EVIDENCE EXAM SCRIPT

Table of Contents

12 Marks; b) 10 Marks; c) 15 Marks; d) 9 Marks; e) 6 Marks; f) 8 Marks.

Q1: 30 mins – 6:00

Q2: 25 mins – 6:25

Q3: 37.5 mins – 7:02

Q4: 22.5 mins – 7:25

Q5: 15 mins – 7:40

Q6: 20 min – 8:00

Universal Notes

All references to legislation pertains to the Evidence Act 2008 (Vic) unless stated otherwise.

Relevance

'Relevance' is a threshold requirement for any evidence admitted in legal proceedings (s 56(1)) - relevant evidence will be admissible unless otherwise excluded by a rule of evidence or by the operation of the ss 135 and 137 discretions.

The test is whether [evidence] could rationally affect the assessment of the probability of the existence of a fact in issue, namely whether this evidence is relevant to fact that required to provide in order for [the causation of action / defence to made out OR the element of an offence/defence] made out (Heydon J, HML).

evidence is to be taken at its highest (IMM), meaning all evidence with any probative value will be admitted (BBH).

Discretionary and mandatory exclusions ss135-7

General discretion to exclude evidence (s 135)) (both civil and crim)

[D/P] will rely on s 135 to exclude [evidence] on the basis that its probative value is substantially outweighed by the danger that the evidence might:

- be unfairly prejudicial to a party (s 135(a)).
- be misleading or confusing (s135(b))
- cause or result in undue waste of time (s 135(c))

Probative value

When assessing an evidence's PV, the evidence is to be taken at its highest (IMM). OTF, the PV is [strong/weak] because:

- it directly supports the elements of [offence]

- it only shows motive. While motive may suggest an element of [offence], it is not sufficient on its own to establish that element.

Unfairly prejudicial

OTF, there is a risk

- the jury may rely on the evidence in an improper or emotional way that is, on a basis not logically connected to the issues.
- The evidence might appeal to their sympathies, provoke horror, or trigger a desire to punish, leading them to decide the case on something other than the facts.
- It may also cause jury to accept a lower standard of proof than is normally required.

Example of evidence that may be unfairly prejudicial

1. Evidence that creates procedural fairness (*Darmody*)
2. Evidence that creates forensic disadvantages, inability to cross examine
3. Evidence that may be emotionally charged evidence (think sexual offences, offences against children, family violence, violence against women)
4. have potential for misuse

General discretion to limit evidence (s 136)

As there is a danger that a particular use of the evidence might

- be unfairly prejudicial to [party] (s 136(a))
- be misleading or confusing (s 136(b))

then the court may limit the use to be made of evidence. Unlike s 135 and s 137, s136 does not require a balancing test.

Exclusion of prejudicial evidence in criminal proceedings (s 137)

As this is a criminal proceeding, Defence Counsel may rely on s 137, which requires that prosecution evidence be excluded if its probative value is outweighed by the risk of unfair prejudice to [D]. [see above]

On balance, it is likely that the evidence will be excluded / limited per s 135-137.

Unreliable evidence (crim) (s 32 JDA)

As the evidence is (s 32)

- (a) hearsay or admissions
- (b) evidence possibly affected by age, ill health, injury, etc.
- (c) given by a witness may be criminally implicated
- (d) prison informer evidence
- (e) oral evidence of police questioning not acknowledged by accused

P/D may request a jury direction per s 32(1). In giving the direction, under s 32(3) the trial judge must:

- warn the jury that the evidence may be unreliable;
- inform the jury of the significant matters that may cause it to be unreliable (s 32(3)(b)(i));
- if a child witness, explain what matters, besides age, might cause it to be unreliable (s 32(3)(b)(ii)); and
- warn the jury to be cautious in deciding whether to accept the evidence and in determining its weight (s 32(3)(c)).

Unreliable evidence (civil) (s 165 EA)

OTF, the evidence may be unreliable because it is (s 165(1))

- (a) hearsay evidence or admission evidence
- (b) identification evidence
- (c) evidence may be affected by age, ill health, injury, etc

As, there is a jury, P/D may the judge to (s 165(2)):

- warn the jury that the evidence may be unreliable (s 165(2)(a)
- inform the jury of matters that may cause it to be unreliable (s 165(2)(b))
- if a child witness, explain what matters, besides age (s 165(6)), might cause it to be unreliable (s 165(2)(b))
- warn the jury to be cautious in deciding whether to accept the evidence and in determining its weight (s 165(2)(c)).

Direction in relation to identification

The prosecution or defence counsel may request under s12 that the trial judge direct the jury on identification evidence in accordance with s 36 JDA.

Competence

Normal adult

For [witness] to give evidence, they must be both competent and compellable. Under s 12, every person is competent to give evidence (s 12(a)), and all competent persons are compellable to do so 12(b)).

Pursuant to ss 12(a) and 13(6), we presume that as an adult with no cognitive or mental impairment, [witness] has the capacity to understand questions about facts (s 13(1)(a)), and give answers that can be understood (s 13(1)(b)). Therefore, [witness] is both competent and compellable to give evidence.

Moreover, [witness] understands the obligation to give truthful evidence, they will give sworn evidence after taking an oath or affirmation (ss 21(1)–(2)), in the appropriate form (s 21(4)).

Child

For [witness] to give evidence, they must be both competent and compellable. Under s 12, every person is competent to give evidence (s 12(a)), and all competent persons are compellable to do so 12(b)). Given [witness]'s age, there may be concern that they lack the capacity to understand a question about a fact (s 13(1)(a)) or give an answer that can be understood (s 13(1)(b)) and that this incapacity cannot be overcome (s 13(1)).

However, under s 13(2), partial competence may be sufficient if the child can competently give some relevant evidence.

Further, if [witness] does not understand the obligation to tell the truth (i.e. is not aware they are morally or legally bound – GW), then they cannot give sworn evidence (s 13(3)). The current facts are comparable to GW, where Burns J held that the child lacked the required level of understanding. Thus, [witness] may give unsworn evidence, provided the Court informs them of the matters in s 13(5) (s 13(4)), and failure to do so may render the evidence inadmissible (SH).

Lastly, it should be noted that

- if civil – A judge cannot provide any warning on the basis that the [witness] is a child (s 165A EA)
- If criminal – A judge cannot provide any warning on the basis that the [witness] is a child (s 33 JDA)

Adult with disability

For [witness] to give evidence, they must be both competent and compellable. Under s 12, every person is competent to give evidence (s 12(a)), and all competent people are compellable to give that evidence (s 12(b)).

To rebut the presumptions, a lack of capacity must be shown. Here, the presumption of competence may be rebutted by [mental, intellectual, physical disability]. Due [witness's] [condition/circumstances], [party] will argue that [witness] will not be competent to give evidence, as they

- does not have the capacity to understand a question about the fact (s 13(1)(a)); or
- does not have the capacity to give an answer that can be understood to a question about the fact (s 13(1)(b))

Even if [witness] is considered incompetent, s 13(1) requires that this incapacity cannot be overcome. [Party] may argue the incapacity can be overcome through:

- An interpreter (s 30)
- Appropriate questioning techniques (s 31(1)) (e.g. for hearing impairment),
- Giving evidence by other means (s 31(2)) (e.g. communication difficulties).

Further, the Court may obtain expert opinion to assess competence per s 13(8). OTF, it is likely [witness] will be found to be [competent / incompetent].

Sworn evidence

If [W] is found to be competent, they will generally be required to give sworn evidence, provided they understand the obligation to tell the truth (s 13(3); *Seymour*). Here, [witness] understands the obligation to give truthful evidence, they will give sworn evidence after taking an oath or affirmation (ss 21(1)–(2)), in the appropriate form (s 21(4)).

Unsworn evidence

Red flag: Young children and adults with a cognitive impairment

Similar to the witness in GW, the facts suggest that [W] arguably lacks the capacity to understand the obligation to tell the truth, as required by s 13(3). However, under s 13(4), [W] may still give unsworn evidence, provided that the Court informs them of the matters in s 13(5). Failure to provide this explanation may result in [W] being incompetent to give unsworn evidence or the evidence being deemed inadmissible (SH). Importantly, the Evidence Act does not treat unsworn evidence as unreliable.

Lastly, since [W] has a cognitive impairment though is competent, the opposing party may seek a reliability warning (CRIM: ss 31(b); 32 JDA / CIVIL: s 165 EA).

Witness is D

For [witness] to give evidence, they must be both competent and compellable. Under s 12, every person is competent to give evidence (s 12(a)), and all competent persons are compellable to do so 12(b)). As [W] is an accused in a criminal proceeding, they are not competent to give evidence for the prosecution (s 17(2)) but they are still competent to give evidence for their own defence.

W ceased to be competent

Even though W [dies / ceased to be competent to give evidence] after giving part of their evidence, evidence already given remains admissible (s 13(7)).

Compellability

Co-accused

Tried jointly

As [witness] and [D] are being tried together, [witness] is not compellable to give evidence for or against [D] in the same trial for the Crown (s 17(3)).

Tried separately

As [witness] is being tried separately from [D], [witness] is compellable to give evidence for or against [D] in that separate proceeding (s17(3)).

W is D's spouse or immediate family

Since [W] is the [spouse/de facto partner/parent/child] of the accused ([D]) in a criminal proceeding, [W] may object to giving evidence under s 18(3). The Court must inform [W] of their right to object under s 18 (s 18(4)), and the objection must be made before giving evidence or as soon as practicable after becoming aware of that right (s 18(3)).

If an objection is made, [W] is not compelled to give evidence if D's counsel satisfy the two-limb test in s 18(6):
It is not contentious that compelling [W] to give evidence would likely cause harm to [W] or to their relationship with [D] (s 18(6)(a)). But P may argue that the desirability of admitting the evidence is high because:

- the nature and gravity of the offence (a)
- how important [W]'s evidence is and how much weight it's likely to carry (b)
- whether the prosecutor can reasonably get other evidence about the same matters (c)
- the nature of the relationship between [A] and [W];
- whether [W] would have to reveal something the accused told them in confidence (e)

- The charge is very serious (ie murder in Khan) (s 18(7)(a))
- [W] is the only eyewitness (*Khan*), and there is no alternative evidence available (s 18(7)(c)).
- Furthermore, the evidence will not reprise any personal sexual matters involving unfaithfulness, as was the case in Khan (s 18(7)(e)).

However, this is counterbalanced by the fact that:

- The weight of [W]'s evidence may be limited, analogous to Khan, where the wife's evidence carried little weight due to prior inconsistent statements (s 18(7)(b)).
- [W] would likely be required to disclose confidential matters discussed with [D] in the context of their relationship, which weighs against compellability (s 18(7)(e)).

On balance, it is [likely/unlikely] that the harm of compelling [W] outweighs the desirability of their evidence, although conclusions to the contrary are clearly open as different Judges will have different perspectives on the balancing exercise. Therefore, [W] [will/will not] be compellable under s 18(6). Accordingly, per s 18(8), the prosecutor may not comment on the objection, decision and failure of the person to give evidence.

Khan – K charged with murdering his friend. Wife not compelled to give evidence, considering the following:

- Murder was a serious offence
- They had the knife and the body of the deceased so they may not need Mrs K
- she was making an inconsistent statement with her police interview. Her evidence had limited weight, because she indicated that she would retract her statement made previously if she had to give evidence. It was therefore not reliable.
- Harm to relationship – They had been together for 10 years and were still together after the affair and killing. They also had children together

Alternative arrangement – *Criminal Procedure Act*

Red flag: Discuss the way in which this witness can give evidence

Red flag: Advise [victim] of the manner in which she may give evidence at trial if she is scared of facing [D] in the court room.

The legislation referenced in this answer is from the Criminal Procedure Act.

Div 4 – Adult victim + witness in sexual offence / family violence

Because [witness/complainant] is giving evidence about a sexual offence or family violence, alternative arrangements may be made to support their giving of evidence (s 359 CPA). These can include:

- Giving evidence via CCTV (s 360(a));
- Using a screen to prevent [W] from seeing D (s 360(b));
- Permitting an emotional support person to be present with [W] (s 360(c));
- Requiring the de-robing of counsel (s 360(e));
- Requiring legal practitioners to remain seated while questioning (s 360(f)).

Under ss 363, 354, and 365, the court must order the alternative arrangements (a)-(c) unless the witness is informed of their right to give evidence in that manner and chooses not to.

In all cases where such arrangements are made, the trial judge must warn the jury not to draw any adverse inference against D, or to give the evidence any greater or lesser weight as a result of the use of these arrangements (s 361).

Div 5 – Child or person with cognitively impairment witness in sexual offence / assault / family violence

Where the [witness] is [under 18 / has a cognitive impairment] and is giving evidence about a sexual offence, family violence, or an offence involving assault, injury, or a threat of injury to [W] (s 366 CPA), they may give evidence-in-chief (wholly or partly) in the form of an audio or audiovisual recording under s 367. The advantages of using a pre-recorded statement include ensuring [W] does not have to directly face D, a more informal setting for [W], the ability to record the statement closer in time to the alleged offence, allowing [W] to begin moving on.

Under s 368(1), such a recording is admissible as if its contents were direct oral evidence, provided that notice requirements have been complied with; D and their lawyers have had a reasonable opportunity to view or listen to the recording, [W] attests to the truthfulness of the recording's contents at trial and is available for cross-examination and re-examination.

Per s 368(3), the court retains discretion to rule any part or all of the recording inadmissible and may direct that specified parts be edited or deleted.

Div6 – child or cognitively impaired victims in sexual offence

Because [complainant] is [under 18 / has a cognitive impairment] and is giving evidence in a criminal proceeding involving a sexual offence (s 369), all evidence, including cross-examination and re-examination, must be given at a special hearing, where it will be recorded and presented to court in recorded form (s 370(1)).

However, under s 370(2), P may apply for the complainant to give direct testimony in the proceedings. The court may allow this if it is satisfied that [complainant] is aware of their right to have evidence taken at a special hearing, and is able and wishes to give direct testimony in court.

Privilege

Privilege must be claimed in respect of each piece of evidence

Preliminary proceedings to Court

S 131A(1)(a) allows the application of client legal privilege, and public interest immunity to preliminary proceedings. However, [person] cannot object to the production of information in preliminary proceedings on the basis of PASI.
Per s 131A(2), these preliminary proceedings include:

- A summons or subpoena to produce documents or give evidence (a)
- Pre-trial discovery (b)
- Non-party discovery (c)
- Interrogatories (d)
- A notice to produce (e)
- A request to produce a document under Division 1 of Part 4.6 (f).
- A search warrant (g)

Self-incrimination (PASI)

If [D] is a witness in their own criminal trial, D cannot claim PASI (s 128(10)). [D] cannot object to giving evidence on the ground that it may incriminate them in relation to the offence with which they are currently charged. Therefore, even if [D]'s answer may tend to reveal AR or MR of the offence on trial, they cannot rely on s 128 to avoid answering. The privilege is not available in relation to self-incrimination for the offence currently being prosecuted (s 128(10)).
*D can only claim PASI if the evidence will reveal ANOTHER OFFENCE

Relevance (s 55)

For evidence to be admissible, it must be relevant (s 56(1)). Evidence is relevant if it could rationally affect the assessment of the probability of a fact in issue (FII) (s 55(1)). Here, the key FII is X. It is contentious whether [x] evidence could rationally affect this assessment. Accordingly, the evidence is relevant under s 55.

Competency and compellability

For [witness] to give evidence, they must be both competent and compellable. Under s 12, every person is competent to give evidence (s 12(a)), and all competent persons are compellable to do so (s 12(b)). OTF, there is nothing to rebut these presumptions – [witness] is both competent and compellable.

PASI

Notes

- PASI does not apply to *non-testimonial evidence* (Sorby per Gibbs J)
- PASI applies to *derivative evidence* – the evidence may lead to the discovery of evidence of an incriminating nature (Sorby per Gibbs J)
- PASI cannot be claimed by *corps* at the CL (EPA v Caltex) or under the EA (s 187)
- PASI extends to *non-judicial proceedings* eg Royal Commission (Sorby)

However, [witness] may raise an objection under the privilege against self-incrimination (PASI). Specifically, they may refuse to give evidence on the grounds that it may tend to prove [they have committed an offence / are liable to a civil penalty] (s 128(1)). If the evidence is inadmissible under Part 3.10 or at CL, it must not be admitted (s 134).

Reasonable grounds for objection (s 128(2))

The court must determine whether there are reasonable grounds for the objection (s 128(2)).

First, there must be a real and appreciable risk of self-incrimination, not merely a fanciful or speculative risk (Brebner).

OTF, it is likely that if [witness] were to give evidence at [D]'s trial, there would be a real and appreciable risk of self-incrimination in relation to [offence / civil penalty], as they would be confirming that they engaged in [such act].

Second, it is clear that [witness] is invoking PASI genuinely to protect themselves, and not for a collateral purpose (*Brebner*).

- The objection to giving the evidence and the claim of PASI was aimed at protecting a third party [third party]. This is analogous to Brebner, where the court held that Seely could not claim PASI because his objection was made to protect Perry, not himself.

S 128(4) Interests of justice

Nevertheless, even if there are reasonable grounds for [W]'s objection, the court may still require [W] to give evidence if it is satisfied that: (a) the evidence does not tend to prove that [W] has committed an offence or is liable to a civil penalty under foreign law (Sorby); and (b) the interests of justice require [W] to give the evidence. As such, *Lodhi* factors must be considered.

- Nature of charges: As the nature of the offence that [W] would be liable for is very serious - [offence], with a high likelihood of substantial imprisonment, it is comparable to the terrorism offences in Lodhi, which also entailed substantial imprisonment. This supports the maintenance of PASI.
- If crim, who is calling the evidence: Since the defence is calling [W], there is a strong public interest in ensuring that [D] is able to present a full and fair defence.
- Importance of the evidence: It is likely that [W] is the only person with direct knowledge of the key facts. This indicates that their evidence is crucial and otherwise unobtainable. OR Similar to Lodhi, the evidence was not considered "significant or critical" because other evidence was available.
- Likelihood of prosecution and penalty:

- OTF, [witness] [has/has not] been granted immunity from prosecution or issued a certificate under s 128(5). Consequently, the court is [more/less] likely to compel [witness] to testify, as they [have/lack] such protection.
- However, broader consequences of giving evidence must also be considered. Beyond the immediate risk of prosecution or penalty, Whealy J in *Lodhi* noted that even when a witness is granted immunity or a certificate, it "does not give absolute protection". The "interests of justice" under s 128 can include 'real prejudices'.
- Potential prejudices that may arise in this context include:
  - Damage to [witness]'s reputation in the community for testifying
  - Exposure to disciplinary proceedings, particularly if [witness] is a professional
  - Loss of employment opportunities or permanent damage to career prospects
  - Threats to personal safety, including risks of harm or death, akin to the risks Ul-Haque faced in Lodhi, where a certificate did not shield him from actual death threats
  - Undermining of the professional bond of confidence between [witness] and their legal counsel of choice

- Interests of witness in getting a fair trial: As in *Lodhi*, compelling [W] to give evidence may prejudice their own interests, especially where no other evidence exists against them.
- Reliability of evidence: This factor was not determinative but was taken into account in Lodhi. There is a motive for [witness] to lie because of his self-interest [the witness is an accessory]. Therefore, the evidence would be considered unreliable.
- Effects of admitting: The court may control publication or dissemination, which can reduce prejudice.

Conclusion

- On balance, it is unlikely that the court will compel [W] to give evidence under s 128(4). As a consequence, the court must not require [W] to give the evidence and must inform [W] of the matters set out in s 128(3)(a)–(c).

- On balance, it is likely that the court will compel [W] to give evidence under s 128(4), and [W] will receive a certificate under s 128(5). Furthermore, given that the evidence is of high probative value—being central to a key issue in the case—the court is unlikely to exclude it under either s 135 or s 137.

Client legal privilege

Relevance (s 55)

For evidence to be admissible, it must be relevant (s 56(1)). Evidence is relevant if it could rationally affect the assessment of the probability of a fact in issue (FII) (s 55(1)). Here, the key FII is X. It is therefore uncontentious that the evidence could rationally affect this assessment. Accordingly, the evidence is relevant under s 55.

There is nothing on the facts (OTF) to rebut the presumptions under s 12—[witness] is both competent and compellable to give evidence. However, [witness] may object to giving evidence of [X] on the basis that it is protected by client legal

privilege (CLP). It appears that [lawyer] is acting for [client] in a legal capacity, and therefore a lawyer–client relationship can be established.

If In house legal

Since the lawyer is an in-house counsel, CLP will only apply if the lawyer is sufficiently independent from their employer (Harrington; Waterford).

- Analogous to Harrington, where the in-house counsel's role was likely to engage the personal loyalties and duties of all partners of the firm.
- Similar to *Waterford*, the in-house lawyer maintained professional detachment and acted with sufficient independence from the employer. Therefore, communications between the in-house lawyer and the employer could fall within the scope of CLP

Confidential communication or documents?

CLP can only be claimed in relation to confidential communications or documents. OTF, the [communication / document / other] likely [does/does not] meet this requirement because:

- It was [made/prepared] in circumstances where the [maker/recipient] was under an express or implied obligation not to disclose its contents (s 117(1))
- ordinary lawyer–client communications are presumed confidential (*Mann*)

Moreover, even if the client has never seen the document, CLP can still apply as long as it is confidential (*Hodgson*). The communications were already in public domain which undermines its confidentiality.

Scope of CLP

[Client] may seek to claim CLP under s 118 / 119 / 120, The evidence would disclose

Legal advice (s 118)

- a lawyer/client communication
- a lawyer/lawyer communication
- a confidential document prepared by the client, lawyer or another

that was made for the dominant purpose (*Esso*) of the lawyer(s) providing legal advice to [client].

Legal services/litigation (s 119)

- a lawyer/another person communication
- a client/another person communication
- the contents of a confidential document (delivered or not), prepared

that was made for the dominant purpose (*Esso*) of the client being provided with legal services relating to actual or anticipated proceedings (*Mitsubishi*).

Unrepresented parties (s 120)

- confidential communication between the unrepresented party and another person
- contents of confidential documents prepared by/at direction of the unrepresented party.

that was made for the dominant purpose (*Esso*) of preparing for or conducting a proceeding.

If relevant – copies of documents

Copies of privileged

A document includes any copy, reproduction, or duplicate of the document or any part of it (Dictionary). Therefore, a copy of a privileged document is also privileged (*Mann; Propend Finance*).

Copies of non-privileged

Red flag: A company prospectus made by client, but copy made by lawyer to then conduct due diligence

A document includes any copy, reproduction, or duplicate of the document or any part of it (Dictionary). OTF, a copy of a non-privileged document in the possession of [lawyer] may nevertheless attract privilege if it was created for the dominant purpose of obtaining legal advice or for use in legal proceedings (Propend).

Dominant purpose?

Dominant purpose is the prevailing or paramount purpose' (Hodgson). OTF, the test appears to be met because the [document / communication] was created solely for the purpose of seeking legal advice OR for use in anticipated litigation (s 118/119), satisfying the dominant purpose test.

Dominant purpose is the prevailing or paramount purpose' (Hodgson). There is room for argument that the dominant purpose was not for legal advice OR litigation because

- The report was created not for anticipated legal proceedings, but rather for the assessment of an insurance claim
- The legal service was provided after D was charged, but litigation was not inevitable, as the matter could have been resolved without trial. Therefore, anticipated litigation may not have been the prevailing purpose.

Exception?

It may be argued that [client]'s CLP over communication or document has been lost due to [conduct]. As such, CLP may have been waived through the operation of [ss 122–126]

Express waiver (s 122(1))

OTF, [client] has expressly waived the privilege by giving explicit consent for [evidence] to be adduced (s 122(1)). Accordingly, the evidence is admissible, and [client] can no longer assert CLP in respect of it.

**NO PARTIAL WAIVER

Implied waiver (s 122(2))

It may be argued that [client] has impliedly waived the privilege by acting in a way that is inconsistent with maintaining the confidentiality of the communication or document (s 122(2); Mann; Roads Corp). OTF: