VICTORIAN BAR

Candidate Number:

ENTRANCE EXAM

VICTORIAN BAR READERS' COURSE

12 MAY 2016

(Annotated with sample answers)

1. This document is a reproduction of the Readers' Course Entrance Exam which candidates sat on 12 May 2016, 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 underlined.
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
16 June 2016

INSTRUCTIONS TO CANDIDATES:

1) During the exam, you must not be in possession of anything other than writing implements, this exam script, the hard copies of the Reading Guide and examinable excerpts of legislation, and the coloured noting paper that have been provided. You are not permitted to have in your possession any other 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 17 questions (Questions 1 to 17) 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 17 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 of marks allocated to the question. The total number of marks allocated to each subject area in Part A is: Criminal Procedure (21 marks), Evidence (21 marks) and Legal Ethics (8 marks).

5) **Part B** contains 18 questions (Questions 18 to 35) 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 18 to 35 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 of marks

allocated to the question. The total number of marks allocated to each subject area in Part B is: Civil Procedure (18 marks), Evidence (22 marks) and Legal Ethics (10 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. With some questions, it may be necessary to do so in order to completely answer 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 unless the question specifically directs you to do so. 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) During the 30 minutes of perusal and noting time prior to the commencement of the exam you **must not write in this exam script**. However:

   i) you may peruse this exam;

   ii) you may write in the coloured noting paper provided to you (but anything you write on this noting paper will not constitute part of your answer to any question in the exam);

12) You are **not permitted to remove** from the examination room:

   i) this exam script;

   ii) the Reading Guide and examinable excerpts of legislation provided to you;

   iii) any additional writing paper provided to you;

   iv) the coloured paper provided for note-taking during the perusal and noting time prior to the commencement of the examination.

13) Failure to comply with a requirement contained in paragraphs 1, 11 and 12 of these instructions will result in your disqualification as a candidate in this exam and forfeiture of your registration fee at the discretion of the Chief Examiner.

PART A (Questions 1 to 17) – Candidates are required to answer ALL questions in Part A.

Assume the following Prosecution summary of alleged facts relates to all questions in Part A.

The Accused is Justin NOLAN and is 32 years old (born 02/02/1984). The Accused resides at 4/18 Fenton Street, Preston, VIC 3072.

On Saturday, 3 October 2015, the Accused was a crowd control officer at *Mission Control* nightclub located at 19 Smith Street, Fitzroy ('**Mission Control**'). The Accused is 188 cm tall, weighs 108 kilograms and has a solid muscular build. The Accused commenced his shift at 8.00 pm that evening and was assigned crowd control duties at the main public entry to the nightclub.

At approximately 11.15 pm the Accused was asked to assist other crowd control officers already inside the nightclub for the purposes of removing an intoxicated patron. The Accused made his way upstairs into the bar area of the nightclub. The Accused saw that two other crowd control officers, Leanne HENRY and Sasi FATEA, were involved in a verbal altercation with the Victim, Craig BUXTON. The Accused observed the Victim gesticulating towards Ms Henry and Mr Fatea and shouting at them *'Fuck off! I'm not going anywhere!'*. The Victim was intoxicated and was behaving in an aggressive manner. The Accused observed the Victim point aggressively at crowd control officer Ms Henry. The Victim's finger made contact with Ms Henry's chest.

The Accused ran over to assist Ms Henry and Mr Fatea. Because the Victim's back was facing the Accused, the Victim did not notice the Accused's arrival. Without warning, the Accused grabbed the Victim from behind and secured the Victim in a 'headlock' position. The Victim was 166 cm tall, weighed 68 kilograms and of slight build. The Victim attempted to escape the Accused's brace but was unable to do so. The Victim shouted *'Fuck off! Let me go you fucking cunt! Fucking let me go!'*. The Accused said to the Victim *'You're outta here, cunt'*. The Accused maintained the Victim in a headlock position as he led the Victim back towards the top of the stairs which led down to the main entry of the nightclub. The Victim became more agitated and continued to shout at the Accused *'Let me go! I can't fucking breathe! Fuck you, you fat cunt!'* as he struggled to escape the brace of the Accused's headlock without success.

When the Accused reached the top of the stairs, he released his grip around the Victim's neck and forcibly pushed the Victim towards the stairs and shouted *'Fuck off!'* at the Victim. As a result of being pushed, the Victim lurched forward without control into the stairwell. The Victim was unable to regain his balance and tumbled uncontrollably down the two flights of stairs where he came to rest

at the main entry of the nightclub. The Victim lay motionless and unconscious as his neck had been broken between the second and third cervical vertebrae (C2 and C3) and his spinal cord severed as a result of the fall. The Victim suffered immediate spinal shock with death being almost instantaneous.

****

The Accused was arrested and interviewed on 4 October 2015 before being charged with murder. The Accused made a 'no comment' interview.

Murder is an offence at common law with the maximum penalty prescribed under section s 3 of the *Crimes Act 1958*, which provides:

> **3 Punishment for murder**
>
> (1) Notwithstanding any rule of law to the contrary, a person convicted of murder is liable to –
>
> (a) level 1 imprisonment (life); or
>
> (b) imprisonment for such other term as is fixed by the court –
>
> as the court determines.

In order to prove a charge of murder, the Prosecution must establish the following elements:

(i) that the Accused caused the Victim's death;

(ii) that the Accused's acts were conscious, voluntary and deliberate;

(iii) that at the time the Accused did the acts which caused the Victim's death, he either: (a) intended to kill or cause really serious injury; or (b) knew that his acts would probably cause death or really serious injury; and

(iv) that the Accused killed the victim without lawful justification or excuse.

QUESTION 1

Criminal Procedure:	Following his arrest, which of the following propositions is most accurate concerning the issue of the Accused obtaining bail?
Your answer: ***(circle ONE)***	a) There is a common law presumption in favour of bail and statute does not specifically deal with the Accused's situation. b) There is a statutory presumption in favour of bail. **c) <u>There is a statutory presumption against bail because the Accused has been charged with murder, but bail may be granted if he can demonstrate that exceptional justifying circumstances exist.</u>** d) There is a statutory presumption against bail because the Accused, having been charged with murder, poses an unacceptable risk to the community if released. e) Bail must be refused under statute because the Accused has been charged with murder, unless the Accused can show cause why detention in custody is unjustified.
[1 mark]	f) Bail must be refused under statute absolutely because the Accused has been charged with murder.

QUESTION 2

Criminal Procedure:	In which court is the Accused most likely to stand trial?
Your answer: ***(circle ONE)***	a) Magistrates' Court of Victoria. b) County Court of Victoria. c) Victorian Court of Serious Criminal Offences. d) Federal Court of Australia. **e) <u>Supreme Court of Victoria.</u>**
[1 mark]	f) High Court of Australia.

QUESTION 3

Criminal Procedure:	This case is likely to be tried before a judge and jury comprising how many randomly selected members of the public?
Your answer: ***(circle ONE)***	a) 0. b) 1. c) 6. d) 10.
[1 mark]	**e) <u>12.</u>** f) 16.

QUESTION 4

Criminal Procedure: What is an 'indictment'? Explain how an indictment might be used in this proceeding. **[2 marks]**

Answer #1: An indictment is a document filed in the Supreme or County Court setting out the name of the accused, the charge/s and particulars of the offence/s. An indictment must comply with Schedule 1 CPA (though not invalid for not doing so) and include the names of witnesses and sufficient particulars to identify the charge. In this case, an indictment naming Nolan as the accused would be filed in the Supreme Court after he is committed for trial and Nolan would be arraigned on it before the jury panel and possibly at a Directions Hearing prior to trial.

Answer #2: An indictment must be in accordance with Schedule 1 of the Crim Procedure Act. It is to be filed by the DPP once the accused has been committed to stand trial. It should include a statement of the charge. For example, in this case it should state that the accused did on 3 October 2015 at approximately 11.15pm murder the victim Craig Buxton.

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

The Accused intends to plead not guilty to the charge. He has been committed to stand trial. The Accused has instructed that he largely accepts the Prosecution's version of events, save for the following:

- The Accused denies that he 'forcibly pushed' Mr Buxton towards the stairs. The Accused instructs that Mr Buxton was unrelenting in his struggle to escape the headlock grip, to the point of exhausting the Accused. The Accused finally lost his grip of Mr Buxton at the top of the stairs where Mr Buxton escaped only to launch himself into the stairwell where he then lost his balance and went falling to his death. The Accused emphatically denies pushing Mr Buxton at all. While the Accused seriously regrets how he handled the incident (he concedes he probably should not have used a headlock grip), it was the Accused's intention to convey Mr Buxton down the stairs securely all the way to the main entrance of the nightclub where he would have then released Mr Buxton into the street. At no stage did the Accused ever turn his mind to the possibility that his actions might kill or seriously injure Mr Buxton.
- The Accused admits saying words to the effect of *'You're outta here*' when first placing Mr Buxton in a headlock but denies having used the word *'cunt'* at this point.
- The Accused denies having said the words *'Fuck off'* when Mr Buxton escaped his grip at the top of the stairs.

The Accused has retained Mason Fletcher Lawyers Pty Ltd, a specialist criminal defence law firm, to represent him. A principal solicitor of the firm, Jessica Mason, has received instructions to brief

Counsel. Amongst Ms Mason's list of preferred barristers is Timothy McInnes, a barrister on List Z. She contacts a clerk at List Z, makes it known to the clerk that she is representing the Accused in 'the Mission Control stairs of death' case (the case has received significant media attention), and asks if Mr McInnes would be available to take the brief. The clerk says that he will get back to her. The clerk then telephones Mr McInnes during which the following exchange takes place:

> **Mr McInnes:** No, I don't want the brief. Tell her I'm not available.
>
> **Clerk:** Why not? This would be a fantastic opportunity. Other barristers would kill for this brief!
>
> **Mr McInnes:** I've been thinking of taking some time off after coming out of this 6 month trial. I'm physically and mentally exhausted. In any event, from what I've read, the guy is guilty, and I hate defending guilty guys.
>
> **Clerk:** Oh well, it's your loss. What should I tell Jessica?
>
> **McInnes:** Tell her that my fees have gone up from $3,000 a day to $5,000 a day. That should scare her off.

QUESTION 5

Ethics: Discuss the ethical implications of Ms McInnes' decision to decline the brief. **[3 marks]**

Answer #1: All counsel have an ethical obligation to take any brief offered by a solicitor, provided it is within their experience/skill (presumably McInnis is capable), counsel is available (apparently he is), and reasonable usual fee is offered (apparently yes). The rule is subject to exceptions. Fear or dislike of acting for 'guilty guys' is not a recognised exception and indeed counsel has a duty to fearlessly protect/advance client's interests. Counsel's best argument is that his exhaustion means cannot work to best of skill and diligence (r17(b) Uniform Rules) and/or his plan to take a break is a 'personal engagement' under r105(b) – exhaustion/r17(b) argument is viable, r105(b) probably not as no specific planned engagement. Proposal to set high fee is a breach of r18. Counsel is at risk of Ethics Committee report and disciplinary action by Committee/LSC.

Answer #2: Mr McInnis is prima facie obliged, by the cab rank rule (Barristers Rules r17) to accept the brief if it is within his capacity/skill/experience, he is available, the fee is acceptable and there is no reason that he must or may return it. Here Mr McInnis' desire not to represent guilty clients would be an impermissible reason to refuse the brief (indeed the cab rank rule is explicitly targeted to avoid such actions), and McInnis' suggestion that he will raise his fees to dissuade the solicitor is prohibited by r18 (such that this action may constitute unsatisfactory professional conduct or professional misconduct). The other reason given – the barrister's need for some 'time off' following a large and exhausting trial – will be a sufficient reason for him to refuse the brief, either on the grounds that he is not 'available' (r17(b)), or that accepting the brief may prejudice his 'personal engagements' (s105(b)), so long as the barrister genuinely intends to take some time off and is not using this first as a pretext to refuse the brief.

QUESTION 6

Ethics:	Which of the follow propositions is correct?
Your answer: ***(circle ONE)***	a) There is no general rule that prohibits a barrister from being a witness in a criminal proceeding in which that barrister is appearing as counsel for the Accused. b) A barrister acting for an Accused is prohibited from negotiating with the Prosecution with a view to compromising the case. c) A barrister acting for an Accused should avoid giving legal advice to the Accused. **d) <u>A barrister briefed to represent an Accused would ordinarily be expected to appear on the Accused's behalf in court, and make submissions in furtherance of the Accused's case.</u>** e) All of the above. f) None of the above.
[1 mark]	

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

The depositions include the following sworn statements of witnesses who the Prosecution intends to call to give evidence at trial:

- **Leanne HENRY** states: *'On Saturday the 3rd of October 2015 I was on duty as a crowd control officer at Mission Control in Fitzroy. I was assigned general floor observation duties from about 10.00 pm. Just after 11.00 pm, I was patrolling the bar area when I noticed bar staff arguing with a gentleman who I now know to be the deceased, Craig Buxton. Mr Buxton was thumping his fist on the bar and shouting 'give me a fucking red bull and vodka'. He appeared very aggressive and intoxicated. I made eye contact with one of the bar staff, Natalia Rix, and she motioned with her hand for me to come over. I approached Mr Buxton and asked him what the problem was. He said 'They won't give me a fucking drink.' I said to Mr Buxton 'I think you've had a big night and it's time to go home.' This request made him more irate. He said 'Fuck off!' to me. At this stage, crowd control officer Sasi Fatea had arrived and was standing next to me. Mr Fatea then said to Mr Buxton 'Come on mate, you've had enough. We have to ask you to leave.' As Mr Fatea was engaging with Mr Buxton, I contacted crowd control despatch via my radio headset and advised that we may need assistance to remove an intoxicated patron. Mr Buxton became more agitated and continued to make demands for a drink. He said 'I just want my fucking drink!' and kept referring to myself, Mr Fatea and bar staff as 'fucking cunts'. I asked Mr Buxton to leave again. He became extremely aggressive and agitated. He raised his hand and pointed at me and*

shouted 'Fuck off! I'm not going anywhere!' Mr Buxton then pressed his finger into the top of my chest. I then noticed crowd control officer Justin Nolan come up from behind Mr Buxton. Mr Nolan said 'You're out of here mate' or words to that effect. He put Mr Buxton into a headlock. Mr Buxton struggled to escape the headlock but he couldn't. Mr Nolan then led Mr Buxton to the top of the stairs that descended to the main entry of the nightclub. Mr Fatea and I accompanied Mr Nolan as he held Mr Buxton in a headlock to make sure other patrons did not get in the way. I was walking next to Mr Nolan's left side. He had Mr Buxton in a headlock under his right arm. Mr Fatea was walking next to Mr Buxton so that Mr Buxton was effectively being led to the stairs with Mr Nolan and Mr Fatea on either side of him. Mr Buxton continued to struggle and was screaming 'Fuck off! Fuck off cunts!'. I could see Mr Nolan was having difficulty with Mr Buxton struggling to get loose, but he still managed to maintain the headlock as we walked towards the stairs. As Mr Nolan was about to lead Mr Buxton down the stairs, Mr Nolan jerked to the left unexpectedly which knocked me backwards. I fell onto the floor. I looked up and saw Mr Buxton falling towards the stairs. I did not see Mr Nolan pushing Mr Buxton at all. I think he must have finally struggled loose, lost his balance and that's why he fell. It was all just a horrible accident.'

- **Sasi FATEA** will give evidence generally consistent with the evidence of Ms Henry and states further: '*Mr Buxton was extremely aggressive. He was like a ferocious pit bull that was wanting to attack anything that annoyed him. When we got to the top of the stairs, it was pandemonium. Mr Buxton was still screaming 'fuck off cunts' and struggling to get loose. I think Justin didn't have the energy to hold him anymore. He let him go and the next thing I see is Mr Buxton go tumbling down the stairs. I didn't see Justin push him. The guy just fell down the stairs because he was so drunk and aggressive. As I said, he was like a pit bull.'*
- **Natalia RIX** will give evidence generally consistent with the evidence of Ms Henry and states further: *'I'm employed as a bar manager at Mission Control Nightclub. I was behind the bar when this drunk guy started causing problems when he became overly intoxicated. I told staff not to serve him any more drinks. He became aggressive. When I saw one of the bouncers, Leanne, I called her over. Then another bouncer turned up. I think his name is Sasi. The drunk guy was pretty small but he had a foul mouth. He was saying 'fuck this' and 'fuck that' and calling everyone a 'cunt'. Then I saw one of the other bouncers, Justin, come over and put the drunk guy into a head lock. Justin said something like 'you're outta here cunt'. The guy had no chance. Justin was twice his size. The head lock was a bit overkill I think. I'm sure the guy would have eventually left without the bouncers getting physical on him. I didn't see what happened at the stairs as I was behind the bar at the time.'*
- **Susan YOUNG** states: *'On Saturday 3 October 2015 I went to my friend Hayley's place in Fitzroy for drinks. Just before 11.00 pm we decided that we would go to Mission Control. It's only a 5*

minute walk from Hayley's place. There were 6 of us who were at Hayley's place and we all decided to go. There was me, Hayley, our other friends Tim and Lucy, and two of Hayley's other friends I didn't know. We got there just after 11.00 pm and there wasn't much of a queue to get in. I've been to Mission Control many times before. As you walk in the main entrance, there's a huge flight of stairs that leads up to the main bar area and dance floor. After we were let in, I had to check my bag into the cloak room which is at the bottom of the stairs. Hayley and the others didn't wait for me and went straight up to the bar area. After I checked my bag in, I walked up stairs. There was nobody else on the stairs as I was going up. When I was about half way up, I heard this commotion coming from the top of the stairs. I looked up and saw 3 bouncers – 2 male and 1 female. The biggest bouncer had his arm around some guy's head in a headlock. The guy in the headlock was screaming 'let me fucking go' and called the bouncer a 'fat cunt'. He was struggling to get free but he was too small compared to the bouncer that was holding him. All of a sudden I saw the bouncer release him from the headlock. I don't think the small guy was expecting to be let go. The bouncer then shoved him really hard right into the stairs and shouted 'Fuck off!' I couldn't believe what I was seeing. The small guy screamed as he flew into the air. I ran to the side of the stairs to avoid getting hit. He landed face first into the stairs about two thirds of the way up. I heard this loud crack as he hit the stairs. He then went tumbling down the stairs past me like he was knocked out or something, like a rag doll. He came to rest at the bottom of the stairs and wasn't moving. Other bouncers and nightclub staff went to see if he was ok. I looked back up the stairs and saw the three bouncers. The bouncer that pushed him had this really satisfied look on his face.'

QUESTION 7

Evidence: Refer to the extracts taken from the sworn statements of witnesses **Henry**, **Fatea**, **Rix** and **Young** above and answer the following questions.

***Note*:** There are four sub-questions in this question, (i) to (iv). In answering each sub-question, you must select a different witness statement. You are advised to read all four sub-questions first, before attempting any answer.

(i) Choose any ONE of the four witness statements. Identify and explain why a part of that statement is evidence of ***an opinion*** and is **not admissible** ***as opinion evidence***. **[2 marks]**

Answer #1: Rix's statement that 'guy would have eventually left' is an opinion. It is an inference/prediction drawn from observed facts. Opinion evidence is prima facie inadmissible. Exception for lay opinion is based on observation and 'necessary' to explain observation, but is not 'necessary' in this way. Nor does Rix have standing as expert (unless his

experience at bar such that she can tell who leaves/doesn't – unlikely). Instead that statement is not properly based on any evidence and is largely speculative opinion. This part of Rix's evidence ought not to be admitted.

Answer #2: Henry: The statement 'I think he must have finally struggled loose, lost his balance and that's why he fell'. This is Henry's opinion and is not admissible to prove the existence of a fact about the existence of which the opinion was expressed. It is not admissible (s76). The lay opinion exception (s78) does not apply as Henry did not see the moment that the victim fell (as he had been knocked backwards onto the floor). He therefore cannot give an opinion about how the victim fell as his opinion is not based on what he saw, heard or otherwise perceived.

(ii) Choose any ONE of the four witness statements (which has not been used in answering (i) above). Identify and explain why a part of that statement is evidence of ***an opinion*** and **<u>is admissible</u>** ***as opinion evidence***. **[2 marks]**

Answer #1: Young – 'The bouncer then shoved him really hard'. The evidence of the push being really hard is Young's opinion and is prima facie inadmissible. However it is likely to be admitted as opinion evidence under the exception for lay opinions (s.78 EA) as the opinion is based on what she saw when Nolan pushed Buxton and it is necessary to obtain an adequate account of her perception of the event on the stairs.

Answer #2: The evidence of Henry that the victim was intoxicated is an opinion. It may be admissible under 1) lay opinion that Henry saw the victim thumping the bar, demanding alcohol and being very aggressive and swearing so the opinion is based on what she saw and heard. The evidence is necessary to obtain an adequate account of her perception of the matter – that is that the victim was intoxicated which is relevant to whether he may have fallen himself and whether accused had reason to restrain. The opinion is not as strong as if Henry actually saw victim consume many drinks but it is not a best evidence rule so likely to be admissible.
2) Expert s.79 – it could be argued as a crowd control officer Henry has specialised knowledge from her training and/or work experience that was the basis of her opinion in identifying the accused was intoxicated.

(iii) Choose any ONE of the four witness statements (which has not been used in answering (i) or (ii) above). Identify and explain why part of that statement is ***not*** evidence of ***an opinion*** and **<u>is admissible</u>** because it ***is relevant***. **[2 marks]**

Answer #1: Young's statement that D 'shoved' V is not an opinion – she says she has personal knowledge of/observed him doing so. It is relevant to proving D caused death and did so consciously voluntarily and deliberately. Indeed it appears to be the only direct evidence on these points.

Answer #2: Henry's evidence as to the interactions between the victim and the security guards (recounting the conversations between the victim, Rix, Fatea and herself) is not opinion evidence but is rather evidence of what she directly perceived – no inferences are sought to be drawn from these direct perceptions within Henry's witness statement: The evidence is clearly relevant – it rationally affects the probability of a fact in issue (s55 EA) as it makes the prosecution's version of events – that the accused's actions were conscious, voluntary and deliberate – less likely by

suggesting that the victim had been extremely aggressive towards others, which may assist in the drawing of the inference that his aggressive jerk caused his fall.

(iv) Choose any ONE of the four witness statements (which has not been used in answering (i), or (ii) or (iii) above). Identify and explain why one part of that statement is evidence that is **not admissible** because it is ***not relevant***. **[2 marks]**

Answer #1: The evidence of Young that she went to the club with two friends of Hayley's that she did not know is not relevant to issues in dispute and so will not be admissible s.56(2). It would be different if there was an issue with Young's account and these two persons were providing evidence about Young that they could not possibly know given Young says she doesn't know them. However this is not the case.

Answer #2: Young's statement that 'other staff went to see if V was ok' is not relevant to any issue in this case, save for prejudicial/character purposes (ie D is hard-hearted), cannot be used for example as evidence of post-offence incriminating conducting as there is no way in which it could rationally affect the probability of the fact alleged (ie conscious of guilt/desire to avoid consequences of same). Because not relevant, fails the basic test of admissibility under s.55 (and would be excluded under s.137 even if of marginal relevance).

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

Upon the Accused's instructions, prior to trial Mason Fletcher Lawyers Pty Ltd hired a private investigator to make inquiries into the 'background' of Susan Young, a witness whose evidence is crucial to the prosecution's case against the Accused (see the extract of her statement above). The private investigator spoke to Ms Young's friends – Hayley, Tim and Lucy – who were with Ms Young on the night in question. Tim mentioned to the private investigator that *'we had all had 2 lines of coke and a spliff [marijuana] at Hayley's before we left, including Susan.'*

Tim subsequently mentioned to Ms Young about a week before the trial that a private investigator had been asking about what they were doing that night and that he mentioned that they had all had cocaine and marijuana. Ms Young panicked, essentially for the following reasons:

- Ms Young is a high-achieving law student who is in her final year of studies. Practising law, in particular criminal law, has been her long-term personal ambition since she was a teenager.
- She plans to work in the area of criminal law and aims eventually to secure a job as a crown prosecutor. She also aspires to be judge one day.
- She fears that questions may now be asked in court about her having taken illicit drugs and that, if the truth comes out in court (you can assume that she did in fact take these drugs), this will have a detrimental impact on her long-term career aspirations in the law. ***Note:*** You should assume

that, given the significant media attention in relation to the case, if evidence is given that Ms Young had used cocaine and marijuana, this information will come to the attention of relevant members of the legal profession. This is likely to hinder her ability to achieve her personal aspirations.

Three days before trial, Ms Young telephones Prosecuting Counsel, and then Defence Counsel, to express her concerns about giving evidence and that she no longer wishes to do so.

QUESTION 8

Ethics: What should Prosecuting Counsel and Defence Counsel do when they each receive the phone call from Ms Young? Explain. **[4 marks]**

Answer #1: The prosecutor has an obligation to call all material witnesses whose evidence is admissible and necessary for the presentation of the relevant circumstances, subject to limited exceptions (Barristers Rules r89). Accordingly, prosecuting counsel should advise Ms Young that he cannot refuse to call her on the basis of what she's told him. In addition, if Ms Young has revealed the drug use to the prosecuting counsel, he will be under an obligation to disclose this to the defence as the drug use may well affect both the credibility and reliability of Young's evidence. This is critical in circumstances where Young's evidence is the only direct evidence inculpating the accused in a voluntary, deliberate act of pushing the victim (r87). Similarly, the prosecution must not take any step to discourage Young from speaking to defence counsel for fear that this may lead to evidence about her lack of credibility or reliability being disclosed. Neither the prosecution nor the defence can advise Young to give false or misleading evidence to cover up her involvement in drug taking, nor may they coach her, although they may advise her that she must tell the truth whilst giving evidence (rr.69/70).

Answer #2: Neither party should provide Young with any legal advice. As a witness to proceedings counsel for P and D should not give her legal advice and the Bar rules prohibit coaching of witnesses. DC should refer Young to the Prosecutor and advice that DC cannot discuss the case. DC should contact P and disclose the communication with Young. The prosecutor should refer Young to get independent legal advice. P has a duty to call all witnesses whose evidence is relevant and necessary, which is clearly the case in relation to Young. P would need to get independent advice both in relation to her options in terms of giving evidence and the potential to objecting to giving evidence about drugs or applying for a suppression order. P should then discuss with DC as they have an obligation to disclose matters relevant to the case. Although P has a duty call witnesses, P can seek consent of DC not to call Young and must inform DC as soon as practicable if they have determined not to call Young. It seems likely DC would consent to Young not being called as her evidence is detrimental to Nolan but unlikely P would seek not to call her.

QUESTION 9

Evidence: The trial judge has expressed concern to Counsel about the 'grubby language' appearing in many of the witness statements. His Honour states to Counsel: '*I'm minded to order that none of the witnesses can make any kind of reference to the words "fuck" and "cunt" in their evidence. It is foul language that the jury simply doesn't need to hear. In any event, it's all probably inadmissible because it's irrelevant and hearsay. Does Counsel have any concerns about me making this order?'* What should the Prosecutor and Defence Counsel each say in response? **[3 marks]**

Answer #1: Pros should say that evidence is not hearsay – apparently each conversation will be attested to by a person w/ person knowledge of it. Eg. Fatea can say V swore at him. Not attempting to use conversations to prove asserted facts. Pros should also argue that evidence is relevant as it goes to the state of mind of each participant, eg. D's swearing at V could rationally affect the probability that D did intend to cause death/really serious injury.
Finally Pros should point out that juries are assumed to be robust, and their sensibilities are not a concern that should override the need to put all evidence before the Court.
D counsel should agree, especially as it is probably in D's interests to use the V's swearing to relevantly suggest he was very drunk and aggressive, increasing the likelihood that he stumbled down stairs, possibly while attacking D/others.
Finally each counsel should take care to explicitly object to judge's proposals as may otherwise be precluded from using it as appeal point.

Answer #2: Prosecutor: 1/ The swearing is relevant as it goes to issues of whether the victim was intoxicated (not very probative but an inference can be drawn in combination with the other evidence) and whether accused was acting aggressively, evidence about victim not helpful to prosecution case but has obligation to present all relevant evidence, so should be admissible s.56. Prosecution will argue swearing of accused is relevant as goes to issue of intention of accused – pushing and shouting fuck off increases likelihood that accused intended to harm the victim.
2/ The swearing of the victim is a previous representation but it is not hearsay as it is not being used to prove the truth of an asserted fact. The swearing of the accused is but again also not being used to prove truth of asserted fact.
Defence: 1/ Defence will argue swearing of victim relevant as increases likelihood of finding victim was intoxicated and aggressive before the event in question which may give accused lawful justification or excuse.
2/ Defence will argue it is not evidence to prove truth of asserted fact – just that victim the words to admissible.
3/ Defence may argue evidence of accused swearing should be excluded under s.135 or s.137 as undue weight may be given to it making it unfairly prejudicial.

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

In order to be employed or contracted as a crowd control officer in Victoria, it is a legal requirement that the individual concerned possess a current crowd control licence issued by Victoria Police. Licences are issued only after a criminal record check and successful completion of a certified crowd

control training course. The situation with respect to the Accused's crowd control licence is as follows:

- The Accused obtained a crowd control licence on 2 August 2013, after successful completion of a certified crowd control training course. The Accused had no criminal history at that time. The Accused gained employment with a private security company in September 2013 which had a contract with the owners of Mission Control to provide security services for the nightclub. The Accused was regularly assigned crowd control duties at Mission Control by his employer as soon as he commenced his employment in September 2013 up until the night of Mr Buxton's death on 3 October 2015.
- On 3 January 2014, the Accused had ejected an intoxicated and abusive patron from Mission Control whose name was Brian TAYLOR. The Accused used a headlock manoeuvre to control Mr Taylor on that occasion. Mr Taylor lost consciousness while he was in the headlock and ambulance officers had to be called to revive Mr Taylor. Mr Taylor subsequently made a complaint to Victoria Police and the Accused was charged with recklessly causing injury. The Accused pleaded not guilty to the charge. On 2 September 2015, the Accused was found guilty of this charge by the Magistrates' Court and convicted and fined $1500.
- On 15 October 2014, the Accused had ejected an intoxicated and abusive patron from Mission Control whose name was Jonah LINGHAM. The Accused did not use a headlock on this occasion. However, Mr Lingham alleged that he was being led down the stairs by the Accused when the Accused forcefully pushed him towards the bottom of the stairs after Mr Lingham called the Accused *'a pussy'*. Mr Lingham tumbled down the stairs and suffered a broken leg as a consequence. Mr Lingham complained to Victoria Police and the Accused was charged with recklessly causing serious injury. The Accused pleaded not guilty to the charge. This charge was dismissed by the Magistrates' Court on 5 June 2015 on the basis that the Magistrate could not be satisfied beyond reasonable doubt of Mr Lingham's version of events (there were no other independent witnesses).
- On 3 September 2015, as a result of his conviction received in the Taylor matter a day earlier, Victoria Police gave the Accused written notice that his crowd control licence had been revoked and that he was no longer permitted to be employed as a crowd control officer. The Accused did not notify his employer that his licence had been revoked because, had he done so, his employment would have been terminated. Victoria Police also gave written notice of this decision to the Accused's employer. However, due to a change of the employer's postal address, the Accused's employer did not become aware of the licence revocation until after Mr Buxton's death.

QUESTION 10

Evidence: The Prosecutor intends to adduce evidence at trial of the incidents involving the Accused and Mr Taylor and Mr Lingham. Defence Counsel objects to the admissibility of this evidence. With reference to *Velkoski v The Queen* [2014] VSCA 121, and relevant provisions of the *Evidence Act 2008*, consider how the trial judge might rule in relation to this evidence. **[5 marks]**

Answer #1: P are likely intending to adduce evidence on the basis that the evidence goes to proving the accused has a tendency to cause injury to patrons while on duty. The evidence will not be admissible unless P gives reasonable notice and the evidence is of significant probative value. P must also establish that probative value substantially outweighs prejudice to accused. As per Velkoski the relevant test is not striking similarity. The test is whether the similarities suggest an underlying unity, modus operandi or pattern of behaviour. Here DC will likely succeed in a submission that neither of the evidence involving BT or JL meet this threshold. While both occur in similar proximity to each other in time and at the same place (MC) and relate to an intoxicated and abusive patron, much of this evidence is usual to a person who is working in crowd control in terms of dealing with and ejecting abusive patrons. In respect of BT there is the use of a headlock which is distinctive and similar to offence with victim. But no claim of forcible pushing which is a key element in this case. Further BT lost consciousness and suffered an injury which is much less severe than death, which was caused on this occasion. Therefore unlikely to have sufficient similarity to increase likelihood guilt in relation to CB. In respect of JL there is the forceful push at the top of the stairs and calling of names which is similar but no headlock and the result was again much less severe. In relation to JL insufficient similarities. If met threshold could argue probative value, while significant, substantially outweighed by prejudice to accused. The danger being a fact finder would be at risk of deciding case according to moral bias against accused – that he is a violent person and should be punished. May be excluded under s.137.

Answer #2: The evidence is sought to be adduced as tendency evidence under s.97 of the Evidence Act. There is no statement that P has issued a tendency notice as required by 97(1)(a) of the EA. This is required. The notice ought to have set out the tendency which is sought to be asserted by the evidence. The evidence will only be admissible if it has significant probative value. Presumably, the tendency sought to be proved is that accused has a tendency to behave violently towards patrons in 'Mission Control nightclub' and has a tendency to hold them in a headlock and push them down stairs.

In Velkoski v R, the court considered the meaning of significant probative value. The court determined that the analysis ought to be made by reference to the number of prior incidents, how close together they were, the stand out features of the events that demonstrate a modus operandi, and any other similar features. Will also consider the strength of the evidence about each prior event. This analysis avoids misuse of otherwise inherently unreliable or prejudicial evidence.

Here we have 2 prior offences. One which was not proved in a court of law beyond reasonable doubt. The events both occurred in the same place which is not surprising given accused works there. Only one involved a headlock and the other involved stairs. They were 10 months apart. However both victims were abusive and intoxicated. I consider a trial judge would rule this inadmissible because there is insufficient probative value (only 2 offences and no modus operandi shown) to render it 'substantial' in the face of what is otherwise very prejudicial evidence that may lead jury to convict on other than rational grounds. Under s.101 of the Evidence Act, the P must also establish – in addition to the 'significant probative

value test' that the probative value of the evidence substantially outweighs any prejudicial effect. For the reasons stated above this test is not met.

QUESTION 11

Criminal Procedure: Assume that the trial judge rules the Taylor and Lingham evidence to be inadmissible prior to the trial commencing. Explain whether and how the Prosecution is able to challenge this decision immediately and, if so, whether any such challenge is likely to succeed. **[3 marks]**

Answer #1: The P can seek leave to appeal the interlocutory decision of the trial judge in the Court of Appeal. P needs the trial judge to certify that the evidence if ruled inadmissible would eliminate on substantially weaken the Ps case (s.295 CPA). If the trial judge refuses to certify P can seek that the Court of Appeal review that decision (s.296). If the judge certifies/review is successful, leave will be granted only if the Court of Appeal is satisfied it is in the interests of justice having regard to the extent of any delay to the trial, whether the decision may render the trial necessary, reduce fine or reduce the likelihood of a successful appeal by A.
Leave is unlikely to be granted in this case given that the exclusion of the tendency evidence would not render the trial unnecessary and would not reduce likelihood of A appeal. Nolan is more likely to appeal if it is admitted and he is convicted.

Answer #2: Prosecution may seek to appeal this interlocutory decision. They would need the trial judge to certify that the inadmissibility of the evidence eliminates or substantially weakens the prosecution case. It is unlikely here as there is other direct evidence that the prosecution can rely upon, rather than tendency reasoning. If judge fails to certify, prosecution will have a right of review. Even if trial judge certifies, would still need leave from Court of Appeal which is only available if the factors in 297(a) of the CPA apply. Again, unlikely here as the tendency evidence is not the 'cornerstone' of the prosecution case and there is other direct evidence they can rely on.

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

Ms Young has given evidence for the Prosecution and her evidence was generally consistent with what she said in her written statement to police (see extract above). She took care not to mention anything about her drug use during questioning from the Prosecutor. In the course of cross-examination by Defence Counsel, the following exchange then takes place:

> **Defence Counsel:** And you say that prior to your attendance at Mission Control, you were at your friend Hayley's place?
>
> **Ms Young:** Yes.
>
> **Defence Counsel:** And what were you doing there?

Ms Young: Just chatting, drinking and listening to music.

Defence Counsel: Drinking alcohol?

Ms Young: Yes. Wine.

Defence Counsel: How much wine did you have to drink?

Ms Young: Maybe 2 glasses. Not that much.

Defence Counsel: Apart from alcohol, did you consume anything else at your friend Hayley's place?

Ms Young: I'm not sure what you mean.

Defence Counsel: Yes you do. Drugs, Ms Young. Did you have any drugs?

Ms Young: I'm not comfortable with these questions your Honour. Do I have to answer them?

QUESTION 12

Evidence: Explain why Ms Young will/will not be compelled to give evidence about using cocaine and marijuana before going to the nightclub that night. **[5 marks**]

Answer #1: The issue here is the effect of the evidence on Y's credit as a witness. If she took drugs before attending the night club her powers of perception may be significantly impaired. The DC is wishing to attack her credibility by adducing the evidence which would make her evidence less reliable. Under s.102 credibility evidence is inadmissible unless used for a different evidentiary purpose or under statutory exception. Here the evidence could substantially affect the assessment of the credibility of the witness and is therefore admissible under s.103. It goes to the truthfulness and reliability of the W. If the W has concerns about the future use of her evidence especially in relation to her career an application under s.128 may be made which will protect against self-incrimination. The W will be advised of the certificate and asked to give evidence willingly. If she refuses the TJ will consider whether it is in the interests of justice to compel her and whether she would be liable for prosecution elsewhere/foreign court. Given there is no other source of her evidence and the case at hand is very serious it is likely she will be compelled but a certificate under 128 granted.

Answer #2: Witnesses are assumed to be compellable to give evidence unless an exclusion applies. S.128 EA applies here. A witness can object to giving evidence if the evidence would tend to prove she has committed an offence (as here – the use of illicit drugs). The court is likely to consider she has reasonable grounds for this objection; it can order a voir dire s.189 if required to ask Ms Young questions about the night in the absence of the jury. Having determined Ms Young has reasonable grounds, the court should inform her she need not choose to give the evidence but if she doesn't she can be compelled, and in either case if she gives evidence she will be given a s.128 certificate granting immunity from prosecution. In the current case, the importance of the evidence is high, as it will go to Ms Young's ability to perceive and recall events properly on the night. Further, the offence charged (murder) is a grave one. In addition Ms Young's evidence forms a crucial part of the prosecution's case and her evidence about her consumption of drugs etc will be vital to the defendant's attempts to discredit her testimony. Accordingly, it is likely that the judge will compel Ms Young to

give evidence, and award a certificate under s.128. The evidence sought to be led is credit evidence (s.101A) as it is only relevant to the reliability of Ms Young's perception and recall on the night. The evidence is likely to get in under the XXN s103 provisions – as it is capable of substantially affecting the assessment of Ms Young's credibility.

QUESTION 13

Criminal Procedure: Defence Counsel intends to make a 'no case' submission. Explain what this means (***Note***: you should include in your explanation an indication of when the submission is likely to be made and the practical implications of the trial judge acceding to the submission). **[3 marks]**

Answer #1: A no case submission is made by defence counsel where they are of the view, following the close of the prosecution case and before the accused calls/gives evidence and closing addresses that the prosecution has failed to prove the case. The test is that the jury, properly instructed, could not convict the accused. It is a high test. It is unlikely in this case that the submission could be successful as there are various witnesses with various accounts that put Nolan with Buxton in a headlock at the top of the stairs. Some say push, some say fall. Ultimately they are questions of fact for the jury. The judge will no doubt leave that to the jury to determine.

Answer #2: A no case submission is to the effect that no jury, properly directed, could find beyond reasonable doubt that the charge is proven, ie D is guilty. Must take evidence at its highest. Submission likely to be made at close of Pros case. If judge accedes, must direct jury to enter verdict of not guilty. Unless Young's evidence and the tendency/coincidence evidence are both excluded, Pros has a prima facie case on which jury could be convinced to the requisite standard.

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

Defence Counsel's 'no case' submission is not successful. The Accused elects not to call any evidence (*Note:* Recall that the Accused also made a 'no comment' interview when he was arrested and interviewed by police).

QUESTION 14

Criminal Procedure: Who is responsible for specifying jury directions to be given in a criminal trial? Having regard to this case, how it is put, and the available evidence, specify **FOUR (4)** particular directions that could be given to the jury in this case. **[3 marks]**

Answer #1: Pros and D counsel must assist judge by requesting particular directions (save for general directions). Trial judge must direct jury accordingly unless good reason not to do so. Must not give direction not requested unless there is a substantial and compelling reason to do so.

Four directions:

- Direction on proper use of tendency and coincidence evidence and what is tendency, here proven.
- Direction that certain evidence may be unreliable (eg if Young drug affected).

- Direction that D's failure to give evidence might not be taken as evidence against him.
- Direction on elements of offence (general direction).

Answer #2: Counsel in trials have obligations under the JDA to identify issues in dispute and request directions relevant to those issues. The onus is on counsel to request directions and the judge must give requested directions unless there is a good reason not to. The judge must not give directions not requested however there remains a residual obligation on the judge to give a direction not requested if failing to do so would result in a substantial miscarriage of justice. This is a big test, and higher than to ensure a fair trial. Four directions in this case could be:

- Accused not giving evidence or calling witness.
- Unreliable evidence of Young – drug affected.
- Direction on opinion evidence and use of.
- Direction to avoid improper use of other misconduct evidence – if previous events of Taylor and Lingham were led as context rather than tendency evidence.

QUESTION 15

Criminal Procedure:	In the ordinary course of events, after the Prosecution and Defence have concluded calling evidence, in what sequence does the Prosecution, Defence and Trial Judge address the jury before they retire to consider their verdict?
Your answer: ***(circle ONE)***	a) **<u>Prosecution, Defence and then Trial Judge</u>**. b) Defence, Trial Judge and then Prosecution. c) Trial Judge, Prosecution and then Defence. d) Trial Judge, Defence and then Prosecution. e) Prosecution, Trial Judge and then Defence. f) Defence, Prosecution and then Trial Judge.
[1 mark]	

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

The Accused has been found guilty of murder. The matter proceeds to a sentencing hearing. Mr Buxton is survived by his wife, Hilda Buxton (aged 35), and their two children, Priscilla Buxton (14) and Jonathan Buxton (11). Mrs Buxton wants to let the court know the profound impact that Mr Buxton's death has had on her and her children. She wants the judge to impose the harshest sentence possible. She has stated to the solicitor at the Office of Public Prosecutions handling the matter that the judge needs to *'lock him up and throw away the key.'*

QUESTION 16

Criminal Procedure: What if any role can Mrs Buxton assume at the sentencing hearing? Explain. **[3 marks**]

Answer #1: Mrs Buxton can provide a victim impact statement, and may be permitted to read part or all of this aloud at the sentencing hearing (ss. 8K/8L Sentencing Act); and Mrs B may read the statement herself or it may be read by the prosecutor (s.8Q). The sentencing judge may also read aloud from the VIS (s.8Q(4)).
The impact of the offence of Mrs B must be taken into account by the sentencing judge under s.5(2) of the SA – see s.5(2)(daa). This provision would also allow the impact on Mrs B's children to be taken into account.

Answer #2: Buxton can provide a victim impact statement but not required to do so. It can set out the impact including the loss and economic damage as well from death. It can include photos and drawings, eg if victim with children. Buxton can request to read it at sentencing or prosecutor can read. Admissibility rulings may be made.

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

The Prosecutor makes the following oral submissions relating to an appropriate sentence for Mr Nolan: *"It is my submission that the court should consider imposing a term of imprisonment of between 20 and 22 years with a non-parole period of at least 18 years. The verdict of guilty demonstrates that the jury was of the view that Mr Nolan intended to kill Mr Buxton or, at the very least, intended to seriously injure him. He has also shown no remorse by pleading not guilty, by not co-operating with police, and putting Mr Buxton's family through the trauma of this trial. These are necessarily aggravating factors that justify a higher term of imprisonment than normal."*

QUESTION 17

Criminal Procedure: Identify and explain any errors in the Prosecutor's sentencing submission. **[3 marks]**

Answer #1: Firstly the prosecutor has offended the principles of Barbaro by stating the number of years Nolan should be sentenced to. P is entitled to make submissions re custody vs non custody but not specify the length of imprisonment. The submission re what the jury found is also incorrect. The jury could have been satisfied he was reckless. The submission about remorse is correct as he did not plead guilty but cannot be used as an aggravating factor 0 a person is entitled to mitigation for a plea of guilty but not aggravation for running a trial. The factors set out by P are not matters that can justify a higher term of imprisonment (unlike serious offender provisions).

Answer #2: Post-Barbaro, the prosecutor should not be making submissions on precise sentencing ranges (see also Matthers). Prosecution is making assumptions about the basis on which the jury found the accused guilty, impermissibly. The prosecution is attempting to adduce evidence of the accused not pleading guilty as an aggravating factor, when in fact evidence of pleading guilty is to be treated as a 'mitigating factor' (s.6AAA Sentencing Act) – an absence of that factor does not aggravate per se.

END OF PART A

PART B (Questions 18 to 35) – Candidates are required to answer ALL questions in Part B.

Refer to the facts in Part A. The following further facts relate to all questions in Part B.

Prior to his death, Craig Buxton was employed as Chief Executive Officer of TRP Limited, a publicly listed company with a market capitalisation of $2bn. Mr Buxton's annual salary was between $3m and $5m (the precise amount each year was dependent on performance milestones being achieved). Mrs Buxton and her two children were entirely dependent on this income.

Mrs Buxton, in her capacity as executor of the estate of her deceased husband, has issued proceedings on behalf of herself and her two children who are the beneficiaries under Mr Buxton's will. Mrs Buxton (as Executor) is named as Plaintiff. She has named Mr Nolan as First Defendant and his employer, Private Security Australia Pty Ltd ('**PSA'**), as Second Defendant. In her pleadings, she has alleged causes of action based in tort including assault, battery, and negligence (torts committed against Mr Buxton) where she relies on her statutory right to pursue such claims under the *Wrongs Act 1958* (Vic). She has also pleaded claims based in negligence for the psychiatric injuries that she and her children have suffered as a result of Mr Buxton's death. She has alleged that PSA is vicariously liable for the actions of its employee, Mr Nolan, and claimed damages in the sum of $50m.

Mrs Buxton has instructed Fleming Jones & Co, a firm of solicitors specialising in civil litigation and common law personal injury claims. Belinda Jones, a principal of the firm managing the case, briefed Counsel, Helena Southwick, to draw the pleadings.

QUESTION 18

Civil Procedure:	Which of the following **TWO** propositions are most likely to be correct in this case?
Your answer: ***(circle TWO)***	a) The pleadings will be signed by Mrs Buxton. b) The pleadings will be signed by Ms Jones (Mrs Buxton's solicitor). c) **<u>The proceeding will be commenced in the Supreme Court of Victoria</u>**. d) The proceeding will be commenced in the Victims of Crimes Compensation Tribunal of Victoria. e) The proceeding will be commenced by the filing of a statement of claim. f) **<u>The proceeding will be commenced by the filing of a writ</u>**.
[2 marks]	

[NB: There are no questions numbered 19 or 20.]

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

The First and Second Defendants have filed their respective defences. Important facts and evidence have now come to light which are likely to have a significant bearing on the proceeding, including the following:

- Mrs Buxton's essential allegations include the following:
    - Mr Nolan failed to adhere to crowd control safety protocols in the course of ejecting Mr Buxton from Mission Control in that he engaged Mr Buxton in a headlock position and pushed him down the stairs, causing his death.
    - PSA is vicariously liable for the wrongful actions of its employee Mr Nolan as at all material times Mr Nolan was acting within the scope of his employment.
    - PSA was under a duty of care as a registered employer of security personnel to '*refuse to engage, or discontinue the engagement of, an employee as a crowd control officer upon the registered employer becoming aware that there is reasonable cause to suspect that the personality, temperament or general behaviour of that employee could expose members of the public to a risk of serious injury caused by that employee*' (this is a legal duty specified under the *Security Personnel Licensing Act 1997* (Vic)). PSA breached that duty by failing to discontinue the engagement of Mr Nolan as a crowd control officer prior to the date of the death of Mr Buxton.
    - PSA knew or ought to have been aware that Mr Nolan was unsuitable to be employed as a crowd control officer.
    - PSA knew or ought to have been aware that it was obliged to terminate Mr Nolan's employment as a crowd control officer upon Mr Nolan being convicted on 2 September 2015 on a charge of recklessly causing serious injury (see the Taylor case referred to in Part A above).
- The Managing Director of PSA, Nigel SCHOFIELD, has instructed his solicitors as follows:
    - PSA entered into a long-term contract with Mission Control Pty Ltd (the corporate entity that owns and operates Mission Control) whereby PSA agreed to provide security services and personnel for the nightclub.
    - Mr Nolan was previously counselled about his 'overly physical' behaviour with respect to ejecting intoxicated patrons (including in relation to patrons Taylor and Lingham whose evidence was referred to in Part A above). It was emphasised to Mr Nolan that his practice of headlocks and unnecessary 'manhandling' of intoxicated or verbally abusive patrons had not gone unnoticed. After the Lingham incident on 15 October 2015, Mr Schofield

advised Mr Nolan in writing that any such further conduct would be regarded by PSA as gross misconduct and that his employment would be immediately terminated.

- On 12 December 2014, Mr Schofield advised management of Mission Control that, due to certain 'reported incidents' (including those concerning Mr Taylor and Mr Lingham referred to in Part A above), Mr Nolan would be reassigned and taken away from duties at Mission Control. In response, the manager of Mission Control, Leah GRAVES, stated that Mr Nolan was an essential crowd control officer at Mission Control because *'he took no crap'* and kept the club safe by dealing so effectively with intoxicated patrons. Ms Graves threatened that Mission Control would cancel its contract with PSA if Mr Nolan was reassigned from Mission Control. Had Mission Control not insisted that Mr Nolan remain at the nightclub, he would not have been there on the night Mr Buxton attended (and Mr Buxton would therefore not have been killed by Mr Nolan).
- Victoria Police failed to notify PSA in writing of Mr Nolan's conviction of 2 September 2015 (Victoria Police is obliged to do this within 7 days under the *Security Personnel Licensing Act 1997*). PSA had notified Victoria Police of its change of registered postal address in April 2015. However, due to an administrative oversight on the part of Victoria Police, the update of address was not effected on Victoria Police's system. Victoria Police sent the written notification to PSA's old address. Had PSA received written notice from Victoria Police of Mr Nolan's conviction and revocation of his crowd control licence, Mr Nolan's employment would have been terminated, effective immediately. This would have meant that Mr Nolan would not have been on duty on the night Mr Buxton attended Mission Control and Mr Buxton would therefore be alive today.
- The certified crowd control training course undertaken by Mr Nolan in July 2013 was run by Security Training Programs Australia Pty Ltd ('**STPA'**). After completing the module relating to how crowd controllers should deal with anti-social and intoxicated patrons, the STPA instructor assessed Mr Nolan as having 'failed' this part of the course. On his assessments notes, the training instructor wrote: *'Mr Nolan fails to understand the limits of appropriate use of force. He has an aggressive temperament and is easily angered. He is ill-suited to be a crowd controller and should be advised to discontinue the program.'* For reasons that remain unexplained, Mr Nolan was certified by STPA as having successfully completed the course when this 'fail' grade should have made him ineligible for certification. Had STPA not provided crowd control certification to Mr Nolan, he would never have gained a crowd control licence and employment as a crowd control officer, and would therefore never have been a position to kill Mr Buxton.

QUESTION 21

Civil Procedure: Assume that there is a factual and legal basis for either the Plaintiff (Mrs Buxton), the First Defendant (Mr Nolan) and/or the Second Defendant (PSA) to make further allegations against Mission Control Pty Ltd, Victoria Police and STPA that could lead to findings of contributory negligence in the event of a judgment in favour of the Plaintiff. What steps could the Plaintiff, First Defendant and/or Second Defendant take in order to maximize their respective interests in the outcome of the litigation for this purpose. **[3 marks]**

Answer #1: Mission Control (MC) could be joined as a defendant by Buxton. This can be ordered at any stage of proceeding. It is likely to be ordered as there are common questions of law and fact and relief flows from same transaction. Could also join STPA and VicPol on this basis as if not for their conduct Nolan would be have been terminated. PSA (if Buxton doesn't) will want to join MC, VicPol and STPA as third parties and make contribution/indemnity claims under order 11.

If Buxton joins will need to amend her pleading. Can do so without leave if pleadings have not closed. Otherwise leave is likely as will avoid a multiplicity of proceedings and ensure just, efficient and timely and cost effective resolution of real issues in dispute (CPA s9).

Answer #2: The plaintiff could seek an order that Mission Control (MC), VicPol and STPA be added as defendants to the proceedings pursuant to R9.06 on the basis that there exists a question relating to the claim in the proceeding and it is just and convenient to determine that question.

The first and/or second defendant could file a third party notice pursuant to order 11 of the SC Rules. This could be against MC, VicPol and STPA. The third party procedure is the appropriate procedure as opposed to a counterclaim (as the defendants have no claim against the plaintiff which is a necessary requirement for a counterclaim). The third party notice is to be in form 11A and endorsed with a statement of claim.

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

Mission Control, the State of Victoria (Victoria Police) and STPA are now parties to the proceeding. The issues as between the parties are diverse and involve complex questions of fact and law. The credibility of all witnesses will be at issue at trial.

QUESTION 22

Ethics: In what circumstances may Counsel represent two parties in a proceeding? Having regard to the information available, explain whether two parties in this proceeding could be represented by the same counsel. **[3 marks]**

Answer #1: A barrister cannot represent two parties in a proceeding if the interest by those parties conflict. Under R119 of BR the barrister must determine as soon as possible whether the interests of the parties may as a real possibility conflict and if so return the brief. In this case it is unlikely that any two parties could be represented by same counsel. The interests of VicPol, MC and STPA are all in clear conflict with the 1st and 2nd defendants. While it could be said that the first and second defendants are effectively on 'the same side' there is a real issue as to whether Nolan was acting outside the scope of his employment (given he knew his certificate had been terminated) and this may lead to a conflict in interest where vicarious liability is an issue.

Answer #2: Counsel should not act for 2 or more parties unless their interests are aligned and there is no risk of conflict. In this case cannot act for plaintiff and any other party. Although there may not be a conflict between VicPol and STPA should assume they provide written informed consent and get independent advice before acting for both. Nolan has adverse interest to all other defendants so cannot act for him and anyone else, same with PSA. If counsel acts for 2 or more clients if counsel determines there is a conflict he must return brief for one or more (or all in case of confidentiality issue). Here should only consider for VicPol and STPA but interests not sufficiently aligned so should decline.

QUESTION 23

Civil Procedure: Explain whether this matter is able to be heard before a judge and jury, or whether it is more likely to be heard by a judge alone. **[2 marks]**

Answer #1: This case is effectively founded on tort and either party could therefore apply to have it heard before a jury. The court can order that it proceed without a jury even if a party makes that application. This is a complex case involve many parties and issues of vicarious liability and other complex questions. In my opinion it is most likely that a judge would order that it be heard by a judge alone.

Answer #2: As the matter is commenced by writ and founded in tort it is able to be heard before a judge and jury rather than judge alone. Either a P or D can elect for trial by jury and the party who elects must bear the cost of jury fees. The trial then proceeds as a jury trial unless the court otherwise orders. Given the number of Ds and the different considerations for each, the judge may take the view that the matter is too complex to proceed by way of jury and order that it be heard by judge alone.

QUESTION 24

Civil Procedure: The Plaintiff (Mrs Buxton) is contemplating making an application for 'summary judgment' against the Second Defendant (PSA). What is summary judgment? Explain the procedural steps that both the Plaintiff and Second Defendant would have to take in relation to such an application. Explain why you think an application for summary judgment is/is not a sensible course to take in this case. **[3 marks]**

Answer #1: Summary judgment is an application to order judgment against a party without a hearing. It is governed by the CPA and the SC Rules. To be successful the plaintiff would need to show that PSA's defence had no real prospect of success. The court in Lysaght noted that this SJ should be granted with caution (although note Nettle JA's conflicting view). The plaintiff would need to make an application by summons supported by an affidavit. The second defendant would then need to 'show cause' by filing an affidavit, as to why the application should not be granted. In this case there is a real issue as to whether the second defendant knew (or ought to have known) about the 1st defendant's conviction. There is also the issue of the proposed reassignment and the request by Mission Control. In the circumstances it is unlikely to be found that there is no real prospect of success in the 2nd defendant's defence. The plaintiff should avoid making the application.

Answer #2: Summary judgment is a procedure that allows a judge to determine the outcome of a proceeding without it having proceeded to full trial, where a party has 'no real prospect of success' CPA Pt 4.4. If the plaintiff wished to make such an application, they would be required to file a summons and an affidavit in support, verifying the basis on which the application is made and deposing to their belief as to lack of prospects (r22.04). The defence may then show cause by filing an affidavit in response (r22.05). The court may cross-examine any maker of an affidavit (r22.07), and may make orders with respect to the application under r22.08. While summary judgment has been liberalised under the CPA (Lysaght), 'no real prospect of success' is still a demanding test, and therefore given the potential merit in some of the D's claims which can only be teased out at trial, it would not be sensible for the Ds to apply for SJ here – and may involve a breach of the OD to only take steps to resolve the proceeding.

QUESTION 25.1

Civil Procedure: Explain the obligation and purpose of 'discovery' in civil proceedings. Identify FOUR (4) categories of documents (specific to the likely issues to arise in this proceeding) that would be sought/discovered by any of the parties to the proceeding. **[4 marks]**

Answer #1: The purpose of discovery is to compel parties to disclose relevant information to avoid ambush and surprise at trial and allow parties to prepare their own cases. Parties must discover (unless ordered otherwise) all documents that they are aware of after reasonable enquiries that the party relies on, adverse to case or adverse to or supportive of case of another party.

1/ PSA must discover documents recording Nolan's employment contract and terms of employment and scope.

2/ MC and PSA must discovery all communications about retaining Nolan after 12/12/14.

3/ STPA must discover all documents regarding the certification of Nolan.

4/ VicPol must discover all communications to PSA regarding Nolan.

Answer #2: Parties to a civil proceeding must discover, ie list and produce on request all documents on which they intend to rely which damage own case or support or damage another party's case, unless reasonable belief other party already has the document. Aim is fairness and forensic convenience by all parties understanding what documentary evidence is available to support/harm each party's case.

Four categories are:

1/ D1's employment contract.

2/ D2's disciplinary/complaints history for D1.

3/ Ps record of psychiatric treatment for claimed injuries.

4/ Ps financial records re lost earnings of deceased.

QUESTION 25.2

Evidence: Refer to the evidence of Mr Taylor and Mr Lingham in Part A above. Is this evidence admissible/not admissible for the same/different reasons in the present civil proceeding? Explain. **[3 marks]**

Answer #1: There is no reason why T's and L's evidence cannot be sought to be used as tendency/coincidence evidence in present trial. Test under s.97/98 is the same, and P will be happy to know that S.101 and 137 don't apply ie easier to get in. As set out in earlier question, I consider that Lingham but not Taylor evidence admissible for this purpose.

T and L evidence also now relevant to state of knowledge of D2 as to D1's history/risk and what ought to be done about this. This is not a rare character attack and character protections in s.109-112 Ev Act don't apply here.

Both sets of evidence admissible and relevant docs could be admitted using s.48(1)(e) and business records exception for hearsay (if want to use for hearsay purpose if proving attacks occurred, not just D's knowledge re this).

Answer #2: To be admissible as tendency evidence must have significant probative value. On a civil standard, P does not need to show 'probative value substantially outweigh prejudice'.

For the reasons stated in Part A, I don't consider admissible on the civil standard as tendency evidence. However, may be admitted for non-tendency reasons – with appropriate direction to jury (if any) about the use to which the evidence can be put. Evidence of Taylor and Lingham is relevant to matters including (a) VicPol's knowledge of offending, (b) D1's failure to inform D2 of his offending, (c) whether D2 acted reasonably/had notice of D1's character. Therefore maybe admissible as relevant - subject to the s.135 discretion to exclude. However as very probative evidence giving to existence of duties of care and breach of those duties and of contracts – the probative value is unlikely to be outweighed by danger of prejudice from evidence.

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

- The STPA course undertaken by Mr Nolan involved specific instruction being given to course participants (including Mr Nolan) as to appropriate ways to remove intoxicated and abusive patrons from liquor licensed premises. A **Training Manual** (a copy of which was provided to the Accused in July 2013 during the course, which was his to keep) contained a list of actions that are specifically prohibited '*where removal of a patron is not the result of the patron posing a serious physical threat to the safety of yourself, other staff or members of the public*'. Included in the list of prohibited actions is '*head locks … which could lead to the patron having difficulty breathing and loss of consciousness*', and '*punching, hitting, or other excessive force disproportionate to any physical force used or threat posed by the patron*'. This document has been disclosed by way of discovery.

- The Training Manual is regarded as the crowd control industry's 'bible'. Everyone who is involved in the crowd control industry has a copy, including almost all employees of PSA (Mr Schofield has his own copy) and STPA and relevant members of Victoria Police involved in the administration of crowd control licenses.
- The assessment notes made by the STPA instructor in relation Mr Nolan's suitability as a crowd controller have been made available by way of discovery (see above) but it is unclear who was the author of the assessment and the relevant instructors employed in 2013 have all left STPA and are unable to be located.

QUESTION 26

Evidence: Explain the relevance of the Training Manual and on what basis it may be tendered into evidence? You should consider and explain the merits in any possible objections that may be made as to its admissibility. **[3 marks]**

Answer #1: The TM is relevant to the reasonableness of D1's actions and also to the reasonableness of STPA's actions in passing D1 from its course. Could even be used as admission against STPA (ie these were its standards, it failed to meet them). Since document is relevant, prima facie admissible under s.55. May seek to tender via witness or tender as business record of STPA under s.48(1)(e).

Objection may be taken on basis that document is hearsay. It is, but s.69 (business records rule) applies assuming it is clear who wrote it and why they had knowledge).

If used, keep for opinion purpose (ie these ought to be standards to be used), need to prove whether an expert in the topic (probably – he 'wrote the book').

Answer #2: The training manual is relevant to the issues of whether D1 was acting within the scope of his authority and whether D2 breached their duty of case: ie what is the reasonable standard of care in the crowd control industry – how does a reasonable crowd controller act?

Could be tendered as an STPA business record as exception to the hearsay rule as created in the course of STPA's business – however query what representations of fact are contained: perhaps A headlock can cause loss of consciousness. Does contain opinion re: the result of headlocks – not specialised knowledge opinion. Also does not comply with lay opinion test.

Objections: opinion evidence with expertise knowledge not made out.

Otherwise tender through a witness for STPA who authored the Bible or can personally speak to its authorising and/or is an expert himself. This may address the objection re opinion.

QUESTION 27

Evidence: Are the STPA instructor's assessment notes (author unknown) concerning Mr Nolan's suitability as a crowd control officer admissible? Explain. **[3 marks]**

Answer #1: The assessment notes are hearsay and opinion.
-First hand hearsay because document containing PR which facts asserted relied upon.
-Business records exception – while author unknown can be directly or indirectly supplied by person with personal knowledge of asserted fact.
-SPTA instructor – likely to have personal knowledge (distinguish ICM).
-Contains opinion re suitability - however expert opinion likely to apply. STPA instructor has specialised knowledge as trainer (due to study experience) and opinion wholly or substantially based on training, study experience.

Answer #2: The STPA instructor's notes will likely be objected to on the basis of hearsay and opinion (ICM), though they are clearly relevant. Hearsay is unlikely to be insurmountable – even though the precise maker of the representation is unknown, the representation itself is clear (if ICM). Assuming that the maker can be deemed unavailable, the document should be admitted under s.63 (assuming notice is given), or alternatively under the business records exception (s.69). An opinion rule exception must also be made out (ICM). This is more difficult in the absence of being able to identify the maker, but a court may be willing to assume that the person writing the notes had direct knowledge of the facts giving rise to the opinion (s.78(a)). If so, the lay opinion exception may be relied upon as the second limb (s.78(b)) is almost certainly met. Section 79 may have also been a possibility if the maker's identity were known.

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

- The matter has proceeded to trial before judge and jury.
- On the third day of trial, Counsel for the Plaintiff is approached by a journalist during the lunchtime adjournment and asked for his view as to how the case is going for Mrs Buxton. Counsel replied: *'It's going extremely well. I think the jury is very interested in this tragedy that has befallen my client and the outrageous conduct of all those involved who allowed this to happen. Let's just hope the jury makes the right decision.'*
- On the fourth day of trial, another barrister', Leila STONE (who is not representing any of the parties to the proceeding but is experienced in the relevant area of law) is interviewed by another journalist on a prime time current affairs program and asked for her opinion on the factual and legal issues arising out of the case. Ms Stone replied: *'I'm afraid I can't really say anything about the specifics of the case as I'm not involved. However, what I can say is that this particular case raises serious issues that should be of general concern to all owners of licensed premises and security staff that work at such venues. I think this case is probably going to be seen as a test case that will give us an indication as to the extent that the owners of licensed premises can be held responsible for the actions of their security staff.'*

QUESTION 28

Ethics: Discuss the ethical implications arising out of Counsel for the Plaintiff's comments and Ms Stone's comments made to the journalists. **[4 marks]**

Answer #1: Counsel should be careful in making media comment. Counsel for the plaintiff is required to comply with r77 and 78 BR, which is that they shouldn't make media comment unless it is limited to the facts of the case and doesn't give an opinion on the merits (R76). Here counsel has breached the rule. Stone may comment on the case as it is by way of educational comment and she is not briefed in the proceedings.

Answer #2: Plaintiff: counsel's obligations are governed by R77 of the Barristers Rules. It is evident that counsel has gone well beyond what she is entitled to say to the media and has given her personal opinion as to the merits of the case. This goes well beyond the identity of the parties, nature of issues, orders made and client's intention. The ethical implications for counsel could be severe as a breach of the barristers rules could lead to disciplinary action.
Ms Stone: Ms Stone is governed by R76 as she is not appearing. Her comments are in line with that rule. She has not offered her personal opinion on the merits of the case but is discussing matters of law for genuine academic discussion. Her comments are likely to have no ethical implications for her.

QUESTION 29

Evidence: Mr Schofield (the Managing Director of PSA, the Second Defendant) does not want to give evidence on behalf of the Second Defendant at the upcoming civil trial because he is '*nervous about giving evidence in court and doesn't want to be painted as a fool in open court'*. Is this an acceptable reason for refusing to give evidence? Explain the possible consequences if he does not do so. **[2 marks]**

Answer #1: No, it is not an acceptable reason for not giving evidence. As the MD of PSA he is a witness who would reasonably be expected to give evidence. If counsel for PSA fails to call Schofield and does not provide a good reason for not doing so (which this isn't) counsel or the P and the other Ds can invite the jury to draw an inference that the evidence of Schofield would not have assisted PSA's case (Jones v Dunkel).

Answer #2: Schofield is on the facts component and thus compellable. If he does not give evidence for the second defendant then a Jones v Dunkel inference may be drawn that his evidence would not have assisted the case. The second defendant could subpoena him if he is resisting giving evidence.

QUESTION 30

Evidence: What is the rule in *Browne v Dunn* and who has to comply with it? Hypothesize as to **TWO (2)** different occasions where this rule might have to be applied at trial, and explain the consequences in the event of non-compliance with the rule. **[4 marks]**

Answer #1: All counsel must put to witnesses so much of their client's case as is inconsistent with that witness' evidence and allow the witness a chance to agree/disagree/explain differences between the case put and their evidence/comment. All parties appear to be in dispute as to facts, and so all will be needing to XXN each other's witnesses and put matters under Browne.

Hypothetically, - Graves might deny telling Schofield they must keep Nolan on. PSA's counsel would need to XXN Graves and put to her that this is not true, ie she asserted he was 'essential' and that MC would terminate Ct if Nolan gone.

- D1 and D2 might deny psychiatric injury and say these are pre-existing. Might have to have D1/D2 counsel XXN P and put to her that she has long psych history pre-dating death of husband, and this didn't worsen on death.

If rule is not complied with, only rarely will party in breach be prevented from putting that case.

The usual remedy is a direction to the jury. Could also permit party in breach to recall witness under s.46 Ev Act.

Answer #2: The rule in Browne v Dunn is one of fairness. Any party intending to contradict the testimony of a witness must put the imputation to a witness so they have the chance to respond. Failure to do so could lead to witness being recalled (s.46), evidence being discounted in weight or an adverse inference (rare).

1/ The plaintiff must put it to Nolan that he breached crowd control safety protocols.

2/ The second defendant can put it to STPA 'you certified Nolan despite knowing he failed the course, didn't you?'

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

The trial judge has given the parties permission to use the police statements made for the purposes of the criminal proceeding (in Part A) for the purposes of the present civil proceeding.

The Plaintiff intends to call Ms Young to give effectively the same evidence that she gave in the criminal proceeding concerning her observations of Mr Nolan pushing Mr Buxton down the stairs. However, because of the publicity and personal embarrassment Ms Young suffered from having given evidence at the earlier trial, she has no intention of giving evidence again. She has made that clear to the Plaintiff's solicitor and that if she is *'forced to go to court, I won't be remembering anything!'*.

QUESTION 31

Civil Procedure: What steps can the Plaintiff take to force Ms Young to attend court and give evidence? **[1 mark]**

Answer #1: P should subpoena Young to attend. Can issue as of right and serve personally, with conduct money, must serve 5 days before attendance (unless Court fines the date). Young is a competent witness and therefore presumed to be compellable: s.12(b) Ev Act.

Answer #2: The plaintiff can issue a subpoena to Ms Y to attend court to give evidence (r42.02) and must ensure that the subpoena is served within the relevant period and that conduct money is paid to Ms Y to ensure its efficacy.

QUESTION 32

Evidence: In the event that Ms Young is forced to give evidence for the Plaintiff, what should Counsel for the Plaintiff do when she says '*I can't really remember anything that occurred that night*' at the commencement of examination in chief? Is the Plaintiff able to tender her original police statement and invite the jury to accept the contents of that statement as her evidence? **[4 marks]**

Answer #1: If she cannot remember, then counsel should seek leave under s.32 to allow Ms Young to refresh her memory by giving a copy of her statement being prepared previously for the criminal proceedings. Presuming Ms Young continues to assert that she does not remember, counsel can apply under EA s.38 to have Ms Young declared an 'unfavourable witness' on the basis of her prior statement which is obviously inconsistent. If leave under s.38 is granted, counsel needs to then put to Ms Young the substance of her prior inconsistent evidence – though he need not s how the document to her. Once Ms Young has been questioned sufficiently in accordance with D v D rule, counsel can then tender her original police statement as an attack on Ms Young's credibility. It is likely to be admissible per s.103 – substantially affect assessment. Once this through, s.60/s.101A means that the inconsistent statement is usable not just for its credibility purpose but also for its hearsay purpose ie to prove the truth of the representation.

Answer #2: Counsel could seek leave from the court to let her use her previous statement to 'refresh' her memory under s.32. If court gives leaves, statement can be used by her. If she still refutes evidence, counsel can apply to court to treat her as an unfavourable witness under s.38 EA which then allows counsel to XXN her. Counsel would then put the statements she made to police to her with sufficient detail so she knows what statement counsel is referring to (s.43) and if she continues to deny knowledge, counsel should tender the statement under s.106 EA as exception to credibility rule. S.106 allows counsel to admit the evidence through the statement. If admitted under s.106, s.160 would allow her statement to be used for hearsay purposes meaning it could be used as evidence of the facts – ie that she saw Nolan push the victim.

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

The Plaintiff's solicitors have engaged an expert criminologist, Professor Joel HEINZ, who has conducted sociological and statistical research in the field of 'nightclub culture' in Australia. Professor Heinz is able to prepare a report. Professor Heinz's report includes the following statements, based on his research and review of data obtained from official government sources:

- From 2010 to 2015 there were on average 135 incidents per annum reported to Victoria Police that involved allegations of violence being perpetrated by crowd control officers (or 'bouncers') against members of the public in or near nightclub venues.
- On average, one nightclub has one such incident of such violence occurring every two months.

- From 2010 to August 2013, Mission Control's average was consistent with the Victorian state average – one incident reported every two months.
- Between September 2013 and October 2015, Mission Control had an average of two such incidents reported every month (i.e. a 300% increase in reported incidents).
- Mr Nolan commenced his employment at Mission Control in September 2013 and ceased working in October 2015.
- The significant increase in reported increase in incidents of violence at Mission Control during that time is likely to be attributable to Mr Nolan's presence as a crowd control officer at the nightclub.

QUESTION 33

Civil Procedure: Explain the procedural steps and requirements associated with the preparation and contents of Professor Heinz's report prior to trial. **[3 marks]**

Answer #1: Plaintiff needs to comply with O44 in order to be able to tender report at trial. This means that Heinz needed to be given a copy of the code of conduct for expert witnesses before he prepared report. He needed to have read it and in his report stated that he read it and agrees to be bound by it.
His report will also need to state name, address, qualifications, facts/assumptions he took into account, any literature he relied on, any issues outside his area of expertise, any tests he conducted, etc.
In order to be able to tender the report at trial, P needs to serve copy of the report (and give copy to court) on each party at least 30 days before trial.
If P doesn't comply with above, cannot lead evidence in XIC from expert other than with leave of the court or consent of the other parties – rule 44.05.

Answer #2: The P should ensure that the expert is provided with the O44 Expert Code of Conduct and attention drawn to its overarching obligations under the CP Act. The expert must understand and agree to be bound by both. Prior written notice of intention to rely on the report should be filed and served within 30 days of the hearing listing the name, address, opinion, reasoning, findings, any assumptions etc. of the expert. Further supplementary reports must also be served – Hudspeth.

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

The contents of Professor Heinz's report referred to above were only finalised after a conference attended by Counsel for the Plaintiff, the Plaintiff's solicitor, and Professor Heinz in which the data was discussed and Counsel asked Professor Heinz a number of questions. Part of the conference included the following exchange:

Counsel: I'm just concerned about your conclusions in relation to Mission Control's average reported incidents of violence and how it increased in September 2013 through to July 2015?

Professor Heinz: Yes?

Counsel: Don't you think the increase lasts a bit longer than that? When I look at the data, you could probably say the increase in incidents actually extends to October 2015. Is that interpretation open?

Professor Heinz: Yes, it's possible. Adding a few extra months won't substantially affect my conclusions, but in my opinion it would be more scientifically sound to draw the line at July.

Counsel: Well we need to think about the interests that we represent, Professor. If October 2015 is open, then that's what I think you should say. That is what the Plaintiff would want to contend.

Professor Heinz: Yes, well it's open I suppose. I'm reasonably comfortable in saying that if that's what you prefer.

QUESTION 34

Ethics: Discuss the ethical implications of this conversation. **[3 marks]**

Answer #1: This is coaching the witness – must not occur. The appropriate question would have been – 'please address this inconsistency to confirm your original finding, or advise whether this should be changed' (by provision of subsequent report). It is, of course, permissible to robustly test the witnesses and the evidence they intend to give. However counsel here is referring to manipulating the evidence to 'what the plaintiff wants' is a qualitatively different issue.
Heinz also problematic – he is proposing to change his evidence not on his expert opinion but based on the plaintiff's requests. He is acting as an advocate, in breach of the code (see Hudspeth).

Answer #2: Counsel has an obligation not to influence the expert in preparing his report and to ensure that the report is the expert's own opinion. It is acceptable to question the expert and ask them whether certain interpretations are open (ie first question) and then leave it to the expert to form their opinion. Here counsel has probably crossed the line and influenced what interpretation or opinion the expert has (ie expert saying it is one interpretation rather than his interpretation). Counsel should only question an expert on their report to ensure its admissibility and how clear the report is.

QUESTION 35

Evidence: Is Professor Heinz's evidence admissible at trial? Explain. **[3 marks]**

Answer #1: It depends on whether J is satisfied on BOP that the field of 'nightclub culture' as a subset of the discipline of criminology is 'specialised knowledge based on training, knowledge, experience' etc. – any person can assess number of incidents at a nightclub without specialised study.
The real problem of the opinion evidence have is relevance. There are a plethora of reasons (including random statistical 'noise' in a small sample) why the reports of incidents spiked during N's employment. It could have been the result of

increased/different patronage. How the raw number of matters over the period makes logically more likely the existence of facts in issue establishing breach of duty by PCA/MC is useless.

Answer #2: The opinion rule states that evidence of an opinion is not admissible, unless on exception applies. One relevant exception is when the opinion is based on specialised knowledge.

An expert will have specialised knowledge if the opinion is based on training, study or experience.

In this case, Heinz is an expert criminologist. No doubt he has undertaken extensive training and study to become qualified as such. His knowledge of statistics and his chosen field of application, being 'nightclub culture' tends to support the fact that he has specialised knowledge. Criminology is not a novel or niche area that means the D would be without an opportunity to obtain a report to oppose the opinion of Heinz.

Thus the report is admissible as opinion evidence. Objection may be taken under the court's exclusionary powers in s.135 as being misleading (if counsel for P's suggestion above is adopted) or because it draws a conclusion that is unfairly prejudicial to the D. It may also lead a jury to improper reasoning and affording the opinion more weight than it actually deserves.

END OF PART B

End of examination