

LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2008

EVIDENCE

TIME: Three Hours.

Candidates are required to attempt **ANY THREE** questions.

No question is compulsory.

All questions are of equal value.

If a candidate answers more than the specified number of questions, only the first **3** questions attempted will be marked.

All questions may be answered in one examination booklet.

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.

Question 1.

Fred Nerk is on trial before a judge and jury in the Criminal Division of the Supreme Court of New South Wales charged with the manslaughter of his ten-month-old son, Patrick. The prosecution alleges that on 12 December 2006 Fred had agreed to drop his son off at the day care centre. He put the child in the car seat in the rear of the car but forgot he was there. He left the car in the parking lot outside his place of work in Parramatta. The temperature that day reached 36° C. When Fred returned to the car at noon the child was dead.

The prosecution calls as a witness Dr Julia Lo, a paediatrician who is on staff at the Children's Hospital in Sydney. Dr Lo testifies that she has read several studies of experiments run to determine the effect of the surrounding temperature on the temperature in a closed car standing under full sun. This evidence is objected to on the basis that it is outside her area of expertise and is hearsay but the judge dismisses the objection. Dr Lo further testifies that in her opinion, if as these studies suggest, the temperature in the car had reached 46°C within 40 minutes, the child would have died within an hour. Finally, she testifies that, in her opinion the death was due to criminal negligence on the part of Fred Nerk. The defence objects that the final statement by the expert goes to the ultimate issue. The judge agrees, and accordingly excludes this evidence.

The prosecution presents a Report from the Bureau of Meteorology describing the weather in Parramatta on 12 December 2006. The trial judge decides that the court will take judicial notice of the contents of the Report, the judge so informs the parties and instructs the jury that these facts are to be accepted.

The defence wants to call Betty Nerk, mother of the child and wife of the defendant. They expect her to testify that up until 12 December 2006 Fred had been a devoted and loving father. Betty objects to testifying and tells the judge that she cannot forgive Fred Nerk for causing the death of the child.

Discuss the evidentiary issues which arise from the facts set out.

Question 2.

Moonee Bob Lockhart is the defendant in a civil action in which the Cronulla Sharks are seeking damages for breach of contract in the Supreme Court of New South Wales.

The plaintiff's manager, Tim Hayes, testifies that on October 18 2006 Moonee Bob Lockhart signed a contract with the Cronulla Sharks in which he undertook to play rugby league for the Sharks for three years. It was a term of the contract that Lockhart would be available for all games designated by the Shark's manager during this period of time (2006-2009). The defence objects to the reception of this evidence on the basis that it is secondary evidence of the contents of a document but the judge dismisses the objection.

(Question 2 continues)

(Question 2 continued)

Hayes also testifies that, at the end of July 2007 Lockhart left Australia for France. After that date Lockhart played only for a French club. He failed to appear to play for the Sharks on ten designated dates that year. He produces records from the club's office to prove that the dates in question were so designated.

Lockhart testifies as the first witness for the defence, to the effect that the Cronulla Sharks had breached their contract with him before he left for France. Specifically he alleges that the team management failed to provide him with the services of a personal trainer and a dietician during June and July 2007, despite the fact that it was a term of the contract that these services would be provided on a continuing basis throughout the currency of the contract. In cross-examination Lockhart is asked:

Q: It's true, isn't it that you showed no loyalty to your club?

Lockhart's counsel objected to the form of the question but the objection was overruled and Lockhart answered the question. The cross-examiner then questions Lockhart as follows:

Q: Didn't you, earlier that year, condemn Smith, a player, for showing no loyalty to the club?

A: I don't remember that, when exactly? (His counsel objects that he needs to be told when and what exactly he is alleged to have said but the plaintiff's counsel does not comply.)

Q: Isn't it also true that, on the day before you left for France you said and I quote: "You've got to stick with your team and work as a team"?

Lockhart admits having said this but the plaintiff seeks to call as a witness the reporter to whom it was said. This is allowed, over objection.

At no stage is Lockhart cross-examined about the allegation that the club was in breach of the contract. In the circumstances Lockhart does not call Brad Bacon, who could testify in support of his evidence on this point.

In the closing address for the plaintiff, counsel suggests that Lockhart's testimony that the club was in breach of its contract with Lockhart should be "treated with the derision it deserves". Counsel further suggests that "the evidence about Lockhart's statements about credibility demonstrate that he is not to be believed on his oath". The defence object that in the light of the questions asked in cross-examination this argument is precluded.

Discuss the evidentiary matters that arise. Do you agree with the manner in which each of the objections was decided?

(Question 3 follows)

Question 3

Charles and Felicity Banks are on trial on charges of conspiring to defraud a number of insurance companies. The prosecution alleges that Charles and Felicity acted together in planning and executing the disappearance of Charles and that subsequent to, and because of, his disappearance Felicity collected \$1.5 million dollars from three insurance companies. It was subsequently discovered that Charles Banks was alive and living in the Bahamas.

In order to prove Felicity's part in the conspiracy the prosecution calls her son Lionel to testify. Lionel testifies that Felicity appeared to be deeply distressed, indeed hysterical, when she told him that his father had been lost at sea. "She threw herself into my arms, sobbing convulsively and said "Your father is dead!" "All our happiness is at an end!" "I will never be happy again." The defence objects that this evidence is hearsay.

Lionel further testifies that Felicity told him six months later that "I feel it is my duty to collect on the insurance policies that your father took out for my benefit."

Police Constable Pearson testifies that after he had been arrested, Charles Banks was interviewed by the police. The interview was recorded by means of a video cassette. In the course of the interview Banks stated that "The whole thing was Felicity's idea and I could not have done it without her. We had some debts and I was sick of watching every penny." Counsel for Felicity points out that, whether or not this statement is admissible, it should not be used as evidence against Felicity.

Felicity seeks to call a psychologist who would testify on her behalf that in his opinion she was a submissive wife who would have been acting as a result of "marital duress" when she misled her son and when she collected the insurance money.

The trial judge directs the jury that they must convict Felicity unless they are satisfied beyond reasonable doubt that the defence of marital duress has been made out.

Advise the defendants in this case as to whether the judge's rulings are correct and whether they have any grounds for appeal that might have a reasonable chance of success.

(Question 4 follows)

Question 4. Answer EITHER Part A OR Part B of this question.

Part A:

The judge may, if satisfied that it is necessary in the interests of justice to do so in the particular case, give a warning that it would be dangerous to convict on the uncorroborated evidence of a particular witness, but the judge is never under an obligation to do so.

Discuss the statement, indicating the basis for this statement of the law and discussing how the law in the area has changed in the last fifty years.

In your answer you must at least include:

- a) A comparison of the position at common law and the position that now obtains under the statutory provisions of the “Uniform Evidence Law”;
- b) A discussion of what was meant by the term “corroboration” and of the impact of s.164 of the Evidence Act 1995.
- c) Comment on the treatment of unreliable evidence that the statute now requires, illustrating this approach by reference to relevant cases.

Part B:

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:

- (i) *Phillips v The Queen* [2006] HCA 4
- (ii) *Cornwell v The Queen* [2007] HCA 12, (KOP 492)
- (iii) *Lee v The Queen* (1998) 195 CLR 594

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