**LEGAL STUDIES  
  
Unit 3 – Written examination**

# PES

# 2021 Trial Examination

**SOLUTIONS & MARKING GUIDE**

**SECTION A \_\_\_\_\_\_\_/40 marks**

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| **Instructions for Section A**  Answer **all** questions in the spaces provided. |

**Question** **1** (2 marks)

Define representative proceedings.

**Mark Allocation**

* 2 marks for providing a definition of this term

**Sample response**

Representative proceedings are where a plaintiff brings a civil claim to court on behalf of a larger group of people who have claims that arise from similar or related circumstances and so put their claims together in one case against the defendant (or group of defendants). The plaintiff bringing the claim to court therefore litigates on behalf of the group.

**Question 2** (2 marks)

Explain the purpose of Consumer Affairs Victoria in relation to resolving civil disputes. (2 marks)

**Mark Allocation**

* 2 marks for providing a detailed explanation of the purpose of CAV identifying CAV’s jurisdiction.

Please note: Only 1 mark awarded if response is only a brief explanation of the purpose of CAV.

**Sample response**

The purpose of Consumer Affairs Victoria in relation to resolving civil disputes is to provide consumers and traders, and landlords and tenants, with a dispute resolution process, which is conciliation. Conciliation involves the use of a third party (conciliator) who listens to the parties, facilitates discussion and makes suggestions in order for the parties to reach an agreement.

**Question 3** (2 marks)

Explain the role of Victorian Legal Aid (VLA) in relation to assisting an accused.

**Mark Allocation**

* 2 marks for providing an explanation of the role of VLA when assisting an accused.

Please note: Only 1 mark awarded if response is only a very brief explanation of the role of VLA.

**Sample response**

The role of VLA in relation to assisting an accused is to provide free legal advice and information about the law and how it applies to the accused’s criminal case, and low-cost or no cost legal representation for people who can’t afford to pay for their own lawyer.

**Question 4** (4 marks)

Explain one right of an accused person and one right of a victim of a crime.

**Mark Allocation**

* 2 marks for explaining one right of an accused person.
* 2 marks for explaining one right of a victim of a crime.

**Sample response**

One right of an accused person is the right to trial by jury for indictable offences heard and determined in the County Court or Supreme Court. The role of the jury in a criminal trial is to determine questions of fact and to apply the law, as stated by the judge, to those facts to reach a verdict of guilty or not guilty.

*Other rights of an accused students could explain include the right to be tried without unreasonable delay and the right to a fair hearing.*

One right of a victim is the right to give evidence as a vulnerable witness. This includes a person who is a child, an individual who suffers from an intellectual disability, a victim of a sexual offence to which the proceedings relate, or in the opinion of the court is vulnerable. Special provisions include having a friend or relative in court while you give evidence (provided that this support person is not also appearing as a witness); having the court closed to the public while you give evidence; giving your evidence on closed circuit television; or having a screen in the court so that you do not have to see the accused while you are giving your evidence.

*Other rights of victim’s students could explain include the right to be informed about the proceedings and the likely release date of the accused.*

**Question 5** (4 marks)

Thomas was found guilty of culpable driving by a County Court jury. As Thomas was under the influence of alcohol at the time of his offence, he now attends rehab for his addiction to alcohol. Due to this, his lawyer argued for a lighter sentence to be imposed, even though it is his third conviction.

Distinguish between mitigating factors and aggravating factors that the judge may consider in this case when sentencing Thomas. Include examples to support your response.

**Mark Allocation**

* 1 mark for explaining mitigating factors including one example.
* 1 mark for explaining aggravating factors including one example.
* 2 marks for explaining the difference between the two factors.

**Sample Response**

Mitigating factors decrease the culpability of the offender and therefore decrease the severity of the sentence/ sanction imposed. One mitigating factor in this case is the fact that Thomas is currently attending alcohol rehabilitation.

Aggravating factors increase the culpability of the offender and therefore increase the severity of the sentence/ sanction imposed. One aggravating factor in this case is that this is Thomas’ third conviction indicating that he has not learnt from his mistakes of committing prior offences.

The difference between mitigating factors and aggravating factors is that mitigating factors decrease the culpability of the offender, whereas aggravating factors increase the culpability of the offender. Also, mitigating factors decrease the severity of the sentence/ sanction imposed, whereas aggravating factors increase the severity of the sentence/ sanction imposed.

**Question 6** (4 marks)

Explain the difference between mediation and arbitration as methods used to resolve civil disputes.

**Mark Allocation**

* 1 mark for explaining mediation.
* 1 mark for explaining arbitration.
* 2 marks for explaining at least two differences between these two methods of civil dispute resolution.

**Sample Response**

Mediation is a dispute resolution method used in civil cases that involves an independent and impartial third party (the mediator) who listens to both parties and facilitates discussion between the two parties.

Arbitration is a dispute resolution method used in civil cases, where an independent and impartial third party (the arbitrator) listens to both parties and then makes a legally binding decision.

One difference between mediation and arbitration regarding the role of the mediator is that in mediation the third party only listens to both parties and facilitates discussion between the parties but does not make a decision. Whereas, the role of the arbitrator involves listening to both parties and then making a decision that is legally binding on the parties.

A second difference is that in arbitration the decision of the arbitrator is always legally binding on the parties and therefore enforceable through the courts. Whereas, in mediation the mediator does not make a decision as the parties decide the outcome themselves.

**Question** **7** (4 marks)

Explain two reasons for the Victorian court hierarchy in determining criminal cases.

**Mark Allocation**

* 2 marks for explaining one reason
* 2 marks for explaining a second reason

**Sample Response**

One reason for the Victorian court hierarchy in determining criminal cases is specialisation. Each court specialises in its own area of law and is familiar with that area of law allowing the court to develop specialised expertise and experience in dealing with their areas of law. Courts, magistrates and judges become well versed in dealing with certain types of criminal cases that fall within their own jurisdiction, as well as allowing for a greater deal of fairness in each case as they have been heard by a specialist in that area of law. For example, higher courts hear complex more serious cases, whereas lower courts hear less serious cases.

Another reason for the Victorian court hierarchy in determining criminal cases is to provide appeals. Someone who is not satisfied with a decision can take their matter to a higher court to have their matter reviewed and heard again, if there are grounds for appeal. This provides fairness and should allow for any mistakes to be corrected. If there were no higher courts in the court hierarchy, a system of appeals could not operate and this would most likely create unfairness if criminal cases were incorrectly decided by a court. A system of appeals would not be possible without a court hierarchy because there would be no higher court to appeal to.

**Question** **8** (8 marks)

Analyse **two** factors a plaintiff should consider when initiating a civil claim.

**Mark Allocation**

* 2 marks for explaining one factor a plaintiff should consider
* 2 marks for explaining second factor a plaintiff should consider
* 4 marks for the ‘analysis’ part of this question – addressing both sides of the issue

Factors to consider when initiating a civil claim include negotiation options, costs, limitation of actions, the scope of liability and enforcement issues.

**Sample Response**

One factor a plaintiff should consider when initiating a civil claim is costs. When resolving a civil dispute there are many costs involved such as court fees, fees for legal representation, and other disbursements – for example, fees paid to expert witnesses. The cost of going to court to resolve a civil dispute can be a huge barrier especially if one party can afford top level legal representation and the other party cannot. However, costs being such a huge barrier may make a plaintiff think twice before pursuing legal action.

Another factor a plaintiff should consider when initiating a civil claim is negotiation options. In some cases, depending on the situation and circumstances involved, the plaintiff may try to negotiate a settlement directly with the defendant instead of taking their claim to court or VCAT. For example, dispute resolution method such as mediation is a negotiation option where an independent third party (the mediator) listens to both parties and facilitates discussion between the parties, so they are able to hopefully decide on an outcome themselves. The mediator does not make a decision. Negotiating an outcome via mediation saves costs and time for all parties involved compared to taking your case to court or VCAT. However, negotiating an outcome by using mediation may not always be beneficial, particularly where there is a power imbalance between the two parties or where the parties are not willing to negotiate an acceptable outcome.

**Question** **9** (10 marks)

*‘Achieving justice is one of the main aims of the criminal justice system’.*  Indicate the extent to which you agree with this statement, providing reasons. Include in your response the ability of the criminal justice system to achieve two principles of justice.

**Mark Allocation**

* 4 marks for indicating the extent to which you agree with this statement, including reasons.
* 6 marks (2 principles x 3 marks each) for an evaluation of the ability of the criminal justice system to achieve two principles of justice (e.g. fairness, equality or access)

**Sample Response (summary)**

I agree to a great extent that achieving justice is one of the main aims of the criminal justice system. Our criminal justice system aims to provide fairness, equality and access, allowing all participants in the justice system to achieve a just outcome.

The principle of justice, fairness, refers to the criminal justice system having processes in place to help ensure all parties involved in a criminal case receive a fair, impartial and unbiased hearing. For example, the existence of the presumption of innocence achieves fairness, trial by jury for indictable offences achieves fairness, and criminal trials being presided over by an independent, unbiased and impartial judge who aims to ensure that each party has an equal opportunity to present their case.

This is further enhanced by the burden and standard of proof in a criminal trial. As the prosecution (acting on behalf of society) brings the case to court, they have the burden of proving the case against the accused. This is fair as the accused has the right to be presumed innocent until proven guilty, and therefore the level of proof, or standard, needs to be substantial. The accused has the right to silence and can’t be compelled to give evidence in court and be cross-examined.

The principle of justice, access, refers to the idea that people involved in a criminal case need to understand their legal rights and the legal processes when going to court. They must also be able to use the various legal bodies that can provide legal advice and assistance as well as be able to access the system of appeals if needed.

Victoria Legal Aid and Community Legal Centres assist parties to a criminal matter understand their rights and obligations and the processes involved in a criminal case. This better prepares the accused person for trial, which allows them to go into a dispute with more knowledge and are therefore better able to make informed decisions.

**SECTION B \_\_\_\_\_\_\_/40 marks**

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| **Instructions for Section B**  Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.  Answer **all** questions in the spaces provided. |

**Question** **1** (20 marks)

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| Two Echuca men charged with Cohuna murder face court committal Daniel Oberin and Kevin Johnson appeared at Bendigo Magistrates’ Court via video link for the start of a three-day committal hearing into the shooting murder of 29-year-old Matthew Alexander at Daltons Bridge on 13th September, 2019.  *Australian Community Media* (ACM) reported that witness Ebony Bennett gave evidence in court that the day before the shooting, Mr Oberin told her he wanted to go to Mr Alexander’s Eastons Rd address to collect his ‘‘stolen gas bottle and tool trailer’’. Ms Bennett told the court that during several messages and phone calls, Mr Oberin told her he believed a woman had stolen the items and Mr Alexander was in possession of them. Ms Bennett said Mr Oberin told her no-one was going to get hurt and he just wanted to talk to Mr Alexander. She also said Mr Oberin asked her to delete their message and call history from her mobile phone. The court heard Ms Bennett’s partner Cameron Warby was with Mr Alexander when he was shot and killed. Ms Bennett said Mr Warby was hysterical when he called her after the shooting and told her Mr Oberin had been at the Eastons Rd property.  In giving evidence, Mr Warby told the court he had taken the drug ice with Mr Alexander in the hours before the shooting and couldn’t remember much of that morning. According to ACM, Mr Warby told the court he had been working under the bonnet of a Holden Commodore when two men drove into the driveway in a ute. He said he didn’t look up from his work but heard Mr Alexander say Mr Oberin had arrived. Mr Warby told the court he then heard the sound of a gunshot and looked up, but one of the men ordered him to sit down with his head in his hands. He said he stayed in that position until the two men drove away from the scene. He also said he heard a second gunshot and raised voices during the incident.  Mr Oberin and Mr Johnson were remanded in custody.  Source: https://www.sheppnews.com.au/police--court/2021/02/11/3054791/echuca-men-charged-with-cohuna-murder-face-court-committal |

1. With reference to this case and use of examples, distinguish between summary offences and indictable offences. (4 marks)

**Mark Allocation**

* 1 mark for explaining summary offences with an example
* 1 mark for explaining indictable offences with an example
* 1 mark for explaining the difference between summary offences and indictable offences
* 1 mark for referring to this case in response

**Sample Response**

Summary offences are minor/ less serious criminal offences that are heard in the Magistrates’ Court. For example, driving offences.

Indictable offences are more serious criminal offences that can be heard before a judge and jury in either the County Court or Supreme Court. The case referred to in the article refers to murder which is a serious criminal offence and is heard in the Supreme Court.

The difference between a summary offence and an indictable offence is that summary offences are minor/ less serious criminal offences that are heard in the Magistrates’ Court. Whereas, Indictable offences are more serious criminal offences that are heard before a judge and jury in either the County Court or Supreme Court, depending on the crime committed.

1. With reference to this case, explain what is meant by the term ‘presumption of innocence’. (2 marks)

**Mark Allocation**

* 1 mark for explaining presumption of innocence.
* 1 mark for referring to this case in response.

**Sample Response**

Presumption of innocence means all persons accused of a crime are considered innocent until the prosecution proves in court that the accused is guilty of committing the offence. In a criminal trial, it is the responsibility of the prosecution to prove that the accused (in this case Daniel Oberin and Kevin Johnson) are not innocent and therefore guilty of committing the shooting murder of 29-year-old Matthew Alexander. An accused person can only be found guilty if the magistrate, judge or jury is reasonably certain that the accused person committed the crime. The presumption of innocence also means that, in a criminal trial, the accused has the right to remain silent because they do not have to prove that they did not commit the crime. It is the prosecution that has to prove that the accused did commit the crime.

1. Referring to this case, explain one purpose of a committal proceeding. (3 marks)

**Mark Allocation**

* 2 marks for explaining one purpose of a committal hearing.
* 1 mark for referring to this case in response.

**Sample Response**

One purpose of a committal proceeding is for the Magistrate to determine whether there is sufficient evidence against the accused for a jury to find the accused pair guilty of murder and therefore gain a conviction once the case proceeds to trial in a higher court – either the County Court or Supreme Court, depending on the crime committed.

In this case, Daniel Oberin and Kevin Johnson appeared at Bendigo Magistrates’ Court via video link for their committal hearing into the shooting murder of 29-year-old Matthew Alexander at Daltons Bridge on 13th September, 2019. If the Magistrate determines there is sufficient evidence to gain a conviction, this case would proceed to trial in the Supreme Court because the crime committed was murder.

1. Distinguish between the burden of proof and standard of proof in criminal cases (3 marks)

**Mark Allocation**

* 1 mark for explaining burden of proof in criminal cases
* 1 mark for explaining standard of proof in criminal cases
* 1 mark for explaining the difference between burden of proof and standard of proof in criminal cases

**Sample Response**

The burden of proof in criminal cases lies with the prosecution to prove their case as they are the party responsible for bringing the case to court.

The standard of proof, being the weight of evidence required to prove the case, is beyond reasonable doubt, meaning without any doubt at all, the accused is guilty of committing the crime.

The difference between the burden of proof and standard of proof in criminal cases is that the burden of proof is who (the prosecution) has the responsibility to prove the criminal case. Whereas, the standard of proof is the extent to which the criminal case needs to be proven. In other words, the weight of evidence required to prove the criminal case.

1. Explain the likely sanction to be imposed on the accused in this case if the case proceeds to trial and the accused are found guilty. (2 marks)

**Mark Allocation**

* 1 mark for identifying the likely sanction (imprisonment) to be imposed on the accused’s in this case.
* 1 mark for explaining imprisonment as the likely sanction to be imposed on the accused’s in this case.

**Sample Response**

The likely sanction to be imposed on the accused in this case is imprisonment.

Imprisonment is where the convicted offenders are sent after being found guilty of committing a crime. Imprisonment punishes the offender for breaking the law by removing them from society losing their freedom, and remaining locked up in jail until they serve out their sentence.

1. Discuss the ability of sanctions to achieve three purposes of sanctions. (6 marks)

**Mark Allocation**

* 2 marks for discussing how sanctions achieve one purpose of sanctions.
* 2 marks for discussing how sanctions achieve a second purpose of sanctions.
* 2 marks for discussing how sanctions achieve a third purpose of sanctions.

The purposes of sanctions are: rehabilitation, punishment, deterrence, denunciation and protection

**Sample Response**

Three purposes of sanctions, such as imprisonment, are protection, deterrence and rehabilitation.

One purpose of sanctions is to protect society. Sanctions, like imprisonment, achieve this purpose because society is protected once the offender is sent to jail. However, once the offender is released protection may not be achieved.

A second purpose of sanctions is deterrence, where an offender may be deterred from committing another offence in the future (specific deterrence), while others in the community may be deterred from committing similar offences after seeing what happens when someone commits an offence. However, the offender or the community may not be deterred resulting in more offences being committed.

A third purpose of sanctions is rehabilitation, where hopefully the offender is reformed once they have served their sentence. However, an offender may not be rehabilitated as offenders may come out of prison worse criminals than when they went in, particularly if while in jail they have mixed with other criminals who have committed serious crimes and perhaps picked up new ways of committing offences. Therefore, imprisonment can result in more crimes because of the bad influence of other prisoners.

**Question 2** (20 marks)

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| Geoffrey Rush has major court win against Daily Telegraph The publisher of a Sydney newspaper has lost its appeal in the high-stakes defamation case of actor Geoffrey Rush, who was awarded a record multi-million dollar payout.  Nationwide News appealed after the Oscar winner was awarded almost $2.9 million in damages over defamatory articles published by The Daily Telegraph in 2017. The [record payout included $850,000 in general and aggravated damages](https://www.abc.net.au/news/2019-04-11/geoffrey-rush-wins-defamation-case-against-nationwide-news/10991756), $1.9 million for past and future economic loss, and $42,000 in interest.  The stories alleged Rush behaved inappropriately towards Eryn Jean Norvill, his co-star in the Sydney Theatre Company production of King Lear. He denied the claims.  The Federal Court dismissed all grounds of the Nationwide News appeal, meaning the awarded damages stand. The appeal judges upheld the original judgement that Eryn Jean Norvill's evidence was unreliable. They said the damages awarded to Rush were "not manifestly excessive"  This decision comes eight months after [the appeal was heard before the full Federal Court](https://www.abc.net.au/news/2020-07-02/geoffrey-rush-defamation-payout-appeal-to-be-revealed-today/12409054), comprising Justices Jacqueline Gleeson, Richard White and Michael Wheelahan.  Nationwide News said the damages awarded were excessive and singled out several legal decisions made by the original judge, Justice Michael Wigney, which it argued were legal errors.  The appeal also had legal ties to a defamation case involving actor Rebel Wilson, who was initially awarded $4.7 million in damages against Bauer media before the amount was reduced on appeal to $600,000.  Source: https://www.abc.net.au/news/2020-07-02/daily-telegraph-loses-defamation-appeal-in-geoffrey-rush-case/12414536 |

1. Identify whether this case involving Geoffrey Rush is a civil case or a criminal case, justifying your response with a reason. (2 marks)

**Mark Allocation**

* 1 mark for identifying this case is a civil case
* 1 mark for justifying response with a reason

**Sample Response**

This case involving Geoffrey Rush is a civil case because it involves the tort of defamation where someone’s rights were infringed with the plaintiff seeking a remedy. In this case Geoffrey Rush sued the Daily Telegraph over defamatory articles published about him, and the remedy awarded was almost $2.9 million in damages.

1. Distinguish between the burden of proof and standard of proof in civil cases. (3 marks)

**Mark Allocation**

* 1 mark for explaining burden of proof in civil cases
* 1 mark for explaining standard of proof in civil cases
* 1 mark for explaining the difference between burden of proof and standard of proof in civil cases

**Sample Response**

The burden of proof in civil cases lies with the plaintiff to prove their case as they are the party responsible for initiating civil action and therefore bringing the case to court.

The standard of proof, being the weight of evidence required to prove the case, is on the balance of probabilities, meaning that the court will decide whether the plaintiﬀ’s case or the defendant’s case is more probable.

The difference between the burden of proof and standard of proof in civil cases is that the burden of proof is who (the plaintiff) has the responsibility to prove the civil case. Whereas, the standard of proof is the extent to which the civil case needs to be proven, that is, the weight of evidence required to prove the civil case.

1. With reference to this case, analyse the responsibilities of the judge and jury in a civil trial.

(6 marks)

**Mark Allocation**

* 3 marks for analysing the responsibilities of the judge in a civil trial, with reference to this case.
* 3 marks for analysing the responsibilities of the jury in a civil trial, with reference to this case.

**Sample Response**

The responsibilities of the judge in a civil trial is to oversee court proceedings, address the jury, and in cases without a jury decide the verdict and remedy determining the amount of damages that the plaintiff is entitled to. The judge is also responsible to take into account points of law and fact in determining the amount of damages, if any. In this case, the court awarded almost $2.9 million in damages to Geoffrey Rush.

The responsibilities of the jury in a civil trial are to listen to the facts and evidence presented in court, apply the law as stated by the judge, and decide a verdict of liable or not liable on the balance of probabilities, which is the standard of proof in civil cases. Therefore, the civil jury’s decision is for either the plaintiﬀ or the defendant. In addition to this, a civil jury is also required to determine the remedy and award damages if the plaintiﬀ wins the case (except in defamation cases where the judge will decide the level of damages to be awarded). In this case, there was no jury present. Therefore the judge had the responsibility in this case.

1. Identify and describe the remedy awarded to Geoffrey Rush in this case. 3 marks

**Mark Allocation**

* 1 mark for identifying the correct remedy awarded
* 2 marks for describing the correct remedy awarded with reference to this case

**Sample Response**

The remedy awarded to Geoffrey Rush in this case was compensatory damages of $2.9 million in his defamation case against Rupert Murdoch’s Nationwide News, the largest such payout to a single person in Australia’s history. Mr. Rush was initially awarded $850,000 in damages, and an additional $1.98 million for past and future economic losses and 42,000 dollars in interest. That brought the total award to $2.9 million dollars.

Compensatory damages are an amount of money that is awarded by the court to compensate the plaintiff for their loss if it is proven that the defendant was in the wrong and caused loss or injury to the plaintiff. There are two types of compensatory damages: specific or special damages and general damages.

* Specific or special damages can be accurately measured and are awarded to compensate the plaintiff for items that can be calculated exactly in terms of a monetary value. For example, medical costs and loss of income/wages.
* General damages cannot be accurately measured, but are awarded to compensate the plaintiff for losses that cannot be calculated exactly in terms of a sum of money. For example, pain and suffering and loss of enjoyment of life.

1. Referring to this case, discuss the ability of the remedy identified in part d. to achieve its purposes. (6 marks)

**Mark Allocation**

* 1 mark for identifying that damages is the remedy awarded in this case.
* 2 marks for discussing strengths/ advantages – the ability of damages to achieve its purposes
* 2 marks for discussing weaknesses/ disadvantages – limitations on the ability of damages to achieve its purposes
* 1 mark for referring to this case in response.

**Sample Response**

An award of damages was the remedy in this civil case.

Two purposes of the remedy of damages is to firstly compensate the plaintiff for their loss or injury by awarding a sum of money to the injured party for the damage/ injury/ loss they suffered. Another purpose is to restore the plaintiff, as the injured party, back to the original position (as far as possible) that he was in before the loss or injury occurred.

Damages aim to both compensate and restore the plaintiff, in this case Geoffrey Rush, to the position he was in, or as near as possible, before his rights were infringed by the defendant. In situations where a plaintiff has suffered losses that can be calculated such as medical expenses and loss of income, it is possible for damages to restore the plaintiff back to their original position. The money provided as compensation can be used to pay for medical bills or regain lost income. Therefore, achieving its purpose.

However, in some cases damages do not achieve their purposes. It can be argued that Geoffrey Rush’ reputation has suffered to such an extent that the public will remember the accusations against him and it may impact his ability to gain work in the future. Damages are often unable to adequately compensate for this occurrence and so they don’t fulfil their purpose.

**END OF MARKING GUIDE**