EVIDENCE AND PROOF
In theory and practice

2012
Examination – Student Feedback

Exam feedback

When you collect your marked exam you will notice that each marker has also included some feedback on the exam itself. In addition to those specific comments, the markers would like you to consider the general feedback below.

Asking for further feedback

If, after considering your individual feedback and the feedback below, you still have questions about your exam please make an appointment to speak to the person who marked your exam about your work. The marker's initials, which will appear on the marked exam, refer to the following individuals:

DC = David Caruso	(david.caruso@adelaide.edu.au)
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Seeking a remark

If, **after** speaking to the marker, you still feel the final mark you received is not appropriate, you may seek a remark of the assignment. To do this please request **the original marker complete the application for remark form or make a notation on the assignment that it has been approved for remark**.

Re-assessment of assignments must be sought within five business days of the date when the papers are available for collection from the Law School Front Office. Please note that re-assessment can be requested only **after** consultation with the original examiner.

While you are entitled to seek a re-mark if you think that the mark does not reflect the quality of your work, you should remember that your result could **go down** after a re-mark.

General feedback

Some general comments on each of the questions posed in the exam are included below. Please note these comments are not exhaustive. There are many more useful things you may have done, and you will have been credit for those. This is a guide as to the central issues which arise in the exam problems. Answers which logically and persuasively argued for opposite conclusions have also been rewarded.

In addition to these comments, please note:

- The applicable law in the Supreme Court case is the common law, as modified by the *Evidence Act 1929* (SA). In the Federal Court case the Commonwealth Evidence Act applies. Reference to the incorrect legislation suggested a significant misunderstanding as to the applicable law.
- Relevance is fundamental and critical to critiques of admissibility – particularly where hearsay is concerned. Failure to carefully consider the particular way in which evidence was relevant led to an incomplete consideration of admissibility.
- Quality of written expression is essential to communicating complex ideas. If your exam included grammatical and syntax errors, it is probable that the quality of your argument suffered as a consequence. This would have affected your mark.
- State propositions of law (as described above) before dealing with the exceptions which might apply. It is not appropriate to state that – for eg. res gestae is an exception to the hearsay rule - if you have not mentioned the hearsay rule itself.
- Read the facts carefully - where a misreading of facts occurred it negatively affected analysis.
- Authorities should be provided (although full citations are not necessary) for substantive legal propositions wherever possible.
- All questions had to be answered. Due to time management or oversight, the failure to answer questions at all or incompletely lead to significant losses of marks.
- Drawing case analogies or distinguishing cases on the facts is the most persuasive form of argument.
- Always ensure you apply the law you have stated to the facts of the problem.
- Be consistent in your analysis or explain inconsistencies.
- Endeavour to reach a conclusion based on the competing arguments.

Grade descriptors

The examination was marked in accordance with the following grade descriptors:

Fail 0-49%

- Does not identify or address the legal and factual issues
- Inadequate knowledge of the Priestley 11 topics
- Insufficient identification, or understanding, of ethical issues
- Does not develop coherent and rational arguments
- Demonstrates fundamental errors of understanding of key legal principles and concepts
- Absence of legal analysis
- Demonstrates limited analytical and evaluative skills

Pass 50-64%

- Adequate identification of legal and factual issues demonstrating adequate knowledge of the Priestley 11 topics
- Adequate identification of ethical issues and understanding of ethical principles
- Adequate articulation of argument
- Demonstrates a basic understanding and application of analytic concepts and theoretical concepts
- Basic understanding of readings
- Insufficient legal or factual analysis

Credit 65-74%

- Demonstrates thorough understanding of the relevant legal materials
- Good understanding and application of ethical principles
- Demonstrates some critical legal thinking and evaluative skills
- Adequate legal analysis
- Good skills in presentation and articulation of argument

Distinction 75-84%

- High standard of understanding of the relevant legal materials with some original and sophisticated perspectives
- Sophisticated understanding and application of ethical principles
- High level of insight and legal analysis
- Evidence of high level of critical legal thinking
- Well developed analytical and evaluative skills
- Developed presentation skills
- Good anticipation and response to opponent's case

High Distinction 85-100%

- Outstanding level of understanding and interpretation
- Compelling, well-supported and tightly structured legal arguments
- Excellent understanding and application of ethical principles to create arguments
- Original and sophisticated thinking
- Highly developed communication and presentation skills
- Excellent anticipation and response to opponent's case

THE UNIVERSITY of ADELAIDE

Primary Examination for the Bachelor of Laws

Semester 2, 2012

105022 (Course ID)	**EVIDENCE AND PROOF IN THEORY AND PRACTICE LAW 3502**

Official Reading Time:	10 mins
Writing Time:	150 mins
Total Duration:	**160 mins**

Instructions for Candidates

- This is an open book examination.
- This exam consists of two parts: **Part A** and **Part B**.
- **Both** Part A and Part B should be attempted.
- Part A is worth 40 marks. It contains 2 questions each of which must be answered. Each question is worth 20 marks. Within Part A, Question 1 requires an analysis and application of South Australian evidence law. Question 2 requires analysis and application of Commonwealth evidence law.
- Part B is worth 60 marks and contains 1 Question with 5 sub-questions each of which must be answered. The marks allocated to each sub-question in Part B are indicated below. Insofar as any questions relate to the admissibility of evidence tending to suggest that a defendant has engaged in discreditable conduct other than conduct constituting the offence charged (and trial directions regarding the same) the Evidence (Discreditable Conduct) Amendment Act 2011 (SA) is to be applied and is examinable.
- In your answers please make it clear which question you are answering eg. 1(a), 1(b) etc.
- Candidates should answer all questions in the exam paper.

Permitted Materials

Candidates may take into the examination room any book or materials other than those borrowed from a University Library.

DO NOT COMMENCE WRITING UNTIL INSTRUCTED TO DO SO

PART A (40 MARKS)
Students must answer BOTH of the questions in Part A.
The questions are worth 20 marks each and each question will be marked holistically (specific marks will not be allocated to each sub-question).

QUESTION 1 (20 MARKS):

P is an art collector and an inventor. Since 1975 P has been working on a new computer prototype to identify and date the materials used by Australian indigenous artists to ensure that the provenance of indigenous artwork is more accurately identified. The machine is unique in the world and P is preparing a patent application to secure the intellectual property in her invention.

On a field trip in early 2010 to the Amata community in the APY Lands in the Far North of South Australia P purchased a painting from X for $750. X said to P at the time of the purchase: "This painting was done by my mother, Y, who died last year. She did a lot of paintings of the area where our mob comes from. The ochre which she used is from the waterhole in the valley in those ranges over there. The painting tells the story of the "basket tree" which used to grow next to the waterhole."

After purchasing the painting, P put it in her 4WD car and walked into the valley and found a dry waterhole and a stump of an old tree. P also saw an old plaque on a rock which said "Waterhole and Basket Tree – APY Lands. Basket Tree destroyed by fire in 1966." P took a photograph on her mobile phone of the ochre near the waterhole which was a distinct orange red colour with bright gold flecks. She also got out her pocket knife and took a small sample of ochre and put it securely in a vial.

P returned to Adelaide and took the painting to D, an art and antiques dealer. D said to P: "I have never seen anything like it. I will hang it in my next Australian art sale. It is so unusual that I am unsure if it will sell and I will only charge you 5% commission on the sale price rather than my usual 10% commission." P said: "Thank you D, I agree to those terms."

Prior to the auction, P decided to investigate the provenance of the painting in more detail. P sought an opinion from Z, a leading art dealer who specialised in indigenous art. Z said that it was his view that the painting was by Y based on (a) P's conversation with X, who was an aboriginal elder from the APY Lands, and (b) the fact that X's mother was Y who was well-known in the indigenous art community to have painted a series of landscapes of the APY Lands in the 1960s.

Prior to the auction of the painting in late 2010, P instructed D that, based on the opinion of Z, the provenance of the painting was that it was painted by Y in around 1960. At the auction the painting sold for an Australian record price of $5 million to an overseas buyer, F.

After the auction D housed the painting in her gallery. Two nights after the auction thieves broke into D's gallery and stole the painting and it was never recovered and the purchaser never received the painting.

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In January 2011 P sued D in the **Supreme Court of South Australia** for breach of contract and negligence arising from D's failure to properly secure the painting and the premises in breach of her contractual and tortious duty of care and claimed $4.75million (the sale price of the painting of $5m less the 5% commission). In her Defence, D did not deny that she had been in breach of her duty of care but alleged that the painting in fact had been created by P and not by Y and was worthless.

a) Are the statements by X to P at the time of the purchase of the painting on the APY Lands admissible and, if so, for what purpose?

At trial P gives evidence that on her return to Adelaide she had taken a small sample of material from the bottom left hand corner of the canvas of the painting and tested it in her prototype machine against the ochre sample she had obtained from the APY Lands which she had placed in the vial.

b) Can P give evidence about the results from her prototype computer machine of the similarities, if any, between the ochre sample from the painting with the sample she collected from the APY Lands?

The trial judge is also an art lover and has a recent catalogue from an international commercial art dealership, ArtOne, on her coffee table in her judge's chambers which lists all known works by Australian indigenous artists, including Y, but makes no reference to the painting the subject of the proceedings. The catalogue is only available to members of ArtOne's mailing list.

c) Is the trial judge entitled to take judicial notice of the contents of the catalogue?

P seeks to tender a document which was obtained during pre-trial disclosure from D. The document is part of D's working ledger and is entitled "Indigenous Art – Articles for Sale" which is prepared by G, D's in-house indigenous art specialist, who has worked with D for 30 years. At trial P says that she has known G for twenty years and that he is a fastidious and highly experienced art specialist. The ledger states:

Item and Artist	Estimated Value	Issues
Basket Tree Painting, approx 1960 – Artist Y (APY Lands)	> $3.5m	Orange Red (with Gold fleck) ochre matches SA Museum batch 1234

P does not call G as a witness because G has gone on a study tour to Papua New Guinea and cannot be contacted. P gives evidence that she has also recently visited the South Australian Museum and been given access to the ochre collection. She compared the ochre sample and the photo which she took at the APY Lands and said that, visually, the ochre matched sample 1234 and there were no other orange red ochres with gold flecks in the Museum's collection.

d) Is the working ledger document admissible and, if so, for what purpose?

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QUESTION 1 – FEEDBACK
(MARKED HOLISTICALLY OUT OF 20)

1(a) Relevant to P's belief that the painting was an original painting painted by Y i.e. not for a hearsay purpose. P's belief is based on X's belief that it was painted by his mother. Reliability concerns? Relevant also to the provenance of the painting as being a painting painted by Y using ochre from near the waterhole at Amata i.e. as a hearsay statement re provenance of the painting – inadmissible as hearsay.

1(b) Relevant to provenance of the painting as being painted by Y using ochre from near the waterhole at Amata. Evidence of similarities equivalent to lay observation of identity or likeness (Sherrard v Jacob) or expert opinion? The interposition of a computer in the production of the result does not mean that the figures are hearsay: R v Wood (1983) 76 Cr App R 23 If expert opinion, Dasreef [2011] HCA 15 – are criteria established re use of machine and output? Issues re independence and reliability and acceptance by other experts in the field. Criteria for admissibility as computer output: S.59B of the SAEA.

1(c) s. 64 of the SAEA – is the catalogue a published book "in matters of ..art"? Judicial notice cannot occur without the comment of the parties on contested matters or, if controversial (as here), without the consent of the parties: Cavanett v Chambers [1968] SASR 97. The discretion should be exercised judicially and with caution. The material must be so available that it is generally accessible to any member of the public having an interest in it although it does not have to be published at large: Casley-Smith v Evans (No 4) (1988) 49 SASR 339.

1(d) The records are business records: s.45A of SAEA. The weight to be given to the business records requires consideration of the source from the documents are produced and the safeguards (if any) which have been taken to ensure their accuracy: s.45A(3).; Hillier & Carney v Lucas. Admission by G (D's employee) of value: made with authority? They are also documents which are admissible pursuant to s.34C of the SAEA - s.34C(1)(a)(i) (personal knowledge of the matters dealt with in the statement) and s.34C(1)(a)(ii) (continuous record, made in performance of duty by persons who had or might reasonably be supposed to have personal knowledge of those matters).

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QUESTION 2 (20 MARKS):

The purchaser of the painting in Question 1 is F who is the owner of an extensive fine arts collection in Manila in The Republic of the Philippines and who also has interests in art galleries in Australia.

F bought the painting for $5 million at the auction but, due to the theft, did not pay that amount to P. F had proposed to install the painting as a central feature of her collection in Manila and to reproduce prints of the painting for her Australian collections.

The Commonwealth Government of Australia has introduced legislation effective from 1 January 2010 to limit the sale and export of Australian indigenous art called the Art for (Australians) Art's Sake Act 2010 (Cth) ("the AAAS Act"). Section 6 of the AAAS Act provides that it is an offence, which is the subject of **civil penalty** only, to purchase, sell or reproduce (or be involved in the purchase, sale or reproduction of) art work of any description by an Australian indigenous artist without the written approval of the Director of the National Gallery of Australia ("the Director"). The AAAS Act provides in section 7 that it is a defence to any prosecution pursuant to section 6 if the sale was by a relative of the Australian indigenous artist or if the true value of the art work is less than $100,000.

The maximum penalty for breach of section 6 by an "art dealer or collector (including an overseas art dealer or collector)" is $1 million and suspension of the dealer's licence for a period of up to 5 years. The maximum penalty for breach by other individuals is $20,000.

The Director sues X, P, D and F in the South Australian District Registry of the **Federal Court of Australia** and alleges that each of X, P, D and F breached section 6 of the AAAS Act.

At the trial in the Federal Court it is agreed by all parties and accepted by the Director in opening its case that the painting was painted by Y and that she was an Australian indigenous artist. It is agreed also at trial that X is a relative of Y. It is also agreed that there was no written approval given by the Director prior to the sale by X to P or prior to the sale of the painting by P to F.

a) Assume you were acting for X. What submission, if any, would you make at the conclusion of the case against X and what prospects of success do you consider it would have?

In the case against P, D and F, the Director alleges that the true value of the painting was either the $5 million which F agreed to pay for it at the auction and prior to its theft (being its market value) or, in the alternative, $3 million based on the opinion of R who is called as a witness by the Director. R is an independent expert in Australian indigenous art and has written and researched extensively on the provenance and value of Australian indigenous art and is based at the Red Centre Institute in Alice Springs in the Northern Territory. R expresses an opinion based on the assumptions that (a) the painting was painted by Y (b) the ochre on the painting which was tested by R using the most up to date "ArtTruth" spectrophotometry technology was found

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to be from the APY Lands and (c) the painting by Y of the Basket Tree is of immense significance due to the fact that the tree was destroyed in 1966 and formed a significant part of traditional customs and beliefs of the local indigenous community. R's opinion is that the painting is unique, painted by Y in about 1960 and of immense cultural significance and was worth approximately $3 million at the time of the sale by P to F and that the sale at $5 million by P to F was due to a unusual peak in international interest in indigenous art in 2010. R acknowledges in his report that he has not previously valued any of Y's work and that the highest price obtained for a painting of any description by Y was $20,000 which was for a painting sold in 2009 at an auction in Sydney which was the last occasion Y's work was sold at auction prior to the auction by D.

b) Is the opinion of R admissible?

The Director has obtained a copy of the insurance claim form lodged by D against his business insurer, ABC Insurance, arising from the theft of the painting. In the claim form D has stated that the value of the painting was $5 million.

c) Is the claim form admissible against D and, if so, is it also admissible against P and F?

At the trial P calls L. L is Y's brother and is 75 years old. L is unable to recall the painting or anything about it when asked about it in examination in chief. P's counsel seeks permission for L to refresh his memory from a photo taken of L and Y at Amata in 2009 in which Y is holding a painting of a Basket Tree which also stated on the back of the photograph in L's handwriting: "Y and me at Amata in 2009 with her Basket Tree painting from the 1960s. Y wants me to sell painting for $1,000 at next Amata sale in 2011".

d) What criteria are relevant to whether to grant permission for L to refresh his memory and what is the effect, if any, of the evidence by L if his memory is refreshed?

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QUESTION 2 – FEEDBACK
(MARKED HOLISTICALLY OUT OF 20)

2(a) X's counsel would make a no case submission. X is a relative of Y which is agreed. No offence pursuant to section 6 because defence in section 7 is agreed. Director's case against X dismissed.

2(b) Opinion evidence inadmissible (s.76 UEA) unless criteria in section 79 of UEA established. Dasreef. Specialized knowledge, opinion wholly or substantially based on that knowledge, assumption identification, proof of assumptions, statement of reasoning. The evidence about the provenance of the painting is likely to be admissible as opinion evidence. Admissibility of opinion in relation to value (no prior experience and value differential of value of Basket Tree painting from value of previous sale) is unlikely to be admissible. Ultimate issue – value (ultimate issue abolished by s.80 UEA).

2(c) Admissible against D as an admission: s.81 of the UEA. Business record of D as dealer:s.69 – "personal knowledge" by G? Not admissible against P and F unless they consent: s.83(2) of the UEA.

2(d) Refresh memory: s.32(2) criteria of the UEA. Relevant as evidence of Y's opinion of its value?

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PART B (60 MARKS)
All students must answer ALL FIVE (5) sub-questions in Part B. Part B is worth SIXTY (60) marks. The marks associated with each sub-question are indicated below.

QUESTION 3

Phillip Pirrip is to be tried by jury in the **Supreme Court of South Australia** for the murder of Estella Havisham on or around 13 October 2011 at Lavender Lane, Port Adelaide, South Australia.

On 14 October 2011, fishermen found Havisham's corpse floating in the water near the wharfs at Port Adelaide. Forensic testing revealed the cause of death was asphyxiation, with her body having been in the water for approximately 16 hours. It is not disputed that Pirrip and Havisham had lived in a *de facto* relationship for 2 and one half years at the time of Havisham's death and lived, alone, at the Newport Quays apartment complex at Port Adelaide throughout their relationship.

The Prosecution case is that Pirrip killed Havisham out of greed, as he is the sole beneficiary of her estate, which is valued at $2 million.

As part of its case, the Prosecution seeks to lead the following evidence.

Testimony from the deceased's aunt, Beatrix Potter, that approximately 6 months before the death of her niece, her (Potter's) late husband had bequeathed Havisham $1.8 million in cash and property assets as part of his will. Her husband told Havisham he would do this in one of her final visits with him at the hospital before he died. Potter will further testify that her husband had requested Havisham come visit him alone so he could tell her this privately, away from Pirrip, as he did not like Pirrip at all and considered him to be a liar and scoundrel, unfit for his niece. It was her husband's intention that Havisham have sufficient assets that she could leave Pirrip and be financially secure. Potter will further testify that a couple of weeks after the funeral of her husband, she invited her niece over for tea and asked her if she had all her affairs in order with respect to her inheritance, to which Havisham said: "Oh aunty, I felt so uncomfortable being left so much money by uncle, but when I told Pip (Pirrip) about it, he took care of everything. He prepared all the paperwork and all I had to do was sign – I'm not even quite sure what all those papers said but, not to worry, because when I told Pip about it, he said he would make all the arrangements". The Prosecution will tender Havisham's will, signed by her two weeks after the death of her uncle, which bequeaths her estate to Pirrip in the event of her death.

a) Can Beatrix Potter be called by the Prosecution to testify in these terms? (15 MARKS)

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[All the evidence BP gives is admissible as either original evidence of her own perceptions or evidence of OOC statements that have an original use (i.e. to prove the bequeathing of moneys).
At the least, discretionary exclusion (Christie) would apply to BP's inflammatory language given it's a criminal trial (i.e. liar, scoundrel – these comments would likely, firstly, fall foul of s18(1)(d) of the SAEA).
An important issue involves considering the relevance of BP's recounting of the "family distaste" for the accused. Inflammatory language aside, it is necessary to contextualise the main point of her testimony, namely BP's evidence of the deceased's OOC statements concerning the accused's knowledge of the deceased's inheritance. So, provided that evidence is admissible, the contextualising evidence will be permitted.
However, the statement beginning "Oh aunty" is inadmissible hearsay. That OOC statement is relevant to prove (a) the accused knew of the inheritance prior to deceased's death and (b) the accused made arrangements concerning those moneys. That use relies on the truth of what is asserted. The deceased's state of mind is not relevant (at least not in any way where probity would outweigh prejudice). No exception to hearsay applies. BP's testimony above should not have been permitted.
The will is admissible as original evidence (relevant to motive/intention).
Peripheral issues which need not, but might be, considered briefly (but only in order to dismiss it as an issue) relate to competence, compellability or *res gestae*.]

Testimony from Abel Magwitch, the neighbour of Pirrip and Havisham in the apartment complex, that approximately 1 year prior to Havisham's death he remembered hearing a terrible argument between Pirrip and Havisham through the paper-thin walls of their apartment. Magwitch recalls the argument involved Pirrip yelling at Havisham about her meddling family and that he was tired of her aunt and uncle showing him no respect and treating him with disdain. Magwitch will testify that he heard Pirrip shout: "You do nothing to stop them – you horrid bitch! You never take my side, you never support me. You and your family think I'm nothing but your whipping boy". Magwitch says he heard several thuds and sounds of breaking glass before the argument came to an end. The next morning he saw Havisham and noticed she had a bandage around her right wrist and what appeared to be bruising and cuts on her left cheek, but could not be sure because she was wearing a lot of make-up.

b) Can Abel Magwitch be called by the Prosecution to testify in these terms? (10 MARKS)

[All the evidence AM gives prior to the OOC statement in quotations is admissible as either original evidence of his own perceptions or to contextualise, again, provided the main evidence that follows is admissible. The OOC statement is original evidence of the accused's state of mind with respect to his anger against the way he is treated by the deceased's family and associated anger against the deceased. In criminal cases, because intention/motive are critical, bare intention can be relevant (cf, *Kamleh*). However, admissibility put the cart before the horse. What is the relevance of an argument about an altogether common argument about family relationships, especially when that argument occurs 1 year before the death and even pre-dates the bequest? None that warrants reproduction

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in a criminal trial. AM's further evidence about hearing sounds of a physical fight and (perhaps) witnessing cuts and bruising would equally be inadmissible as raising discreditable conduct. It would certainly not satisfy 34P(2)(b) of the SAEA for a dispositional/propensity purpose.
An argument which could be raised, which if raised demonstrates good understanding of the propensity/ non-propensity concepts, could rely upon non-propensity use to show the relationship between the accused and deceased but that argument should recognize that s 34P(2)(a) will not be satisfied particularly given the equivocal nature of AM's testimony.
AM's evidence should not have been permitted.]

Testimony from Herbert Pocket, Pirrip's friend and work colleague, that approximately 3 months before Havisham's death he and Pirrip were having a "big Friday night" after work. The two drank a considerable amount and, at around 2.00 am on the Saturday morning, Pirrip suggested they visit a brothel called "All Night Pleasures". Pocket will testify that he agreed but was surprised as they had had many nights out and Pirrip had never before suggested going to such a place. Pocket says when he asked Pirrip why he wanted to go, Pirrip, who had drunk a lot, smirked and said: "Just getting back in the game, mate. I don't know how much longer Estella and I are going to last to be honest. She's never really respected me so I think it's time we part ways. But not to worry, I think everything will get much better for me when she's gone – I'll be able to shout you next time we come here".

c) Can Herbert Pocket be called by the Prosecution to testify in these terms? (10 MARKS)

[The key issues to identify are that (a) HP's evidence regarding visiting the brothel would be excluded by s 34P of the SAEA, (b) the brothel incident and HP's evidence of what the accused said have insufficient relevance on the basis of, if nothing else, equivocality and displaying no probative sinister motive other than wanting to break-up.
Analysis is required of the issues arising from the entire last sentence in the problem, particularly: "I'll be able to shout you next time we come here". The last line may be relevantly interpreted as an admission (a statement against interest). It is reasonably close in time to the death and post-dates the bequest. A very insightful argument would be to identify that whilst BP's testimony should not have been admitted, the will is admissible and creates a timeline.
If the OOC statement is admitted as an admission, the preceding evidence concerning the brothel should be led to give context to the admission – namely, the accused had drunk a lot.
Strong directions would have to be given to guard against improper disposition reasoning: s 34R of the SAEA.]

Evidence from Joe Gargery, a petty criminal who was on remand (in custody) with Pirrip after Pirrip had been arrested by police and denied bail, that Pirrip had told him he, "Did his missus for the dough". Gargery said Pirrip told him: "I was tired of being stepped on by her and her family, so when she told me that the old man had died and left her all that money – and asked me to sort it all out for her, like I was her accountant or something – well, I decided to get back at all of them". Counsel for Pirrip have been given a copy of Gargery's statement and have spoken with Warden

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Dolge Orlick of the remand centre. Orlick has told the legal Defence team for Pirrip that Pirrip suffered constant abuse from the other prisoners on remand throughout his time on remand. He regularly required treatment for bruising and lacerations sustained at the hands of his fellow prisoners. Orlick said Pirrip, with his fine English accent, stood out a mile to the other prisoners, especially Gargery who came from a tough background. Orlick says he often saw Gargery leading other prisoners in attacks on Pirrip.

d) In light of the statements from Joe Gargery and Warden Dolge Orlick, can Joe Gargery be called by the Prosecution to testify? If Gargery is permitted to testify, should the Court give any particular directions or warnings to the jury? (15 MARKS)

[JG's evidence is clearly relevant as confessional evidence, the issue (before directions) is whether it is sufficiently reliable to put before jury.
The Warden's evidence supports an argument that the accused's will was overborne by physical threats, hence the confession should be excluded as involuntary (cf, *Geesing*).
The additional information provided by JG is consistent with other testimony hence goes against fabrication, however much of that other testimony should not have been admitted.
It is unlikely JG would be permitted to testify, but not a certainty as reliability is a matter for juries and JG and the Warden can be examined and cross-examined, and directions given.
If JG testifies, corroboration warnings should be given with respect to what is effectively a prison yard confession. This warning will come after but be in addition to directions that the jury be satisfied the confession was made voluntarily.]

The trial proceeds. Assume the trial judge has ruled all the above evidence admissible and it is led as part of the Prosecution case. Pirrip gives evidence in his own defence. He testifies that the death of Estella has been unbearable and singularly devastating for him. He says he did feel unwanted by her family and that occasionally frustrated him only because he could not understand why he was not accepted by her family given his devotion to Estella. He denies ever having physically harmed Estella. He explains that he only suggested going to the brothel to try and cheer-up Pocket who had recently broken-up from a long term relationship. He says he only made the comments to which Pocket testified to try and make Pocket feel better by suggesting his own relationship was having difficulty – but nothing could have been further from the truth. Pirrip testifies that he was constantly beaten whilst on remand and said anything he could to stop the beatings. He says the police never considered anyone else in their investigation of Estella's death, despite the lock on the door of their apartment being broken and his statements to police in two separately recorded interviews that he loved Estella and only Estella.

In response to Pirrip's evidence in chief, the Prosecution seek to cross-examine Pirrip along the lines that he had visited "All Night Pleasures" at least twice a month in the 4 or 5 months prior to Estella's death, and that he only stopped visiting the establishment when he was banned by management for striking some of the women there for not doing what he demanded.

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e) Should the Prosecution be permitted to do this? (10 MARKS)

[None of this evidence would have been admissible under 34P of the SAEA if the Crown had sought to lead it in chief.
To be the subject of XXN, it must be appropriate to allow these topics to be raised in fair rebuttal of the accused's evidence. Both topics of XXN reveal bad character.
Permissibility depends on whether exceptions to 18(1)(d) apply. The accused has given evidence of good character via his testimony of devotion to the deceased and not frequenting brothels (a good argument is to identify that this is not evidence of GC but a response to issues raised on the Crown case). More clearly, the accused has given evidence impugning the police investigation. Exceptions (ii) and (iii) are immediately apparent. Section 18(1)(d)(iii), (2) would not apply, the defence is wholly consistent with an absence of thorough police investigation and grounded in the basis of other evidence (especially assuming the door lock actually broken and the statements made in interviews). Similarly, it is unlikely that his protestations of devotion and "devoutness" amount to leading evidence of his own GC. However, on the case run by the Crown (assuming all Crown evidence admitted), a major issue in the trial is attendance at the brothel. Presuming (fairly) that the Crown did not know what the accused would say in his defence, XXN should be permitted on the issue (s18(1)(d)(i)) of his attendance at the brothel on multiple occasions. Evidence of those attendances could not be led in chief because they would not survive 34P, but they can be raised in XXN pursuant to 18(1)(d)(i) as rebutting that part of the defence (*Corak & Palmer*). The residual question is whether the probity of that rebuttal outweighs its prejudice which it does. The jury will not reason to guilt from attendance at the brothel and will be strictly directed that they may take it into account in assessing the credit of the accused and the issue of his attendance. XXN on management's response to striking, on the other hand, would unlikely be allowed given the risk that it will be used impermissibly by the jury to reason via impermissible propensity (that the accused is the sort of person who hits women), without the evidence having any particular probity to facts in issue.]

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