



VICTORIAN BAR

Candidate Number:

ENTRANCE EXAM

VICTORIAN BAR READERS' COURSE

1 NOVEMBER 2018

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 16 questions (Questions 1 to 16) 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 16 then follow. In answering Part A, you should assume that all

questions are referable 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 (24 marks) and Legal Ethics (5 marks).

- 5) **Part B** contains 13 questions (Questions 17 to 29) 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 29 then follow. In answering Part B, you should assume that all questions are referable 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 (21 marks), Evidence (17 marks) and Legal Ethics (12 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 16) – 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 Sarah JELAS and was 26 years old at the time of offending (date of birth 21/11/90).

Punt Road is one of Melbourne's busiest roads that runs in a North-South direction from the Bridge Road intersection in East Melbourne/Richmond to St Kilda Junction in Windsor/St Kilda.

On Sunday, 23 September 2017 at approximately 10.30 pm, the Accused was driving south along Punt Road in her 2012 Nissan Tiida motor vehicle towards the intersection of Punt and Toorak Roads, South Yarra. The stretch of road leading up to the intersection is designated a 60 km/h speed limit zone. Traffic at the Punt Road/Toorak Road intersection is regulated by a standard automatic traffic light signalling system. The weather was fine, the roads were dry and traffic was light.

As the Accused approached the Punt Road/Toorak Road intersection, the traffic light regulating traffic travelling in the Accused's direction was green, signalling that the Accused had the right-of-way through the intersection. The Accused's vehicle was 150 metres north of the intersection when the traffic light then changed from green to amber. At this point, the Accused's vehicle was travelling south towards the intersection at a speed of 70 km/h. When the Accused saw the light change from green to amber, she accelerated her vehicle. Approximately 3 seconds later, the traffic light changed from amber to red when the Accused's vehicle was still 70 metres from entering the intersection. As the Accused's vehicle continued to accelerate, the traffic lights regulating west-east bound traffic along Toorak Road changed from red to green when the Accused's vehicle was still 40 metres from entering the intersection.

The Victims in this matter are James MORETTI (aged 53), Leah MORETTI (aged 45), and their two children, Alana MORETTI (aged 17) and Michael MORETTI (aged 18). At approximately 10.30 pm, the Victims were the occupants of a 2017 Alset motor vehicle travelling west along Toorak Road in South Yarra. James MORETTI, the driver of the 2017 Alset, maintained the vehicle in a stationary position at the intersection of Punt Road/Toorak Road as he waited for the traffic lights regulating east-west bound traffic to change from red to green. When the traffic lights turned green, the Victim James MORETTI gradually accelerated his vehicle into the intersection failing to notice that the Accused's vehicle was approaching at a dangerous speed to his right. As the Victims' vehicle entered the intersection at a speed of less than 10 km/h, the Accused's vehicle entered the intersection at a

speed of approximately 105 km/h. The Accused had seen the Victims' vehicle begin to enter the intersection and so she steered to her right to avoid a collision. However, the Accused's vehicle clipped the front of the Victims' vehicle as she attempted to manoeuvre past it, resulting in her losing control of the vehicle. The Accused's vehicle spun and rolled several times before crashing into a concrete power pole located on the west side of Punt Road where the vehicle came to a stop.

As a result of the Accused's vehicle clipping the front of Victims' vehicle, the Victims' vehicle spun 90 degrees counter-clockwise and came to a stop. The driver and front passenger safety airbags were automatically deployed. Due to a technical fault with the airbag deployment process, both airbags combusted inside the vehicle causing the vehicle to catch fire. On-lookers heard screams coming from the Victims' vehicle as flames engulfed it. Victims Alana MORETTI and Michael MORETTI managed to exit the vehicle via the rear passenger doors. On-lookers observed Victims Alana MORETTI and Michael MORETTI running from the vehicle both covered in flames and screaming for help. Several on-lookers came to their aid and assisted them in extinguishing the flames. Victims James MORETTI and Leah MORETTI were unable to escape the burning vehicle and the intensity of the blaze prevented on-lookers from attempting to extract them. Both perished in the burning vehicle.

Emergency services arrived at the intersection at approximately 10.40 pm. By this stage, the flames from the Victims' vehicle had substantially reduced, though the vehicle was completely incinerated. Victims Michael MORETTI and Alana MORETTI were transported to the Alfred Hospital's burns unit for treatment. Victim Alana MORETTI, having suffered the most serious burns, succumbed to her injuries and died three days later on 26 September 2017. Victim Michael MORETTI survived, suffering permanent injuries and scarring to 60% of his body.

The Accused was transported to the Alfred Hospital and treated for her injuries of a fractured leg and pelvis. She was arrested and held at the hospital under police guard. Blood samples were compulsorily taken from the Accused at 11.45 pm on 23 September 2017. Test results indicated the level of blood alcohol concentration in the Accused's blood to be 0.11 percent (i.e. more than twice the legal limit). Traces of methylamphetamine were also detected.

The Accused has been charged with several offences, the most serious of which include offences under ss 318 and 319 of the *Crimes Act 1985* (Vic), which provide:

318 Culpable driving causing death

- (1) Any person who by the culpable driving of a motor vehicle causes the death of another person shall be guilty of an indictable offence and shall be liable to level 3 imprisonment (20 years maximum) or a level 3 fine or both.
- (2) For the purposes of subsection (1) a person drives a motor vehicle culpably if he drives the motor vehicle—
 - (a) recklessly, that is to say, if he consciously and unjustifiably disregards a substantial risk that the death of another person or the infliction of grievous bodily harm upon another person may result from his driving; or
 - (b) negligently, that is to say, if he fails unjustifiably and to a gross degree to observe the standard of care which a reasonable man would have observed in all the circumstances of the case; or
 - (c) whilst under the influence of alcohol to such an extent as to be incapable of having proper control of the motor vehicle; or
 - (d) whilst under the influence of a drug to such an extent as to be incapable of having proper control of the motor vehicle.
- (2A) Without limiting subsection (2)(b), negligence within the meaning of that subsection may be established by proving that—
 - (a) a person drove a motor vehicle when fatigued to such an extent that he or she knew, or ought to have known, that there was an appreciable risk of him or her falling asleep while driving or of losing control of the vehicle; and
 - (b) by so driving the motor vehicle the person failed unjustifiably and to a gross degree to observe the standard of care which a reasonable person would have observed in all the circumstances of the case.

...

319 Dangerous driving causing death or serious injury

- (1) A person who, by driving a motor vehicle at a speed or in a manner that is dangerous to the public having regard to all the circumstances of the case, causes the death of another person is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).
- (1A) A person who, by driving a motor vehicle at a speed or in a manner that is dangerous to the public having regard to all the circumstances of the case, causes serious injury to another person is guilty of an indictable offence and liable to level 6 imprisonment (5 years maximum).

...

Three charges under s 318(1) were laid against the Accused, one charge for each victim that died. In each case, the prosecution is putting its case on the basis of s 318(2)(b) in that it is alleged that the Accused was grossly negligent in all the circumstances and that her negligence caused the death of each victim.

Three charges under s 319(1) were also laid, as alternative charges to the s 318(1) charges.

One charge under s 319(1A) was laid in relation to Michael MORETTI.

QUESTION 1

Criminal Procedure: Explain what is meant by the Prosecution alleging the s 319(1) charges ‘as alternative charges to the s 318(1) charges’. [2 marks]

Answer: _____

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

The Accused’s personal circumstances include the following:

- She is 26 years old, single and lives with her parents in Kew.
- She graduated from Monash University in 2011 with a Bachelor of Science, and then from Melbourne University with a Doctor of Dentistry in 2016. She is a qualified and practising dentist employed full-time at her father’s dental clinic based in Kew.
- Her annual salary is \$90,000 plus superannuation.
- She is a dual Australian/Croatian citizen and holds both Australian and European Union passports.
- She has no prior criminal convictions. However, since 2012 she has been issued with 5 infringement notices for violation of road safety rules while driving a motor vehicle, all of which were detected by automatic speed or red-light cameras:
 - o running red light (Punt Road/Toorak Road intersection, South Yarra, 6 January 2012);
 - o speeding (67 km/h in 60 km/h zone, Victoria Parade, East Melbourne, 18 June 2012);
 - o running red light (Camberwell Junction, Camberwell, 15 September 2013);
 - o running red light (Camberwell Junction, Camberwell, 22 December 2016);
 - o running red light (Burke Road/Old Burke Road intersection, Kew, 5 February 2017).

The Accused concedes that she ran a red light. However, she has instructed Defence Counsel to plead ‘not guilty’ to the charges on the following basis:

- it was not a ‘gross’ breach of the standard of care;
- it was not ‘dangerous’ driving in all the circumstances;
- her actions/conduct were not an operating and substantial cause of the Victims’ deaths/injuries (rather, it was the faulty Alset airbags that caused them).

QUESTION 3

Criminal Procedure: The issue of whether the Accused was negligent to a 'gross degree' in this case is best characterised as:

Your answer:

(circle ONE)

- a) A question of fact to be determined by the jury.
- b) A question of law to be determined by the trial judge.
- c) A question of opinion to be determined by expert witnesses.
- d) A mixed question of fact, law and opinion to be determined by the jury, trial judge and expert witnesses in consultation.
- e) A non-contentious fact in issue.
- f) A non-contentious legal issue.

[1 mark]

QUESTION 4

Evidence: The issue of whether the Accused's actions were an operating and substantial cause of the Victims' deaths/injuries is best characterised as:

Your answer:

(circle ONE)

- a) A defence in relation to which the Accused bears an evidential burden.
- b) A defence which the Accused must prove on the balance of probabilities.
- c) A fact in issue that must be proved by the Prosecution beyond reasonable doubt.
- d) An issue in relation to which both the Prosecution and Defence bear an equal evidentiary burden.
- e) An evidentiary issue to which no burden attaches to either the Prosecution or the Accused
- f) A legal issue in relation to which no issues of evidence could potentially arise.

[1 mark]

QUESTION 5

Criminal Procedure: This matter is most likely to proceed by way of:

Your answer:

(circle ONE)

- a) Committal proceeding, summary hearing, then trial.
- b) Committal proceeding, then trial.
- c) Summary hearing, committal proceeding, then trial.
- d) Summary hearing, then trial.
- e) Summary hearing only.
- f) Trial only.

[1 mark]

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

The Prosecution intends to call the following witnesses:

- **Clive LEBLANC** can give evidence that he was walking back to his car parked on Toorak Road after having dinner with his wife at a nearby restaurant, shortly before the collision at the intersection occurred. He was walking west along Toorak Road towards the intersection when he saw the traffic lights change from red to green, giving the Victims' vehicle right-of-way. He was only 20 metres away from the intersection when this occurred. He saw the Victims' car accelerate into the intersection *"about 2 seconds after the light had changed to green"*. He then says he saw the Accused's vehicle *"suddenly enter the intersection 2 seconds later"* and clip the front of the Victims' car. He says that the Accused's vehicle was *"travelling more than 110 km/h when it entered the intersection"*. Clive LEBLANC and his wife assisted Michael MORETTI in extinguishing the flames on his body and comforted him until emergency services arrived.
- **Claire LEBLANC** can give evidence that corroborates her husband's evidence above. However, she estimated the Accused's vehicle to be travelling at *"200 miles an hour or more!"*. She also said that the Accused's vehicle *"went into the intersection long after it had changed red, maybe 10 seconds after"*.
- **Braydon NEALE** was driving a vehicle that was behind the Accused's vehicle as it approached the intersection. He estimated the Accused's vehicle was *"initially travelling 70 km/h before the light changed from green to amber"*, and then observed the Accused's vehicle quickly accelerating *"to beat the red light"*.

QUESTION 6

Criminal Procedure: Are these witnesses likely to give evidence at a committal hearing? Explain.
[3 marks]

Answer: _____

seconds or 3 seconds, has had a demonstrable effect at reducing the number of collisions at intersections.

- All of Victoria's traffic light signalling devices, including the Punt Road/Toorak Road intersection have always operated with the amber light transition lasting only 3 seconds.
- It is possible that, had the Punt Road/Toorak Road traffic light system been operating an amber light transition time in accordance with international best practice of 3.5 seconds, it is possible that the Accused may have made the decision to stop, rather than continue, and avoid the collision altogether.

The Prosecution has been served with a copy of the expert report. Counsel for the Prosecution considers her conclusion about the potential avoidance of the collision to be fanciful and highly speculative and should not be presented to the jury.

QUESTION 14

Evidence: Consider the arguments that can be made by the Prosecution to exclude Professor HOGG's evidence, and any response to such arguments of Defence Counsel. [3 marks]

Answer: _____

PART B (Questions 17 to 29) – 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.

Michael MORETTI, in his capacity as executor of the estate of his deceased parents and on his own behalf, has issued proceedings in the Supreme Court of Victoria against Alset (Australia) Pty Ltd (**'Alset Australia'**). Alset Australia distributes the Alset motor vehicle. In his pleadings, Michael MORETTI has named himself as Plaintiff and Alset Australia as Defendant. The Plaintiff has alleged negligence and relies on his statutory right to pursue claims for wrongful death under the *Wrongs Act 1958* (Vic). The Plaintiff has also pleaded claims based in negligence for psychiatric injuries and for breaches of the Australian Consumer Law. He seeks damages exceeding \$20 million.

The Plaintiff's critical allegations in his claim are: (1) the airbags supplied in the 2017 Alset motor vehicle purchased by the Plaintiff's father were defective, in that *'the amount of tetrasulfur tetranitride ('TSTN') used to ignite the deployment of the airbags generated an unreasonable and foreseeable risk of combustion upon deployment that could result in injury or death of a vehicle occupant'*; and (2) Alset Australia ought to have been aware of this risk.

QUESTION 17

Ethics: Assume that you, in your capacity as a member of Counsel, have been approached by a journalist of a leading Australian newspaper and asked to answer the following questions:

- i. *"Do you agree with the jury's verdict in relation to the Sarah Jelas case?"* (refer to Part A above);
- ii. *"What are the prospects of success for the Prosecution/Defence in appealing the outcome of the criminal case involving Sarah Jelas?"* (refer to Part A above);
- iii. *"Can you explain the concept of negligence and what Michael Moretti's lawyers are arguing against Alset Australia?"*;
- iv. *"Is \$20 million too much? Will he win?"*

You were not involved in the Sarah JELAS case and you have not been briefed to act for any of the parties in the civil claim. The journalist has made it clear that your answers to the questions will be

quoted in an article she is writing. You are keen to answer the questions because you want to enhance your reputation as an expert in the field.

Should you answer the questions? Discuss. **[5 marks]**

Answer: _____

QUESTION 18

| | |
|---|---|
| <p>Ethics:</p> <p><i>Your answer: (circle TWO)</i></p> <p>[2 marks]</p> | <p>In settling the statement of claim, Counsel for the Plaintiffs must be satisfied of which TWO of the following matters?</p> <ul style="list-style-type: none">a) Each allegation has a factual basis.b) Each allegation has a witness to support it at trial.c) Each allegation has a proper basis.d) Each allegation cannot be refuted by a reasonable defence.e) There is no viable defence to each allegation.f) There is no viable counter-allegation to each allegation. |
|---|---|

QUESTION 19

| | |
|--|---|
| <p>Ethics:</p> <p><i>Your answers: (circle TWO)</i></p> <p>[2 marks]</p> | <p>Which TWO of the following constitute obligations of a barrister in relation to a case for which he or she is briefed?</p> <ul style="list-style-type: none">a) Present relevant issues clearly.b) Present relevant issues cleverly.c) Maximise evidence in the proceeding.d) Maximise embarrassment for the opposition.e) Minimise the time in court as is reasonably necessary.f) Minimise quantum of damages. |
|--|---|

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

In its Statement of Claim, the Plaintiff has pleaded the following in relation to his negligence claim

28. In or about March 2017, the Defendant breached its duty of care by supplying a vehicle with air bags with an amount of TSTN generating an unreasonable risk of combustion upon deployment that could result in injury or death of a vehicle occupant.

Apart from the allegations pleaded in paragraph 28, nothing further is pleaded which identifies the amount of TSTN that was contained in the airbags and the precise nature of the alleged risk.

The Plaintiff has also pleaded allegations of misleading and deceptive conduct in contravention of section 18 of the Australian Consumer Law:

34. And furthermore, by reason of the aforementioned allegations, the Defendant has engaged in misleading and deceptive conduct contrary to section 18 of the *Australian Consumer Law*.

Paragraph 34 is the only paragraph in the claim that explicitly deals with the misleading and deceptive conduct claim. It is also not clear which of the ‘*aforementioned allegations*’ in the Statement of Claim might constitute the misleading and deceptive conduct.

QUESTION 20

Civil Procedure: After being served with the Statement of Claim, the Defendant’s solicitors wrote to the Plaintiff’s solicitors complaining that paragraphs 28 and 34 of the Statement of Claim are ‘*embarrassing*’. In what ways may that contention be justified? Explain what, if any, reasonable demands would most likely be included in the Defendant Solicitor’s letter in relation to this complaint, and the possible consequences for the Plaintiff if it fails to comply with these demands. [4 marks]

Answer: _____

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

The Plaintiff has obtained the ‘Illinois Uni data’. The data documentation relates to testing of Matsuda’s airbags in Alset motor vehicles which was conducted at Illinois State University in April-June 2015. The testing was commissioned and paid for by Alset US and administered under the supervision of Waldemar HERDER, Professor of Mechanical Engineering in the Faculty of Engineering. Attached to the data documentation is a cover letter from Professor HERDER dated 15 July 2015, which summarises the findings: *“There is a 1 in 1000 chance of airbags exploding on deployment due to irregularity and inconsistency in concentration of tetrasulfer tetranitride. This would most likely be due to a manufacturing process fault in dispensation of tetrasulfer tetranitride into each airbag unit which may be remedied at plant manufacture stage. However, the risk of explosion may increase if environmental temperature variations are extreme and may suggest tetrasulfer tetranitride is not generally safe for use in airbags.”*

Professor HERDER’s findings appear to contradict Alset US’s own in-house testing data (which was disclosed by way of discovery to the Plaintiff). Alset US’s data suggests that there were absolutely no safety issues revealed by its own testing of airbags.

The Plaintiff’s solicitors have contacted Professor HERDER who has indicated he is willing to give evidence in support of the Plaintiff’s case. When asked to comment on the discrepancy between his testing of the airbags, and that of Alset US, Professor HERDER told the Plaintiff’s solicitors: *“It could be for any number of reasons, and perhaps it’s not as devious as you might think. Certainly, I heard nothing more from them after they received my report, but their own testing may have employed a different methodology that didn’t disclose the safety concerns mine did. On the other hand, they could have falsified the data for the purposes of getting regulatory approval. I assume that’s why they commissioned the testing in the first place.”*

