ENTRANCE EXAM

VICTORIAN BAR READERS' COURSE

29 OCTOBER 2014

(Annotated with sample answers)

1. This document is a reproduction of the Readers' Course Entrance Exam which candidates sat on 29 October 2014, with annotations included as a means of feedback. For each question requiring a written response (i.e. all questions bar the multi-choice questions), a sample of actual answers given by candidates in the examination immediately follows the question. For multi-choice questions, the correct answers are highlighted and brief explanations are provided.
2. Attention is drawn to the following **important points concerning this document**:
   - Each sample answer has been reproduced in type-written form verbatim, as it appeared in the candidate's actual examination script. Any errors and omissions contained in the candidate's original answer are therefore included. No attempt has been made in this document to correct such errors and omissions. Accordingly, **each sample answer is not to be regarded as perfect and necessarily exhaustive of all relevant issues disclosed by the particular question**.
   - In assessing each sample answer, an examiner has applied a combination of quantitative and qualitative criteria and taken into account any errors and omissions in the answer. The candidate has been awarded either the maximum or *near*-maximum possible marks attainable for that question. For example, in the case of a question worth 2 marks the sample answer scored 2 marks, and in the case of a question worth 4 marks the sample answer may have scored 3½ or 4 marks.
   - It is possible that other candidates' answers (not included in this document) obtained a similarly high mark for the same question but for different reasons. Accordingly, each sample answer represents only one way in which it was possible to score highly for a particular question.

Jason Harkess
Chief Examiner
10 December 2014

INSTRUCTIONS TO CANDIDATES:

1) This exam is closed book. During the exam, you must not be in possession of anything other than writing implements and this exam script. You are not permitted to have in your possession any paper, notes, books, electronic devices, mobile phones, pencil cases or any other items that have not been specifically authorised by the Chief Examiner and/or Invigilators of the exam. Any item on your person, on your chair, or on your desk are deemed to be in your possession.

2) Your Candidate Number (but not your name) appears at the top of this page. Your Candidate Number represents your unique identifier for the purposes of this exam. You have previously been advised in writing of the Candidate Number which has been assigned to you. Please ensure that the Candidate Number above matches the Candidate Number which has been assigned to you. You **must not write your name** on any page in this exam script.

3) This exam tests your knowledge and understanding of rules of **Civil Procedure**, **Criminal Procedure**, **Evidence** and **Legal Ethics**. The exam consists of two parts – Part A and Part B. You **must answer all questions (and sub-questions) in both Parts of the exam**. The total number of marks allocated to questions in the exam is 100, so that the maximum score attainable by any candidate is 100. A total mark of 75 or more is required to pass the exam.

4) **Part A** contains 14 questions (Questions 1 to 14) and is worth a total of 50 marks. Part A commences with a preliminary statement of facts giving rise to a hypothetical **criminal proceeding**. Questions 1 to 14 then follow. In answering Part A, you should assume that all questions are referrable to the preliminary statement of facts. Each question posed in Part A informs you of the following: (i) whether you are being tested on rule(s) of criminal procedure, evidence or legal ethics (but note paragraph 6 of these instructions below); and (ii) the total number marks allocated to the question. The total number of marks allocated to each subject area in Part A is: Criminal Procedure (17 marks), Evidence (25 marks) and Legal Ethics (8 marks).

5) **Part B** contains 12 questions (Questions 15 to 26) and is worth a total of 50 marks. Part B commences with a preliminary statement of facts giving rise to a hypothetical **civil proceeding**. Questions 15 to 26 then follow. In answering Part B, you should assume that all questions are referrable to the preliminary statement of facts. Each question posed in Part B informs you of the following: (i) whether you are being tested on rule(s) of civil procedure, evidence or legal ethics (but note paragraph 6 of these instructions below); and (ii) the total number marks allocated to the question. The total number of marks allocated to each subject area in Part B is: Civil Procedure (20 marks), Evidence (17 marks) and Legal Ethics (13 marks).

6) Although each question is designated as either ‘Criminal Procedure’, ‘Civil Procedure’, ‘Evidence’ or ‘Ethics’, you may refer to legal rules and principles outside the designated subject area if you consider these to be relevant in answering the question.

7) You must write your answers in the writing space provided after each question. The reverse side of each page in this exam script contains further writing space if required. Further additional blank writing pages have been provided at the end of this exam script.

8) In the case of multi-choice questions, you must simply circle the answer(s) you consider to be correct. Some multi-choice questions are worth 1 mark where **only one answer** may be circled, and other multi-choice questions are worth 2 marks where **two answers** may be circled. If you circle more than one answer for a 1-mark multi-choice question, or more than two answers for a 2-mark multi-choice question, a score of **zero marks will be recorded** for that question. If you wish to change your answer(s) to a multi-choice question, you will not be penalised for doing so provided that the change is effected in such a manner that clearly indicates your intended final answer(s).

9) Your attention is also drawn to the following:

   i) If an application of state law is necessary in answering any question, you should assume that the law of Victoria applies.

   ii) In answering questions, you are not required to cite section numbers or case names. You may restate principles of law or rules in your own words. A significant degree of latitude is given to you paraphrasing rules and principles.

   iii) The standard of expression, spelling, punctuation, grammar, conciseness and legibility of your writing will be taken into account in the assessment of your answers.

10) It is suggested that you allocate time spent on each question proportionate to the number of marks allocated. The table below is provided to assist you in planning time (calculated on the basis of 180 minutes total writing time).

TABLE – SUGGESTED TIME SPENT ANSWERING QUESTION BASED ON MARKS ALLOCATED

Marks	**Time (approx.)**
1 mark	no more than 2 minutes
2 marks	3½ minutes
3 marks	5½ minutes
4 marks	7 minutes
5 marks	9 minutes
10 marks	18 minutes

11) You are **not permitted to remove this exam script** from the examination room.

PART A (Questions 1 to 14) – Candidates are required to answer ALL questions in Part A.

Assume the following prosecution summary of alleged facts relate to all questions in Part A.

The Defendant is Victor SCHNEIDER and is 35 years old (born 5 June 1979). The victim is Claire LARKINS and is 29 years old.

The Defendant and the victim are in a de facto relationship and have resided at 2/18 Stanley Grove, North Melbourne for more than three years. On the night of Friday 5 September 2014, the victim was at home alone watching television. The Defendant arrived home at approximately 8.30pm and was heavily intoxicated, having consumed between 8 and 10 cans of full strength beer over a period of less than three hours at an inner city office work function earlier that evening.

Upon arriving home, the Defendant went into the kitchen and started searching cupboards for more alcohol. The Defendant became verbally aggressive and abusive towards the victim, shouting at her '*Where's the fucking vodka'*, '*You had the last of the vodka'* and referring to the victim as a '*fucking bitch*'. The victim attempted to calm the Defendant by suggesting that they go out for some dinner. The Defendant found an empty glass bottle of vodka in a kitchen cupboard and threw it down on the kitchen floor which resulted in the bottle shattering. The Defendant continued to accuse the victim of having consumed the last of the vodka and repeatedly called her a '*fucking bitch*'. The Defendant then pushed the victim with both his hands with such force that she fell backwards onto her backside onto the broken glass on the kitchen floor. The victim was left very upset and shaken. The Defendant then went into the bedroom and watched television.

As a result of receiving a complaint from neighbours about a domestic disturbance, Police attended 2/18 Stanley Grove at approximately 9.10pm. The victim answered the door and invited Police into the kitchen area of the premises. The victim explained to Police what had occurred. She then directed Police to the bedroom indicating the location of the Defendant. Police entered the doorway of the bedroom and observed the Defendant in bed watching television. The room smelt of liquor. He appeared dazed and intoxicated. Upon noticing the presence of Police, the Defendant raised his head and stated '*I'm sorry ok. I'm sorry. I didn't mean to push her. Can you just please go.*' Police asked the Defendant how much alcohol he had consumed that evening to which he replied, '*I've only had about 8 to 10 cans of beer. Please just go.*' The Defendant then fell back onto his pillow and fell asleep. Police advised the Defendant that he may receive a summons, however he was non-responsive to this.

The victim expressed no concern for her safety and Police did not view the Defendant as any threat and so they left the premises.

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The Defendant was subsequently charged with common assault, an offence under s 23 of the *Summary Offences Act 1966*. The alleged assault is put by the prosecution on the basis of the Defendant pushing the victim onto the kitchen floor.

The Defendant was served personally with a copy of the charge-sheet and summons (**reproduced** overleaf) on 13 September 2014. The summons indicates that the Defendant is obliged to appear at the Magistrates' Court at Melbourne on 8 December 2014 to answer the charge.

Section 23 of the *Summary Offences Act 1966* is a summary offence that provides:

> **23. Common assault**
>
> Any person who unlawfully assaults or beats another person shall be guilty of an offence.
>
> Penalty: 15 penalty units or imprisonment for three months

FORM 3

Magistrates' Court Criminal Procedure Rules 2009

Charge-Sheet and Summons

(Copy for the Accused)

To the Accused			
	Victor Reginald SCHNEIDER 2/18 Stanley Grove North Melbourne VIC 3051	☑Male ☐ Female	Date of Birth 13 July 1983
	You have been charged with an offence. Read these pages to see what you must do.	Registration No. / State	
		Licence No. / State	

DETAILS OF THE CHARGE AGAINST YOU

What is the charge? (Description of offence)	1 ***[TO BE COMPLETED – see Question 1]***		
Under what law?	☑State ☑ Act ☐ Other-specify ☐C'wealth ☐ Reg.	Act or Regulation No. 7405/66	Section or Clause (Full Ref.) 23
Are there more charges?	☑No ☐ Yes – See Continuation of Charges attached		
Request for Committal Proceedings	☑No ☐ Yes		
Type of offence	☑ Summary Offence (You should go to Court) ☐ Indictable offence (You must go to Court)		
Who filed the charge-sheet(s)? (informant)	Neville SMITH	Email: ndsmith@police.vic.gov.au	
Agency and Address	North Melbourne Police Station 36 Wreckyn Street North Melbourne VIC 3051	Phone: (03) 9876 5432 Fax: (03) 1234 5678 Ref: PMZ9732/21	
Signature of Informant	*N D Smith*	Date 8 September 2014	

Charge filed at		on	
	MELBOURNE (Venue)		8 SEPT 2014 (Date)

WHERE WILL THE CASE BE HEARD

Where you must go	The Magistrates' Court of Victoria at MELBOURNE			
Address	233 William Street, Melbourne VIC 3000		Phone: (03) 9628 7777	
When	Time 10.00am	Day 8TH	Month December	Year 2014

DETAILS ABOUT THIS SUMMONS

Issued at	North Melbourne Police Station 36 Wreckyn Street North Melbourne VIC 3051	Date: 8 September 2014
Issued by (Signature)	*N D Smith*	☐ Registrar ☐ Magistrate ☐ Public Official ☑ Member of Police Force ☐ Prescribed Person

QUESTION 1

Criminal Procedure: Complete the Charge-Sheet and Summons by drafting the charge. Provide your answer in the writing space below. **[3 marks]**

Sample answer #1: That the accused (Schneider) did, on Friday 5 September 2014, between approximately 8.30 – 9.10pm at 2/18 Stanley Grove, North Melbourne, unlawfully assault Claire Larkins by pushing her with both hands with such force that she fell backwards onto the floor.

Sample answer #2: The accused at North Melbourne on the 5th day of September 2014 did unlawfully assault Claire Larkins.

Sample answer #3: On 5 September 2014 at North Melbourne, the accused did unlawfully assault Claire Larkins.

Sample answer #4: Victor Schneider did, on 5 September 2014, at 2/18 Stanley Grove, North Melbourne, unlawfully assault Claire Larkins.

Sample answer #5: The accused at North Melbourne on the 5th day of September 2014 did unlawfully assault Claire Larkins.

QUESTION 2

Ethics: Assume you are Counsel and that you have been approached by the Defendant to act for him in relation to this matter. In what circumstances are you able to act for the Defendant on a 'direct access' basis? Explain whether you would you be able to do so in this case. **[3 marks]**

Sample answer #1: Counsel may only act for a defendant on a direct access basis if satisfied that the interests of the defendant do not require that a solicitor be briefed in the matter. There are also restrictions on the courts in which counsel may appear on a direct access basis. Counsel can appear on a direct access basis in a criminal proceeding in the Magistrates Court, like this case. In considering whether a solicitor is required, counsel must take into account the complexity of the matter, and the extent of solicitors' work that would be required, including preparing affidavits and proofs of evidence, and corresponding with other parties. This is a summary offence, and the only witness for the defence is likely to be the accused. There is nothing to indicate that the matter may later become more complicated. Counsel would be able to act on a direct access basis in this matter.

Sample answer #2: Counsel can act on a direct access basis only if satisfied that an instructing solicitor is unnecessary, and can only appear in criminal matters (once proceedings are issued) in the summary jurisdiction of the Mag Court (or by brief from the VLA in the County Court). Counsel cannot generally act in civil proceedings in the courts on a direct access basis. Here the matter is clearly summary, and so counsel could act in the Mag Court (on a direct access basis). But counsel must consider if a solicitor is required. This is probably advisable since there may be some complex evidentiary issues requiring solicitor assistance, as well as solicitor related tasks which counsel must not perform.

QUESTION 3

Criminal Procedure: The Defendant wishes to have the charge determined by a jury. Explain why that option is/is not available. **[2 marks]**

Sample answer #1: The option is not available. This is an exclusively summary matter, to be heard in the Magistrates' Court in front of a Magistrate only.

Sample answer #2: A trial by jury only occurs in indictable offences (heard in the County Court or Supreme Court). Common assault is a summary offence heard by a Magistrate (in the Magistrates Court) and there is no jury.

For the purposes of answering further questions in Part A, assume the following additional facts:

The matter has proceeded to a contested hearing at the Magistrates' Court. The Defendant has pleaded 'not guilty'.

The Prosecution intends to call the following witnesses:

- **Claire Larkins**: Ms Larkins can give evidence of being assaulted in the circumstances as outlined in the prosecution summary of facts. She refused to make a formal statement. However, the informant, Constable Neville Smith, took detailed notes of Ms Larkins' version of events which she narrated to Constable Smith when he attended the premises on 5 September 2014 (see summary of Constable Smith's evidence below).
- **Kylie Wright:** Ms Wright is a neighbour who lives at 3/18 Stanley Grove, a unit with a wall that adjoins 2/18 Stanley Grove. She made a formal statement to police which includes the following evidence:
    - She was at home on the evening of 5 September 2014 and heard the incident involving the Defendant and Ms Larkins.
    - She heard the Defendant shout '*Where's the fucking vodka'* and also heard him shout '*fucking bitch*' several times.
    - She heard the sound of a bottle smash and then heard what sounded like a female sobbing. She then called '000'.
    - Since she has been living in Unit 3 for the last year, Ms Wright has on several occasions heard the Defendant arrive home on a Friday night and start verbally abusing Ms Larkins, often calling her a '*fucking bitch*'.
- **Neville Smith:** Constable Smith, the informant, attended 2/18 Stanley on the night of the alleged assault in the company of Constable Leanne Waterhouse. He questioned Ms Larkins as soon as

they arrived at 9.10pm. She described in detail what had happened that night from the time the Defendant arrived home to the time Police arrived at the unit at 9.10pm. Constable Smith noted what Ms Larkins was telling him in his police notebook as she was relaying it (the contents of these notes, being the only written record of Ms Larkins' version of events, provide the basis for the prosecution summary of alleged facts as outlined above). Constable Smith was also the police member who observed and questioned the Defendant at the Defendant's bedroom doorway. Constable Smith also wrote detailed notes of his observations and of his conversation with the Defendant while he was still at the premises. The prosecution summary of alleged facts accurately reflects the contents of Constable Smith's notes as contained in his police notebook.

The Defendant has instructed Defence Counsel to refute the charge on the basis that he did not push Ms Watkins (ie, there was no assault). The Defendant otherwise accepts that he arrived home intoxicated, may have been verbally abusive, and may have smashed the empty vodka bottle. He also accepts he may have had a conversation with Constable Smith while he was in bed, but he has no recollection of it. He strenuously denies that he could possibly have said that he pushed Ms Larkins because he did not actually push her.

QUESTION 4

Criminal Procedure: Which **TWO** of the following statements are <u>correct</u> in this case?

Your answer:
(circle TWO)

a) The Prosecution must prove the charge beyond reasonable doubt.
b) The Prosecution must prove the charge on the balance of probabilities.
c) The Prosecution must satisfy the Magistrate that a jury could properly convict the Defendant on the evidence presented.
d) The Defendant must disprove the charge on the balance of probabilities where there is a prima facie case to answer.
e) The Defendant bears an evidentiary burden of raising reasonable doubt before the Magistrate can dismiss the charge.
f) The Defendant bears no legal burden in advancing his defence.

[2 marks]

Chief Examiner's note: Answer (a) needs no explanation – answers (b) and (c) are incorrect descriptions of the Prosecution's legal burden in a summary contest before a Magistrate. Answer (f) is correct in the context of this case as the Defendant is simply seeking to raise factual doubt as to an external element of the offence (i.e. whether he pushed the victim).

QUESTION 5

Evidence: Explain how the rule in *Browne v Dunn* would be applied by Defence Counsel in this case. **[3 marks]**

Sample answer #1: D Counsel would be required to put to pros witnesses in XXN so much of the defence case as is inconsistent with their evidence, in sufficient detail to enable them to comment /refute /accept any essential elements of the case. Main issue here is whether 'the push' occurred – would need to XXN Ms Larkins and say 'it's not true he pushed you is it?', and XXN Constable Smith to effect that accused didn't say anything about pushing Ms Larkins. No evidence from Ms Wright about 'push' so need not put this to her.

Sample answer #2: The rule in Browne v Dunn requires defence counsel to put to witnesses for the prosecution – Claire Larkins and Neville Smith – the substance of the evidence that counsel intends to call to contradict their version of events. Here counsel would need to put to Larkins in cross-examination that the defendant did not in fact push her, and to Smith that the defendant did not in fact admit to pushing Larkins. The rule gives those witnesses a fair chance to answer or respond to the contracting evidence and assists the court to assess the weight to attach to it and the demeanour of the witnesses.

QUESTION 6

Evidence: Assume that when the victim, Claire Larkins, is called by the Prosecutor to give evidence, the following exchange takes place before she gets into the witness box:

> **Ms Larkins:** Your Honour, I don't want to be here.
>
> **Magistrate:** What's the problem Ms Larkins?
>
> **Ms Larkins:** I don't want to say anything against my partner Victor.
>
> **Magistrate:** You're in a relationship with the Defendant? Is that what you're saying?
>
> **Ms Larkins:** Yes your Honour. We've been living together for more than three years.

Consider whether Ms Larkins is obliged to give evidence for the Prosecution. **[5 marks]**

Sample answer #1: Family privilege available to spouse /de facto /child /parent of accused, makes not compellable witness for prosecution where risk of disrupting or causing harm to family relationship (include risk of economic /emotional harm), not outweighed by desirability of having evidence adduced. Must consider what risk of harm and importance of evidence/nature of offence charged and weigh up. Might be available to Ms Larkins because she is de facto of accused, and possible risk of physical /other harm if she gives evidence against him (this is a domestic violence charge, he might end relationship /kick her out etc). But her evidence is central to prosecution case – without it, no direct evidence of conduct constituting the assault. This is a common issue in family violence cases – there is an exception based on

public interest where the violence involves a child (ie family privilege doesn't apply) but I don't think it applies to violence between domestic partners. Given though that the offending is at the lower end of scale (not apparent that any physical injury, seems to be first time police have got involved) and that if called she might be unfavourable anyway and lose credibility (ie evidence might not have much probative value where reluctant /unfavourable) interest in not causing harm to her /relationship probably outweighs desirability of calling her to give evidence in this case.

Sample answer #2: Section 18 of the Evidence Act provides that a de facto partner of the accused may object to giving evidence for the prosecution. So here Larkins is entitled to object. In determining whether to allow the objection, the court will consider whether the giving of evidence would raise a risk of harm to Larkins or to her relationship with the accused. The court will allow the objection if the risk of harm outweighs the desirability of hearing the evidence from Larkins. In making its decision, the court will have regard to:

- The seriousness of the offence (a relatively minor summary offence);
- Importance of the evidence (it is important as it's the only direct evidence of the offence);
- The nature of the relationship with the accused and the degree of harm that might be caused (here clearly Larkins is worried that giving evidence will harm her 3 year relationship) and she felt that way at the time as she refused to make a statement to the police. Also risk of further harm – retribution by accused/ violence;
- Other ways in which the evidence may be admitted (here there is evidence of Larkins' account given to Smith which may be sought to be adduced);
- On balance, given the real risk of harm (even violence) to Larkins and the lower seriousness of the offence and the alternative evidence – likely court will allow Larkins' objection and order that she is not a compellable witness for prosecution.

QUESTION 7

Evidence: Assume that the Magistrate rules that Ms Larkins is not obliged to give evidence. Ms Larkins then leaves the court room. The following exchange then takes place:

> **Magistrate:** How does the prosecution wish to proceed?
>
> **Prosecutor:** Well your Honour, …
>
> **Defence Counsel:** They have no case without this witness your Honour. I'll be seeking to have the charge dismissed on this basis.

Is Defence Counsel correct? Answer this question by considering the evidentiary significance and admissibility of:

i) Kylie Wright's evidence (what she heard on the night of the alleged assault and what she heard on other occasions); and

ii) Constable Smith's evidence (his account of what Ms Larkins told him when he arrived and his observations of and conversation with the Defendant).

[10 marks]

Sample answer #1: Wright's evidence is circumstantial, ie. it is not direct evidence of a fact in issue, but evidence of another fact from which an inference about a fact in issue can be drawn. For example, she heard the accused shout 'where's the fucking vodka' and 'fucking bitch' several times. She also heard the bottle smash and then what sounded like a female voice sobbing. From those facts, the prosecution may seek to draw an inference that the assault occurred. (In criminal case the inference must be only rationale inference available). The evidence of the found of the bottle smashing and what sounded like a female sobbing is lay opinion evidence (s78EA). Generally opinion evidence is not admissible to prove the fact about which the opinion is expressed. However if the opinion is based on what a person heard, saw or otherwise perceived, it is admissible. Also the evidence about what the accused said is direct evidence and admissible. It is not hearsay as it is not being used for the hearsay purpose. In terms of the previous statements on other occasions, that would be tendency or coincidence evidence (ss97-98). It would need to have significant probative value. Notice would need to be given and the probative value would need to substantially outweigh the prejudice (101). Note in this case, the fact that the accused said those things: (a) may be admissible and not in issue, and (b) does not prove the assault took place.

Smith – what Larkins told Smith may be admissible as hearsay (first hand) (s65). Here the matter of the representatives is unavailable (Magistrate rules Larkins would not give evidence). She has personal knowledge of the asserted facts (what occurred etc – the push/assault). The previous representations were made shortly after the events took place in circumstances where it is unlikely to be a fabrication (may also be highly reliable). Subject to notice being given, Smith can give hearsay evidence under s.65 of what Larkins said. (Smith heard/saw/perceived Larkins make the representation). The admission is more complex. First under s.86 the documentary record of an admission, not signed/acknowledged is true by the accused is not admissible. However, that section does not exclude the police giving oral evidence of the admission. The admission may also be excluded under s.85 – evidence of an admission made by an accused to or in the company of a police officer is not admissible unless the circumstances in which the admission were made make it unlikely that the truth of the admission were adversely affected. Further s.90 EA provides that an admission is not to be admitted if the circumstances in which it was made make it unfair to admit the admission. Here the issue is one ss.85 and 90 triggered because the accused was drunk and dazed when he made the admissions, maybe not admissible, but maybe this issue can be decided in a voir dire. I have not raised s.138 (improperly obtained evidence) because the victim invited the police into the house – a warrant is not therefore needed. Note also ss.136 and 137 (discretionary exclusions).

Sample answer #2: Defence counsel is presumably foreshadowing a no case to answer submission at the close of the prosecution case. The relevant test is whether, on the evidence as it stands at the close of the prosecution case, taken at its highest, the defendant could lawfully be convicted. In answering this question, it is necessary to consider what other evidence could be admitted.

Ms Wright's evidence of hearing things: Ms Wright's evidence of hearing fighting and the sound of a bottle smashing is circumstantial evidence. It does not directly prove a fact in issue (whether the defendant pushed Ms Larkins), but the prosecution might argue that, taken with the other evidence, the fact that the defendant and Ms Larkins were fighting and that Ms Larkins was sobbing can give rise to an inference that the defendant pushed Ms Larkins. This kind of evidence is

rather weak. It is only capable of meeting the threshold of relevance (capable of affecting the rational assessment of the probability of the existence of a fact in issue) when considered with other evidence. If that other evidence (ie the admission) is in admissible, this evidence will likely not be admissible because it is irrelevant, or more prejudicial than probative.

Ms Wright's evidence of previous fights: Ms Wright's evidence of hearing fights between the defendant and Ms Larkins on other occasions over the past year is tendency evidence (evidence of previous conduct of the defendant adduced to prove that the defendant has a tendency to act in a particular way or to have a particular state of mind). It is only admissible notice of its intention to adduce the evidence for that purpose, and if the evidence has significant probative value, and (because it is adduced by the prosecution in a criminal proceeding) if the probative value significantly outweighs any prejudicial effect. Velkoski makes clear that the key and assessing significant probative value is similarity: striking similarity is not required, but there must be a modus operandi pattern of conduct. The fact that the fights occurred on Fridays (when it is more likely a person might have been out drinking) and involved the phrase 'fucking bitch' (not a particularly distinctive form of abuse) do not rise to the level of similarities giving the evidence significant probative value. Further, evidence of a tendency to have verbal arguments with Ms Larkins is not probative of whether the defendant pushed her on this occasion, and clearly would not rise above the prejudice caused by the admission of this evidence.

Constable Smith's evidence of Ms Larkins' statement: Constable Smith's evidence of Ms Larkins' statement may be admissible as first hand hearsay in exception to the hearsay rule. Ms Larkins is not available to give evidence because her objection has been upheld. This is first hand hearsay because Ms Larkins (also made the relevant representation) had personal knowledge of whether she was pushed: it happened to her. The statement was made shortly after the occurrence of the asserted fact in circumstances that do not make it likely to be unreliable (it was made to police immediately after the event). The prosecution would need to have given notice of its intention to adduce this evidence before it can be adduced as first hand hearsay: if it has not given notice, it may be not be admissible.

Constable Smith's evidence of what the defendant said and how the defendant seemed: This is evidence of an admission made by the accused in the presence of an investigating official. As a general rule, admissions are admissible in exception to the hearsay rule. However, because this was an admission by the accused to an investigating official, the court must be satisfied that the circumstances are such that it is likely to be a reliable admission. Here the fact that the defendant was clearly intoxicated may mean the admission does not meet that requirement, however the fact that it was unprompted makes it more reliable. Further, the court has a discretion to exclude an admission if it would be unfair to the defendant, given the circumstances. The court may decide to exercise that discretion here. Constable Smith will be able to give evidence of his observations of the accused, including that he smelled of liquor. Constable Smith will only be able to give evidence of an opinion that the defendant was intoxicated if he satisfies the lay opinion exception is the opinion rule: that the opinion is based on what Smith observed, and is reasonably necessary to understand Smith's observation. It is not clear that such an opinion would be admissible. However, Smith may still report his observations.

Provided that Ms Larkins' statement is admissible as first hand hearsay, the prosecution should be able to meet any no case to answer submission.

For the purposes of answering further questions in Part A, assume the following additional facts:

- The Prosecution calls Kylie Wright and her evidence is ruled to be admissible.
- The Prosecution calls Constable Smith and her evidence is ruled to be admissible.

QUESTION 8

Ethics: Assume that when Ms Wright walks into court after being called by the Prosecutor, Defence Counsel immediately recognises her. Defence Counsel represented Ms Wright three years ago in a matter where she had been charged with making a false complaint to police about being sexually assaulted by her former neighbour when she was living in Brunswick. Ms Wright was found guilty of this offence in the Melbourne Magistrates' Court and she was convicted and sentenced to undertake a Community Corrections Order. Defence Counsel remembers the circumstances of this case and also that Ms Wright has a number of other prior convictions for making false complaints to police. Defence Counsel also remembers tendering a psychiatric report in the course of the plea which established that Ms Wright had a severe depressive and borderline personality disorder at the time. The reason Defence Counsel did not realise this witness is a former client until now is that Ms Wright has changed her name (Counsel remembers her original name as 'Heather Ricketson'). The prior convictions of Ms Wright (Ms Ricketson) were not disclosed to Defence in the Prosecution brief in the present matter because a search of the Police criminal history database for this witness was done on the basis that her name was 'Kylie Wright'. The search report disclosed no prior convictions for 'Kylie Wright'. Presently only Ms Wright and Defence Counsel are aware of her former name and prior criminal history.

Discuss the ethical implications for Defence Counsel at this point. **[4 marks]**

Sample answer #1: Counsel has a duty of loyalty and a duty not to disclose confidential information obtained when acting or a former client. However it is not confidential information that the witness was convicted and sentenced. Further, as the prosecution has a duty to disclose prior convictions that go to credibility (eg lying) they are obliged to disclose that information. Defence counsel should call on full disclosure. In terms of cross-examining the witness a reasonable fair-minded person might perceive a danger in counsel disclosing information that is actually confidential about the witness. Counsel should disclose the relationship to the court as other side. Presumably an adjournment will be necessary in any event for the police to obtain her prior convictions and that should be enough time to either seek leave to withdraw or have another barrister appear to cross-examine the witness if counsel believes due to personal connections she cannot cross-examine, but otherwise will not breach confidentiality by continuing to act in the matter.

Sample answer #2: Counsel has a duty to his client to advance his client's interests to the best of his abilities, consistently with counsel's other duties. Counsel also has a duty to his former client not to use confidential information obtained from that client without that client's consent. It is important to distinguish between confidential and non-confidential information. Ms Wright's previous convictions are a matter of public record. However Ms Wright's depressive and borderline personality disorder is a matter confidential to Ms Wright. Counsel cannot use or disclose the psychiatric disorder, and therefore cannot cross-examine Ms Wright consistently with counsel's duty to the defence (as counsel will be required to hold back relevant matters). Counsel should seek an adjournment and seek to have new counsel briefed to conduct the cross-examination of Ms Wright. Ms Wright's change of name is arguable a matter of public record, and therefore not confidential information. Assuming this is the case, counsel should disclose the information to the prosecution so it can reconsider the value of the witness' evidence. Counsel would also be able to disclose the matter to any new counsel cross-examining Ms Wright. If the information is confidential, counsel must not disclose it.

QUESTION 9

Evidence: After being sworn, Constable Smith is asked by the Prosecutor to recount his observations made upon his arrival at the home of the Defendant and Ms Larkins. Constable Smith says *'I don't really have a good recollection.*' In what circumstances will Constable Smith be allowed to either refer to or read aloud his notes contained in his notebook and/or his formal written statement which he prepared shortly after he arrived back at the Police station on the night of the alleged assault? In answering this question, you should assume that Defence Counsel has been provided with copies of these documents well before the contested hearing. **[4 marks]**

Sample answer #1: Smith may be permitted to refer to his notebook with leave of the court, on the basis it would be used to refresh his memory about the facts that are said to have occurred at the defendant's residence. This would be on the prosecutions application to the court. The court would consider the extent to which Smith is able to recall matters independently of his notebook – here not at all and whether the notes were made by him at a time of or shortly after the recorded events. Here the notes were taken contemporaneously with his conversation with Larkins. The court would likely grant him leave to read aloud so much of the notes as are relevant to refreshing his memory. These principles do not apply to his formal statement, as it was completed by him and signed when he was a police officer, and was done when events were likely fresh in his memory – here upon returning to the police station. Also a copy has been supplied to the defendant in advance of giving the evidence. As such Smith would likely be permitted to read or be led through his statement.

Sample answer #2: Counsel may attempt to refresh Constable Smith's memory in court by seeking leave to allow Constable Smith to refer to his notebook. In considering whether to grant leave, the court will consider whether Smith is able to recall the matter without referring to notes (which it seems he is not), and whether the notes were made when the matter was fresh in Smith's memory (the notes in the notebook certainly were). It is likely that such leave would be granted. As Constable Smith is a police officer, counsel may also seek leave for Constable Smith to read from his written statement. The court must be satisfied that the statement was prepared when events were fresh in Smith's memory (it was prepared that night, so this is likely to be satisfied), that it was signed by Smith, and that it was provided to the defence a reasonable time before trial. It seems all of these requirements have been satisfied.

QUESTION 10

Ethics:	On the basis of the known evidence, which **ONE** of the following questions may properly be put by Defence Counsel in cross-examination of Constable Smith?
Your answer: ***(circle ONE)***	a) *'Do you regularly conspire with Constable Waterhouse to falsify your evidence?'* b) *'Did you pressure Ms Larkins to say that she was pushed?'* c) *'Your suggestion that the Defendant said he pushed Ms Larkins is patently false, isn't it?'* d) *'Are you currently under investigation by the ethical standards division in relation to this matter?'* e) *'Have you given false evidence in other cases?'*
[1 mark]	f) *'Were you attracted to Ms Larkins when you first saw her?'*

Chief Examiner's note: Answer (c) is a permissible way by which Defence Counsel could comply with the rule in *Browne v Dunn*. There is no evidentiary foundation for any of the other questions to be properly put.

QUESTION 11

Evidence: Assume that the Defendant gives evidence in his own Defence and denies assaulting Ms Larkins. In the course of giving evidence, he also says *'I'm not the sort of person to be physical with my girlfriend. I've never hit a girl in my entire life.'* The Defendant was found guilty of affray fifteen years ago. The circumstances of this prior matter relate to the Defendant's involvement in a drunken pub brawl with a number of his friends while he was still studying at university. For that offence he received a good behaviour bond without a conviction being recorded.

Will the Prosecutor be permitted to cross-examine the Defendant about this prior matter? **[3 marks]**

Sample answer #1: Assume that the defendant adduced this evidence for the subjective intention of character evidence (in a particular way, ie. 'I don't hit girls') then the hearsay, tendency, opinion and credibility rules do not apply evidence adduced to rebut the good character (in a particular aspect). However, you cannot cross-examine an accused about good character without leave (192) having regard to the nature of the offence, importance of the evidence, prejudice/ unfairness and delay to the trial. Here the evidence shows he gets drunk and hits people (at its highest), 15 years ago. I think it would be unfair to allow cross on this matter. It is nothing to do with good character, ie. Hitting girls. Also could be excluded under s.137 (Unfair tendency reasoning etc).

Sample answer #2: The accused has raised evidence of character in his evidence. The prosecution must seek leave to cross-examine the accused in relation to its character. However as the accused has only raised his character in a limited way that is 'I'm not the sort of person to hit a girl', the prosecution will only be able to rebut a limited. If accused had stated he had never hit anybody as he is not that kind of person the prosecution would be entitled to cross-examine about his prior conviction for affray. Even if court accepted that the accused raised his character in a general way it is likely that the conviction for affray 15 years ago would be excluded as its probate value would be outweighed by the danger the jury would reason in a tendency way.

For the purposes of answering further questions in Part A, assume the following additional facts:

The Magistrate finds the Defendant guilty of the offence of common assault. The Defendant is convicted and sentenced to undertake a Community Corrections Order for a period of 6 months.

In the course of sentencing the Defendant, the Magistrate makes the following remarks: *'I have included within the Community Corrections Order a requirement that you undertake drug and/or alcohol counselling as directed by your Community Correctional Services officer. But you need to understand that you are answerable to the community for your drunken display of inexcusable violence against your partner that evening. In this respect, you must receive a sentence that the community considers you deserve. I am therefore including a requirement that you undertake 100 hours of unpaid community work during the operational period of the order.'*

QUESTION 12

Criminal Procedure: Which **TWO** sentencing factors appear to be implicitly addressed in the Magistrate's sentencing remarks?

Your answer:
(circle TWO)

a) General Deterrence.
b) Just Punishment.
c) Parsimony.
d) Rehabilitation.
e) Remorse.
f) Totality.

[2 marks]

Chief Examiner's note: Just Punishment is reflected in "*you are **answerable** to the community for your drunken display of **inexcusable violence** against your partner that evening. In this respect, you must receive a **sentence** that the community considers you **deserve**.*" Rehabilitation is reflected in the requirement that the Defendant undertake drug and alcohol counselling as part of the CCO.

QUESTION 13

Criminal Procedure: Refer to the list of possible answers to Question 12 above. Select **TWO (and only two)** sentencing factors **from the four you did not include in your answer to Question 12**. In relation to each of these two other factors you have selected: (i) explain how it works as a general concept in the sentencing process; and (ii) explain how it could/could not have been applied (hypothetically) by the sentencing Magistrate in this case. In answering this question you may speculate as to the existence of other relevant facts that may assist in your explanations. **[4 marks]**

Sample answer #1: a) General deterrence – is expression in sentencing process of the idea that by publicly punishing /denunciating a particular offence /type of conduct, others in the community will be deterred from acting the same way. Hypothetically, Magistrate could have referred to the need to show public disapproval of violence against women and let others know it is not acceptable conduct.
e) Remorse – used as a mitigating factor where offender acknowledges their wrong doing and is sorry for the consequences of their actions (but note must relate to consequences for others, ie impact on victim, can't just be sorry they got caught /convicted). Hypothetically if Mr Schneider instructed you he felt bad for getting drunk and violent and was sorry, could make submission to Magistrate that he was remorseful and Magistrate could take into account in mitigation.

Sample answer #2: Totality – where an accused is convicted of multiple offences in court must ensure that the sentence imposed is appropriate when having regard to the totality of the offences. Totality would not have been a relevant consideration for the Magistrate when sentencing the accused because the accused was only convicted of one offence. If the accused had been convicted of another offence then this would have been a relevant consideration.
Parsimony – the sentence imposed must not be greater than warranted having regard to the circumstances of the offence. This is a relevant consideration in the sentencing of the accused because the Magistrate would have had to consider the seriousness of the offence when determining what sentence to impose. Given the nature of the offence – common assault involving alcohol it was reasonable for the Magistrate to impose drug/alcohol rehabilitation and community service order.

Sample answer #3: General deterrence – court in sentencing may have regard to deterring not just the accused but also the community more broadly by making it clear that this kind of offending is not tolerated by courts and community. Could apply in this case as no special disability suffered by accused and domestic violence is kind of offending from which court would consider it appropriate to deter other potential offenders.
Parsimony – sentence must be no more punitive than required to meet sentencing purposes in each case. Could apply (and likely did) by ensuring sentence meets purpose of punishment, rehabilitation and specific and general deterrence by combining punitive component /community work) with rehabilitation component (drug /alcohol counselling) and for CDO not running for too long – 6 months is quite reasonable.

Sample answer #4: General deterrence: In sentencing, the court should have regard to the need to impose a sentence which will deter other members of the community from committing the same or a similar offence. Here the Magistrate might have applied general deterrence by increasing the sentence to deter others from committing violence in domestic relationships.

Remorse: Remorse acts as a mitigating factor in sentencing, if the court believes it is genuine. Here the Magistrate could have reduced the sentence if convinced that the defendant had shown genuine contrition. This is more applicable where there is a guilty plea.

QUESTION 14

Criminal Procedure: Outline and explain the Defendant's and the Prosecution's potential avenues for appealing the final determination of the Magistrates' Court in this matter. **[4 marks]**

Sample answer #1:

1. Accused can appeal sentence and conviction, or conviction as of right. It is a hearing de novo in the County Court without a jury.
2. Prosecution can appeal sentence to County Court if it is in the public interest as of right.
3. Either party can appeal to the Supreme Court on a question of law, but that prevents an appeal to the County Court.
4. The County Court can increase the sentence and the accused should be warned. The accused can only appeal the sentence of the County Court if the County Court imposes a jail term (as this was not imposed by the Magistrate) to the Court of Appeal (must get leave, show error (House v R or specific error) and that a different sentence should be imposed).
5. DPP cannot appeal conviction of County Court but can seek an opinion from Court of Appeal (s.308 CPA).

Sample answer #2: The defendant may appeal against conviction and/or sentence to the County Court, within 28 days of sentence. The County Court will conduct a rehearing of the matter, with all evidence called again. If it convicts the defendant, the County Court can exercise the sentencing powers of the Magistrates' Court, but must warn if it intends to impose a more severe sentence. The defendant may also appeal on a point of law to the Supreme Court (but will not be permitted to go to the County Court for rehearing if it does so). The prosecution may appeal to the County Court against sentence if it is in the public interest to do so, (eg because there is a point of principle). Again the County Court will be able to exercise the Magistrates' Court's sentencing powers. If this were an acquittal, the prosecution could appeal on a question of law, but this would not affect the defendant's acquittal – only clarify the law for future cases.

End of Part A

(*Turn the page for Part B*)

PART B (Questions 15 to 26) – Candidates are required to answer ALL questions in Part B.

Assume the following alleged facts relate to all questions in Part B.

CareSuper Pty Ltd ('**CareSuper'**) is a corporation which administers a large superannuation scheme for employees of a network of nursing homes and private hospitals in Victoria. It currently manages the funds of around 20,000 employees each of whom is a member of the scheme. The fund is currently worth around $2 billion.

The board of CareSuper is constituted by three directors. One director is appointed by the nursing homes in the scheme, another director is appointed by the private hospitals in the scheme, and the third director is an independent director appointed by the other two directors. Sarah Percival ('**Ms Percival**') was appointed as a director two years ago. She is the independent director. She was appointed by the other two directors Danielle King ('**Ms King**') (appointee of the nursing homes) and Michael Wong ('**Mr Wong**') (appointee of the private hospitals). They appointed Ms Percival for her significant experience gained as an investment banker at a major investment company in the United States.

A function of the board is to manage members' superannuation funds which includes managing the investment of members' funds. Historically, the board has made conservative investments, with over 70 per cent of funds invested in 'low risk' assets such as cash (ie, cash deposits in interest bearing domestic and foreign bank accounts).

On 1 July 2014, the board met. At that meeting, Mr Percival proposed that the fund change its investment strategy to invest more in the Australian share market. Mr Wong was reluctant to embrace this more risky approach. Ms King also expressed reservations. Ms Percival explained to the others that they could still be assured that the investment policy was overall conservative in nature by investing funds in 'blue chip' stocks that had a good history of capital growth and dividend yields. Mr Wong and Ms King were satisfied with this argument and so deferred to Ms Percival's judgment. It was resolved that Ms Percival would be responsible for implementing the strategy.

The following day, Ms Percival instructed CareSuper's stockbroker to purchase $50 million worth of shares in MeBank Limited ('**MeBank**'), a highly speculative publicly listed company on the Australian Stock Exchange ('**ASX'**). The heavy buying interest generated by this one-off purchase resulted in Mebank's share price climbing from $0.15 to $0.45 in one day, settling at a price of about

$0.35 a few days later. CareSuper's price paid per share averaged $0.33 (ie, it acquired 150 million shares in total).

Ms King and Mr Wong were informed about Ms Percival's purchase of MeBank Shares by CareSuper's chief executive officer, David Price ('**Mr Price**') a few days later. After a secret investigation, they discovered that Ms Percival's fiancé, Ronald Crump ('**Mr Crump**'), had owned $2m worth of MeBank shares which he had sold when the market share price hit $0.40 on 2 July 2014 for a total sale price of $5 million. He therefore profited $3 million as a result of CareSuper's share purchase of MeBank shares on the same market trading day.

On 14 July 2014, Ms King and Mr Wong took the following action:

- They met with Ms Percival, advised her of the outcome of their secret investigation and demanded her resignation. Ms Percival tendered her resignation although she denied any fault.
- They instructed CareSuper's stockbroker to sell all its MeBank shares. By this time, the share price had fallen further. The shares were sold for a total sum of $40 million, resulting in a total loss of $10 million to the CareSuper fund.
- They notified members of the CareSuper scheme in writing that as *'a result of an irregular transaction authorised by Ms Percival, the scheme has suffered an immediate financial loss of $10m and, in the circumstances, the Board had accepted Ms Percival's resignation effective immediately.'*

In early October 2013, members of the scheme ('**Plaintiffs'**) launched a class action against CareSuper ('**First Defendant'**), Ms King ('**Second Defendant'**), Mr Wong ('**Third Defendant**') and Ms Percival ('**Fourth Defendant**'), claiming in excess of $10 million in losses and damages. The Plaintiffs' primary cause of action is negligence. The main facts in issue are:

- Whether Ms King, Mr Wong and/or Ms Percival breached their duty of care by allowing funds to be invested in the ASX.
- Whether Ms King and Mr Wong were in breach of their duty of care by giving sole decision-making power in relation to ASX investments to Ms Percival.
- Whether Ms Percival's decision to invest $50m in MeBank was in breach of her duty of care.
- Whether CareSuper is vicariously liable for the conduct of Ms King, Mr Wong and Ms Percival.

QUESTION 15

Civil Procedure:	The Plaintiffs' proceedings are most likely to be commenced by the filing of what document in the Supreme Court?
Your answer: ***(circle ONE)***	a) Interlocutory Application. b) Notice of Proceedings. c) Originating Motion. d) Statement of Claim. e) Summons. f) Writ.
[1 mark]	

Chief Examiner's note: See *Supreme Court (General Civil Procedure) Rules 2005*, O 4.01.

QUESTION 16

Ethics:	Who is bound by the overarching obligations in civil proceedings, as set out in the *Civil Procedure Act 2010*?
Your answer: ***(circle ONE)***	a) A party to the proceeding. b) All witnesses to the proceeding. c) Law Institute of Victoria. d) Victorian Bar, Inc. e) All of the above. f) None of the above.
[1 mark]	

Chief Examiner's note: See *Civil Procedure Act 2010*, s 10.

QUESTION 17

Ethics:	Which **TWO** of the following are overarching obligations in civil proceedings, as set out in Part 2.3 of the *Civil Procedure Act 2010*?
Your answers: ***(circle TWO)***	a) to maximise the number of claims/defences available. b) to act impartially. c) to act consistently. d) to co-operate with other parties in connection with the proceeding. e) to minimise litigation risk for all parties in the proceeding. f) to act honestly.
[2 marks]	

Chief Examiner's note: See *Civil Procedure Act 2010*, Part 2.3.

QUESTION 18

Ethics: What is a 'conditional costs agreement'? Is it possible for Counsel to act for the Plaintiffs in this case by entering into such an agreement and, if so, what is Counsel obliged to do if the brief is accepted on this basis? **[3 marks]**

Sample answer #1: A conditional costs agreement is one where some or all of the legal fees are deferred subject to plaintiff obtaining a 'successful outcome' from proceeding (judgment or settlement in their favour). Would be available for a civil claim like this, provided counsel satisfied plaintiffs have a good case against one or more defendants (here they probably do). If agreed to act on conditional costs basis, must agree with client what constitutes a 'successful outcome', must disclose all usual matters about estimates of costs /basis, when costs payable, etc., all in writing, advise client to get independent advice on draft agreement, and if happy, sign it. If matter settles also obliged to class action to have settlement approved by court and should inform clients of this.

Sample answer #2: A conditional costs agreement is an agreement that a lawyer will act and will only require a fee for services provided if their client is successful (also known as acting on a no-win no-fee basis). Counsel cannot act on the basis in criminal law or family law matters but can act as a no-win no-fee basis for the plaintiffs in this case. The conditional costs agreement must be in writing, must set out what will be a successful outcome eg Damages in amount of 5 million dollars, and signed by the client and must include statement that clients have been advised of their right to obtain independent legal advice, and also the possible consequences of refusing a reasonable offer to settle.

QUESTION 19

Ethics: What is a 'proper basis certification'? Explain how this requirement would apply to the Plaintiffs' legal representatives in this proceeding and what the potential consequences could be (if any) if they fail to comply with that requirement. **[3 marks]**

Sample answer #1: A proper basis certification is a certification made under the Civil Procedure Act that the claims or defences made are made with proper basis. The plaintiff's legal representatives must not make a claim in the proceeding which they do not reasonably believe to be justifiable or is not based upon the instructions they have been provided. The plaintiff's legal representatives may themselves be liable to costs, compensation and other orders for failure to comply (s29, see also case with excessive contest of appeal books).

Sample answer #2: This is certification to be filed with the first substantive document in the proceeding (here probably the statement of claim) that certifies that practitioners have a proper basis for every allegation of fact, denial or matter which is said to be not admitted. Here the plaintiff's legal representatives would file the certification stating that there is reasonable belief as to the truth of the matters alleged against the defendants. Failure to comply would be in breach of the overarching obligations on practitioners pursuant to the Civil Procedure Act, and may result in an order of costs against the practitioner or a limiting of the claims the plaintiffs may bring in the proceeding.

For the purposes of answering further questions in Part B, assume the following additional facts:

- All Defendants have filed and served their defence.
- CareSuper, Ms King and Mr Wong deny liability in relation to the Plaintiffs' claims. They have pleaded a number of alternative defences and additional allegations, summarised as follows:
    - They deny any breach of duty of care.
    - Ms Percival fraudulently represented to Ms King and Mr Wong that funds would be invested only in 'blue chip' stocks when her intent was always to invest in MeBank. She exceeded the scope of her authority and is liable to indemnify CareSuper, Ms King and Mr Wong for all losses associated with the MeBank transactions (including the losses associated with defending these proceedings).
    - Mr Crump was a party to Ms King's unlawful conduct or otherwise knowingly profited from it. He is liable for knowingly being in receipt of trust funds (the profit of $3 million from the sale of MeBank shares) or was other unjustly enriched as a result of Ms King's unlawful conduct. He is liable to account to CareSuper for all of these profits.
- Ms Percival also denies all liability. She also pleads:
    - She denies that MeBank was a risky stock.
    - She denies being aware that Mr Crump owned and subsequently sold MeBank shares.
    - She denies profiting from Mr Crump's sale of MeBank shares.
- Ms King, Mr Wong and Ms Percival have also sought full indemnification from liability in this proceeding by the terms of an insurance policy held by CareSuper. The insurer is PIA Insurance Limited ('**PIA')**. PIA has denied their claims on the basis that the insurance policy expressly excludes cover for 'reckless' conduct on the part of directors. PIA asserts that the conduct of all three directors was reckless.

QUESTION 20

Civil Procedure: Explain any further procedural steps which the Plaintiffs and/or the Defendants should now consider taking to maximise their interests in the outcome of the litigation. **[3 marks]**

Sample answer #1: CareSuper should seek to bring claims against Mr Crump for knowing receipt or unjust enrichment by issuing a third party notice: there are common questions of fact or law with the existing proceeding, and the relief claimed against Mr Crump arises from the same transaction as the relief claimed against the directors. CareSuper, King and Wong should bring a claim of fraudulent representation against Ms Percival: she does not need to be joined as she is already a party, so the claim could be brought by notice against a party under Order 11, as it is a claim for an indemnity.

King, Wong and Percival should bring a claim for indemnity against PIA by way of third party notice, and join PIA as a third party: it falls within the scope of the third party provisions as it is a claim for indemnity. The plaintiffs may seek to join Crump if the other parties do not: common questions, and relief arises from the same transaction.

Sample answer #2: The defendants could join PIA as a third party on the basis they have claims against PIA arising out of the same factual circumstances, and that if they are liable to the plaintiffs they are entitled to recover from PIA. The plaintiffs should join Crump or commence a separate action against Crump and have it consolidated with the first action. CareSuper, King and Wong could serve third party notice on Percival in relation to their claim for fraudulent misrepresentation claiming contribution.

QUESTION 21

Civil Procedure: Could this matter be heard before a jury? Explain your answer. **[2 marks]**

Sample answer #1: This matter could be heard by jury if commenced by writ as it's founded on tort. The plaintiff would request trial by jury in the writ or the defendant could file and serve notice that a jury is required within 10 days of the last appearance. The court retains discretion however to determine the mode of trial even if plaintiff or defendant elect (eg. for complexity).

Sample answer #2: A civil trial can be conducted before a jury where it deals with a matter in contract or tort. The plaintiff's primary cause of action is negligence, therefore either the plaintiffs or defendants can request a jury on their originating processes. Whichever party claims the privilege of a jury must pay for it. The right to a jury can be excluded by the judge if in consideration of all the circumstance a jury is improper due to nature or complexity of proceeding.

For the purposes of answering further questions in Part B, assume the following additional facts:

- Mr Crump and PIA are now parties to the proceeding.
- The matter has been set down for a trial by judge alone with an estimated trial duration of four weeks.
- All steps in the litigation prior to trial have been completed by the parties, including discovery.

QUESTION 22

Ethics: In what circumstances may Counsel represent two parties in a proceeding? Having regard to the information available, is it possible that two parties in this proceeding could be represented by the same counsel? **[4 marks]**

Sample answer #1: Counsel may represent two parties in a proceeding provided there is no conflict of interest and in any event with both parties informed, written consent. Counsel would need to enquire upon being offered a brief whether there is, or is a real possibility, of a conflict of interests in serving multiple parties. If so counsel must refuse the brief (as an exception to the can rank rule) unless, having raised it with the parties, the parties consent to counsel acting for both. Here counsel could act for both Ms King and Ms Wong as two of the defendants. They are both directors on the same board, and hence their interests would likely be aligned – advancing the interests of CareSuper. It is unlikely that their custodianship over different portfolios (nursing homes and private hospitals) would be an issue, though counsel may nonetheless enquire with these parties.

Sample answer #2: Counsel may act for two parties in a matter, but only so long as there is no conflict from the outset, or likely to be a conflict as the case progresses. Conflict may arise most obviously where the two clients' interest are opposed, or may become opposed later. Or it may arise because counsel will be exposed to confidential information for one client that may advantage the other client, ie give rise to conflict. Or counsel may have a specific connection with a client that would create a conflict or a potential new party. Here is it possible counsel could act for both Wong and King, and possibly CareSuper, as their interests are generally aligned. Although CareSuper may want to point the finger at all directions, making this potentially problematic. Percival and crump need to have separate representation, as does the insurer. Their interests are all generally opposed (Crump may end up denying any involvement and blaming Percival).

QUESTION 23

Civil Procedure: Explain the obligation and purpose of 'discovery' in civil proceedings? Identify **FOUR** specific categories of document that would be sought/discovered by any of the parties in this proceeding. **[4 marks]**

Sample answer #1: The obligation of discovering in civil proceedings is an obligation to disclose relevant documents to the other parties to the litigation. The documents which must be disclosed are those of which a party is aware after a reasonable search: on which the party relies; which could form the party's case; or which could help or harm another party's case. The purpose of discovery is to ensure that parties have access to relevant documentary material required to prove their case, and to help narrow the issues in dispute by ensuring that parties are able to access all relevant documents. Discovery is subject to claims of privilege.

In this proceeding, four relevant categories are:

1. Documents setting out the terms of Percival's appointment as a director (which are relevant to determining the scope of her authority);

2. Communications between Percival and Crump concerning the purchase of shares in MeBank;
3. Documents, including minutes, concerning the Board meeting on 1 July 2014 (at which King/Wong gave Percival responsibility for investing);
4. Communications between Percival and her stockbroker concerning the purchase of MeBank shares.

Sample answer #2: Parties must disclose all relevant documents they rely on and those adverse to their interests. They must conduct reasonable searches. They need not disclose multiple copies, documents the other side possesses or privileged documents. A party serves, after pleadings have closed, a notice of discovery. The other side must give discovery within 42 days by providing an affidavit of documents that enumerates the discovered documents, groups them into classes if appropriate, states any privilege claims asserted, explains what happened to documents no longer in the party's possession, and explains why reasonable searches haven't been conducted if that is the case. A party may serve a Notice to Produce and seek an order for particular discovery if a document discloses the existence of an undiscovered document.

The purpose of discovery is to identify material which the parties, and ultimately the court, can use to assess the factual allegations of the parties made in the pleadings. Four categories:

1. Employment agreements of the directors;
2. The records of the board meeting/s;
3. Communications between Percival and Crump in relation to the purchase of shares by Crump;
4. Communications between the directors and PIA in relation to the claims.

QUESTION 24

Civil Procedure: Discuss the difficulties associated with large-volume discovery with reference to the High Court decision of *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46. **[5 marks]**

Sample answer #1: When undertaking discovery with large volume material, errors will happen. Documents will be discovered and produced to the other for inspection which are privileged. ERA makes the following points very clear: (1) inadvertent disclosure of privileged documents does not normally result in waive under s.122 of the Evidence Act; (2) principles of fairness (no overarching principle) remains relevant – prejudice costs, what use has been made of the document etc; (3) normally when an error occurs, you should write to the other side and put them on notice of the document you think was provided in error (ie. is privileged). The document(s) should be returned and the list of discovered documents amended under order 36.01. (4) technical non-essential fights about waiver should be avoided – they are inconsistent with the just, timely, cost-effective and efficient resolution of the real issues in dispute; (5) from GT – don't give documents that were provided in error and privileged to counsel – they may be restrained from acting because issues re cross-examination; (6) lawyers are under a duty to return confidential and privileged documents provided in error.

Sample answer #2: Large volume discovery can be the bane of large scale commercial litigation. When hundreds of thousands of documents are required to be reviewed and potentially discovered, it is very difficult and in some cases not practicable to ensure that client legal privilege (CLP) material is not inadvertently provided to another party. Expense reduction has clarified the situation as to what is required when that occurs. In light of the parties' overarching obligations, not to mention pre-existing professional obligations, where a party receives inspection of material which appears to be subject to CLP:

1. CLP is not waived by virtue of that inadvertent disclosure;
2. The party should not continue to review documents – failure to do so could result in the legal representative being prevented from acting due to their knowledge of material subject to CLP which they are not entitled to use;
3. The party should let the other side know that they have seen material which may be subject to CLP, identify that material, confirm their review has stopped, pending confirmations and seeking confirmation as to whether the inspection as inadvertent or by way of intentional waiver;
4. If the material was provided in advertently, it must be returned to the other side and not used or shown to counsel or client.

QUESTION 25

Assume that two weeks before trial, a junior solicitor employed at the firm acting for Ms King decides to conduct some research on 'Ronald Crump' on the internet. She does a simple *Google* search which reveals a link to a 'Ronald Crump' *Facebook* page. She clicks on the link and immediately recognises his photograph from Mr Crump's attendance at a Court directions hearing a few months earlier. She had indeed found Mr Crump's Facebook page. Mr Crump was apparently unaware that the settings on his Facebook account were set for 'public' meaning that the junior solicitor could read all of his conversations had with his Facebook friends. One such conversation that was able to be viewed had taken place just a few hours earlier, between Mr Crump and his older sister Helen Crump, in which Mr Crump wrote: *'Sarah and I are literally packing up everything now. House settlement this Thursday. Flying to Brazil in a few days … can't wait. Will be glad to see the back end of Australia!!'*

The junior solicitor takes a screen-shot and prints out the Facebook conversation which she immediately shows to her supervising Partner. The other parties' legal representatives (excluding Ms Percival's and Mr Crump's) are also informed, and all express serious concern about Ms Percival and Mr Crump having possibly liquidated all their assets and are about to leave Australia. They are aware that, up until now, Ms Percival and Mr Crump are joint owners of a residential property worth $4 million in Toorak, hold individual and joint bank accounts at various banks with cash deposits totalling in excess of $3 million, and have other assets in Australia worth more than $8 million.

Civil Procedure: Outline and explain the steps that the other parties to the proceedings could take as a matter of urgency to avoid the possibility of any of them obtaining a 'hollow' judgment against either Ms Percival or Mr Crump. You should identify any information and documents that would need to be placed before the Court, consider whether Ms Percival or Mr Crump's legal representative should be notified by the other parties of any such action, and address considerations the Court would most likely take into account in determining any application(s) the parties may make. **[5 marks]**

Sample answer #1: The parties should make an application for a freezing order. A freezing order can be granted where there is a risk that a judgment or a prospective judgment will be wholly or partially unsatisfied. Applicants must satisfy the Court that there is a reasonable prospect of success at trial, that there is a real danger judgment would be unsatisfied and that the balance of convenience lies in favour of granting the order. Application can be with or without notice to Crump and Percival with supporting affidavit stating the amount of the claim, the assets of the respondent (ie house, bank accounts and other assets), basis for belief as to why judgment may not be satisfied (selling house, leaving the country), and any others who may be affected by the order (eg if Crump and Percival have children). If made without notice, counsel for the applicants will need to make full and frank disclosure of all relevant matters including any agreements against granting the order. If order is made without notice an authenticated copy must be served on the respondents and the order will last only for as long until the respondents can appear and respond to the order. Applicants will then bear onus of proving order should continue. Freezing order is an extreme order and may require applicants to make usual undertaking as to damages. Court can also make ancillary orders to determine if order should be made or requiring disclosure of assets where appropriate.

Sample answer #2: The other parties may seek and make an urgent application for freezing orders against Percival and Crump. A freezing order is used to prevent frustration of the court's processes where a judgment may be left wholly or partly unsatisfied. Here Percival and Crump are both parties, and are therefore both prospective judgment debtors. The test that the court will apply in considering whether to grant a freezing order is to ask whether there is a danger that any judgment in the proceeding would go wholly or partly unsatisfied because Percival and Crump had absconded, or had dissipated their assets or removed them from Australia. An application for a freezing order can be made urgently and without notice to the respondents. Here the information indicates that Percival and crump plan to leave the country in a few days, so it may be appropriate for the application to be made without notice. The application must be made by summons supported by an affidavit setting out: the nature of the claims against Percival and Crump and the nature of the underlying proceeding; information about the assets of Percival and Crump (including the house in Toorak, the bank accounts, and the other assets) available to meet any judgment; information about the plans to abscond (flying to Brazil) or dissipate the assets (selling the house) and the danger that the judgment would be unsatisfied if this were allowed; and information about any other person who may be affected by the order (here the purchase of the house in Toorak). In deciding whether to grant an order preventing the sale of the house, the court would have regard to the other assets still available to satisfy the judgment. If Crump is liable for the profit ($3mil) and Percival for the full loss ($10mil) and both for costs, there is a clear danger judgment could be unsatisfied. The court may stop the sale of the house and prevent the removal of money from the bank accounts.

Sample answer #3: Given the urgency, the other parties might apply ex parte to the court for freezing orders. Freezing orders are made if the court considers there is a danger of possible future judgment may not be satisfied because of party (here P and C) is transferring assets out of the jurisdiction (overseas) or is otherwise transferring or diminishing the value of their assets. It is not made to give security for a damages award, but to ensure that a party is not able to frustrate deliberately the court's processes upon later enforcement. Here the parties may apply without notice, if truly urgent it may not be though since the email only refers to the house. They need a supporting affidavit showing:

- The basis of their claims generally in the proceeding;
- The email of their claim;
- What they know about P and C's assets, ie house, cash, other;
- The evidence they have to show there is a danger that P and C are transferring assets or otherwise dealing with the assets to avoid paying once future judgment.

The court will not make the order lightly, since it interferes with assets before there is any judgment against P and C. It will weigh up the danger, considering

- The Facebook page only mentions selling the house;
- They have extensive other assets in Australia;
- But also, they are clearly intending on moving permanently, which creates the stronger suspicion.

The court can also order (ancillary) P and C to appear for oral examination as to their assets and what they are doing with them. The parties cross-examine in relation to their intentions and the Facebook page.

For the purposes of answering further questions in Part B, assume the following additional facts:

- The matter proceeds to trial.
- Ms Percival and Mr Crump did not liquidate their assets nor did they fly to Brazil. They are in attendance with their legal representatives at Court ready to defend the claims.

QUESTION 26

A critical document disclosed by CareSuper in discovery is headed *'Transcript of phone conversation between Sarah Percival and Ronald Crump occurring 11/07/14'*. The document appears on its face to be a type-written transcription of a private telephone conversation between Ms Percival and Mr Crump that occurred on the morning of 11 July 2014. It appears from this document that Ms Percival telephoned Mr Crump from her office at CareSuper that morning and had a brief conversation with him which included the following exchange:

> **Percival:** Nothing to report.
>
> **Crump:** Does anyone suspect anything?
>
> **Percival:** No. They have no idea. Nobody will find out. Look, you've sold the shares and we've made our money. Let's move on and stop panicking.

Both Ms Percival and Mr Crump have instructed that this conversation took place but they were not aware it was being recorded. They suspect that Mr Price, at the behest of Mr Wong and Ms King, planted a secret recording device in Ms Percival's phone without her knowledge. If that suspicion is correct then Mr Price, Mr Wong and Ms King were all potentially party to committing a criminal offence under either Federal or State legislation (ie, recording private telephone conversations without the consent of any of the parties to the conversation is illegal).

Counsel for CareSuper, Ms King and Mr Wong intend to tender/rely on the transcript as evidence. Counsel for Ms Percival and Mr Crump object to the admissibility of this evidence.

i. **Evidence**: Explain the evidentiary significance of the transcript and the likely basis upon which Counsel for CareSuper, Ms King and Mr Wong will argue it to be admissible. **[2 marks]**

Sample answer #1: The transcript seems to be an admission – a previous representation made by parties to a proceedings that is adverse to their interests in the outcome of the proceeding. Counsel will argue it is relevant (rationally affects assessment of probability of fact in issue) because it shows Crump and Percival were jointly complicit in their purchase of MeBank shares and was potentially for her own benefit and in breach of her duty of care.

Sample answer #2: Argue that the conversation is evidence of an admission which could be used against Percival and Crump and D on exception to the hearsay rule. It is relevant to the fact that Percival was acting fraudulently.

ii. Evidence: Explain the basis upon which Counsel for Ms Percival and Mr Crump could object to this evidence and the likely matters the trial judge would consider in determining whether the objection will be upheld. **[5 marks]**

Sample answer #1: Counsel for Percival and Crump are likely to object to the evidence on the ground that it should be excluded in the exercise of the court's discretion to exclude evidence obtained as a result of improper or illegal conduct. Here the relevant conduct is obtaining the evidence by unauthorised surveillance, contrary to federal or state legislation. In exercising its discretion, the court will need to consider whether the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in that way. It must take into account the probative value of the evidence, the importance of the evidence to the proceeding, the nature/subject matter of the proceeding, the nature of the illegal conduct (including its gravity, whether it was deliberate, whether other proceedings have been taken in relation to it, whether it was in breach of human rights) and whether the evidence could be obtained another way. Here the evidence is highly probative and very important to central issues in the case. However if it was deliberate and authorised by King/Wong, then the degree of impropriety is quite high, and the court may exercise its discretion to exclude the evidence despite its clear probative value. There might be no other way evidence of this conversation could have been obtained, but the court will need to consider what is revealed about Percival's knowledge by other evidence in the case, including communications between Percival and Crump revealed during discovery. If Crump is separately represented, he may argue that the admission is not admissible against him, but only against Percival (as the relevant representation was made by Percival).

Sample answer #2: Could object on basis that the evidence was obtained improperly and should therefore be excluded under the general discretion. The trial judge will consider whether the desirability of admitting the evidence outweighs the undesirability of evidence being obtained in that way being admitted. In this case, the judge would consider the importance of the evidence. The nature of the impropriety, whether there is another source of evidence, the nature of the claim and whether the evidence could have been obtained without such impropriety. The impropriety is serious, potentially criminal, however the evidence is also of significant weight. It is unclear what other evidence may be available to establish that Crump and Percival benefitted illegally from the share sale. In all the circumstances, it would be seen that such a breach of privacy should not be sanctioned by the court and therefore the evidence should be excluded. However, if the source of the phone call was not due to the use of an illegal recording device, however was mistakenly overheard for example, more likely to be admissible.

iii. Evidence: At the commencement of the trial, the trial Judge requires that the issues in relation to this evidence to '*be resolved by way of a voir dire*'. What is a 'voir dire'? Explain how a voir dire process could resolve the issue of whether this evidence is admissible. **[3 marks]**

Sample answer #1: A voir dire is a hearing of a preliminary question usually in relation to admissibility of evidence. It is heard in the absence of a jury and witnesses can be called to give evidence and cross-examined. Both Crump and Percival could be called to give evidence about their conversation and what 'they' and the 'shares' referred to. Wong, King and Price could also be called to give evidence as to whether they planted the recording device. If this line of questioning is taken they may need to object to giving evidence on the basis of self-incrimination and the trial judge may need to consider granting a s.128 certificate.

Sample answer #2: A voir dire is a hearing (often called a 'trial within a trial') at which evidence can be led concerning a question such as the admissibility of certain evidence. In a trial before a jury, a voir dire is usually held in the absence of the jury (and must be held in the absence of a jury where the question relates to the admissibility of illegally or improperly obtained evidence). Here a voir dire would enable the judge to hear evidence on the question of how the evidence of a phone conversation was obtained. At the moment, all counsel have a suspicion of improper conduct. Mr Price could be called as a witness on the voir dire to give evidence about how he obtained evidence of the telephone conversation, and whether he had legal authorisation to do so. Evidence could also be given about whether King/Wong authorised this. These matters would be relevant to the exercise of the judge's discretion to exclude the evidence on the basis that it was illegally obtained.

iv. Evidence: In the course of the 'voir dire', the trial judge asks Counsel for CareSuper whether Mr Price is going to be called to give evidence to respond to Ms Percival's and Mr Crump's objection. What are the potential consequences for CareSuper if Mr Price is not called? **[2 marks]**

Sample answer #1: The rule in Jones v Dunkel provides that if a party does not call a witness who the party would reasonably be expected to call, then an inference can be drawn that the evidence of the witness would not assist the party. Here if CareSuper does not call Mr Price, the court will be entitled to assume that his evidence does not assist CareSuper (ie that he did not have authorisation to record the telephone conversation).

Sample answer #2: Mr Price is a witness that is clearly 'in the camp' of CareSuper. If he does not give evidence then Crump and Percival may seek to have an inference drawn pursuant to the rule in Jones v Dunkel, that Mr Price's evidence would not have assisted CareSuper's case.

v. Evidence: Assume that Mr Price is called to give evidence. In response to a question put to him about his knowledge of a secretly recorded phone conversation between Ms Percival and Mr Crump, he says *'Under advice, I will not answer that question. I claim privilege.'* What 'privilege' is Mr Price referring to? Explain how the Court will most likely deal with his claim. **[5 marks]**

Sample answer #1: Mr Price is referring to the privilege against self-incrimination under s.128 of the EA. It states that where a witness' evidence would expose them to liability for a civil penalty or criminal offence can object to giving evidence on that basis. If reasonable grounds for Price's objection judge must inform of the availability of a s.128 certificate which would prevent evidence being used to initiate proceedings (except in relation to falsifying evidence). Mr Price could then willingly give evidence and receive certificate. If maintains objection judge will have to decide if Price should be compelled to give evidence because interests of justice require it. Should consider gravity of alleged offence of witness, degree of impropriety in illegally recording the conversation, whether can obtain this evidence from another witness. Although this evidence could be given by Wong or King, considering the degree of illegality and the significance of the conversation if it is admitted, it is likely the interests of justice will require Price to give evidence. Upon him giving evidence the judge will then issue a s.128 certificate.

Sample answer #2: Mr Price is referring to his privilege re against self-incrimination. A person may object to answering a question if they have reasonable grounds to believe it may incriminate them, ie that they may have committed an offence. It is based on hearing and the fundamental principle that the State ought not compel a person to provide evidence orally against themselves. There is a process in the Evidence Act for any objection. The court must determine first if there are reasonable grounds for the objections by Mr P. Here it appears there is, since the direct allegation against him is that he bugged the phones. If there is, then the court must explain to him that he can give a certificate that protects him, by not permitting the answer to be used against him in any other proceeding, including a prosecution. If he does not consent, then the court should consider if (a) the answers really are likely to incriminate; and (b) if it is in the interests of justice that he give the answers. If it is, then the court may compel the answers, but must give the relevant certificate. Here the evidence is probative, so the court is likely to give a certificate and compel the answers.