# Answer guidance

## Thinking point 7.1

Which of the following threats do you think amounts to serious injury?

a. a broken arm/leg

a dislocated finger

one slap around the head

a hundred slaps around the head

an electric shock?

* The *Graham*/*Howe* test requires death or serious injury.
* However, what is trivial to one person might be serious to another.

b. Economic ruin, damage to reputation, the destruction of a home or object with monetary or sentimental value?

* None of these would qualify.
* Do you think that this is fair, or overly harsh?

## Thinking point 7.2

Which of the following characteristics would be admissible in relation to the standard of reasonable firmness to be expected of a reasonable person after Bowen:

■ being 18: possibly

■ schizophrenia: yes

■ mild depression/anxiety: no

■ weakness and timidity: no

■ weakness/timidity of grandmothers aged 57 or 75: no / no (but age might be)

■ low IQ: no

■ Battered Woman Syndrome: yes

■ blindness: yes

■ suicidal tendencies: no.

## Thinking point 7.3

1. Do you think that ordinary people are heroes?

* There is no right answer to this question, but if your answer was not a definite ‘yes’ then you might question whether the law should expect them to be.

1. What moral principle is reflected in Howe’s stance on duress?

* Sanctity of life

1. Is there a ‘social good’ or utilitarian principle to the judgment?

* Preventing the defence from becoming a charter for terrorists and gangsters

1. If you were threatened that your two children would be shot unless you shot a stranger, what would you do? Would duress provide a defence? Should it?

* Your answer will depend at least in part on your views of the principles considered above.

## Thinking point 7.4

Are all murders morally the same? Do you think that any of the following murders are morally justifiable? Should duress be allowed?

■ A mother kills X when her child, who is being held hostage, is threatened with death.

■ A young child is threatened with death by his psychotic father if he does not assist in killing his mother.

■ A pregnant woman kills X rather than submit to being killed, in order to save the life of her unborn child.

■ A woman subject to domestic violence from her husband assists in killing his adversary.

* There is no single right answer to this question.
* Did thinking about the specific examples affect your answer to the original question?
* Note that duress would not be available in any of these examples.

## Thinking point 7.5

Consider whether duress of circumstances applies to the following:

■ D was approached in his car by a plain-clothed police officer. He thought he was going to be attacked and drove away at high speed. He was charged with reckless driving.

* *Denton* [1987] 85 Cr App R 246: duress of circumstances

■ D, who had been assaulted by her husband and threatened with death, drove 72 miles to her hometown whilst intoxicated in order to escape. Would it make any difference if she had only driven to the nearest place of safety?

* *DPP v Lorraine Tomkinson* (2001) EWHC Admin 182: 72 miles is more than necessary so defence fails.
* Defence will succeed provided D drives no further than necessary to escape.

■ D was forced to drive whilst drunk in order to escape from a threatened arson attack on her home.

* See *DPP v Lorraine Tomkinson*; but contrast *DPP v Mullally* [2006] EWHC 3448 (Admin) where driving half a mile whilst drunk and in night clothes to escape a threatening scene after the police had arrived was unreasonable.

## Thinking point 7.6

Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings requires that the UK ‘shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so’. Does s45 meet that obligation?

* It is unlikely.
* Ds accused of offences excluded by Schedule 4 will have to rely on prosecution discretion not to prosecute, or on the defence of duress.

## Thinking point 7.7

Answer the following. In each case, think of whether the harm outweighs the offence and the best interest’s criterion.

1. A 15-year-old anorexic girl is refusing to eat. Can a hospital force-feed her against her wishes? (*Re F and Re W (A Minor) (Refusal of Medical Treatment)*, CA, 10 July 1992.)

* If she lacks capacity to decide and treatment is justified in her best interests.
* Necessity would provide a defence.

1. A 20-year-old woman refuses a blood transfusion under the influence of her mother who is a Jehovah’s witness. Can the hospital force it upon her? (*Re T*, CA, 14 October 1992.)

* If her capacity has been overborne, then a decision can be made in her best interests.

1. A 12-year-old pregnant girl wishes to have an abortion, but her mother will not give consent because she does not agree with it. Can the hospital perform the operation? (*Re B (A Minor)*, Family Division, 20 May 1991.)

* In *Re B*, abortion was in her best interests. She was made a ward of court.
* Her best interests were paramount.
* Note that in all these scenarios, deciding on the person’s competence and/or best interests can be a complex and sensitive decision. It will usually require an application to be made to the civil courts.

## Thinking point 7.8

Following Re A, would necessity provide a defence in the following murder cases?

1. A mountaineer (D) whose companion (V) falls over a precipice is in danger of being pulled over the edge. D cuts the connecting rope and V falls to a certain death.

* This example was given by G Williams, *Criminal Law, The General Part*, as a justified killing.
* *Re A*: necessity is a defence where one of the victims is designated for death.

1. D climbs a ladder whilst leading a group to safety in an upturned and sinking ship. He pulls from the ladder a man who has frozen with fear so that the others may escape. The man is swept away to certain death.

* This reportedly happened during the sinking of the Herald of Free Enterprise ferry. See JC Smith, *Justification & Excuse in the Criminal Law* (Hamlyn, 1989) at 77-78.
* There was no prosecution. If D had been prosecuted, would they have a defence?

1. State security forces shoot down an airliner full of passengers which has been taken over by terrorists and is about to crash into a crowded skyscraper. It is the only way to save more lives.

* JC Smith, in his commentary to the case of *Shayler* (below) argues necessity should provide a defence.
* M. Bohlander, ‘In Extremis – Hijacked Airplanes, “Collateral Damage” and the Limits of Criminal Law’, [2006] *Crim LR* 579 argues that the criminal law of England and Wales currently has no answer to this problem.
* What do you think the answer would be? What should it be?

## Thinking point 7.9

Is necessity/necessity of circumstances available in the following?

[Remember: it involves a balancing of harms. The offence must be proportionate, the action must be taken to avoid a greater harm, the threat must be extraneous, possibly criminal, and must not involve self-help/direct action.]

1. A prisoner escapes from a burning gaol in order to save his life.
2. D smuggles through customs a parcel of cannabis for medicinal supply to others.
3. D, whose wife is suicidal because of enduring pain from multiple sclerosis, drives her to hospital despite being disqualified from driving.
4. D, who is suicidal because of enduring pain from multiple sclerosis, drives himself to hospital despite being disqualified from driving.

* Consider *Martin* and *Quayle* on duress of circumstances and necessity.
* The defence may succeed in (a) and (c) but is unlikely to in (b) or (d).

## Thinking point 7.10

1. Why do you think the law is based on ‘reasonable’ force in self-defence?

* Your answer might include the following factors:
* It means D (believes they) are actually under attack
* It excludes revenge or retaliation
* The victim of D’s use of force is also entitled to the law’s protection: their interests must be balanced with D’s.

1. Is this an objective test (one which is measured against the standard of a reasonable person) or a subjective test (one which is measured against D’s own standards)?

* This is an objective test
* However, allowances are made for heat of the moment decisions, genuine fear and mistakes.

1. Do you think reasonable force has been used in the following?

■ D shoots a burglar in the arm with an air rifle as he is making off with D’s television.

■ D finds an intruder in her bedroom at 3.00 am. Fearing she will be raped, she stabs him fatally in the neck with some scissors;

■ D stabs and injures a burglar whilst he is still outside D’s house on the pavement;

■ D knocks unconscious a youth who is about to break a priceless vase;

■ D breaks the arm of a youth whom he sees mugging a man.

* Key points to remember include:
* D’s use of force must be objectively reasonable
* This is assessed in all the circumstances as D believes them to be
* If the force is excessive, the defence is likely to fail. However, some allowance is made for decisions in the heat of the moment.
* Reasonableness is not always easy to quantify.

## Thinking point 7.11

Look at the facts of the American case of People v Goetz 497 NE 2d 41 (NY 1986) where D was twice acquitted of murder at a trial and retrial:

D, a racist, was approached by four black youths on the underground who asked him for money. D took out a gun and shot them dead. When charged with murder, D asserted that he honestly believed the youths were going to rob and assault him and that he acted in self-defence. Would his defence succeed in England?

* What did D honestly believe the circumstances to be? His belief need not be reasonable.
* In the circumstances as D believed them to be, was the force used reasonable?
* You might think that the use of fatal force was objectively unreasonable and that the defence should therefore fail.

## Thinking point 7.12

D is sitting in a café. He is approached by a plain-clothed county court bailiff (V) who enquires about an unpaid judgment debt. D does not know who V is. A fracas ensues and D hits V in the face. D is charged with assault. Does he have a defence?

* Did D honestly believe he was under attack? If so, his mistake does not need to have been reasonable.
* Was the force D used objectively reasonable?

## Thinking point 7.13

D stabbed her husband (V) fatally with a kitchen knife whilst he grabbed her throat in a struggle. She believed her life was in danger. D suffered from post-traumatic stress disorder and was extremely sensitive to danger. The facts did not disclose a life-threatening struggle. Does D have a defence to murder?

* What were the facts as D honestly believe them to be? This is a subjective test: her belief need not be reasonable.
* Was the force used reasonable in those circumstances?
* *Martin*/*Shaw*: jury should be directed on D’s perception of danger. Heightened sensitivity to danger from a violent partner may be evidence that the force was reasonable on the facts as D believed them to be.
* However, D’s characteristic of PTSD would be inadmissible in relation to the degree of force (*Martin*).

## Thinking point 7.14

D armed himself with a rice-flail: two pieces of wood joined by a chain sometimes used in martial arts. He and others went to confront someone known to be violent. He carried the weapon because of fear of imminent attack. Has D committed an offence and what is his defence?

* Offence: possession of an offensive weapon (s1 Prevention of Crime Act 1953)
* *Evans v Hughes*: defence of lawful authority or reasonable excuse is possible
* *Malnick v DPP* [1954] Crim LR 1989: defence unlikely to apply where D assumes risk of violent attack by seeking out the attacker
* *Devlin v Armstrong*: attack must be imminent
* *AG’s Reference (No 2 of 1983)*: although self-defence is a lawful object, preparing for it by arming oneself may be unlawful.

## Thinking point 7.15

D wished to protect the habitat of Great Crested Newts, occupying a site for which planning permission had been granted. V was legitimately using a mechanical digger on the site. D struck the digger with a stake. V chased D who struck V on the arm with the stake. D was charged with assault. Can D plead prevention of crime or defence of property?

* These facts are borrowed from *DPP v Armstong-Braun* [1999] Crim LR 416, Divisional Court (a case of self-defence rather than prevention of crime/defence of property)
* *Jones & Milling* and *Bayer* would deprive D of a defence since V’s actions are lawful.

## Thinking point 7.16

V entered a public house, the worse for drink, and demanded to be served. D, the publican, told him to leave. V refused. D bundled V out of the bar by pinning his arms to his side from behind and pushing him violently towards the door. V fell backwards down a flight of five steps, struck his head and received injuries from which he later died. D was charged with manslaughter and raised self-defence. Which of the following statements correctly represent the law?

a. The use of force in self-defence is subjectively assessed.

b. D can make an unreasonable but honest mistake that he is under attack.

c. D can use an unreasonable amount of force on the facts as he honestly believes them to be.

d. The use of force is assessed in an objective sense as to whether or not force is reasonably necessary in the circumstances as D honestly believed them to be.

* (b) and (d) are correct.