CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

LEVEL 6 – UNIT 15 CIVIL LITIGATION

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers 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 2020 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers 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

The paper was well-attempted overall. Q 2(a) and Q 4(b) posed the greatest challenge for candidates who were less confident in the application of knowledge where it relates to law and practice. However, candidates seem able to memorise procedural rules and generally do well when called upon to repeat that knowledge. This paper is a practice paper and at its heart is application of the law which assumes an underpinning knowledge of contract and tort.

Some candidates chose to write to the client by way of advice when the command word was given as "advise". This was not necessary and skewed the type of answer which might be given. Nonetheless relevant points made by those candidates taking this approach were credited. Moreover, where candidates, despite clear instructions on the paper, completed the N1 claim form, which was part of the question paper, for reference only, all relevant content was credited. Candidates were also credited in Q4(c) whether they chose to describe the calculation in words or used figures. Most candidates found this to be an accessible question and did well.

The paper included, as usual, open questions 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. When advising a client with regard to the law, a breadth of understanding is expected. It was surprising how few candidates recognised that Fortune Servicing may have a duty of care in negligence to Trevor.

As expected, there was a full spectrum of responses and in many instances, candidates gave quality responses. Some candidates shone with polished answers showing broad contextual awareness and understanding. Weaker candidates continue to rely overly on stating process and rules which are peripheral to the question being asked. Weaker candidates also continue to recite as much knowledge as they can remember from the syllabus, regardless of its relevance to the question.

The comments below should be read in conjunction with the suggested answers.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

This question was almost universally done well. Candidates were asked to draft the contents of a claim form (which had been provided as an aide-memoire and for reference only in the question paper). The majority of candidates were able to access a high number of marks, but it was surprising that candidates were not able to complete the statement of value accurately.

(b)

This question was also done well. Candidates had clearly taken advantage of the indication given in the advance materials to look closely at the requirements for service of proceedings where a registered company is the defendant and, as a result, were able to access a good proportion of the marks.

Question 2(a)

This question required candidates to advise the client about liability. Candidates, surprisingly, had difficulty realising that Fortune Servicing, as experts in forklift truck servicing, should reasonably have had in contemplation that a failure to carry out the servicing to a reasonable standard could present a risk to users and so engage the neighbour test (Donoghue v Stevenson) and that Trevor would have a potential claim against them in negligence. It was good to see that some candidates picked up that, as there were no allegations of contributory negligence raised in the defence, Trevor's claim either succeeds or fails in its entirety against his employer. Most candidates realised that the employer had a direct and non-delegable duty of care to its employees and that would capture vicarious liability for Kasja's actions. There was some debate as to whether the defendant should bring a counterclaim rather than a claim for contribution or indemnity against Fortune Servicing and a number of candidates established that, aside from negligence, the defendant would also have a claim against Fortune Servicing for breach of contract. The addition of Fortune Servicing to the proceedings by Trevor

was generally seen to be a sensible idea but counter-argument, for example, that addition was not necessary given the likelihood of recovery in full against the defendant especially as contributory negligence had not been raised, was also credited.

2(b)

This was done well. The question served its purpose in eliciting from candidates what it is that they should do to secure the evidence of a witness from obtaining a witness statement, serving that statement and ensuring the witness attends trial. Points made relevant to hearsay were credited.

(c)

Although the professional guidelines changed in November 2019, candidates responded to this question well. It was particularly pleasing to see that most candidates recognised that Lucy could not be seen to engage in conduct which might mislead the court by putting forward a false statement containing a statement of truth. It was also noted that Trevor's attempts at concealment on an issue relevant to damages might in any event be revealed during the litigation process and have a potential impact on costs.

Question 3(a)

This question served its purpose by asking candidates to think about the process of standard disclosure and what is involved in that process and was done well. Candidates were credited where they gave specific examples of the types of documents which Ashraf might disclose.

(b)

This question purposefully extended the topic of disclosure with reference to key documentation. Overall, the question revealed that candidates are not as familiar as they might be with regard to the grounds of privilege and when a document might be withheld from inspection. There was a suspicion that candidates believe that disclosure is simply a process between the parties, which it is, but, of course, the documents which are disclosed and inspected will then be available to the court. Therefore, regardless of whether the other party might already have the document, the document might require to be disclosed, inspected and the document made available to the court. The pre-action emails were disclosable as part of standard disclosure and most candidates recognised that. Most candidates also recognised that counsel's advice could be withheld on the ground of legal advice privilege. Surprisingly few candidates recognised that a specialist external report could be withheld as litigation was clearly underway and the report would attract litigation privilege. For those candidates who recognised this, credit was also given where it was stated that that privilege might be waived if the report was favourable. The without prejudice letter falls between two stools and depends on its contents bearing in mind that the client, who may claim the privilege, may waive that privilege if the document is useful.

Question 4(a)

This question was well done overall with most candidates recognising the expert's expertise and her duty as a single joint expert to the court which would appear to have been carried out without favour to either party. The majority of candidates recognised that questions might be put to the expert and that it would be a fruitless exercise to attempt to obtain the court's permission to obtain additional evidence.

(b)

This was generally well attempted. Candidates took on board the need to link the proposed option with its likely cost outcome including any benefit and, therefore, were able to structure their responses accordingly and on the whole captured a number of possible options for the claimant to consider including an appropriate reflection on the costs implications.

(c)

It was good to see candidates attempting this question as well as they did. The operation and effect of the CFA is important in terms of how it provides for a success fee and how that should be calculated, and the impact it has on damages. The straightforward question sought a calculation of the firm's profit costs allowing for costs recovery from the opponent and recoupment of the success fee, and the effect which that would have on the client's damages. Credit was given where this calculation was described in words. It is reasonable at Level 6 to expect that a candidate should be able to advise a client how much of their damages they will retain following deduction of the success fee and to have an understanding of the costs which their firm will recover.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 15 – CIVIL LITIGATION

Question 1(a)

The following details should be included in the claim form:

- Correct court name: In the County Court Money Claims Centre
- Claimant's name and address including postcode: Mr Trevor Mitchell
- The Firs, Scott Road, Luton, Bedfordshire, LU5 2HP
- Defendant's name and address including postcode: Gerry's Garden Centre Ltd
- 15, The Plain, Oxworthy Lincoln LN14 6RT
- Brief Details of Claim: Damages for personal injury and losses sustained as a result of an accident
- at the defendant's premises on 28 March 2019
- together with interest pursuant to s69 County Courts Act 1984 at such rate and for such period and the court thinks fit.

Statement of Value:

- The claimant expects to recover more than £25,000
- and expects to recover as general damages for pain, suffering and loss of amenity
- more than £1,000

Preferred County Court Hearing Centre: Bedford

1(b)

The Defendant is a limited company and should be served at its principal office or any place where the company carries on its activities and which has a real connection with the claim. Here, the registered office of the defendant company is in Lincoln and the accident happened at the garden centre address in Bedford. Therefore, service can be effected at either the garden centre or at the address in Lincoln. The most suitable method of service is by using first class post as it would be the cheapest and most convenient method. The claim form, the particulars of claim and a response pack must also be served. Using the first class post method of service, the deemed day of service is the second business day after posting the claim form (CPR7.5). As the claim form is to be served within the jurisdiction, the claimant must complete the step required by the particular method of service chosen, here it is suggested to be using first class post, before 12.00 midnight on the calendar day four months after the date of issue of the claim form. On the facts, that would be 6 August 2020.

Question 2(a)

Where a defendant blames someone else for the accident and claims to have no personal responsibility for the claimant's damage, this should be pleaded in the defence, which the employer has done. The claimant should make a decision as to whether to add in the allegedly blameworthy party i.e. FS Ltd. Here, the defendant, as employer, has a non-delegable duty of care for the safety of its employees which would cover any negligence by Kasja acting during the course of her employment and for which in any event the employer is likely to be vicariously liable. It is likely also to cover any negligence of the independent contractor in the servicing of the forklift truck as the employer also has a duty to provide safe equipment. Possibly, it may be that the employer might not be found to be fully liable for the accident if it is proven that they did identify the directional control problem to FS Ltd. However, this argument is weakened as it seems that Kasja had allegedly complained to her supervisor about the ongoing problem with the directional controls after the service, and this was not heeded.

There is certainly no indication on the invoice that FS Ltd carried out any work on the directional controls but just because it is not stated does not mean that the problem was not identified to them; conversely, it may indicate that they were not told of the problem. However, it may be reasonable to suggest that, as experts in forklift truck servicing, they should have discovered the defect in any event. It is therefore arguable that FS Ltd is partly liable for the accident and should have had in contemplation that a failure to carry out the servicing to a reasonable standard could present a risk to users and to those in the vicinity and so fulfil the neighbour test (Donoghue v Stevenson) as Trevor's cause of action against FS Ltd is in negligence and not under contract.

However, currently FS Ltd is not a party to proceedings and so the success of Trevor's claim depends on being 100% successful against the defendant as

employer. There are no allegations as contributory negligence so the claim either succeeds or fails in its entirety against the defendant. It would be sensible having considered liability to bring a claim against FS Ltd in addition and this can be done by adding them to the existing proceedings as second defendant. A claim can be brought against FS Ltd by adding them to the proceedings as it is desirable to add them so that the court can resolve all matters in dispute in the proceedings. In this way, it is more likely than not that Trevor will recover in full on liability. Of course, bringing in FS Ltd is likely to increase costs. If Trevor does not bring in FS Ltd the defendant may bring contribution proceedings against FS Ltd.

2(b)

The general rule is that any fact which needs to be proved is to be proved at trial by oral evidence and no witness can be called to give evidence unless their witness statement has been served unless the court gives permission. Kasja should be contacted directly and a witness statement taken from her. This can then be served when witness statements are served on the date given in the directions timetable. In due course, Kasja should be asked to attend trial to give oral evidence. Her statement will stand as examination in chief and she will be cross-examined on it. To be sure of her attendance, it would be sensible to issue a witness summons to ensure her attendance at trial which must be served as least 7 days before trial with sufficient money tendered to cover expenses.

(c)

Lucy must act in a way which upholds the Principles contained within the SRA Standards and Regulations (November 2019) which replace the SRA Code of Conduct. The underlying ethos is the same in both as in particular she must uphold the proper administration of justice and public trust and confidence. She must act with honesty and integrity and must not misuse or tamper with evidence - here the client's witness statement. It has always been the case that a lawyer should not seek to influence the substance of evidence including generating false evidence i.e. by not telling the truth about Trevor smoking. All of these expected behaviours would be compromised if Lucy does not include the truth in the witness statement which is that Trevor has not given up smoking. This is an important piece of evidence because it will impact upon the valuation of general damages and the extent to which Trevor has mitigated his loss. Lucy should not place herself in contempt of court which she would do if she knowingly assists Trevor in putting forward a false statement which nonetheless contains a statement of truth. It would be sensible for Lucy to advise that Trevor tell the truth in his witness statement and, if he refuses, she should consider coming off the record and no longer act for him.

Question 3(a)

When giving standard disclosure, a party is required to make a reasonable search for documents which includes: the documents on which he relies and the documents which adversely affect his own case; adversely affect another party's case; or support another party's case. In deciding the reasonableness of a search a party must consider: the number of documents involved; the nature and complexity of the proceedings; the ease and expense of retrieval of any particular document; and the significance of any document which is likely to be located during the search.) A party's duty to disclose documents

is limited to documents which are or have been in his control. The list must indicate those documents in respect of which the party claims a right or duty to withhold inspection; and those documents which are no longer in the party's control; and what has happened to those documents.

3(b)

When a document is disclosed, the party must ordinarily allow the other party to inspect the documents within 7 days unless the document can be withheld from inspection. Legal professional privilege many be claimed as a reason for withholding a document; the purpose of which is to enable a party to receive professional legal advice without risking it being disclosable at a later stage.

Emails from Tantalum Ltd pre-action which blame SureFind for the problems arising with the website:
Documents should be disclosed and inspection cannot be withheld even though they are adverse to SureFind's case as they fall within the requirements for standard disclosure; inspection cannot be withheld as they do not attract any form of privilege.

Counsel's advice to SureFind:
inspection can be withheld on the ground of legal advice privilege as this is a confidential communication between an advisor and client for the purpose of receiving legal advice.

A specialist external report commissioned by SureFind in February 2020 as to the reasons for the website problems:
Inspection can be withheld as litigation was clearly underway as the claim was issued in January. The report will attract litigation privilege as the dominant purpose was to assist in the conduct of litigation.

A letter headed "without prejudice" sent by Kempstons to the defendant's solicitors.
This may or may not be withheld. If the letter contained any proposals for settlement made with a genuine intention to reach settlement then it would be privileged from disclosure. If not, then it might be disclosable although the client may waive the privilege if the contents of the letter are useful to him.

Question 4(a)

The court has appointed a single joint expert as this is a fast track matter and it is the duty of the experts to help the court on matters within their expertise and this overrides any obligation to the party who has instructed them. This is why the report is addressed to the court. The expert's findings should be independent and uninfluenced by pressures. The expertise of the chosen expert in her field should be recognised and which may allay Ashraf's concerns. If Ashraf wishes, it will be possible to put written questions to the expert for the purpose of clarifying the report. Such questions must be put within 28 days of service of the report. It should be emphasised that the answers to the questions are part of the expert's report and there can be no guarantee that the expert will change her view or that the report will be more favourable as a result. Ashraf should be reminded that the report is not wholly supportive of either party and therefore presents options for resolution.

4(b)

Ashraf should be told that it is better to recognise the weaknesses of his case now rather than pressing on to trial. There seem to be issues on both sides in terms of what was said i.e "the server will be OK" and other reasons for the decline in business as this provides the opportunity for concluding the matter potentially more favourably than if the matter proceeded to trial. This may lead to a more cost-effective outcome which will minimise the risk to him bearing in mind that the general rule is that the losing party bears the costs of the successful party. The range of options include informal settlement negotiations and informal offers which can be arranged between the lawyers and options for resolution discussed on a without prejudice basis. The costs outcome is not prescriptive and it may be possible to conclude matters upon agreement that both sides bear their own costs in recognition of the risks of litigation. These negotiations may be made entirely without prejudice or without prejudice as to costs in which latter event the negotiations may be referred to at any subsequent trial where costs orders are to be considered.

ADR, such as mediation, is another option. This would enable an external mediator to attempt to resolve the dispute. A formal decision is not imposed by the mediator and costs will be part of the discussion and is not prescribed. Discontinuance is also an option although, if Ashraf discontinues without first discussing with the opponent, an automatic costs order will follow and Ashraf would be liable to pay the defendant's costs.

Even though Ashraf's position seems weaker, it is still worth making a part 36 offer to gain the costs advantages of a Part 36 offer.If carefully pitched the defendant might accept the offer within the relevant period. Ashraf would receive the settlement sum within 14 days and he would recover the costs of the proceedings. As this would be a claimant offer if not accepted and judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer, the court must, unless it considers it unjust to do so, order that the claimant is entitled to interest on the sum awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired; costs on the indemnity basis from the date on which the relevant period expired; interest on those costs at a rate not exceeding 10% above base rate; and 10% of the sum awarded.

Therefore, even though the expert evidence is not as favourable as hoped for there is still scope for settlement and the possibility of costs recovery.

(c)

The Success fee owed to the firm is 50% of costs

- = 50% of £9,000
- = £4,500

There is no cap on the costs/damages percentage as this is not a personal injury matter. Therefore, the total costs recovered by firm therefore equals:

- £5000 from opponent plus
- success fee of £4,500 from damages
- As the success fee is payable from the client's damages of £10,000
- This reduces the damages to £5,500 which the client will retain.