

Monterey College of Law

EVIDENCE

Final Examination

Spring 2023

Judge J. O'Keefe

General Instructions:

Answer All Three Essay Questions.

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

QUESTION 1

Alley-Op, a professional basketball player with the Jump Shots team, brought a cause of action against Mighty Ball, the manufacturer, for negligence and product defect. The exercise stability ball was manufactured by Mighty Ball and was advertised as burst resistant and able to withstand a total of 600 pounds.

Alley-Op was balancing on an exercise stability ball while lifting weights at the same time. He had 50-pound weights in each hand when the exercise stability ball suddenly burst. As a result, he fell forcibly to the ground.

Minutes later, at the emergency room, Alley-Op told Dr. Bones, “The pain in my left hand is excruciating, it happened when the ball popped like a balloon, and I fell!” Dr. Bones is a qualified expert orthopedic surgeon. Based on the X-rays, and conference with a radiologist, Dr. Bones diagnosed Alley-Op with a fractured left hand and a concussion. The personal injury caused Alley Op to miss the entire basketball season.

During a trial preparation meeting, Alley -Op showed Saul, his attorney, his gym journal. After the fall, Alley-Op made handwritten notes in his gym journal. The notes read, “Left-hand hurts and feeling dizzy. Going to Dr.” Alley –Op is right-handed.

Saul learns that Mighty Ball has had 752 written complaints from professional athletes that involved the exercise stability ball bursting with the weight of 150 pounds or less. Also, Saul learns from the authorized Mighty Ball website that the manufacturer changed the product design of the ball after the filing of the present lawsuit.

Assume the following occurred in a jury trial in a California state court. Discuss all evidentiary issues and arguments that would likely arise in each section below. Assume proper objections were made. Answer according to California Law.

1. During Alley -Op’s case, he testified as to his injuries, his statement to Dr. Bones and his gym journal notes.
2. Next, Dr. Bones testified that Ally Op had a fractured left hand and a concussion. He showed the jury the X-rays.
3. Finally, Saul introduces the following documents:
 - (a) The 752 verified prior complaints made regarding the exercise stability ball bursting.
 - (b) The Mighty Ball changed the design of the exercise stability ball.

QUESTION 2

Darryl Driver is being charged with hit and run driving resulting in death in the case of People of the State of X vs. Darryl.

On January 2nd at 8:00 a.m. Daryl Driver calls police to report that his vehicle was stolen. He tells police he last saw his black car at 11:00 p.m. when he returned from a New Year's Eve party and went to bed.

On January 2nd at 3:00 p.m. police are dispatched to a 2-vehicle accident. Both vehicles are found in a ravine off the roadway a half mile from Darryl's house. Police locate Victor in the driver's seat of the red car. Victor is badly injured but conscious. The black car is unoccupied. The black car is registered to Darryl Driver.

Victor is taken to the hospital where he tells Nurse Nan, "I am in so much pain and I don't think I am going to make it. I was driving home from my night-shift job at 1:00 a.m. on January 2nd when a black car came flying down the road. The car hit me and we both went down the ravine. I saw a male driver get out of the black car". Victor loses consciousness and dies from the injuries he sustained in the crash shortly later at the hospital.

Due to heavy rain and flooding the morning of January 2nd, the police are unable to determine the cause of the crash based on physical evidence.

On January 15, Officer Owen receives a call from Hillary, Darryl Driver's wife. Hillary tells Owen that Darryl came home at 3:00 a.m. on January 2nd after attending a New Year's Eve party. When Darryl got home he was drunk. Darryl told Hillary that he hit another car and they rolled down a ravine. Darryl said he was able to walk home. The next morning Hillary heard Darryl on the phone falsely reporting his car stolen. Hillary just found out Darryl was cheating on her and wants Darryl to go to prison because he is a lying cheat.

Assume the following occurred in the jury trial of Darryl. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. **The State of X has adopted the Federal Rules of Evidence.**

1. In their case in chief, the People call Nurse Nan to testify to Victor's statement.
2. The People call Hillary to testify regarding her observations of Darryl, the statements he made to her and his false report to police.
3. The People call Eugene Einstein, the author of a book on the application of the law of physics to colliding billiard balls and other objects. Einstein would testify that the black car was the cause of the crash based on the application of billiard ball physics to the angles of the vehicles located in the crash. Einstein has a PhD in physics. There are no peer reviewed studies that have applied his theories to vehicle crashes.

QUESTION 3

Officer West responded to a call for service dispatched by dispatcher Carly. According to Carly, the 9-11 caller identified herself as Jewel, the 14-year-old daughter of David and Vicky. Dispatcher Carly informs Officer West through dispatch channels that Jewel was crying hysterically and frantically begging for police to come because “my dad is upstairs killing my mom, I saw him beating and choking her!” Dispatcher Carly noted on the call that she heard what sounded like a male adult screaming in the background and a woman crying. When Officer West arrived at the house where the call originated, he saw David standing on the porch with his shirt off smoking a cigarette. Officer West asked David to sit on the curb while he made contact with Vicky. Vicky had a bloody gash on her forehead, deep red marks around her neck, and was bleeding from her lips and mouth. When Vicky came outside, she was crying and hyperventilating and said, “he tried to kill me! He tried to kill me!” Emergency Medical Technicians (EMTs) were called to the scene to treat Vicky’s injuries. When the EMTs were done treating Vicky, and she had calmed down considerably, Officer West interviewed her. Vicky told Officer West that David had come home and the two were having a nice time watching TV until Vicky got on her phone. David demanded to see who Vicky was texting but she refused to show David. Vicky said David then grabbed the phone and hit her in the head with it, causing the gash. David then punched her in the face and began strangling her. Vicky was rendered unconscious while being choked. Vicky said when she woke up, her daughter Jewel, was yelling at David, “you better get off her, the cops are on their way!” That is when David got off her and went outside to smoke. David was arrested and the District Attorney charged him with felony domestic violence against Vicky under the California Penal Code.

The following proffers were made at trial:

- 1) During the prosecution’s case-in-chief, Vicky testified that she lied to the police about David hurting her, and that she had made the whole thing up because she thought David was cheating on her. In response, while she was on the stand, the prosecutor played two segments of the properly authenticated footage from Officer West’s body-worn camera:
 - a. Footage showing Vicky coming out of the house and yelling that David tried to kill her
 - b. Footage showing Vicky telling Officer West that Vicky was regaining consciousness when Jewel yelled “you better get off her, the cops are on their way!”
- 2) During the prosecution’s case-in-chief, Jewel was called to authenticate her 9-11 call. The prosecution then played her 9-11 call for the jury.
- 3) During the prosecution’s case-in-chief, the prosecutor called Priscilla, David’s former girlfriend, who would testify that David had beaten her in the past, though he had never been charged.

Discuss the potential objections, and responses to objections, to the proffers. Answer according to California Law.

**EVIDENCE-ANSWER OUTLINE- SLO-HYB-MCL
FINAL EXAMINATION
SPRING 2023**

QUESTION 1 -OUTLINE- Prof. Lizardo

SUMMARY ANSWER OUTLINE- Alley Op

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Please note students may offer different outcomes or rules. This summary is intended to highlight the major issues and rules.

1. Testimony Of Alley -Op (A-O)

As per CEC 350, only relevant evidence is admissible.

Logical Relevance/ CEC 250 Tendency Test- *Evidence is logically relevant if there is a tendency to prove or disprove any disputed fact that is of consequence in the determination of the action.*

Negligence claim includes consists of duty, breach of a duty, causation, and damages. Product liability theories include negligence that involve inadequate warnings and manufacturing or design defects.

Here, A-O was using the exercise ball as a foreseeable use because it was while exercising. It does not appear he was misusing the product. His testimony tends to establish the breach of duty by Mighty Ball since a defective product was provided.

Thus, A-O's testimony is logically relevant and admissible.

Legal Relevance/Balancing Test CEC 352- *the trial court has discretion to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice.*

Here, Alley -Op is a percipient witness to his fall and the injuries. Therefore, the probative value of A-O's testimony greatly outweighs any unfair prejudice. It does not seem likely Alley-Op's testimony would confuse, mislead or be a substantial danger of undue prejudice or a waste of time for a jury.

Thus, the trial court will rule the evidence is legally relevant and admissible.

Competency—*for a witness to be competent to testify, under CEC it states that all people are qualified unless there is a disqualification due to: perception, memory, or the witness does not understand the "truth" or cannot communicate. In short, witnesses must have capacity to observe, recollect, communicate and affirm to be truthful.*

Here, although Alley -Op sustained a concussion, felt dizzy, had a left-hand fracture, and pain, it does not appear this injury affected his memory or communication skills. His testimony is relevant because he is a percipient witness. Therefore, his competency is not compromised, and he may testify regarding his fall and injuries.

Lay opinion *must be based on rationally based perceptions. The fact that Alley -Op was working out when the injury occurred will be admissible.*

Writing- Gym Journal: "Left hand hurts and feels dizzy."

Under CEC, the definition of a "writing" is broad and includes, but is not limited to handwriting, typewriting, electronic mail, or other forms of communication.

Here, the gym journal is a writing under CEC because it is a handwriting. The journal may be relevant as to how A-O was feeling right after the fall (dizzy). Since A-O is right handed there is a reasonable inference that he wrote the notes with his right hand. The fact that it was A-O 's left hand was injured should not prevent him from writing with his right hand.

Authentication

This provides that the proponent must provide sufficient information that the item is what it purports to be, Alley-Op's gym journal.

Here, Alley-Op is a witness with personal knowledge since the gym journal are his notes, so this satisfies the sufficiency test. Therefore, he can easily recognize his notes in the journal.

Secondary Evidence Rule

Under the CEC, the Secondary Evidence Rule is applied when the contents of a writing are in issue. Writings may include documents, photos, or recordings. At times, copies may be used if it is a reproduction of the original writing.

Here, the gym journal is the original notes written by A-O and is available. There has been compliance with the rule and is admissible.

Hearsay- "The pain in my left hand is excruciating, it happened when the ball popped, and I fell!"

Defined as an out-of-court statement offered to prove the truth of the matter asserted. This is offered for the truth of the pain and how the fall occurred. It is inadmissible unless there is an exception. Below are some exceptions.

Spontaneous Statement Exception

Defined as a statement by the declarant that describes, explains or narrates an act or event that happened when the declarant was under the stress of excitement of an event.

Here, within minutes of the fall, Alley-Op is in the emergency room telling Dr. Bones that his left-hand pain was excruciating. Since A-O, a basketball player, experienced hand pain due to a fall, this will be deemed a stressful event.

Most likely he realized what an injury would do to his basketball season that caused additional stress.

Defense will argue that too much time has gone by since it took time for A-O to get to the emergency room Therefore, the statement lacks spontaneity. However, Plaintiff will contend that the pain was ongoing and only minutes went by. To fulfill the stress requirement.

The trial court will rule the statement is a spontaneous statement and admissible.

Contemporaneous Statement Exception

Requires a statement to describe or explain an event as it is occurring. It is like the spontaneous statement exception but does not involve a stressful event.

Here, it may be argued by Plaintiff that pain was ongoing so it was during the event, the fall. However, Defense will argue that time went by so the event ended.

The trial court will rule the statement is a contemporaneous statement and is admissible.

State of Mind Exception

Requires the statement by a declarant's (here Alley-Op) then existing state of mind, emotion or physical sensation may be admissible.

Here, A-O is telling Dr. Bones during a medical treatment or diagnosis meeting that he is in excruciating pain only minutes went by from the fall to the ER visit. It does not appear that A-O had time to concoct how the fall happened. The defense will argue that the portion of the statement involves ball popping may be stricken since it does not deal with a medical purpose. However, Plaintiff will counter that how the fall happened, the distance A-O fell and what he was doing is part of diagnosis and treatment.

The trial court will rule this exception applies and the statement of pain is admissible including how the fall happened with the weights and the ball. However, the court may give a limiting instruction regarding how the fall occurred. In short, the jury may not use the how the ball burst to hold the manufacturer liable by itself. Other elements of the civil case must be proven.

2. Dr. Bones Testimony about the injury and the X-rays

Logical Relevancy- defined above.

Dr. Bones' testimony tends to show that A-O's injury was a fractured hand and a concussion. He is a qualified orthopedic surgeon and has expertise in the subject matter of bones. The X-rays are writings and part of the tools Dr. Bones used to diagnose the injuries.

Legal Relevancy- defined above

The trial court has the discretion to weigh the probative value of the letter offer against the unfair prejudicial effect.

Hearsay - rule above. State of Mind exception on pain only (The pain in my left hand ...) See above exceptions under call #1.

Doctor-Patient Privilege

The Dr.- Patient privilege protects confidential communications between a doctor and patient if the communication was for medical diagnosis and treatment.

Here, the patient, A-O is seeking medical assistance due to a fall. Therefore, the privilege would apply unless there is an exception. The X-rays are part of A-O's medical records and likely admissible because they will show the fracture of the hand.

Exception to Privilege: Tort

Alley -Op is seeking damages due to Mighty Ball's defective design of the exercise stability ball. He placed his injuries and damages in issue, so this serves as an exception to the privilege. Dr. Bones may testify to the injuries and show the jury the X-rays.

3. Saul introduces documents.

(a) Similar Happenings/Mighty Ball on Notice - the 752 prior complaints.

In general, similar happenings are when a business has numerous other claims for a similar accident, fall, etc. The fact of other accidents may establish that Mighty Ball has notice or knowledge of a defective product and did nothing to prevent future injuries. Thus, the 752 prior claims could help establish that Mighty Ball has breached a duty of care by providing a defective product, an exercise stability ball, to consumers.

Here, A-O wants to establish that Mighty Ball was on notice and had knowledge that the ball would burst even at a low weight. Further, the ball was defective because it could not hold 600 pounds. This is relevant for product defects. The 752 prior complaints occurred before the present lawsuit. However, the prior complaints are being used to establish knowledge of a defective exercise ball, not fault.

The defense may argue the present injuries resulted due to a misuse of the product by A-O. However, Plaintiff will counter arguing that A-O is a professional basketball player and is aware of how to properly use sports equipment. Also, the fact that other professional athletes suffered injury may help establish there was not a misuse of the ball.

The trial court will rule the prior complaints are admissible for notice or knowledge only. A limiting instruction may be given to limit how the jury may use the evidence.

(b) Special Relevancy- Subsequent Remedial Measures

Logical Relevancy- defined above.

In general, evidence of safety measures or repairs after an accident is inadmissible to prove negligence. This is due to public policy concerns as landlords, owners, managers, or manufacturers should fix a problem. Taking action to fix prevent future harm is good public policy. Remedial measures taken before an accident do not implicate policy concerns.

The changed product design tends to establish that Mighty Ball knew of the defect problem and did nothing to fix the problem until after A-O's lawsuit. However, the public policy against using this changed design will be deemed inadmissible to prove negligence.

Legal Relevancy-defined above.

The trial court has discretion to weigh the probative value of the prior claims against unfair prejudice. Due to the special relevancy rules, the changed design is too prejudicial and will not be admissible.

Q2 - O'Keefe: SPRING 2023 EVIDENCE EXAM QUESTION AND ANSWER

Darryl Driver is being charged with hit and run driving resulting in death in the case of People of the State of X vs. Darryl.

On January 2nd at 8:00 a.m. Darryl Driver calls police to report that his vehicle was stolen. He tells police he last saw his black car at 11:00 p.m. when he returned from a New Year's Eve party and went to bed.

On January 2nd at 3:00 p.m. police are dispatched to a 2-vehicle accident. Both vehicles are found in a ravine off the roadway a half mile from Darryl's house. Police locate Victor in the driver's seat of the red car. Victor is badly injured but conscious. The black car is unoccupied. The black car is registered to Darryl Driver.

Victor is taken to the hospital where he tells Nurse Nan, "I am in so much pain and I don't think I am going to make it. I was driving home from my night-shift job at 1:00 a.m. on January 2nd when a black car came flying down the road. The car hit me and we both went down the ravine. I saw a male driver get out of the black car". Victor loses consciousness and dies from the injuries he sustained in the crash shortly later at the hospital.

Due to heavy rain and flooding the morning of January 2nd, the police are unable to determine the cause of the crash based on physical evidence.

On January 15, Officer Owen receives a call from Hillary, Darryl Driver's wife. Hillary tells Owen that Darryl came home at 3:00 a.m. on January 2nd after attending a New Year's Eve party. When Darryl got home he was drunk. Darryl told Hillary that he hit another car and they rolled down a ravine. Darryl said he was able to walk home. The next morning Hillary heard Darryl on the phone falsely reporting his car stolen. Hillary just found out Darryl was cheating on her and wants Darryl to go to prison because he is a lying cheat.

Assume the following occurred in the jury trial of Darryl. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. **The State of X has adopted the Federal Rules of Evidence.**

1. In their case in chief, the People call Nurse Nan to testify to Victor's statement.

Relevance: Evidence is relevant if it has some tendency to make the existence of a fact of consequence more or less likely than it would be without the evidence. Nurse Nan's testimony is relevant because Darryl's statement establishes the timeline of and cause of the crash and identifies a male driver leaving the scene.

Hearsay: Hearsay is an out of court statement offered for the truth of the matter asserted.

Dying Declaration: FRE 804(b)(2) allows dying declarations in a prosecution for homicide or in a civil action or proceeding. The declaration needs to be made while the declarant believed his or her death was imminent, and it needs to concern the cause or circumstances of what he or she believed to be his or her impending death.

Analysis: *The statement is not admissible as a dying declaration because a dying declaration requires that the case is either a homicide prosecution or a civil case*

1. *The case is a prosecution for a homicide or a civil case*
2. *The declarant is the victim named in the pleading.*
3. *At the time of the statement, the declarant had a sense of impending death.*
4. *At the time of trial the declarant is unavailable*
5. *The statement relates to the event inducing the declarant's dying condition*
6. *The statement is factual in nature.*

Residual Exception: *a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in [Rule 803](#) or [804](#):(1) the statement has equivalent circumstantial guarantees of trustworthiness;*

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. *The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.*

Note: No other hearsay exception would apply

2. *The People call Hillary to testify regarding her observations of Darryl, the statements he made to her and his false report to police.*

Relevance: *Hillary's testimony would establish Darryl is the driver.*

Spousal Immunity- Privilege Not to Testify in Criminal Cases. *A defendant's spouse has a privilege to refuse to testify at the trial of his or her spouse. When the privilege of spousal immunity is invoked, a married person whose spouse is the defendant in a criminal case may not be called as a witness by the prosecution and a married person may not be compelled to testify against his spouse in any criminal proceeding. Only the witness-spouse may invoke the privilege against adverse spousal testimony. Thus, one spouse may testify against the other in criminal cases, with or without the consent of the party spouse, but the witness-spouse may not be compelled to testify, nor may she be foreclosed from testifying (except as to confidential communications)*

Immunity may be asserted only during the marriage. *It terminates upon divorce or annulment. If the marriage exists, the privilege can be asserted even as to matters that took place before the marriage.*

Analysis: *In the present case, Hillary wants to testify against Darryl because he is cheating on her. They are currently married. Darryl cannot assert this privilege to prevent her from testifying.*

Privilege for Confidential Marital Communications. *In any civil or criminal case, either spouse, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a*

confidential communication made between the spouses while they were married. The rationale is to encourage open communication and trust and confidence between spouses.

Both spouses hold the privilege. *Either can refuse to disclose the communication or prevent any other person from disclosing the confidential communication.*

Elements of the privilege:

1. **Marital relationship.** *The communication must be made during a valid marriage. Divorce will not terminate the privilege retroactively, but communications after divorce are not privileged.*
2. **Reliance on intimacy.** *Routine exchanges of a business nature, abusive language and misconduct directed to the spouse are not privileged. If the communication was made in the known presence of a stranger, it is not privileged. The confidential communication does not need to be spoken but may be made by conduct intended as a communication.*

Analysis: *Darryl can assert this privilege. This privilege only protects confidential communications that are made during a valid marriage. Darryl and Hillary were married at the time of the communication. Darryl's statements that he hit another car and rolled down a ravine, and that he was able to hitchhike home would fall within this privilege because they were confidential communications.*

Hillary could still testify to other events and conversations. Hillary could testify that she observed Darryl come home at 3:00 a.m. and that she observed he was drunk. These are not confidential communications that fall within the privilege.

Hillary could also testify to what she heard of Darryl's conversation with police. This is not a confidential communication because the statement was made by a third party.

Hearsay: *Hearsay is an out of court statement offered for the truth of the matter asserted.*

Statement of a Party Opponent: *FRE 801(d)(2)(A) authorizes the admission of personal admissions. It permits the proponent to introduce a statement when "the statement is offered against a party and is ... the party's own statement, in either an individual or representative capacity ..." Since the People are offering Darryl's statement through Hillary, it would qualify as a statement of a party opponent.*

Prior Bad Acts. *The basic rule is that when a person is charged with a crime, extrinsic evidence of his other crimes or misconduct is inadmissible if such evidence is offered by the prosecution solely to establish a criminal disposition. The prosecution may not show the accused's bad character to imply criminal disposition. The reason the rules preclude this use of character evidence is due to the danger that the jury may convict the defendant because of past crimes rather than because of her guilt of the offense charged.*

Admissible if Independently Relevant. *Although evidence that could lead to a conclusion about someone's character is kept out if offered to show action in conformity with that character on a specific occasion, it can be admitted if it is introduced for other purposes. FRE 404(b) states that such prior acts or crimes may be admissible for other purposes (such as to show motive, opportunity, intent, preparation, knowledge, identity absence of mistake or lack of accident) whenever those issues are relevant in either a criminal or a civil case. Upon request by the accused, the prosecution in a*

criminal case must provide reasonable notice prior to trial (or during trial if pretrial notice is excused for good cause shown) of the general nature of any of this type of evidence the prosecution intends to introduce at trial. Thus, if the evidence is logically relevant to a fact in issue other than character, and the probative value of the evidence is not substantially outweighed by its prejudicial effect (FRE 402), the prosecution may introduce evidence of the uncharged act.

Analysis: *Darryl false report that his vehicle stolen is relevant as to the identity of the driver. It's probative value on that issue is substantially outweighed by the prejudicial effect. It will be admissible on that issue*

3. *The People call Eugene Einstein, the author of a book on the application of the law of physics to colliding billiard balls and other objects. Einstein would testify that the black car was the cause of the crash based on the application of billiard ball physics to the angles of the vehicles located in the crash. Einstein has a PhD in physics. There are no peer reviewed studies that have applied his theories to vehicle crashes.*

Expert testimony: *A person can qualify as an expert witness by a showing of knowledge or experience. An expert's opinion can be based on any data that experts in the field ordinarily use, but it must apply reliable principles to sufficient data related to the case. An expert may state an opinion or conclusion based on the facts the expert believes to be true or may answer a hypothetical question that asks the expert to make assumptions.*

A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if:

1. *The expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;*
2. *The testimony is based on sufficient facts or data;*
3. *The testimony is the product of reliable principles and methods; and*
4. *The expert has reliably applied the principles and methods to the facts of the case.*

Daubert: *when scientific testimony is offered, the court must first make an assessment of whether the testimony is based on scientifically valid reasoning or methodology, and whether the testimony can be applied properly to the issue at hand. The court provided guidance as to various considerations the trial court may review in determining admissibility, including:*

1. *Whether a theory or technique can be and has been tested*
2. *Whether the theory or technique has been subject to both peer review and publication*
3. *The known or potential error rate of the method*
4. *The existence and maintenance of standards controlling its operation*
5. *Whether it has attracted widespread acceptance within the relevant scientific community*

Analysis: *Students should apply the Daubert factors to this testimony.*

Q3 (H. Starr): SPRING 2023 EVIDENCE EXAM QUESTION AND ANSWER

Proffer 1 is worth about 40% of the points

Proffer 2 is worth about 30% of the points

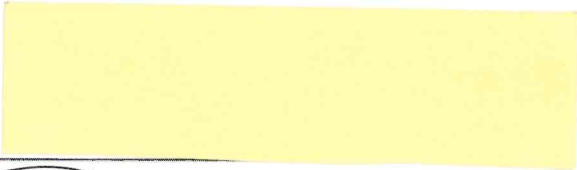
Proffer 3 is worth about 30% of the points

1) Proffer 1 – Recantation and BWC footage

- a. Initial testimony (this should be a small percentage of the weight for this proffer)
 - i. Relevance – students should find this relevant. Students should not use objective truth of the statements as a factor when determining whether it is relevant.
 - ii. Character – (red herring) students should not be performing in-depth analysis on character evidence.
 - iii. 352 – Students should not use truth of the testimony as a factor to consider.
 - iv. Overall – students should see the relevance of the initial testimony.
 1. Students will be ahead of the curve if they identify and communicate that, tactically, 1) defendant would not object to testimony that benefits him and 2) prosecution will not object because they want to use the hearsay exception of prior inconsistent statement.
- b. Personal Knowledge – While it is not intended to be tested, if students can competently discuss why Vicky’s unconsciousness might raise an issue of personal knowledge, they should receive points.
- c. Body-worn camera footage
 - i. Relevance (small percentage of the total points for this proffer) – Students should immediately see that it is relevant both as impeachment and for the truth of the matter asserted
 - ii. Hearsay (primary source of points for this) –
 1. Hearsay for statement one – student should recognize that it is hearsay as it is being used for the truth of the matter asserted
 - a. Students who also recognize that even as non-hearsay (not for TMA and used as impeachment) are doing quite well.
 2. Hearsay exceptions for statement one
 - a. Spontaneous statement – students should find it does apply
 - b. Prior inconsistent statement – students should find it does apply and can be used to impeach AND for TMA
 - i. Any other hearsay exceptions that student competently identifies and can actually link to the facts should be given more points, but not if they are just running through exceptions finding them inapplicable based on “no facts supporting”
 3. Crawford Analysis for Statement one – Important part is that they spot the issue. Conclusion is likely does not violate Crawford as being non-testimonial and witness is present for cross exam.

4. *Hearsay for statement two – Students should recognize hearsay within hearsay – Jewel’s statement and Vicky’s statement.*
 - a. *Jewel’s Statement – unlikely used for hearsay purposes, since that statement is not really trying to prove that the police were called and on their way, but to show effect on the listener or to explain what happened next.*
 - i. *Hearsay exceptions for Jewel’s statement*
 1. *Spontaneous statement likely applies*
 - b. *Vicky relating the statement – This is for the truth of the matter asserted, because it is Vicky’s statement to police that Jewel made the statement. Accordingly, students should recognize that it is hearsay*
 - i. *Hearsay exceptions for Vicky’s statement*
 1. *Spontaneous statement is unlikely to apply in this scenario – students should recognize that the crux of this issue is whether Vicky has calmed down enough that the statement does not apply*
 2. *Prior inconsistent statement likely applies, and the statement is admissible both as impeachment and for the truth of the matter asserted*
 - c. *Crawford for the BWC – Students should see that both witnesses are subject to cross examination, but only the statement to police after Vicky has calmed down is likely to be considered testimonial*
 5. *Students should NOT address authentication of the video because the facts say it is properly authenticated*
 - d. *352 – Students should competently identify why the proffer is highly probative and should conclude that 352 objection will likely be overruled. Depth of analysis here is key.*
- 2) *Proffer 2 – Jewel’s authentication and 9-11 call*
- a. *Relevance – Students should recognize that this evidence tends to show David’s guilt.*
 - b. *Competence – Students should address competence because Jewel is a minor. Students should focus on Jewel not being a small child, and her actions that prove she is a capable young adult (e.g., calling police, apparent ability to authenticate the exhibit, etc.)*
 - c. *Authentication – Students need not discuss authentication, but should earn a small bonus if they do so competently – they should point out Jewel’s ability to recognize her own voice and remember the events as sufficient to authenticate.*
 - d. *Hearsay – Students should understand that the prosecution is seeking to use Jewel’s statements for the truth of the matter asserted and that this is hearsay.*
 - i. *Exceptions – Spontaneous statement – This is the primary exception that students should find applicable*
 1. *If students make a good argument for application of another exception, they should be given additional points, but no if they merely review other exceptions that no fact supports.*

- ii. *Crawford* – Students should find that this is not likely to be considered testimonial, but also note that *Crawford* is not violated when the witness is subject to cross examination, as is the case here.
 - e. 352 – Students should identify relatively high probative value and conclude that this objection will be overruled. Depth of analysis here is key.
 - 3) *Proffer 3 – Prior girlfriend domestic violence*
 - a. *Relevance* – Students should recognize that this is relevant to show propensity to commit domestic violence. Motive and intent may also be discussed, but the important part is that students are able to articulate their reasoning for mentioning each exception they think is applicable.
 - b. *Character* –
 - i. *Character objection* – students should be able to point out that this IS character evidence and does violate the general rule against propensity evidence.
 - ii. *1101(b) Exceptions* – Students who can competently apply any of the 1101(b) exceptions should receive points, but none are particularly well suited
 - iii. *DV Character exception* – Students should be able to articulate the CA exception that allows domestic violence prior conduct to be admitted to show propensity.
 - c. 352 – Students should identify relatively high probative value and conclude that this objection will be overruled. Depth of analysis here is key.



1)

Rog 1

Testimony about injury

Relevance

Excellent Job!

Good

Evidence is relevant when it has a tendency to make a material, disputed fact more or less probably true. The evidence in question here is Alley-Op's (A) testimony about his injuries. A's injuries are material because they go to damages, a necessary element of negligence, one of the causes of action A is suing for. The extent of A's injuries make the issue of A's damages more or less probably true, which make the testimony probative. Therefore, A's testimony about A's injuries would be relevant.

Competency as a Witness

Good

To be competent, a witness must have personal knowledge of the what they are testifying about and affirm they will testify truthfully by taking the oath. Here, A is testifying as to his own injuries, and as such would have personal knowledge of his own injuries. Mighty Ball (MB) will argue that one of A's injuries is a concussion, and the effects of the concussion could make A's testimony unreliable. However, this would only be relevant in A's competency if the concussion effected him at the time of the trial. Therefore, unless A was clearly still suffering from cognitive difficulties at the time of the trial, he would still have personal knowledge of his injuries and be deemed competent as a witness, assuming he takes the oath.

Relevance of A's Full Statement to Dr. Bones

See above for rule. Both parts of A's statement to Dr. Bones (B) are material and probative. When A said the pain in his "left hand is excruciating", it also helps show A's

injuries, which speak directly to the damages of his claims, making the statement material. The fact that the pain is described as excruciating makes the claims of the damages resulting from A's injury more or less probably true, making the statement probative.

The statement made by A saying it happened "when the ball popped like a balloon, and I fell" help establish the causation of A's injury, which also is a necessary element to prove in both A's causes of action. Therefore, that part of A's statement is also material. This part of A's statement is also probative, as it makes the causation claim more likely, since it establishes a direct link between the ball popping causing A's fall, and that A's hand started hurting immediately after that fall.

Therefore, the entirety of A's statement to Dr. Jones is relevant.

Hearsay

Hearsay is an out of court statement offered to prove the truth of a matter asserted. Here, the above statements by A are being offered for their truth, as A is attempting to prove that A did injure his hand and that the injury occurred after the ball popped and caused A to fall. Therefore, A's statement is hearsay. Hearsay is generally inadmissible unless it falls within an exception to hearsay.

Present Bodily Condition (PBC)

An exception to hearsay is when the declarant makes a statement regarding their current bodily condition to another person. That person does not have to be a doctor or healthcare professional. Here, A's statement to B about the pain in his left hand is describing the current condition of his left hand. Therefore, this statement would likely fall under the PBC hearsay exception and be admissible.

However, A's statement about the injury happening after the ball popped was not related to his present bodily condition. Therefore, a court would likely deem that part of his statement inadmissible.

Statement Seeking Medical Diagnosis or Treatment

An exception to hearsay is when the declarant makes a statement to a medical professional that is in the furtherance of obtaining a diagnosis or receiving treatment. As stated above, A's statement about the pain in his left hand was made to B, a Doctor, at the hospital. Because A was seeking treatment for his injured left hand, the statement would be admissible under this exception as well.

However, this exception applied only to statements made to assist in the treatment to the declarant's injury. MB would argue that the statement about the ball popping was not related to A's treatment or a diagnosis and should not be admissible under this exception. A court would likely agree and find that part of A's statement inadmissible.

Spontaneous Statement

An exception to hearsay is a spontaneous statement. This requires a declarant to describe, narrate, or explain a stressful event they have personal knowledge of that caused them to experience a nervous excitement, and that the declarant must be in that state of nervous excitement when the statement was made. Here, A will argue that the sudden fall and injuries to his hand and head qualify as a stressful event, and that the excruciating pain kept him in a state of nervous excitement. A will argue that because of this, A's entire statement should be admitted under the Spontaneous Statement exception. MB will argue that A was merely in physical pain and not in a state of nervous excitement, and as such the spontaneous statement exception does not apply. While close, a court would probably find that A was still in a state of nervous excitement, and therefore admit A's entire statement.

Great Analysis!

Doctor Patient Privilege

In California civil cases, confidential communications between a doctor and patient are privileged. The patient, A, was a patient of B and therefore his statements related to his treatment would be privileged. However, as the holder of the privilege, A can simply waive the privilege and testify. Additionally, when a party puts their physical condition at issue, the privilege does not apply. Because A is putting his physical condition at issue, the privilege would not apply here anyway.

Great!

Gym Notes

Relevancy

See above for rule. A's gym notes detail his injuries to both his head and hand. They are therefore material as they go to his damages, and probative as they make those damages more or less probably true. Therefore, the notes are relevant.

Hearsay

See above for rule. Here, A's notes are being offered for their truth and were made out of court. Therefore, they are hearsay.

Contemporaneous Statement

The contemporaneous statement exception applies when a declarant is engaged in an activity and makes a statement explaining their actions in an attempt to explain those actions. A may argue that his notes fall within this exception as they explain his action, falling. However, the notes were written after the fall and not during the fall, therefore the contemporaneous statement would not apply. Therefore, the gym notes would likely be considered hearsay without an exception and be inadmissible.

Good!

Rog 2

Relevancy of B's testimony

See above for rule. B's testimony is regarding A's fractured hand and concussion. These injuries go directly to A's damages, making them both material and probative. Therefore, B's testimony would be relevant.

Competency as a lay witness

See above for rule. Because B treated A personally and diagnosed A, B would have personal knowledge of A's injuries. Therefore, as long as B takes the oath, he will be competent as a witness.

Qualifying as an expert witness

A witness is qualified as an expert witness if they have specialized skills, knowledge, education, experience, or training. The matter must be appropriate for witness testimony, and the expert's opinion must be based on reliable facts that are generally accepted in the relevant field. Here, B is a "qualified expert orthopedic surgeon". Because of his specialized knowledge, skill, and education, B would be qualified as an expert in the field.

Great! To be appropriate for expert witness opinions, the subject must be one where the expert's specialized knowledge would help the fact finder evaluate evidence or a fact in issue. Here, the X-Rays will help the jury understand A's injuries, and B will help the jury interpret the X-Rays. Therefore, the subject is appropriate for expert testimony. Furthermore, because X-Rays are facts doctors rely on in the medical field to make a diagnosis, the X-Rays would be considered a proper basis for B's opinion about A's injured hand.

Finally, for scientific evidence that is not novel, California uses the reasonable reliance test to determine if that scientific evidence is admissible. As stated above, X-Rays are

reasonably relied on by experts in the medical field. Therefore, the court would admit the X-Rays.

In conclusion, B's testimony and X-Rays of A's hand would both be admissible.

Rog 3

Relevance of 752 prior complaints

Good!
See above for rule. The complaints about MB's ball would show that MB knew, or should have known that there was some sort of issue with the exercise ball. Knowledge of a design defect is helps prove both a negligence and design defect cause of action. This makes the complaints both material and probative.

Similar Occurrences

Great!
Prior similar occurrences are generally inadmissible. However, they can be admitted to show knowledge of a defect. Here, A will argue that the 752 complaints should be admitted to show MB had knowledge of a design defect. MB will argue that admitting these complaints would be so prejudicial that they would substantially outweigh their probative value. A court would likely allow the complaints with a limiting instruction that the complaints only prove MB had knowledge of a potential defect.

Relevance of change in design

See above for rule. MB changing the design of the exercise ball is a tacit admission that there was a flaw in the design of the exercise ball. Because this is essentially what A is trying to prove, it is very material to his cause of action, and would make A's product defect cause of action much more likely true. Therefore, it is relevant.

Special Relevancy, Subsequent Remedial Measures

When a party takes steps to fix an issue after an incident occurs, it is considered a subsequent remedial measure (SRM). SRMs are not admissible in negligent or design defect causes of action. The policy reason is that courts want to companies to have an incentive to fix issues with their products without fear that this will be used against them to prove the defects they are fixing. Because of this, the fact that MB changed the design of the ball after A's injury would be considered a SRM and would be inadmissible.



2)

Excellent Answer!

Circumstantial Evidence

Although police were not able to determine the cause of the crash based on physical evidence, the trial court and jury may consider circumstantial evidence of Darryl's alleged criminal liability for Victor's death.

1. People call Nurse Nan to testify to Victor's Statement

Relevance

Evidence is relevant if it has a tendency to prove or disprove a fact of consequence. Under FRE 403(b), evidence should be excluded if the probative value is substantially outweighed by the possibility of undue prejudice, misleading the jury, or wasting the court's time. Here, Victor's statement speaks directly to an essential fact of consequence-- that a car matching Darryl's car's description, and a driver matching Darryl's description, were reported by Victor. Also, that the black car was "flying down the road." These assertions are highly probative. Because there is nothing about these to raise undue prejudice beyond the normal reaction to the tragic circumstances, the evidence will most likely be considered relevant.

Great!

Competency

Under FRE, all witnesses are competent unless the rules for exceptions provide otherwise. Those exceptions would be inability to communicate, recall, or understand the obligation to tell the truth. There is nothing to indicate any of those are the case for Nurse Nan, so she would be considered a competent witness.

Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Victor's statement was made out of court, and he is not available to testify because he is dead. The statement is offered by the prosecution to prove that Victor was struck by a black car moving at high speed, that they both went down the ravine, and that a male driver exited the black car. These are asserted to prove the truth of the matter. Darryl will raise an objection on the grounds of hearsay. Because Victor's statement meets the basic definition of hearsay, the trial judge will consider if there is an exception.

The People will argue that the exception of Dying Declaration allows Victor's statement to come in. Dying Declaration is only available when the declarant is unavailable, as is the case here. A Dying Declaration must be made under the fear of imminent death, and it must be regarding the circumstances of the perceived imminent death. Here, Victor specifically stated, "I don't think I am going to make it," and then proceeded to describe the specific circumstances of the crash that caused his fatal injuries. When he died shortly thereafter from his injuries, he became unavailable. Based on the clear showing of a fear of imminent death, and the statement pertaining to circumstances of death, where Victor is unavailable because of his death, the exception of Dying Declaration is met. Therefore, the judge will overrule the hearsay objection and allow this testimony.

Impeachment

Impeachment is challenging the veracity or truthfulness of a witness on cross-examination of by use of extrinsic evidence. There is nothing here to show grounds for impeachment of Nurse Nan.

Expert Testimony

Nurse Nan has professional expertise, however in this case her testimony is that of a Lay Opinion Witness. A lay opinion witness must have personal knowledge that will be helpful to the trier of fact. They are able to make determinations based on their

perception including that of bodily condition. Further, because of Nurse Nan's professional expertise, she will be able to respond to any cross-examination that might challenge her qualification or understanding of the circumstances surrounding her testimony. Her testimony is clearly helpful to the trier of fact, as it provides important evidence pointing to Darryl's alleged criminal liability. Therefore, her testimony is allowable as lay witness opinion.

Confrontation Clause

Under the Sixth Amendment, a criminal defendant has the right to confront any witness against them. Even when hearsay is allowable under an exception, the evidence may still be excluded if it violates the confrontation clause. Darryl will object that because there is no opportunity to confront and cross-examine Victor, Nurse Nan's testimony should be barred on grounds of the confrontation clause. Here, the court will consider whether Victor's statement is sufficiently accusatory that the confrontation clause would prevent it from being introduced. Because Darryl has no opportunity to challenge Victor's statement, impeach his testimony for sensory issues, or cross-examine Victor, there is a possibility that the confrontation clause would apply.

However, for the confrontation clause to apply the statement must be testimonial--made in the course of investigation. Here, Victor's statement was made in response to an emergency. He was still in a state of extreme shock, he was not being interrogated by a police officer, and he was responding to the emergency of the car accident and his impending death.

Therefore, even though Darryl cannot cross-examine Victor, because the statement is not testimonial, the confrontation clause will not apply here. The court should overrule any objection for confrontation clause.

Conclusion-Nurse Nan

Nurse Nan's testimony will be allowed as lay witness opinion, and the exception of dying declaration will allow it even though Victor's statement is hearsay.

2. Hillary's testimony regarding observation of Darryl and subsequent statements made to her and to police

Relevance

As supra, 403(b) requires that the probative value not be substantially outweighed by the possibility of undue prejudice. Here, Hillary's observations happened soon after the incident in question, they are not regarding any past similar actions that would prejudice the jury against Darryl, and their probative value is significant as it pertains to both Darryl's honesty, his physical condition on the night of the accident, and his false report to police. It is probable that the evidence would be found relevant by the judge and not excluded for 403(b).

Good

Competency

As supra, unless the rules provide otherwise, a witness is competent. Hillary demonstrates the capacity to remember, communicate, and recognize the necessity of telling the truth on the witness stand. Therefore, she is competent to testify.

Lay Opinion Witness

Hillary is being called as a lay opinion witness. A lay opinion witness may testify if they have direct personal knowledge that will be helpful to the trier of fact. Here, Hillary is testifying as to her own personal observations on the night of the accident and the following morning. Her opinion about Darryl's physical condition, state of mind, and subsequent statement to police are all very helpful to the trier of fact. Therefore, her testimony should be allowed as lay opinion witness.

Good!
Lay opinion witnesses may testify to mental state and physical condition based on reasonable observations and familiarity with the subject. Here, Hillary knows Darryl well, and is well-qualified to form an impression of his mental and physical state--specifically, that he was drunk. This testimony is valid and will be allowed as lay opinion.

She can also testify to her personal observations, in this case the phone call that Darryl made to the police in which he lied about the accident.

Marital Privilege

There are two marital privileges--confidential marital communications, and spousal testimonial privilege. Confidential marital communications require that the communication be made with an expectation of confidentiality, made while married, with no third party present. Either party may assert the confidential marital communication privilege. Spousal testimonial privilege exists when the testimony is made while the parties are legally married. In a criminal case, under federal rules, only the testifying spouse may assert the privilege.

Confidential Marital Communication

Good!
Darryl will object to Hillary's testimony about the statement he made to her, claiming that it was a confidential marital communication. There was no one else present, and Darryl could reasonably assert that he had an expectation of confidentiality when he told Hillary that he hit another car and they rolled down a ravine. Although he did not expressly say the communication was confidential, a reasonable person would expect that such a statement made to a spouse in private would include an expectation of confidentiality. Most likely this objection will be sustained, and Darryl's statement to Hillary will be excluded for marital privilege as confidential marital communication.

Spousal Testimonial Privilege

The spousal testimonial privilege allows a spouse to refuse to testify against their spouse so long as they are legally married at the time of the testimony. The privilege applies to any testimony, including actions witnessed before the marriage, and any actions whether they are communications or not. Further, the spousal testimonial privilege prohibits a spouse from being compelled to testify against the other spouse. However, in a criminal case, the testifying spouse is the only spouse who can assert the privilege. If the witness wants to testify, she can, and her spouse does not have the right to invoke the privilege. Here, Hillary wants Darryl to go to prison, so she is motivated to testify against him. Darryl may object for spousal testimonial privilege, but such an objection would be overruled as long as Hillary is testifying voluntarily.

Hearsay - Darryl's statement to police

Darryl will object to Hillary's testimony about his statement to police as hearsay. As supra, hearsay is an out of court statement offered to prove the truth of the matter asserted.

Here, there are two reasons why Darryl's objection will fail. First, Darryl's statement is not being offered to prove its truth (that the car was stolen). Second, it is a statement of the party opponent.

Statement of Party Opponent

A statement of party opponent is categorically not hearsay. Because Darryl is a criminal defendant, he is the party opponent, and therefore his statement should be allowed for this reason.

Truth of Matter

In addition to being a statement of party opponent, Darryl's statement is not being offered to prove the truth of the statement--that his car was stolen. Rather, it is being offered to show his deceitful state of mind, and his efforts to cover his tracks and hide his responsibility. Therefore, even if Darryl's objection was not overruled as a statement of

party opponent, it should be overruled because the statement itself is not offered to prove the truth of what Darryl said.

Impeachment

Impeachment is attacking the credibility of a witness using cross-examination or extrinsic evidence. Here, Darryl will attempt to impeach Hillary's veracity on the basis of bias/motive. In order to lay the foundation for the claim of bias, Darryl's lawyer will first ask Hillary about Darryl's cheating--when she found out about it, how she feels about it, and her opinion of Darryl. Darryl will ask about Hillary's bias towards Darryl. If Hillary admits the bias, and explains it, then there is nothing left that Darryl can do. If she denies the bias, then Darryl could bring any available extrinsic evidence.

Bolstering

It is improper to bolster a witness's credibility. However, if the People anticipate the impeachment, they could introduce the issue on direct examination. They could ask Hillary about the circumstances of the cheating and give her a chance to explain why her testimony is still reliable and not biased. This would potentially minimize the impact of this revelation on the jury's opinion of Hillary's reliability as a witness.

Rehabilitation

If Hillary's credibility is attacked for bias on cross-examination, then the People can attempt to rehabilitate her character on redirect. At a minimum, this would include giving her a chance to explain her feelings. Depending on how convincing her testimony is to the jury regarding the alleged bias, her testimony may be given significantly less weight by the jury. A reasonable juror could come to the conclusion that her testimony was biased. The testimony will be allowed, but if Hillary loses credibility with the jury, it may not be believed.

Excellent

Character Evidence

Character evidence is allowed if the relevant character trait is at issue in the claim or defense, or with a valid exception. Otherwise character evidence cannot be introduced to show a predisposition to act in a certain way. Here, Hillary's opinion that Darryl is "a lying cheat" is not at issue in his hit and run case. If Hillary does say in her testimony that Darryl is a lying cheat, Darryl will object on grounds of improper character evidence. Such an objection would almost certainly be sustained, and probably would make a poor impression on the jury in the process. The People would be best served by avoiding questions that would lead to Hillary saying that Darryl is a lying cheat. Darryl may try to bring out this type of statement on cross, to then object and further cast Hillary in a negative light.

Conclusion - Hillary's testimony

Great!

Hillary's testimony will be considered relevant testimony, Darryl's statement to police is a statement of a party opponent and not offered to prove the truth of the matter asserted, and so not hearsay. Her testimony that Darryl was drunk is allowable lay opinion witness testimony. However, Darryl's statement to her that he hit another car and they rolled down a ravine will most likely be not allowed as it is a confidential marital communication. Although they are legally married, this is a criminal case, therefore Hillary can voluntarily waive the spousal testimonial privilege and Darryl cannot invoke it to prevent her testimony. Her observations of Darryl, and his statement to police will be admitted, while his statement to her will be excluded.

3. Eugene Einstein

Relevance

As supra, if Einstein's testimony will have a tendency to prove a fact of consequence, it will be considered relevant. The question of which car is the cause of the crash is very much at issue in this case. Therefore, his testimony is relevant.

Competence

As supra, Einstein is competent unless barred by an exception. None of the exceptions apply, therefore he is competent to testify. However, there is a special consideration here as he is a scientific expert witness, so his testimony must also meet the requirements for expert opinion or it will not be allowed.

Expert Opinion Witness

Einstein is being called as an expert opinion witness. An expert witness must have some knowledge beyond the general public's knowledge that will be helpful for the trier of fact to understand an issue of consequence. Here, the issue is which car caused the crash. Einstein's testimony would be helpful to the trier of fact. The judge will consider Einstein's PhD in physics in determining whether he is qualified, however, depending on the jurisdiction's dominant rule, he may be disqualified as an expert witness under the Frye or Daubert test.

Frye or Daubert test

If it is a Frye jurisdiction, the court will consider if the science used is reasonably relied upon in the field. Here, the science may be reasonably relied upon in the field of billiard ball physics, but it does not appear to be reasonably relied upon for crash analysis. If the jurisdiction follows the Daubert rule, the court will examine the scientific method used, and the application of that method. They may also consider other factors, especially in this case that there are no peer reviewed studies that have applied his theories to vehicle crashes.

Under either test, it is likely that Einstein's testimony would be excluded because the science he used is not reasonably relied upon in his field, has no peer reviewed studies, and is not an accepted application of the scientific method of analyzing physics of billiard balls and applying that to car crashes.

Impeachment

There is no indication of any way for Darryl to reasonably impeach Einstein's testimony, except as related to the aforementioned lack of reasonable reliance / scientific methodology.

Conclusion

Einstein's testimony will not be allowed because his scientific method fails the Frye and Daubert tests.

3)

1. Vicky's testimony

Relevance

Good
Evidence is relevant in California if it tends to prove or disprove a disputed fact of consequence. CEC 352 allows the court to exclude evidence if its probative value is substantially outweighed by the likelihood of undue prejudice. Undue prejudice is found when the emotions of the jury are inflamed in a way that risks they will determine the facts based on their feelings instead of a rational evaluation of the evidence. Here, Vicky's testimony is undoubtedly going to cause some emotional response from the jury. Any reasonable person would be moved by her statements. However, there is significant probative value, and the testimony does not refer to same or similar circumstances, which is one of the most prejudicial elements. Therefore, it will likely be allowed for relevance.

Competence

Good
In California all people are presumed to be competent unless they lack personal knowledge, ability to recall, ability to communicate, or an understanding of the obligation to tell the truth. Nothing here indicates that any of these apply to Vicky, so she is competent to testify.

Impeachment

Impeachment is attacking the credibility of a witness. Here, Vicky's deception would certainly serve to impeach her testimony. However, the prosecution brought out this information on direct testimony, so it is not precisely impeachment. By bringing this out on direct, the prosecution has effectively out-manuevered David from what would otherwise be a dramatic impeachment of Vicky's honesty. By admitting that it was a lie,

Vicky and the prosecution have deprived David the opportunity to impeach Vicky for this deception.

Secondary Evidence Rule

In California, secondary evidence is only allowed when the original evidence (document, recording, etc.) is unavailable for having been destroyed or lost in good faith, being outside the jurisdictional authority of the trial court, or in the possession of another party refusing to turn it over. Here, the best evidence - the original recordings - is offered for the body-worn camera footage. Therefore, the evidence satisfies California's secondary evidence rule.

Authentication

Documentary evidence must be authenticated to be admitted. Here, the body camera footage was "properly authenticated," therefore it will not be excluded for lack of authenticity.

Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Here, Vicky's statements recorded on the camera were made out of court, so there is a possibility that they could be objected to and excluded as hearsay.

a. "David tried to kill her"

The first statement from the footage meets the hearsay exception of **Spontaneous Statement**. A spontaneous statement is one that is made during the stress of an occurrence, about the circumstances of that occurrence. Because it is spontaneous, and made in a state of excitement, it is assumed to have greater veracity. Here, Vicky's statement that David tried to kill her was made under a state of stress and excitement, and

it was about the circumstances that caused her state of excitement. Therefore, it would fall under the hearsay exception of spontaneous statement if Officer West testifies as to Vicky's statement.

Vicky can also separately testify as to what she said, but her credibility would be low after admitting to her lies.

However, because the secondary evidence rule allows the authenticated original recording to be admitted, the jury can see for themselves what Vicky said.

b. Jewel yelled - Not a Spontaneous Statement - calmed down

The later statement made by Vicky to Officer West would not fall under the same exception of Spontaneous Statement. She "had calmed down considerably," so that statement was not made under the state of excitement and stress required for this exception. If Officer West tried to testify as to this statement, David could object on hearsay grounds. Secondary evidence could potentially still allow the video, however there is another important hurdle. The second footage is hearsay-within-hearsay.

Double Hearsay

Not only can Officer West not testify as to what Vicky said because it is hearsay, there is another layer of hearsay that will likely result in the second footage being excluded entirely. Even though the secondary evidence rule is satisfied, the key part of that footage is Vicky relating what Jewel said. David will object on hearsay grounds to this statement within the recording. The prosecution will need to show a valid exception, or prove that it is not hearsay. In this case, they will assert that it is a contemporaneous statement, and that it is not offered to prove the truth of the matter, but rather to show the effect on the listener.

Contemporaneous Statement

In California, a contemporaneous statement is one made during the course of an incident, and is made by the declarant explaining their own behavior. The prosecution will argue that Jewel was describing her own behavior of calling the cops when she made that statement to Vicky. Although this argument is flimsy, there is another more powerful argument to allow this statement as non-hearsay.

Effect on the Listener

When a statement is offered to show the effect on the listener, it is not being used to show the truth of the matter asserted. The people are not trying to prove that the cops were on their way, they are trying to show the effect on Vicky, and on David when he stopped the attack and went outside to smoke a cigarette. In particular, this statement's effect on David shows some evidence of his guilty mind. Therefore, the prosecution could successfully argue that this statement is not hearsay, and the objection would be overruled.

Conclusion - Vicky's testimony and Camera Footage

Although Vicky is an unreliable witness due to her admitting to having lied, the footage is original documentary evidence that is properly authenticated. Any hearsay objection would be overruled, because the first statement is a spontaneous statement and the second is not offered for truth of the matter, it is offered for effect on the listeners. Therefore, the footage should be admitted.

2. Jewel's 911 call

Relevance

As supra, the 911 call is relevant because it has a tendency to prove a disputed fact of consequence.

Competence

Good
Jewel is competent because she has personal knowledge, memory, communication, and understands her obligation to tell the truth. Even though she is a minor, at the age of 14, the judge can ask her the necessary questions to confirm that she understands. There is nothing to indicate that she would not be found competent by the judge upon questioning.

Secondary Evidence Rule

As supra, secondary evidence is only allowed when original recordings or documents are not available, or within limited exceptions. Documentary evidence must be authenticated.

Authentication

Evidence can be authenticated through witness testimony, self-authentication for some documents, implied authentication such as the reply rule, or through some government or legal authentication. Here, Jewel has personal knowledge of the 911 call, and is called as a witness to testify to its authentication. This is sufficient to authenticate the recording and allow it into evidence.

Impeachment

David would want to impeach Jewel's testimony, to attack her credibility. This would require a showing of bias, prior inconsistent statement, prior bad act, conviction, or sensory deficiency. The only avenue that David would have for impeachment would be to suggest a sensory deficiency at the time of the incident as evidenced by the fact that she was "crying hysterically"--suggesting that she was not rational and may have overreacted to what was happening. That because of her extreme emotional state, her memory and senses were unreliable. This could be brought up on cross-examination, but as long as

Jewel was able to appropriately respond to questions, such an approach would likely hurt David with the jury, rather than help by discrediting Jewel.

Conclusion - Jewel and the 911 call

Even though she is a minor, Jewel is competent to testify. She is able to authenticate her own 911 call on the witness stand, and her testimony is relevant. Although David may try to impeach her on cross-examination, this is likely to provide little benefit to his case. Her testimony and the call should be admitted as evidence, and the jury would most likely give relatively strong weight to her testimony and the contents of the call.

3. Priscilla's testimony

Relevance

Priscilla's testimony has logical relevance, however it must also pass the legal test under CEC 352 that will exclude evidence if its probative value is substantially outweighed by the possibility of undue prejudice. Here, this testimony is extremely prejudicial, because it pertains to same or similar conduct. Allowing this testimony would create a risk that the jury would just assume David was guilty because he had previously been accused of domestic violence. There would need to be a significant amount of probative value to this testimony for it to pass the CEC 352 relevance balancing test.

Competency

As supra, there is nothing to show that Priscilla is not competent (personal knowledge, memory, communication, truth-telling), so she is presumed to be competent.

Character Evidence

Priscilla's testimony is being offered as character evidence. Character evidence is allowable the character trait is at issue in the claim or defense. Here, there is an assertion of a

tendency to violence, and specific acts are being used to bring the assertion. Normally this type of evidence would only be allowed if David opened the door by claiming his own lack of a violent character, or by asserting that Vicky had a violent character. In either of those cases, the door would be open for this character evidence of specific acts of violence against Priscilla.

Good
In California, evidence of domestic violence does not require that the door be open. However, the lack of corroborating evidence because there are no charges will weaken the weight of this evidence. However, because it relates to specific acts of domestic violence it may be allowed without David first opening the door. Therefore, Priscilla's testimony should not be excluded on grounds of character evidence.

Conclusion - Priscilla

Even though Priscilla is competent and her testimony is a type of allowable character evidence because it relates to specific acts of domestic violence, it would still be excluded because of its probability of undue prejudice. The similarity of Priscilla's assertions to the current case would create a serious risk that the jury would make its determination based on inflamed emotions and prejudicial opinion rather than an objective analysis of the facts. Therefore, the court should exclude this evidence based on CEC 352.

END OF EXAM
