In dealing with rules on revocation, students sometimes provided interesting critical accounts of the situation encountered in a case such as Dickinson v Dodds but, more usually, explanation predominated over evaluation.

Discussion of acceptance tended to concentrate on the rules for postal acceptance, the distinction between counter offers and requests for further information, and on silence and acceptance. As always, decisions in cases such as Adams v Lindsell and Household Fire and Carriage Accident Insurance v Grant were the subject of highly critical comments, though, surprisingly, there was relatively little discussion of problems caused by the adoption of modern technology. As on previous recent occasions when a question of this kind has been asked, the traditional ‘battle of the forms’ issue was rarely addressed. On the other hand, the issue of acceptance in unilateral
contracts, traditional or not, provoked some good answers in which the decision in a case such as *Errington v Errington and Woods* featured prominently.

Inevitably, students who were able to present a detailed, well-structured analysis which contained significant criticisms were in a much stronger position to make substantial proposals for reform than those whose answers consisted mainly of reiteration of rules or were vague and imprecise in assessment. Given that there was little discussion of problems caused by the adoption of modern technology, it was not surprising that there was little on proposals for reform in that area. Weaker students were driven to rely on rather general suggestions that changes should be made but with little idea of what form they might take.

Scenario 4

Question 10

This question raised issues arising out of the rules on formation of contract, and required discussion of agreement, intention to create legal relations, and consideration. Assuming initially that intention and consideration were present, the analysis of the agreement aspect would begin with a determination of whether Keira’s advertisement was an offer or an invitation to treat (*Fisher v Bell*, *Partridge v Crittenden*, *Pharmaceutical Society of Great Britain v Boots Cash Chemists*). The sensible approach here was to adopt one interpretation and pursue the following events to a conclusion (perhaps involving further decisions on alternatives), and then to repeat the process with the alternative interpretation. Taking the advertisement as an offer, Harley’s statement during his visit to Keira’s house was clearly a purported acceptance which was valid unless not in compliance with the terms of the offer because he made a visit rather than telephoning (*Carlill v Carbolic Smoke Ball Co*). If Harley did not validly accept, then the way was open for Lilly to do so, and it seems that her telephone call would have sufficed. So, whether the offer was accepted by Harley or by Lilly, a contract certainly came into existence before Keira changed her mind and any attempt by her not to complete performance would amount to a breach.

Interpreting the advertisement as an invitation to treat, both Harley and Lilly would have made offers which were not accepted by Keira, leaving her free to make a further offer to either or both. That offer was for the sale of the hutch for £50, collection to be the responsibility of the buyer. Harley rejected the offer, whilst Lilly accepted it, resulting in the formation of a contract between Keira and Lilly and ensuring that Harley had no rights against Keira.

As indicated, on the first interpretation (the advertisement was an offer), Keira would have made a contract with Harley or with Lilly. In either case, she would essentially have been giving the hutch away for nothing and merely recovering a delivery fee from Harley. She might seek to avoid that, and so claim that the valid contract was between herself and Lilly as agreed later (£50 for the hutch, collection to be Lilly’s responsibility) by arguing that, irrespective of agreement, there was no intention to create legal relations and/or no consideration supplied in the earlier agreement(s). In the case of Harley, the argument on intention to create legal relations might be based both on some prior relationship between them and, perhaps rather more significantly, on Keira’s evident intention to give the hutch away for nothing, save only for some money to cover expenses if she had to deliver it. Only the second of those two reasons would apply to Lilly. In the later agreement with Lilly, of course, there was clear evidence that Keira was now intending to make some money on selling the hutch, and little reason to suppose that there was no intention to create legal relations. Again, in the first alleged agreement(s), it could be argued that there was no consideration but that, rather, the hutch was a gratuitous gift. However, this would be less likely to be successful since Keira was requiring something of the person who acquired the hutch, namely, money for delivery or time and effort in removing it. None of the above would be relevant, of course, if the advertisement was merely an invitation to treat. In that case, as explained earlier,
there would be no contract until the agreement made between Keira and Lilly, which undoubtedly was intended to create legal relations and displayed evidence of consideration.

Answers to this question tended to concentrate almost entirely on the agreement aspect, with very little examination of the intention to create legal relations issue and none at all of consideration. Students were at their best in explaining and applying the distinction between offers and invitations to treat, even though they were usually unable to provide any significant rationale for the distinction as applied to illustrative cases. Consequently, application of the distinction to Keira’s advertisement often lacked clarity and the decision on how to categorise it often appeared merely arbitrary. However, the real weakness of answers lay in the rather general inability to work through the different possibilities in any logical manner. As a result, the analysis frequently appeared chaotic and semi-coherent and the answer gained credit mainly for the initial discussion of the distinction. Because of this, there were a number of different conclusions as to whether, and between whom, a contract had been made. Even when students suggested that Keira had been in breach of a contract already made by her subsequent conduct in demanding £50 for the hutch as well as its collection by the purchaser, they did not really attempt to explain what remedy or remedies might be available.

Question 11

The facts in the scenario for this question revealed that a contract was made between Keira and Wordflow for the sale and purchase of a printer for £100. This contract was governed by the Consumer Rights Act 2015, the relationship being one of consumer and trader. The contract gave Keira the right to goods which were of satisfactory quality (s9) and fit for their purpose (s10). The repeated jamming of the paper-feed clearly amounted to a breach of both terms, entitling Keira to remedies which could not be negated by reference to any term purporting to exclude or limit Wordflow’s liability (s31). It appears that the time elapsed from purchase to manifestation of the deficiency (in excess of 30 days) would mean that she no longer had the short-term right to reject under s19, as further developed in s20 and s22. In that case, she would have rights to repair or replacement, supported by a final right of rejection or a reduction in price (s19, as further developed in s20, s23 and s24). All these remedies, of course, were available against Wordflow, not the manufacturer.

When Keira’s father, Nick, bought the ink cartridge for Keira’s new Wanchun printer, he, too, entered into a contract governed by the Consumer Rights Act 2015, the relationship with Mortons equally being one of consumer and trader. The contract gave Nick the right to goods which were fit for their purpose (s10) and as described (s11). Since Nick bought it on the express understanding that it was compatible with his daughter’s Wanchun printer, it seems that there was a breach of both s10 and s11 entitling Nick to the range of remedies identified above when discussing Keira’s claim in relation to the purchase of the defective printer, but probably including the short-term right to reject. Yet it was important to note that the question asked students to discuss the rights and remedies of Keira against Mortons, not those of Nick. Inevitably, the obstacle facing Keira was the doctrine of privity of contract, to overcome which she would have to rely on the provisions of the Contract (Rights of Third Parties) Act 1999. She could rely on the rights acquired by, and remedies available to, Nick if she could show that the contract expressly provided that she might do so, or the term(s) purported to confer a benefit on her (s1(1)). However, the 1999 Act further requires that Keira would have to be expressly identified in the contract by name, as a member of a class or as answering a particular description (s1(3)). It is a little doubtful whether such identification would have been made in a contract for such a mundane item as a printer cartridge. If the 1999 Act was applicable, then, in addition to the statutory remedies, Keira would have been able to claim damages for the consequential loss she suffered when the Wanchun printer was irreparably damaged.
A further important point to make concerns the falsity of the statement made by Mortons to Nick. Whether innocent, negligent or fraudulent, this statement certainly constituted a misrepresentation which induced Nick to buy the printer (that is, enter into the contract). As such, it would have given Nick rights and remedies against Mortons additional to those available under the *Consumer Rights Act 2015*. However, as a *misrepresentation rather than a term*, it would not have given those rights and remedies to Keira. The representation was not made to her and it did not induce her to enter into any contract. The rights given to a third party by the *Contract (Rights of Third Parties) Act 1999* are rights to enforce terms in a contract. In the case of Nick, Mortons and Keira, the relevant terms in the contract between Nick and Mortons, potentially enforceable by Keira, were, as previously discussed, those implied by s10 and s11 of the *2015 Act*. If the (mis)representation made by Mortons to Nick became a term of the contract, and if the *1999 Act* were applicable, then Keira would be able to enforce it as a term, not as a misrepresentation. But, of course, the term would simply be duplicating, probably less powerfully, the terms already implied by the *2015 Act*.

In relation to Keira’s rights and remedies against Wordflow, answers to this question took a very similar form to those on Question 07, on which comments have been made above. So, to reiterate, answers were not comprehensive. There was a considerable imbalance of knowledge and understanding between rights and remedies, and answers were frequently very superficial in all respects. For example, in dealing with fitness for purpose (s10), few students considered the precise expression in s10(1) and its application to the facts. Discussion of remedies was usually devoid of any clear framework and mixed statutory and common law remedies in an extremely confusing manner, so that it was usually impossible to see any logical progression through the various stages of remedies as they are set out in the statute. Some students focused on the exclusion or limitation of liability aspect though, in truth, this could have been disposed of relatively straightforwardly by reference to s31 of the *2015 Act*. In relation to Keira’s rights and remedies against Mortons, most students seem to have misunderstood what was in issue or to have dealt very briefly with issues of privity in which they did not properly explore Nick’s rights and remedies against Mortons, and displayed little knowledge and understanding of the provisions of the *Contract (Rights of Third Parties) Act 1999*. Instead, they tended to concentrate on analysing the misrepresentation made by Mortons to Nick, without understanding that this could have no relevance to Keira for the reasons which have been explained above.

**Question 12**

For comments on answers to this question, see comments on answers to Question 03 (above).
Use of statistics

Statistics used in this report may be taken from incomplete processing data. However, this data still gives a true account on how students have performed for each question.

Mark Ranges and Award of Grades

Grade boundaries and cumulative percentage grades are available on the Results Statistics page of the AQA Website.

Converting Marks into UMS marks *(delete if appropriate)*

Convert raw marks into Uniform Mark Scale (UMS) marks by using the link below. UMS conversion calculator