



**FACULTY OF ARTS AND LAW
SCHOOL OF LAW**

COURSE NAME: LAW OF EVIDENCE

COURSE NO: LA310

TIME ALLOWED: 3 [Three] Hours

READING TIME: 10 [Ten] Minutes

NUMBER OF PAGES: 9 [Nine] including this cover page

NUMBER OF QUESTIONS TO BE ANSWERED: 7 questions [ie five [5] from Part A and one each from Parts B and C

MARK ALLOCATED FOR EACH QUESTION: Part A: 40 marks
Part B: 30 marks
Part C: 30 marks

TOTAL MARKS: 100 marks [60% of Final grade]

1. THIS EXAM HAS 3 PARTS. ALL PARTS ARE COMPULSORY

Part A: 40 marks
Part B: 30 marks
Part C: 30 marks

2. There is some choice available in each part
 3. You are required to answer a total of 7 questions ie five from Part A and one each from Parts B and C
 4. Write your answers in the answer booklet provided
 5. This exam is worth 60% of your overall mark
 6. You may take any WRITTEN materials into the examination room EXCEPT Text Books.
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Please do not turn over any page until you are told to do so.

APPROVED

Z. Popeski 24/05/07

PART A (40 Marks) This part consists of only question 1. However, there is a choice within the question.

Question 1. Answer any 5 of the 7 parts of this question. Each part is worth 8 marks.

(a) John runs a tourist cruise boating business, taking paying passengers on rides in his boat. When taking the boat through the breaking waves at the entrance to a lagoon to get out into the quieter ocean waters one Saturday afternoon, the boat was hit by a huge wave. It overturned, and one of the passengers, Jenny was thrown from the boat and drowned. Her husband Peter, the Plaintiff, is suing John, the Defendant, alleging negligence in his conduct when in charge of the boat.

The Defendant wishes to call Dr Smith, an oceanographer, to give evidence of the rarity of such a large wave, and the unlikelihood of the boat being overturned.

The plaintiff wishes to call a local fisherman, Jack, to explain to the court the dangerousness of John's actions, based on his local experience of the seas at the location of the accident.

Discuss the evidential issues raised in relation to these witnesses.

(b) Alfred is charged with the murder of his neighbour 10 years ago. During the prosecution case the prosecutor called Dr Fang, an expert odontologist, who testified that some bite marks on the deceased's neck matched those of Alfred. During cross examination by defence counsel it was put to Dr Fang that she had remarked to a colleague 3 years ago that it was generally virtually impossible to reliably identify the teeth of any person from bite marks. Dr Fang answered "Yes" to this suggestion.

The prosecutor has in his brief a copy of a paper delivered by Dr Fang to a conference 7 years ago in which she explained that although bite marks were generally difficult to match to any individual teeth an exception existed in the case of bite marks on specific areas of the body such as the neck because those types of marks were generally less diffuse because the incisor and canine teeth often left distinctive impressions.

What should the prosecutor do? Discuss fully the evidential issues raised.
DO NOT DISCUSS EXPERT OPINION EVIDENCE

(c) (i) What is corroboration?

(ii) With reference to caselaw, discuss whether a lie told by an accused can amount to corroboration.

(iii) Can a recent complaint in a sexual case be treated as corroboration? Why or why not? Refer to decided caselaw.

(d) Describe how judicial notice and presumptions operate to establish facts in court without a party having to call evidence of the fact. In your answer illustrate the matters by reference to relevant decided caselaw.

(e) In a civil action for negligence seeking damages arising out of a collision between the Defendant's motor car and the Plaintiff's bicycle the Plaintiff's counsel calls Mrs S who testifies in her Evidence in Chief that she was in her back yard with her daughter (from where she could see the intersection where the collision took place). She heard a car "revving up and sort of roaring up the road." She testified that the noise of the car sounded very fast and then she heard the screech of brakes and a bang and she then looked over to the intersection for the first time and saw the Plaintiff and the bicycle he was riding up in the air. She was then asked by the Plaintiff's counsel what she said to her daughter immediately BEFORE the noise of the accident reached her.

Counsel for the defence has objected to this on the grounds it is hearsay and a previous consistent statement.

You are the trial judge. It has been indicated to you that the answer from Mrs S would be, referring to the noise of the vehicle, "He is going too fast" and that she completed the sentence just as the noise of the impact was heard. Give a short ruling on Defence counsel's objection, referring to relevant rules of evidence.

(f) In a civil action arising out of a collision between a jet ski and a yacht moored at a marina Mr Y was called by the plaintiff and in his Evidence in Chief described how he saw the jet ski collide with the yacht because he was standing on the deck of his yacht looking towards the scene.

During cross examination it was put to him that he could not see the scene because it was late afternoon in winter and the western sun would have been shining directly into his eyes. Mr Y agreed that the western sun would have been shining into his eyes but for the fact that the yacht moored next to him, called the "*Pacifica Goddess*" had its mainsail up and this protected him from the western sun.

Defence counsel has a copy of the Pacific Post newspaper dated 5 days before the accident which has a photo of the "*Pacifica Goddess*" leaving the marina and a news item stating "*Pacifica Goddess*" set sail today on its long journey to the Americas Cup off the United States of America.

What can defence counsel do with the newspaper article? **HINT:** The newspaper article is not the document of Mr Y.

(g) Compare and contrast the Burden and Standard of Proof that applies in a civil and criminal trial. In your answer refer also to the standard that applies when a defendant makes a non suit or no case submission and how this is approached by a court when there are assessors involved.

PART B. (30 Marks) This part consists of 2 questions arising out of the same trial.

Answer EITHER Question 2 OR Question 3.

Question 2

Janelle Brown is the Plaintiff in a civil trial. She is suing the Defendant, Rupert Cross, alleging negligence arising out of an accident on 1st February 2005 when her husband Fred fell to his death from the 3rd floor of a motel building owned by the Defendant. The Defendant, Rupert Cross, is an accountant.

During the Plaintiff's case Albert was called as an eye witness. Albert is a self employed earth moving contractor. He swore that the deceased leant gently against the railing on the balcony when it suddenly gave way and the deceased fell three floors to his death.

During the cross-examination of Albert by defence counsel the following exchange occurred:

Q1. You have known the defendant for years haven't you?

A. No I had never seen him before the accident.

Q.2 He was appointed in 2001 to liquidate your father's assets in Bankruptcy I suggest.

A. I have no idea.

Q.3 You lost all of your inheritance because of his actions I suggest?

A. I did lose my inheritance that's true, but I don't blame him.

Q.4 I suggest that you threatened to get even with the defendant if it was the last thing that you did.

A. Absolute rubbish.

Q5 You testified that you witnessed the accident from a vacant allotment next door to the accident scene?

A. Yes

Q.6 And you were there on the 1st February 2005 because you were preparing the site for construction of a new building?

A. That's right.

Q.7 I put it to you that you submitted your final invoice for that job in November 2004.

A. That's a lie.

Q.8 You are having a sexual relationship with the Plaintiff aren't you?

A. Certainly not. I barely know her.

During the Opening of her case Defence Counsel foreshadowed calling the following evidence:

- (a) The Managing Director of the Defendant's firm to say that the Defendant liquidated Albert's father's assets in Bankruptcy in 2001.
- (b) A handwritten letter by Albert to his cousin Ben dated 12 January 2002 in which Albert threatened to get even with the Defendant.
- (c) The owner of the site next door to the accident scene to give evidence and tender a photocopy of Albert's final invoice for site preparation dated 20 October 2004 and stating that the work was complete.
- (d) Peeping Peter who will say that Albert and the Plaintiff had stayed overnight at his motel twice in early 2006.

Answer ALL of the following questions.

- i. **Which, if any, of the pieces of evidence in (a) (b) (c) or (d) proposed to be called by the defence relate to the facts in issue and which, if any, offend the Collateral Issues Finality Rule. Give full reasons for your answer identifying the ultimate facts in issue, the relevance of the evidence to them and explaining the Collateral Issues Finality Rule and applying it to the proposed evidence. (12 Marks)**
- ii. **Explain the rule in *Browne v Dunn* and discuss whether the rule has been sufficiently complied with during the cross examination detailed above. In your answer you should discuss the way a court can deal with a breach of the rule. (12 Marks)**
- iii. **Explain the use, if any, that can be made of the photocopy of the invoice dated 20th November 2005 (6 Marks)**

Question 3

During the same trial as in **Question 2 above** Rosemary was called to give evidence during the Defence Case. The following took place during her Evidence in Chief.

Q.1 Were you at the Defendant's motel on the 1st February 2005?

A. Yes

Q. 2 Did you see the deceased on that day?

A. Yes

Q. 3 Where was he?

A. I don't really recall.

Q.4 Did you go to the 3rd Floor balcony that day?

A. I don't remember. I could have.

Q. 5 Did you see any accident that day?

A. I'm not sure really.

Q.6 Would you like some more time to think about it?

A. No, Mr Smartie Lawyer, I'm sure I don't remember. You lawyers think you are all so superior.

Defence Counsel has a signed statement given to Detective Starling by Rosemary 5 months after the accident in which she detailed how on the 1st February 2005 the deceased had been drinking heavily with her and others on the 3rd Floor balcony and how later in the evening he had been demonstrating to his 10-year-old son Whacko how he, as a former International Rugby Union front rower, would tackle a New Zealand All Black front rower. During this demonstration he crashed into the balcony railing and it gave way under his excessive weight and force and he fell to his death.

Defence counsel also wishes to call the 10 year old son Whacko. Whacko had spoken to his cousin later that night and at that time wrote in his own handwriting a statement detailing what had happened on the balcony. Whacko now has no recollection of what happened on the night.

Answer ALL of the following questions.

i. What can Defence counsel do with the witness Rosemary? Detail fully the relevant law. (10 Marks)

ii. What use can be made of the signed statement by the witness Rosemary. Explain fully the significance of the statement, its evidential effect and the procedures that should be followed in making any use of it. (10 Marks)

iii. What evidential issues are raised by the defence's desire to call Whacko? (5 Marks)

iv. Explain the use, if any, that can be made of the handwritten statement of Whacko during his evidence in chief. (5 Marks)

PART C (30 Marks) This part consists of 2 questions. Answer EITHER Question 4 OR Question 5

Question 4 (30 Marks)

Bernadette had planned to celebrate her 21st birthday on her grandfather

George's houseboat, which was moored at a pontoon at the back of Bernadette's house. When Bernadette woke up and proceeded to the kitchen to make herself breakfast, she found an envelope containing a birthday card from her mother on the kitchen table. The card said, "Happy 21st Birthday Bernie! You've grown up so fast! Here are the keys to your grandfather's houseboat. I hope you have a great time celebrating your birthday on the houseboat with your friends. Unfortunately, I can't help you set it up because I have to go to Canada on urgent business. Love Mum. P.S. Be careful on the top deck as your grandfather says the wiring in the railing is a bit loose."

Bernadette had invited two of her friends, Finlay and Flynn, to come to her house on the morning of the party to help set the houseboat up with balloons, streamers, food and drinks. Finlay and Flynn arrived at 11am and starting drinking bourbon and colas. Bernadette showed Flynn the birthday card she had received from her mother, but did not show Finlay as he was busy pouring himself another bourbon and cola.

Whilst setting up for the party on the houseboat, Bernadette took a photograph on the top deck of the houseboat of Finlay, who was holding a bourbon and cola, and wearing a party hat. The railing on the top deck is in the background of the photograph and the wire in the railing looks quite loose.

At 10pm, the party was in full swing. All the guests had arrived, music was playing loudly and there was plenty of alcohol to sustain them for a few more hours. By this time, Finlay had been drinking bourbon and colas for 11 hours. Since 6pm, party goers had seen Finlay staggering around the top and lower decks of the houseboat. In particular, one party goer, Paris, had said that Finlay was quite intoxicated.

Finlay had staggered up to the top deck of the houseboat and tried to rest on the vinyl bench seat. However, Finlay found the loud music all too much and decided he would have to leave the houseboat. As Finlay stood up, he leant both of his arms backwards on the top deck railing to stretch himself. At that point, he was heard by Bernadette to call out "Help the railing has given way" and seen to fall to the lower deck. Finlay sustained head injuries and is suing Bernadette's grandfather, the owner of the houseboat, for negligence. Finlay is unable to recall any of the events of the day. Assume that Bernadette's grandfather is counterclaiming for contributory negligence because Finlay had been drinking heavily for the 11 hours in the lead up to the fall.

Discuss the admissibility of the evidence that both sides may wish to lead arising from the above.

Question 5 (30 Marks)

John Brown is an employee in the accounts department of a firm of Accounts. A sum of Vt 400,000 is missing from the firms Trust Account. John is the person responsible for the administration of the account. A cheque was made out to a “Ms J Smith”, drawn on the account, in the amount of Vt400,000.

The signature on the cheque is in the name of John Brown. John denied all knowledge of any wrong doing when questioned by the police. The signature looks like his but John says the signature is a forgery. John has been charged with fraud, and stealing.

At his trial the prosecution wish to lead the following evidence

- (a) a photocopy of the cheque.
- (b) call another member of the accounts department to identify the signature on the cheque.
- (c) produce the entries that have been made in the firms ledger which show the movement of the cheque through the firms accounts purporting to show the missing amount as a refund of overpaid fees by “Mrs J Smith”. The book keeper who made the entries is on an extended holiday somewhere in the Antarctic.
- (d) produce a marriage certificate showing the marriage of John Brown to Jenny Smith the year before the alleged offence.
- (e) Call a police officer who says that he tape recorded a confession by John to him made in the police car taking John to the police station. The police officer says it is John’s voice on the tape but the recording is so distorted that it is impossible to even recognise whether the speakers are male or female.

John wishes to give evidence in his own defence and say that the police officer is lying and has fabricated evidence like this in another trial.

John also wants to give evidence of his good reputation in the community and his incident free history of being the treasurer of a large sporting club for the last eight years.

John has 3 convictions for shop stealing 5 years ago.

Comment on the evidential issues raised by all of the evidence intended to be introduced by both sides.