VICTORIAN BAR

Candidate Number:

ENTRANCE EXAM

VICTORIAN BAR READERS' COURSE

10 MAY 2017

(Annotated with sample answers)

This document is a reproduction of the Readers' Course Entrance Exam which candidates sat on 10 May 2017, with annotations included as a means of feedback. For each question requiring a written response (i.e. all questions bar the multi-choice questions), a sample of actual answers given by candidates in the examination immediately follows the question. For multi-choice questions, the correct answers are highlighted and underlined.

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
28 June 2017

EXAM DURATION: **3 hours** writing time

30 minutes perusal time (prior to commencement of exam)

INSTRUCTIONS TO CANDIDATES:

1) During the exam, you must not be in possession of anything other than writing implements, this exam script and the hard copies of the Reading Guide and examinable excerpts of legislation 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 15 questions (Questions 1 to 15) 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 15 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 (22 marks) and Legal Ethics (7 marks).

5) **Part B** contains 15 questions (Questions 16 to 30) 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 16 to 30 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 (25 marks), Evidence (17 marks) and Legal Ethics (8 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, and conciseness will be taken into account in the assessment of your answers. Please take care to ensure your writing is legible.

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

TABLE – SUGGESTED TIME SPENT ANSWERING QUESTION BASED ON MARKS ALLOCATED

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

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

PART A (Questions 1 to 15) – 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 Samuel KANE. He is 55 years old and lives at 67 Wattletree Avenue, Bendigo, Victoria.

On Sunday, 1 May 2016, the Bendigo Bicycle Association, Inc. ('BBA') hosted the inaugural Bendigo Bicycle Race in Bendigo, Victoria. The race was open to any member of the public with a bicycle. There were over 500 registered entrants.

The race route was approximately 12 kilometres long and circumnavigated Bendigo's central business district. The start/finish line was located at 18 High Street, Bendigo near the Bendigo McDonald's fast-food outlet. Cyclists commence the race by travelling southwest along High Street before turning left onto Myrtle Street. A map of the route is annexed to this summary of facts as **Exhibit 1**.

The racing event was scheduled to start at approximately 10.30 am. Members of the Executive Committee of BBA, which included the Accused, had obtained a permit from the Bendigo City Council which allowed BBA to run the event. The permit allowed BBA to close temporarily those parts of roads that were affected by the race from 8.00 am to 12.00 pm. This included closure of that part of Chum Street that intersected with Thistle Street. The permit was subject to conditions which included, among others, the following:

1. BBA *"must personally deliver to all residents who will be affected by the road closure a notice about the event notifying them of what roads will be closed and at what times".*
2. BBA *"must ensure that adequate signage is in place for the duration of the road closure period which must include, as a bare minimum, a 'ROAD CLOSED' sign at the intersecting points of all unclosed roads with the temporarily closed roads*".
3. BBA *"must ensure that adequate safety barriers are in place at all points where unclosed roads intersect with the temporarily closed roads, such that motor vehicle users on unclosed roads are inhibited from gaining access to the temporarily closed roads".*
4. BBA *"must, for the duration of the race itself, ensure that one or more persons are assigned the responsibility of marshalling each point where any unclosed road intersects with a temporarily*

closed road for the purposes of enforcing the road closure against any motor vehicle user on an unclosed road who may desire to gain access to a closed road."

These conditions were designed to minimise the risk of harm to cyclists and other members of the public attending the event.

BBA's Executive Committee ("Committee") had appointed the Accused as Track Safety Inspector for the event. Between 10.00 am and 10.20 am the Accused conducted a personal inspection of the entire race circuit by driving his car around the circuit. The purpose of this inspection was to ensure that the track set-up was sufficiently safe for the cyclists and members of the public before the race began. At this point in time:

- Large portable plastic safety barriers had been erected at all main intersections along the race circuit. However, many of the more "minor" intersections did not have equivalent safety barriers in place. At these intersections volunteer marshals had tied plastic fluorescent safety tape to fixtures on each side of the road on an ad-hoc basis (e.g. wherever there was a tree or street light on the nature strip, tape was tied around that fixture and then extended across the road and tied to another similar fixture). In these instances, the only physical barrier between the race circuit and an unclosed road was the line of plastic safety tape. The intersection of Chum and Thistle Streets was one such intersection. It was therefore only tape that was physically preventing motor vehicle users on Thistle Street gaining access to Chum Street.
- Volunteer track marshals were positioned at various points around the race circuit where the closed roads intersected with unclosed roads. However, not all intersections had an assigned marshal. The intersection of Chum and Thistle Streets had no marshal assigned to it.
- "ROAD CLOSED" signs had been erected at almost all intersections of closed and unclosed roads around the race circuit. However, BBA personnel had omitted to erect a "ROAD CLOSED" sign at the end of Thistle Street where it intersects with Chum Street.

At approximately 10.25 am, the Accused signed a pro-forma certificate produced by BBA for cycling events for certification by the designated track safety inspector. The certificate stated: *"I have inspected the race circuit and consider that the measures in place are sufficiently safe for the event to commence."* The Accused then presented the Chief Steward of the event, Nigel GROUNDS, with the certificate. Upon receiving the certificate, at approximately 10.30 am Mr Grounds declared the commencement of the race with the sound of an air horn.

At approximately 10.40 am, Geraldine CULLERTON got into her car parked in her driveway located on Thistle Street. She was intending to drive to a doctor's appointment on a route that she had driven

numerous times before. She drove in a north-westerly direction up Thistle Street where it intersected with Chum Street. Her intention was then to turn left into Chum Street. She saw that safety tape had been erected across the road, tied to a "Give Way" sign on her left and running to a street light pole on her right. She was unaware of the reason for it. She was late for her doctor's appointment so decided to continue driving through the tape. She looked right and saw no on-coming traffic. As she pressed her accelerator pedal to turn left into Chum Street, she was unaware that the leading cyclists of the race were travelling at approximately 40 kilometres per hour coming directly towards her vehicle. By the time that she and the cyclists had noticed one another, it was too late to avoid a collision. Ms Cullerton's vehicle collided with five cyclists.

The leading cyclist, Leanne WEIR (24 years of age), collided with Ms Cullerton's vehicle head-on. Ms Weir was thrown from her bicycle and propelled onto Ms Cullerton's windshield, and then into the air before she landed on the road. Ms Weir suffered serious head injuries. She was transported to the Alfred Hospital in Melbourne. She underwent emergency surgery before being placed in an induced coma. Ms Weir died from her injuries the following day.

Brian HENDERSON (32 years of age) was another cyclist who collided with the vehicle. He was thrown into the air and landed on the road. He suffered serious head injuries, a broken collar bone, a broken leg and abrasions. He was also transported to the Alfred Hospital in Melbourne but survived his injuries. However, he has suffered permanent brain injury that has left him severely disabled. He is unable to walk, talk or care for himself in any way. He will require 24-hour professional care for the remainder of his life.

Jeremy TOWNS (52 years of age), Alicia KNOWLES (41 years of age) and Campbell CLAYTON (18 years of age) also collided with the vehicle. They suffered relatively minor injuries and are expected to make a fully recovery.

A map identifying the exact location of the collision is annexed to this summary of facts **as Exhibit 2**.

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(Turn the page to see Exhibit 1 and Exhibit 2)

EXHIBIT 1

MAP DEPICTING ROUTE OF 2016 BENDIGO BICYCLE RACE

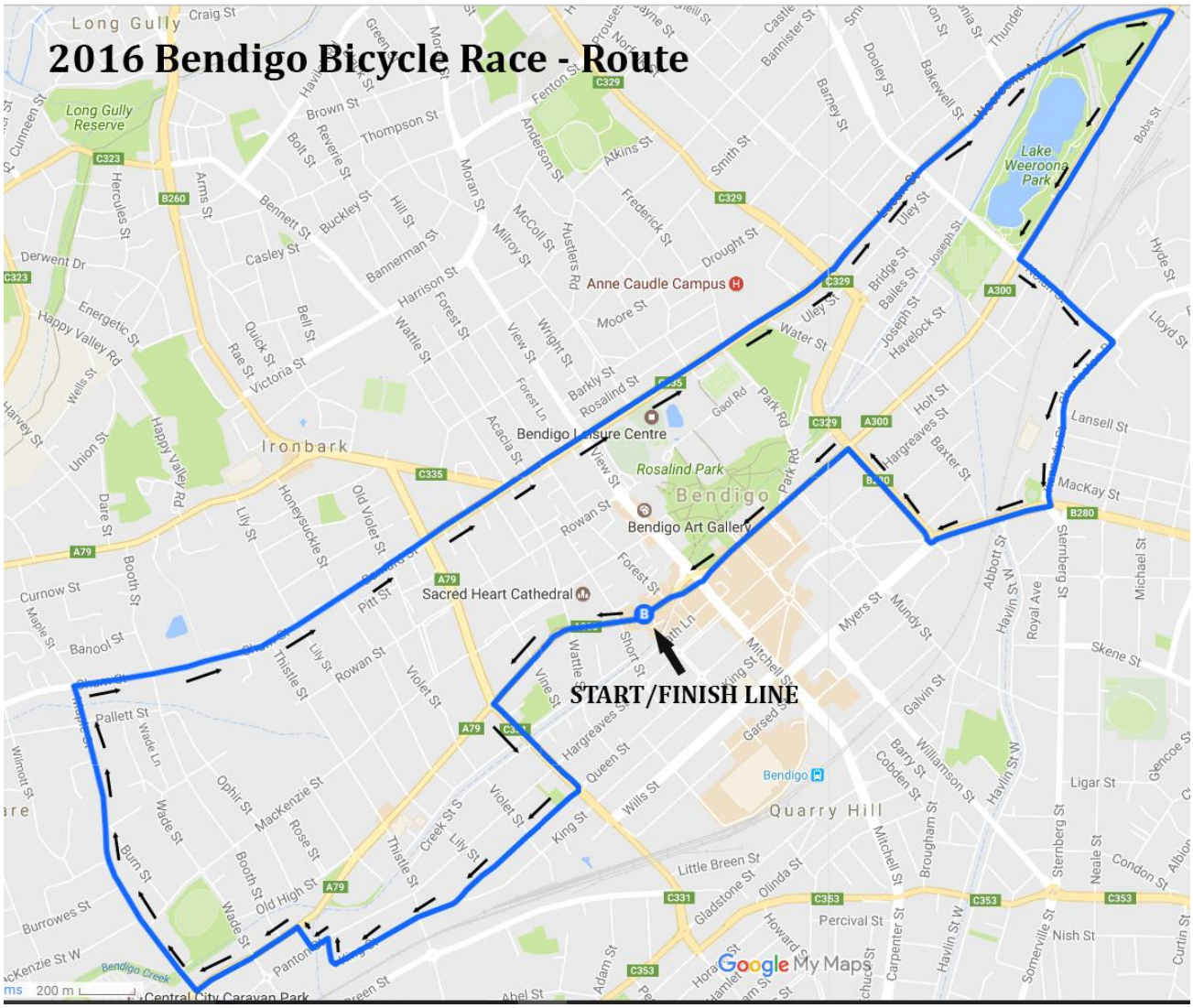
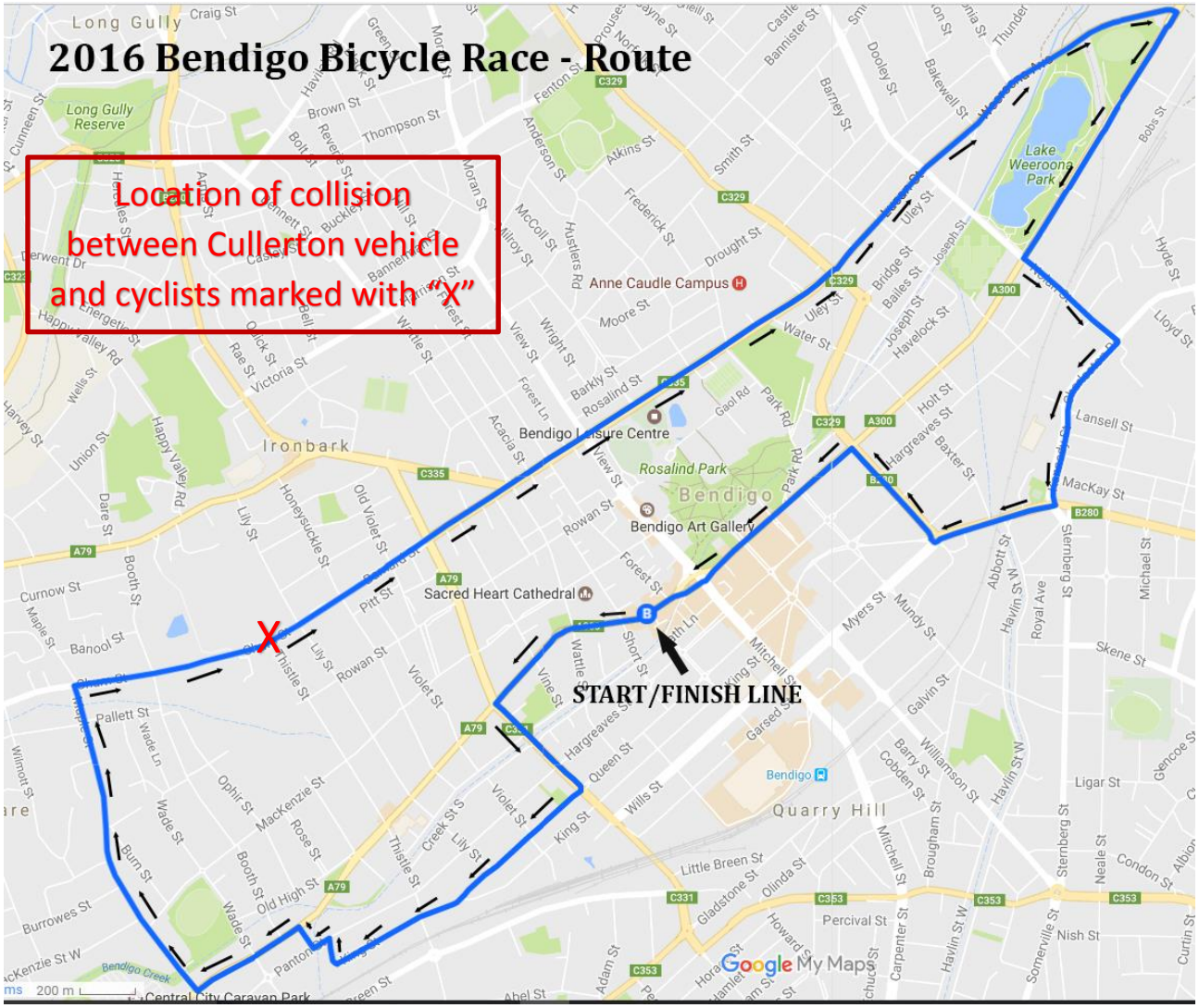


EXHIBIT 2

ANNOTATED RACE MAP DEPICTING COLLISION BETWEEN CULLERTON VEHICLE AND CYCLISTS



IMPORANT NOTE: **Only Exhibits 1 and 2 are fully reproduced in this examination. Other exhibits are referred to in this examination (Exhibits 3 and 4) which are not fully reproduced but quoted from where deemed necessary.**

Detective Senior Constable Jacqueline EDWARDS ("DSC Edwards") was the principal member of Victoria Police responsible for investigating the incident. Upon completing her investigation, DSC Edwards was of the view that the Accused should be prosecuted for **manslaughter (by gross negligence)** in relation to the death of Ms Weir, and for **negligently causing serious injury** in relation to the injuries suffered by Mr Henderson.

Manslaughter is an offence at common law with a penalty provided by section 5 of the *Crimes Act 1958*, which states:

> **5 Punishment for manslaughter**
>
> Whosoever is convicted of manslaughter shall be liable to level 3 imprisonment (20 years maximum) or to a fine in addition to or without any such other punishment as aforesaid.

The Prosecution alleges its case of manslaughter on the following basis:

1. The Accused owed the Victim (Ms Weir) a duty of care by assuming the responsibility of Track Safety Inspector and, in that capacity, the Accused was legally obliged to take all reasonable steps to ensure the Bendigo Bicycle Race track was reasonably safe for the Victim who was competing in the race.
2. The Accused breached that duty by omitting to ensure that the following measures were in place before allowing the race to begin:
    a. plastic safety barriers erected across Thistle Street where it intersects with Chum Street;
    b. a track marshal assigned to the intersection of Thistle and Chum Streets; and
    c. a "ROAD CLOSED" sign erected at the end of Thistle Street where it intersects with Chum Street.
3. The breaches of duty referred to in 2(a) to 2(c) in their aggregation constitute an omission on the part of the Accused falling so far below the standard of care a reasonable person in his position would have exercised, and involving such a high risk of death or really serious injury, that the omission merits criminal punishment.
4. The Accused's omission was conscious and voluntary.
5. The Accused's omission caused the Victim's death.

Negligently causing serious injury is an offence under s 24 of the *Crimes Act 1958*, which states:

24 Negligently causing serious injury

A person who by negligently doing or omitting to do an act causes serious injury to another person is guilty of an indictable offence.

Penalty: Level 5 imprisonment (10 years maximum).

The Prosecution alleges its case of negligently causing serious injury under s 24 on the same basis as its case of manslaughter, save that the Victim in this instance is Mr Henderson and the Accused's negligence caused serious injury (not death).

The Accused intends to plead **not guilty** to both offences alleged.

QUESTION 1

Criminal Procedure:	In what court's jurisdiction is the Prosecution likely to seek to have the alleged offences ultimately determined?
Your answer: ***(circle ONE)***	a) Magistrates' Court's summary jurisdiction. b) Magistrates' Court's indictable jurisdiction. c) County Court's summary jurisdiction. d) County Court's indictable jurisdiction. e) Supreme Court's summary jurisdiction.
[1 mark]	**f) <u>Supreme Court's indictable jurisdiction.</u>**

QUESTION 2

Criminal Procedure:	On the assumption that the matter proceeds to trial, which of the following propositions is correct?
Your answer: ***(circle ONE)***	**a) <u>The Accused will be tried before a judge and jury.</u>** b) The Accused will be tried before a judge alone. c) The Accused will be tried before a judge alone, unless the Accused seeks leave to be tried before a jury. d) The Accused will be tried before a judge and jury, unless he seeks leave to be tried without a jury. e) The Accused will be tried before a judge alone, unless the Prosecution seeks leave to empanel a jury. f) The Accused will be tried before a judge and jury, unless the Prosecution seeks leave to have the Accused tried without a jury.
[1 mark]	

QUESTION 3

Criminal Procedure: What is the difference between a "charge" and an "indictment"? Which of these legal documents is/are likely to be used in this proceeding? Explain. **[3 marks]**

Answer #1: A charge is a statement in writing that an accused has committed an offence and it commences a proceeding (either upon signing by an informant or filing at the Magistrates' Court), when it meets certain other criteria. It is used in the Magistrate's Court. To be valid the statement of charge must comply with the requirements of Schedule 1 of the Crim PA. An indictment is the document which states the charges which a person faces in the CCV or SCV, it is signed by the DPP or a Crown Prosecutor. The charge must still comply with Schedule 1. Unless it is a direct indictment it does not commence a proceeding but merely continues one where a charge was previously laid. In this proceeding charges would be laid initially by the informant in the MC and once committed for trial the accused would face an indictment in the SCV and it would be from this document that he would be formally arraigned in the Supreme Court.

Answer #2: 'Charge' is the accusation of committing an offence made against the accused – in this case A is charged (ie accused) of manslaughter and neg cause serious injury. A 'charge sheet' setting out the details of the charge and other information would be filed in the Magistrates' Court (complying with Schedule 1 and other requirements of the CPA).

An 'indictment' is a document filed in the VSC by the prosecution that formally sets out the charges on which the accused is to be tried. It must be filed within 6 months of the committal hearing.

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

The Accused has been charged with 1 x count of manslaughter and 1 x count of negligently causing serious injury, as originally recommended by DSC Edwards. He will need to apply for bail.

The Accused has instructed a solicitor who has, in turn, briefed Counsel to act for the Accused.

QUESTION 4

Criminal Procedure: In course of communicating preliminary instructions to Defence Counsel, the solicitor for the Accused says to Counsel: *"Now that he's been charged, we'll need to apply for bail. Because we're dealing with manslaughter, we'll need to show exceptional circumstances. We'll need to get a decent surety from him and his passport too. What else do you think we'll need to show the court?"*

Is the solicitor for the Accused correct with his assumptions about what needs to be organised for the pending bail application? What should Defence Counsel say in response to his instructing solicitor's comments and query? **[4 marks]**

Answer #1: A is charged with manslaughter and negligently causing serious injury. He is therefore prima facie entitled to bail and the onus will be on the prosecution to establish that A is an unacceptable risk of the factors in s.4(2)(d)(i). It seems the solicitor has confused murder with manslaughter, and applied the wrong test. Nevertheless, A is at risk of receiving a significant custodial sentence if found guilty and thus a significant surety would strengthen his application to reduce risk of flight. The court will also look at the factors in s.4(3). The applicant would need to show the court – good family and community support – the solicitor would want to arrange a couple of witnesses, stable residence, good character, lack of prior history if possible, surety (as discussed) and a willingness to involve himself in any community activity to repair the harm/damage – without it looking like an admission of course.

Answer #2: No, this is not an 'exceptional circs' situation, or a 'show cause'. A prima facie entitlement to bail conditions (eg surety and surrender passport) may only be attached to mitigate an 'unacceptable risk' of FTA/ further offending/ danger to community/ or obstruction of justice. Further, court may only impose a surety if an identified risk cannot be mitigated by conduct conditions.

In this case, not clear that any unacceptable risk established – potentially FTA given seriousness of charge and likelihood of imprisonment on conviction. A should adduce evidence that likely to attend – eg ties to local community etc. If risk established, conduct conditions show of a surety would suffice – eg reporting to police and residence – to mitigate risk of FTA.

QUESTION 5

Criminal Procedure: What is the difference between a "summary hearing" and a "committal hearing"? Which of these types of hearing is/are likely to take place in this proceeding? Explain. **[3 marks]**

Answer #1: A summary hearing is for summary offences – minor offences tried without a jury, generally punishable by only up to two years imprisonment, or less serious examples of some indictable offences where they are not overly complex or serious and the accused consents. It is where the hearing is heard and determined entirely by a Magistrate sitting alone. A summary proceeding is usually made up of (unless an A pleads guilty) a summary case conference, contest mention, and contested hearing. A committal hearing, on the other hand, is for more serious examples of indictable offences on track to be heard by a judge and jury. It is an administrative hearing to determine whether there is evidence of sufficient weight to sustain a conviction, if there is, the A is 'committed' to stand trial. The process allows A to test the evidence, prepare the defence, determine whether summary jurisdiction may be appropriate, confine the factual basis for

a plea and a range of other things. In this case, a committal proceeding will be held as manslaughter is an indictable offence that can only be heard by a jury.

Answer #2: A summary hearing is heard in the Magistrates' Court to finally determine summary offences, or indictable offences triable summarily. The Mag's determination is whether the charge is proven beyond reasonable doubt. A committal hearing is also heard in the Mags Court but is an administrative preliminary hearing for offences in the committal stream, ie that will ultimately be heard in the CC or SC (unless discharged, discontinued or a Mag grants summary jurisdiction). A committal hearing can either be 'on the papers', ie by way of straight hand up brief or with witnesses that D can XXN, or with submissions alone. The Magistrate's determination is whether the evidence is of sufficient weight to support a conviction. Here given the manslaughter charge, this proceeding is likely to have a committal proceeding.

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

The matter has proceeded to trial. The Prosecutor's brief of evidence has been disclosed to the Accused's legal representatives well before trial. It includes written statements that were made in May and June 2016, including statements made by the following witnesses to be called by the Prosecution:

- Geraldine CULLERTON states: *"…I had a doctor's appointment at about 10.45 am. It's only a 5 minute drive, but I was already running late. I got in the car and drove down Thistle Street. There was this plastic tape stretched across the road. I had no idea why it was there. I couldn't see anybody around and there was certainly no ROAD CLOSED sign. I assumed some kids had put it there. I looked right for oncoming traffic and there was none. So I drove on. Suddenly out of nowhere the cyclists came crashing into my car. I didn't see them. It was too late for me to do anything. They were on the wrong side of the road. I had no idea that there was a bike race going on."*
- Hanna MCLEAN states: *"I am secretary of the Bendigo Bicycle Association and sit on the Executive Committee. Sam Kane also sits on the Committee. The other members of the Committee are Nigel Grounds, Sophie Teoh and Wendy Walker. The Committee met on 1 March 2016. All members attended. I advised the Committee that Bendigo City Council had just granted a permit for our first Bendigo Bicycle Race event. I provided all Committee members with a copy of the permit which had the conditions printed on it. At the same meeting the Committee resolved that Nigel would be the designated Chief Steward and Sam the Track Safety Inspector. Sam had no hesitation in taking on this role because he said he'd acted as track inspector in many other races before. All of this is recorded in the minutes of the Committee meeting which I typed-up and*

*circulated the next day (refer **Exhibit 3 "Minutes of BBA Executive Committee Meeting of 1 March 2016")*."

- Nigel GROUNDS states: *"I am chairman of the Bendigo Bicycle Association. I recall the meeting of the Executive Committee which I attended on 1 March 2016. I was appointed Chief Steward of the event scheduled for 1 May 2016. Sam Kane also attended that meeting and was appointed track safety inspector. I recall the Committee secretary, Hanna McLean, reporting to the committee that a permit for the event had been granted. However, I don't recall receiving a copy of the permit. The race circuit was designed by me and approved at a Committee meeting some time in 2015 (refer **Exhibit 1**). On the day of the race, 1 May 2016, I commenced the race shortly after I received the written certificate from Sam Kane which stated that the track was safe for the race to begin (refer **Exhibit 4 "Track Safety Certificate"**). I remember him saying that everything was right to go. I declared the beginning of the race at exactly 10.30 am*.'

The Prosecution intends to call a number of other witnesses who attended the scene of the collision shortly after it occurred. These include volunteer track marshals, members of the public, and staff at a nearby private hospital who administered first aid to the injured cyclists. Some of these witnesses say that they saw *"no track marshal at the Thistle Street and Chum Street intersection"* and *"there was no ROAD CLOSED sign at the end of Thistle Street"*. Other witnesses have said that they have no recollection about what they saw in this respect (i.e., some witnesses might concede it is possible there was a sign and/or a track marshal, but they just cannot remember seeing them there before the accident).

The Accused has briefed Counsel and instructed as follows:

- The Accused will plead not guilty.
- The Accused concedes the collision occurred as alleged by the Prosecution (i.e. the occurrence of the collision, its location, the people directly involved, and the fatality and injuries suffered by the cyclists are not in issue). All other factual allegations are potentially in issue.
- The Accused had been a member of BBA's Committee for five years. He had attended all Committee meetings leading up to the race and remembers that the BBA Secretary, Hannah McLean, advised at one Committee meeting, about two months before the race, that Bendigo City Council had granted a permit for the event. However, the Accused denies ever seeing the permit or being informed of the conditions attaching to it.
- The Accused remembers inspecting the track before certifying that it was safe for the race to commence (i.e. he concedes authorship of Exhibit 4 referred to in the statement of Nigel Grounds). He has only a vague recollection of what was situated at the intersection of Thistle and Chum

Streets when he drove past it just prior to the race. However, he is adamant about his recollection of the following:

  - There was a 'ROAD CLOSED' sign erected at the end of Thistle Street as he drove past it.
  - There was a track marshal positioned at the same intersection, near the road sign, as he drove past it. He does not remember who this was because there were over 100 volunteer track marshals positioned around the circuit that morning.

- The Accused accepts there were no large plastic safety barriers erected across Thistle Street as had been erected across the major intersections. The limited resources of BBA did not permit the hiring of enough barriers to be placed across every single intersection. *"We did the best we could in the circumstances"*, the Accused has instructed.

QUESTION 6

Ethics: Assume you are Counsel briefed for the Accused. You have substantial experience in criminal law, but it has been a while since you acted in any 'criminal negligence' cases. You do not have time to research the issue yourself. You are embarrassed to ask your instructing solicitor to find case law on the issue because you fear it might show a lack of competence on your part. Without telling your instructing solicitor, you approach another member of Counsel and ask if she has time to find recent case law on the issue and prepare a short memorandum explaining the current state of the law. She agrees on the basis that you promise to pay her $200 per hour. You do not disclose this agreement to your instructing solicitor.

Is this kind of agreement between barristers permissible? Explain. **[2 marks]**

Answer #1: Yes, although the general rule is that B's must be sole practitioners and must not employ another legal practitioner (R12). A barrister does not breach that rule by devilling, that is, giving a specific task of research (here looking at recent case law) to another barrister, usually in chambers. This is often carried out without the solicitor's knowledge, but is only allowed if B takes all responsibility for the work. The work is delivered under C briefed for the A's name, there is no standing retainer or employment terms (here there does not appear to be) and it is not intended to enable the barrister briefed to make a profit from the other barrister doing the work (over and above reasonable remuneration). Given his paying his chamber colleague $200/hour it appears to comply with R113.

Answer #2: Yes, this kind of agreement is permissible – it is called devilling and is allowed by VBR, R113. First though I note counsel should be acting in A's best interests, without regard to consequences for herself (ie 'fear' about reputation cannot determine what counsel does).

Nevertheless, counsel does not breach R12 requirements to be sole pract by giving this task to another barrister as long as she takes full responsibility for work; delivers it under own name (if at all); does not amount to standing retainer; she does not make a profit, other than reasonable remuneration for responsibility/supervision. Here R113 appears to have been complied with.

QUESTION 7

Evidence: Explain the rule in *Browne v Dunn* and how Defence Counsel might apply the rule in course of the trial? Provide **TWO (2)** examples with reference to two *different witnesses* in your answer. **[4 marks]**

Answer #1: The rule in B v D is an essential rule of fairness that requires a party to put to a W so much of its case as concerns that W and, if it will be suggested that the W is being untruthful, that must be put so that the W has an opportunity to respond (Reid v Kerr). DC must ensure that his client's version of events is put to any witness who contradicts it and, if he will call a W untruthful, or that conclusion would be required to find his client not guilty, that must be put, for example with respect to Hannan McClean it must be put that she did not provide Sam Kane with a copy of the permit or inform him of the conditions of it. Witnesses who made observations of the Thistle and Chum intersection, it must be put that there was a road closed sign and a track marshall.

Answer #2: The rule in B v D is one of XXN, where if a party intends to adduce evidence that contradicts or discredits a witness, that party must put the evidence to the witness and allow them to comment. It is a rule of fairness, it puts the other side on notice that the evidence will be disputed and it allows the fact finder to see the disputed evidence 'side by side'.

A breach can result in the witness being recalled per s.46, an adverse direction to the jury (eg that it suggests recent invention), or in exceptional circumstances, the party may not be allowed to adduce the evidence. Two examples are to Hannah McClean: put that she did not provide a cpy of the permit to SK, eg 'you didn't provide SK with a copy of the permit though, did you?'. To Geraldine Cullerton, DC must put that there was a 'road closed' sign, eg 'you are mistaken about not seeing a road closed sign, aren't you?'.

QUESTION 8

Evidence: Assume that Prosecution witness Geraldine Cullerton dies the day before the trial is scheduled to begin. The Accused's legal representatives did not seek to cross-examine Ms Cullerton at any prior stage in the proceeding. However, the Prosecution proposes to adduce her written police statement into evidence at trial. Will the Prosecution be permitted to do so? Discuss with reference to the case of *Luna v The Queen* [2016] VSCA 10. **[5 marks]**

Answer #1: GCs written SM is hearsay evidence, as it is a previous rep being used to prove the existence of a fact that GC can reasonably be supposed to have intended to assert. It is therefore inadmissible unless written notice is given and one of the exceptions apply. In Luna the witness died before trial, but had been subject to competent, searching XXN at committal (albeit not in relation to psych issues that only came to light after death). Defence objected to the admissibility of her SM and transcript of committal under 137, on the basis that the probative value was outweighed by the unfair prejudice suffered by defence in the lost opportunity of XXN her re psych issues, and because XXN at committal different to trial, for example, there is no requirement to comply with B v D. The CoA upheld the TJs decision to allow the evidence (although foreshadowed it was perhaps too early to be aware of the unfair prejudice at interloc stage), on the basis that the complainant's evidence was the 'backbone' of Ps case, and therefore highly probative, and that unfair prej could be cured by directions to the jury about, eg, the diff b/t committal XXN and trial. Here GCs SM was made shortly after the incident and the circs that make it unlikely it was a fabrication. She is 'unavailable' (she is dead), and her SM of the informant is firsthand as she had actual knowledge of the incident. Therefore likely to be admissible per 65(2)(b), and given Luna, and the fact her evidence is crucial to Ps case as to what she observed of the road before the crash, it is likely to be held admissible despite DC arguing it should be excluded per 137, as long as the judge gives careful direction as to the prejudice suffered by A in the last opp of XXN her.

Answer #2: P could seek to adduce evidence of C's statement via s.65 – which is an exception to the hearsay rule. It provides that in circumstances where the maker of a statement is unavailable (ie dead) evidence of the statement can be adduced through a person who saw, heard or otherwise perceived the statement being made. In this case, the police officer who took C's statement can be called to give evidence. I should note that the maker of the statement (C) must have had personal knowledge of the facts asserted in her statement and the statement must have been given either at the time or soon after the events in circumstances where unlikely the statement was a fabrication. Presumably the statement satisfies the proximity issue and one would expect it to be unlikely to be a fabrication when given formally to a police officer. However, D will be objecting on the basis that the probative value of the evidence is outweighed by the prejudicial effect (s.137) in that D will not now have an opportunity to XXN C as to her statement. Luna held that whilst inability to XXN does afford some prejudice, it would have to be very significant in order to remove 'the backbone of the P case'. The same would be argued to apply here. C is the main P witness to the facts in issue. D had an opportunity to XXN as the committee but chose not to. The probative value is high and is not arguably outweighed by unfair prejudice to D (137) or even substantially outweighed (s.135).

QUESTION 9

Criminal Procedure: Does Defence Counsel have to disclose the Accused's case to the Prosecution and give prior notice as to what evidence the Accused objects to? Explain. **[3 marks]**

Answer #1: Effectively no. The A is presumed innocent and the burden lies on the prosecution to prove its case BRD. The only requirements the A has to disclose its case are 1/ to disclose what is in issue in the defence response 14 days before trial or as otherwise ordered (s.183); 2/ disclose alibi evidence 14 days after committal; 3/ disclose expert evidence

14 days before trial. However for the proper and efficient running of trials and the courts, it is very common to disclose objections to evidence in advance of trial in accordance with ss.199 and 200 of the CPA and to even seek an advanced ruling on evidence under s.192A of the EA. It would only be in very rare cases that C would make a strategic decision to withhold an objection to admissibility of evidence until the trial had begun.

Answer #2: There is very little DC must disclose about their case. They need not disclose which witnesses they intend to call or whether the A will give evidence. This is subject to some exceptions:

Firstly, A must give written notice of any intention to rely on an alibi within 14 days from committal (or otherwise with leave of Court). The notice must state the time and place of the alibi, any witnesses to the alibi and their last known address, or other info to assist P to locate them. P is then prevented from contacting them without D's consent or presence.

Secondly, A must, if relying on expert evidence, provide a S/M from that expert at least 14 days from trial (or as soon as it comes into existence otherwise) setting out the name, address and substance of expert's evidence.

Thirdly, if D intends to question a complainant re prior sexual history, must give 342 notice (does not apply here obviously).

Fourthly, D is required to file and serve a defence response to the P opening per 183 at lease 14 days before trial identifying the facts, acts, matters and circumstances with which issue is taken with the opening, and any pre-trial issues such as whether objection will be made to the hearsay evidence, and a notice of pretrial issues re what will be agreed as not in dispute, and what evidence is in issues and basis of issue taken.

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

The following exchange takes place before the trial commences:

Defence Counsel: The Accused objects to the admissibility of Exhibit 1, being the map of the bicycle race referred to by witness Nigel Grounds.

Judge: On what basis?

Defence Counsel: Hearsay, your Honour.

Judge: Hearsay? It's a map! It's not hearsay.

Defence Counsel: With respect, your Honour, this map, like any other map, is a previous representation containing asserted facts which, in this trial, the Prosecution would appear to be adducing for the purposes of proving those facts. Those asserted facts include the route which the cyclists allegedly took, the locations of all relevant events that allegedly transpired, and the distances involved. The maker of the map, and I suspect there may have been many people involved in making that map, would have intended to assert all those things when they contributed to making it. There's a prima facie violation of section 59 of the *Evidence Act 2008*. It's hearsay.

Judge: Even if you're right, is it first-hand or second-hand hearsay you're complaining about?

Defence Counsel: That's not a concern for me at this stage your Honour, because it's reasonably clear it's hearsay one way or the other, and therefore inadmissible.

Judge: I see. What does the Prosecution wish to say in response to this objection?

QUESTION 10

Evidence: Discuss the merit in Defence Counsel's objection to the admissibility of Exhibit 1. How might the Prosecution sensibly respond to the objection? In giving your answer, you should explain whether Exhibit 1, assuming it is hearsay, is best characterised as either first-hand or second-hand hearsay (or both). **[5 marks]**

Answer #1: DC has merit in its objection. The map is being used for a hearsay purpose, that is, to prove the facts that the maker of the map can reasonably be supposed to have asserted by its making (such as the truth of the bike route, the location of various sheets etc.). It is therefore hearsay, and P will need to argue it satisfies one of the exceptions before it can be admitted for that purpose.

The map contains a number of representations, but is likely to be admissible under the business records exception as it was made as an internal record in the course of the business (of map making), from people who it can reasonably be assumed had actual knowledge of the path or its contents. However, as stated in ICM, it contains a number of different authors, and is likely to contain both 1st and second hand hearsay (the map drawer may be basing measurements from reports from someone else who took the measurement from the street itself. Hence this would be second hand knowledge). Business records can be admitted as an exception to the hearsay rule regardless of whether they are 1st, 2nd or more remote hearsay. But they must also not fall foul of the opinion rule. As stated above, P is best to choose the particular part of the map being relied on so the Court can properly assess its relevance and based on its author, whether it is opinion based on specialised knowledge and therefore admissible as an exception to the opinion rule or not. The bicycle route part of the map may have simply been drawn on by a member of Council, which if being used to show the truth of the bike route, is based on the Council member's opinion of where the route went, based on their observations, and may fall foul of opinion rule. P should also have provided reasonable written notice although Court can dispense with this requirement.

Answer #2: The map makes a representation as to which path the race was supposed to take – or actually did take. It's not clear whether it was prepared before or after.

It will be first-hand hearsay if the map-maker mapped it out from their personal knowledge of the race and area. E.g. if the map-maker saw the race him/herself and drew up the map per his/her own perception of the race, it is first-hand hearsay.

If, instead, the map-maker was told by another person, x, "the race took such-and-such a route", then the map captures not the map-maker/s own personal knowledge but rather X's representation from X's personal knowledge from X seeing the race.

There are no exceptions for 2nd hand hearsay, so if that's the case it's inadmissible. The Prosecution will need to show it is 1st hand hearsay, e.g. by establishing its author and source of info through witnesses on a voir dire. It may then be admissible e.g. as a business record of the event organisation.

For the business records exception, the Pros must demonstrate the map-maker made it from his/her own personal knowledge, or directly/indirectly from someone else's personal knowledge, which was fatal in ICM whether the party hadn't clarified authorship. As stated, the author(s)/sources must be addressed here. It was clearly recorded in the ordinary course of business (assuming it was made in advance of the race, to show participants the track).

Alternatively, P would argue the 'civil maker available' exception to hearsay on the basis that it's unduly expensive and impractical to call the contributors to give oral evidence re the course, and the hearsay map should go in.

QUESTION 11

Evidence: Defence Counsel objects to the admissibility of Exhibit 4 (the "Track Safety Certificate") on the basis that *"it violates the hearsay and opinion rules"*. Is there any merit in this objection? Discuss. **[3 marks]**

Answer #1: No. First, the representation is not hearsay under s59 because the Prosecution is not addressing it as evidence of the truth of the statements, but rather evidence that the Accused made the statements; in fact the Prosecution argues the facts intended to be asserted in Exhibit 4 are not true – the Accused did not inspect the track and it was not safe. Second, s76 excludes evidence of an opinion when it is adduced to prove the existence of the opinion asserted. Again – the opinion is that the track was safe, the prosecution seeks to prove the opposite, that it was not.

I note, however, that the Accused statement that he inspected the track and it was not safe could – in the context of other evidence - be an admission made under s81. If this is the case, s60 does not apply if P wanted to use it to prove the state of mind of the Accused. Naturally it would be admissible under s81 as it is first hand hearsay made shortly after (5 minutes) the events in question (s81(2)).

Answer #2: P will argue the certificate is an admission (a previous representation) by a party adverse to the interest of the party in the outcome of the proceeding) because it establishes responsibility for checking the circuit. Thus, the hearsay and opinion rules don't apply and there is no merit to the objection.

P could alternatively argue that it is not being tendered for its hearsay purpose (to prove that the measures were safe, indeed rather the opposite) but merely to prove that A was responsible for the task. Similarly, it is not being used to prove the truth of the opinion, quite the opposite. As such, the hearsay and opinion rules don't apply.

QUESTION 12

Evidence: Assume that when Hanna McLean is called by the Prosecution, she replies to every question put by the Prosecutor with the words *"I can't remember, sorry."* When the Prosecutor attempts to refresh her memory by showing her the written statement she made to police, and the minutes of the meeting she typed-up (Exhibit 3), she responds with the words *"I don't recall ever seeing those documents, sorry*." Explain how **the following provisions of the *Evidence Act 2008*** may combine to operate in this situation to allow the Prosecutor to prove the truth of the facts asserted in Ms McLean's statement and Exhibit 3 (entirely, or in part) despite Ms McLean now denying any recollection of such facts:

- Section 38
- Section 42
- Section 43
- Section 60
- Section 69
- Section 103
- Section 106
- Section 192

[5 marks]

Answer #1: If she can't remember the minutes, I would seek leave under s32, with reference to the s192 factors, to put a document to H to help refresh her memory. Assuming H is being deliberately evasive H will say she still can't remember. P can then seek leave, again considering s192 factors to have H declared an unfavourable witness. Court likely to grant leave on basis that she may reasonably be supposed to have knowledge of the minutes she types or statement she gave and she is not making a genuine attempt to give evidence. Once declared an unfavourable witness, P can put leading questions to her (s42) in order to tender the evidence of statement and minutes, P must comply with s43. Must inform H of enough of the circumstances of making the statement and minutes to enable her to identify the docs and draw her attention to so much of the docs as is inconsistent with her evidence. This evidence is prima facie credibility evidence but it is evidence that could substantially affect the assessment of H's credibility (s103). If she continues to deny existence of docs, P can rebut denials by tendering docs under s106. Once admitted for credibility purpose can use for hearsay purpose (s60), i.e. to prove her statements that A provided with permit at meeting, amongst other matters.

Minutes also likely business record (s69). Facts here seem very similar to ICM. Minutes based on personal knowledge of H.

Answer #2: The prosecutor will seek leave under s38 to have McLean declared unfavourable. The judge may grant leave taking into consideration the matters in s192(2). Once leave is granted, the prosecutor may then XXN McLean as though she is a defence witness meaning the prosecutor can ask leading questions (s42). In doing do, the pros may put to the witness any prior inconsistent statement (s43). In doing so the prosecutor may put the witness' statement before her, or give sufficient particulars of the prior statement that the witness can respond. If she does not admit the statement, the pros can seek to tender it if s42(3) has been complied with.

The prosecutor may seek to admit the statement as credibility evidence as proving a prior inconsistent statement would substantially affect the assessment of the credibility of the witness (s103). This can be done once the witness is declared unfavourable (i.e. in XXN). S106 would also mean the credibility rule would not apply here. S106(2)(c) means leave would not be required.

The prosecutor may also seek leave to tender exh 3 as an exception to the hearsay reule. The pros would argue that it is being tendered for a non-hearsay purpose (s60), that being that it records what was said at the meeting, not the truth of what was said. The would also seek to have the doc tendered as a business record. The relevant asserted facts would have to be established and the Court may only admit some parts (ICM).

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

Defence Counsel intends to make a "no case" submission. Among other submissions, an essential point of the Accused's "no case" submission will be that there is *"no legal precedent in Australia where an appellate authority has recognised that a volunteer sports official may be guilty of criminal negligence in circumstances such as those alleged in this case."* The Prosecutor will concede there is no such appellate authority on point, but that this does not necessarily mean the "no case" submission must succeed.

QUESTION 13

Criminal Procedure: Explain what is meant by a "no case" submission and how it is likely to be made in this proceeding. (***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 or rejecting the submission). **[3 marks]**

Answer #1: A "no case" submission is made at the end of P's evidence, prior to D calling any evidence. It has a legal submission, and argues that the Prosecution has not discharged its duty in adducing sufficient evidence to support a conviction (e.g. no reasonable jury could convict). The evidence must be taken at its highest. It is usually made where there is a dearth of evidence in support of an element of the offence. If the judge accepts the submission, they must direct

the jury to enter a verdict of not guilty. If rejected, D can then go on to call evidence, or make submissions/closing address. Here, where there are questions of weight and factual disputes on whether there was/was not a ROAD CLOSED sign, the submission is likely to fail as these are matters for the jury.

It is no argument to say there is no precedent for this if the elements can be made out.

Answer #2: A no case submission is a submission that no reasonable jury acting rationally and accepting all the prosecution evidence could lawfully convict the accused (May v O'Sullivan, see also Doney, Attorney-General's Reference No. 1 of 1983). Effectively its that P has failed to establish pro of an element. In and entirely circumstantial case as is here, the test will be met where there is a hypothesis consistent with innocence that no rational jury could rationally exclude (R v Cengiz). Here, D is likely to argue that the elements of criminal negligence and causation simply can't be made out as in Pace and Conduit. The submission is made at the close of P's case and prior to D's election. If the no case is successful, TJ will direct the jury to enter an acquittal, if it is not, TJ will ask A to make his election.

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

The trial judge has reserved his decision in relation to the "no case" submission and has adjourned the trial for 2 days so that he can consider the submissions made. The next day, the following events transpire:

- The solicitor for the Office of Public Prosecutions receives a call from a man called Thomas REDD. Mr Redd states that his father, Nathan REDD, had been assigned as a volunteer track marshal on the day of the tragic race and was positioned at the intersection of Thistle Street and Chum Street. Mr Redd (junior) proceeds to explain that he knows this because his father had sent him a "selfie" photo taken on his smartphone at about 9.45 am on the day of the race. The photo clearly depicts Mr Redd (Senior) at the intersection and would support the Accused's account of seeing a marshal there when he inspected the track. Mr Redd (Senior) died of a heart attack, coincidentally, on the same day of the bicycle race. The name "Nathan Redd" appears on a list of over 100 track marshals that police obtained early in the investigation. It is possible that, because he was feeling unwell, Nathan Redd left his track marshalling position *after* the Accused had inspected the track, but *before* the accident occurred. DSC Edwards never followed up the whereabouts of Mr Redd (senior) when she could not locate him for the purposes of taking a statement. Mr Redd (junior) has provided the Office of Public Prosecutions with a copy of the photo and shown it time-indexed on his phone. It appears to be authentic. The solicitor who took Thomas Redd's call has told the Prosecutor about this new evidence. The Prosecutor is of the

view that this evidence *"is irrelevant and speculative and need not be disclosed at this late stage to the Defence.*"

- Defence Counsel discovers a judgment delivered by the Supreme Court of Canada (the highest appellate court in that jurisdiction) a week ago. The case concerns the prosecution of a volunteer race official who was found to be criminally negligent by a lower court for failing to take adequate precautions in making a bicycle race track safe for cyclists, which negligence led to the death of a cyclist. The Supreme Court of Canada upheld the conviction. Defence Counsel is of the view that the case *"is unhelpful and need not be disclosed to the Prosecution at this late stage."*

QUESTION 14

Ethics: Discuss the ethical implications of the events that have now transpired and the decisions of both the Prosecutor and Defence Counsel, respectively, not to disclose the information that has just now come to their attention. **[5 marks]**

Answer #1:

1. Prosecution – is under an ongoing duty to disclose all material facts relevant to the guilt or innocence of an Accused (Barrister Rules). Duties of honesty and ethical behaviour are governed by these rules and Prosecutor (and counsel) have overriding duty to the court and the administration of justice. The Prosecutor has a particular duty to assist the court to conduct a fair trial and fairly arrive at the truth. This includes disclosure of all material and relevant information. Prosecutor's allegation that the Rudd Senior Information is "irrelevant" and "speculative" is completely unfounded. It is indeed relevant information because <u>if accepted</u> it could rationally bear on the assessment of the probability that the Accused had in fact discharged his legal obligation to inspect tract. It may be exculpatory as showing no fault by Accused because of the contribution/failure of Rudd Senior. Prosecution should immediately disclose to defence and adjournment sought to investigate as necessary.

2. Defence is also bound by duties of honesty and proper conduct under the Barristers' Rules, however disclosure obligation is to a lesser degree than the Prosecution. Here the question is whether Defence Counsel must disclose an authority (legal precedent) from another jurisdiction (Canada). Under BR rule 29 counsel must disclose any binding authority or where no binding authority, any authority decided by an Australian appellate court and any applicable legislation. This is consistent with overriding duty to the Court and administration of justice. On the present facts, the authority relates to a precedent in Canada and has no binding or indeed persuasive authority on the consideration of the case before a Victorian Court. D counsel is not under an obligation to disclose this case the Prosecution or to the Court.

Answer #2: Rudd's (R) evidence is highly probative and it may prove that there was a Marshall at the intersection as A submitted. The prosecution is therefore obliged to share the evidence with defence counsel as it is relevant to A's guilt. A failure to disclose the evidence is a breach of P's ethical obligation and may result in a mistrial and disciplinary action. The solicitor and counsel may other both be liable for breaching continuous obligations of disclosure with respect to the relevant hand-up brief materials. The late stage is immaterial but may require an adjournment for P to further investigate.

Counsel for defence must correct any misleading statement made to the court and is otherwise required to inform the court of any binding or appellate authority which are directly in point against A's case. Counsel may not, however, have breached these obligations as counsel's only statement was that there are is no legal precedent in Australia. This is not misleading with the new information. Moreover, because the SC Canada is not binding or appellate authority, it does not fall within r29 as being required to be disclosed. Counsel may act fearlessly in A's interest and keep the case confidential.

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

Defence Counsel's "no case" submission is not successful. All of the Accused's objections in relation to admissibility of evidence have been rejected by the trial judge. The Accused elects not to call any evidence.

QUESTION 15

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

Answer #1: Counsel are responsible for identifying/requesting jury directions. Court must give a requested direction unless good reason not to, need not give an unrequested direction unless substantial and compelling reason. Potential directions:

- Failure of accused to call evidence – burden on pros to prove, no obligation to call, jury not to guess/speculate or try to 'fill gaps'
- Unreliable evidence – e.g. evidence of Cullerton unreliable because hearsay, untested, need for caution in accepting/weight of evidence
- Not a direction, but if asked, directly or indirectly by jury, Court may explain BRD by reference to Pros obligation to prove, prob/likely guilty ≠ guilty, etc.
- If there was a significant delay which occasioned disadvantage (e.g. witnesses no longer available, like Cullerton), could seek direction on delay. Mere delay is insufficient – must point to other factors resulting in disadvantage to A.

Answer #2: Both parties are responsible for assisting the judge to determine what directions should be given. If a party requests a direction, the judge should give it unless there is a good reason not to. The trial judge must not give directions not requested unless there are substantial and compelling reasons for doing so, and he must give the parties notice.

- Failure of the accused to give evidence (s41)
- General directions – what must be proved BRD
- Credibility evidence
- Opinion evidence

END OF PART A

PART B (Questions 16 to 30) – Candidates are required to answer ALL questions in Part B.

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

Samuel Kane was found not guilty and acquitted of both criminal charges.

Leanne Weir is survived by her husband, Tony WEIR, and their two children, Bobby and Joseph. Mr Weir, in his capacity as executor of the estate of his deceased wife, is contemplating issuing proceedings against BBA, Inc. alleging claims based in tort (negligence) for economic and psychiatric damage incurred by himself, and Bobby and Joseph, as a result of Ms Weir's death. The right to pursue such claims is founded under the *Wrongs Act 1958* (Vic) and on principles of vicarious liability.

Brian Henderson, by his wife and guardian Lisa HENDERSON, is also contemplating bringing civil proceedings against BBA alleging the same causes of action. However, the damages sought in his claim will also encompass the losses associated with his ongoing 24-hour care and his loss of quality of life.

QUESTION 16

Ethics: In what circumstances may Counsel act for two or more parties in a proceeding? Is it possible that the same barrister can act for both Mr Weir, Mr Weir's children and Mrs Henderson in relation to their respective claims? Explain. **[3 marks]**

Answer #1: Counsel may act for 2 or more parties provided there is no real possibility that their interests will conflict (if so, must refer/return briefs to eliminate conflict). In this case no real possibility, on the facts, that these clients interests will conflict. Same cases of action – no suggestion of cross claims, allegations against each other, or any other conflict. Differences in losses claimed not a conflict. Counsel can act for all unless further information/cites causing a conflict arise.

Answer #2: Counsel can act for 2/more parties if satisfied their interest can not, as a real possibility, conflict. If they do, counsel must return the brief for one (or both, if she has confidential information re both) – r119. Here, counsel could likely act for W's and H's. Their interest clearly align – and there is no foreseeable risk of their interests conflicting. Counsel will have to advise each P independently regarding quantum, and different factors will need to be proved re quantum for each plaintiff, but this does not constitute a conflict, as long as counsel satisfied she can represent both to the best of her ability. Issues of liability would be the same for each P.

QUESTION 17

Civil Procedure: Is it possible for Mr Weir's and Mrs Henderson's respective claims to be tried before the same judge at the same time and, if so, explain why this is likely to occur in this case. **[3 marks]**

Answer #1: Yes. Claims may be tried together where "some common question of law or fact would arise" or rights to relief arise from the same translation (r9.02) or where it is necessary to ensure that "all questions in the proceeding are effectually and completely determined and adjudicated upon" (r 9.06). Here, the questions of liability are almost identical and so under r9.02 the Court is likely to find it is in the interests of the just, efficient, timely and cost effective resolution of the real issues in dispute (s8 CPA) to have the two proceedings heard together.

Answer #2: Yes. Court may consolidate proceedings under r9.12 where common questions of fact, law or rights to relief from same transaction. Here clearly common questions – same claim against same defendants arising from the same circumstances. Far more efficient and cost effective to hear together than have same evidence and arguments in two different proceedings.

QUESTION 18

Ethics: The work of a barrister includes which **TWO** of the following?

Your answer:
(circle TWO)

a) <u>advising clients as to their prospects of success in litigation</u>

b) counselling vulnerable clients to seek medical or other similar professional help to cope with life stressors

c) providing career advice to junior legal practitioners

d) making ethical judgments and complaints about the conduct of colleagues

e) <u>attempting to convince a court that the party the barrister represents should win in a particular proceeding</u>

f) obtaining Continuing Professional Development points

[2 marks]

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

Mr Weir and Mrs Henderson have instituted proceedings against BBA in the Supreme Court of Victoria. Mr Weir is named as First Plaintiff and Mrs Henderson as Second Plaintiff. BBA is named as Defendant.

QUESTION 19

Civil Procedure: What is the difference between a "writ", a "statement of claim" and an "originating motion"? Which of these documents is most likely to have been filed by the Plaintiffs' legal representatives at the commencement of this proceeding? Explain. **[3 marks]**

Answer #1: A writ and originating motion are two types of documents which commence a legal proceeding. A writ is used where the facts are likely to be disputed and pleadings and discovery will be required. An originating motion is used in more limited circumstances such as when the application is ex parte or not appropriate for discovery. A statement of claim, however, is the document that actually sets out the legal claims and the basis for it. In this case, the P would have filed a write because the action is founded on tort, an exception does not apply to make an originating motion appropriate and discovery and pleadings will be required. P will also file a statement of claim.

Answer #2: A write and originating motion are the two documents filed in the court commencing civil proceedings. OM's are required where there is no defendant identified, or permitted where there is unlikely to be any facts in dispute and therefore no pleadings or discovery (4.05 and 4.06). This proceeding will be commenced by writ, as all other proceedings must be commenced by writ. The writ contains the party's mane and address for service. The Statement of Claim is the document attached to the write and sets out the P's pleadings, that is, a statement of material facts in summary relied on to plead the claim and particulars necessary to enable the other party to plead, define issues for trial and avoid surprise at trial. Pleadings must not contain evidence.

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

- The Defendant has filed its defence within time.
- The Defendant denies liability in relation to all the Plaintiffs' claims. It has pleaded a number of alternative defences, summarised as follows:
    - BBA, by its employees and agents, did not breach its duty of care in relation to the bicycle race track set-up.
    - At all material times, BBA acted in accordance with the advice of Bendigo City Council and Victoria Police in running the bicycle race event.
- An expert civil engineer engaged by the Plaintiffs' solicitors, Professor Ian GREEN, is of the view that it was simply not possible to run a bicycle racing event like this safely around the Bendigo central business district. Professor Green opines that such an event is *"inherently dangerous and no amount of precautions, even those suggested by the conditions attaching to the Council permit, could generate safety for cyclists unless every single road was closed in the area. Council and Police should never have allowed the race to go ahead."*

- BBA's assets are limited. In the event that the Plaintiffs succeed in their claim, BBA is unlikely to be able to pay the judgment sum (BBA had no public liability insurance in relation to the event).

QUESTION 20

Civil Procedure: Is it too late for allegations to be made by the Plaintiffs and/or BBA against Bendigo City Council and/or Victoria Police? Explain what, if anything, could be done in this respect. **[3 marks]**

Answer #1: No. P's should join BCC and Vic Pol as defendants to maximise her chances in the proceeding, on the basis that there is a common Q, and relief flows from same transaction. P will need to amend her pleadings to do this, which they can do once before close of proceedings or otherwise with leave from Crt. Crt likely to grant leave to avoid multiplicity and ensure just, timely, cost effective resolution of the real issues in dispute. Likewise, BBA should join BCC and Vic Pol as 3P and claim indemnity/contribution. BBA should first file a defence, and can then file and serve a 3P notice within 30 days of date given for filing defence (or otherwise with leave of court/consent of parties).

Answer #2: Not for the plaintiff. A party can be added at any stage of the proceeding under r9.06. P could make application for BBC and Vic Pol to be added as a party (application on summons and affidavit r9.07). It is likely that they would be added to ensure that all questions are determined. As long as it is within 30 days of the defence being due for service, it is not too late for BBA to seek to join BCC and/or Vic Pol as third parties by filing and serving a Form 11A indorsed with a statement of claim. Must be served within 60 days of filing with a member of other documents identified in r11.07(5).

QUESTION 21

Civil Procedure: In this proceeding, in what circumstances could: (i) a party obtain a freezing order; and (ii) a party obtain an order for security for costs? Explain why you consider that these orders are likely/unlikely to be obtained in this case on the given facts. **[4 marks]**

Answer #1: A party can obtain a freezing order to avoid the possibility that the Court's judgment will be frustrated because a party has removed its assets from a jurisdiction or diminished them in value so as to avoid paying a judgment debt. A party can obtain a freezing order where it makes application on affidavit setting out the matters in r37A.02(5) and establishing a prima facie case and the value of prospective judgment with some precision; danger that assets will be removed, dealt with, diminished in value; that the balance of convenience favours the making of the order (Zhen v Mao

[2008] VSC 300). Here, there is simply no evidence that any party is at risk of dealing with assets in the relevant way. The fact that BBA has no assets is not enough for a freezing order which is an extraordinary remedy.

An order for security for costs is obtained by a D and requires that P provides some security for the likely value of D's costs order should P lose. It can be made under r62.02 or the inherent jurisdiction of the Court (Cox v Cox). Because the P's are natural persons, it would not be enough that P's were impoverished, there would need to be more such as P's reside out of Victoria, bring the action on behalf of someone else, have a weak claim etc., none of which appear to be relevant here. Thus it is unlikely D would make an application for security, there is no proper basis for it.

Answer #2: (i) Party may obtain a freezing order if 'good arguable case' and danger that any judgment would be unsatisfied because D abscond/move assets out of Vic/dispose of or dissipate assets. Would have to apply to court, with or without notice, by summons and affidavit setting out info on claim and possible defence, nature and extent of assets, risk of absconding etc, and 3rd parties might be affected. P must make full and frank disclosure and offer undertaking for damages, (also counsel's ethical duty if made ex parte). It is an extraordinarily remedy not granted lightly. Highly unlikely to be made in this case – no evidence whatsoever that danger of absconding etc.

(ii) D may seek security for costs under Rules if any of the matters in o62 are satisfied. Here there is no evidence suggesting any of them, so court would have no jurisdiction under Rules. But court may also grant security in its inherent jurisdiction. D must show additional factor beyond P's impecuniosity – again, no evidence here that any basis to grant (e.g. that someone else standing behind the litigation, P taking steps to avoid having assets to satisfy a costs order). On the contrary, given P's are individual natural persons, risk that security could satisfy the proceedings. Court unlikely to grant this either.

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

- Bendigo City Council and Victoria Police are now parties to the proceeding.
- All of the documents that were used in the criminal proceeding in Part A are available to the parties to use in the current civil proceeding.
- On 15 December 2015, Bendigo City Council employee Noah RHODES, of the traffic management unit, sent an email to Senior Constable Dillon JAMES ("SC James") at Bendigo police station: *"Hi Dillon, an application for a street bicycle race has come across my desk. It looks like a great idea for Bendigo but I'm thinking Council probably needs to get advice from VicRoads as to appropriate safety measures. But you know what they're like …".* Senior Constable James replied on the same day with the following: "*Hey Noah, yeah I hear ya! Don't bother. They're pedantic. Just put in the usual conditions for road closures. She'll be right. Nothing bad's likely to happen, except maybe the roads having a few less cyclists afterwards, which has to be a good thing! ;-)"* This email exchange was not disclosed by the Prosecution in

the criminal proceeding. It has only come to light now as a result of Bendigo City Council's legal representatives preparing documents for the civil proceeding.

- Bendigo City Council never consulted VicRoads about the road race. Had Council done so, it is likely that VicRoads management would have given the same advice stated by Professor Green, namely that it is simply not possible to host a bicycle event like this safely (i.e. it should *never* have been allowed to go ahead).

QUESTION 22

Evidence: Explain the evidentiary significance of the email exchange between Mr Rhodes and SC James. Assuming it is available for use by the Plaintiffs, could Counsel for the Bendigo City Council or Victoria Police make any meritorious objections as to its admissibility? Discuss. **[4 marks]**

Answer #1: Each email can be characterised as an admission – a pervious representation by a party adverse to the party's interest in the outcome of the proceeding. With respect to RHODES, he was employed by BCC and acting in the scope at the time he sent the email (s87(b)), it can thus be attributed to BCC. It is adverse because it is relevant to knowledge of acting below acceptable standards (breach). As an admission, opinion and hearsay rules don't apply.

With respect to S/C JAMES' reply, this can also be characterised as an admission by the same reasoning. However, Vic Pol may have a stronger argument that the admission was outside the scope of employment and should not be attributed to the organisation (unlikely to succeed). However, the portion "except maybe the road having a few less cyclists… good thing" would be objected to as highly prejudicial and it should be excluded under s135, it inviting an overly emotional response from the jury and it having no particular relevance. P would argue foresight of the particular act that did occur.

Answer #2: The email exchange is significant because it shows that both Vic Pol and BCC had turned their minds to the fact that VicRoads would probably require additional safety measures and that these were not sough/pursued in order to cut corners and avoid red tape, therefore the event wasn't as safe as it could have been. It is evidence of representations against interest, therefore admissions, and also adverse to the parties so should be discovered. The communications are previous representations, but hearsay rule doesn't apply to evidence of admissions if first hand, so Counsel can't object on that basis. No reason to suggest it would be unfair to admit either, so no exclusion per 90.

Each party could argue that the other's admission is not admissible against them, so could argue per 83 that the admissions aren't cross admissible (and BBA should argue neither are admissible against them). Alternatively, the parties could argue NR & SC J were not acting with authority to make those statements on behalf of Vic Pol or BCC, although this is unlikely to succeed as seems reasonably open to find they were. Comments not made confidentially for dominant purpose of legal advice/services either, so can't claim CPL.

Seems no rational argument to make that they should be excluded per 135, as have high probative value. Likely admissions will be admitted in email. Note: meta data re who emails from will be admitted per 71.

QUESTION 23

Civil Procedure: Are the Plaintiffs entitled to obtain copies of the email exchange between Mr Rhodes and SC James? If so, explain the formal procedures likely to have been used by the Plaintiffs' legal representatives in the course of the proceeding to do so? **[3 marks]**

Answer #1: Yes, the email exchange is relevant to the dispute and adverse to BCC and Vic Pol's case, so they are discoverable. P should serve D's with notice for discovery after close of proceedings. D then have 42 days to make discovery, by producing an affidavit of docs listing all docs they rely on, support other P's case, are adverse to their or other P's case, that they are aware of after a reasonable search and describing doc and basis of any privilege claimed. P can then serve D's with a notice to inspect, seeking to inspect the email. D must respond within 7 days by notice appointing time and place for inspection within 7 days time.

Answer #2: P's are entitled to these documents, they are not privileged and ought to be discovered in the usual way. P would file a notice of discovery (Form 29A) after pleadings have closed; D would then file an affidavit of documents (Form 29B) listing all discoverable documents; P would then request inspection of particular documents in Form 29C and D would allow inspection within 7 days.

QUESTION 24

Evidence: Would your answers to Questions 22 and 23 above be different in any way if SC James had ended his email with the words *"But Council should probably get legal advice on this to cross the T's and dot the I's, so to speak ;-)."*? Explain. **[4 marks]**

Answer #1: This additional information may raise the possibility that Mr Jones response (not Rhodes email) was subject to lawyer client privilege. Privilege applies to discovery and notice to produce pursuant to s131A of the Evidence Act. The email is arguable a communication by SC James for the dominant purpose of seeking legal advice regarding the race (s118).

In my view this claim for privilege has no merit. 1) The dominant purpose of the communication was not to seek legal advice, SC James merely suggested Council seek legal advice. Read as a whole, the document was largely information. 2) SC Jones himself was not considering seeking legal advice but proposing Rhodes seek legal advice. 3) If the email

chain were treated as a single document, then it is clear Rhodes was seeking information from Police not lawyers. 4) It is not even apparent the communication was confidential

The best argument that could be made was Rhodes was from the beginning seeking advice of a legal nature. However, the advice was not from a lawyer to be privileged.

Answer #2: Evidence of a confidential communication between client and lawyer or between two or more lawyers regarding the client or of a confidential document prepared by the client, lawyer, or other person it is not admissible if the communication was sent, or the document prepared for the purpose of providing legal advice to the client. At the time of the communication, there was no remedy on interrupted litigation, so litigation privilege most likely not relevant. The existence or otherwise of privilege would not affect the relevance of the evidence (q22) but it may affect the discoverability (q23). Privilege is a valid objection to inspection.

The communication in question is between employee of the council (the potential client) and a third party (police officer). It would seem to be highly unlikely that the mere mention by the police officer of reference to potentially seeking legal advice would result in the communication being privileged. It is not clear that advice would be sought.

Further, and in my view, the fact that the communication is between the potential client and a third party, this suggests that by privilege would have been lost because of s122(2). Although, again, it is difficult to see how that would apply where it is the police (not the client) suggesting to the potential client that they should seek legal advice.

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

Prior to a decision being made by the Bendigo City Council to disclose the email exchange between Mr Rhodes and SC James, the Council's solicitors decide to seek Senior Counsel's advice on the issue. Bendigo City Council is worried about the embarrassment the email might generate once it becomes public. The following exchange takes place between Senior Counsel and the instructing solicitor acting for the Bendigo City Council after Senior Counsel has been provided with a copy of the email exchange.

> **Instructing Solicitor:** It's terrible publicity for Council if this comes out now. Can't we just accidentally drop the email in the shredder and advise Victoria Police to do the same?
>
> **Senior Counsel:** Yes, probably for the best I think. In any event, Council is well justified in withholding this kind of information. There is a greater public interest in maintaining public confidence in the integrity of our local councils than there is in a couple of vexatious litigants having their day in court. There is clear authority that supports this and there's nothing wrong in this very usual circumstance in destroying all traces of the email exchange. Make sure you let Victoria Police's lawyers know what we're doing and tell them to do the same.

QUESTION 25

Ethics: Consider the merit in Senior Counsel's advice in relation to the withholding of, and advice to destroy, the email exchange. **[3 marks]**

Answer #1: SC's advice is in clear breach of his overarching obligations not to mislead/deceive, to act honestly, and to disclose all documents critical to the dispute. He is also in breach of the barrister's rules not to knowingly/recklessly deceive the court or an opponent, and is suggesting the destruction of evidence, which is arguably a criminal offence, and at the lease breaches his duty not to advise/suggest a witness give false/misleading evidence, and is disobeying the court's orders re discovery. This is likely to result in findings against SC under s29 (and may result in costs orders against him personally, particularly as he is causing his client to breach the order as well) and most certainly will land him with a finding of prof misconduct and potentially a period of suspension to prac certificate.

Answer #2: This is totally unethical. Counsel has profession Rules (and both counsel and solicitor obligations under CPA) not to mislead court and to further administration of justice. Shredding relevant evidence and encouraging others to do so is a clear breach of those duties. It has effect of misleading court that the evidence doesn't exist. It does not – contrary to SC's assertion – promote public confidence in Council – in any event this is not a relevant consideration. Overriding duty to court, not client or reputation of council's. This is likely to be professional misconduct – substantial falling short of expected standards - that would be met with serious sanction, including being struck off.

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

- Bendigo City Council and Victoria Police have destroyed all traces of the email exchange between Mr Rhodes and SC James.
- As a result of receiving an anonymous tip-off, the legal representatives of the Plaintiffs have become aware of the existence of the email exchange and its general subject matter (but they are not aware of its exact contents). The Plaintiffs' legal representatives also have reason to believe that the email exchange may still exist elsewhere, including:
    - On the hard-drive located in the chambers of Senior Counsel acting for the Bendigo City Council (Senior Counsel omitted to delete the email from his instructing solicitor that contained the email exchange);
    - Within the "claim file" of Bendigo City Council's insurer (Council officers forwarded all material relating to the bicycle race to their insurer, including the email exchange, when they became aware that Council would need to claim indemnity under its insurance policy for being sued by the Plaintiffs).

- The Plaintiffs are considering taking procedural steps, including the possibility of making an *ex parte* application, in the proceeding that will allow them to get hold of the email exchange from either of these two sources.

QUESTION 26

Civil Procedure: Explain what procedural steps are available to the Plaintiffs in relation to obtaining copies of the email exchange from either the hard-drive of Senior Counsel for the Bendigo City Council, or the insurance claim file of Council's insurer. In giving your answer, you should also explain what is meant by "*ex parte* application" and consider when such an application is appropriate in these circumstances. You should also consider what, if any, objections are likely to be made by Senior Counsel (in his personal capacity) and the Insurer in response to steps taken by the Plaintiffs. **[4 marks]**

Answer #1: P should make an application to inspect SC's computer per O37, allowing them to enter SC's office and inspect his computers. The process should be sought by summons and accompanying affidavit setting out the facts on which the application is made and description of the property being sought.

Alternatively, P could seek an injunction prohibiting SC from dealing with the computer further (he may delete the email all together). This can be done ex parte, without notice to SC, but P will need to make full and frank disclosure of all relevant issues. D will need to show the following: 1) A prima facie case/serious q to be tried – here this is satisfied. 2) The harm that would be caused if no injunction would be such that damages would be an inadequate remedy. If the email is deleted, it will be gone forever and unable to be used at trial, so this may be made out. 3) The balance of convenience favours the making of the order – here, if the order is made incorrectly, the risk of injustice caused by prohibiting someone from deleting an email is slight. The greater injustice will be to P if no order is made and the email is deleted. The court is likely to grant the interlocutory injunction.

Alternatively, P should subpoena the insurer by issuing a subpoena to produce the document. Must be in form 42A, addressed to someone personally (e.g. "proper officer"), clearly identify the email being sought and be served personally at least 5 days before it is returnable (although insurer must still comply if they have actual knowledge) prior to last day. P would otherwise seek discovery from a non-party from the insurer by filing and serving summons and affidavit setting out facts and description of doc being sought. Should serve on all parties (therefore, not ex parte) and on insurer personally.

SC should claim privilege of the email as it forms part of his file in the proceeding, and should place doc in envelope and accompany part to Court for ruling of matter if application to inspect is granted. The insurer may object on basis that it was provided to them for dominant purpose of them seeking legal advice on their own liability and is privileged per 119 by virtue of 131A.

Answer #2: BCC – P could seek presentation of property owner, to pressure evidence (i.e. hard drive) until trial. This can not be made under ex parte under O.37 – on basis that evidence of real risk council will destroy evidence, and owner to enter land and pressure/take into custody the property is necessary. Could also seek order for particular discovery of the emails (i.e. the documents), not hard drive.

Insurer – could issue a subpoena for the emails with insurer as addressee, specifying the emails with sufficient detail so know what have to produce. Insurer not have to comply if no conduct money and could object to court. Could also seek non-party discovery on the basis that the information is relevant to issue in the proceeding – court might be cautious before granting, but in this case because can't obtain from others. But subpoena more appropriate – specific documents only, not voluminous. Insurer would not have grounds to object.

SC – P could seek non-party discovery/subpoena or order from court under CPA (e.g. comply with s26 obligation to disclose). SC would object on basis that privileged under LPP litigation privilege. Provided to him in course of professional legal services re actual litigation (i.e. their proceeding) for dominant purpose of receiving those services. Objection would be made by client, not SC himself.
Arguably s125 would not apply – the document itself was not prepared in furtherance of fraud/civil penalty/abuse of power. The council's actions and SCs advice were the misconduct, not the email exchange itself.

Ex parte = application made without opposing party present. Counsel must disclose to court all information aware of, not protected by privilege that could support an argument against granting the relief sought, or limiting relief adverse to client. Must seek waiver of privilege over any such info, and refuse to act if consent not granted.

QUESTION 27

Civil Procedure: Could the trial of this proceeding be heard before a jury? Explain. **[2 marks]**

Answer #1: Yes. A trial can be heard by jury when founded on tort (as here) or contract and a party elects in writing (P in the write, D within 10 days of the last appearance) and pays the jury fees. The TJ still has a discretion to order that the matter be heard by judge alone and this may occur where the matter is complex (issues, number of questions) or overly lengthy (see Gunns v Marr or Matthews v SPI). This proceeding is likely to be complicated but could still probably be heard by a jury if a party elected.

Answer #2: Yes – if a party requests and pays the fees. Can be done because founded on tort. Judge may still order hears as a cause before judge alone if not appropriate because e.g. complexity or other reasons. Here no reason why inappropriate – not so complex jury couldn't follow – therefore likely to be allowed.

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

- The matter has been set down for trial before judge and jury.
- The trial judge has ordered that the parties prepare a "statement of issues".
- The Plaintiffs propose to call Professor Green to give evidence about the lack of safety measures in place around the track. A copy of Professor Green's report has been provided to all other parties in the proceeding well before the trial is scheduled to commence.

QUESTION 28

Civil Procedure: What is a "statement of issues"? Explain what is likely to be included in such a document in this proceeding. **[3 marks]**

Answer #1: A statement of issues is a document which identifies and summarises the key issues in dispute. A court may order such a statement under the CPA which the parties must consent and prepare jointly. The court can settle the contents if the parties cannot agree. It will generally frame the issues to be decided for the purposes of the trial.

Here, the statement will set out the key legal elements that P is required to satisfy and which is disputed and requires a finding from the court. For example: (a) Did BBA/Council/Vic Pol owe P a duty of care? (b) What was the standard of care required to be met? (c) Did BBA/Council/Vic Pol meet the standard? (d) Did P suffer injury?

Answer #2: A statement of issues is ordered under s50 CPA and includes a summary of the key issues in dispute. It is intended to be used (particularly in complex proceedings with multiple parties) to assist the court to manage the proceeding, it does not replace pleadings. So for example, it would set out the elements of negligence and identify as issues that BBA did not breach its duty as it acted in accordance with advice of BBC and VicPol, that BBC acted in accordance with advice of VicPol, that VicPol was not in breach.

QUESTION 29

Evidence: Counsel for Bendigo City Council objects to the admissibility of Professor Green's evidence on the basis that it is *"opinion evidence and goes to the ultimate issue in the case"*. Explain why Counsel for Bendigo City Council is correct in characterising Professor Green's evidence as "opinion", but the objection is likely to be overcome by Counsel for the Plaintiffs in any event. **[4 marks]**

Answer #1: s80 EA abolishes the ultimate issue and common knowledge rules. An expert can give an opinion where it bears on the ultimate issue. Greene's evidence is opinion because it is an inference from observable facts used to prove the truth of the inference. However, it is likely that GREENE's opinion will qualify as an expert opinion and be admissible. Expert opinion must be (1) from a witness who is an expert in a field of a specialised knowledge based on study, training and experience, (2) the opinion must be wholly or substantially based on that knowledge, (3) if based on facts assumed they must be admissibly proved, if observed they must be identified and proved by the expert, (4) the facts must form a proper basis for the opinion, and (5) the expert must explain how the knowledge applies to the facts to produce the opinion. At this point it is unclear whether GREENE's report meets the criteria (from Makita v Sprowles). If it does, s80 will overcome the ultimate issue objection.

Answer #2: First, the objection that Greene's opinion goes to the ultimate issue in the case is not a valid objection in light of s80 EA which expressly abolished the common law rule that evidence of an opinion is not admissible because it is about a fact in issue (ultimate issue). Greene's evidence is correctly characterised as "opinion" if it is "specialised knowledge" (based on balance of probabilities) based on his study, training and experience, and the opinion is within (1) the substance of his report, an advance copy of which was provided, and (2) his opinion was based on this specialised knowledge. Therefore argue s79 expert opinion exception applies to overcome the rule that opinions are not admissible.

Arguable, however (1) that Greene has gone beyond scope of his specialised knowledge in asserting the race should never have gone ahead. I.e. His material facts (underlying his opinion) may not sufficiently support this opinion. (2) P may argue that his evidence should be excluded under s135. S135 is a discretionary measure to exclude evidence if its probative value (PV) is substantially outweighed by unfair prejudice and/or misleading or confusing. Contend the prejudice is significant here and probative value is outweighed by this prejudice => Exclude.

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

Despite the initial objection in relation to Professor Green's evidence being overruled by the trial judge, Counsel for Bendigo City Counsel now intends to make a further and alternative submission seeking to exclude Professor Green's evidence. That submission is based on the following:

- Professor Green's evidence is based on an unusual and untested algorithmic analysis of the risk of accidents occurring at events when roads are temporarily closed in urban centres. His algorithm, which he created himself, involves a complex mathematical formula that generates a numerical "risk factor" from 0 to 1. A score of "0" yielded from an application of the algorithm to the given data means there is "*no risk at all*" of an accident occurring. A score of "1.00" means an "*accident will occur absolutely*." In applying the algorithm to a particular case, the greater the number of roads involved, the greater the score. In the case of the Bendigo Bicycle Race, Professor Green calculated a risk factor score of 0.975, meaning in his opinion there was a 97.5%

chance of an accident occurring. This was the basis of his opinion that the race should never have been allowed to take place.

- Professor Green published his algorithm in the little known *Antipodean Journal of Obscure Engineering Science* in 2010. It has not been recognised by any of his professional or academic peers as a useful algorithm. It has not been cited authoritatively since its publication. On the contrary, a number of academics have openly derided the article and the algorithm at engineering conferences as "junk science". Indeed, shortly after Professor Green published the article, he became the laughing stock of his own academic peers at the university where he was then employed.
- Counsel therefore seeks to exclude Professor Green's evidence on the basis that *"it has minimal probative value, it is unreliable, and he is clearly not a credible witness."*

QUESTION 30

Evidence: Discuss the merit in Counsel's objection now advanced in relation to Professor Green's evidence. In giving your answer, you should take care to explain: (i) the relationship between sections 79 and 135 of the *Evidence Act 2008* in application to this evidence; (ii) what is meant by "*reliability*" as opposed to *"credibility"*; (iii) the significance of any applicable principles discussed in *IMM v The Queen* [2016] HCA 14. **[5 marks]**

Answer #1: The case of IMM v The Queen tells us that when assessing probative value (under s135 or 137 EA) the TJ must assume the jury will accept the evidence, i.e. that it is both credible and reliable for this purpose. As discussed in Q29, P would argue Prof G's evidence is expert opinion evidence and falls within the s79 EA exception for evidence based on person's training, study or experience. After determining evidence is relevant (it is) and that it falls within s79 exception, the general discretion to exclude evidence in s135 must be applied, whereby the court may refuse it admit the evidence if its probative value is substantially outweighed by danger the evidence might be unfairly prejudicial (i.e. the jury may misuse it or give it too much weight) or mislead or confuse the jury. The D may argue that the untested algorithm used by Prof G makes his evidence unreliable – in the sense that its probative value is greatly decreased – and the fact that the algorithm was published in an obscure journal and not recognised by peers and described as 'junk science' and that Prof G is a "laughing stock" amongst his peers means that D's credibility can be impugned i.e. the jury may place too much weight on what he as a person says, compared to the weight he deserves taking these matters into account. While IMM does require TJ to assume TJ will accept the evidence – so not take into account reliability and credibility. In assessing probative value of Prof G's evidence, this does not mean the court cannot 'look behind' the evidence and still find it inadmissible, note also the court in IMM's comments about a 'limiting case' where evidence is so 'fanciful and preposterous' it will not get through the gaze of relevance. Arguably here Prof G's evidence is so preposterous in context that it is not relevant and so not admissible.

Answer #2: IMM (High Court) determined that, when assessing the probative value of evidence, must accept the evidence as credible and reliable (i.e. the evidence is accepted). This does not, however, mean that the content of the evidence is accepted and taken as true. S79 allows an exception to the opinion rule for expert opinion (as here) if established (balance of probability) specialised knowledge based on study and experience. S135 excludes evidence (discretionary) if probative value substantially outweighed by unfair prejudice or evidence would be misleading and confusing or cause or result in undue waste of time. Per IMM, in assuming the PV of Greene's report, judge must accept he is truthful and reliable (i.e. he is accurately recounting his opinion where is honestly held) however do not need to accept the content as true at this point. The credibility of an expert will factor in to assessing PV of expert evidence (per IMM) thus Greene's previous separation and dubious prior report will lessen the overall probative value and the complex calculations may also be misleading and confusing and cause an undue waste of time (as well as cause prejudice – jury may place undue weight on Greene's opinion).

In light of low PV, suggest judge exclude under s135. S192 factors are relevant.

END OF PART B

End of examination