CHIEF EXAMINER REPORT

JANUARY 2024

LEVEL 6 UNIT 15 – Civil Litigation

The purpose of the suggested points for responses is to provide candidates and Training Providers with guidance as to the key points candidates should have included in their answers to the January 2024 examinations.

The suggested points for responses sets out points that a good (merit/distinction) candidate would have made.

Candidates will have received credit, where applicable, for other points not addressed in the suggested points for responses or alternative valid responses.

Chief Examiner Overview
In general, candidates were stronger on procedure than the application of procedure to the circumstances disclosed in the CSM and QP. Many candidates showed very detailed knowledge of many of the relevant parts of the CPR. Some answers seemed quite formulaic and preprepared, including material not actually required by the specific rubric. Candidates often failed to focus closely enough. In Q3(b), many did not specify what allegation of breach of duty applied, namely allowing a significantly under height individual to ride and failing to keep a proper lookout for untoward events while the ride was operating. In Q4 (a) many failed to deal with whether the claimant could establish that she was likely to be awarded substantial damages. Q3 (c) specifically asked for the procedure 'if proceedings are to be commenced'. This only called for a detailed discussion of the appointment of a litigation friend, as there are no current limitation issues and any settlement approval lies well into the future.

Candidate Performance and Suggested Points for Responses

It is noted that the low numbers of candidates taking the Level 6 exams limits the scope for constructive feedback to be given and for firm conclusions to be reached. Therefore, feedback on candidate performance is limited.

Section A

Question 1a	7 marks
Most responses could explain the claim form and particulars of claim, but not all stated that the claim was a county court one, or made any reference to the issue fee. A significant number of answers contained a substantial amount of material relating to the earlier investigative and pre-action phase which was not required by the question.	
Suggested Points for Response:	
• The key document is the claim form which indicates the nature of the claim and must comply with CPR16 and PD7A para 4.1. • The claim will be commenced in the County Court using the Damages Claims Pilot Portal (DCP) in accordance with PD51ZB. • The claim form must be completed online in the DCP and the issue fee paid. • The claim form is issued through the DCP. • Details of the claim (Particulars of Claim and supporting documents) must also be uploaded to the DCP • As the defendant is unrepresented the claim form and details of the claim must be served in the usual way: PD51ZB 3.11. • The claim will only continue in the DCP if the defendant becomes represented within 14 days of service of the details of claim by a DCP registered legal representative. • Otherwise it will exit the DCP and proceed in the Civil National Business Centre as a Part 7 claim.	

Question 1b	7 marks
Most candidates rightly recognised that judgment could not be set aside as of right. Candidates would often neglect to identify that a dispute as to quantum could be dealt with at the disposal hearing, or that a desire to claim indemnity from a third party was not a defence. The denial of breach could amount to a defence.	
Suggested Points for Response:	
• If the claim remains within the DCP judgment in default could be applied for under PD51XB 6.6. If it has left the DCP judgment in default can be applied for under CPR12. • The defendant may apply to set the default judgment aside pursuant to CPR13. • This is mandatory where the default judgment has been obtained where the requirements of CPR12.3 were not met, but this does not apply here. • It is discretionary in any other case and the court must consider whether the defendant has a real prospect of successfully defending the case or there is some other reason for setting the judgment aside (CPR13.3 (1)). • The promptness of the application is a relevant factor (CPR13.3 (2), but this application is prompt. • Disputing the amount of damages would not in itself justify setting aside judgment as this can be done when the existing application is determined. There is an allegation that the defendant is not in breach, and also an apparent assertion that liability may rest with a third party. • The claimant should consider whether to resist the application to set aside the default judgment bearing in mind the overriding objective.	

Question 1c	8 marks
Most candidates identified O20 as relevant, but there was confusion between additional claims and additional parties, and the level of detail on the procedure was variable and often limited.	
Suggested Points for Response:	
• Magnetic Motors Ltd appears to be alleging that any fault is the responsibility of Clockwell Autoservices Ltd. • This does not appear to affect the contractual position which is that the van was supplied by Magnetic Motors Ltd which is contractually responsible to Breakout Foods Ltd for its quality and fitness for purpose. (2 MARKS) • However it may wish to seek an indemnity or contribution from Clockwell Autoserviceservices Ltd. • The appropriate procedure is to make an additional claim pursuant to CPR20.7. • The defendant must issue and serve on the additional party a claim form together with particulars of the additional claim (CPR20.7 (2) and (4)). • This may be done without the permission of the court if it is filed and served with the defence or with the permission of the court at any later time (CPR20.7 (3)). • This is not an appropriate case for the claimant to consider joining the additional party as a defendant as there is no privity of contract and nothing to suggest a sufficient degree of proximity to give rise to a duty of care in negligence for what is essentially pure economic loss.	

Question 1d	8 marks
There were many excellent, accurate and detailed answers. Limited answers confused a claimant's offer and a defendant's offer and/or failed to deal accurately with the costs consequences of a declined offer, in particularly wrongly suggesting adverse consequences for the claimant if the claimant succeeded at trial but recovered less than the amount of the offer.	
Suggested Points for Response:	
• Part 36 offers are an important part of the arrangements for seeking to achieve the overriding objective by encouraging the parties to make realistic offers to settle. • The offer must comply with the formal requirements of CPR36.5. • Must be open for acceptance for not less than 21 days, and is normally inclusive of interest. • May be for a specified period only but is normally open ended. • If accepted within its currency, the claimant will be entitled to costs on the standard basis to the date of acceptance (CPR36.13) the claim will be stayed and the amount of the offer is payable within 14 days (CPR36.14). • If not accepted the existence of the offer will not be disclosed to the trial judge (CPR36.17) • If not accepted and the judgment is at least as advantageous to the claimant as the proposals in the offer, the defendant will be ordered to pay interest on any monetary award at a rate not exceeding 10% above base rate, together with costs on the indemnity basis, together with interest at a rate not exceeding 10% above base rate, each case from the date on which the offer was originally open for acceptance. The defendant will also be ordered to pay an additional amount equating to 10% of the sum awarded (CPR36.17 (5) and CPR44). • The court has a discretion not to award the costs referred to in whole or in part if it would be unjust to do so having regard to all the circumstances including the conduct of the parties and the stage in the proceedings at which the Part 36 offer was made (CPR36.. • There are no special costs or other consequences if judgment is not as advantageous to the claimant as the proposals in the offer.	

Question 2a	8 marks
Most candidates explained the changes in format and presentation but would often fail to consider the content of the statement. Several recognised that there was inadmissible opinion to be edited out, but only a couple suggested editing out irrelevant material.	
Suggested Points for Response:	
• Formal requirements (CPR32.8 and PD32): • case heading; • identifying details of the statement as in para 17.2; • full name address and occupation; • in the first person, and in the witness' own words (i.e. the witness must specifically approve the wording). • numbered pages and paragraphs; • statement of truth. • Contents: should only contain relevant and material factual information, so omit the reference to the collection of the daughter from her grandmother. • A witness of fact cannot give evidence of opinion, so omit any reference to the witness' opinion as to the responsibility for the accident.	

Question 2b	12 marks
Most candidates recognised that this was a case of applying for relief from sanction and marks varied with the detail and precision of coverage and realistic application.	
Suggested Points for Response:	
• Here, due to the inclusion of the incorrect attachment, the witness statement has not been served on the other party within the time prescribed by the court. • The consequence of this is that the claimant will not be able to call the witness without leave of the court (CPR32.10) • It will therefore be necessary to make an application for relief against sanctions (CPR3.9). • Denton v T H White provides a three stage test for determining whether relief should be granted: • In the first instance the seriousness or significance of the breach is considered. • Relief will normally be granted if the breach has not caused significant prejudice to other parties or interfered with the court timetable. • Here, it would seem that the breach was discovered quickly and could be remedied speedily without affecting the court timetable. • The second criterion relates to the reason for the default. Here the error appears to have arisen from general carelessness which is not normally an acceptable reason. • It would be different if it could be shown that the file handler was unavoidably absent at short notice for illness or other legitimate reason. There is however nothing in the materials to suggest anything other than a careless oversight • The third criterion allows the court to take into account all the circumstances of the case in order to do justice. • In making the application a witness statement should set out the precise circumstances and reasons for the default. • The solicitors for the defendant should be invited to consent to relief being granted on the basis that contesting this would be disproportionate and contrary to the overriding objective. • Clear and coherent account with appropriate application to facts.	

Question 3a	8 marks
Candidates often neglected reference to or proper explanation of qualified one way costs shifting, and its impact here. Coverage of both CFAs and DBAs tended to be brief.	
Suggested Points for Response:	

- This case will benefit in any event from Qualified One-way Costs Shifting (CPR44.13-14).
- If the claim is pursued honestly and reasonably the claimant will not be liable for the cost and disbursements of the defendant even if the claim fails.
- If the case is privately funded, there will be a retainer in the usual way and the client will be liable for Kempstons' costs and disbursements in the usual way, irrespective of the outcome of the case.
- This is subject to the likelihood that the defendant would be ordered to pay a significant proportion of these costs if the claim succeeds.
- A Conditional Fee Arrangement is regulated under s 58 Courts and Legal Services Act 1990.
- The solicitor does not charge any upfront fees, but agrees a success fee which represents an uplift on the ordinary costs not exceeding 100%.
- In personal injury cases the maximum that can be recovered is limited to 25% of the damages recovered.
- A Damages Based Agreement is broadly similar in that in a personal injuries case the maximum that is deductible to cover costs is 25% of the damages recovered.
- [These agreements are rare as the detail of their operation is disadvantageous to the legal representative.]
- A Conditional Fee Arrangement may be preferable if the risk assessment undertaken by Kempstons leads them to offer it as it provides greater protection against payment of costs and disbursements, although the success fee may result in the claimant giving up some of the damages awarded.

Question 3b	12 marks

There were many strong answers, adopting an appropriate form and covering the required content. The most common omissions were reference to the insurance position and a clear allegation of negligence based on allowing a seriously under height child to ride and lack of attention by the ride operator.

Suggested Points for Response:

The format of the Letter of Claim is set out in Annex B to the Pre—Action Protocol for Personal Injury Cases.

Chatterley Bros Ltd
Funtime House
Berry Brow
Beeston BE3 7GG

Dear Sirs

Re:
Seema Malhotra
[address]

We are instructed by the above named to claim damages in connection with an accident which occurred at the funfair at Castle Park Beeston on 25 June 2022 when our client was thrown from the Paratrooper ride operated by yourselves and fell to the floor suffering significant injuries.

Please confirm the identity of your insurers. Please note that the insurers will need to see this letter as soon as possible and it may affect your insurance cover and/or the conduct of any subsequent legal proceedings if you do not send this letter to them.

The circumstances of the accident are: that our client, with her older sister, paid for access to the Paratrooper ride. While the ride was in motion our client started to slip between the security bar and the seat and eventually failed to maintain herself within the car and fell to the ground. Our client was slipping from her original position and clearly in distress for a significant period but this was not observed by the ride operators.

The reason why We are alleging fault is that our client'sheight is 133 cm which is 17 cm less than the minimum height which you have specified. The cashier and/or ride operator should have identified that our client was significantly under the minimum permitted height and refused her access to the ride. This was not done.

In addition, there was a significant period between our client first starting to slip from her seat and finally falling from the ride. It is our contention that the ride operator, if paying proper attention, should have noticed this and brought the ride to a halt as soon as our client started to slip from her seat.

This constitutes actionable negligence for which we hold your client vicariously liable.

A description of our clients' injuries is as follows:
A large extra-dural haematoma overlying the left temporal lobe and inferior parietal lobe with a marked midline shift. A comminuted (open) fracture of both the tibia and fibula of her left leg with involvement of the ankle joint and a complex fracture dislocation of the left shoulder joint involving the scapula, clavicle and upper humerus. A number of other contusions and abrasions.

Our client is currently suffering from a significant left sided hemiplegia resulting from the extra-dural haematoma and significant weakness of the left side of the body resulting from the fractures. She is likely to have significant limitations on her mobility permanently.

She is likely to require ongoing intensive physiotherapy and other rehabilitation and will require substantial modifications to her living environment to accommodate her disability.

As our client is currently a 10 year old schoolgirl, there is no current loss of earnings. Significant expenses are being incurred on her behalf in relation to physiotherapy and other rehabilitation measures and there is a potential claim for future loss of earnings.

At this stage of our enquiries we would expect all documents relating to the operation and management of the Paratrooper ride, including any method statement and risk assessment, to be relevant to this action.

A copy of this letter is attached for you to send to your insurers.

Finally we expect an acknowledgment of this letter within 21 days by yourselves or your insurers.

Yours faithfully
Set out properly in letter form with clear structure.

[The passages above indicate the areas that should be covered, but the precise wording will depend on the approach taken by the candidates.]

Question 3c	6 marks
Good answers focussed on the litigation friend.	
Suggested Points for Response:	

- Proceedings where a child is a party must normally be conducted by a litigation friend on behalf of the child (CPR 21).
- A proposed litigation friend must file a statement of suitability with the court (CPR21.4).
- The litigation friend must be able to conduct the proceedings fairly and competently on behalf the child.
- The litigation friend must not have any adverse interest.
- The litigation friend must undertake to pay any costs which the child is ordered to pay.
- [In this case Qualified One-way Costs Shifting will render this undertaking largely otiose.]
- Either parent would appear to be an appropriate litigation friend in this case.

Question 4a	10 marks
Generally well answered, but often limited answered failed to identify what the legal basis for making an award was – it must be that it is likely that the claimant will recover substantial damages, and this needed to be explored.	
Suggested Points for Response:	
• In formal terms the appropriate application would be for an interim payment. However the reason for the application is to meet rehabilitation needs and it is necessary to consider this in the light of the overriding objective and the specific requirement to engage with rehabilitation under the pre-action protocols which is an ongoing obligation. • The solicitors acting for the defendant would be invited to agree a voluntary interim payment. This would be consistent with the obligation to consider rehabilitation, although regard must also be had to the nature of the claim. • An application for an interim payment can be made pursuant to CPR 25.6; the application is usually on notice and supported by evidence (CPR25.3). • As liability has not been admitted or judgment entered, the court must be satisfied that the claimant would obtain at trial a substantial judgment against the defendant (CPR25.7 (c)). The interim payment must not exceed a reasonable proportion of the likely damages having made appropriate allowances for contributory negligence (CPR25.7 (4) and (5). • The application should be supported by evidence in relation to the amount being claimed under the various heads and also explaining the necessity or desirability of the various heads being claimed.	

Question 4b	6 marks
Most candidates could explain the essential purpose in terms of compliance with directions and identifying witnesses and counsel. Limited answers often lost marks by not explaining the position with regard to witnesses in the case (e.g. that the paediatricians' evidence was agreed).	
Suggested Points for Response:	
• The listing questionnaire is an important procedural device in relation to preparation for trial for cases which are proceeding on the multitrack. • The party completing the questionnaire must indicate the extent to which existing directions have been complied with, and raise any additional directions which are required. • The questionnaire should identify the witnesses of fact, in this case Radha Malhotra. • It should also identify expert witnesses distinguishing between those who are to be called to give evidence, in this case Aleksandra Cortez and those whose statements will be admitted without oral evidence, in this case Harmanpreet Johal and Thomas Lowe. • It will also identify trial counsel, James Waters. • Any dates within the provisional trial window which are inconvenient to counsel or the witnesses should be identified.	

Question 4c	8 marks
Most candidates recognised the need for leave, and that an error or errors by the judge needed to be identified.	
Suggested Points for Response:	
• An appeal from a decision at this level requires leave. Appeals are governed by CPR52. • An application for permission to appeal could have been made to Her Honour Judge Ching, at the conclusion of the hearing, but this does not appear to have been done. • An application for leave to appeal can be made in an appeal notice to the Court of Appeal within 21 days. • The application will normally be considered on the papers without a hearing. • Permission to appeal to the Court of Appeal will be granted where the appeal is considered to have a real prospect of success or there is considered to be some other reason for it to be entertained (CPR52.6) as this is a first appeal. The leave to appeal may be limited in terms of the issues. • In this case, the alleged failure to understand the evidence could be a legitimate basis for an appeal. It is less likely that leave would be granted in relation to the proportion of contributory negligence, unless there are more specific allegations of an incorrect approach to the assessment.	