VICTORIAN BAR

Candidate Number:

ENTRANCE EXAM

VICTORIAN BAR READERS' COURSE

1 NOVEMBER 2018

Annotated with Sample Answers

This document is a reproduction of the Readers' Course Entrance Exam which candidates sat on 1 November 2018, 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.

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.

Dr Jason Harkess
Chief Examiner
1 February 2019

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 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 (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

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 (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.

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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 1: The allegation of alternative charge means that if the jury (here as indictable offence) is not satisfied BRD at the offence of culpable driving because for example did not think the level of negligence fell within meaning of culpability in s318(2)(b) but did think that the level of driving fell within that contained in s319 as dangerous, then can instead convict on that charge instead. If the MK/AK does not fit within the more serious charge of s318, open to find on the alternative basis in s319 instead, be elements similar but s319 lesser.
Answer 2: A charge that is heard "in the alternative" is one that is heard within the same trial, but unless the prosecution says that the alleged acts if proved would constitute both offences. The charge in the alternative is used where tjere are additional elements to one of the charges – as here, where dangerous to the public driving could be proved even if gross negligence for s 318(1) is not proved.

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:
    - running red light (Punt Road/Toorak Road intersection, South Yarra, 6 January 2012);
    - speeding (67 km/h in 60 km/h zone, Victoria Parade, East Melbourne, 18 June 2012);
    - running red light (Camberwell Junction, Camberwell, 15 September 2013);
    - running red light (Camberwell Junction, Camberwell, 22 December 2016);
    - 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 2

Criminal Procedure: Sections 318(1), 319(1) and 319(1A) of the *Crimes Act 1958* are 'Schedule 2 offences' under the *Bail Act 1977*. Explain what this means and whether the Accused is likely to be granted bail. **[4 marks]**

Answer 1: There is a statutory entitlement to bail unless the Bail Act requires bail be refused (s 4 BA). In the case of Sched 2 offences, there is a statutory presumption AGAINST bail unless certain conditions are satisfied. First, the bail decision maker must refuse bail to A charged with Sched 2 offences (as here) unless satisfied that a compelling reason exists that justify the grant of bail (s 4C). The burden to show compelling reasons rests with the A; with the bail decision maker to take into account all the relevant surrounding circumstances contained in s3AAA of the BA. Given the recency of the Bail Act, there is little by way of judicial exegesis of the meaning of 'compelling reasons', however in a recent June 2018 case, the Supreme Court indicated that an A must demonstrate to the court, that balancing all the relevant facts, it is compelled to the conclusion that detention in custody is not justified. At this first step, A will seek to show that given she has no criminal history, and is young and a dentist, compelling reasons exist. She may also point to the fact that she was not on bail etc at the time of offending and her personal circumstances (including employment etc.) justify a finding that compelling reasons exist. However, this is a very heavy burden and the other s3AAA surrounding circs that the court is likely to consider include the seriousness of the alleged offending (including level 3 indictable offences) the nature of their committing, the strength of the P case (numerous Ws). Unlikely A will have discharged her burden in this case.
If she does discharge this burden, then the second step will be the unacceptable risk test, with the P bearing the burden to demonstrate that there is a risk that he A will fail to surrender to bail, endanger the safety or welfare of a person, commit and offence, interfere with a W or course of justice (ss 4D, 4E). Here, there do not appear to be any such risks, except perhaps in light of her infringements she might commit another MV offence. Court would have regard to surrounding circs to determine whether risk unacceptable, and also whether any bail conditions (s 5, s 5AAA) could be imposed to mitigate, such as the surrender of her licence, or curfew or use of a bail support service etc. Likely bail to be refused at the first step in this case. While s4 bail act provides that an accused has a presumption of bail, bail act also provides that bail must not be granted in certain circumstances.

Here, as charged with a sch 2 offence, the bail decision maker must refuse bail unless the accused can show a "compelling reason" which justifies the grounding of bail. In this way committing an offence contained within sch 2 acts as a refutable presumption to grant of bail. In order to be granted bail, accused must satisfy, when considering surrounding circumstances in s3AAA, that there is a compelling (i.e. a strong/convincing) reason that bail should be granted. Here weighing against bail is the seriousness of the offences (i.e. 3 people died) and the strong prosecution case. However, accused may argue that because she has no priors, works full time as a health care worker (dentist) and was not on bail at the time then compelling reasons are satisfied. It is unlikely considering seriousness that she would get bail, however her lack of priors and young age may justify granting of bail. If court satisfied there are compelling reasons, then onus shifts to prosecution to demonstrate unacceptable risk. Here as her dual passports and financial means to flee jurisdiction may be unacceptable risk that she will leave jurisdiction/not answer bail. However, such risk could be mitigated by putting conditions on bail like surrendering passport, requiring her not to drive (addresses risk of future offending) and possibly residential req at her parents' house and have her parents put substantial surety in place.

Answer 2: There is a statutory entitlement to bail unless the Bail Act requires bail be refused (s 4 BA). In the case of Sched 2 offences, there is a statutory presumption AGAINST bail unless certain conditions are satisfied. First, the bail decision maker must refuse bail to A charged with Sched 2 offences (as here) unless satisfied that a compelling reason exists that justify the grant of bail (s 4C). The burden to show compelling reasons rests with the A; with the bail decision maker to take into account all the relevant surrounding circumstances contained n s 3AAA of the BA. Given the recency of the Bail Act, there is little by way of judicial exegesis of the meaning of 'compelling reasons', however in a recent June 2018 case, the Supreme Court indicated that an A must demonstrate to the court, that balancing all the relevant facts, it is compelled to the conclusion that detention in custody is not justified. At this first step, A will seek to show that given she has no criminal history, and is young and a dentist, compelling reasons exist. She may also point to the fact that she was not on bail etc at the time of offending and her personal circumstances (including employment etc.) justify a finding that compelling reasons exist. However, this is a very heavy burden and the other s3AAA surrounding circs that the court is likely to consider include the seriousness of the alleged offending (including level 3 indictable offences) the nature of their committing, the strength of the P case (numerous Ws). Unlikely A will have discharged her burden n this case. If I am wrong and she does discharge this burden, then the second step will be the unacceptable risk test, with the P bearing the burden to demonstrate that there is a risk that he A will fail to surrender to bail, endanger the safety or welfare of a person, commit and offence, interfere with a W or course of justice (ss 4D, 4E). Here,

there do not appear to be any such risks, except perhaps in light of her infringements she might commit another MV offence. Court would have regard to surrounding circs to determine whether risk unacceptable, and also whether any bail conditions (s 5, s 5AAA) could be imposed to mitigate, such as the surrender of her licence, or curfew or use of a bail support service etc. Likely bail to be refused at the first step in this case.

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: *Your answer:* ***(circle ONE)*** **[1 mark]**	This matter is most likely to proceed by way of: 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.

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 1: Witnesses will not usually give evidence at committal. Per s 124 leave is required in order to cross examine a witness at committal. The informant may or may not consent and this will then be considered by the Magistrate. The Magistrate will not give leave to cross examine unless the accused identifies an issue to which the questioning relates and provides a reason why the evidence is relevant to that issue. Here the evidence of witnesses is relevant to the speed at which the accused was travelling and when travelling through the intersection. The speed at which the accused entered the intersection is relevant to whether she was negligent per s 318 or driving dangerously, and so is relevant to a fact in issue. Also relevant is the need to determine whether prosecution case is adequately disclosed and will help in preparation of defence as may need to provide alternative evidence (s 124 (4)). Likely here, especially given the importance of the evidence of speed (s 192 E.A), the leave would be granted.

Answer 2: Witnesses will only be required to give evidence at the committal hearing where the accused seeks and is granted leave to XXN the witnesses during the hearing. Leave is granted/not granted having regard to whether the prosecution case is sufficiently disclosed, issues are clarified, and matters relevant to a possible discontinuance are considered (CPA 124(4)). If leave is given it is limited to certain issues on which leave is sought. The prosecution must indicate if it consents or doesn't. Here it is likely the accused would want to XXN all these witnesses during the committal in order to support a submission that because the evidence of the prosecution is so varied and unreliable, that the accused should not be committed to stand trial. Leave would likely be granted on the basis that evidence as to the collision is central to the case and the evidence should be tested at committal.

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

The matter has been set down for trial in the County Court of Victoria.

QUESTION 7

Criminal Procedure: Defence Counsel has identified several matters that will need to be raised at some point in conducting the Accused's case. These include:

i. the admissibility and reliability of the evidence of several Prosecution witnesses;

ii. the meaning of 'gross negligence';

iii. calling an expert witness to give evidence about traffic light signalling systems.

Explain how and when these issues should be raised by Defence Counsel. **[4 marks]**

Answer 1: (i) The admissibility of the evidence of the P witnesses can be challenged at any stage, however, it is best to advise the court as soon as possible, and in any event 14 days before trial of any challenges the D has to the evidence, and seek a pretrial ruling on the issues (see ss 199-200 CrPA; and can get an advanced ruling on evidence under s 192A of the Evidence Act). Note that the court will determine admissibility issues under s 199-200, but reliability may be a matter for the jury (for instance, if the evidence is relevant, but not reliable and so should carry less weight, that is a matter for the jury; although if it goes to whether the evidence should be excluded under s 137 of the EA, then it might be determined at the stage of admissibility by the court). Failure to identify challenges to evidence at this early stage may carry consequences for seeking certification/leave to appeal an interlocutory decision
(ii) the meaning of 'gross negligence' – this depends on whether this is considered a question of law or fact. In my view, it is a question of law – the meaning of that term in law (not whether A committed gross negligence, which would be q of fact). If it is considered a question of law, that is, what the legal meaning of gross negligence is, D may seek a pre-trial ruling on the meaning of the term under s 192A EA. This can be done at any stage, but obviously should be before trial. The legal meaning of that term may also be the subject of jury directions by the judge. In addition, if the court determines that the question of the legal meaning of gross negligence must be determined by the CoA, it could reserve that question of law to the CoA (s 302 CrPA), but that is unlikely in this case as it is not a novel question of law.
(iii) As to the D's intention to call expert witness, D must serve on the P and file in court a copy of the statement of the expert witness at least 14 days before the trial is to commence (of if not yet in existence, ASAP after coming into existence) (s 189). The statement must contain the name, business address of the W, describe the qualifications of the W, set out the substance of the evidence it is proposed t adduce of the W, including opinion of the W and acts, facts, matters and circs on which opinion is formed. For its admissibility, D will also need to ensure expert evidence complies with the requirements of s 79 of the Evidence Act (see also Wilson v Bauer). Assuming these procedural notification requirements are met ant he evidence is admissible, then the evidence of the expert will take place after the A's opening address in accordance with s 231, which allows various ways n which the court may allow witnesses to give evidence (and as it is expert evidence, TJ may give directions about giving of concurrent or consecutive evidence if there are multiple expert Ws: see s 232).
Note also that A's case must be consistent with its response to P's summary of opening and notice of pre-trial admissions (see s 183 CrPA).

Answer 2: (i) Admissibility per s199 and s200, if defence counsel wishes to raise an issue of admissibility, per s200 the accused must notify prosecution and court of the objection to admissibility and grounds of objection. This needs to be done at least 14 days before trial. The judge may per s199 hear and determine the admissibility of the evidence pre-trial. However,

unlikely that questions of reliability will be dealt with pre-trial, as per IMM evidence of witnesses is to be taken at its highest – reliability is better seen as a question of weight for the jury to determine.
(ii) Gross negligence: The meaning of gross negligence is a question of fact. That is whether accused was grossly negligent is a question to be determined by a jury. If legal basis of gross negligence is in question may need to be dealt with pre-trial in some manner as above.
(iii) Expert: A s def wishes to call an expert, must save a copy of expert statement on accused at least 14 days before the trial. The expert statement should contain name and business, describe qualifications to give the evidence, and the substance of evidence proposed to be given.

QUESTION 8

Evidence: Defence Counsel will object to the admissibility of the following evidence proposed to be adduced by the Prosecution from the following witnesses:

i. *"about 2 seconds after the light had changed to green"* (Clive LEBLANC);
ii. *"suddenly enter the intersection 2 seconds later"* (Clive LEBLANC);
iii. *"travelling more than 110 km/h when it entered the intersection"* (Clive LEBLANC);
iv. *"200 miles an hour or more!"* (Claire LEBLANC);
v. *"went into the intersection long after it had changed red, maybe 10 seconds after"* (Claire LEBLANC);
vi. *"initially travelling 70 km/h before the light changed from green to amber"* (Braydon NEALE);
vii. *"to beat the red light"* (Braydon NEALE).

Are the objections likely to succeed? Explain. **[5 marks]**

Answer 1: All the statements extracted for the purposes of this question raise the issue of opinion evidence. As an anterior matter, all these pieces of evidence meet the threshold of relevance because, if accepted, they are capable of rationally affecting assessment of a fact in issue (see ss 55-6), the relevant facts in issue being the extent of A's negligence and whether her driving was dangerous. Therefore, the challenges will need to be mounted with respect to the opinion rules, and perhaps mandatory or discretionary exclusions.
Evidence of an opinion is not admissible to prove the existence of a fact about which the opinion is expressed (s 76), however, there are various exceptions to this rule. I will deal with each statement separately.
(i) 'About 2 seconds …' is opinion evidence, because it is being adduced to prove the truth of the opinion. The W, CL, is not an expert but is a lay W. The relevant exception that applies is s 78, which provides that the opinion rule does not apply to evidence of an opinion expressed by a person who saw etc or perceived a matter and the evidence is necessary to obtain an adequate account or understanding of their perception of the matter or event. Here, D may argue that it is not necessary to receive this evidence of opinion in order to understand CL's evidence or obtain an adequate account of his perception. However, the better view is that in order to obtain an adequate account of CL's evidence, it is necessary to understand his opinions about the speed at which A entered the intersection. Therefore, D's objection unlikely to succeed re this part.
(ii) The same analysis would apply to the second statement ('suddenly enter…') – the evidence is

necessary to obtain an adequate account of CL of what he saw.
(iii) The analysis might be the same with respect to 'travelling 110km or more…'; however, D may argue that it is actually not necessary to receive that estimate of speed in order to adequately understand CL's evidence of the speed of entry of the vehicles into the intersection. D's argument is probably strongest in respect of CL's evidence om this statement; because arguably this is not a lay opinion on the basis just explained, and he is not an expert in traffic speed etc. and therefore s 79 does not apply. However, the court may determine that having regard to the remainder of his evidence, this part is necessary to understand it as a whole under the lay rule. This last statement is a more finely balanced point. In respect of (i)-(iii), D may argue that the probative value is outweighed by danger of unfair prejudice to A, and therefore the court must refuse to admit it (s 137); however, the evidence is likely to be highly probative to facts in issue (the extent of her negligence), and the fact that the evidence is inculpatory does not render it unfairly prejudicial.
(iv) '200 miles or more' – this statement, from Claire L, is also opinion evidence, within the definition I gave above. The evidence is relevant, and the fact that it may be out of step with the other evidence of sound ridiculous as an overstatement is not to the point. It may fall within s 78, as it is necessary to obtain an adequate understanding of her perception of the relevant events. However, this evidence is more likely to be excluded on the basis of s 137 than the above. Although the evidence has probative value (and is taken at its highest for this purpose), it may be unfairly prejudicial in the sense that it would arouse a sense of horror or instinct to punish in the jury.
(v) 'Went into the intersection long after…' again this opinion evidence (adduced to prove the truth of the asserted fact contained in the opinion); and again admissible under s 78 for the reasons given above.
(vi) 'Initially travelling 70k….' – same as above, this evidence is opinion evidence and falls within the s78 exception.
(vii) 'To beat the red light'. This evidence is opinion evidence, but arguably is not relevant (the A's intention in entering the intersection is not a fact in issue). However arguably, it demonstrates what the witness perceived she was trying to do, which is a dangerous act when driving. However, even if relevant, it would not fall within s 78 because the W's opinion of the A's intention is not necessary to obtain an adequate account of what the W perceived.
Therefore, most evidence likely to be admissible under s 78 (although arguments can be raised about s 137).

Answer 2: (i) This is likely considered opinion evidence as is an inference drawn from facts perceived by Clive, thus prima facie inadmissible per s76. However likely to be admissible either as may be considered direct evidence – i.e. because just stating what he saw, or if opinion may apply exception in s78 as a lay opinion because the opinion that she entered intersection "about 2 seconds after" was evidence of an opinion based on what Clive saw. Relevant to degree of culpability.
(ii) Once again likely considered to be admissible opinion evidence as the fact that he saw enter "2 seconds later" was an opinion based on what he saw.
(iii) This is also opinion evidence. Is likely objection will be sustained as Clive could not give an opinion on how fast accused was going as he did not see her speedo/and further is not an expert in speed of vehicles. Could provide lay opinion that she was going very fast, but likely inadmissible as not qualified to give the opinion that was 110km.
(v) This would likely be either direct evidence as based on what Claire saw, or more likely opinion as based on an inference she has drawn about the time elapsed based on what she saw from her car. The time at where car entered intersection after red light is clearly relevant to fact in issue and therefore likely admissible.
(vi & viii) Both of these are likely inadmissible as opinion evidence as a) couldn't know and is not

qualified to give evidence of how fast the car was travelling, and b) could not know why the car was trying to speed up – not within something he perceived/saw. Also, evidence of why she sped up may not be considered relevant as the reason why she sped up is not necessarily relevant to a fact in issue.

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

Counsel for the Prosecution was concerned about the discrepancies between the evidence of Clive LEBLANC and Claire LEBLANC. He decided to meet with them at his chambers to discuss their evidence before trial. The instructing solicitor was too busy to attend, which did not seem to be of any concern to Counsel because he did not need an instructor's assistance for this meeting. The following exchange took place in Counsel's chambers:

> **Prosecuting Counsel:** Mrs LEBLANC, do you understand the problem here? You're suggesting that the car was travelling more than 3 times as fast as what everyone else says. And your estimate of when the Accused's vehicle went into the intersection is way out.
>
> **Clive LEBLANC:** Yes, dear. It's not possible. You've got it all mixed up.
>
> **Claire LEBLANC:** Oh, I see. Yes. I'm not very good with speeds and things like that. What should I say then?
>
> **Prosecuting Counsel:** Well it's not my place to be coaching you as a witness, Mrs LEBLANC. That's a matter for you to sort out before you give evidence. You don't want to look like an idiot. Can I suggest you go home tonight, discuss what happened with your husband, and just get the story straight between you.

After the conference, Counsel for the Prosecution formed the view that Mrs LEBLANC would be 'absolutely hopeless' as a witness and made the decision not to call her at trial.

QUESTION 9

Ethics: Discuss the ethical implications arising from Prosecuting Counsel's conference with Mr and Mrs LEBLANC and his decision not to call Mrs LEBLANC at trial. **[5 marks]**

Answer 1: The barrister has breached numerous ethical rules. First, counsel cannot confer with multiple lay witnesses at once (as here), and counsel is conferring with them about the speed the car was travelling – a key fact in issue as it goes to the extent and nature of A's negligence and dangerous driving. Counsel must not confer with multiple lay witnesses at the same time about any issues which there are reasonable grounds that the B believe may be contentious at the hearing and where such conferral could affect the evidence of a W (r 71). This is clearly breached on these facts, given what they are conferring about, and indeed he suggests that her evidence should be amended. He could have tested her evidence in conference (alone, without the other W there), including drawing attention to inconsistencies or difficulties with it (s 69); but he goes further may saying 'you estimate … is way out'. Second, therefore, this amounts to coaching the W. Although he says is not his place to coach her, he is telling her that her evidence is way out and that she should go discuss the matter with her husband to get the story straight. This may amount to advising her to give false evidence – i.e. copy her husband's evidence, contrary to r 69.

B could have admonished W to tell the truth and in sole conference tested difficulties with her evidence. His conduct could amount to deceiving the court (r 23) and opponent (r 49). Regarding B's decision not to call her at trial, that is also a breach of the Rules. P counsel is obliged to fairly assist court in arriving at the truth, including presenting all relevant evidence (r 83). Must also disclose all evidence relevant to guilt or innocence to the D (r 87) and call all Ws, including Claire, because her evidence may be necessary for presentation of all the relevant circs (r 89). However, given the nature of her evidence is arguably 'plainly unreliable', B counsel need not call her, but must inform opponent of same (r 90). Also, could seek opponent's consent to not calling her, which might be given in light of the prejudicial nature of her evidence to A's case. Counsel's ethical breaches explained about may amount to UPC/PM (s 296-298 LPUL) and can carry serious consequences, including being struck off in relation to suggesting evidence W must give.

Answer 2: Counsel cannot advise witness that false or misleading evidence should be given, nor can they coach (r69). Could argue that counsel was just drawing inconsistencies to her attention (r70), however hardly likely as is clearly advising client to go home and collaborate story to husband – thus likely a breach of rule and therefore liable to disciplinary action. Further, counsel cannot confer with more than one lay witness at a time – clearly breached here as have got both witnesses about contentious issues at the hearing (r71). Also breach of rules and possible unsatisfactory professional conduct or prof misconduct. As Prosecution must seek to have evidence put before the court "impartially" – may be in breach by seeking to influence evidence given by Claire. Re decision not to call: Prosecution has a duty to call all witnesses whose testing is relevant (i.e. here clearly relevant as goes to question of whether was driving dangerously etc). Can only not call if def consent to not calling, or for example here, as thinks it might be plainly unreliable. Unlikely that the evidence would be considered plainly unreliable – witness reliability and credibility is something jury should determine, and there is no reason to believe that there is any factor which marks the evidence inherently unreliable, therefore needs to call. However, if determine that they wont call Claire, prosecution has a duty to inform defence of fact they will not call. It is not a good reason not to call her, and likely fail in duty to put all available and relevant evidence before the court.

QUESTION 10

Criminal Procedure: Assuming the Prosecution does not call Mrs LEBLANC, is the Accused entitled to a *Jones v Dunkel* direction to the jury in relation to Mrs LEBLANC's evidence? Explain. **[2 marks]**

Answer 1: The Jury Directions Act explicitly overrides and abolishes the common law rule in criminal proceedings of Jones v Dunkel. However, s43 provides a statutory version of Jones v Dunkel, whereby the defence may request (s12) that a direction be given on the basis that the prosecution did

not call Claire LEBLANC. The direction will be given if the judge is satisfied that the prosecution was reasonably expected to have called and has not explained why they have not called the witness. If the direction is given, then the judge can instruct the jury that they can conclude that the witness would not have assisted the prosecution case. It is likely that the direction will be given as there has been no good reason for not calling the witness.

Answer 2: Yes, the accused would be entitled to request such a direction under s43 of the Jury Directions Act, which the trial judge should give unless a good reason not to. Section 43 provides that a Jones v Dunkel direction can be given where the prosecution was "reasonably expected to call a witness" and the prosecution has not satisfactorily explained why not. Here, although the prosecution has a justifiable reason under the conduct rules not to call her, as far as the jury is concerned, it would be expected that all eye witnesses give evidence and unreliability is not an excuse. But all the inference does is state that the evidence would not have been helpful, so it does little to assist the defence here.

QUESTION 11

Evidence: The Prosecution intends to adduce evidence of the four prior occasions on which the Accused ran a red light and for which she was issued infringement notices. Explain any basis upon which the Prosecution may attempt to do so and the objections that may be advanced by Defence Counsel in response. **[4 marks]**

Answer 1: Prosecution will want to adduce evidence of the prior running red lights on a tendency basis per s97. If want to rely on tendency evidence must 1) give notice (reg 7 Ev Regs) 2) Evidence must have significant probative value, and 3) as crim matter, the probative value must substantially outweigh any prejudicial effect. Here, likely to rely on the evidence to prove that accused had a tendency to run red lights. In Hughes HCA said that in determining whether the evidence had significant probative value, need to first determine whether evidence proves the alleged tendency and second whether the tendency then goes/proves can infer from tendency, a fact in issue. Here clearly four priors for running red light would be strong evidence proving tendency to run red lights, as specific tendency and similar circumstances. However, the facts above state that the accused concedes that she ran a red light, therefore unlikely that this particular tendency would have significant probative value to a fact in issue, as it is not in issue that she ran the red light. It is therefore given the low probative value, unlikely that the evidence would be considered to substantially outweigh the large prejudicial effect that the jury hearing the evidence of the prior convictions may have. This is

because jury may then place too much weight on these and infer from the facts of the priors, which would ordinarily be inadmissible that she was more likely to have committed the offence. Defence could also object on basis of fact evidence is not relevant as not in issue that she ran the red light, or seek to have excluded on basis of s135.s137 for same reasons as above.

Answer 2: The P may seek to adduce this evidence as either or both of tendency or coincidence evidence. First, re tendency evidence: evidence of the conduct, character, reputation, or tendency that a person has is not admissible to prove that a person has a tendency to act in a particular way or have a particular state of mind unless (i) the party seeking to adduce (here, P) has given reasonable notice in writing, and (ii) the evidence (on its own or with other evidence) has significant PV (s 97). P will argue that evidence of her prior infringements demonstrate a tendency to act in a particular way, namely a tendency to drive dangerously, and will seek to tender it to prove that she acted in accordance with that tendency on this occasion. Tenedncy evidence likely to have significant probative value where (i) strongly supports proof of the tendency, and (ii) strongly supports proof of fact in issue (Hughes, unaltered in Bauer). The PV of the evidence here is significant because it demonstrate that she had a tendency to drive fast or entering an intersection when prohibited by law from doing so. A special feature may be required (Bauer) although here there probably is one – driving into intersections either too fast or running red light.
D counsel may argue that the evidence should be excluded on the basis of s 101, on basis that its PV substantially outweighs danger of prejudicial effect. However, the evidence does have reasonably high PV (demonstrate tendency described above, capable of supporting proof of facts in issue), and no unfair prejudice (no risk of unfair use, arouse sense of horror in jury, or jury likely to give disproprortionate weight, or A having to answer a raft of very old charges: see Dickman, Bauer, Hughes). Same analysis would apply to s 137 if raised by D. P may also notify on the basis of coincidence evidence, on the basis that evidence of the previous events of infringement sought to prove that on the basis of their similarity with instant offence, unlikely they all occurred by coincidence (s 98). However, in s98 context, more similarity is required than in s 97 context, and given in some cases the evidence was of running a red light and some speeding (whereas in the instant case – both), and in the instant case involved serious injury/death where it did not in the prior cases, likely to have significant PV. If this is wrong, s 101 and s 137 analysis would apply. If this evidence is adduced, D counsel could seek directions under the JDA s 27 (other misconduct evidence).

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

The Accused was arrested and formally interviewed by police when she was released from hospital on 26 September 2017 (three days after the collision). She made a 'no comment' interview. However, Senior Constable James MILLER accompanied the Accused in the ambulance that transported her to Alfred Hospital. He engaged in the following conversation with the Accused in the back of the ambulance:

> **S/C MILLER:** You've just killed some innocent people, Sarah.
>
> **Accused:** Oh my god! Oh my god! I'm sorry.
>
> **S/C MILLER:** You know you ran a red light?
>
> **Accused:** I knew I wouldn't make it. It was so stupid.

The conversation was not recorded, but it can be corroborated by the evidence of the paramedic, Sean WILSON, who was also in the back of the ambulance treating the Accused for her injuries. Mr WILSON had administered morphine to the Accused for her pain, prior to the conversation between S/C MILLER and the Accused taking place. The Accused was at time delirious and incoherent in her speech due to the combined effects of the morphine, alcohol and injuries. The Accused may also have been affected by amphetamine. Several times during the trip to the hospital, Mr WILSON had to tell S/C MILLER to stop speaking to the Accused as Mr WILSON was trying to administer treatment. Mr WILSON considered S/C MILLER's general demeanour to be aggressive and overbearing.

QUESTION 12

Evidence: Explain the relevance of the conversation between S/C MILLER and the Accused, and consider the arguments that can be advanced by Defence Counsel to exclude this evidence. **[5 marks]**

Answer 1: This evidence likely amounts to admission by the A, on the basis that it is evidence of a previous representation by a party (A) and is adverse to her interest in the outcome. It is relevant because capable of affecting existence of a fact in issue, being whether she was negligent or drove dangerously, because could amount to an admission by her of same, and therefore satisfies the relevance threshold under ss 55-6. She said 'oh my god, I'm sorry, I was so stupid' etc., which could amount to an admission that committed the acts in question. The hearsay and opinion rules do not apply to evidence of an admission (s 81), although HS rule only doesn't apply if its first hand (s 82). Evidence from either Miller or Wilson would be first having evidence of the admission and therefore

prima facie admission under s 81, and the HS rule does not apply. Therefore, their evidence can be adduced to prove the truth of what she asserted – assuming that she intended to assert that she committed the acts in question. However, given she made the admission to/in the presence of Miller (an investigating official who presumably was at the time performing functions investigating the offences in question), the evidence of the admission is not admissible unless circumstances are such that it is unlikely truth adversely affected (s 85). Court would take into account her disabilities at the time (drugs, physical injury, morphine, alcohol etc.) and likely will determine truth adversely affected. Would also have regard to the way in which Miller put the questions to her. Note: s 86 does not apply because there is no record. In addition, court has a discretion to refuse admission if in the circumstances it would be unfair to the accused. Given she was inebriated, under physical distress etc., and likely under serious stress and shock, and given Wilson kept telling M to stop speaking, court likely to find that it is unfair to adduce. Also, pursuant to s 138, court must refuse to admit evidence that is improperly obtained unless desirability of admitted outweighs undesirability. D may argue improperly obtained on basis that she was questioned by an investigating official and she was either coerced or deceived into making the admission (s 138(2)) however Miller didn't actually do anything to deceive her. Probably s 139 applies because there was sufficient basis to arrest her and she was not cautioned. Then court will balance desirability v undesirability: will look at the PV of the evidence (high because could prove facts in issue), gravity of contravention (also high, he knew she was inebriated etc.), importance of evidence, availability of other evidence (there are many Ws and other evidence), whether deliberate or reckless etc. Court likely to refuse to admit. Also, may conclude that prejudicial effect outweighs PV under s 137. Note: Court to find she made the admission if reasonably open to so find (s 88). If the court concluded that given the equivocal words she used (I'm sorry etc) does not amount to an admission; then the evidence would be hearsay evidence, because the P would be tendering it to prove that she drove dangerously etc. If so, hearsay evidence adduced by M or W would need to fall within an exception in s 65, and possible circs re such that unlikely to be a fabrication and made shortly after asserted fact. However, once again, court likely to exclude on bases above (including s 137).

Answer 2: The conversation is relevant as an admission because it is a previous statement which is adverse to her outcome in the proceedings as it suggests that she was trying to run the red light. Whilst hearsay, admissions operate as exception to the hearsay rule (s81). Defence may argue that evidence should be excluded per s85 on basis that the circumstances of making admission was unreliable. This is because accused was high on morphine at the time was made and was put in response to the officer

telling her that she had killed people. Further, could seek to exclude on basis of s90 discretion because she was groggy on morphine and therefore the circumstances of making the admission mean that it would be unfair to rely on the admission. Further, as not recorded, could seek to exclude on basis of s138 as evidence was improperly obtained. Need to determine whether the desirability of the evidence outweighs the undesirability of admitting evidence which was obtained in way that was obtained. Here could have waited to get to station to record and could be highly undesirable to admit evidence which was obtained where was under influence of heavy painkillers. S84 Unlikely relevant here, although could argue that fact that being in the back of ambulance and high on morphine whilst also being pressured by an "aggressive" police officer may mean that the admission was influenced by this fact – although query whether reaches high test set by s 84.

QUESTION 13

Evidence: The admissibility of the evidence of the conversation between S/C MILLER and the Accused is to be determined by way of 'voir dire'. Explain what this means, including what critical distinctions may be drawn between adducing this evidence in a 'voir dire' and adducing the same evidence in the ordinary course of the trial. **[3 marks]**

Answer 1: A voir dire is a 'trial within a trial'. It is a hearing to determine the existence of facts going to a preliminary question, usually (as here) in relation to the admissibility of evidence (s 189). Witnesses can be called and XXN'd, assisting the judge in determining the relevant issue. Voir dire usually held in the absence of a jury, and in the case of either admissions or improperly obtained evidence under s 138 (both of which apply here, for reasons explained in previous question), the voir dire MUST be conducted in absence of the jury. Therefore, one obvious difference with adducing at trial is that the jury will not be there. The TJ will determine the existence of relevant facts for the purpose of determining the evidentiary issue. For instance, here, will determine on the basis of s 88 (reasonably open) whether A made an 'admission' or not, and whether improperly obtained or not. Also note, questions concerning facts going to admissibility of evidence (whether on voir dire or at trial) are determined on balance of probability (s 142; although note difference explained above re s 88).

Answer 2: A voir dire, per s189 EA, is a hearing held in absence of a jury to determine questions of admissibility. One distinction is that finding of fact must be made on the BOP (s142) rather than BRD, and also not heard in front of the jury. One other distinction is that, per s189(8) EA fact of evidence is given by a witness on voir dire, that evidence cannot be adduced in the actual proceeding

unless the evidence is relied on as a previous inconsistent statement or the witness has died. Further, hearsay rule does not apply to evidence if party who adduces also adduces evidence of its source (s75), whereas at trial rules of hearsay apply.

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

Defence Counsel intends to call Professor Ainsely HOGG to give evidence on behalf of the Accused. Professor HOGG is an expert in traffic signal engineering and teaches at Bristol University in England. Professor HOGG prepared a report dated 6 May 2018 which she wrote after conducting an inspection of the Punt Road/Toorak Road traffic light signally system. Her report states the following:

- International standards in relation to traffic light signalling devices have long held that 3.5 seconds is the most efficacious duration of an amber light signal that transitions flowing traffic from a green ('go') signal to a red ('stop') signal. This international standard has been adopted in most European and North American countries and reflects research that 3.5 seconds, rather than 4 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 1: Hogg's evidence is opinion evidence. Defence Counsel need to establish it is admissible under expert evidence exception, by showing Hogg has specialised knowledge based on study, training, experience (yes), that the opinion is wholly or substantially based on that knowledge (yes)

and, the facts upon which the opinion is based and a statement of reasoning explaining relationship between facts and opinion. While these elements are likely to be established, the preliminary issue is whether the evidence is relevant. Evidence is relevant if it could rationally affect the assessment of the probability of the existence of a fact in issue, if accepted. May be relevant if PV 'slight'. Prosecution can argue under s 135 evidence should be excluded as PV substantially ostracized by risk unduly waste time or be misleading/confusing, since fanciful. When assessing probable value for either relevance or s 135, evidence is to be assumed to be relevant and credible – unless it is inherently fanciful or could not be rationally accepted. Here, PC has a reasonable argument that evidence of best practice traffic lights and what A might have done with longer amber light is inherently fanciful and therefore not admitted under s 55 or excluded under s 135.

Answer 2: H's evidence is opinion evidence (s 76), and therefore an exception needs to apply to adduce. Per s 79, opinion rule does not apply to evidence of opinion given by an expert, with specialised training, knowledge, experience and where opinion substantially or wholly based on the expertise. P counsel may challenge admissibility on the basis that here evidence is not relevant, or she does not have relevant expertise, or her statement of reasoning is deficient. Per Wilson v Bauer, for s 79 admissibility, evidence of expert must be relevant, based on expertise, and include statement of reasoning exposing assumptions on which it is based, which are capable of independent proof, and statement of reasoning (although unsound or truncated reasoning does not render inadmissible because that can be exposed during XXN). Here, P may argue that H's evidence not relevant to any fact in issue, because not relevant to whether A acted dangerously or grossly negligently. However, it is relevant to the substantial and operating cause question therefore satisfied relevance threshold. Given H is an expert in traffic control and teaches at Bristol, satisfies expertise rule, and also H's evidence is based on that expertise, therefore satisfied expertise basis rule. P may argue that evidence does not sufficiently expose factual assumptions capable of independent proof or statement of reasoning but in this case, it is likely that the statement is merely truncated but not sufficient to render it inadmissible as in Wilson. Also, unlikely that any undue waste of time, prejudice, or misleading evidence, nor likely to demean the victims, such as to raise an issue under s 135 for discretionary exclusion.

QUESTION 15

Evidence: Assume that the trial judge would have ruled that Professor HOGG's evidence admissible. However, a day before she was due to give evidence, she died. Can Defence Counsel now simply tender into evidence a copy of her written report and invite the jury to consider it in their deliberations? Explain. **[3 marks]**

Answer 1: Can't just tender. The evidence is hearsay as it is evidence of a previous representation which is sought to be adduced to prove the truth of the facts contained in the report. Thus, hearsay and inadmissible. However, if give notice in s67, may seek to adduce on basis that the master is unavailable (clearly satisfied = dead). Need to show that the report was made in circumstances which make it highly probably was reliable – likely here as was made in context of writing a scientific report. However, as no possibility to cross examine, may not be admitted given questions of reliability.

Answer 2: Professor H's evidence is being used for a hearsay purpose (to prove the truth of its contents) Thus admissible unless exception applies. Here, only relevant exception is s65 (not admissible because dead) would need to satisfy one of the paragraphs of s65(2) – only (2)(c) is relevant, and it is not likely to be satisfied - circumstances do not suggest rep is highly probably to be reliable. Even if a hearsay exception applied, PC would likely argue s175 should exclude because unfairly prejudicial not to be able to cross examine Prof H re manner in which opinion reached.

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

The jury returned a verdict of 'not guilty' in relation to the three s 318 charges, but 'guilty' in relation to the three s 319(1) (death) charges. The jury also found the Accused 'guilty' in relation to the s 319(1A) (serious injury) charge. Following a plea in mitigation, the trial judge convicted the Accused and sentenced her to 36 months imprisonment in relation to each s 319(1) charge and 30 months in relation to the s 319(1A) charge. All sentences were to be served concurrently, making a total effective sentence of 36 months. The judge set a minimum non-parole period of 31 months.

Prosecution and Defence Counsel take issue with the outcome of the case in the following respects:

- Prosecution Counsel believes that the evidence clearly established the s 318 charges beyond reasonable doubt and desires a re-trial on those charges.
- Defence Counsel believes there should have been an acquittal on all charges, including the s 319 charges.

- Both Prosecution and Defence Counsel think the non-parole period of 31 months is bizarre.
- Both Prosecution and Defence Counsel are not satisfied with the total effective term of imprisonment (believed to be too low and too high by the Prosecution and Defence, respectively).

QUESTION 16

Criminal Procedure: Explain the appeal options for Prosecution and Defence in relation to their respective grievances with the trial and sentencing outcome. **[4 marks]**

Answer 1: P cannot appeal against acquittals but can appeal against sentence. Only if satisfied that there is an error in the sentence imposed and a difference sentence ought to be imposed, and satisfied appeal should be brought in public interest (s 287), filed within 28 days of sentence. P cannot get a retrial on charges where there was an acquittal. Can appeal against sentence on the basis that it was manifestly inadequate (see Osborn for a similar appeal re sentence being inadequate)). Also, note that P can refer a point of law to the CoA in respect of an acquittal under s 308, but that will not alter the outcome.

D may appeal against conviction on any ground, to the CoA, with leave (s 274), must file application for leave within 28 days of sentence. CoA may allow if s 276 satisfied. D also ale to appeal against sentence alone, with leave, within 28 days (s 278) (although sounds as though D likely to appeal conviction and sentence, therefore s 274 is the appropriate route). Therefore, D can appeal against convictions AND sentence, including if think sentence manifestly excessive. The NPP is erroneous. A NPP must be at least six months shorter than the head sentence (s 11 Sentencing Act), and therefore this is clearly an error. Therefore, sentencing appeal likely to succeed if brought by either on this basis. (There is not mathematical formula for a NPP – see McLean; but can to be at least 6 months less than head sentence).

Answer 2: As has been acquittal, pros cannot seek a re-trial/appeal decision. However, DPP may appeal to CoA per s308 by referring a question of law that has arisen in the proceeding. Needs to be a question of law only, cannot be questions of fact. Def may apply for leave to appeal against his conviction. Appeal will need to be commenced by app for leave to appeal, filed within 28 days. Will need to satisfy CoA that the verdict of guilty was unreasonable/error due to irregularity/some miscarriage of justice. CoA can either remit for rehearing/acquit dependent on their findings. A NPP must be at least 6 months less than the head sentence, therefore as here is only 5 months, there has clearly been an error in sentencing. Pros/Defence should seek leave to appeal against sentence, as

clearly an error in sentencing entire sentencing discretion re-opened and therefore may re-sentence (as below process) – see House v R. Need to explain where NPP is more than 80% (Romero) see s281 – error. Either DPP or appellant can appeal against sentence. DPP has a right of appeal where determine appeal is in public interest. Accused can apply for leave to appeal against sentence. Both need to be filed 28 days after sentence. As likely error in sentence, then will grant leave. If going to give a more severe sentence CoA must warn (on appellant sentence appeal).

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 1: As counsel is not briefed in the case, then r76 applies. Counsel can make comment to the media in relation to explaining what negligence is as it is a discussion of "genuine academic discussion" in relation to a current or potential proceeding but must be careful not to discuss her opinion as to merits of the negligence arguments. Re other questions: (i) Likely could make comments, as r76 only relates to a current proceeding and case is past. However, should be careful not to make comments as to enflame integrity of legal profession. Although should not make comment while there is possibility to appeal. (ii) Per r76, cannot discuss opinion on merits of a current proceeding – discussing merits of appeal would be in breach so should not discuss this question. (iv) Similarly, merits of whether $20m is too much or the Plaintiff's likelihood of success are likely to appear to express opinion on merits of case, therefore should not answer. If answering permissible questions, should not divulge any confidential or inaccurate information.

Answer 2: Even though I, as counsel, am not involved in the proceedings I am bound by the Bar Rules regarding media comment. I am only allowed, per BR r 76, to express my opinion on the merits of a current or potential proceeding only in relation to genuine academic/educational discussion on matters of law. Q (i) of the journalists' questions is actually not about a current or potential proceeding, but rather about a concluded proceeding (assuming no appeal has been brought). Nevertheless, it could go to the current civil proceeding (for instance, if the jury was right to convict SJ, then that may go to the civil defendants' liability), and in any event it would be improper for a barrister to comment on whether a jury got it right or wrong; that may damage the reputation of the profession. However, is at least a close call given the criminal proceedings have concluded. Q (ii) asked by the journalist: given an appeal might be pending (depending on the timing of the questions etc.) it would be a breach of r 76 for me to answer, because it is not a genuine discussion in an academic/educational context on matters of law. Q (iii) asked by the journalist requires an explanation of the concept of negligence – if this were divorced from a question about a current proceeding, might be ok to answer as arguably it is to educate public about a matter of law (negligence). However, what MM's lawyers are arguing is beyond the scope of what r 76 allows. The same goes for Q (iv) – I cannot, as counsel, express my opinion on the merits of the proceeding and it is not for an education purpose/context. Barrister must maintain high standard of professional conduct, and owe paramount duty to administration of justice, and also owe duties to their colleagues. This media comment, if

given, could even prejudice a jury if there is one, in this civil case, and damage the administration of justice. If answers given to all the questions, could amount to UPC/PM under the LPUL.

QUESTION 18

Ethics:	In settling the statement of claim, Counsel for the Plaintiffs **must** be satisfied of which **TWO** of the following matters?
Your answer: ***(circle TWO)***	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.
[2 marks]	f) There is no viable counter-allegation to each allegation.

QUESTION 19

Ethics:	Which **TWO** of the following constitute obligations of a barrister in relation to a case for which he or she is briefed?
Your answers: ***(circle TWO)***	a) Present relevant issues clearly.
	b) Present relevant issues cleverly.
	c) Maximise evidence in the proceeding.
	d) Maximise embarrassment for the opposition.
[2 marks]	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 1: Pleadings are 'embarrassing' in the legal sense when they do not enable the other side to understand the case put against it. Pleadings must contain a summary of the material facts on which the party relies and should set out each allegation in separate paragraphs. [28] fails to set out each element of the negligence claim and the material facts supporting those elements. Pleadings must also contain particulars of fact to enable the other party to plead and define questions for trial. Paragraph 28 does not include any particulars explaining the amount of TSTN alleged or facts that underpin this claim. Further, particulars should be given where knowledge or motive is alleged.
(13.10) – Here P's claim is that D ought to have been aware of risk, so basis of this knowledge/motive should be pleaded.
[34] Pleads a conclusion of law without pleading the material facts supporting that conclusion. D's lawyers should write to P's lawyers asking them to amend pleading and provide further and better

particulars, outlining why. If P refuses, D could apply to strike out pleadings in [28]/[34] as embarrassing (v23.02) could also seek order for particulars under v13.11.

Answer 2: Pleading is "embarrassing" if it is difficult to understand/does not disclose a cause of action. The pleadings here are likely justified to be described as embarrassing on the basis that re [28] does not describe how it was unreasonable/why it was unreasonable by amount of TSTN and re [31] it is unclear which allegations make up allegations of misleading and deceptive conduct, and therefore the Defendant is unable to properly respond. The Defendant should write and ask for further and better particulars with regard to the missing information as identified above. Could also seek that the Plaintiff amend their pleading (allowed per 036 – and should be alone here to determine the real question in controversy between the parties). The Plaintiff would need to seek leave to amend. If Plaintiff does not provide f&b particulars, then as def has already written to Plaintiff, court may order (r13.11) that the Plaintiff provide f&b particulars. If f&b particulars are still not provided, def may seek, per r23.02 that the pleadings be struck out either in whole or in part on basis that the pleadings do not disclose a cause of action (e.g. Here as does not say how misleading & deceptive), or on basis that may embarrass fair trial of the proceeding as does not allow defence to be pleaded in response. Will make app of affidavit evidence, served by way of summons.

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

At an early stage in the proceeding, it becomes clear to both the Plaintiff and the Defendant that other parties may also be potentially liable for the claims alleged by the Plaintiff, including:

- Alset, Inc ('**Alset US**'), Alset Australia's parent company that manufactures and supplies Alset motor vehicles to Alset Australia.
- Matsuda Kaisha ('**Matsuda'**), the Japanese company that manufactured and supplied to Alset US the faulty airbags.

QUESTION 21

Civil Procedure: Who should join Alset US and Matsuda to the proceeding– the Plaintiff or the Defendant? Discuss with reference to the case of *Fafoutellis v The Blockage Bloke Pty Ltd* [2017] VSC 480. **[4 marks]**

Answer 1: The Plaintiff or Defendant could seek to join Alset US and Matsuda. Plaintiff would seek to join either on the basis of r9.02 or 9.03 – Likely that a common question of fact or law would arise, and incident occurred out of some series/transactions. Therefore, may be in interests of promoting efficient determination of dispute. More likely r9.02, as it is unlikely considered would be jointly liable. In Fafoutellis leave to join a third party was refused on the basis that the joinder would have effect of adjoining the trial, and there was no reasonable explanation offered as to why the third party was sought to be joined sooner. However, here we are in an "early stage" of the proceeding and parties appear to have only just found out possibility of joining, so would appear (Fafoutellis) that would be in best interests of both parties and the administration of justice that the two parties be joined. The Defendant could seek to join by way of third party notice in form 11A. Would seek to use third party while as they may either be seeking contribution/indemnity from the parties on the basis that they supplied faulty goods or on basis that any question relating to liability between Plaintiff and Defendant should also be determined between the other parties. Likely here as questions of liability in supply chain may help determine liability. Although, Plaintiff could issue separate proceedings and then per r9.12 seek to consolidate them, however preferable to join and would better serve overarching purpose.

Answer 2: Either P by rr 9.02 or 9.06, or D by third party notice under O11, could seek to join Alset US or M. Fafoutellis was about joinder by TPN under O11. A defendant may, if seeks a contribution or indemnity from a third party, or rights of relief substantially the same as relief brought by P, or a question arises also as against the third parties, as well as against P and D, may join them by third party notice, by filing a TPN in Form 11A, indorsed with a statement of claim, within 30 days after the time for served a defence (and served on TP within a further 60 days). If do not comply with that time limit – need leave. Therefore, D should do it ASAP and within the 30 days after defence served. Fafoutellis raises the issue of an application for leave to join by TPN well after that time. In Fafoutellis, Mr F sued his employer, BB, for personal injury arising out of work (he was a jet truck operator working on water infrastructure, who was injured inter alia during the moving of man hole covers and operating a water hose). BB denied liability; and another defendant was Lendlease. Three months before trial, well out of the time prescribed under O11, BB sought leave to join a third party, Yara Valley Water (the owner of the water infrastructure) for contribution or indemnity for its failure to take reasonable care, in the event the BB was held liable for F's injuries. The Court refused to grant leave, on the basis that given BB knew of the potential third party joinder issue well in advance of the time it sought leave (it was simply waiting for LendLease to join YVW), there would be

irreparable delay (Mr F had been injured and unable to work since 2014), which could not be cured, there would be a vacation of the trial date, and at least a six months delay. Therefore, in the circumstances, and in light of the purpose of the CPA for just efficient timely resolution of dispute, court held leave should be refused (but synergies could be obtained by using evidence and discovery in proceeding in any subsequent proceeding against YVW). Applied here, if the Ds are on notice of the third party issues, they should file third party notices, or risk that the court will refuse leave for similar reasons as in Fafoutellis – there might be a vacation of the trial date, there might be irreparable prejudice to the P, and there will be stress and anxiety caused to P, as there would have been to Mr F, if there was such a delay and vacation of the trial date, which would be contrary to the purpose of the CPA. Also, although this was not raised in Fafoutellisis, here, as an alternative, P may apply to join each of them on basis that common question of law or fact arises, and rights of relief arise out of the same transaction or series of transactions (r 9.02). Here commons questions of negligence, duty, breach, causation and all rights of relief arise out of the same crash. In addition, could seek to join under r 9.06.

QUESTION 22

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

Answer 1: Yes, the matter could be heard before a jury because under r47.02, it is founded on a tort (negligence of Alset) including breach of statutory duty (by ACL claim). To have it heard by a jury, either party may elect – Plaintiff by stating in the court, defendant by notice within 10 days of last appearance. However, the court retains a discretion to order that it proceed by judge alone – including where issues are complex and evidence voluminous. Given the multiplicity of parties, it is likeloy such a claim would ultimately not be heard by a jury.

Answer 2: Yes, since claim is based on tort it can be heard before a jury of 6 if either party requests (in writ or notice) and pays jury fees. Court has a discretion to direct that a matter not be heard by a jury but should only do so where there is a "special reason" (Svajcer).
Juries to be regarded as capable of dealing with complex factual and legal matters. No reason to order no jury trial here. Other claims can be heard by jury where court orders.

QUESTION 23

Civil Procedure: Explain the following two types of court order and the circumstances that might give rise to a party in this proceeding seeking and obtaining such an order:

i. order for security for costs **[2 marks]**
ii. freezing order **[2 marks]**

Answer 1: (i) Security for costs: On application of the defendant, court may order the P pay into court some security for its costs of defending. This may be made pursuant to O62 (see Raventhorpe) or in the court's inherent jurisdiction (Trkulja). An order for security under O62 may be granted in circumstances where (a) the jurisdiction under r 62.02 is enlivened (here that would require that the P be ordinarily resident outside of Victoria, for instance), and (b) the court to decide whether to exercise its discretion t grant, having regard to factors including (as relevant: whether the security order would stultify proceedings, any delay by D in bringing the application, whether P's impecuniosity was caused by D – probably would be here, as his parents were killed etc.). Court could also order security even if there were no r 62.02 ground if for e.g. P had acted with impunity as to his obligations under the CPA, or perhaps had many versions of his statement of claim struck out, as in Trkulja.

(ii) A freezing order: a freezing order under O37A is an order that seeks to meet the danger that the court's processes will be inhibited by a judgment/prospective judgment going wholly or partly unsatisfied. May be made where court is satisfied that the respondent is likely to engage in some prohibited dealing (mere impecuniosity is not enough), for instance, absconding, moving asserts or dissipating assets. For e.g., if one or more defendants were selling off their assets or moving them offshore, or there was evidence that they intended to do so, P could apply for a freezing order to prevent that. P could do so with or without notice (with or without summons), with affidavit in support, verifying basis of claim, any defence if without notice/argues against, nature of assets as known, any person likely to be adversely affected and basis for deponent's belief of prohibited dealing.
Note that improperly bringing either type of order may amount to a breach of the relevant party/lawyer's obligation to only take steps to resolve or determine the dispute (s 19 CPA).

Answer 2: (i) Security for costs (062) is an application made by the Defendant in a proceeding where necessary because there is a danger that if they are successful plaintiff may not be able to pay the Defendant's costs. In *Raventhorpe* court identified that first need to determine whether one of the factors in r62.02 is present which would enliven the security jurisdiction, and then 2nd, by reference to factors such as delay caused by the def/voluntary ass. of risk (not relevant here). Whether security and for how much should be granted. Security here may be warranted if Plaintiff was not a Victorian resident, or has multiple claims in different courts, however no such circumstances appear likely here. (ii) Freezing order (037A) will be ordered where necessary to protect Plaintiff from receiving a "hollow" judgment, that is, will be ordered where there is evidence that has been put on affidavit and that prospective judgment may be wholly unsatisfied on the basis that the assets of any of Defendant's might be removed from Australia, or might otherwise dealt with/disposed of in a way which would frustrate judgment. Here may be necessary to ensure that the assets of Alset are not transferred out of Australia to parent company. Plaintiff would need to show that they have a good arguable case.

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

Alset US and Matsuda have been joined to the proceeding. Orders for discovery and inspection have been made.

The Plaintiff's solicitors have inspected all other parties' discovered documents and have found the following documents particularly useful:

- Email dated 2 May 2018 from John PERKINS (Chief Executive Officer, Alset Australia) to Alyssa HALL (Vice President, Alset US) stating: "*Lawyers have asked us to provide all airbag testing data, including damaging data. The Illinois Uni data will be bad for us but this needs to be included."*
- Email dated 9 March 2017 from Alan Motors, Inc (a United States car dealership based in Palm Beach, Florida) to Alset US outlining an incident that occurred on 1 March 2017 with a customer that had just recently bought a new 2017 Alset from the Alan Motors car dealership. The author of the email, David ALAN, stated in the email: *"The customer had a minor rear-end collision with a car in front and the airbags deployed and exploded causing significant burns to the customer."*
- Newspaper article from *Florida Times* dated 2 March 2017 reporting on the same incident.

QUESTION 24

Civil Procedure: None of the parties have produced any 'Illinois Uni data' as part of their discovered documents. Explain the following:

i. the general obligations pertaining to 'discovery' in civil proceedings and whether any of the parties may have breached these obligations; **[2 marks]**

ii. the procedural steps that the Plaintiff could take to obtain the 'Illinois Uni data' documentation. **[2 marks]**

Answer 1: (I) Discovery is obligation on parties to search for, disclose and provide for inspection any relevant documents for the proceeding. The scope of discovery is any documents which the party relies on, adverse to party's case, adverse to the other party's case and support the other party's case. Here the 'Illinois Uni data' would appear to be highly relevant to the proceedings, as goes to show that Alset may have knowledge that the airbags were not safe. Therefore, Alset may be in breach by not discovering any university data. (ii) Could first seek an order for particular discovery per r29.08 on the basis that it appears that the university data may be within power/possession of Alset. Could alternatively seek further discovery if later comes into possession once brought to attention, or, could issue subpoena to Illinois Uni if could particularise what the data is, would be in form 42B, however unclear from the email what the actual data is, so better to ask for particular discovery from Alset or potentially discovery from third party and determine what the data is.

Answer 2: (i) obligation of discovery: parties must discovery all docs, after a reasonable search, upon which they rely, or which are adverse to their case or another party's case, or support another party's case (r 29.01.1). Reasonable search would have regard to the nature of the proceedings, number of docs involved, ease and cost of retrieval, importance of any doc if found. The procedure is that after pleadings have closed, party give another notice for discovery and opposite party to give discovery by way of affidavit within 42 days, enumerating and describing the docs, and identifying any docs no longer have and any docs in respect of which privilege claimed, and the ground. Then the first party by notice to produce can request inspection of discovered, and opposite party to reply within 7 days stating time and place for inspection (rr 29.02, 29.03, 29.04, 29.09). In addition, there is a continuing obligation of discovery under the Rules. With respect to the 2 May email including Illinois Data (whatever that may be), it appears likely breach of discovery obligation because likely relevant and probably adverse to Ds' cases. Also, if they claim privilege in respect of Illinois Data,

they needed to set that out in their affidavit. Failure to comply with discovery obligations can carry serious sanctions (see eg CPA s56).
(ii) procedural steps: P can seek an order under r 29.08 for discovery of the Illinois Data as there is grounds to believe such data is in the Ds possession. Could also seek an order under r 29.11 requiring Ds to comply with their discovery obligations. In addition, P could serve on Ds a default notice in accordance with rule 29.12, and on default the court may order committal.

QUESTION 25

Evidence: The email from John PERKINS to Alyssa HALL dated 2 May 2018 was included in Alset Australia's discovered documents. Alset Australia is now asserting that this email was discovered "*inadvertently"* and "*cannot be used by the Plaintiff in this proceeding in any way"*. Is there any merit in this assertion? If the Plaintiff insists upon relying on this email, and the Court is called upon to adjudicate a dispute over its use, will the Court resolve the issue by drawing upon principles of common law or provisions of the *Evidence Act 2008?* Explain. **[5 marks]**

Answer 1: Alset is raising a claim of legal professional privilege. Could be on the basis of legal advice privilege or litigation privilege (as we do not know whether the proceedings were contemplated at 2 May 2018; mostly likely litigation privilege on the basis of the date, the proceedings were probably already contemplated). Evidence is not to be adduced, on objection of client, if court satisfied its adducing would result in disclosure of confidential communication between client and another (here, a communication from employees of two Ds) for the dominant purpose of (either) client being provided with professional legal services in relation to an anticipated/pending proceeding (s 119). Here, the communication relates to correspondence from one defendant to another defendant likely for dominant purpose (paramount, actuating purpose) of each of them being provided with professional legal services in relation to proceeding. Because communication refers to 'lawyers' asking for particular docs, and it is in May 2018, when likely proceedings actually contemplated or commenced. Note a communication is confidential if court determines that either sender or recipient under express or implied obligation not do disclose its contents. Given the reference to lawyers, probably an implied obligation of confidence here. Prima facie, the docs are privileged (court may inspect them to determine, because it is not easy to say on the face of the information we have at present).
However, client legal privilege may be lost, where for e.g. client/party consents to disclosure (s 122(1)) or has acted in a way inconsistent with the maintenance of the privilege and maintaining the

objection (s 122(2)). Here, if they consented to the disclosure by way of discovering, short of it being inadvertent and therefore being not a waiver, may be consented. As to s 122(2), it is worth noting that it is not inconsistent with the maintenance of the privilege that the disclosure was between parties, because they likely have joint privilege (assuming same lawyer retained), or common interest privilege. Inadvertent (i.e. entirely mistaken) disclosure is not usually regarded as sufficient to amount to inconsistency (as the HCA held in the Expense Reductions case). Court will have regard, first and foremost, to the statutory text, to ascertain whether there has been a waiver (see Viterra). There is some merit in the assertion that there was an inadvertent waiver, but we would need more facts – because on those disclosed so far, does not appear that there was a large volume of disclosure and a simple mistake. Therefore, there may be a waiver under s 122(1) or (2). Court will resolve this matter not by the common law but by reference to the Evidence Act, because s 131A provides that although s 118-119 (and following) refer to 'adducing evidence', they also apply to pre-trial procedures, such as discovery. If privilege waived, privilege in related communications may also be waived (s 126). Note also that where joint privilege applies, one of the joint privilege holders can waive privilege – court does not need to find that both of them waived privilege (see s 124).

Answer 2: The Defendant is seeking to assert privilege over the email. Likely to seek to rely on privilege on basis that it is a document which was prepared for dominant purpose of being used in litigation, therefore client legal privilege protects the doctor. Plaintiff would asset that the privilege has been waived per s122, as it was disclosed to the Plaintiff. However, the Defendant would argue that it was inadvertently disclosed and therefore did not knowingly and voluntarily disclose (see, eg Viterra or ERA). The question of whether the privilege can be exercised is a question to be answered by reference to both common law and evidence act s9. EA provides common law, not to be affected by EA.
Common law here would indicate, 0per ERA, that inadvertent disclosure would not ordinarily waive the privilege and similarly in Viterra said not waive privilege as long as maintenance of the privilege was not in contradiction to the pleading. However, s125 cannot maintain privilege if is in furtherance of a fraud – arguably here cannot maintain privilege is purpose to hide fact that they did not disc lose certain documents required to be disclosed.

QUESTION 26

Evidence: Counsel for the Plaintiff proposes to adduce into evidence at trial copies of the email dated 9 March 2017 from Alan Motors as well as the *Florida Times* newspaper article. Counsel for the Defendant, Alset US and Matsuda object to this evidence being adduced on the basis that it is 'hearsay'.

i. What is 'hearsay' evidence and why is there a general rule that prohibits its use? **[2 marks]**
ii. Explain why you consider each of these documents is/is not hearsay. **[2 marks]**
iii. If each document is hearsay, explain whether it is likely to be first-hand, second-hand or more remote hearsay. **[2 marks]**
iv. Explain whether any hearsay 'exceptions' could apply to each document. **[2 marks]**

Answer 1: (i) Hearsay evidence is evidence of a previous presentation made by a person (outside of the proceedings) and is not admissible to prove the existence of a fact in issue that it can reasonably be supposed that the person intended to assert by that presentation (sJ9). There is a general rule against its use because it is inherently unreliable.
(ii) The email is arguably not hearsay, while it is a previous representation is not sought to adduce the previous incident occurred, it is sought to prove the fact that Alset had received other notices of similar incidents prior to the matter occurring and was therefore on notice of potential problems, therefor relevant whether it was negligent by failing to investigate issues. It is hearsay if sought to prove the existence of the earlier incident. The article is clearly hearsay as it is a previous representation sought to be adduced to more existence of asserted fact – that other incidents have occurred.
(iii) If the documents are hearsay, the letter will be second hand hearsay – The person who wrote it did not have personal knowledge of whether incident occurred, they did not see it or hear it but was informed by a customer. The newspaper article is second hand hearsay if it was written by someone who interviewed the customer who has the accident (who had personal knowledge) but may be more remote if it was based on an interview with Alan (which would be based on other previous reps from his customers).
(iv) The non-hearsay exception may apply to the email if it is sought to prove whether Defendant had knowledge of other potential incidents rather than to prove the asserted fact that the incident occurred, to put it on notice and turn mind – relevant to negligence fact in issue. May be a business record (s69) not produced for legal proceedings (Adams). Metadata admissible to prove when/to who it was sent (s71). No exceptions for article.

Answer 2: Hearsay is evidence of a previous representation which is adduced to prove the fact asserted in the previous representation which can reasonably be thought to have been intended to be asserted in the representation. Excluded per s59 on basis of fairness – other party should have ability to cross examine and to test the evidence of the other side.
Email would be hearsay as is evidence of a rep that a customer has collision, however 2nd hand hearsay as a maker of representation unlikely to have personal knowledge of the representation. If 2nd hand then only business records exception applies, as other exceptions only first hand. Would fit under s69 exception if found to be a document prepared in course of business – likely here as an incident report email likeoly a document could be produced in course of business. If considered FHH (only if maker had personal knowledge because saw incident) then likely admissible. Strong maker avail exception, as may be too difficult to fly out to give evidence.
Likely newspaper article is FHH as the maker of the representation (journalist) would have seen/perceived the representation that the incident occurred. However, if did not have personal knowledge (also likely as may not have seen and story would be based on other eye witness accounts) then would be SHH. Would only be admissible if business record, news article likely business record per s69 as prepared for business of making newspaper. Also, could rely on judicial notice (s144) if able to verify by ref to other articles. Is hearsay as it is intended to be relied on to prove the truth of assertion in the news article – ie that the airbag burns occurred as a result of collision.

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."*

QUESTION 27

Civil Procedure: Explain the procedural steps and requirements associated with the Plaintiff having to prepare Professor HERDER's expert evidence for trial. **[3 marks]**

Answer 1: Per v44 would need to ASAP provide Professor with a copy of expert code in Form 44A and would need to provide copy of report to court and other parties 30 days before trial. Report must be signed by expert. Report needs to comply with code and must outline things like facts/assumptions made in report (ie could provide copy of instruction letter) and also basis of any shortcomings in evidence/also the way in which his qualifications justify the making of his opinion in the report. Need to ensure witness aware of his requirements re overarching obligations. Need to attach data documents to the report.

Answer 2: As soon as practicable after order 44 engagement Plaintiff should give Herder a copy of the expert code of conduct. No later than 30 days before trial, the report must be served on each party if any subsequent reports are made by Herder, these should also be served on all other parties. The report should be signed by Herder and accompanied by clear copies of photographs, plans, calculations, analysis, measurements and reports to which the report refers. Plaintiff should ensure Herder is to be available to give evidence at trial, will not be able to give evidence (except in cross examination) unless substance is in report or court gives leave. Report should set out statement of assumptions and specialised knowledge (Wilson).

QUESTION 28

Ethics: Would Counsel for the Plaintiff be entitled to assert that Alset US and/or Alset Australia conspired to falsify the testing data at trial? Explain with reference to Counsel's ethical obligations. **[3 marks]**

Answer 1: Falsifying data amounts to fraud. It must not allege any matter of fact amounting to criminality, fraud or serious misconduct under (r65) B believes on reasonable grounds that (a) available material by which the allegation could be supported provides a proper basis for it, and (b) client wishes allegation to be made, after having been advised of seriousness of allegation and possible consequences for client if case not made out. Here there is no material providing a proper basis – the mere fact of an inconsistency cannot supply one, and H himself has made it quite clear that there could be any number of reasons for it. While B can rely on sol's opinion that material is credible (r66), B still needs to exercise independent judgment concerning whether the material, if credible, would provide a proper basis – here it does not. If B adduced the evidence, would also breach overarching obligation (eg s18 proper basis). Would likely constitute unsatisfactory conduct (if not prog misconduct) and could open B up to costs order.

Answer 2: Counsel must not allege any matter of fact amounting to fraud or other serious misconduct, which collusion would clearly be, unless counsel believes on reasonable grounds that available material supports a proper basis for the allegations and the client wishes allegations to be made after having been advised of the seriousness of the allegation and possible consequences if the case is not made out. Also has similar obligations under CPA. Should only assert if have proper factual basis by which to base the claim on.

QUESTION 29

Evidence: Assume the adduction of evidence that suggests Alset US and Alset Australia falsified the data is ethically justified. What legitimate forensic purposes would such evidence serve and how, practically speaking, would the Plaintiff adduce it? Is *Browne v Dunn* applicable? Explain. **[4 marks]**

Answer 1: The evidence would be used to discredit the evidence/witness who provided evidence of the testing data. Generally, the credibility of a witness is not proper for cross examination, however here the evidence may substantially affect the assessment of the credibility of the witness as it is

evidence which tends to prove that a false representation (i.e. false date testing) was used. As Plaintiff wants to put evidence which contradicts the evidence put by the Defendant, would need to put Alset witness who adduced the report in order to give opportunity to explain. Could alternatively put on basis that Alset have breached their overarching obligation not to mislead or deceive and obligation to act honestly. Could adduce the evidence that the data is falsified in order to prove that the evidence was intended to deceive the court. Should provide the evidence which demonstrates falsity of the evidence to Alset out of fairness and then should provide to court. Court may then make orders (including costs) re the failure to comply to overarching obligation into account re costs/dismiss proceedings. Could also seek to call witness who could testify as to how the data was falsified. If done this way would need to comply to B v D.

Answer 2: If there is evidence that the data was falsified, it is relevant to demonstrate knowing breach of the duty of care, and that the testing data is unreliable. It is likely to affect the credibility of a witness, e.g. the person who did the testing. The Plaintiff may adduce the evidence via Professor Herder depending on the form of the evidence, timing etc. Alternatively, the Plaintiff may take to deduce the evidence of falsification via cross-examination of a witness (or witnesses) for the defendant. If we assume that there is a document showing falsification perhaps showing the "real" (pre-falsifications) figures, it would have to be put to the witness in XXN (s 43, s 106). If the witness did not accept the documents, it would then be adduced (s 106). It would then be admissible as proof of the asserted facts (s 60). If the evidence is relevant only to credibility, section 103 would need to be considered but it seems likely that XX about the existence of a prior inconsistent statement of results would be allowed. The rule in Browne v Dunn is applicable. Counsel would need to put to any defence witness that relies on the falsified data that they were false. May also need to put that they know they were false.

END OF PART B

End of examination