



NEW SOUTH WALES
BAR ASSOCIATION®

NSW Bar Examination

February 2023

Candidate Number

F23 - _____

Do **NOT** write your name on this book or any part of the exam

Civil Examination Questions

Book Two (PM)

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Question 1 [ES Q1]

5 marks

**Candidates are to be advised of a typo in Question 1 of the Civil Paper. In the first sentence of question 1, the reference to “defendant” should be “plaintiff”. Candidates are advised to handwrite the change in their question book.*

You are acting for a company which is the **defendant* in a proceeding in the District Court. An employee of the company has made an affidavit in support of your client’s case. The defendant’s solicitor has told your instructing solicitor that the defendant’s solicitor will shortly telephone the employee to ask the employee some questions about the case. Your instructing solicitor seeks your advice as to what the employee can properly be told in advance of being contacted by the defendant’s solicitor.

What advice do you give?

Question 2 [ES Q2]

7 marks

You act for the plaintiff in a proceeding in the Equity Division of the Supreme Court seeking damages for breach of contract. Paragraph 10 of your client’s Statement of Claim alleges the existence of a written contract between the plaintiff and defendant.

The defendant’s Defence is due to be filed in 3 weeks. Yesterday, your instructing solicitor was served with a Notice to Produce requiring production of the following documents to the defendant within 14 days:

1. A copy of the written contract identified at paragraph 10 of the Statement of Claim (**the Contract**).
2. All documents recording any variation of the Contract.
3. All documents relevant to the formation, existence or terms of the Contract.

Your instructing solicitor seeks your advice on what should be done about the Notice to Produce.

What advice do you give?

Question 3 [ES Q3]

6 marks

You have been briefed to appear at a 3-day trial in the Local Court, starting in one week. A solicitor contacts you to offer you a brief as a junior to a leading silk in a high-profile 3-day case in the High Court. The hearing in the High Court is on the same days as the Local Court trial.

Discuss whether you can accept a brief for the High Court case.

Question 4 [ES Q4]

7 marks

Your client was the plaintiff in a proceeding in the District Court for false imprisonment. There were two defendants.

Judgment has been given for your client for \$600,000 against the first defendant. Six weeks before the trial began, your client made a settlement offer to the first defendant to settle the proceeding against the first defendant for \$500,000 exclusive of costs. The first defendant did not accept that offer.

In relation to the second defendant, your client's claim has been dismissed. The claim against the second defendant failed only because of a special statutory immunity availability to the second defendant. On all other issues, the trial judge found in favour of your client against the second defendant. Your client did not make a settlement offer to the second defendant.

The trial judge has given the parties an opportunity to agree costs orders. Your instructing solicitor asks you what costs orders your client should seek.

What advice do you give?

Question 5 [ES Q5]

6 marks

Your neighbour in chambers has recently had a flood at their home and is having difficulty with their insurer. They bring you a draft letter they are proposing to send to the insurer. It is on their standard barrister's letterhead. It threatens the insurer with proceedings unless their insurance claim is paid within 7 days.

Your neighbour tells you that they have no intention of commencing litigation but hopes the letter will frighten the insurer into paying. Your neighbour then asks you for your views on the letter.

What do you say?

Question 6 [ES Q6]

7 marks

You act for the plaintiff in a defamation proceeding in the Supreme Court. The defendant is a B-grade celebrity. The trial is listed for a hearing in a month's time. Several weeks ago, a subpoena was issued to the defendant's mother for certain emails between her and the defendant. Three days ago, those emails were produced to the Court and yesterday orders were made giving your client access to them. The emails

are not relevant to the case but contain information that is embarrassing to the defendant. There have been no other subpoenas or discovery in the proceeding.

This morning, your instructing solicitor mentions to you that they have been contacted by a journalist at the Sydney Morning Herald (who happens to be friends with your client) asking for copies of each party's pleadings and affidavits, as well as the subpoenaed emails. Your client is keen to assist their journalist friend in whatever way they can.

What do you tell your instructing solicitor?

Question 7 [ES Q7]

8 marks

You are appearing in a Federal Court trial for the applicant, the publisher of a weekly magazine. The respondent had a contract to typeset the magazine, so that it could be printed by a printing company. The applicant alleges that, in 2019, the respondent failed to perform its typesetting functions on time, with the result that a particular weekly issue in that year was unable to be printed. The applicant alleges that the respondent engaged in misleading or deceptive conduct concerning its abilities. The applicant claims damages for lost profits on the sales of the missed issue. There is a dispute at trial about the quantum of the applicant's loss.

You seek to tender three documents in support of the quantum for which the applicant contends:

1. an extract from the management accounts prepared each month by the applicant's internal accounts team showing weekly sales for the financial year in question;
2. an article from the issue of the magazine the week after the week in question written by the editor that refers to the number of weekly sales the magazine usually has; and
3. a document prepared by the editor shortly before the proceeding was instituted setting out the lost sales.

Counsel for the respondent objects to the tender of each of these documents.

How do you respond?

Question 8 [ES Q8]

7 marks

You have been briefed for the defendant in the Supreme Court in a proceeding for damages for misleading or deceptive conduct. The Statement of Claim includes the following allegations:

12. On 1 April 2020, the defendant represented to the plaintiff that the income of the business for the year ending 30 June 2020 would most likely exceed \$1,000,000.
13. The defendant had no reasonable grounds for that representation.

Before you were briefed, your instructing solicitor filed a Defence. It responded to these allegations as follows:

12. The defendant does not plead to paragraph 12.
13. The defendant denies paragraph 13.

You have been instructed that the representation made by the defendant on 1 April 2020 was that the income of the business for the year ending 30 June 2020 would most likely exceed \$100,000 (not \$1,000,000). You have also been instructed that your instructing solicitor has received a request for particulars of paragraph 13 of the defence.

- a. **Advise your instructing solicitor as to whether the defence requires any amendment in light of your instructions and, if so, what steps should be taken (4 marks).**
- b. **Advise your instructing solicitor as to whether there are proper grounds to refuse to provide the requested particulars (3 marks).**

Question 9 [ES Q9]

11 marks

This question concerns a proceeding in the District Court in which the plaintiff claimed that the defendant owed money under an oral contract of sale for a car. The contract was allegedly entered into during a meeting on 6 June 2021. The defendant denied that there was any contract.

During the trial, the defendant was cross-examined by the plaintiff's counsel about the meeting. An extract of the cross-examination is set out below (with questions numbered for ease of reference):

- (1) COUNSEL: Your friend was also at the 6 June meeting, correct?
- D: Yes.

(2) COUNSEL: Can you think of any reason he would lie to the court about what happened at the meeting?

D: No.

(3) COUNSEL: Did you receive legal advice about whether there was a contract?

D: Yes, I think so.

(4) COUNSEL: What did the advice say?

D: I don't really remember the details.

(5) COUNSEL: How can you not remember? Do you have an intellectual disability? Did your parents drop you on your head too many times as a child?

D: I didn't pay that much attention to the advice because ...

(6) COUNSEL: [*interrupting the witness*] Nothing further, your Honour.

What, if any, objections could the defendant's counsel properly have made and why?

**Question 10 [ES Q10]
marks**

9

You are appearing for the plaintiff at the trial of a medical negligence case in the District Court. The Court has made an order that other witnesses not be present in the court room while the plaintiff is giving evidence. The plaintiff is being cross-examined. During his cross-examination, the plaintiff makes a number of concessions which are very damaging to the claim that the plaintiff's earning capacity has been affected by the medical negligence. The plaintiff remains under cross-examination when the court breaks for lunch.

Your instructing solicitor says to you: "You really must talk to our client over lunch. Either our client has to settle or come back after lunch and fix up this morning's evidence. While you're doing that, I'm going to talk to our next witness about the evidence our client has given and see if I can get them to give some better evidence than our client has done."

How would you respond to your instructing solicitor?

Question 11 [ES Q11] marks

10

You are acting for the defendant in a one-day trial in the District Court, in which a key issue in dispute is what was said by the plaintiff at a particular meeting. The plaintiff has filed an affidavit. The affidavit contains some evidence about the meeting that is helpful to the plaintiff's case. The affidavit also contains some evidence about other topics that is helpful to your client's case. Several weeks before the commencement of the trial, your instructing solicitors gave notice that the plaintiff was required for cross-examination.

When the trial begins, counsel for the plaintiff announces that the plaintiff is sick and cannot attend court, and that they do not propose to read the plaintiff's affidavit. No medical or other evidence is produced in support. Counsel for the plaintiff then tenders some documents that go some way to supporting the plaintiff's case and closes the plaintiff's case.

Discuss the courses open to you concerning the plaintiff's affidavit and non-attendance, and their advantages and disadvantages.

Question 12 [ES Q12] marks

11

You are appearing for the respondent in a misleading or deceptive conduct case in the Federal Court. Your client is a car manufacturer. It made public statements about the fuel efficiency of its cars. The Australian Competition and Consumer Commission has brought the proceeding against your client, alleging that those statements were misleading or deceptive. A key issue in the case is whether your client's cars are as fuel efficient as your client stated.

In accordance with directions given by the Court, both sides have filed reports from experts concerning the fuel efficiency of the cars in question. You have noticed the following matters about the report prepared by the ACCC's expert:

1. the expert's CV shows that, for the last 20 years, the expert has worked for companies that manufacture boats, specialising in improving the fuel efficiency of those boats;
2. within the expert's report, the expert states that they have made an assumption that measuring fuel efficiency for boats and cars does not differ; and
3. the report does not include an acknowledgement that the expert's opinions are based wholly or substantially on specialised knowledge arising from the expert's training, study or experience.

Discuss whether these grounds provide a basis for you to object to the evidence of the ACCC's expert.

Question 13 [ES Q13] marks

12

Your client was the defendant in a negligence proceeding in the District Court. The plaintiff claimed damages of \$300,000. At trial, your client contended that it was not negligent but, even if it was, the plaintiff's damages should be reduced to \$80,000 because of the plaintiff's contributory negligence. Your client argued that the contributory negligence lay in two different failings by the plaintiff.

The trial was heard by the District Court on Thursday 20 and Friday 21 October 2022. On Monday 24 October 2022, the trial judge delivered *ex tempore* reasons concluding that: your client was negligent; the plaintiff's loss was \$300,000; the plaintiff was guilty of contributory negligence in relation to one of the failings argued by your client and the plaintiff's damages should be reduced to \$80,000 on that account; and it was not necessary to decide whether the plaintiff was guilty of contributory negligence by reason of the other failing alleged by your client. The trial judge asked the parties to agree on any interest and provide consent orders to give effect to the *ex tempore* reasons within 7 days.

On Monday 31 October 2022, the parties provided consent orders to the trial judge's chambers. The consent orders provided for judgment for the plaintiff for \$95,000 (including interest). On Tuesday 1 November 2022, the trial judge made those orders.

On Tuesday 29 November 2022, the plaintiff's solicitor filed and served a notice of intention to appeal to the Court of Appeal.

On Wednesday 1 February 2023, the plaintiff filed and served a notice of appeal to the Court of Appeal, seeking that the trial judge's orders be set aside and, in their place, that there be judgment for the plaintiff for \$300,000 plus interest.

Your instructing solicitor seeks your advice on the following questions:

- a. Does the plaintiff require leave to appeal (3 marks)?**
- b. Has the proceeding in the Court of Appeal been instituted within time (3 marks)?**
- c. What, if anything, must your client do if it wishes to agitate in the Court of Appeal all of the issues at trial and by when must it take any such step (6 marks)?**

Question 14 [ES Q14] marks

14

You are appearing for the defendant in civil proceedings in the District Court. The matter is listed for a one-day trial. The plaintiff is unrepresented.

During the plaintiff's closing submissions, the trial judge becomes increasingly irritated and irascible. The trial judge regularly interrupts the plaintiff's submissions and makes sarcastic remarks about the plaintiff. Just before lunch, whilst the plaintiff is making submissions, the trial judge says:

Look, the submissions you have been making about contract law are just complete nonsense. There is no case which supports them. You should really think over lunch about whether you want to keep going with this, because if do you I warn you now that I will order indemnity costs.

The trial judge then adjourns for lunch.

You are aware of a decision of the Court of Appeal in which two judges, in *dicta*, expressed views that support the plaintiff's submission. Neither party has yet referred the trial judge to the case. Over lunch, you discussed the Court of Appeal decision with your instructing solicitor, who told you not to tell the plaintiff about it because your instructing solicitor hoped the trial judge's comments would put pressure on the plaintiff to abandon the case.

Ten minutes before the hearing is scheduled to resume after lunch, the plaintiff comes to you and says: "Given what the judge said before lunch, I have to give up and withdraw my case."

What do you do?