



NATIONAL COMMITTEE ON ACCREDITATION

SAMPLE EXAMINATION

EVIDENCE LAW

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**SAMPLE EXAMINATION
EVIDENCE LAW
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INSTRUCTIONS:

- (a) You have three hours to complete this examination.
- (b) Answer questions with full sentences.
- (c) This is an open book examination. You are permitted to bring into the examination and to consult any material you choose.
- (d) The value of each question is indicated above each question. The value of all questions together is 100. A pass on the examination is 50. You are expected to answer all of the questions.
- (e) Fact Situation “A” involves a criminal investigation. It contains 6 questions (some of which have sub-questions) worth a total together of 60 marks. Fact Situation “B” is based on Fact Situation A but involves civil evidence. It contains 4 questions (some of which have sub-questions) worth a total together of 40 marks. Answer all questions.



Criminal Evidence - Fact Situation “A”

Spence has been charged with criminal negligence causing death, and impaired driving causing death, as the result of an automobile accident in which the truck he was allegedly driving struck and killed a pedestrian. It is not contested that Spence was in the vehicle at the time of the incident but he claims to have been a passenger, not the driver. Even if he had been driving, he contests his liability on the basis that he was not impaired and that the incident was a mere accident caused by the glare of the sun and by a possible suicide attempt of the pedestrian, not as a result of criminal negligence.

10 marks

1. The ambulance attendant who arrived at the accident wrote a report that describes how the pedestrian was dead at the time of his arrival. It goes on and contains the following information:

....Two males were beside the truck. While I was putting away the board and kit I had taken with me I noticed the taller of the two men open the driver’s door, and from where I was it looked like he was wiping the steering wheel with a rag, as if to remove fingerprints or something, and I saw him throw a sweater onto the passenger’s side. When I heard that he told a policeman he was the passenger, and the policeman believed him because his sweater was in the passenger seat, I told the officer what I had seen.

The ambulance attendant wants to go on a golf-trip to Florida the same week the trial is on. You are articling for the Crown’s Office. The Crown wants your opinion on whether, if they permit the ambulance attendant to go to Florida, they will be able to get the ambulance attendant’s document put into evidence. Analyse fully.

15 marks

2. The Crown has had the police run a criminal record check on Spence. Spence has been convicted in the past for obstructing justice for lying to a police officer about his name, for breaching probation, for theft, and twice for impaired driving. The impaired driving convictions both occurred within the last year. The Crown asked the police to pull the files on Spence’s prior convictions and has learned that during the first impaired driving incident eleven months ago, the police arrived at a single vehicle accident to discover Spence and three other men standing outside the vehicle. He asked them who was driving and each of them said they were just passengers, and that the driver, a man they had met at a bar and who offered to be their designated driver, ran away when the truck went off the road. Spence was convicted only because he was identified as the driver by two witnesses who had watched the accident happen. In the second impaired driving incident, only four months ago – for which Spence went to jail for 90 days – he was again outside of the vehicle at the time of an accident and did not admit to driving when asked. Again, witnesses put him behind the wheel. The Crown has also had the police confirm that Spence has been attending Alcoholics Anonymous meetings as a result of his

probationary term imposed after the second accident.

You are articling with the Crown Office. The Crown has asked you if she can use any of this evidence, and has asked you to describe the law on each possibility and to evaluate what is likely to happen, with full explanations. Please do so.

5 marks

3. Before the police arrived a woman who witnessed the accident approached Spence. She said, “Why were you going so fast. You were just speeding through that intersection like you didn’t care. What were you thinking?” Spence said nothing at first but the woman persisted. Spence responded, “I don’t have to answer to you.” The Crown has asked you whether you think this exchange will be admissible, and to describe what arguments the defence might make to try to keep this proof out. Explain the law fully.

15 marks

4. You are the Trial Judge. Assume that you have found the Charter to have been violated, in the following partial judgment:

On the evidence I am satisfied on the balance of probabilities that Officer Choy violated both sections 8 and section 10(b) during his investigation. These breaches occurred when Officer Choy approached Mr. Spence, who was standing at the side of the vehicle, and told him to produce the ownership and insurance papers for the vehicle. Mr. Spence said that he would not because he was not the driver and he was not obliged to do so. When Mr. Spence told Officer Choy he was leaving, Officer Choy told him that if he did he would be charged with leaving the scene of an accident. At that point it is clear that Mr. Spence was being detained by Officer Choy. Officer Choy was therefore obliged to immediately advise Mr. Spence of his right to counsel. He did not. When asked about why he did not read him the right to counsel Officer Choy said he did not because he had not arrested Mr. Spence even though he thought Mr. Spence might have been driving because he was still investigating what happened and would not have done anything at that point if Mr. Spence had tried to leave. Officer Choy therefore lied to Mr. Spence and claimed he would invoke his powers of arrest in order to make Mr. Spence forfeit his liberty.

At this point Mr. Spence said, “I am not helping you convict me. You will have to get the documents without my help.” Constable Choy then opened the vehicle door and proceeded to open the glove compartment, where he found a bottle of whisky. Mr. Spence said, “Oh boy. That must be my brother’s. He borrows my truck all the time.” Testing has shown that Mr. Spence’s DNA was on the mouth of the bottle and his fingerprints have been found on it as well. When Constable Choy was asked on what basis he thought he could open the glove compartment he gave two justifications. He said that he interpreted Mr.

Spence's statement, "You will have to get the documents without my help" as Mr. Spence's consent to open the glove compartment. That is clearly not adequate consent. Constable Choy may have interpreted it this way but he was wrong to do so. When he was pressed on this Constable Choy said that he was conducting the search "incident to arrest." While it is true that the law permits officers to search the area within the immediate control of an arrested suspect, including the glove compartment of a car in suitable cases, Constable Choy cannot rely on this basis because, as indicated, he claims not to have arrested Mr. Spence. In fact, Constable Choy did have the lawful right to search the glove box as part of the potential crime scene under investigation but he never attempted to rely on that ground. It is not for me as the judge to find that Constable Choy was invoking a particular legal authority to conduct a search when on his own evidence he was not invoking that authority. As I say, Constable Choy violated section 10(b) of the Charter by not advising a detained Mr. Spence of his right to counsel, and he has violated section 8 by searching the glove compartment without consent. Mr. Spence's lawyer has asked me to exclude the following evidence:

- (a) Mr. Spence's statement "I am not helping you convict me. You will have to get the documents without my help," which the Crown wants to rely on;
- (b) The whisky bottle and DNA and fingerprint evidence; and
- (c) Mr. Spence's statement "Oh boy. That must be my brothers. He borrowed my truck all the time."

.....

You are to complete the judge's decision.

5 marks

5. When Spence was arrested he was put into a cell with a man who introduced himself as "Singhal." Singhal was in fact a police officer who had been placed in the cell to record anything Spence might say. Singhal asked Spence what he was in for, and Spence said, "They think I killed a lady with my car but my brother was driving, man." Singhal said, "Why would they think that you are driving?" Spence said, "Because maybe I was." Singhal called for the custodial officer and asked if his lawyer was there yet, which was the signal that he should be let out as he had what he needed. He then left the room and immediately recorded the conversation in his duty book. Can Singhal testify about this conversation during the criminal trial? Explain the relevant law fully.

10 marks

6. When presenting his defence Spence's lawyer wanted to show that the pedestrian who was killed was suicidal. This was to buttress or support the theory that she waited for the truck to be turning, and jumped in front of it intentionally. The lawyer has evidence that immediately before the accident, the pedestrian had just been fired from work and that her husband had left her the month before. The lawyer had heard from a neighbour that the woman had a history of suicide attempts and was seeing a psychiatrist named Dr. Numbo about serious depression. Spence's lawyer has subpoenaed Dr. Numbo to come to court with his records. Dr. Numbo has shown up with a lawyer who argues that the records are privileged and should not be turned over, and that Dr. Numbo should not have to testify. Discuss the appropriate law and evaluate to the extent you can whether Dr. Numbo's lawyer is correct.

Civil Evidence - Fact Situation "B"

Assume that Spence has been sued civilly for negligence in the death of the pedestrian who the truck struck and killed. Again, it is not contested that Spence was in the vehicle at the time of the incident but again he claims to have been a passenger. Even if he had been driving, he contests his liability on the basis that he was not impaired, and that the incident was a mere accident caused by the glare of the sun and the woman's possible suicide, and not as a result of negligence on his part.

10 marks

7. Assume that, in his decision, the Criminal Court judge convicted Spence of simple impaired driving but acquitted him of criminal negligence on the basis that the judge was left in reasonable doubt as to whether that the negligence was serious enough to constitute "criminal negligence," and was also left in doubt as to whether the manner of driving caused the death of the pedestrian, who may have jumped suddenly into the path of the car. You are a junior lawyer working with Spence's defence counsel. Write a memo on whether the criminal judgment would be admissible in the case, and if so, precisely what technical and tactical use could be made of it by the plaintiffs and the defence.

20 marks

8. Marilyn is being offered by Spence's defence team as an accident reconstructionist. She works for Clover Industries as a civil engineer. The firm contracts itself out as a consulting and construction firm for road and transit design and has expertise in avoidance of accident risks. As part of their work, they also offer expert accident reconstruction opinions. Marilyn had been with the firm for three months following her graduation at the time she prepared the following report. Her experience consisted of a general civil engineering degree that included three courses on highway, road and runway design. She has also taken Clover Industries' in-house accident

reconstruction program, which involves five days of seminars and the preparation of three mock accident reconstructions. She also attended as a kind of apprentice with an experienced engineer for one month while he prepared accident reconstruction reports. The relevant aspects of the report she has furnished are as follows:

The intersection where the accident occurred is a “T” intersection, as depicted on the attached plan of survey from the City of Omaha. It is my opinion that the pedestrian was not struck while walking within the cross-walk lines from north to south, as claimed by Witness Wilson. Witness Wilson’s testimony is not credible because, based on firm science, the pedestrian was struck at a point seven feet south of the north bound curb, and nine feet to the east of the east line of the north-south cross-walk on the west side of the intersection – in other words, nine feet into the intersection. I have determined this location based in part, on the ultimate location of the body, which was indicated by fluorescent paint markings that were still visible when I reviewed the scene thirteen days later, and as located on police diagrams. The pedestrian was struck by the lower right hand corner of the vehicle, which sustained damage only at the lower grill level and below. I am assuming that the truck was travelling at a speed of between forty-five and fifty-five kilometres per hour because I am advised that witnesses did not hear any squealing of tires, and there were no skid marks observed by officers at the scene; based on seven attempts in our lot where pavement conditions are similar, this vehicle could not negotiate a 90 degree turn in a similarly short radius at more than fifty-five kilometres per hour without squealing and losing traction. Based on the speed of the vehicle, the weight of the pedestrian (61 kilograms), the path of the vehicle (I am assuming it stayed within its lane on making the turn as there is no indication to the contrary), and the location of the body when it came to rest, I have been able to use standard physics to determine the likely point of impact. I have relied in making this assessment on the “Doster test” that were performed late last year at Memorial Maine University to determine the impact of posture on the distance of pedestrian flight. Those tests involved the use of crash-test dummies being struck in various positions to identify their trajectory and distance at various speeds. Because of the location and nature of the damage to the truck, I have selected the relevant flight path from posture C1 in the Doster tests - a crouching position where the pedestrian is below the windshield line when struck. Based on the calculated location of the point of impact, it is my opinion that the Pedestrian was not attempting to cross north to south at the intersection because she would have to be taking a U shaped path into the intersection if that was her intent, which makes no sense. The location is consistent with someone who had moved into the intersection with the intention of being struck, a theory that is supported by the distraught and unstable condition of the pedestrian shortly before the accident.

Analyse whether Spence will succeed in having Marilyn present this evidence when she testifies. Be specific, identifying all of the contentious issues and using the correct law to provide an appropriate resolution.

9. Assume that Spence testifies that he was not the driver

3 marks

(a) The plaintiff's lawyer ends his cross-examination of Spence by saying, "I would put it to you that you and your brother have made up this whole story about him driving after you met with your lawyer the next day and learned that, if convicted, you would lose your licence for life because of your prior convictions?" What will the defence objection be and under what circumstances would it succeed?

2 marks

(b) Can Spence's lawyer call Spence's neighbour in reply to testify that when Spence got home the night of the accident he said he was upset because his brother had killed a woman in a car accident? Explain fully, citing the relevant rules.

10. Assume that Spence testifies that he was at the library studying all afternoon before going to the restaurant where he had dinner, including wine. The Plaintiff's counsel heard from a college classmate of Spence's "who did not want to be quoted on it," that Spence was in fact at a pornographic movie house with three friends all afternoon.

2 marks

(b) Can the Plaintiff's counsel confront Spence with this allegation?

3 marks

(c) Assuming the Plaintiff's counsel knows two of the boys who were with Spence. Can he call those boys to testify about Spence's whereabouts? Explain your answer fully.