

LEGAL PROFESSION ADMISSION BOARD

MARCH 2013

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.

PART A

Question 1

Brady Smith is on trial before a judge sitting alone on the charge of assault occasioning actual bodily harm to Wayne Comfort. It is not disputed that on the evening of 16 June 2011, at Katrina Goy's home in Randwick, the appellant punched the complainant in the upper right-hand side of his face following which there was a scuffle which continued until the appellant put the complainant in a 'choker hold' as a result of which he lost consciousness (the incident). Ms Goy and her 9-year-old son, Luke, were present throughout the incident.

Dr Robert Butcher is called to testify as to the fact that on the evening in question the complainant suffered fractures to bones around the socket of his right eye. In response to a question from the prosecutor he testifies that *"In my opinion, it would have required the direct application of considerable force to the face. This must have come from a punch deliberately aimed at the face by the defendant."* Dr Butcher is not cross-examined and no other expert evidence is called by either party.

Katrina Goy is called to testify for the prosecution. Defence counsel asks her about her relationship with Warren Comfort. She states that they had been acquaintances for six weeks when the incident happened. Defence counsel asks her what her relationship with Comfort is now and she replies. *"We remain friendly, that's all."* Defence counsel now wishes to call a witness who will testify that Goy and Smith are now living as a de facto married couple. The judge rules that this is not permissible as it is a collateral matter.

The defence calls Luke Goy to testify but the trial judge intervenes saying that *"It is my duty to satisfy myself that this child is competent to testify"*. The judge then proceeds to ask the child a series of questions about his religious beliefs before ruling that the child is not competent to testify.

At the end of the trial, the defence counsel asks the jury to reject Dr Butcher's evidence on the basis that it is clearly not credible.

Comment on the evidentiary issues that arise.

(Part A Question 2 follows)

Question 2

Fred Foot is on trial charged with impersonating a police officer and obtaining money on false pretences. The prosecution alleges that on a number of occasions, Fred, dressed in a police uniform and wearing a fake badge, accosted motorists who had parked illegally and demanded that they pay him \$250.⁰⁰ or he would have a tow truck on the scene within five minutes to remove the car. If the motorist could not pay cash Fred would agree to keep their driver's licence as security until they could obtain the cash.

The first witness for the prosecution is a woman named Anna Boston. She was questioned and responded as follows:

Q 1: How much money did Fred Foot make you pay him after you parked your car illegally in Centennial Park on 1 April 2010?

This question was objected to and she was instructed not to answer it. The transcript then continues:

Q2: Where were you at 11 a.m. on 1 April 2010?

A: I was in Centennial Park.

Q3: What did you do?

A: I parked my car under a tree?

Q4: What happened next?

A: A man approached me.

Q5: Do you see that man here in court? Can you identify him?

A: Yes I do. He's seated over there (pointing at the defendant).

This evidence is objected to but allowed.

Q6: What did he say to you?

This question is objected to on the basis that it is asking for hearsay evidence. A *voire dire* is held to allow the judge to determine what the witness would say and whether it is admissible. On the *voire dire* the witness indicates that she would testify that *"Fred said: "You've parked illegally. That is a very serious offence. It is my duty to call a tow truck to come immediately and remove your car and impound it. However, if you pay me \$250 right now, I will go and talk to that man over there before I take action against you. If the car has been moved when I come back, I won't have to do anything."*

Later in the trial, the prosecution offer evidence that a search of Fred's car resulted in the seizure of ten driver's licenses that belonged to people other than Fred Foot and the police uniform. In response to a query from defence counsel the police officer who is tendering the evidence acknowledges that Fred had not consented to the search and a search warrant had not been obtained. The prosecution ask the judge to direct Foot to don the police uniform and walk up and down in the court.

Identify the evidentiary problems that have arisen in the course of this trial and indicate how the trial judge should have handled each problem, and what the authorities are for your advice.

(Part A Question 3 follows)

Question 3

Rudolf Bruhn is suing his brother Georg, the firm Prussian Blue Cement and other partners in the firm seeking a declaration that he was a partner in the firm. The firm was established in the 1950s. By the 1960s the partners consisted of three groups, each holding a one-third share. One group was the Bruhn family, the second the Maurer family and the third the Zeigert family. Rudolf became a partner in the firm in 1969 taking a portion of the Bruhn share and commencing work for the firm. In 1984 Rudolf stopped working for the firm and the defendants allege his interest was bought out at that time.

You are assisting Theo Stoppard QC who has been briefed by Georg Bruhn and leads the defence in the multi-party case. You have been asked to prepare a number of briefing notes.

(a) The defence is in possession of a document signed by the appellant, Rudolf Bruhn, entitled "Change of Holder Details", a form required under the Business Name Regulations current at that time. The form dated 26 June 1984 stated that, with effect from 1 July 1984, he, Rudolf Bruhn ceased to carry on business under the business name of Prussian Blue Cement and the other partners were continuing to carry on business under that name. The other partners also signed the form and it was lodged with the relevant department.

You are asked to advise as to whether it is necessary to produce evidence as to which regulations applied NSW in 1984.

(b) A search of the firm's business records had produced duplicates of the tax returns filed by the firm in 1985, and 1986 which do not list the plaintiff Rudolf as a partner.

You are asked to advise whether and on what basis these records are admissible in court and whether they can be used to prove that Rudolf was no longer a partner.

(c) In a letter to Rudolf dated 5 June 2010 and headed "Without Prejudice", Georg Bruhn states that *"I was not paying close attention to the business of the firm which was handled by our father. As you know he died in 2009 and I am not well placed to prove what exactly happened in 1984."*

You are asked to advise as to whether you will be successful in resisting any attempt by the plaintiff to introduce this document into evidence as an admission.

(d) You are told that Rudolf Bruhn has spent time in gaol sentenced on charges of extortion and asked to advise whether this evidence of character can be introduced and if it can be introduced whether it can be used for the additional purpose of attacking Rudolf's credit.

(Part B follows)

PART B

Answer **ONLY** one (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:

- (a) *Esso Australian Resources Ltd v Federal Commission of Taxation* (2000) 168 ALR 123;
- (b) *Papakosmos v R* (1999) 196 CLR 297

Question 5

Kathleen Folbigg was convicted in 2003 of murdering her four children. A recent book *Murder, Medicine and Motherhood*, by Emma Cunliffe argues that this is a wrongful conviction.

Do you agree that this conviction should be reviewed?

Include in your answer:

A discussion of the dangers presented by evidence of tendency and coincidence and the precautions that should be applied before this evidence is introduced in a criminal trial;

An explanation of the approach taken by Australian courts to the admissibility of expert opinion evidence;

The application of the rules about burden of proof and in particular a discussion of the correct approach to circumstantial evidence.

END OF PAPER