

LEGAL PROFESSION ADMISSION BOARD

MARCH 2014

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**, students 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 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 and could, in some circumstances, result in the candidate receiving a fail grade.

This examination is worth 80% of the total marks in this subject.

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

As some instances of cheating, plagiarism and of bringing unauthorised material into the examination room have come to the attention of the Admission Board, candidates are warned that such conduct may 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.

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PART A

Question 1

You are acting for Larry Glover who is on trial together with Nathan Thomas on charges arising out of a series of armed robberies that occurred in Sydney in 2011. On 4 May the Nelson Hotel in Bondi Junction and the Sands Hotel in Maroubra were robbed; on 7 June the Rose of Australia Hotel in Erskineville and the Excelsior Hotel in Surry Hills were robbed.

Vincent Rubber, the manager of the Excelsior Hotel testifies that on the evening of 7 June he came out of the toilet to find a man dressed in black pointing a black pistol at him. He identifies Glover in the dock as that man. He had not been asked to pick him out of an identification parade. You call a psychologist to testify that it is her opinion on the basis of many experimental studies that if the account is correct Rubber's attention would have been focussed on the gun to the exclusion of the facial features of the person holding it.

A recording of an interview of Nathan Thomas has been introduced into evidence. In the interview Nathan is heard to say "Larry and I carried out those hits together".

Dr Freud, a psychiatrist interviewed both of the accused. He is prepared to testify that Thomas has a high IQ and a dominant personality, while Glover is much less intelligent and a submissive personality. It is his opinion that "Glover was little more than a gofer."

Comment on the admissibility of the evidence and indicate what directions you will seek from the judge. Include in your comments the issue of whether evidence about the other robberies can be used when determining whether Glover is guilty of the robbery at the Excelsior Hotel.

Question 2

Emmylou Smithers is suing Embers and Ash Ltd the major retail firm for \$1.3 million claiming she suffered nervous shock and attempted suicide as a result of the sexual harassment of her supervisor Das Drysdale. Smithers is claiming that Embers and Ash Ltd were negligent in failing to properly supervise Das Drysdale. The claim is brought in the Supreme Court of New South Wales.

She alleges that he made many suggestive remarks, once asking her if she had been "keeping her husband up late?" The defence objects to the introduction of this evidence on the basis that it is hearsay.

Emmylou testifies that "On April 15 2012, he dragged me into his office and used force to turn me so that I was facing him. The distance separating us was a few centimetres. He rubbed his hand up and down my forearm and fondled my breast."

Her barrister attempts to introduce into evidence a copy of CCTV footage from a camera in the hall outside the office, which shows her being pulled into the office. The original footage was in very bad shape and so was duplicated. The defence object to the introduction of this evidence.

(Question 2 continues)

(Question 2 continued)

Emmylou testifies that “After I escaped from his office, I went down the hall toward the washroom, my friends Verity and Veronica were there ... I told them “Das assaulted me ...he ran his hands all over me”. The defence objects to this testimony and to the plaintiff’s attempt to call Verity and Veronica to testify.

The defence seek permission to call as a witness the sexual assault counsellor that Emmylou consulted on April 17, they have reason to believe that Emmylou may have questioned whether anything in her behaviour enticed Drysdale to think she would welcome his advances.

At the end of the trial the judge comments before delivering his judgment that “I was conscious in coming to my decision of the fact that women alleging sexual assault or sexual harassment frequently exaggerate their claims and that as this is an allegation of some gravity I should need more evidence to convince me of the wrongdoing alleged.”

Comment on the evidentiary issues that arise.

Question 3

Fanciful Feathers are suing the State Rail Authority for damage to property arising out of an incident when three truckloads of feathers that were to be used in costumes were destroyed by a fire in the depot. The defendants have claimed that the cause of the fire was the intensely flammable nature of the property of which they had not been warned.

The plaintiffs have filed an interlocutory application seeking access to various documents in the possession of the defendant. First among these documents is a report that was prepared for the general manager about a possible increased risk of fire caused by the storage arrangements for the oils used in the depot. The defendant resists an order for production on the basis that it was contemplated, when the document was put together, that it would be submitted to their solicitors if a fire should eventuate.

The second document to which the plaintiff seeks access is a report on possible ways to cut costs in the operations of the Authority. This document was prepared for consideration by the NSW State Government and submitted as material for the consideration of cabinet on 1 April 2013. The Minister responsible for Transport claims that discovering this document would be contrary to the public interest.

The plaintiff’s solicitor has queried whether the fact that in a letter responding to a claim for damages the depot supervisor acknowledged that “The accident could have been caused when fumes accumulated as a result of a break down in the air conditioning, but the feathers were highly flammable.”

Discuss the bases on which the State Rail Authority might resist the claims to produce the documents sought and to prevent the use of the letter from the depot manager in evidence. How would you expect a judge to rule on these claims?

(Part B follows)

PART B

Answer ONLY 1 question from this part.

Question 4

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:

- *Baker v The Queen (2012) HCA 27*
- *Dasreef v Hawchar Pty Ltd (2011) 243 CLR 588*

Question 5

Decisions of our courts must be based upon facts proved by admissible evidence. This principle admits of no exceptions.

Do you agree?

Include in your answer

- An account of the treatment of judgments and convictions as proof of the facts on which they are based.
- An explanation of the operation of evidential presumptions.
- A discussion of the categories of judicial notice.

END OF PAPER