



NEW SOUTH WALES
BAR ASSOCIATION®

NSW Bar Examination

June 2023

Candidate Number

J23 - _____

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

Civil Examination Questions

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Question 1 [ES Q1]

8 marks

You are acting for Best Insurance Brokers Pty Ltd, the defendant in proceedings in the Supreme Court. The proceedings concern the placement of a particular insurance policy by your client a number of years ago. It is alleged that an employee of your client, Hope Less, was negligent in failing to advise the insured on the policy of certain exclusions in the policy, contrary to your client's Insurance Placement Manual. Your client has recently appointed a new Chief Executive Officer. Before her appointment, she had no connection with your client. She had no involvement in the events the subject of the proceedings.

Yesterday, the plaintiff served two subpoenas.

The *first* is a subpoena directed to the Chief Executive Officer to attend to give evidence at the trial.

The *second* is a subpoena directed to the proper officer of your client to produce documents described as follows:

- (a) *A copy of the Insurance Placement Manual in force at the time of the placement of the policy.*
- (b) *Copies of all emails sent or received by Hope Less during her employment by Best Insurance Brokers Pty Ltd.*
- (c) *Copies of any document relevant to the alleged negligence of Hope Less.*

Advise your client about its ability to have the first subpoena and the second subpoena set aside.

[Space intentionally left blank]

Question 2 [ES Q2]

8 marks

You act for the respondent in Federal Court proceedings. Your client sells luxury cars. The applicant is an individual who bought one of your client's cars. The applicant claims that a statement of a sales assistant employed by your client misled the applicant into believing the car was the most powerful model made by your client when, in fact, a more powerful model was available.

The applicant has given an affidavit which includes the following:

1. *Before I bought the car, the sales assistant said to me: "This model has the most powerful engine of all our models."*
2. *My wife was with me at the time and I said to her: "I only want the most powerful one."*
3. *The day after I bought the car, my friend Jeremy May-Hammond saw it and said: "Nice car, but it's a shame you didn't buy their model with the most powerful engine, like I did."*

Jeremy May-Hammond subsequently died in a car accident.

Your instructing solicitor has suggested to you that each of the paragraphs of this affidavit referred to above is inadmissible hearsay.

What is your response, giving reasons in relation to each of the three paragraphs of the affidavit?

[Space intentionally left blank]

Question 3 [ES Q3]

10 marks

You are appearing for a client in the New South Wales Civil and Administrative Tribunal in a two-day case against a government department. One of the relevant documents in the case is a government form. The version in the bundle of documents prepared by the parties for the Tribunal is the current version. When the bundle was being prepared, counsel for the government department told you that the form had not changed since the events the subject of the proceedings.

On the afternoon of day one, the Tribunal member asks your opponent whether it is common ground between the parties that the form was the same at the time of the events the subject of the proceedings. Your opponent says that it is.

As you are packing up following the adjournment that afternoon, out of anyone else's hearing your client whispers to you:

I'm glad everyone has forgotten the form used to be different. My case would be stuffed if anyone realised! Make sure you don't spill the beans tomorrow.

What do you do?

Question 4 [ES Q4]

9 marks

You have just been briefed for a client who is the plaintiff in a medical negligence case. The claim is against the client's general practitioner. In reviewing the brief, you realise that the specialist to whom the general practitioner referred the client may also have been negligent. The observations in your brief from your instructing solicitor at the firm of Best Lawyers state:

I note the possibility that the specialist was also negligent. The previous Best Lawyers solicitor on the file missed this possibility and a claim against the specialist is now statute barred.

The general practitioner is the father of a close friend of yours. He has now retired. When he retired, your friend said to you:

I'm glad Dad has retired. He told me that he doesn't feel as skilful as he used to be, and that he is concerned that he might have been making mistakes.

What do you do?

Question 5 [ES Q5]

10 marks

Yesterday, a judge of the Supreme Court granted an injunction against your client, restraining it from entering into a contract to sell a block of land for \$1.5 million to a third party until a final hearing is held in the matter in several months.

At the hearing before the judge, then counsel for your client conceded that there was a *prima facie* case that your client had already contracted to sell the block to the plaintiff. Argument was focussed entirely on the balance of convenience. No argument was made about the adequacy of the plaintiff's undertaking as to damages.

Your instructing solicitor has asked for your advice on the possibility of appealing to the Court of Appeal.

Your instructing solicitor has suggested that some of the evidence relied upon by the plaintiff before the judge at first instance suggests it has very few assets, so that the plaintiff's undertaking as to damages is worthless. This was not an argument made before the judge.

Your instructing solicitor has also prepared a new affidavit on behalf of your client, giving further details of the prejudice your client would suffer if it cannot enter the new contract. All of the evidence it contains could have been included in the evidence put before the judge.

(a) Is leave to appeal required [2 marks]?

(b) Can you advance an argument for the first time in the Court of Appeal that the plaintiff's undertaking as to damages is worthless [4 marks]?

(c) Will the Court of Appeal receive the evidence in the new affidavit [4 marks]?

[Space intentionally left blank]

Question 6 [ES Q6]

8 marks

You are acting for the plaintiff in defamation proceedings in the District Court. Your instructing solicitors have received a letter from the defendant's solicitors. The letter encloses copies of two documents.

The *first* is a screenshot of your client's publicly accessible Facebook page, in which your client posted a photo of a letter of advice from your instructing solicitors in which the text is not legible. The comment attached to the photo by your client was:

My solicitors have told me I'm going to win my defamation case!

The *second* is an email from your instructing solicitors to a public relations company engaged by your client. The email says:

As requested, on a confidential basis, please see attached a draft affidavit we have prepared for our client.

The email was produced on discovery but the attached draft affidavit was redacted. Your client's affidavit has not yet been finalised and served.

The defendant's solicitors have served a notice to produce requiring production of (a) the letter of advice featured in the Facebook post and (b) the draft affidavit attached to the email. Your instructing solicitors have said they intend to resist production on the ground of privilege.

What is your response, giving reasons in relation to (a) the letter of advice and (b) the draft affidavit?

[Space intentionally left blank]

Question 7 [ES Q7]

12 marks

You are briefed for the defendant in proceedings listed for trial in the District Court starting tomorrow. The proceedings were commenced two years ago. The plaintiff's claim is for damages for the tort of negligence. Late last night, the plaintiff's solicitors sent your instructing solicitors a proposed amended statement of claim. There are three categories of proposed amendments.

First, the plaintiff seeks to clarify that its loss includes a loss of a chance. This is not clear on the existing statement of claim. However, the plaintiff's lay and expert evidence dealt with the lost chance and your client filed lay and expert evidence in response. You had always understood that the claim included a loss of chance claim.

Secondly, the plaintiff seeks to add a claim for breach of contract. The factual circumstances upon which the claim is based are exactly the same as the existing negligence claim. To deal with the new cause of action, you would not need to adduce any further evidence beyond that already filed on behalf of your client. However, the limitation period for the new cause of action expired six months ago.

Thirdly, the plaintiff seeks to introduce new allegations of negligence that have not previously been raised. Your assessment is that, to respond to these new allegations, it would be necessary to put on significant further evidence from your client and that your client would therefore require an adjournment of the trial.

The explanation for the amendments provided in the letter from the plaintiff's solicitors is that senior counsel has recently been briefed and recommended the amendments. The letter says that the plaintiff will agree to pay the costs thrown away by reason of the amendments, including if an adjournment is necessary. Your instructions are that your client does not want there to be an adjournment.

Advise your client whether there is a basis to oppose leave to amend being granted in respect of each category of amendment.

[Space intentionally left blank]

Question 8 [ES Q8]

9 marks

Your clerk tells you that a solicitor has just rung seeking to brief you for the plaintiff in defamation proceedings. The plaintiff is suing a newspaper for publishing an article suggesting he is a white supremacist. The article contains extracts from the plaintiff's publicly accessible Facebook page in which the plaintiff made extremely racist remarks about a range of groups. Throughout university you were heavily involved in the student union's anti-discrimination initiatives. You are now a member of the Bar's Diversity and Equality Committee. You think the plaintiff's Facebook comments are vile.

Defamation is an area of practice listed on your website profile, you have capacity to take on the proceedings and the plaintiff is proposing to brief you at your usual commercial rates. You would be led by a very competent and experienced defamation silk.

You would really prefer not to take this brief. You ask a more senior junior in chambers what to do and they say:

Don't worry. Just tell them you'll only do it if they pay twice your usual commercial rates. There's no way they'll agree and then you'll be off the hook.

What do you do?

Question 9 [ES Q9]

10 marks

You have been briefed by a New South Wales solicitor to act for a New South Wales resident plaintiff in a claim against a corporation for damages for misleading or deceptive conduct contrary to s 18(1) of the *Australian Consumer Law* (Cth). The quantum of your client's alleged loss is \$1 million. The claim arises from events that took place in New South Wales.

Advise your client:

- (a) what court or courts the claim could be brought in [5 marks]; and
- (b) what court or courts you recommend the claim be brought in [5 marks].

Question 10 [ES Q10]

11 marks

You act for John who is the plaintiff in Local Court proceedings. Your client is suing Harry for \$50,000 in damages for an assault.

Your client has given affidavit evidence that he and Harry were at a club together with their mutual friends, Claire and Sue, and that during the evening Harry punched your client.

Harry denies punching your client and has brought a cross-claim alleging that your client punched him. Harry has served two affidavits: an affidavit from himself and one from Sue.

Sue's affidavit contains the following paragraphs:

8. *I was standing close to John and Harry at the club. They were speaking loudly. John was drunk.*

9. *I was talking to Claire and heard a noise. I turned around and saw John and Harry on the ground. It looked to me like John had punched Harry.*

10. *The next day, Claire told me that while John and Harry were on the ground she heard John say: "Don't do that again".*

No one has called Claire to give evidence, though she is available.

(a) What, if any, objections can you make to these paragraphs of Sue's affidavit? [8 marks]

(b) What, if any, submissions can you make about the fact that Harry has not called Claire to give evidence? [3 marks]

[Space intentionally left blank]

Question 11 [ES Q11]

12 marks

You overhear a senior junior in chambers talking to a colleague about the way he runs his practice, as follows:

I have a great arrangement with my reader from a couple of years ago. We agreed it at the beginning of his reading period and we've kept it going ever since.

He takes care of everything that my hopeless instructing solicitors would normally stuff up. He writes the correspondence, files court documents, organises witnesses – everything! He does it so much better than a solicitor would.

But it's even better than that. He also does all of my work too. I barely look at the drafts of advices and submissions he prepares for me. I just check they're in my preferred font and format, so they look like my work.

And here's the best part. My solicitors have no idea about any of this. So when it comes to billing, I just find out from him how many hours he has spent at his usual rates, then I bill the clients for the same number of hours but at my rates, which are a lot higher. I can then pay him and make a profit.

Are these arrangements acceptable? Address both the position of the senior junior and the former reader.

Question 12 [ES Q12]

13 marks

You are briefed for the plaintiff in a negligence claim in the District Court. One of the issues is whether the defendant ran a red light while driving her car. Your client's evidence is that the light was red at the time. The defendant's evidence is that the light was green.

A local newspaper reporter interviewed both parties at the scene following the accident and published a story in the local newspaper about it. Among other things, the newspaper article:

(a) records your client as saying: *"The light was definitely red when she came through the intersection"*; and

(b) records the defendant as saying: *"I guess my light might have been red but I don't think it was"*.

How, if at all, can you permissibly question the defendant about the statements in the newspaper article in cross-examination?