

Examiners' Comments on the 2021 Examination

Head II: Civil & Criminal Procedure

The Overall Performance of Candidates

1. The number of candidates who sat the Head II paper in 2021 was 44, down from 64 in the previous year. 14 candidates were given overall pass marks, resulting in a pass rate of 32%. This is a significant decrease from the 77% pass rate in the previous year where 49 out of 64 candidates were given overall pass marks. Unfortunately the pass rate is now back to where it was in 2019 (31%). Whether 2020 was simply an outlier year of improvement as opposed to the start of a significant trend remains to be seen.

The Standard and Format of the Examination

2. The Examination, as in previous years, was open book.
3. The Examination is premised on the standard to be expected from the Day One Lawyer. The Day One Lawyer is one who has completed both the academic and vocational stages necessary for professional qualification. In Hong Kong that means the LL.B (or a non-law degree and the CPE), the PCLL and the two year training contract. Day One Lawyers should have a sound base of substantive knowledge and have acquired the ability to apply that knowledge to straightforward situations. In reality those taking the examination will be more than Day One Lawyers because of experience obtained in their home jurisdictions. Even so the Panel was careful to focus on the "Day One" standard and to keep away from what might be classed as "advanced procedure" or "superior ability". A Day One Lawyer intending to practise in Hong Kong should, however, have the ability to demonstrate an appreciation of the structure, powers and responsibilities of Hong Kong's Courts and have a basic knowledge of what is required in advising and representing clients in litigious matters. They should not be a danger to the client.
4. The Panel was concerned to set questions which would test substantive knowledge and the ability to apply that knowledge in a constructive, practical and common sense manner. The examination deliberately mimics the situation of a solicitor asked to advise a client about a problem, and calls for directional practical answers, sometimes against an unfamiliar factual background.

General Comments

5. There were five questions in the paper, and candidates were required to answer any four of those questions. The time allowed was 3 hours and 30 minutes. The first 30 minutes is intended to allow candidates an opportunity to read and digest the questions in the paper and to plan their answers before starting to write. However, candidates can start to write their answers as soon as they wish.

Performance on individual Questions

Criminal Procedure

6. Questions 1 and 2 focused on the kinds of issues any newly qualified solicitor should be able to guide their client through in a competent manner. This year the answers provided by the candidates were notably poor. For question two, which was based on basic and long-standing tests for criminal culpability, not one of the 14 candidates who attempted the question was able to explain the applicable law satisfactorily. For question one, the pass rate was much better, but still low at 43%. The questions were no more difficult than those posed in previous years and it is very clear that many candidates take this exam with little understanding of criminal practice and either fail to answer the question asked or answer in the briefest point form, ensuring they miss many of the key issues raised by the examiners. The overall pass rate for criminal procedure was a disappointing 30%, a significant drop from the pass rate of 45% last year.

Question 1 (pass rate 43%)

7. This question had two parts, the first requiring candidates to identify the court in which common criminal offences of assault and criminal damage would be tried. This requires candidates to have mastered basic statutory interpretation skills and an understanding of sentencing practices in Hong Kong which should not have presented the difficulties they did to many candidates. Part two of the question required candidates to explain, in basic terms, the threshold requirements for bail in cases related to national security offences. Many were unable to do so.

Question 2 (pass rate 0%)

8. This question had two parts and related to a case of drug trafficking with an international element. The first part of the question required candidates to be aware of and explain in simple terms the application of the evidentiary burden arising from the presumption of knowledge under section 47 of the Dangerous Drugs Ordinance Cap 134. The applicable section was provided in the paper. The law in this area was settled in *HKSAR v Hung Chan Wa and Another* [2005] 3 HKLRD 291.
9. The second part of this question required candidates to evaluate the evidence against the hypothetical client and identify whether to make a no case to answer submission. The capability to recognise when the prosecution has insufficient evidence to claim a reasonable jury properly directed could convict is a fundamental requirement for practice in any jurisdiction. It is astonishing it presented such a burden to candidates for practice in Hong Kong.

Civil Procedure

10. Questions 3, 4 and 5 addressed issues of civil procedure which could well land on the desk of a newly admitted solicitor. The answers were expected to be at the level of sophistication and experience of a solicitor at that stage. In some cases, common sense application of established procedures and procedural law was all that was sought, rather than a recitation of black letter rules. The overall pass rate was 48% on the civil

procedure side, which is down from 71% in the previous year and closer to the 2019 figure of 42%. 57% of candidates were able to pass all the civil procedure questions they attempted. Questions 3 and 4 proved easier in that an over 60% pass rate was achieved but this dropped to 23% for question 5 which might reflect the fact question 5 required a rather wider range of knowledge of civil procedure than questions 3 and 4 which were more discrete in their areas of knowledge dealing with the commencement of proceedings and the drafting of a statement of claim (question 3) and a summary judgment application (question 4).

Question 3 (pass rate 65%)

11. Question 3 asked candidates to advise a client resident in Taiwan (potential plaintiff) on his rights against a borrower under a simple loan agreement where the borrower was in default.
12. Candidates were asked to advise the client on what proceedings could be brought and in which forum and also to advise on any matters he should be aware of if legal proceedings were brought in Hong Kong.
13. Candidates were then asked to draft a statement of claim, which task constituted three-fifths of the marks available and lastly to consider and advise on a specific bare allegation in a defence.
14. The majority of candidates were able to identify and draft the statement of claim to a reasonably acceptable standard.
15. Not many candidates were able to properly identify and explain the potential issue of security for costs given the client's residence outside the jurisdiction
16. Very few candidates seemed to understand the purpose of a request for further and better particulars of an allegation in a pleading which resulted in no or very low marks being given to the majority of candidates for this part of the question.

Question 4 (pass rate 61%)

17. Question 4 concerned a client (defendant) who was being sued on a dishonoured cheque which he said he had mistakenly issued on his personal account rather than his company account. An Order 14 (summary judgment) application had been taken out by the plaintiff. The question consisted of two parts.
18. First, for 10 marks candidates were asked to explain a few short points about the Order 14 application such as what client could do to oppose it, and whether client's personal assets were at risk. This part of the question was generally well answered. However, many answers were uncannily similar, suggesting that candidates were answering with the benefit of pre-prepared notes from a common source. These answers were mostly rather general but correct and were generally awarded passing marks. Better candidates focused on the facts given in the question, resulting in better answers which were rewarded with higher marks.
19. Secondly, for 15 marks candidates were asked to draft an affirmation in opposition to the Order 14 application. To avoid going into substantive law candidates were told they

could assume that client had a good defence of total failure of consideration on the basis that liability for the payment lay with client's limited company and not himself. The overall performance was reasonably good, and the pass rate was high. Some candidates produced excellent draft affirmations and were awarded with high marks. Common mistakes among candidates who unfortunately did poorly included:

- (1) mixing up plaintiff and defendant;
 - (2) naming client's company rather than client himself as defendant when it was clear from the facts set out in the question that client had been sued personally;
 - (3) failing to put forward a defence in the affirmation, clearly or at all, meaning that the document being drafted could not possibly serve its purpose of opposing the Order 14 application.
20. There were also some candidates who assumed that client was being sued in the Court of First Instance, when the District Court would clearly have been more appropriate. However, as the choice of forum was not up to client, but the plaintiff, and given that the two courts technically have concurrent jurisdiction for this level of simple claim, this was not treated as a grave error.

Question 5 (pass rate 23%)

21. Question 5 concerned matters arising before and after the trial of an action. It embraced diverse areas relating to the giving of evidence at trial in the light of the Covid pandemic and the perennial issue of a recalcitrant witness.
22. Separately questions were put as to certain post-trial matters relating to issues of quantum after a trial with a finding of liability and appeals by both parties.
23. Disappointingly, few candidates had any real knowledge of how evidence could be given at a trial other than by viva voce testimony. This is disappointing given this has been an issue which has been the subject of several cases since the inception of Covid.
24. There was a greater understanding of the possible need to serve a subpoena on a reluctant witness although little consideration of the possible impact of compelling a reluctant witness to give evidence.
25. There seemed to be very little knowledge or understanding of a split trial between liability and quantum and the type of directions that might be sought for such a quantum hearing. On reflection this may have been a little too arcane a subject to expect widespread knowledge on the part of candidates.
26. Conversely, an understanding of the basic principles of an appeal from a trial on liability in the High Court is something of which one would expect any candidate to have a reasonable knowledge. Sadly this was not the case with a number of candidates although this part of the question was better answered than the others.