

## FACULTY OF LAW

FINAL EXAMINATION – APRIL 24, 2009

### LAW 453:B1 THE LAW OF EVIDENCE (ROYAL)

Time Allotted: Three (3) Hours and Fifteen (15) Minutes

Code Number: DO NOT ENTER YOUR NAME ON ANY ANSWER SHEETS OR BOOKLETS. A list will be circulated and your name is to be entered opposite a number on that sheet. That number will be your code number FOR THIS EXAMINATION ONLY and should be entered on the examination booklets in the space provided for your surname. This is to ensure anonymity during marking.

- Special Instructions:
1. This examination paper contains eight (8) questions on seventeen (17) pages. There is also an Appendix of forty-one (41) pages. Check to ensure it is complete before starting.
  2. You are to answer five (5) questions and all eight (8) questions are of equal value, twenty (20) marks. You can answer any five (5) of the eight (8) questions you wish.
  3. Please read the questions carefully before answering.
  4. Students are reminded of Part I of the *Constitution Act, 1982*, namely, *The Canadian Charter of Rights and Freedoms*. You are to consider the possible application of the *Charter* with respect to each of the questions answered. The relevant sections of the *Charter* are found in the Appendix.

## QUESTION 1

- (i) In September, 2008 the Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard was published.

In Chapter 7, Summary of Findings and Recommendations, is found the following commentary on a significant Crown witness called at trial, Ms. Nichol John:

“(c) Conduct of the Trial

...

### **(iii) Nichol John’s Evidence and Application of s. 9(2) of the *Canada Evidence Act***

52. In her May 24, 1969 police statement, Nichol John said that she saw David Milgaard grab a girl in the alley and stab her. At trial John did not repeat this evidence.

53. T.D.R. Caldwell [Crown Counsel] applied to the trial judge under s. 9(2) of the *Canada Evidence Act* to use Nichol John’s May 24, 1969 statement to challenge the credibility of her trial evidence. The trial judge failed to follow the proper procedure and allowed Caldwell to read the May 24, 1969 statement to John in the jury’s presence. Although John did not subsequently adopt the most incriminating parts of her statement as her trial evidence, the jury became aware that she had previously told police that she witnessed David Milgaard commit the murder.

54. Before allowing the jury to learn of Nichol John’s previous statement and its contents, the trial judge should have held a *voir dire*, in the absence of the jury. The purpose of the *voir dire* would have been to enable T.D.R. Caldwell to prove the statement and to provide Calvin Tallis [Defence Counsel] with an opportunity to probe the circumstances surrounding the taking of the statement, to show that due to the manner in which the statement was obtained by the police, introduction of the statement and cross-examination on it would be improper.

55. Calvin Tallis should have been allowed to cross-examine Nichol John in the absence of the jury. He could have aggressively questioned John about her dealings with the police without fear of an adverse answer from John being accepted by the jury. Tallis could also have cross-examined Raymond Mackie and Art Roberts [the police officers who were responsible for the taking of Ms. John’s statement] in the absence of the jury, about the circumstances of

Roberts' questioning of John and Mackie's taking of her statement. This may have resulted in a ruling by the trial judge that T.D.R. Caldwell could not use the May 24, 1969 statement to cross-examine John, due to the circumstances in which the statement was obtained. Instead, Tallis was denied these opportunities and the jury heard the most incriminating portions of John's May 24 statement before Tallis even had a chance to question her.

56. During the course of T.D.R. Caldwell's cross-examination of Nichol John on her statement, the trial judge persistently intervened and effectively destroyed the credibility of John's evidence that she could not remember or recall the most incriminating parts of her statement. The trial judge's questioning of John left the impression that John's failure to recall was not genuine. In the result, the jury was likely to conclude that the truth lay in her May 24 statement.

57. When Calvin Tallis finally had a chance to question Nichol John, he had no ability to cross-examine her about the incriminating things she now said she could not remember because she had not adopted them as her evidence. As a result, John's unadopted eyewitness account of the murder went untested and was heard by the jury.

58. The trial judge's instructions to the jury about disregarding the portions of Nichol John's May 24, 1969 statement which she did not adopt on the stand amounted to an effort at damage control, which could not repair the trial judge's destruction of her credibility in front of the jury nor his error in failing to permit cross-examination in the jury's absence on the circumstances of her statement.

59. On appeal, the Saskatchewan Court of Appeal found that the trial judge made a procedural error in failing to hold a *voir dire* regarding the circumstances under which Nichol John's statement was provided. However, the Court concluded that David Milgaard suffered no prejudice as a result of the improper procedure utilized by the trial judge. The Saskatchewan Court of Appeal was wrong in reaching this conclusion. Evidence at the Inquiry established that the defence was prejudiced by this error. Allowing the jury to hear John's statement was a turning point in the trial and instrumental in Milgaard's conviction. Had Calvin Tallis been allowed to cross-examine John, Art Roberts and Raymond Mackie in the absence of the jury, he might have revealed circumstances in John's handling by Saskatoon Police and by Roberts [a Calgary police officer and polygraphist seconded to the investigation] which might have

convinced the judge to withhold the out of court statement from the jury. What happened instead was disastrous for the defence.

60. The fact that jury heard Nichol John's May 24, 1969 statement could have led them to accept it as corroboration of Ron Wilson's trial evidence [Wilson was a witness who also implicated Milgaard].

61. The combination of legal error respecting the application of s. 9(2) of the *Canada Evidence Act* and Chief Justice Bence's impatience respecting the evidence given by Nichol John at trial probably contributed to the wrongful conviction of David Milgaard."

At the conclusion of Chapter 7, recommendation number 5 is as follows:

"5. The *Criminal Code* should be amended to permit academic inquiry into jury deliberations with a view to gathering evidence of the extent to which jurors accept and apply instructions on the admissibility of evidence, particularly relating to inconsistent out of court statements. Amendments to s. 9 of the *Canada Evidence Act* should then be considered."

What observations do you make with respect to this particular recommendation having regard both to the *Milgaard* case and the law generally with respect to jury instructions? How should section 9 be amended? Is the *Milgaard* decision, which is now almost 40 years old, still an important case in the modern law of evidence?

**VALUE 12 marks**

(ii) Discuss the significance of the following decisions:

- (a) *R. v. Lavallee* [1990] 4 W.W.R. 1
- (b) *R. v. Lyttle* (2004) 180 C.C.C. (3d) 476
- (c) *R. v. Shearing* (2002) 165 C.C.C. (3d) 225
- (d) *R. v. Fliss* (2002) 161 C.C.C. (3d) 225
- (e) *R. v. Potvin* (1989) 47 C.C.C. (3d) 289

**VALUE 5 marks**

(iii) What is meant by the term, the evidentiary burden?

**VALUE 3 marks**

## **QUESTION 2**

- (i) You are the presiding Justice's articling student. She is sitting with a jury and the four accused are charged with conspiracy to import a controlled substance into Canada in contravention of s. 6(1) of the *Controlled Drugs and Substances Act*. She asks you to outline for her the directions she will be required to give to the jury on both the operation of the co-conspirators' exception to the hearsay rule and the use the jury could make of the evidence given by one or more of the accused at trial in the event that they elect to testify.

### **VALUE 6 marks**

- (ii) What is meant by the term spousal privilege? Has the law been amended or refined by the Supreme Court of Canada in the last 25 to 30 years? If so, how significant have such changes been?

### **VALUE 5 marks**

- (iii) Identify and discuss the major methods of impeaching your opponent's witness?

### **VALUE 9 marks**

### QUESTION 3

The accused, Tom Smith, is charged with the following three offences appearing on the same Indictment:

- Count 1: That he, on or about the 14<sup>th</sup> day of February, 2008 at the City of Edmonton, in the Province of Alberta, did unlawfully rob Janet Jones, contrary to section 344 of the *Criminal Code of Canada*.”
- Count 2: That he, on or about the 14<sup>th</sup> day of February, 2008, at the City of Edmonton, in the Province of Alberta, did commit a sexual assault upon Janet Jones, contrary to section 271 of the *Criminal Code of Canada*.”
- Count 3: That he, on or about the 17<sup>th</sup> day of February, 2008, at the City of Edmonton, in the Province of Alberta, did unlawfully rob Susan Brown, contrary to section 344 of the *Criminal Code of Canada*.”

Both complainants are street prostitutes working in the area of 118<sup>th</sup> Avenue and 46<sup>th</sup> Street in the City of Edmonton, Province of Alberta.

The first complainant, Ms. Jones, tells the police that on February 14<sup>th</sup>, 2008, she was picked up by a john on 118<sup>th</sup> Avenue and 45<sup>th</sup> Street. He agreed to pay her \$60.00 for an act of fellatio and they went in his vehicle together to an industrial area nearby. It was 2:30 a.m. On arrival she asked for the cash up front and he immediately punched her in the face and produced a knife, holding it to her throat. He then forced her to perform the act of fellatio upon him and he then robbed her at knife point of the cash that she had in a small handbag that she carried in her coat pocket. He then dumped her out of the vehicle and she walked back to her motel. Later that day she phoned the police and provided a written statement of what had occurred to her and a description of both her attacker and the vehicle he was operating.

On February 17<sup>th</sup>, 2008, at 3:00 a.m., Susan Brown was working at 118<sup>th</sup> Avenue and 46<sup>th</sup> Street and she got into a vehicle driven by a man who wanted to know how much she would charge for an act of fellatio. She quoted him \$60.00 and he agreed with the price quoted. They went to a secluded spot where the man pulled a knife and threatened to stab her. He then took her money, which she had hidden in the lining of her coat and he then kicked her out of his vehicle. She was able to flag down a passing motorist. She told him that she had been out for a walk, got lost, and asked him if he could drop her off on 118<sup>th</sup> Avenue and 46<sup>th</sup> Street. He did so and she “broke” twice more that morning, that is, she engaged in acts of prostitution with two other men, before then going home.

The police, on arresting the accused one week after Ms. Jones' complaint, search his vehicle and find three different women's purses without identification in the trunk. A knife is found in the glove box. The accused is arrested at 4 a.m. driving a vehicle similar to that described ultimately by both complainants on 118<sup>th</sup> Avenue and 51<sup>st</sup> Street. There is a prostitute, Jean Fraser, in the vehicle with him when stopped and she is allowed to leave by the police after providing this brief oral statement:

"He offered to pay me \$60.00 for a blow job. We were going into the park where it's quiet."

Four months after the arrest of Mr. Smith for the offences involving Ms. Jones, Ms. Brown goes to the police with her complaint.

Although initially both complaints were proceeded with separately, Crown Counsel decide to join the offences together with a view to having one preliminary inquiry, the accused having elected for trial before a Court composed of a judge and jury. At the preliminary inquiry both complainants are called to testify and each describe the acts complained of. Both identify the accused as their assailant. The accused's lawyer vigorously cross-examines each of the complainants, suggesting that they are mistaken with respect to their claimed identification of the accused as their attacker.

At the preliminary inquiry, Ms. Jones admits to a prior criminal record for drugs, theft, assault and assault with a weapon. She has had a troubled and somewhat calamitous upbringing and would fairly be described as a person of unsavory character. She claims that she is able to identify the accused in the courtroom and describes her ordeal in detail following several meetings with members of the Edmonton Police Service, Victim Services Office. She says that without their intervention and assistance she would not have been able to go through the ordeal of the courtroom experience. She maintains that she was severely traumatized by the incident and is presently receiving psychological counseling. She says that in her meetings with Victim Services personnel her rights as a witness and as a complainant in a sexual case were discussed with her and she was given information concerning potential financial compensation for the trauma that she has suffered through the Crimes Compensation scheme maintained by the Province. With her psychologist she says she has undergone both hypnotherapy to revive her memory of the incident and psychotherapy to deal with the trauma associated with the revived memory.

Ms. Brown at the preliminary inquiry is somewhat more combative in her testimony and does not appear to have been as troubled by the event as Ms. Jones. She maintains that she is fully confident in her identification of the accused as her attacker however she does acknowledge that when first spoken to by the police she expressed some doubt in her ability to identify the man responsible for robbing her. She says that she too has received counseling from Victim Services and she has

made inquiries with the CrimeStoppers Program to determine whether or not she would be eligible for payment under that program. She has also explored the possibility of seeking financial remuneration from the Crimes Compensation Board and, as did Ms. Jones, she completed an application for financial benefit and this application contained a statement of what had occurred to her on the date of the alleged offence.

Following the complaint of each woman to the police, photographic lineups are shown to each of them. Each lineup contains a photograph of the accused as well as photographs of seven other men. Upon being shown the lineup, Ms. Jones, after 90 seconds, points to the picture of the accused and notes on the photographic lineup instructions sheet, "I'm pretty sure that's the guy." When the photographic lineup is shown to Ms. Brown, in 15 seconds she points to the photograph of the accused and says, "That's him, there's no doubt."

The two complainants each deny knowing one another however both have worked for about nine months in the same area of town and Ms. Brown says that she went to the police with her complaint after she was told by another working girl on the street of Ms. Jones' ordeal. Ms. Jones' brother used to date Ms. Brown six years ago.

The Crown also called Ms. Fraser at the preliminary inquiry. She too identifies the accused as the man who picked her up. In the Crown disclosure material you discover that she too has had a troubled life and is undergoing therapy for drug dependency; she is HIV positive and is not expected to live out the year. She is also receiving psychiatric counseling for a severe personality disorder that can distort her perception of events and adversely affect her memory.

You are a student-at-law articling with the lawyer retained to defend Mr. Smith. You are to outline for your principal what evidentiary issues you anticipate arising during the trial, potential Defence tactics with respect to such issues and any pre-trial applications which ought to be considered. In outlining your advice for your principal you ought, of course, to take into account the potential position of the Crown at each stage of the process.

**VALUE 20 marks**

#### QUESTION 4

- (i) “The principal reason for the exclusionary rule relating to propensity is that there is a natural human tendency to judge a person’s action on the basis of character. Particularly with juries there would be a strong inclination to conclude that a thief has stolen, a violent man has assaulted and a pedophile has engaged in pedophilic acts. Yet the policy of the law is wholly against this process of reasoning.

The policy of the law recognizes the difficulty of containing the effects of such information which, once dropped like poison in the juror’s ear, “swift as quicksilver it courses through the natural gates and alleys of the body.” *Hamlet*, Act I, Scene V, ll. 66-77.”

Identify. If this is so why then does s. 12 of the *Canada Evidence Act* apply to the accused qua witness? Are there protections in place to prevent or limit the potential prejudice an accused, who elects to testify in his own defence, will suffer, if his prior criminal history is disclosed?

Discuss.

#### VALUE 6 marks

- (ii) What are the differences, if any, between witness exclusion orders in civil and criminal cases?

#### VALUE 2 marks

- (iii) Albert Fester is charged with one count of sexual interference contrary to section 151 of the *Criminal Code of Canada*. The alleged victim is nine years of age when the complaint was made to the police and aged seven when she says the crime occurred.

The accused is her step-father. She initially said nothing to anyone about the incident because she was, she tells the police, too embarrassed to speak of it. One year after the alleged sexual touching incident, she tells her mother who immediately confronts the accused with the allegation which he adamantly and vociferously denies. He is asked to leave the home by the mother and he does so. Mother then takes the child to the police the next day and the child is interviewed later that same day on video-tape by an experienced child sex crimes investigator. On the tape she describes the

incident clearly and without prompting. There is no other evidence in support of the charge – no medical evidence, no confession by the accused, etc., etc.

At the preliminary inquiry held on January 10, 2007, the young complainant testified both during and following a *voir dire* to determine the admissibility of the video-taped statement she had earlier given to the police. It was ruled admissible and she adopted it as accurate and truthful when it was played by the Crown during her testimony. At the conclusion of the preliminary inquiry, the accused is ordered to stand trial.

At the Court of Queen's Bench judge and jury trial however, although the complainant adopts the video-taped statement during the course of the *voir dire* (and thus it is ruled admissible) when the jury returns and the tape is again played, she stands essentially mute and is either unable or unwilling to give any further testimony notwithstanding the prompting of both the crown prosecutor and the presiding justice.

The only evidence of a sexual touching/interference by the accused comes as noted previously from the tape.

What should Crown Counsel do now? Where does this leave the Crown? What should be the Defence Counsel's response to any attempt or attempts by the Crown to salvage the case?

What options does the trial judge have?

Assuming nothing further is gained from the child in the witness box by Crown Counsel, what should the Defence be contemplating?

Mr. Fester has four prior convictions for pedophilic offences involving pre-pubescent females.

**VALUE 10 marks**

- (iv) Why is *R. v. Khelawon* (2006) 215 C.C.C. (3d) 161 an important case?

**VALUE 2 marks**

## QUESTION 5

- (i) You are working this summer at a prominent Vancouver criminal defence office. Your principal is acting for Cst. X, one of the four R.C.M.P. officers involved in the tasing of Robert Dziekanski who died whilst in police custody at the Vancouver International Airport on October 14, 2007.

After an internal police investigation is completed, during which Cst. X was obliged to give a statement or face disciplinary proceedings for refusing to do so, the Crown decide that no criminal charges are warranted.

There is then discovered a cell phone video recording of much of the incident which seriously calls into question the accuracy of Cst. X's statement to the internal investigator and those also of his colleagues.

A public inquiry is then ordered by the Provincial Attorney General to inquire into the manner in which Mr. Dziekanski met his death and what recommendations the Commissioner would make, if any, to prevent similar deaths in the future.

The Commissioner enjoys all the powers of a Superior Court Justice with respect to the subpoenaing of witnesses and obliging them to testify under oath. Refusal to attend and/or testify can result in significant gaol sentences for contempt.

Cst. X is subpoenaed to testifying at the Inquiry and he does so. He is examined in chief by Commission Counsel and is then vigorously cross-examined by several lawyers appearing for various interested parties.

The Commission Hearings attract considerable media attention with much of Cst. X's evidence and that of his fellow officers being televised on the nightly news for the several days that they are testifying. The evidence of all four R.C.M.P. officers, including Cst. X, is heavily criticized by the media and even The Honourable Wally Oppal, the Provincial Attorney General, muses that the decision not to charge one or more of the four officers may need to be revisited.

You are to outline what steps should be contemplated by your principal in the event that Cst. X and one or more of his colleagues is charged criminally. What protections, if any, do they enjoy in the event that a criminal prosecution is commenced?

**VALUE 9 marks**

- (ii) Define the following terms:
- (a) Judicial Notice
  - (b) Duty to Cross-Examine
  - (c) Gatekeeper
  - (d) Junk Science
  - (e) Child of Tender Years

**VALUE 5 marks**

- (iii) Identify and discuss any circumstances in which solicitor/client privilege will yield.

**VALUE 4 marks**

- (iv) What is after-the-fact conduct? How else has it been referred to in the past?

**VALUE 2 marks**

## QUESTION 6

- (i) Identify and discuss the general factors governing admissibility of evidence in a criminal prosecution.

### VALUE 5 marks

- (ii) In a civil suit for damages the plaintiff's witness, Mr. Smith, has described the motor vehicle accident, which he attributed to the fault of the defendant, and is now being cross-examined:

Q. Sir, you've testified that you observed this accident which you say occurred on February 2, 2007. Can you tell us how you happened to be at that location?

A. Well, yes as a matter of fact. The accident occurred near the Rexall Place. I was on my way to see a hockey game there. Earlier that day I had seen my doctor and he had prescribed me some medication.

Q. For what?

A. Do I have to answer that question My Lord?

THE COURT: Yes.

A. For a venereal disease

Q. Who was playing at this hockey game you attended?

A. The Oilers and the Flames.

Q. And this was on February 2, 2007?

A. Yes.

Q. You're sure about that?

A. I'm sure.

Q. You're as sure about it as you are about all the rest of your evidence?

A. Yes, I am!

Q. Would it surprise you to know that on February 2, 2007, the Oilers were in the middle of a road trip to the West Coast and that night they were playing a game in Los Angeles?

A. It would surprise me very much. I'm certain the Oilers were at home that night.

Q. You're right about everything?

A. This time I am. I saw the accident, your client was at fault and the Oilers were in Edmonton.

COUNSEL: Your Ladyship, I have no more questions for this witness. I do feel obliged to alert the Court and my friend that in presenting my client's case I intend to call evidence that on the evening in question the Oilers were in Los Angeles. Further, I will be subpoenaing Mr. Smith's doctor to bring to Court the witness' medical records to substantiate his claim that the doctor had seen him on February 2, 2007.

Would this evidence be admissible?

Would the evidence be admissible if the proceeding was a prosecution for dangerous driving contrary to s. 249(1)(a) of the *Criminal Code* rather than a civil action for damages?

**VALUE 7 marks**

(iii) "...men lie, circumstances do not." – Identify. Are there special or is there a special rule when assessing this element of a criminal case?

**VALUE 3 marks**

(iv) When will the court allow expert testimony to be received?

**VALUE 3 marks**

(v) What is re-examination and how, if at all, does it relate to rebuttal evidence?

**VALUE 2 marks**

## QUESTION 7

- (i) “One must recall that rules of evidence are not cast in stone, nor are they enacted in a vacuum. They evolve with time ...{T}he recent trend in courts has been to remove barriers to the truth-seeking process. Recent Supreme Court of Canada decisions, by relaxing certain rules of evidence..have been a genuine attempt to bring the relevant and probative evidence before the trier of fact in order to foster the search for truth”.

(per L’Heureux-Dubé in *R. v. Levogiannis* (1993) S.C.C.)

Aside from the search for truth, there are other policy considerations or rationales that inform the evolution of the rules of evidence. Identify these policy considerations and for each one, identify and discuss a case in which that consideration affected the court’s analysis of the evidentiary rule.

### VALUE 6 marks

- (ii) You are asked to speak to a service club about recent developments in the law with respect to the trial of those charged with sexual offences. You are asked by the club to speak on this topic because they have heard that your views are controversial. What is the title of your speech? You are to reproduce the speech in its entirety.

### VALUE 10 marks

- (iii) Discuss a trial judge’s present jurisdiction to exclude evidence tendered by the Crown in a criminal trial on the basis that its prejudicial effect outweighs its probative value.

### VALUE 4 marks

## QUESTION 8

Fred and Margo Thomas are jointly charged with the following offence:

Count 1: Frederick Allan Thomas and Margo Jean Thomas stand charged that they, on or about the 12<sup>th</sup> day of December, 2007, in the City of Edmonton, in the Province of Alberta, did unlawfully cause the death of John Albert Thomas thereby committing second degree murder contrary to s. 235(1) of the *Criminal Code of Canada*.

They also stand charged on the same Indictment that they:

Count 2: On or about the 12<sup>th</sup> day of December, 2007, in the City of Edmonton, Province of Alberta, were unlawfully in possession of a weapon, to wit: a hammer for a purpose dangerous to the public peace, contrary to s. 88(1) of the *Criminal Code of Canada*.

The deceased is their son who was 8 years of age when he died.

They have elected to be tried by Judge and Jury.

You are counsel for Fred Thomas and Margo Thomas is represented by a law school classmate and your good friend, Andy Pollard. You and Andy have practiced in separate firms in Edmonton for 16 years and have had many cases together over the years. Andy is a highly competent, well respected and ethical lawyer.

The preliminary inquiry has just concluded and both accused have been ordered to stand trial.

On December 12, 2007 at 10:30 p.m. the police are called to the Thomas home by a highly distressed and emotional Mrs. Thomas. She is hysterical on the 911 phone call she makes, saying:

“You must come; my baby isn’t breathing; I think he’s dead. He fell down the stairs. Fred my husband has taken off. I am all alone; please help.”

Police and paramedic personnel arrive within minutes of the call and find Mrs. Thomas holding her son John on the couch. She is covered in what appears to be blood. John is lapsing in and out of consciousness and has a severe gaping head wound which is bleeding profusely. He is clinging to his mother and when one of the paramedics attempts to lay him on the spine board, he cries out:

“Don't hurt me anymore; I'll be good; have they gone? Mum, Dad help me.”

He then lapses into unconsciousness and is pronounced dead on arrival at the hospital.

Found lying on the living-room floor is a ball-peen hammer. It is examined forensically for DNA evidence. It has the deceased's blood and hair on it. It has the initials “F.T.” on the wooden handle. No fingerprints are found on this item nor any other DNA evidence located.

Mrs. Thomas is alone in the home when the police arrive. She is under the influence of both liquor and prescription medication; she is unsteady on her feet, slurring her speech and appears disoriented. She is described by various police officers as moderately to grossly intoxicated.

She is taken into custody and at 2:30 a.m. on December 13, 2007 she tells the police, after having been properly advised of the reason for her detention, cautioned and given the right to retain and instruct counsel, that Fred had beaten the boy the evening previous and had then left the home before the police arrived.

She tells the police that she and Fred are living apart however they still see each other occasionally. They were married in 1997 and then lived together for two years before their separation. She tells them that on the night of December 12, 2007, Fred hit the boy once in the head with the hammer after John had thrown a temper tantrum. Fred, she says, had beaten the boy before, usually with a belt. His school teacher had once reported one of these beatings to the Child Welfare authorities and Fred then received counseling for anger management. Her statement to the police is audio recorded without her knowledge or consent.

Fred Thomas turns himself in to the police on December 14, 2007. He denies even being in the home on December 12, 2007 and said he last saw Margo and John two weeks previous. John was fine then. He is also properly cautioned and chartered by the police. He tells them that Margo is a hot tempered woman who has often before beaten their son for little or no apparent reason. Fred consents to the interview being videotaped and is told that it is important that he tell the truth and that he could be in very serious trouble if he lies to the police. He is asked if he would be prepared to give a sworn statement, but he declines on religious grounds.

The pathologist testified at the preliminary inquiry and said that the child received a massive right sided skull fracture, the result of several blows with a heavy blunt instrument such as the hammer seized by the police. The doctor also found evidence of long term abuse, to wit: the child was malnourished, there were cigarette burns on his body, he had a number of healing rib fractures on both the left and right side and there was found significant bruising on autopsy of varying ages to the back, legs and buttocks.

Fred's clothing is seized by the police and on his right shirt sleeve are found a number of very small blood spatters, and there is blood found in the tread of one of his running shoes. According to the DNA analyst, the chances of this blood coming from a source other than the deceased, are one in 5.3 trillion.

Fred has a significant criminal record for narcotic offences and Margo has been convicted of both shoplifting and fraud on more than one occasion.

You and Andy meet to discuss trial strategy. What are the evidentiary and tactical considerations you will each have to consider both now and at the trial?

**VALUE 20 marks**