

**LEVEL 4 – UNIT 7 – INTRODUCTORY CONSIDERATIONS FOR PERSONAL  
INJURY LAWYERS**

**SUGGESTED ANSWERS – JANUARY 2017**

**Note to Candidates and Tutors:**

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2017 examinations. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on student performance in the examination.

**Question 1**

- (a) The defendant insurer is the body responsible for paying damages and costs if the claim is proven against the defendant. The defendant's solicitor acts on behalf of the defendant and represents the interests of the defendant and investigates the case.
- (b) Rachel sustained a comminuted fracture to her left wrist. This is a fracture where the bone is broken into several pieces. Surgery left her with a keloid scar. This is an overgrowth of dense, fibrous tissue outside the borders of the original wound.
- (c) The scarring will form part of the claim for general damages for pain, suffering and loss of amenity (PSLA) and will enhance the award of damages. The scarring to the wrist was caused by the operation, which was necessary because of the broken wrist. The scarring is a reasonably foreseeable consequence of the accident. The scar to the forehead is a direct physical injury resulting from the accident. Both scars are visible and are likely to be permanent, and may cause embarrassment.
- (d) Ms Singh reports that she cannot comment on scarring as this is outside her expertise/she is an orthopaedic surgeon. As scarring will form part of the claim, expert evidence will be needed to support it. A consultant plastic surgeon will need to be instructed to comment on the prognosis of the scarring. The expert's report will need to address the effect the scarring has on Rachel and the future effects/cosmetic effect of scarring. The expert's opinion will also need to address whether there are any treatment or surgical options open to Rachel.

- (e) The Results Determination Panel identified significant issues with question 1 (e). This Question was removed and the candidates' marks were adjusted accordingly to ensure that candidates attempting this Question were not disadvantaged.
- (f) The Limitation Act 1980 sets out the applicable limitation period. The limitation period for personal injury claims is three years. However, as Rachel is a child the primary limitation period will not start to run until she is 18 years old. She is currently 17 years of age. She will be 18 years old on the 14 July 2017. Rachel has until 13 July 2020 to make her claim.

## Question 2

- (a) Before The Event (BTE) insurance is a policy that claimants have already obtained before the accident occurred. These policies are usually attached to household insurance, car insurance, travel insurance or credit card/bank account insurance.
- (b) If Mrs Newton has BTE, the solicitor should act under the terms of that policy if they can. This is because Mrs Newton has already paid for the legal cover. If the solicitors are unable to act for her, they should refer Mrs Newton to the BTE insurers panel solicitors.

- (c) (i) A Conditional Fee Agreement (CFA) is a method of funding litigation, where the client does not pay their solicitor's fee if the claim fails. If the claim is unsuccessful then the success fee (and costs) are not payable by the client or anyone.

If the claim is successful, the solicitor will charge a success fee in addition to their basic costs. The success fee can be up to a maximum of 100% of basic costs but in personal injury claims no deduction can be more than 25% of the total damages payment. It is only the claimant who is responsible for paying the success fee. This is not recoverable from the defendant.

The client remains liable for payment of disbursements incurred, e.g., court fees, medical expert fees, counsel's fees.

- (ii) The success fee will be charged in addition/as an uplift to the normal hourly rate. The success fee should reflect the risks of the case. The fee will come from Rachel's damages if Rachel wins the case.

In this case the risks look low, so the uplift will also be low. The higher the risk, the higher the uplift.

As the claim is post April 2013, the maximum uplift applied in this case will be 25% of the damages recovered, excluding damages for future care and loss.

- (d) (i) After The Event (ATE) insurance is taken out after the event that forms the subject of the claim. The purpose of the policy is to protect the claimant against the making of an adverse costs order.

If Rachel loses her case, Mrs Newton will not be liable for her solicitor's costs but she will be liable for Rachel's disbursements. The

general rule is; if Rachel loses her claim, Qualified One-Way Cost Shifting (QOCS) will kick in. This means that she would no longer be liable for the defendant's costs. The ATE policy will protect Mrs Newton should one of the exceptions to QOCS apply and she does have to pay the defendant's costs.

- (ii) The claimant is liable for the payment of the ATE premium regardless if she wins or loses the case. If Rachel wins her case, Mrs Newton will be liable for the cost of the policy, to be paid from any damages recovered.

### Question 3

Mrs Newton can choose to sue either First Buses or their insurer. The European Communities (Rights against the insurers) Regulations 2002 apply to RTA claims. The regulations apply where the person is a UK resident, has a cause of action in tort against a person insured under a motor policy, and the accident occurs on a road in the UK. The insurer will be directly liable to the claimant to the extent that it is liable to the insured person.

### Question 4

- (a) A Damages Based Agreement (DBA) is an agreement whereby the client makes payment of their fees to their lawyer if they are successful in recovering damages. The payment is a percentage of the damages recovered and is paid from the damages recovered. The success fee will be agreed at the outset of the case/will reflect the risk in taking the case.
- (b) DBA can only be recovered from the general damages awarded for pain, suffering and loss of amenity and damages awarded for the past loss of earnings. DBA cannot be recovered from the future loss of earnings.

The calculation is 20% of damages recovered i.e. 20% of (£18,000 + £5,551.80) = £4,600. The costs recovered from the defendant are offset from this sum. Costs received were £2000, so £4,600 - 2000 = £2,600. The amount to be deducted from the client's damages is £2,600.

- (c) (i) The Employers' Liability (Compulsory Insurance) Act 1969 provides that employers must have insurance against liability for injury. This means that Easi Carton will have insurance cover to pay out in the event of a successful claim. If the employer has become insolvent, then the provisions of Third Parties (Rights against Insurers) Act 1930 will come into effect. This will protect insurance proceeds from insolvency.

The claim can be made directly against insurers. As a precondition, liability must be established by judgment, arbitration or agreement (Post Office v Norwich Union Fire Insurance Society). The insurer may pay out anyway if the claim settles but if proceedings become necessary then the claimant may then issue proceedings against the insurer.

- (ii) From April 2011, insurers set up the Employers' Liability Tracing Office. The office holds information about current policies together with historic policies. It is possible to contact this Office to check for relevant information. It is also possible to contact the liquidator, who will be able to say who the insurer is.