

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 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 January 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

As with previous assessments, there were both strengths and weaknesses in the manner in which the candidates dealt with the paper.

There were some questions in which most candidates showed a good knowledge of the law. This was particularly the case in question 1(c) where most candidates correctly referred to part 24 and showed a reasonable knowledge of the requirements for summary judgment.

Candidates also showed a generally good knowledge of the Law Reform (Miscellaneous Provisions) Act 1934 and Fatal Accidents Act 1976 in question 2(a). This allowed them to take a systematic approach to their answers where they discussed the various heads of damage and how they might apply in this particular case.

This was a question which showed that the better candidates had prepared well for the assessment by analysing the Case Study Materials and identifying potential areas that might arise in the assessment. This was also demonstrated by the manner in which candidates dealt with question 4(a) where the vast majority correctly referred to applying for an interim injunction. Unfortunately, this didn't always lead into a strong answer to question 4(b) – see the comments below.

Candidates also made some useful practical points in their answers which showed a reasonable attempt to interpret the facts and to explore the client's options. In question 1(b) therefore most candidates discussed the difficulties that the client would have in pursuing the fresh head of damage. Candidates also made some useful suggestions as to how the claim could be resolved aside from a summary judgment application in question 1(c).

There were, however, a number of areas in which candidates could have done better – particularly questions 3(b) and 4(b).

Question 3(b) dealt with the consequences of a defendant's Part 36 offer. This was therefore a question on a key area of Civil Litigation which candidates should know well. Unfortunately, candidates didn't approach their answers in a particularly logical and systematic way and so didn't refer to all of the necessary points on the potential costs consequences of such an offer.

Some candidates also discussed points that weren't relevant when answering this question with a number referring to the requirements of a valid part 36 offer under CPR 36.5. This seemed to partly arise from a failure to properly interpret the facts, with a number of candidates referring to the consequences of a claimant's part 36 offer.

With respect to question 4(b), again there was a failure on behalf of some candidates to deal systematically with the relevant points. Candidates either didn't refer to the American Cyanamid guidelines or only referred to some of them. There was also a failure to fully apply the guidelines to the facts of the case.

This was disappointing given that candidates had clearly identified that there would be a question on interim injunctions and thus should have considered the guidelines as part of their preparation. More generally, when answering a question such as this, candidates should structure their answer around the relevant legal requirements and how each requirement applies to the case at hand.

The failure to relate what they said to the facts of the question lost candidates marks in other questions – particularly 1(a) where some candidates could have said more on the specific arguments that would be raised in the Particulars of Claim.

Some candidates also showed a certain lack of attention to detail. For example, in question 3(c), candidates missed key elements that would form part of the consent order with a number not referring to a provision for costs.

This lack of attention to detail also meant that candidates didn't always refer to all of the relevant issues. For example, more candidates could have discussed Qualified One-Way Costs Shifting in question 3(a) given that this was a personal injury case.

Indeed, candidates didn't always deal with issues that were specifically referred to in the question. This was particularly the case in question 1(b) where a number of candidates didn't discuss the SRA Standards and Regulations despite the fact that they were asked to in the question. Candidates should use the wording of the question to guide them as to the content of their answer.

At points the failure to deal with the relevant issues might have arisen from a misunderstanding or lack of knowledge of the relevant law. In particular, in question 2(b) there was a lot of confusion between disclosure and inspection. In addition, candidates didn't show a detailed knowledge of the law relating to privilege. Whilst these are quite technical areas of the law, they are clearly covered

in the Unit Specification. Candidates should therefore ensure that they are familiar with all aspects of the Unit Specification.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

In general, this question was dealt with reasonably well. Most candidates showed some knowledge of the content of a Particulars of Claim, particularly those elements that are required by the rules. There were, however, several elements which distinguished the stronger from the weaker candidates.

Firstly, a number of candidates lost marks through not relating what they said specifically to the facts of the question.

Secondly, candidates needed a systematic approach to the content by setting out in order what a Particulars of Claim would contain.

Thirdly, candidates needed to pay better attention to some of the finer details in their answers, with some candidates referring to the wrong court or an incorrect authority for the claim for interest.

1(b)

A lot of candidates got the practical point that there wasn't any basis for the fresh head of damages with the better candidates explaining why this was. However, candidates did less well with the SRA Standards and Regulations. Indeed, some candidates made no reference to these at all, despite the fact that they were specifically referred to in the question. Finally, very few candidates referred to the consequences of giving a false statement of truth.

1(c)

This was the question in which candidates performed the best across the paper. Most candidates recognised that we could make an application for summary judgment. Again, most candidates were able to discuss the requirements of Part 24. There were also a number of candidates who made sensible suggestions for bringing the matter to an early conclusion through other routes – most notably making a Part 36 offer. The application of the law to the facts wasn't always as good as it should have been, but this didn't detract from the legal knowledge that most candidates demonstrated.

Question 2(a)

This was one of the questions that statistically candidates dealt with well. Most candidates showed a reasonable knowledge of both of the relevant Acts. They also dealt with the answers in a logical and systematic way. They therefore dealt firstly with the damages that could be claimed up until the date of death and then those that applied after death. Most candidates also applied their knowledge well to the facts of the question. There were quite a few candidates who gave an out-of-date figure for bereavement damages which was disappointing given that a small amount of research would have revealed the right figure.

2(b)

This question wasn't dealt with well although it was one of the more challenging questions on the paper. A lot of candidates showed a rather poor knowledge of privilege and when it could be claimed for a document which has a dual purpose. There was also a lot of confusion between disclosure and inspection. As a result, a lot of the answers to this question weren't well constructed.

Question 3(a)

It is disappointing to note that this was the question which was dealt with most poorly across the paper. This was a relatively straightforward question about the consequences of a defendant's Part 36 offer. It therefore represented an opportunity for candidates to obtain a lot of marks. There were various reasons why they didn't do so.

Firstly, candidates were insufficiently systematic in the way that they approached their answers. In particular, they didn't run through each of the different elements of the potential costs' consequences in a logical way.

Secondly, some candidates wrongly referred in some way to the consequences of a claimant's part 36 offer.

Thirdly, some candidates discussed issues that weren't relevant to the questions such as the requirements of a valid part 36 offer under CPR 36.5.

Lastly, relatively few candidates mentioned Qualified One-Way Cost Shifting despite this being a personal injury claim.

3(b)

In contrast, this question was dealt with reasonably well with most candidates referring to when the judge would be told about the part 36 offer and the impact it would have.

Unfortunately, some candidates indicated that the judge wouldn't be told about the offer at all.

A lot of candidates also didn't refer to the without prejudice negotiations when they were told that the client had specifically asked about those.

3(c)

Again, this question was dealt with reasonably well but there were some common problems which lost candidates marks.

Most candidates referred to at least some of the elements of a valid consent order with most correctly referring to the requirements of Part 40.

However, candidates didn't always provide all the necessary detail that was required. In particular, quite a number of candidates didn't include anything on costs or refer to a time limit for the payment of damages.

Question 4(a)

This was one of the questions in which candidates performed best on the paper. This was generally a sign that candidates had prepared well as a reasonable analysis of the Case Study Materials would have led candidates to prepare for a question on interim injunctions. Most candidates therefore identified the right application to make. However, the answers were less strong on the procedure required for making such an application.

4(b)

Given the generally strong answers that were given to 4(a), it was disappointing to see that candidates didn't perform better on this question, given that the two questions were linked. The main issue that divided candidates was how they used the American Cynamid guidelines.

Some candidates didn't refer to the guidelines at all and so produced a submission which lacked substance, A lot of candidates didn't refer to all of the guidelines and so didn't refer to some important points. Lastly, some candidates didn't apply the guidelines to the facts in a systematic way.

Again, these deficiencies in the answers that candidates gave meant that they didn't achieve the marks that they could have done on this question.

SUGGESTED POINTS FOR RESPONSE

JANUARY 2023

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 heading which should comply with PD 7A.4.1• The value suggests this is a High Court case and would go in the King's Bench Division• Names of the parties• Details of the parties and their status – here they are both businesses• Details of the contract including date (30/10/21)• Here we have a written contract which should be attached the particulars (see PD 16.7.3)• The relevant terms – most likely the implied term under s13 Supply of Goods and Services Act 1982	15



	<ul style="list-style-type: none"> • The defendant’s knowledge of the agreement with Peter Fear (to deal with the remoteness point) • Particulars of the breach of implied term – the failure to deal with the wiring properly • Give date of breach • Confirmation that this caused the loss • Details of the loss and damages – the students aren’t given precise figures • The claim for interest (see CPR 16.4) – as a High Court case this would be under s35A of the Senior Courts Act (s69 County Courts Act 1984 if issued here) • Credit for reference to the prayer • The statement of truth 	
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"> • The problem here is that there doesn’t seem to be any basis for this fresh head of damages • As our clients have no acts booked and no licence to put on such shows • There is also the issue of remoteness • If we were to pursue this claim, this would therefore cause us difficulties under the SRA Principles – specifically upholding the rule of law and the proper administration of justice (Principle 1), public trust and confidence in the legal profession (Principle 2), and acting with honesty (Principle 4), and integrity (Principle 5). • More specifically it seems that we would be putting forward a case that wasn’t properly arguable and so could breach paragraph 2.4 of the Code of Conduct • We could also be misleading the court (see paragraph 1.4 of the Code of Conduct) • We should also advise Johnny as to the consequences of giving a false statement of truth as he has confirmed that he will be signing the documents (see CPR 32.14) • We should therefore advise him not to pursue this claim <p>But if he insisted on doing so, we might have to withdraw from the case.</p>	10
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>	5



	<p>Response is appropriately structured</p> <ul style="list-style-type: none"> • Given Johnny’s instructions it seems we could make an application for summary judgment • Under part 24 of the CPR • As the evidence suggests that there is no real prospect of them successfully defending the claim • And there is no other compelling reason why the case should be disposed of at trial • Both the fire report and the evidence from Johnny suggest that there is no other explanation for the fire than LDL’s poor work • And that the defence put forward by LDL lacks credibility as there doesn’t seem to be any evidence to support their case. • Credit can be given if candidates suggest that if there is a need for oral evidence, this might be a compelling reason for the trial to go ahead • Credit for suggesting making a (part 36) offer • Credit for referring to strike out 	
Question 1 total:30 marks		
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"> • As this is now a fatal accident claim where the client survived for some time after the accident there are claims for both the estate and dependants • Under the Law Reform (Miscellaneous Provisions) Act 1934 claims can be made for • Pain suffering and loss of amenity up to death • Loss of income • The services/care provided by his wife (Credit for candidates who refer to loss of earnings as a result of the wife giving up her job) • Possibly funeral expenses (if not claimed under the Fatal Accidents Act) • The dependants could claim under the Fatal Accidents Act 1976 for: <ul style="list-style-type: none"> • Bereavement – for the wife • Credit for the amount (£15,120) • The dependency loss as Mr Quinn was the main earner • Credit for describing how this is calculated (Multiplicand and multiplier) • Credit for reference to services/loss of consortium • Credit for reference to pension (although there is no reference to this in the papers) 	13

<p>2(b)</p>	<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"> • As the existence of the document has been revealed to us, the correct step to take to is to apply to the court to challenge the claim to privilege under CPR 31.19(5) • Although credit can be given for referring to specific inspection • The application here would have to be supported by evidence (see CPR 31.19(7)). • The key argument here concerns the dominant purpose of the report • The description of the document would not be conclusive • As the defendant has conceded that in part the purpose is to prevent further accidents • As well as to prepare a defence to the claim • Unless the latter is seen as the dominant purpose for the preparing the report it would not be privileged • Credit for referring to <i>Waugh v British Railways Board</i> • Credit for arguing that we would seek to deal with this without the need for a court hearing 	<p>10</p>
<p>Question 2 total:23 marks</p>		
<p>3(a)</p>	<p>Correct identification of relevant Facts and Laws Discussion around the above with detailed arguments, for and against being evidenced Relevant alternatives/options available A reasoned conclusion which is supported with evidence, offering the suggested best option available Response is appropriately structured</p> <ul style="list-style-type: none"> • The key issue to discuss with the client is the question of costs and the risks of the claimant losing some or all of their damages. (Candidates must refer to more than costs consequences to be awarded the mark) • If the matter proceeds to trial and our client 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)) • This will mean that our client would be awarded their costs up until the expiry of the relevant period (i.e. at least 21 days after the offer was made) • The defendant would then be awarded their costs after the date of expiry of the relevant period • And interests on those costs • As this would be the period leading up to trial this could be the bulk of the costs 	<p>12</p>



	<ul style="list-style-type: none"> • As this is a personal injury case, we also have to consider the effect of Qualified One Way Costs shifting • This doesn't offer a full protection to our client in this case as under CPR 44.14(1) • any order for costs could be enforced against the damages that our client was awarded without the need for permission from the court 	
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"> • With respect to the Part 36 offer this is treated as without prejudice save as to costs • As a result, the fact of the offer and its amount would not be revealed to the judge until the end of the case (see CPR 36.16) • When it would be taken into account when deciding on the order on costs • With respect to evidence of the without prejudice negotiations, this would not be admissible to prove liability or quantum • Although again the negotiations and any offers to settle can be taken into account when assessing costs (see CPR 44.4) 	6
3(c)	<p>Correct identification of relevant Facts and Laws Correct links between statements where appropriate Correct descriptions of relevant Laws, facts and/or studies Response is appropriately structured</p> <ul style="list-style-type: none"> • CPR 40.6 and PD40B.3.4 have essentially the same requirements The order must: • Be drawn up in the terms agreed • Have on it the words "By consent" • And be signed by the solicitors or counsel acting for both parties. • In addition, it should also deal with the amount of damages and the time for payment of the damages • The payment and assessment of costs • Although a Tomlin order probably wouldn't be used here credit can be given for referring to one • And explaining that it simply stays proceedings and has a separate schedule with the settlement terms contained within it 	7
Question 3 total: 25 marks		
4(a)	<p>Correct identification of relevant Facts and Laws Discussion around the above with detailed arguments, for and against being evidenced Relevant alternatives/options available</p>	6



	<p>A reasoned conclusion which is supported with evidence, offering the suggested best option available Response is appropriately structured</p> <ul style="list-style-type: none"> You would make an application for an interim injunction pursuant to CPR 25.1(1)(a). To restrain GRWM from playing music in its shop (this could be limited to playing music above a certain volume) Draft and issue a claim form <u>or</u> Give an undertaking to file the proceedings N16/N244 application notice plus witness statement from Orla, draft order and appropriate fee. 	
<p>4(b)</p>	<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 power to grant an injunction comes from s.37 Senior Courts Act 1981/s.38 County Courts Act 1984 But in practice is dealt with using the guidelines from American Cyanamid v Ethicon Firstly, is there a serious question to be tried? This would be the case here as there is a claim for noise nuisance which is having a serious effect on Orla’s business, Inner Peace. It is not frivolous or vexatious. Damages are not an adequate remedy - Orla's loss would not be purely financial as she is in danger of losing the business as well as something which she has emotionally invested in and sees as a community resource if the music/noise was to continue Damages are an adequate remedy for GRWM. Their business is still viable without the music and their loss could be compensated. Orla is clearly also in a financial position to give any required undertaking – as she has over £200,000 left over from the legacy from her husband. The balance of convenience favours the granting of the interim injunction as any damage to GRWM is far outweighed by the loss to Orla. It is in the interests of justice and necessary to give effect to the Overriding Objective (CPR 1) that the injunction sought should be granted. When considering the balance of convenience, the court should preserve the status quo It is also necessary for the order to be granted given Carlton Devereux’s unwillingness to settle the claim 	<p>16</p>
<p style="text-align: right;">Question 4 total: 22 marks</p>		