

LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2009

EVIDENCE

Time: Three Hours

This paper consists of **five** questions.

Candidates are required to attempt **three** questions.

At least two questions must be chosen from **Part A**, candidates may answer **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 three questions attempted will be marked. If a candidate answers more than one question from Part B, only the first question 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 Materials:

This is an open book exam. Candidates may refer to any books and any printed or handwritten material they have brought into the examination room.

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 at least two (2) questions in this part.

Question 1

Kimberley Vlaar is suing Pietr Arbon, tattoo artist for damages for trespass to the person. Kimberley, now 18 years old, alleges that acting outside her instructions, Arbon tattooed 59 (fifty-nine) stars onto her face, forehead, cheeks, nose and jawbone. Arbon has entered a general denial as a defence to the claim.

Kimberley testifies that: “Before I arrived at the tattoo shop at 4:30 that afternoon, I had had a few beers with my friends but I was not drunk. I asked the man in the shop to tattoo four stars onto my forehead. I got into his chair and went to sleep. When I woke up I was horrified to find that he had tattooed lots and lots of stars onto my face, and not just my forehead. I think it looks awful.”

The defence objects that she should not have been allowed to state her opinion on the basis that this is the ultimate issue for the court to decide.

Before the case came to court, Kimberley had told her solicitor, Karen Stenson, that “I’m not exactly sure how many stars I asked him to put on my face ... maybe I’d had more than a few beers.” Karen Stenson seeks your opinion on the question of whether, if called as a witness, she would have to tell the court what Kimberley had confided to her.

In the course of negotiations between the parties in an attempt to settle the dispute without litigation, Arbon’s solicitor said, to Stenson, “I admit Arbon could and probably should have got written instructions and a signed consent form before he started work.” He is concerned that this admission might be used as evidence against his client.

At trial Arbon is called to testify for the defence. He applies to the court for permission to use an interpreter. In support of the application his barrister explains that he arrived in Australia from Amsterdam fifteen months earlier and speaks English very badly. The plaintiff opposes the application on the basis that it will entail delay and additional expense.

Comment on the evidentiary issues that arise.

(Part A Question 2 follows)

Question 2

Trevor Cornish has been brought to trial on charges of armed robbery. It is alleged that on the morning of Tuesday 21 October 2009 Trevor and an unidentified man carried out an armed robbery of the Commonwealth Bank on Main Street in Young.

Assume that you are the trial judge in this case which is being heard by a jury and that you have been asked to make rulings on the admissibility of evidence in the following circumstances:

- (a) The prosecution call a witness, Harriet Jones who is identified as a teller in the said bank. She states that a man walked up to the counter pointed a gun at her and said: "This is a hold up I want you to put all the money in the sack."

The defence object to the reception of this evidence on the basis that it is hearsay and further that it is prejudicial to the defence.

- (b) Harriet Jones testifies that: "I was asked to attend an identification parade at the police station. I was shown seven men. The man I identified is sitting over there (she pointed at the defendant Cornish in the dock)." When cross-examined she admits that she was terrified and that her eyes were focussed on the pistol that the man was pointing at her but insists "He was the man there that was closest to what I remembered."

Indicate whether you consider this evidence admissible and on what basis and what other precautions you would have to take in dealing with this evidence.

- (c) The defence suggests that it would assist the court to understand the testimony given by Jones and other witnesses if a visit to the bank could be arranged. The prosecution objects on the basis that the bank has recently remodelled the premises introducing new security measures. **Discuss the factors you would have to consider in making a ruling on this application.**

(Part A Question 3 follows)

Question 3

Sam Emmet and Morton Frick, aged 18, are on trial for the murder of David Grust. In the opening address, prosecution counsel tells the court that the prosecution intends to prove that Grust died when he was hit by bullets fired by the two youths in the course of an incident in the car parking lot outside KFC at Milperra on February 14 2009. Grust had, at the time been driving his truck down the road past the car park.

A police witness, Constable Quinn, testifies that he interviewed an employee of KFC on the night in question and was told: "I heard several shots fired at 9.15pm just outside the shop.... Then the squeal of brakes and traffic started banking up outside." The employee in question gave the police a false name and address. The police have subsequently been unable to identify and locate this youth. The defence objects that Constable Quinn's evidence as to the statement should be excluded on the basis that it is hearsay.

Constable Quinn testifies that the accused were found in the parking lot, they were searched and that two weapons had been confiscated. Two ballistics experts from the NSW Forensic Laboratory testify that tests were carried out on these guns and that:

"In my opinion the bullets that struck Grust came from these guns."

The defence call a ballistics expert who works in Victoria. This witness testifies that: "In our opinion it cannot be said with any certainty that the bullets in question came from these guns." Counsel for both prosecution and defence agree that directions must be given as to the effect of this testimony. The prosecution suggests the jury are to be told that they must accept the evidence of the prosecution witnesses because "it's two against one".

The prosecution calls as a witness, Julie Norris, aged 17. Julie, who is Sam's cousin and was Morton's girlfriend at the time, was in the parking lot as she had gone to the fast food outlet with them that night. Julie objects to testifying.

In summing up to the jury the trial judge comments that the jury are to consider their verdict taking into account the evidence in the trial and considering whether they are persuaded of the guilt of the accused when they apply the standard of "proof beyond reasonable doubt". He tells the jury that this means that when they have reached a decision they should ask themselves if they have any lingering doubts. If there are lingering doubts then they must ask themselves if these doubts are reasonable. If the doubts are not based on reason, you are to convict the accused. Otherwise, you will acquit them.

Comment on the evidentiary issues that arise.

(Part B follows)

Part B

You may attempt only **one** (1) question in this part.

Question 4

Write a case note explaining and critically analysing the significance of any **one** (1) of the following cases in light of the Evidence Act 1995 and other case law in the area:

- (i) *MWJ v The Queen* [2005] HCA 74
- (ii) *HML v The Queen; SB v The Queen; OAE v The Queen* [2008] HCA 16 (24 April 2008)

Question 5

In light of what has been called “the overwhelming cynicism of the age, that is the tendency of most people to distrust others”, it has been suggested that the approach of the law that forbids a party to call evidence to support the credit of their own witnesses is perhaps misconceived.

Comment on this suggestion indicating whether you think the approach is justified and, if so, why.

Include in your answer at least:

- (a) **An outline of the statutory provisions that apply to control the use of credibility evidence, comparing the position that applies when the witness has been called by a party and is being examined in chief by that party and the position that applies when the witness is being cross-examined;**
- (b) **A discussion of the provisions that apply where a witness called by a party has been found to be “unfavourable” to that party;**
- (c) **An evaluation of the credibility rule with rules of evidence that apply in other contexts designed to limit the length and cost of a trial.**

END OF PAPER