

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

### **SUGGESTED ANSWERS - JUNE 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 June 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) Mrs Harrison and Bethany will be the Claimants as they have both suffered injuries. Mr Harrison and Jordan Smyth blame each other for the accident. On the facts of the case it is not clear who is likely to be liable for the accident, and thereby causing the injuries to Mrs Harrison and Bethany. For this reason, both should be named as Defendants.
- (b) (i) Under section 11 of the Limitation Act 1980 a personal injury action must be begun within three years from the accrual of the cause of action or date of knowledge, if later. However, where the minor is under the age of 18 at the date of accident or knowledge, time will not begin to run until the date of their 18th birthday.
- (ii) Mrs Harrison must begin her proceedings on or before 26 March 2020.
- (iii) As Bethany is under 18 years of age, her limitation period will begin on 15 June 2019 (her 18th birthday). The limitation period will expire three years from this date; 14 June 2022.

#### **Question 2**

- (a) A whiplash injury to the neck is a soft tissue injury, whereby the tendons, ligaments and muscles of the neck/cervical spine are stretched and strained. Most people can expect to make a full recovery within a few days or weeks of the accident. However, if symptoms are severe, they can last for months or years. Symptoms can also exacerbate a pre-existing condition and/or accelerate symptoms that would have presented themselves in any event at a date in the future.

- (b) A hypertrophic scar has deposits of excessive amounts of collagen which gives rise to a raised scar.
- (c) (i) A Consultant Orthopaedic Surgeon, who is a specialist in whiplash/neck injuries will be instructed to examine Mrs Harrison. They will have expert knowledge in diagnosing and giving a prognosis for Mrs Harrison's neck injury.
- (ii) Bethany will be examined by:
- a Consultant Orthopaedic Surgeon, who is a specialist in whiplash/neck injuries;
  - a Consultant Plastic Surgeon, to provide an expert opinion on the scar by the eyebrow;
  - a Psychiatrist, as Bethany has been referred for CBT and her doctor has advised she see a psychiatrist.
- (d) To satisfy CPR 35, experts need to be independent and a specialist in the area they are reporting on. They need to be able to provide a prognosis on the nature of the injuries, any on-going symptoms and any future symptoms and treatment. The expert will not be independent if they have been providing treatment to Bethany.

### Question 3

- (a) Both CFAs and DBAs are a form of legal funding arrangements. In both arrangements, the client only pays their legal costs if they win their case.

#### CFA

The lawyer will charge a success fee in addition to their basic costs. The client is liable to pay the success fee not the Defendant. The success fee will be paid for from the damages awarded for pain, suffering and loss of amenity and past pecuniary losses. It does not include future losses. In personal injury claims the success fee is capped at 25%.

#### DBA

When entering the agreement, the client and lawyer will agree what percentage from damages awarded they will pay to the lawyer, if successful in the claim. The percentage is calculated on the damages awarded for pain, suffering and loss of amenity and past pecuniary losses. It is not calculated on any award for future losses. There is a cap on the recovery of costs from damages. This is currently 25%. The client will pay the balance of any costs owed after taking into account the costs recovered from the Defendant.

- (b) Under a CFA, if Mrs Harrison loses her case she will not be liable to pay her own legal costs, but she may have to pay her disbursements. If Mrs Harrison has purchased an After The Event insurance policy this should cover the cost of her disbursements.

The general rule is that she will not be liable for the Defendant's costs because of Qualified One Way Costs Shifting (QOCS). QOCS applies only in personal injury claims and so will apply in this scenario.

Mrs Harrison can lose the protection of QOCS if she is found to be 'fundamentally dishonest'. The claim can be struck out because the claimant has not disclosed any reasonable grounds for bringing the proceedings, or

the proceedings are an abuse of the court's process, or for conduct likely to obstruct the just disposal of the proceedings, or she has failed to beat the Defendant's Part 36 offer.

#### Question 4

- (a) There is a limitation issue. The Limitation Act 1980, section 11 provides claims for personal injury should be brought within three years from the date of the accident or date of knowledge that there is a cause of action.

Mr Nowak was injured on 6 March 2014. His injury was caused by faulty machinery. He was aware of the fault at the time of the accident and knows that it caused his accident. It is unlikely that Mr Nowak can show that his date of knowledge is later than the date of the injury.

The 3-year limitation period expired on the 5 March 2017 and the claim is now statute-barred.

- (b) (i) Mr Nowak may be able to rely on s.33 Limitation Act 1980. This gives the court a wide and unfettered discretion to disapply the three-year limitation period if it appears to the court that it would be equitable to allow an action to proceed.
- (ii) In deciding whether to disapply the three-year limitation period the court will look at several factors. This includes prejudice to parties, the length of the delay and the reasons for the delay.

The length of delay has been very short – only four months. This is unlikely to prejudice the defendant. They should still have all the relevant documents that will be required to be disclosed. However, if the limitation period is not disapplied, the prejudice to Mr Nowak will be significant. Mr Nowak is still suffering symptoms from his injury. This may hinder his opportunity in finding alternative employment. And it may cause him financial difficulties.

Mr Nowak does not have a very good reason for the delay in bringing the claim. This was a conscious decision he made at the relevant time.

- (c) Employers' Liability Insurance is compulsory. This is provided for by the Employers' Liability (Compensation Insurance) Act 1969.

#### Question 5

- (a) The Employers' Liability Tracing Office (ELTO) is an independent body set up to provide claimants and their representatives with quick and easy access to a database of employers' liability policies through an online enquiry facility. This should enable any insurance policy in place to be traced. Alternatively, the liquidators may also be able to provide the details of the insurer.
- (b) The claim can be made. The Third Parties (Rights against Insurers) Act 2010 provides that where the insured (Millers & Sons Engineers) incurs liability to a third party (Mr Nowak) but is declared insolvent, the insurance proceeds will be protected from the insured's insolvency. This means the insured's rights are automatically transferred to the third party following specified insolvency events occurring. Once those rights are transferred Mr Nowak can sue the insurer directly.