

Examiners' Comments on the 2005 Examination

Head II: Civil & Criminal Procedure

1. The overall performance of candidates.

The performance of the majority of the candidates in the 2005 examination was disappointing.

2. The format of the examination.

The examination, as in previous years, was Open Book. Candidates must appreciate that Open Book examinations are not simply tests of ability to copy material into an examination script. Open Book examination questions will be problem-based and will test both substantive knowledge and ability to apply that knowledge in a practical and constructive manner. Open Book examinations require more preparation than closed book examinations. Many candidates apparently did not appreciate this.

3. The standard of the examination.

Though candidates will have been qualified in their home jurisdictions for varying lengths of time, the standard of the examination was that of a Hong Kong Day One Lawyer. As in previous years, the objective was to prepare a paper which was testing but fair and which addressed the standard of substantive knowledge of civil and criminal procedure and the practical ability to apply that procedure to day to day issues to be expected from the Hong Kong Day One Lawyer. The Hong Kong Day One Lawyer is a person who has either a recognized law degree (or a non-law degree and the CPE), has completed the PCLL and the two year training contract. The Hong Kong Day One Lawyer will have had at least three years' practical exposure to the Law of Hong Kong. Those who have completed their law degree in Hong Kong will have had at least three years' exposure to the Hong Kong Legal System before embarking upon their three years of pre-qualification vocational training. The examiners were confident that the paper was well within the standard to be expected from the Hong Kong Day One Lawyer. Regrettably the majority of the candidates failed to meet that standard.

4. General criticisms.

4.1 Many examination scripts showed a serious absence both of understanding civil and criminal procedure and the ability to apply that procedure to practical scenarios. This may be because of a misconception of the nature of open book examinations, a failure to put in the

necessary hard work prior to the examination, an assumption that civil and criminal procedure in Hong Kong is the same as in other jurisdictions or a combination of all three. Candidates must appreciate the need for hard work before entering the examination room. Candidates must demonstrate a basic understanding of the principles of Hong Kong civil and criminal procedure and the ability to apply that understanding to situations a Hong Kong Day One Lawyer could be expected to encounter. The Hong Kong Day One Lawyer is expected to have a sound appreciation of the structure, powers and responsibilities of Hong Kong's Courts as that is the context within which they operate. No concessions can be made about that. The examination is the opportunity for candidates to demonstrate they have sufficient knowledge, practicality and common sense to be fit to practice in Hong Kong. It would be otiose to set a lower standard than that expected from the Hong Kong produced Day One Lawyer. Some candidates appeared to have done little, if any, worthwhile study in advance of the examination. Their answer scripts indicated an apparent reliance on looking up answers from texts taken into the examination room. They had not demonstrated the basic fitness for practice required from the Hong Kong Day One Lawyer.

4.2 The examination is of three and a half hours duration. This is intended to allow time for questions to be read and absorbed before answers are written. Many candidates failed to appreciate the advantages of ensuring that questions were understood and answers were planned and structured before starting to write the answers. The standard of presentation of some scripts left much to be desired. Answers were generally poorly constructed, fragmented, did not focus upon the issues in the questions and frequently contained contradictions and inconsistencies. Candidates must appreciate the need to structure answers, address the issues and keep within the boundaries of the question. It is also important to 'write to the audience' as that enables a candidate to demonstrate a thorough understanding of principles and the ability to apply those principles to the given situation through the advice given, for example, in a letter to a client. The standard of presentation of some papers left the examiners with an impression the examination was simply not being taken seriously.

5. Question No. 1 of the 2005 Paper.

Question No. 1 addressed very basic issues of criminal procedure and should have been well within the ability of an averagely competent Hong Kong Day One Lawyer. The question required candidates to show an appreciation of the practicalities of advising a client about who little was previously known in a police station. Though some candidates answered this question well, there was, overall, a marked lack of practicality and concentration upon the issues raised by the question. Some candidates simply failed to put themselves in the position of a solicitor advising a client in custody in a police station and did not show any worthwhile appreciation of the problems and dangers arising in such a situation. Firm advice should

have been given to the client about the problems which can arise where too much is said to the police too soon, particularly with a possible alibi defence. Overall the response to question 1 was disappointing.

6. Question No. 2 of the 2005 Paper.

The response to question 2 was even more disappointing than the response to question 1. Many candidates simply did not appear to appreciate that there was an issue as to whether there could be an appeal against conviction and/or an application to review a conviction before the defendant has been sentenced. It appeared that candidates had rushed into answering this question before fully considering the overall scenario. There was a marked inclination to write all that was known about appeals from magistrates, reviews of magistrate's decisions and about sentencing options without focusing on the issues in the question. Overall there was a marked lack of awareness of the system and an absence of practicality.

7. Question No. 3 of the 2005 Paper

Most candidates chose to answer Question 3. The procedural issues on enforcement involved in this question were straight forward, similar to those covered in past papers and well within the expected competence of the Hong Kong Day One Lawyer. Despite that, there were demonstrated basic weaknesses of understanding and application. Some candidates wrote answers in points form instead of a letter of advice as required. For those who attempted to write a letter of advice, many were not able to write in a clear and precise manner and to assist the client to understand the issues and make informed decisions. The way in which this question was approached by some candidates illustrates the points made in paragraph two about the need to prepare for open book exams. Questions must be structured so that the ability to apply knowledge is tested. Answers must respond to the question asked and comply with the requirements of the question.

8. Question No. 4 of the 2005 Paper

On the whole Parts (a) and (b) of Question 4 were dealt with satisfactorily. The same could not be said for Parts (c) and (d). Many candidates showed little understanding of what needs to be pleaded in a Statement of Claim and what documents attract privilege on discovery. Fundamental weaknesses of understanding and appreciation of principles were revealed. This was worrying given the relative straight forward nature of this question and the areas that were being tested.

9. Question No. 5 of the 2005 Paper

Not many candidates answered this Question 5. With one or two exceptions, the performance of those who attempted this question was very disappointing. For Part (a), there was a demonstrated failure to identify the issues that needed to be considered before taking action. In Part (b), there was a demonstrated inability to analyse the implications of a Calderbank offer and the payment into court in a systematic and logical way.

10. Conclusions

There are many possible reasons for the poor performance of candidates in the 2005 examination. However the examination technique across the board left much to be desirable. Answers were generally poorly presented and structured. They were fragmented, lacked focus on the issues, contained inherent inconsistencies and contradictions and revealed basic weaknesses of understanding. Candidates must ensure that questions are fully understood and answers are properly planned before starting to write the answer.

Questions 1 and 2 especially presented candidates with developing scenarios. Some candidates simply failed to treat them as such. Answers to a developing scenario should address each part of the scenario in turn and not jump from issue to issue or address the last part of the scenario before addressing the first part.

Candidates must appreciate that they are being tested upon Hong Kong civil and criminal procedure. Those aspiring to practice in Hong Kong must appreciate they are required to show the necessary competence and practicality expected of the Day One Hong Kong Lawyer. Candidates are expected to put in the necessary hard work to familiarise themselves with the Hong Kong civil and criminal procedure. Unless that is done they cannot expect to pass the examination.