

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

**SUGGESTED ANSWERS - JANUARY 2018**

**Note to Candidates and Tutors:**

The purpose of the suggested answers is to provide candidates and tutors with guidance as to the key points candidates should have included in their answers to the January 2018 examinations. 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 tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate performance in the examination.

**Question 1**

- (a) Under s.11 Limitation Act 1980, a personal injury action must be started within 3 years from the accrual of the cause of action or date of knowledge, if later. However, for someone under the age of 18, the time runs from their 18th birthday.
- (b) Adrian must bring his claim by 17 February 2020. This is three years from his 18th birthday.
- (c) If Adrian brought his claim after 17 February 2020, he would need to make an application to seek the court's permission to do so. The application will be made under s.33 Limitation Act and will seek to exclude the limitation time limit.

The court can use its discretion to allow the claim to continue. In deciding whether to use its discretion the court will need to consider all the circumstances of the case. In particular, it will need to consider: the length of delay; reasons for delay; the effect on the cogency of evidence; the conduct of the parties; and any prejudice to the parties.

If the court refuses permission to extend the time limit, it is unlikely Adrian could bring a professional negligence claim as the delay is due to his mother (and him) not responding to correspondence.

**Question 2**

- (a) Section 38 Limitation Act 1980 and CPR 2.3 define a personal injury as an impairment of a person's physical or mental condition.

The fractures and scars to Adrian's ulna and wrist fall within this definition.

- (b) An 'unstable fracture' is where one bone is no longer in its correct anatomical alignment, has become displaced, is positioned at an odd anatomical angulation, or is shortened.
- (c) A Consultant Orthopaedic Surgeon, with a specialism in wrist injuries, and a Plastic Surgeon will need to be instructed to provide further medical evidence.
- (d) Obtaining further medical evidence will mean that a full assessment of damages can be made. Adrian can then be advised on whether any offer made by the defendant should be accepted. Solicitors will also be able to advise Adrian properly on any offer he may wish to make to the defendant to settle the claim.

The further medical evidence will mean that the solicitors will have all the necessary information to enter negotiations. Adrian's expectations can be managed on what is a realistic damages award.

Importantly, once the claim is settled, Adrian will not be able to sue for more damages on the claim. Therefore, it is important to be fully informed now on what he could claim.

### **Question 3**

- (a) (i) A Conditional Fee Arrangement (CFA) is a method of funding litigation where the client does not pay his/her lawyer's fee if the claim fails. If the claim is successful, the lawyer will charge a success fee in addition to their basic costs. The client remains liable for payment of their disbursements.
- (a) (ii) A Damages-Based Agreement (DBA) is a method of funding litigation whereby the client pays their fees if they are successful in recovering damages. The payment is a percentage of the damages recovered and is paid from the damages recovered. The cap on recovery of costs is 25%.
- (b) (i) If Adrian loses his claim Qualified One-way Costs Shifting (QOCS) will apply and he should not have to pay the defendant's costs.

However, costs are always at the discretion of the court. Adrian may face an adverse costs order if his conduct prevents just disposal of the matter, or, for example, he rejects a Part 36 Offer which he fails to beat at court, or one of the exceptions to QOCS applies.

- (b) (ii) Adrian should be advised to take out an After The Event (ATE) policy. This will protect him against the effect of an adverse costs order. He may have to pay the policy premium upfront or it can be deferred. The premium is not recoverable as a disbursement from the defendant. Adrian will be responsible for paying for it.

### **Question 4**

- (a) The claimant's lawyer conducts the claim on behalf of the claimant. They will assemble the case, issue proceedings, and prove the case. Their role includes the investigation of and preparation of the claimant's case, advising on evidence and merits, managing expectations, ensuring compliance with

relevant pre-action protocols, considering alternative dispute resolution, and considering Part 36 Offers.

- (b) The role of the medical expert is to examine the claimant and report on the nature and extent of the injury sustained, the diagnosis, and prospects for recovery / prognosis. Their primary duty is to the court. They must provide objective, unbiased opinions on matters within their expertise. Their report should be independent and uninfluenced by the pressures of litigation. They should consider all material facts, including those which might detract from their opinions. Experts should make it clear when a question or issue falls outside their expertise. They should also make it clear when they are not able to reach a definite opinion, for example because they have insufficient information.

They must comply with CPR 35 and PD Part 35 and the Pre-action Protocol for Personal Injury claims.

### **Question 5**

- (a) The European Communities (Rights against Insurers) Regulations 2002 Reg 3 enables Ms Chan to take action directly against the insurer of a motor vehicle involved in a collision. 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, or a tort or a cause of action, and the accident occurs on a road in the UK. An admission of liability is not necessary to bring a claim.
- (b) Employers' Liability (Compensation Insurance) Act 1969 provides that employers' liability insurance is compulsory. Employers must have insurance against liability for bodily injury and disease arising out of employment. They can be fined if they do not hold a current employers' liability insurance policy.
- (c) Ms Chan can still bring her claim for damages. She can make a claim directly against Simpson Bakers' insurers under the Third Party (Rights Against Insurers) Act 2010. This protects insurance proceeds from insolvency. It is a precondition that Simpson Bakers liability should be established, either by admission or by judgment of the court or by arbitration: Post Office v Norwich Union Fire Insurance Society Ltd (1967). Ms Chan can establish who the insurer is, either through Simpson Bakers, or by tracing them through the Employers' Liability Tracing Office.