Question 1

The first question was a criminal problem split into five sub-parts. On the whole this was answered well, although there appeared to be some common pitfalls.

Part (a) required an analysis of the sections relating to admissions and lay opinion, as well as the rules relating to *voir dire*. Correct answers identified Pierce’s comments as an admission and dealt with it through s 81 or (in the alternative) s 65. However, a number of students incorrectly suggested that Pierce was “available”, when the defendant is never available in the Crown case. Britta’s comments were also a lay opinion. Finally, this question required discussion of whether the jury should be present and whether Pierce has denied the admission, opening grounds for assessment of the veracity of the admission.

Part (b) was a coincidence rule question. Some students characterised this as tendency evidence or failed to distinguish between the two, despite our discussions in revision. Further, the incident report required discussion of s 69 and whether this was a business record. And if it was, did s 69(3) apply? Good Answers also discussed CLP and whether it applied to this report.

Part (c) involved discussion of identification evidence. Good answers assessed the fact that there was no identification parade and that there was a possible displacement because of the Facebook identification. On the whole, this part of the question was dealt with well, and most students referred to both key authorities.

Part (d) involved a discussion of character evidence, and also questioning during re-examination. This was addressed well by most students. Although some raised the issue of credibility, this was not apposite because Pierce was not a witness. The second part of this question appeared to cause difficulty. Some students saw this as an attack on Garett’s credibility, which was an acceptable approach. But it was also rebutting character evidence. However, few students dealt with the issue of Garret’s potential self-incrimination, and whether privilege attached.

Part (e) involved looking at the appropriateness of the judge’s directions. Few students discussed the direction relating to circumstantial evidence and whether a *Shepherd* direction was required. Of those that did, fewer addressed *Bauer*, and what it says in relation to this. The second direction involved an analysis of whether a *Weissensteiner* comment was warranted and whether this constituted one. Both of those propositions needed to be addressed. The third direction related to the standard of proof.

On the whole most students identified the key issues. There were still some difficulties with analysis: with students identifying the issue but not sufficiently applying the law to the facts and/ or supporting key conclusions.

Question 2

Question 2 had a similar structure to Question 1, but was a civil problem.

The key issue in part (a) was hearsay. Most students identified the hearsay, but only some distinguished between the first and the second-hand hearsay. Further a number of students discussed the issue in terms of whether Wendy was available, which didn’t matter because her representations were second-hand. Better answers identified that the rumbling which Mick heard was first-hand and also potentially an admission by the employer. Wendy’s comments, being second-hand could only be admissible by adducing the PIS for its credibility use and then applying s 60. This involved the PIS
analysis that we discussed in class. Some students focused on the questioning part of that analysis, and some on admissibility. The better answers did both.

Part (b) involved discussion of opinion evidence. Better answers dealt with the fact that Gemima relied upon outside information as a potential *Kyluk or Langford* issue, and some discussed the basis rule. There was also an issue of novel theory. This question also involved the issue of accrediting your witness during examination in chief.

Part (c) involved a discussion of judicial notice. Some students did not pick up on this, and dealt with it as a matter of expert evidence. The other part of this question was a matter of tendency evidence. Again, students who did not distinguish between tendency and coincidence reasoning did not do as well.

In part (d), most students identified the issue of inappropriate questioning, but fewer dealt with the credibility issue, and the fact that this was a case of accrediting the witness after his credibility had been attacked. This also resolved the hearsay issue in this part.

Part (e) required an assessment of the principles in *Jones v Dunkel* and the discussion of the standard of proof. Whilst most answers correctly identified these, few answers discussed in sufficient depth how the *Briginshaw* principle applied to the facts in the problem. Good answers also discussed the rule in *Browne v Dunn*.

Overall, most students identified the key issues well, but there were continuing instances of students correctly identifying the relevant issues, but failing to properly assess them: i.e. by applying the principles to the facts and applying or distinguishing the relevant authorities.