Victorian Bar Readers' Course
Entrance Examination for 10 May 2017

EXAM PREPARATION

Seminar delivered on 11 April 2017
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About the exam

- The aim of the entrance exam is to ensure that those admitted to the course have basic levels of competence and can demonstrate aptitude for the skills required of a barrister.
- The exam is not completely 'closed book'. Extracts of examinable statutory provisions, regulations and quasi-legislation will be provided to candidates in the examination room. See below for further information concerning the Exam Materials that will be provided.
- The exam is 3 hours in duration, preceded by 30 minutes perusal time.
- The exam will examine understanding of procedure (both civil procedure and criminal procedure), evidence and legal ethics.
- Candidates should assume that Victorian law applies to all questions asked.
- The exam will comprise a mix of multiple choice, short answer and long answer questions. Questions in the exam are otherwise of two general types:
    - **"Pure Rule" questions:** designed to test the candidate's knowledge of a particular rule or principle *without application* to a stated factual matrix (e.g., "*Q1: What is 'hearsay evidence'?*" requires the candidate to define hearsay evidence).
    - **"Application" questions**: designed to test *both* the candidate's knowledge *and ability to apply* rules and principles to a stated factual matrix (e.g. "*Q2: The prosecution intends to tender into evidence Jane's statement made to police as proof of what it asserts. Will the prosecution be permitted to do so?*" requires the candidate to demonstrate an understanding of the hearsay rule, and its exceptions, by applying the applicable rules of evidence to a given set of facts).

- The **majority of questions in the exam are Application questions**. Accordingly, most marks will be allocated to how well a candidate applies a rule or principle in a given context.
- Candidates are not required to cite case names and may restate principles of law or rules in their own words (including extracted examinable provisions contained in the Exam Materials).
- The standard of expression, spelling, punctuation, grammar and conciseness will be taken into account in the assessment of a candidate's answers.
- Responses must be legible.
- A pass mark of 75% is the minimum entry requirement.

Exam Materials

- The **Reading Guide & Legislation Extracts** ('Exam Materials') provide all examinable subject matter and reproduces extracts of all examinable provisions. These are now available to download from the Victorian Bar website. The Exam Materials will be reproduced in hard copy and provided to candidates in the examination room. Candidates are encouraged to familiarise themselves with these materials. **Candidates must not bring their own hard copies of the Exam Materials to the examination.**
- Application/interpretation of the examinable provisions will be discussed in prescribed texts and case law (which candidates will not be permitted to have in the examination room). It is therefore up to individual candidates to familiarise themselves with how the provisions are applied in particular case contexts.
- The legislative provisions as contained in the Exam Materials published on the Victorian Bar website are deemed to remain static for the purposes of the examination. Any legislative amendments taking effect after publication of the Exam Materials (but prior to the examination) will be deemed to be ineffective and should therefore be ignored.
- Candidates may assume that provisions that have not been extracted and included in the Exam Materials will not be specifically examined.

Exam preparation

- If a candidate expects to perform well in the exam, they will most likely have undertaken the following steps in preparation prior to the examination date:
    - They have read and understood the contents of the Reading Guide.
    - They have read and understood the examinable provisions reproduced in the Exam Materials, and how those provisions are capable of be applied in a hypothetical factual scenario to be adjudicated by a court in Victoria.
    - They have read and understood the selected case law referred to in the Reading Guide.
    - They have read relevant parts of the prescribed texts referred to in the Reading Guide for further explanation of how the examinable legal principles are capable of being applied in factual scenarios.
    - They have read previous examinations and sample answers (provided on the Victorian Bar website) as a means of guidance as to: (i) the sort of question that can be expected in the upcoming examination; and (ii) the kinds of answers that score highly.

General examination tips

- Read the factual problems carefully.
- Read the specific instructions in each question carefully:
    - There may be one question expressed simply (e.g. *'Is the evidence admissible*) allowing scope to raise and discuss a number of legal issues identified by the candidate.
    - Alternatively, there may be a sequence of questions (e.g. *'What is rule in Browne v Dunn? How does it apply in this case? Explain the rationale for the rule.*') indicating that there are several components to achieve a complete answer. Omitting to deal with a component is likely to result in a loss of marks (e.g. omitting to *'explain the rationale for the rule'* will mean that candidate will not be able to achieve maximum marks for the question).
- Sensible time management is very important:
    - The amount of time to spend on a question should be proportionate to the total marks allotted to it.
    - If you have not finished a question (but need to start another due to time constraints), come back to that question later if you do have extra time.

- Questions can be answered in any order.
- You should make an effort to answer **every** question. History and experience of the examiners reveals that a common reason for candidates failing to achieve 75 or more is due to one or more questions not even being attempted by the candidate.

- Write legibly – the 'fantastic' answer will mean nothing to the examiner who cannot read it.

Examiners' marking process

- The process of marking examination scripts is designed to be objective and fair.
- For each question (excluding multi-choice questions):
  - examiners will have before them a list of points that could potentially be made by candidate in answering that question (i.e. a marking guide);
  - the examiner considers and assesses the candidates' answer as against the marking guide;
  - if the candidate's answer includes points not contained in the marking guide, the examiner considers any potential merit in these additional points (i.e. the marking guide does not purport to be exhaustive);
  - the examiner considers and assesses the overall extent to which the candidate's answer: (1) addresses all aspects of the question by the points that have been identified; (2) demonstrates a sound understanding of the relevant legal principles and how they apply to the particular facts at hand (the candidate recognising that there may be competing arguments); and (3) is expressed clearly and succinctly such that the examiner is left in no doubt as to the level of the candidate's knowledge and understanding of the issues disclosed by the question and how they might be correctly resolved;
  - the examiner then records a mark out of the maximum possible marks allocated to the question that reflects the examiner's overall assessment of the candidate's answer (i.e., the mark is derived from an assessment process that necessarily involves a combination and synthesis of quantitative and qualitative criteria).

Sample questions and answers from 31 October 2014 Entrance Exam

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QUESTION 2

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

Marking Guide

References: *Good Conduct Guide*, Chapter 7

General rule:

- Barrister must not act or advise on direct access unless instructed by solicitor.

Exception:

- Advising and appearing in criminal matters is an exception, but only if the matter is being heard in the MC or, if in the County Court, Victoria Legal Aid has made the request.
- Here, the offence will be heard in the MC (a low-level summary offence) so an exception clearly applies.

Other factors to take into account before deciding to act on a direct access basis even if exception applies:

- Is it in the interests of the client that a solicitor be instructed? Will prejudice be suffered by barrister and/or client due to absence of instructing solicitor?
- How complex are the factual/legal issues in this case?
- Rights and liabilities of client?
- Volume of evidence?
- The need to contact, subpoena or otherwise manage witnesses, including experts?
- The need to liaise formally/in writing with prosecution and court?
- The need for engrossing, filing, serving or photocopying of docs, etc.?
- Barrister can't perform solicitors' work or administrative tasks not normally performed by a barrister.
- Barrister needs to execute standard terms of engagement prior to commencing work.
- Costs disclosure obligation to client regarding fees.
- Need to retain records and copies of instructions/briefs.
- Barrister can't handle client's money – must have client pay fees to clerk, and held in trust if in advance

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

Moderate answer: As this matter is to be tried in the Magistrates' Court, being a summary offence, counsel is able to be directly briefed by the accused. This is only if counsel is satisfied that no adverse/negative effect will be borne by the accused as there will be no instructing solicitor. Counsel should also ensure to comply with disclosure obligations under the Rules. Counsel cannot do any of the duties of a solicitor and needs to be sure that the accused is able to perform them.

Poor answer: Counsel can only act on a 'direct access' basis in specific circumstances. Namely, counsel must be appointed to act on this basis by VLA and counsel must be confident that there will be no prejudice to the client if there is no instructing solicitor appointed. In this case, unless the defendant qualifies for legal aid, he will not be able to directly approach a barrister.

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QUESTION 5

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

Marking Guide

Rule in *Browne v Dunn*

- Rule: if a party intends to challenge a witness's evidence, that party must put to the witness its view of the witness's evidence so that the witness has an opportunity to explain.
- Prima facie Defence Counsel must comply, however this is a criminal trial, and the rule does not apply in the same way. Caution must be exercised in applying the rule against the Accused (as the Prosecutor has the burden of proof). The rule is applied less strictly to Defence Counsel.
- An exception to this is where the Accused advances a defence where he is clearly refuting the occurrence of a fact in issue, as is the case here. He denies that he pushed the victim.

Why/how it will/will not apply in the course of Defence Counsel conducting the Accused's case

- Defence Counsel will need to put it to Claire LARKINS in cross-examination that their version/recollection of events is wrong insofar as the witness says she was pushed, and give her an opportunity to explain.
- Defence will also need to put to Constable SMITH (and possibly Constable Waterhouse) that the Defendant never said or suggested that he pushed her.

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

Moderate answer: Given that the accused accepts that he may have been verbally abusive and smashed the vodka bottle, the only issue that is contradictory to the prosecution case is whether the accused pushed the victim. The rule in Browne v Dunn would have to be complied with by putting the defence case of the contradiction (ie no push) to Constable Smith and the victim Claire Larkins if they are called as witnesses. Defence counsel would need to put the defence proposition to the two witnesses in cross examination for them to fairly be able to explain the contradiction.

Poor answer: If any witness called by the prosecution gives evidence adverse to the defence, then it is likely that defence counsel will seek to persuade the court that such evidence ought to be rejected. If counsel is going to make any adverse comment about a witness, or use some of the witness statements against them, counsel ought to put the matter to the witness squarely so that witness has an opportunity to deal with it.

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QUESTION 13

Criminal Procedure: Refer to the list of possible answers to Question 12 above. Select **TWO (and only two)** sentencing factors **from the four you did not include in your answer to Question 12**. In relation to each of these two other factors you have selected: (i) explain how it works as a general concept in the sentencing process; and (ii) explain

how it could/could not have been applied (hypothetically) by the sentencing Magistrate in this case. In answering this question you may speculate as to the existence of other relevant facts that may assist in your explanations. **[4 marks]**

Marking Guide

References: *Sentencing Act 1991*, s 5; Sentencing Manual (Judicial College).

General Deterrence

- The sentence is designed to 'constitute a warning to those minded to commit similar offences'.
- Applying this principle, the Magistrate could simply have said words to the effect of '*a message needs to be sent to the community that domestic violence of this nature, no matter how minor the assault, will not be tolerated – you will be appropriately punished.*'

Totality

- 'The totality principle requires that where an offender is being sentenced to multiple terms, or is otherwise to serve multiple sentences, then the sentencer should ensure that the total sentence remains 'just and appropriate' for the whole of the offending'
- The principle clearly is incapable of being applied to the present case as the Defendant has only been found guilty of one offence.

Remorse

- The word 'remorse' signifies a feeling of deep regret and contrition for wrongdoing. It has been characterized as 'genuine penitence and contrition and a desire to atone'
- There is no evidence of any remorse here. Given that he pleaded not guilty, it would seem this factor is not practically capable of being invoked by the Defendant.

Parsimony

- 'The principle of parsimony is well established at common law. It requires the selection of the least severe sentencing option open to a sentencer which achieves the purpose or purposes of punishment in the instant case, and so achieves the ultimate aim of protecting society:'
- '*Sentencing Act 1991* s5(3)-(7) gives statutory form to the principle of parsimony. It achieves this both by restating the principle, and by placing the different State sanctions in an express hierarchy.'
- In this case, the Magistrate considered that a CCO with 100 hours unpaid community work was the least severe sentencing option for achieving the purposes of just punishment. That is to say, immediate imprisonment would have been too severe especially having regard to the low-level of offending.

Excellent answer:

a) General deterrence – is expression in sentencing process of the idea that by publicly punishing /denunciating a particular offence /type of conduct, others in the community will be deterred from acting the same way. Hypothetically, Magistrate could have referred to the need to show public disapproval of violence against women and let others know it is not acceptable conduct.

e) Remorse – used as a mitigating factor where offender acknowledges their wrong doing and is sorry for the consequences of their actions (but note must relate to consequences for others, ie impact on victim, can't just be sorry they got caught /convicted). Hypothetically if Mr Schneider instructed you he felt bad for getting drunk and violent and was sorry, could make submission to Magistrate that he was remorseful and Magistrate could take into account in mitigation.

Moderate answer:

General deterrence – a sentence may act as a deterrent to anyone else who is considering committing the same offence, ie if you do, this is what you will get. In this case it would send a message to those who would assault their partners that they had better not or this is how they will be punished.

Remorse – a sentence may be decreased if remorse is shown. In this case, no remorse was shown by the defendant and so the degree/extent of the sentence was not decreased by any amount.

Poor answer:

Remorse – it is not possible for it to be taken into account as the accused does not have any. This is in terms of a reduction from the possible sentence. In terms of sentencing it may be taken into account in relation to how severe the punishment should be. As the accused has not shown any remorse the Magistrate should consider a stiffer penalty in order to show the community displeasure with such acts and lack of remorse.

Rehabilitation – it isn't particularly necessary for such a charge. A summary offence is generally not a serious enough nature to warrant rehabilitation being of concern in sentencing especially for a one off offence such as this.

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QUESTION 24

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

Marking Guide

Wide discretion to be given to examiners in marking this question. It should be reasonably straightforward to obtain 4 or 5 marks once candidates identify that the case was about privileged documents that were inadvertently disclosed to the other side. If they have read this case and understood it, there is scope then for candidates to discuss particular points made in that case or more general considerations pertaining to this kind of problem that too frequently arises in large-volume discovery. **Random comments about discovery which demonstrate no knowledge of the facts or general issues raised by *Expense Reduction* should not be given any credit.**

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

Moderate/Good answer: Large volume discovery places an immense burden on both parties to ensure that what is discussed is relevant, conforms to what is requested, and is not privileged. In Expense Reduction, privileged documents were discussed accidently in the use of digital discovery. Armstrong sought to claim that ERA had misused this privilege by discussing the relevant details. The High Court held that they had disclosed accidentally and had taken prompt steps to assert privilege. In that case, the HCA said it was clear the documents were privileged and the proceeding about the misuse had been a waste of time. However, they did intimate that the starting position is often still that acting inconsistently with privilege (by discovery) can constitute waiver. Similar issues were litigated in matters VSCA case. That case resulted in counsel being restrained from acting

… of having read to such accidentally discovered material (whilst having it was discovered accidentally).

Moderate/poor answer: The case of Expense Reduction involved a case where an overly large amount of documentation was discovered by both parties. Much of it was irrelevant for the purposes of the proceeding and resulted in exorbitant costs associated with dealing with the documents. It also was an unnecessary and wasteful burden upon the time and resources of the court. The court decided that the overly large number of documents constituted a breach of the overarching obligation to minimise costs. It was also not in accordance with the overarching purpose to facilitate the (inter alia) efficient and cost effective resolution of the real issues in dispute. This breach was taken into account by the court when ordering costs, both for the party and their legal representatives. Lawyers should take note not to fall into the same trap.

Poor answer: Large volume discovery is one of the areas targeted by the provisions under the Civil Procedure Act that were implemented to ensure costs are reasonable and proportional, and the parties are able to narrow the issues in dispute. Large scale discovery may lead to unnecessary delay in the conduct of the proceeding.

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