

The Joint Examination Board

Basic English Law Paper : November 2011

EXAMINER'S COMMENTS

GENERAL COMMENTS

Candidates are reminded to read the questions set down in the examination paper and to answer the questions asked. As in past years the approach taken by a number of candidates was to put down on paper everything they knew or could recall about a particular topic even though it was not applicable to the question being asked. Furthermore regurgitating lengthy portions of law without applying the content of that law to the question being asked resulted in pointless words and wasted time. Such an approach does not demonstrate a knowledge or understanding of the subject matter but rather an ability to memorize answers without absorbing the meaning or relevance of the law. A number of Candidates, however, had clearly read around the syllabus requirements and were therefore in a position to provide well-structured and considered answers which gained them higher marks.

As with any examination, time management is required in order to complete as much of the paper as possible. It was apparent that in some cases, that candidates had spent a disproportionate amount of time answering questions from Part A of the paper compared to those in Part B which carry higher marks. Where the question being asked offers a higher score, such as those in Part B, it is advisable to address those questions first and then move on to Part A of the Examination paper, which reap a lower score.

PART A - (10 marks per question)

1. Explain the function and roles of each of the following in civil litigation:

- (a) Judge;**
- (b) Barrister, and**
- (c) Solicitor**

Answer:

- Judge: Before trial - case management role, presides over interim applications. During/post trial - rules on procedural applications, determines fact and law, assesses evidence, delivers judgment, awards remedies.
- Barrister : tactical advice and case assessment (working in conjunction with the solicitor), settling pleadings and procedural documents, advocacy at hearings before the Court (both trial and interim), settling evidence, preparation for trial including skeleton arguments.
- Solicitor : client contact, general advice, case assessment, filing procedural documents and pleadings (in conjunction with the Barrister), interim court applications including case management

conferences, settlement discussions, disclosure, narrowing of issues, witness interviews, evidence preparation and response, trial, effect of advocacy qualifications.

Comments:

The majority of candidates who attempted this question, scored above five marks. Generally candidates did not, however, detail the functions for a Judge, Barrister or Solicitor in civil litigation, but merely provided a general description of the role of each of three roles. To score well in this question, a full explanation of each role was required.

2. According to the Civil Procedure Rules Part 1, what is the over-riding objective in Court procedure? What obligations are imposed by the over-riding objective both on the court and on the court user.

Answer:

- Deal with cases justly including; (a) ensuring the parties are on an equal footing; (b) saving expense; (c) dealing with the case proportionately (i) to the amount of money involved, (ii) to the importance of the case, (iii) to the complexity of the issues, and (iv) to the financial position of each party; (d) ensuring the case is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.
- The court must seek to give effect to the overriding objective when it (a) exercises any power given to it by the Rules, or (b) interprets any rule.
- The parties are required to help the court to further the overriding objective.
- The court must further the overriding objective by actively managing cases.

Comments:

This was a popular question and attempted by all but one candidate. The question was straightforward and there was no analytical assessment required or application of the provisions to a scenario. Candidates who answered this question, generally answered it very well. It required knowledge only of the overriding objective of the Civil Procedure Rules and all candidates should be aware of the overriding objective and the responsibilities that it imposes.

3. Summarise the doctrine of judicial precedent. Indicate some advantages and disadvantages.

Answer:

- Hierarchical court structure.
- Decisions bind lower courts.
- Ratio decidendi - the principle or reason for the decision, the principle giving rise to the binding precedent, principle applied to the facts of the case.
- Obiter dicta - "by the way" comments, commentary in a judgment that does not have a binding effect but can be persuasive, many not relate to the facts of the case but may be used as a illustrative example.

- Advantages : certainty, consistency, precision, flexibility, time saving.
- Disadvantages: rigidity, bad decisions, complexity, illogical distinctions, slowness of growth.

Comments:

This question was generally not answered well. A number of candidates demonstrated knowledge of the Court structure, the definitions of ratio decidendi and obiter dicta, but lost valuable marks by ignoring the portion of the question which required comment as to some possible advantages and disadvantages of judicial precedent and thereby lost valuable marks.

4. Under the Civil Procedure Rules, civil litigation is allocated to one of three “WoOLF tracks”. Summarise the characteristics and benefits of each track.

Answer:

- (a) Small Claims Track

Commenced in County Court, disputes under £5,000 (except for personal injury).
 Informal procedure in Open Court - quick, cheap and simple way of making a claim.
 Heard before District Judge who assist parties in explaining their case.
 Claimant encouraged to argue their own case or use a lay representative.
 Loser not liable for other side's costs.

- (b) Fast Track

Commenced in County Court for straightforward disputes £5,000-£25,000.
 Open Court, formal procedure before Circuit Judge.
 Strict timetable set by the court for pre-trial matters.
 Case heard within approx. 30 weeks.
 Hearing limited to one day
 Fixed costs for the advocate at trial.

- (c) Multi-Track

Case commenced in Country Court or High Court
 Claims for more than £25,000 or complex cases.
 Claims over £50,000 heard in High Court.
 Heard by Circuit Judge
 Timetables strictly enforced.
 Flexible approach to case management
 Attempted settlement through ADR an option if parties agree.

Comments:

Only a small number of candidates selected to attempt this question. Generally those who answered the question did not achieve good marks as they did not set down the information required by the question. Overall, candidates were not sure of the nature of each “track” and therefore could not accrue sufficient marks to result in a good score overall. All that was required

by this question was a straightforward description of the characteristics of each of the three Woolf tracks, together with any benefits or advantages of each. This was a sheer learning exercise for candidates and no analysis or interpretation was required in order to achieve full marks. Candidates should be aware of the Woolf tracks.

5. Identify and describe each of the four essential requirements necessary for formation of a valid contract.

Answer:

- Offer. An unequivocal offer of a promise. Compare with invitation to treat. Collateral/Unilateral contracts.
- Acceptance. Unqualified acceptance of the full terms of the offer. Compare with a counteroffer. Positive action. Communication to the offeror. Collateral/Unilateral contracts.
- Consideration. "A detriment in exchange for the promise". Must not be past and must move from promisee. Discussion as to value of consideration.
- Intention to create legal relations. Discussion as between domestic and commercial relations.

Comments:

This question was attempted by every candidate. All candidates were able to identify the four requirements for a contract and were able to provide basic descriptions of each element. However, there was a distinct difference between candidates who had read deeper into the subject thereby being able to discuss each element in greater detail than those who simply had a basic understanding of the topic. Knowledge of the four elements is not sufficient, however, to gain good marks in this question and candidates should demonstrate knowledge of the principles governing each element of a contract.

PART B (15 Marks per question).

(6) (a) What is an interim injunction?

(b) Discuss the principles used by the English Courts in assessing whether or not to grant an interim injunction.

Answer:

- A temporary/emergency order to stop/do something pending further determination, often at trial. Granted by a Court.
- Governed by the principles in *American Cyanamid*.
- Arguable case (consider also Series 5 case)
- Balance of convenience/risk of damage to both parties.
- Speed/urgency linked with balance of convenience.

- Unquantifiable damages/ damages as an inadequate remedy.
- Public policy, “clean hands”.
- Status quo.
- Cross Undertakings.

Comments:

All but one candidate attempted this question. Those candidates that selected to answer this question gained good marks because they provided a brief definition of an interim injunction. However, marks were not lost where candidates went on to talk about Mareva injunctions and Anton Piller/Search and Seizure orders. But including this extra information did not gain any additional marks because a simple definition of an interim injunction was all that was required for Part (a) of the Question. Candidates who gained good scores for this question then went on to identify and briefly discuss each of the principles taken under consideration by the Court in coming to a decision as to whether to grant an interim injunction or not. A simple list of the principles was not enough to gain good marks in this question.

(7) Explain the different types of evidence. Discuss each type.

Answer:

- Direct: First hand evidence given by way of witness statement or oral testimony under oath.
- Opinion: Expert evidence, allowable from non-expert if facts are as perceived by a witness)
- Hearsay: Evidence of what another person said (eg. second hand evidence), given by way of statement or oral testimony. Admissibility rules. Generally only allowed under a Civil Evidence Act notice.
- Real: Physical Exhibits.
- Survey (specific rules on independence, etc)
- Original evidence: Evidence put to the court for any other reason than for proving the fact stated in it.
- Documentary : documents used to provide evidence.
- Methods of giving evidence: Witness statement, statutory declarations, affidavits, oral testimony, live video, recorded testimony, telephone, depositions, physical exhibits.

Comments:

This was a popular question. A number of candidates scored very well in this question because they had a thorough knowledge of the different types of evidence and as a result of reading around the subject, they were able to set down comprehensive and organised answers. At the other end of the spectrum, some candidates listed only two or three different types of evidence and without expanding on their knowledge relative to the named types of evidence, they failed to gain optimum marks for what they did know. All that was required in order to gain a passing mark in this question was a recital of the different categories of evidence. The question was straightforward and did not require analysis of facts or application of legal principles to facts.

(8) In the context of statements relating to trade in goods and services, define malicious falsehood. Discuss each of the necessary elements to prove malicious falsehood and what defences can be raised to such a claim.

Answer:

- False statement - untrue statement - courts take robust approach - specific allegations and denigration - reasonable person test.
- Publication - other than to the subject of the malicious falsehood.
- Malice and damage - recklessness and intention, note also the application of s. 3 of the Defamation Act and its effect waiving the requirement to prove special damage if the offending words are calculated to cause pecuniary loss and are published.
- Consider also DSG v. Comet - on the issue of malice and "advertising puff".
- Defences: Proof that the statement complained of is in fact true.
Justification for the statement.
A careless statement does not equate to malice.

Comments:

This question was straightforward and required candidates to identify the requirements necessary to establish malicious falsehood and to discuss each element in order to demonstrate a comprehensive knowledge of the topic and then to move on to set down some possible defences. The majority of candidates attempted this question and overall many scored high marks because they had a solid understanding of the subject.

(9) Before catching her bus home from shopping in the town, Sally Brown went into the Town Council's public toilets. She used the toilet cubicle, but when she tried to leave the door handle broke in her hand and she could not open the door. Having failed to attract attention by shouting and banging on the door, she tried to climb out of the cubicle by means of standing on the toilet seat and then standing on to the toilet roll fixture. The toilet roll rotated and Sally fell and suffered a compound fracture of her ankle. Sally wants to sue the Council for carelessness in not properly maintaining the Town public toilets and for causing her injury as a result. Explain to Sally what she must demonstrate in any case she brings against the Council and make an assessment as to whether Sally may be successful.

Answer:

- The Tort of Negligence:
If a person claims that the carelessness of another has caused him loss, an action for damages will be in the tort of negligence.
- To succeed in negligence the claimant must prove :
 - (a) that the defendant owed him a duty of care; The Neighbour Test.
 - (b) that there was a breach of that duty of care; existence of duty of care; necessary standard of care - "reasonable man" test. The likelihood of injury being caused.
 - (c) that the breach resulted in damage to the claimant; damage caused by defendant's breach of duty; was not too remote a consequence of it .
- Assessment in applying law to question:
Duty of care. (Neighbour Test) - when does it arise, conditions to consider when it arises.
Breach of duty of care. Standard expected. Factors taken into consideration in determining standard.
Damage - Causation. Foreseeability/Remoteness.

Consider Claimant's actions. Discuss Contributory negligence and Volenti.

Discuss damages. Basic principle of damages is to put the party back in the position it would have been in were it not for the breach. Actual and foreseeable loss.

- Consider:

(a) contributory negligence

(b) Volenti non fit injuria. ("No wrong is done to him who consents")

Comments:

This question was attempted by most candidates and the majority of candidates scored very well by demonstrating a clear knowledge of the basic requirements necessary to establish negligence and then explaining the basic principles behind each requirement. Pursuant to application of the facts to the law, candidates who attempted this question, provided a variety of outcomes and conclusions in relation to the circumstances set down in the question. Marks were given for each well reasoned assessment and answer, notwithstanding the ultimate conclusion. Overall this question was well answered.

(10) Colin started making garden furniture in his shed as a hobby after he was made redundant two years ago. Over that period, he started selling his furniture to local people and now he has a reputation and a number of orders. Such is the demand that he is seriously considering setting up his own business and the local garden centre has suggested that they would be prepared to order £10,000 worth of furniture if Colin could guarantee delivery. Colin's friend Tony wants to join him in running the business but has told him that they must form a registered company if they are to expand their operation, particularly as they would need to rent larger premises and hire a number of workers if they were to meet the order from the garden centre. Advise Colin on the different types of trading structure which are available to him, together with a description of the nature of each type and draw a conclusion as to which may best serve Colin.

Answer:

- Sole trader - Operates alone and total liability. Advantages include the ability to run the business privately, personally and with limited formalities. Disposal of assets as required. Very little regulation. The greatest disadvantage for the sole trader is the risk of unlimited liability.

- Partnership - Two or more people agree to do into business together. Advantages include the ability to share the risks and assets. Little accountability or regulation and no requirement to file reports and accounts. Disadvantages of a partnership include the risk of unlimited liability and joint and several liability for each partner. May be regulated by a written Partnership Agreement.

* Consider: Limited Liability Partnership.

- Limited Company - Created by process of incorporation by promoters. Memorandum and articles and unique structure and direction of company. Company owned by shareholders who vote according to shares owned. Company ownership lies with shareholders, but control lies with directors. Advantages include limited liability and easier contract formation. Assets are entirely separate from the owners assets. Accountability to shareholders. Disadvantages include the publication of the company's activities and financial accounts and relatively onerous

formalities.

- Assessment relating facts to options
- Draw Conclusion.

Comments:

More than half of candidates sitting this paper selected to answer this question. All that was required in order to achieve a pass mark in this question was a listing of the various business structures available to Colin and to then discuss each of those in light of Colin's needs, reaching a conclusion as to the structure which may best suit Colin in his particular circumstances. Although most candidates were sufficiently knowledgeable about the business structures and listed details well, some candidates failed to include in their answers their recommendations for Colin, or they did not provide their reasoning why they reached a particular conclusion. These candidates missed out on valuable marks which would have boosted their overall score.