

LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 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

You are employed in the office of the Director of Public Prosecution. You are told that Adrian Acton is appealing against conviction and given a portion of the transcript of the trial and asked to advise on the evidentiary issues which arise.

Adrian Acton, a teacher aged 35 is on trial charged with various offences arising out of a liaison with a schoolgirl, Vicky Vovo who was fourteen when he was first intimate with her.

The prosecution calls Vicky Vovo as their first witness and ask her a series of questions. In response to those questions she states her age, which is now 16, and admits that she first met Acton when he came to teach a special class on acting. She is then asked the following questions:

Q1: When did you first come to be alone with the accused?

A1: I don't remember.

Q2: What did he do?

A2: I don't remember?

Q3: Didn't he try to kiss you?

A3: I don't remember.

Q4: How old were you when he first kissed you?

A4: I didn't say he kissed me.

The prosecution then seeks leave of the judge to treat the witness as hostile. The judge refuses to grant this leave. The prosecution continues the examination in chief and among other questions asks Vicky:

Q5: "Did you tell your friend Wanda on August 15 2010 about the first kiss he gave you?"

A5: No.

The prosecution then call Wanda Williams, a schoolgirl who was once a close friend of Vicky Vovo. Wanda testifies that:

"Vicky told me on Monday 15 August 2010 that "On Saturday night I met Adrian in the park and he kissed me. That was the first time. Ohhh... he's to die for. I hope he'll be there for me again."

The defence object that this evidence is hearsay and argue that as Vicky has not testified to the conversation Wanda's evidence cannot be admitted. The judge admits the evidence.

(Part A Question 2 follows)

Question 2

Dry Badley, a radio host is being sued for damages by Petunia Petal, a news reporter, who alleges she suffered harm when bullied, intimidated and harassed by Badley.

One of the instances of abuse cited by the plaintiff occurred on 12 June 2012. On that day Badley called Petunia into his office and verbally abused her and bullied her in the presence of Goose Gradidge. When she attempted to leave the office Goose blocked the door. Petunia testified to these events and stated "When he had been shouting for two minutes, I decided I wanted to leave but Goose Gradidge would not let me near the door." Although she was cross-examined as to other aspect of her evidence she was asked no question about the incident of 12 June 2012.

Later in the trial counsel for the defence calls Goose Gradidge as a witness. Goose testifies that he was present at a discussion between Petunia and Badley. He asserts that no one raised their voice and further states that he was standing near the window. When asked specifically by the defence counsel he says that Petunia's testimony that he would not let her near the door "is a lie."

- (a) **Comment on whether a rule of evidence has been breached and if so, what options are available to the court to deal with it.**
- (b) **Assume that counsel for Petunia has possession of a document signed by Goose Gradidge stating that he was present when Badley bullied Petunia on 12 June 2012. How can counsel for the plaintiff use this document? What difference would it make if the witness when asked admits signing such a statement?**
- (c) **After both counsel have presented their closing arguments, the trial judge sitting alone comments that "This is a difficult case, and I am conscious that I must be satisfied beyond reasonable doubt by the evidence for the plaintiff before I can make a finding against the defendant."**

(Part A Question 3 follows)

Question 3

Brian and Darragh O'Malley have been arrested and charged with offences arising out of the theft of diamond jewellery from a shop called Brummer's & Co in Rose Bay on 11 October 2012.

The prosecution's first two witnesses are Edmund and Elizabeth Brummer. Their testimony is to the effect that on 11 October two men wearing female burqas entered the shop. One of them approached Elizabeth where she stood behind the jewellery counter and said "This is a robbery. Put all your diamond jewellery into this bag and do it quickly." While she followed orders he stood with his hand on the counter, watching her closely. The other man held a gun pointed at Edmund throughout the time the two were in the store. Both witnesses testify that, owing to the burqas the men were wearing: "I would not be able to identify either of the men." They also refer to the fact that the whole incident would have been captured by the CCTV camera.

The prosecution introduce a copy of the CCTV film into evidence and it is displayed in court despite an objection from the defence that this was not permissible as it was not the original film. A police officer, Constable Clinton, is called. Clinton testifies that she has watched the CCTV film over fifty times and "I am confident that the man holding the gun was Brian O'Malley". The defence object that this evidence should be rejected.

The prosecution also call Dr Patna from the NSW Forensics Laboratory. Dr Patna testifies that having completed a degree in forensics at the University of Sydney he has worked for his current employer as a fingerprint expert for five years. He states that "I can say with 99% confidence that the fingerprint I recovered from the counter was that of Darragh O'Malley." The defence challenge this testimony on the basis that it is pure opinion.

Finally the prosecution introduce evidence in the form of a record of an interview of Darragh O'Malley which contains the following statement: "Brian planned the whole job. It was his idea that if we were wearing the burqas no one would be able to identify us. I went along with the idea because Brian has always been able to come up with clever plans."

You are briefed to advise Brian O'Malley on whether there are grounds on which he can appeal against conviction.

(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:

- i. *Dasreef Pty Ltd v Hawchar* [2011] HCA 21;
- ii. *Lithgow City Council v Jackson* [2012] HCA 36.

Question 5

A very significant change to the rights of the accused in a criminal prosecution was accomplished by the introduction of s89A of the Evidence Act (NSW) in February 2013.

This provision radically changes the position which was based on the common law and which continues to apply under the Evidence Act (Cth). Some commentators have been strongly critical of the change.

Do you agree that the new position about the silence of the accused is appropriate?

Include in your answer:

A statement of the effect of the amendment;

An outline of the effect of the Commonwealth legislation and of other provisions in the laws of evidence which distinguish between the position of the accused, the defendant in a criminal case, and other parties to litigation;

A discussion of the law governing the burden of proof in criminal cases.

END OF PAPER