NEW SOUTH WALES
BAR ASSOCIATION®

NSW Bar Examination

February 2025

Candidate Number

F25 - _____

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

Civil Examination Questions

Book One (AM)

Question 1 [ES Q1] P&P 10 marks

You act for the plaintiff in a proceeding in the District Court seeking damages for negligent medical advice given by the defendant, a specialist to whom your client was referred by her general practitioner. Paragraph 3 of your client's statement of claim alleges that, when your client attended a consultation with the defendant to discuss a possible surgical procedure, he gave your client a pamphlet setting out some risks associated with the procedure.

The defendant's defence is due to be filed in just over two weeks. Yesterday, your instructing solicitor received a letter from the defendant's solicitor, stating that the defendant no longer had any records relating to his consultation with your client. The letter enclosed a notice to produce, requiring production of the following documents to the defendant within 14 days:

1. A copy of the pamphlet identified at paragraph 3 of the statement of claim.
2. Any other document given to the plaintiff by the defendant during the consultation.
3. A copy of the referral to the defendant from the plaintiff's general practitioner.
4. All documents in the plaintiff's possession relevant to the risks of the procedure.

Your instructing solicitor seeks your advice on what should be done about the notice to produce.

What advice do you give?

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Question 2 [ES Q2] Evidence 10 marks

You are junior counsel for the Commonwealth in a Federal Court proceeding, in which the applicant is challenging the validity of a decision of the former Minister for Immigration to refuse the applicant a visa. Since the decision, there has been a change of government. The former Minister's party is no longer in government and the former Minister is no longer in Parliament, having lost her seat.

One of the applicant's grounds of judicial review is that, when refusing his visa, the former Minister proceeded on an incorrect understanding of the ambit of her powers. There is no record of the former Minister's reasoning, as the statute did not require the Minister to give reasons. Neither party called the former Minister to give evidence.

The Commonwealth did put on an affidavit from a senior civil servant. His affidavit relevantly stated:

> *It was my usual, though not invariable, practice to brief the Minister about the scope of her powers when decisions of this kind came before her. I do not recall if I followed my usual practice on this occasion.*

Counsel for the applicant did not cross-examine this witness.

The applicant has now submitted that (a) the Commonwealth's failure to call the former Minister is evidence that the former Minister misunderstood the ambit of her powers and (b) the Court should reach that conclusion notwithstanding the civil servant's evidence.

a. **Discuss whether submission (a) is correct (6 marks).**

b. **Discuss whether submission (b) can be put, given counsel did not cross-examine the civil servant (4 marks).**

{*Space intentionally left blank*}

Question 3 [ES Q3] Ethics 10 marks

A solicitor calls you. She would like to brief you in a proceeding, led by a silk with whom you have worked before. She has said you can set whatever fee you like, as the client is very wealthy. When you last worked with the silk, you found it an almost intolerable experience. He insisted on monopolising your time, well beyond the capacity you had told him you had to work on the matter. On a number of occasions, he pulled out of interlocutory hearings at the last minute, leaving you on your own. He insisted on putting arguments that you thought were only barely arguable. He was frequently rude to you. You do not want to accept this brief.

What do you do?

Question 4 [ES Q4] Ethics 10 marks

You are appearing for the plaintiff at the trial of a medical negligence case in the District Court. Your client is being cross-examined. Your client's treating doctor has made an affidavit in the proceeding and is waiting outside to give evidence after your client.

During his cross-examination, your client makes a number of statements which contradict things he has told his treating doctor. Your client remains under cross-examination when the court breaks for lunch.

Your instructing solicitor says to you:

> *The other side want to speak to our client's treating doctor. Can I tell her not to talk to them? In the meantime, can you suggest to our client that his evidence this morning cannot be correct and, if he sticks to it, encourage him to settle?*

How do you respond?

{*Space intentionally left blank*}

Question 5 [ES Q5] P&P 10 marks

You act for the defendant in a proceeding in the Supreme Court. The plaintiff is an individual who lives in Hawaii but who comes to Australia for one week each month for business. While in Australia, the plaintiff lives at a house she owns in Sydney.

The plaintiff's claim is as follows. She and your client agreed to undertake an Australian business venture together, where she was to provide the capital and your client was to undertake the work. On the strength of that agreement, she borrowed money from the bank secured by a mortgage over her Sydney house. She spent all the borrowed money on capital expenses for the business. In breach of contract, your client never did any work for the business. Had your client done so, the parties would have made substantial profits. Your client is therefore liable to pay damages calculated at half of those expected profits.

Pleadings have closed, affidavits have been exchanged and discovery has been made.

Your instructing solicitor has now heard rumours that the plaintiff is struggling to make her loan repayments to the bank and that the value of her house has declined significantly. In response to correspondence from your instructing solicitor, the plaintiff has not denied this. Instead her solicitors have:

1. said that the reason for the plaintiff's present financial difficulties is the failure by your client to undertake work on their joint business;

2. supplied proof of an unencumbered property in the plaintiff's name in Hawaii; and

3. said that being required to pay a substantial sum into court will cause the plaintiff to be unable to continue with the proceeding.

Your instructing solicitor has asked you about the prospects of obtaining security for the costs already incurred in the proceeding (which he estimates at $500,000) and the costs expected to be incurred up to judgment (which he estimates at $200,000), by way of a payment by the plaintiff into Court of $700,000.

What do you advise?

Question 6 [ES Q6] Evidence 10 marks

You are appearing in a District Court trial. Evidence in chief is being given orally. One of the other side's witnesses is presently giving evidence in chief. He explains that, before giving evidence, he refreshed his memory of the events in question by reviewing a note prepared at the time by one of his colleagues, who is not giving evidence. Opposing counsel says he proposes to show the note to the witness again. You have never seen this note before. Your instructing solicitor wants you to object.

What do you do?

Question 7 [ES Q7] P&P 10 marks

Your client was the defendant in a proceeding in the Supreme Court. Yesterday, the judge published reasons concluding that your client was liable to the plaintiff for damages of $2.2 million and made an order giving judgment against your client for that amount. The order was immediately recorded in the court's computerised court record system, JusticeLink. In the judge's reasons, she said she would make a further order that the defendant pay the plaintiff's costs of the proceeding on an ordinary basis unless any party sought a different order by notice of motion filed within 7 days.

On reviewing the reasons, you have noticed the following matters:

1. There is a mathematical error in the judge's calculation of the plaintiff's damages. The correct amount should be $1.8 million.

2. The judge has rejected an argument you made that a large part of the plaintiff's damages were too remote on the basis of a clear misunderstanding of the uncontroversial factual position.

3. There may be a basis to argue for a different costs order to the one foreshadowed by the judge, because of offers exchanged earlier in the proceeding.

Your instructing solicitor asks you whether you can go back to the trial judge to address these matters and, if so, what steps you need to take.

What do you advise?

Question 8 [ES Q8] Evidence 10 marks

You are appearing in a District Court trial for the defendant. The plaintiff operates a virus laboratory. It alleges that your client supplied and installed a defective air filtration system, which the plaintiff had to replace.

In opening submissions a few days ago, counsel for the plaintiff stated that it was an agreed fact that, in order to function properly for a virus laboratory of the kind in question, an air filtration system had to have certain minimum properties which he identified. You had, on instructions, agreed these matters with opposing counsel before trial, and you confirmed this to the trial judge. The trial judge said: "*I note that that matter is agreed.*"

Counsel for the plaintiff has now finished calling her witnesses. Before closing her evidentiary case, counsel seeks to tender two documents:

1. an article from a scientific journal published that morning, reporting on a study suggesting that, for a virus laboratory of the kind in question, the air filtration system has to have certain additional minimum properties beyond those she identified in opening; and

2. an article from a standard medical textbook, setting out basic information about viruses.

Your instructing solicitor wants you to object to both documents.

What do you do?

Question 9 [ES Q9] Ethics 10 marks

You are appearing for a client in a mediation of a Federal Court proceeding concerning an allegedly defective machine part supplied by your client. The CEO of your client and your instructing solicitor are present at the mediation. The mediator has been privately appointed by the parties.

During opening statements at the beginning of the mediation when everyone was present, your opponent explains to the mediator that it is common ground between the parties that the machine part can no longer be located, such that the parties' experts have been unable to examine it. This accords with the instructions you have been given.

The mediation is progressing well and, late in the afternoon, the parties seem close to reaching a settlement. You are sitting with the CEO of your client and your instructing solicitor in a room away from the mediator and the other side. While you are waiting to see if the other side accepts your side's most recent offer, the CEO of your client says:

> *You know, it's funny if we settle today, because just yesterday the defective part turned up in one of our warehouses. We should keep quiet about this of course, as it might blow up the mediation.*

What do you do?

Question 10 [ES Q10] P&P 10 marks

Your client was the respondent to a misleading and deceptive conduct claim in the Federal Court arising from an investment made by the applicant on the advice of the respondent.

At trial, your client contended that it did not engage in misleading or deceptive conduct but, even if it did:

1. the applicant should recover no damages because the applicant suffered no loss; and
2. if the applicant suffered any loss, its damages should be reduced on account of its contributory negligence in:
    (a) failing to conduct its own due diligence; and
    (b) failing to sell out of the investment earlier.

On Friday 13 December 2024, the trial judge published reasons concluding that:

1. the respondent engaged in misleading or deceptive conduct;
2. the applicant suffered loss, in the amount of $500,000;
3. the applicant's damages should not be reduced on account of any contributory negligence in failing to sell out of the investment earlier; and
4. the applicant's damages should be reduced to $300,000 on account of its contributory negligence in failing to conduct its own due diligence.

The trial judge asked the parties to agree on any interest and provide consent orders to give effect to the reasons within 7 days.

On Friday 20 December 2024, the parties submitted consent orders to the trial judge's chambers. The consent orders provided for judgment for the applicant for $330,000 (including interest). On Monday 20 January 2025, the trial judge made those orders.

On Friday 31 January 2025, the applicant filed and served a notice of appeal to a Full Court of the Federal Court, seeking that the trial judge's orders be set aside and, in their place, that there be judgment for the applicant for $500,000 plus interest.

Your instructing solicitor seeks your advice on the following questions:

a. **Does the applicant require leave to appeal (2 marks)?**

b. **Has the appeal to a Full Court been instituted within time (2 marks)?**

c. **What, if anything, must your client do if it wishes to agitate in the Full Court the points on which it failed at trial and by when must it take any such step (6 marks)?**

Question 11 [ES Q11] Evidence 10 marks

You have been briefed to appear in a proceeding in the Supreme Court for the plaintiff, Liberty Inc, the publisher of an American legal magazine and an associated website. The defendant, Australia Too Pty Ltd, is the publisher of an Australian legal magazine and an associated website. Australia Too has a licence from Liberty to republish certain articles from the American magazine in its magazine but not on its website.

Liberty earns advertising revenue based on the number of visitors to its website. It has become aware that, three months ago, Australia Too started republishing on its website articles from the American magazine, leading to a reduction in visits to the Liberty website. You have been instructed to obtain an interlocutory injunction restraining this republication and, at a subsequent trial, to seek damages for lost advertising revenue.

In order to prove Liberty's loss first at the interlocutory hearing and then at the trial, your instructing solicitor has suggested tendering three documents:

1. an extract from the management accounts prepared each month by Liberty's internal accounts team showing weekly advertising revenue for the three months before and after Australia Too started re-publishing articles on its website;

2. an article from the issue of the Liberty magazine the week before Australia Too started republishing the articles on its website which refers to the number of weekly visits Liberty usually has to its website; and

3. a document prepared by the editor just recently, setting out the lost revenue.

What do you tell your instructing solicitor about the admissibility of these documents at (a) the interlocutory hearing and (b) a final hearing?

{*Space intentionally left blank*}

Question 12 [ES Q12] Ethics 10 marks

You overhear two female barristers talking in the kitchen in chambers. One says to the other:

> *I have been working closely with a team of solicitors at a large firm — all women, except for the most junior lawyer, who is a 24 year old guy straight out of law school. He is very good looking and wears tight suits that show off his muscles. We've started referring to him in emails and group chats in the matter as "Mr Hotbody". I don't think he minds — he usually doesn't respond and, when he does, it's normally with a smiley face.*
>
> *I don't think anyone on the team is actually attracted to him. In fact, I'm pretty sure he's gay. We all went out to a boozy dinner the other day to celebrate a milestone in the matter, and the partner and I agreed we'd try to find out. We both sat really close to him, and kept flirting with him and touching him, to see how he responded. He just laughed, so I'm still stumped.*
>
> *After the dinner, I suggested going to a gay bar on Oxford Street. Everyone else was keen, but Mr Hotbody said no. What do you think that means?*

Discuss whether this conduct is acceptable.

End of Exam Paper.