

LEGAL PROFESSION ADMISSION BOARD

MARCH 2009

EVIDENCE

TIME: Three Hours

This paper consists of **five** questions.

Candidates are required to attempt any **two** questions from **Part A**, and **one** question from **Part B**.

No question is compulsory.

All questions are of equal value.

If a candidate answers more than the specified number of questions, only the first **2** questions attempted in **Part A** and **first** question in **Part B** will be marked.

All questions may be answered in one examination booklet.

Each answer should start on a new page.

Each page of each answer must be numbered with the appropriate question number.

Candidates must indicate which questions they have answered on the front cover of the first examination booklet.

Candidates must write their answers clearly. Lack of legibility may lead to a delay in the candidate's results being given.

Permitted Material:

This is an open book exam. Candidates may refer to any books and any printed or handwritten material they have brought with them.

As some instances of cheating and of bringing unauthorised material into the examination room have come to the attention of the Admission Board, candidates are warned that such conduct will result in instant expulsion from the examination and may result in exclusion from all further examinations.

This examination should not be relied on as a guide to the form or content of future examinations in this subject.

Part A

Attempt **ONLY TWO** (2) questions in this part.

Question 1

Quentin Night is on trial charged with assault and with intimidation with intent to cause fear of physical and mental harm.

Nadia Hoot is called by the prosecutor and having been duly sworn testifies that Quentin Night had arrived at a brothel named the House of Ill Fame at 7.15 pm on the evening of October 24 2008 and had paid \$220.00 cash to the receptionist for an hour with a prostitute known as "Frangipani". About an hour later she heard a loud bang coming from the room. She went to see what was happening. She states she found Frangipani in "a shaken and distressed state".

Frangipani told Nadia that Quentin had fallen asleep while getting a massage and woke up angry and demanding a refund. Nadia testifies as to the following exchange of words:

Nadia to Quentin: "What seems to be the problem?"
Quentin to Nadia: "Absolutely nothing that's the problem. She didn't do anything for me. All I want is my money back."
Nadia to Quentin: "I can't guarantee you will get your money back."
Quentin: "If I don't get my money back, I'll tear this bloody place apart."

Nadia testifies that the accused, Quentin, approached her with his right fist raised and teeth clenched saying: "I'm going to slit your f---ing throat. Give me my money."

Nadia testifies that she was "scared, frightened and intimidated."

Comment on the admissibility of the testimony and also consider the following questions:

- (a) Can the prosecution introduce evidence of violent behaviour by the accused on other occasions?**
- (b) Would your answer to question a) be different if Quentin Night introduced evidence that he was a solicitor and a respected member of the legal profession.**
- (c) Would the defence be able to introduce evidence to the effect that Nadia had approached the defendant and stated that if he would pay her \$10,000 she would not testify against him?**

(Question 2 follows)

Question 2

Alf, who was 17 years old; Brad who was 18 years old; and Charlie who was 17 years old are charged with sexual assault on Mia who was 13 years old on the night when the events out of which the charges arose occurred. The accused plead not guilty and the trial occurs three years later.

The prosecution calls Mia to testify as their first witness. Over objection from the defence Mia is allowed to testify that the morning after the events occurred she told her teacher Mrs Coffee when asked why she was upset "It's about last night. It was awful. I was made to perform sex acts on three of them." Mrs Coffee told the principal, the police were summoned and Mia gave an account of the incident to a policewoman, Officer Twist.

The police arrested three youths and arranged for Mia to view an identification parade where she identified the three accused as the youths involved in the assault. Mia tells the court about the identification parade and says that she remembers identifying three males but she cannot remember who she identified.

In cross-examination of Mia the defence asks her about a conversation with a rape trauma counsellor that occurred in the week before the trial. This cross-examination appears designed to support an argument that the rape trauma counsellor told Mia what to say in court and that her credibility is therefore questionable.

Officer Twist is called to testify. She tells the court about the statement she took from Mia and identifies the accused as the male individuals identified at the parade.

The prosecution also wishes to introduce into evidence a videotape that shows Mia performing fellatio on Charlie. This videotape was retrieved from a mobile telephone belonging to Sam, a friend of Charlie's. Sam would testify that the video was sent to him on the night of the events by his mate Charlie. The prosecution plans to show the video in evidence and give the jury on paper a "transcript" of the words spoken and a description of the actions shown. The defence objects both to these plans and also on the basis that there is no proof that the videotape was not faked. The trial judge dismisses the procedural objections and rules that, because the presumption in s.146 can be applied, the prosecution does not need to prove that the tape correctly portrays the events shown.

Discuss the admissibility of the evidence for the prosecution.

(Question 3 follows)

Question 3

Peter and Maria Kelty are suing SOS Vessel Management Pty Ltd, Michael Wynn, managing director of the company, and Trevor Jones the captain of the Hazy Star, a boat. The Keltys are seeking damages for breach of contract and negligence. The Keltys allege that they were diving from a boat operated by Trevor Jones for the SOS Vessel Management Pty Ltd on February 15 2007. The boat was in waters off the NSW Coast, within 20 kilometres of Lord Howe Island on the day.

In testimony Peter Kelty asserts that he was diving with his wife and when they surfaced at 4:45 they saw the boat 700 meters away heading for shore. The Keltys survived in the water for 15 hours before they were found. Kelty also testifies that he had a conversation with Michael Wynn on February 16. Kelty alleges that Wynn stated:

“Trevor was a fool not to ensure that all divers were on board before heading for shore”.

The defendant asserts that this statement is excluded from evidence as hearsay and as opinion evidence.

As additional evidence of negligence the Keltys rely upon the fact that criminal charges had been brought against the defendants and that they had been convicted of criminal negligence in the operation of a tour boat. The defence objects that this evidence cannot be used to prove the facts upon which the convictions were based.

The defence calls John Hilton from WorkPlace Health and Safety to offer expert evidence as to the precautions that should be taken to ensure that no divers were left in the water. The plaintiffs object to the introduction of this evidence on the basis that it goes to the ultimate issue that the court has to decide.

Michael Wynn testifies to the fact that those precautions were standard operating procedures on the Hazy Star. However, the defence does not call Trevor Jones to testify that those precautions were in fact implemented on the day. The plaintiffs ask the trial judge to take into account the fact that Trevor did not testify but the trial judge refused to do so referring to s.20 of the Evidence Act of 1995.

Discuss the evidentiary issues that arise.

(Question 4 Part B follows)

Part B

Attempt ONLY ONE (1) question in this part.

Question 4

A witness may claim privilege against answering questions in a number of contexts. Evidence may also be excluded on the grounds that its reception would be prejudicial to the public interest. The effect of excluding information from the court is the same in both cases. The court's ability to render justice is restricted. Whether such restriction can be justified is of course a matter of opinion.

Discuss the statement, indicating whether in your view such a restriction is legitimate in all cases, in some cases or not at all.

In your answer you must at least include:

- (a) A discussion of the provisions in the Evidence Act 1995 creating client legal privilege and a comparison of those provisions with the common law.**
- (b) An account of the law creating public interest immunity.**
- (c) An evaluation of the impact of privilege and public interest immunity in the context of at least three reported cases.**

Question 5

Write a case note explaining and critically analysing the significance of any ONE of the following cases in light of the Evidence Act 1995 and other case law in the area:

MWJ v The Queen [2005] HCA 74

R v Hillier (2007) 81 ALJR 886

END OF PAPER