

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JUNE 2023

LEVEL 6 UNIT 15 – CIVIL LITIGATION

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2023 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

This was pleasingly attempted overall with some exceptionally good answers from some candidates. As always, some candidates appeared more confident when repeating knowledge and performed less confidently when required to apply that knowledge and to consider appropriate steps to progress a claim or provide appropriate advice to a client.

The topic of QOCS and Part 36 appears to be the least well understood and yet costs underpin all litigation. Even an awareness of the principles of the award and assessment of costs would assist the candidates in building confidence in this area. Civil evidence and the reliance on criminal convictions might also benefit from additional knowledge and understanding.

Open questions are intended to assess higher skills and replicate professional practice. Considered and sensible advice in the client's best interests is what is sought from the answer. Most candidates had a grasp of the relevant knowledge and many were able to think through what the question was asking and were able to respond well.

As expected, there was a full spectrum of responses and there was a significant range of marks awarded. This would suggest that the paper was fully accessible to those candidates who had undertaken the necessary preparation and were able to demonstrate the required depth and

breadth of understanding and application expected at this level, especially in terms of demonstrating the ability to respond to open questions replicating the need to give advice.

Most candidates attempted all of the questions and most appeared to have plenty of time to write in the time available and to have engaged with the progressive nature of the question paper which aims to replicate the conduct of litigation cases from inception through to resolution.

Weaker candidates rely overly on process and rules which, whilst clearly having a place, are no substitute for tailored advice. Repeating memorised learning is no substitute for careful thought and planning of the answer to the question asked. The marks which are available respond to the crux of the question and the candidates should think carefully as to what aspect of their knowledge is relevant to the specifics of the question and not digress.

All candidates, even if not successful, should be credited on their efforts to respond to a Level 6 paper. As always, it was a pleasure to see how well the strongest candidates responded giving confident and polished answers showing contextual awareness and understanding.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

This question expected candidates to address the need for expert evidence. Those candidates who had properly understood Part 35 realised that the issue upon which it was suggested that expert evidence was required was a resolved factual issue and, therefore, expert evidence would not be necessary. It was good to see how well many candidates understood the purpose of expert evidence.

(b)

This was well done by most candidates with the correct identification of the requirements of Part 21 in respect of the original need for a litigation friend and the change to that requirement given the dates presented.

(c)

This question concerned the implications of making a Part 36 offer. It was an open question requiring candidates to recognise the benefits to the client, especially given the liability risks. The discussion about the costs benefits was confused in many instances with muddled answers about costs recovery under CPR36.17. QOCS applies and any costs order made against the claimant could be enforced against any award. Costs should always inform any discussion about any step in any action and not least when considering options for settlement.

Question 2(a)

Most candidates recognised that a request was being made for a voluntary interim payment and the reasons why it may be sensible to accede to that request. A number of candidates also recognised the tactical advantage of attempting to persuade the claimant to accept the Part 36 offer, as the request for a voluntary interim payment was being made during the relevant period for acceptance.

Most candidates were also able to identify correctly the relevant ground which might be satisfied should an application be made for an interim payment.

2(b)

This question asked candidates specifically to consider why on the facts presented a Tomlin order is the most appropriate method to record the settlement. It was good to see that the majority of candidates were able to differentiate the reasons why a Tomlin order was more appropriate than a consent order given the specific terms and the need for confidentiality.

Question 3(a)

This question required a careful consideration of what must be done and why in order to comply with the Practice Direction - Pre-Action Conduct and Protocols. Rather than simply list the requirements of the PD, there was wide scope for discussion about what should be included in the letter of claim, and key facts from the scenario provided a ready source. A number of candidates noted that enquiries might be made in relation to the defendant's change of address. The majority of candidates understood the relevance of ADR and the possible costs sanctions in the event of unreasonably failing to engage.

(b)

This question tested candidates' ability to recognise when default judgment might be obtained (Part 12) and how default judgment might be set aside (Part 13) and what the court will take into account. Overall, this was well done. The candidates clearly had an insight into the reasons why the court would set aside the judgment. A number of candidates considered only the discretionary test and promptness, which was incorrect on the facts given.

(c)

Most candidates recognised that a formal request under Part 18 must be made as only a verbal discussion has taken place so far. Most candidates engaged with the provisions of the Practice Direction indicating that the first step in obtaining further information is to make a written request for such information indicating a reasonable date by which a response should be received. Many candidates understood the format requirements for making the request and that an application might be made to the court. Costs are always relevant when applications are made and some candidates understood that an application might be made for costs from the Jedi as the information could have been provided as first agreed without the need for the application.

Question 4(a)

This was muddled in many instances although a number of candidates recognised that the only claim which might be made is that Jag's claim against the car driver survives Jag under the Law Reform (Miscellaneous Provisions) Act 1934 for the benefit of Jag's estate to recover those damages to which Jag would have been entitled had he survived. Those candidates who made that connection discussed accurately the damages which might be recovered including general damages, as Jag survived for a period after the accident, and who might bring the claim, and what would be required procedurally. Limitation was a weaker point as many candidates stated that the time limit for bringing a claim is three years from the date of death rather than the date of the accident. There is no claim for the dependants under the FAA as the cause of death is natural causes unconnected to the accident.

4(b)

This question required consideration of the Civil Evidence Act 1968 specifically that the conviction might be regarded as a subsisting conviction relevant to the issues. This was the least well done of all of the questions. The majority of candidates appear to be confused about the extent to which the conviction impacts the civil evidential burden. The conviction is admissible in evidence for the purpose of proving, where relevant to any issue in those proceedings, that the individual committed that offence. The conviction may assist the claimant in establishing a claim in negligence on the balance of probabilities as the driver shall be taken to have committed the offence of dangerous driving unless the contrary is proved but the conviction does not reverse the burden of proof. While a criminal conviction can be used as evidence in a civil claim, it does not automatically establish negligence or shift the burden of proof. The conviction is likely to be persuasive evidence that the defendant was driving dangerously (especially given the higher standard of proof in the criminal courts), but the claimant would still need to present their case and prove the elements of negligence in the civil claim.

(c)

Overall, it was good to see that candidates had properly thought about the materials in advance of the examination and extracted that the defendant's solicitors had confirmed in writing that they were instructed to accept service of proceedings and therefore the claim form must be served at the business address of that solicitor. The permitted methods of service were well-noted and most correctly ruled out service by email, which had been specifically excluded in the solicitors' letterhead.

Many candidates also engaged well with the problems presented by the offices being closed and were able to rationalise that it may be unreasonable to serve proceedings by post as the claim form would arrive after the offices had closed for the holidays. Personal service was appropriately considered, and many candidates recognised that it was not essential to serve now as the claim form must be served within four calendar months of issue. A number of candidates wrongly considered the relevance of the primary limitation period as if the claim had not been issued.

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 UNIT 15 – CIVIL LITIGATION

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p>Correct identification and explanations of relevant Facts and Laws Creating clear and understandable explanations of complex events/procedures Relevant research A reasoned conclusion which outlines justifications and is supported with evidence Response is appropriately structured</p> <ul style="list-style-type: none"> • The starting point is that expert evidence shall be restricted to that which is reasonably required to resolve the proceedings (CPR35.1). • Although it is possible for the parties to ask for permission to obtain a report from a SJE, the issue with regard to the safety of the wall bars is not in dispute • It is a resolved factual issue. • Therefore, it is highly unlikely that the court will agree that it needs assistance from an expert on this aspect • The court will be mindful of the overriding objective (CPR1). • Evidence is likely to be confined to lay evidence i.e. witness statements, documentary evidence and medical evidence in relation to Millie’s personal injuries • Millie will not be able to call any expert or put a report in evidence unless it has the court’s permission (CPR35.4). • The claim is likely to be allocated to the MT • On the MT, as a general rule, it is more likely that single experts might be instructed by the parties and not limited to the standard fast-track direction of SJE (CPR26.6). 	8
1(b)	<p>Correct identification and explanations of relevant Facts and Laws Creating clear and understandable explanations of complex events/procedures Relevant research A reasoned conclusion which outlines justifications and is supported with evidence . Response is appropriately structured</p> <ul style="list-style-type: none"> • Here we would need to follow the requirements of Part 21 (see CPR 21.9 and PD21.4) • A child (under the age of 18) requires a litigation friend but Millie does not (CPR21.1 and 21.2). • Although at the date of the accident and the issue of the proceedings she was a child, she was not a child by the date of service • Millie’s date of birth is May 21, 2005 	7

	<ul style="list-style-type: none"> • The accident occurred on 5 November, 2021 and Millie was under 18 when the accident happened • Millie was also under the age of 18 when proceedings were issued on 30 April, 2023 • However, Millie is 18 when the proceedings are deemed served on 22 May, 2023 • Therefore, she may conduct the proceedings at this stage as she does not need a litigation friend. 	
1(c)	<p>Correct identification and explanations of relevant Facts and Laws Creating clear and understandable explanations of complex events/procedures Relevant research A reasoned conclusion which outlines justifications and is supported with evidence.</p> <p>Response is appropriately structured</p> <ul style="list-style-type: none"> • It should be explained to Greenbank that costs are always a risk in litigation. • Under CPR 44.2(2)(a) the general rule is that if the court decides to make an order about costs the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; • but the court may make a different order. • As this is a personal injury matter, the claimant has the benefit of some costs protection in the form of QOCS • Even so, making a Part 36 offer has the benefit of putting the claimant at risk of paying costs, and interest on those costs if Millie fails to beat the school's offer but recovers some damages at trial. • It would be a risk for the school to proceed without attempting settlement especially given the latest admission from Jaquie. • Making a Part 36 offer at an early stage offers greater costs protection • Breach of duty has already been admitted in relation to the safety of the bars and the arguments as to causation are now under threat if the school has breached its policy of allowing candidates into the gym unsupervised. • If an offer is made, and the matter then proceeds to trial at which the claimant fails to achieve an award that is more advantageous than the offer • Then the court will make a split costs order • unless the court considers it unjust to do so (see CPR 36.17(3)) • That is that the claimant could be ordered to meet the defendant's costs, together with interest on those costs, from the date of expiry of the relevant period for acceptance of the Part 36 offer • as well as being responsible for payment of her own costs. • The defendant would be able to enforce the order for costs without permission • but only to the extent that costs do not exceed the amount recovered by the client - this could potentially eliminate her damages. • Useful tactic to push for settlement and reach a compromise • The case will not proceed any further after this stage so long as the amount is paid within the agreed timeframe of 14 days. 	12

	<ul style="list-style-type: none"> • A Part 36 offer presents the opportunity for settlement without the detriment of making an admission of liability 	
Question 1 Total:27 marks		
Question Number	Suggested Points for Responses	Marks (Max)
2(a)	<p>Correct identification and explanations of relevant Facts and Laws Creating clear and understandable explanations of complex events/procedures Relevant research A reasoned conclusion which outlines justifications and is supported with evidence Response is appropriately structured.</p> <ul style="list-style-type: none"> • Usually, it would be sensible to consider agreeing to a request for a voluntary interim payment • if no payment is made on a voluntary basis, an application for an interim payment could be made (Part 25) • Advice should be given that under CPR 25.7 - the court may only make an order for interim payment if one of the conditions is made out, • here the condition is not satisfied that liability has been admitted. • So it would be necessary to show that the claimant would obtain judgment for a substantial amount of money. • However, you do not yet know what amount is being sought (the letter is silent on that point) and this is needed to advise the client properly and • would, in any event be needed to satisfy the relevant evidence requirements if an application is issued. • The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment • Therefore, you should ask for the sum of money sought by the claimant • Importantly, tactically, you should bear in mind that a Part 36 offer has been made at £30,000. • Therefore, as the relevant period for acceptance is till current, • you should recommend that the Part 36 offer should be emphasised and inform Millie’s solicitors that your client expects a response on that before considering the suitability of making an interim payment. • This will put pressure on the claimant to accept or make a counter-offer which might produce settlement. • Agreeing to make an interim payment at this stage takes away any urgency for the claimant to try and settle. 	12
2(b)	<p>Correct identification and explanations of relevant Facts and Laws Creating clear and understandable explanations of complex events/procedures Relevant research A reasoned conclusion which outlines justifications and is supported with evidence.</p> <p>Response is appropriately structured</p>	8

	<ul style="list-style-type: none"> • A Tomlin Order is the appropriate order here to record the terms of settlement negotiated between the parties as it the terms of settlement provide for more than just payment of money and • includes terms beyond the original scope of the litigation • i.e. waiving a term’s fees and • keeping the settlement confidential • The Order: constitutes a binding contract between the parties; • stays the claim on agreed terms set out in a schedule to the Order which remain confidential to the parties; • includes public terms in the order itself such as the agreement to pay costs; • brings the proceedings to conclusion save for the purposes of implementing the agreed terms and the order will contain a liberty to apply clause for that reason; • may be enforced without the need for fresh proceedings. However, a further application is required to enforce the terms of Order. 	
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Question 2 Total: 20 marks

Question Number	Suggested Points for Responses	Marks (Max)
3(a)	<p>Correct identification and explanations of relevant Facts and Laws Creating clear and understandable explanations of complex events/procedures Relevant research A reasoned conclusion which outlines justifications and is supported with evidence Response is appropriately structured.</p> <ul style="list-style-type: none"> • Before commencing proceedings, amongst other things, the court will expect the parties to have exchanged sufficient information to understand each other’s position and try to settle the issues without proceedings by considering a form of ADR to assist with settlement and reduce costs. • The court may decide that there has been a failure of compliance with PD-PACAP if Charlie has not provided sufficient information to enable the objectives to be met. • Although Charlie has said that he wants us to “investigate every possible source of information and every possibility and explore every avenue” • Charlie should bear in mind that only reasonable and proportionate steps should be taken by the parties to identify, narrow and resolve the legal, factual or expert issues as disproportionate or unreasonable costs will not be recoverable as part of the costs of any proceedings • A key step for Charlie under the PD-PACAP is to send a letter of claim that clearly sets out concise details of the claim. • It should include the basis on which the claim is made, a summary of the facts, what Charlie wants from Jedi, and, as the claim is a money claim, how the amount is calculated. • You would need to include clear details of the breach of contract, any relevant dates, the nature of the breach, and the remedies sought. 	12



	<ul style="list-style-type: none"> • It is important to identify the correct defendant and ensure that the letter of claim is sent to the correct address for service. • Therefore, as a change of address for Jedi has been mentioned, Charlie needs to establish Jedi’s new address and whether it is the Registered Office of the business or its business address • You should also be sure to send any relevant documents by way of sufficient evidence to support the claim, including copies of any relevant documents such as emails, texts or letters. This will help narrow the issues. • If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. The parties should consider whether negotiation or some other form of ADR such as mediation might enable them to settle their dispute without commencing proceedings as litigation should be a last resort. • An invitation to consider ADR should be included in the letter of claim even though, given the furious rows, mediation or negotiation are perhaps unlikely to be successful. • If Jedi do not respond to an invitation by Charlie to participate or refuse to participate in ADR, this might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs. • Interest and penalties under the Late Payment of Commercial Debts (interest) Act 1998 are claimed. 	
3(b)	<p>Correct identification and explanations of relevant Facts and Laws Creating clear and understandable explanations of complex events/procedures Relevant research A reasoned conclusion which outlines justifications and is supported with evidence Response is appropriately structured.</p> <ul style="list-style-type: none"> • On the facts given the judgment was irregular as it is a judgment in default of an acknowledgement of service • Judgment can be set aside as of right and the court has no discretion (CPR 13.2(a)) • The deemed date of service is 14 May 2023. • That being so, as particulars of claim were served with the claim form, Jedi had until 28 May for service of acknowledgment of service. • Default judgment was entered on 27 May which is too short a time period • The rules provide that a claimant may obtain judgment in default of an acknowledgment of service only if at the date on which judgment is entered the defendant has not filed an acknowledgment of service or a defence to the claim and • the relevant time for doing so has expired. • The likely costs order is that the claimant will be ordered to pay the costs of the defendant’s application as the application has been necessitated by the claimant’s conduct. 	8

3(c)	<p>Correct identification and explanations of relevant Facts and Laws Creating clear and understandable explanations of complex events/procedures Relevant research A reasoned conclusion which outlines justifications and is supported with evidence</p> <p>Response is appropriately structured.</p> <ul style="list-style-type: none"> • You are seeking further information under Part 18 PD 18.1 indicates that the first step in obtaining further information is to make a written request for such information indicating a reasonable date by which a response should be received • At present, there has been a telephone conversation with Sayeed Khan • As no reply has been received as expected and it is now 14 days since the call, it would be sensible to make a written request for further information • The request should be in a separate document or letter which deals only with the Part 18 request • A reasonable time should be given for the response. As there has already been a delay, and Sayeed indicated that he was able to provide the information within seven days, seven days may be appropriate. • If no response is received within the time set out above, an application can then be made to the court • In support of the application, it can be shown that a written request has been made, a reasonable time has been given • An application can also be made for costs from the Jedi as the information could have been provided as first agreed without the need for the application. 	7
Question 3 Total:27 marks		
Question Number	Suggested Points for Responses	Marks (Max)
4(a)	<p>Correct identification and explanations of relevant Facts and Laws Creating clear and understandable explanations of complex events/procedures Relevant research A reasoned conclusion which outlines justifications and is supported with evidence</p> <p>Response is appropriately structured.</p> <ul style="list-style-type: none"> • Jag’s claim against the car driver survives him under the Law Reform (Miscellaneous Provisions) Act 1934. • A claim can be made by the executor for damages for the benefit of Jag’s estate to recover those damages to which Jag would have been entitled had he survived. • and distributed in accordance with his will • Damages may be sought for pain suffering and loss of amenity suffered by Jag prior to death. • This is relevant here as Jag survived for a period after the accident • Jag’s estate is also entitled to claim special damages. • This is relevant here as Jag sustained a loss of income to his business. 	12

	<ul style="list-style-type: none"> • There are other special damages to claim as well e.g. care costs, prescription charges, the value of the motorbike • A claim can be made for funeral expenses if paid for by the estate • Nita is Jag's only executor and sole beneficiary and is entitled to bring the claim. • The grant of probate is needed before we can issue proceedings. • The time limit for bringing a claim is three years from the date on which the cause of action accrued (s11 LA 1980); • Here, that is the date of the accident (not the date of death which is relevant under the FAA*) • Limitation runs from 3 December 2022. <p>*There is no claim under the FAA as the cause of death is natural causes and there is no claim for the benefit of any dependants on the grounds of remoteness as it would have happened in any event.</p>	
4(b)	<p>Correct identification and explanations of relevant Facts and Laws Creating clear and understandable explanations of complex events/procedures Relevant research A reasoned conclusion which outlines justifications and is supported with evidence Response is appropriately structured.</p> <ul style="list-style-type: none"> • In a civil claim, the fact that a person has been convicted of an offence shall be admissible in evidence for the purpose of proving, where relevant to any issue in those proceedings, that he committed that offence (s.11 CEA 1968). • Nita's claim is in negligence, and she must establish on balance of probabilities that a duty exists, that duty was breached, and caused her husband's injuries. • Therefore, the conviction is relevant to these issues in the negligence claim • In a criminal court the burden is to establish the facts of the offence beyond all reasonable doubt. • The fact of the conviction is important and does not depend on whether it followed a plea of guilty or not guilty, as here. • The driver shall be taken to have committed the offence of dangerous driving unless the contrary is proved • And any document which is admissible as evidence of the conviction, shall be admissible in evidence for that purpose. 	6

4(c)	<p>Correct identification and explanations of relevant Facts and Laws Creating clear and understandable explanations of complex events/procedures Relevant research A reasoned conclusion which outlines justifications and is supported with evidence Response is appropriately structured.</p> <ul style="list-style-type: none"> • Mitchell Wilmott have confirmed in writing that they are instructed to accept service of proceedings. This complies with the PD6 requirement i.e. that the defendant’s solicitor has notified the claimant in writing that they are instructed to accept service of the claim form on behalf of the defendant at a business address within the jurisdiction • Therefore, the claim form must be served at the business address of that solicitor at 4 The Deansway Kempston. • Permitted methods of service generally include first class post, personal service and email. • However, email service is not acceptable here as MW have specifically excluded accepting service of proceedings by email in their letterhead. • As to what is appropriate, MW have indicated that their offices will be closed from 22 December until 2 January 2024. • It would be unreasonable to serve proceedings by post as the deemed date of service will be the second day after the claim form was posted and would arrive after the offices had closed for the holidays. • This might be considered unacceptable professional conduct and in conflict with the overriding objective e.g. of cooperation. • Personal service could be effected as the deemed date of service would be on the day of service. • However, on balance, it is not essential to serve now as the claim form must be served within four calendar months of issue so time is not pressing. 	8
Question 4 Total: 26 marks		