

Examiners' Comments on the 2009 Examination

Head II: Civil & Criminal Procedure

The Overall Performance of Candidates

1. Although there was a maintenance of the quality of answers to the 2009 Examination, when compared with the 2008 Examination, again the tendency for candidates not to address the specific issues contained in the questions with the practicality expected from the Day One Lawyer was repeated.
2. There was yet again a marked tendency amongst the candidates to avoid the question related to pleadings and hence, the need for there to be greater focus on such questions in the future continues, particularly mindful of the recently implemented Civil Justice Reforms.

The Standard and Format of the Examination

3. The 2009 Examination, as in previous years, was open book.
4. The 2009 Examination was 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.
5. If it is to have any value in ensuring that those seeking to practise in Hong Kong are of a suitable standard, the examination must test both substantive knowledge and the ability to apply that knowledge. As with any professional qualifying examination, 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.

General Criticisms

6. There were five questions in the paper, 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.
7. As in previous years, the majority of candidates brought into the examination room a significant amount of materials, but it was again noted that such practice proved to be somewhat counter-productive. There is insufficient time in the examination to search such materials for the required answers. Preparation is required in order to be fully conversant with the content of such materials in order to be able to refer to the same in an efficient manner that results in a precise answer to the actual question. In several answers, the candidates went down the road of including materials which were wholly irrelevant to the questions asked or were peripheral to the issues and accordingly, marks were not granted.
8. As has been raised in respect of previous years, candidates would be recommended to spend part of their preparation in focusing upon examination technique. Answers should be carefully prepared such that the issues raised in the questions are identified and precise, direct answers relevant to those issues are produced.

Performance on individual Questions

9. Questions 1 and 2 addressed issues of criminal procedures.
10. Question 1 was split into 3 parts with 15 marks available for parts 1(1), 5 marks available for each of parts 1(2) and 1(3). Question 1 was very poorly answered with a large number of candidates having no notion of the prosecutor's ongoing duty of full and frank disclosure, both at common law and in accordance with the Basic Law. Where mention was made of the Prosecution Policy, old paragraph numbers were used, on the basis of the 2002 document, which has since been updated. Many candidates were also unaware of the large body of

case law on this point and few referred to the test for the materiality of evidence (the Keane test).

11. Of even greater concern was the very large number of candidates who, whilst aware of the duty of disclosure, counselled the client not to appeal on the basis that the information in the undisclosed statements of the officers would make matters worse. Their failure to recognize the credibility issue which had arisen was astounding.
12. A good number of candidates were able to identify the correct court of appeal and the right of appeal under statute but too many failed to identify the power under which the appellate court could award the appellant his costs.
13. Question 2 was split into 4 parts with 8 marks available for part 2(1), 8 marks available for part 2(2), 4 marks available for part 2(3) and 5 marks for part 2(4). Question 2 was answered well by the majority of students. A small number, however, tried to suggest the defendant could influence the choice of venue for his trial, or even dictate it.
14. Most candidates recognized the defendant's ability to challenge the prosecution's case in relation to the use of the drugs and correctly identified the means for doing so, however many did not know the likely tariff for the crime alleged. Unfortunately those students who misidentified the wrong court of appeal.
15. Questions 3, 4, and 5 addressed issues of civil procedure and should not have unduly tested the abilities of an averagely competent Day One Lawyer. The relevant procedure was tested in a manner that sought reference to the rules or other materials in support of the answers and a sensible, practical approach to the issues.
16. Question 3 was split into three parts with 15 marks for part 1, 6 marks for part 2 and 4 marks for part 3. The question was designed to ensure candidates had knowledge of certain aspects of the provisions introduced by the Civil Justice Reforms. Most candidates addressed the issues fairly well in respect of this question, identifying the correct procedural issues and related time limits. However, a number of candidates elected to write at length without focussing the answer on the relevant issues as identified by the question, which indicated a lack of awareness as to what was being sought by the question.
17. Question 4 was split into two parts with 10 marks for part A, which had one question, and 15 marks for part split as to 5 marks for the first question under part B and 10 marks for the second question under part B. Part A of this question concerned drafting in that candidates were required to complete parts

of a writ and prepare a general endorsement of claim and part B tested procedural steps and related issues following service of a Writ. Again, knowledge of certain aspects of the provisions introduced by the Civil Justice Reforms was tested. The majority of candidates did not attempt this question and a number of those who did prepared detailed statements of claim and not a general endorsement of claim. The question needed careful analysis, but if proper preparation had been undertaken enough marks to score well and pass the question should have been easily obtainable.

18. Question 5 was split into 6 parts with the 25 marks being allocated in the following manner: 5 marks for the first part, 8 marks for the second part, 2 marks for the third part, 5 marks for the fourth part, 3 marks for the fifth part, and 2 marks for the sixth part. The question tested knowledge of confidentiality, disclosure, witness credibility, subpoenas, requirement for expert evidence and the procedural timetable. The issues were not overly complex and many of the candidates identified and addressed the pertinent points. However, again there was a tendency to set out knowledge without focussing on the specific question being asked, which resulted in candidates wasting time and not obtaining as many marks as they might have.

Conclusion

19. There was a general consistency in that the candidates who addressed the criminal questions well also addressed the civil questions well, which evidenced such candidates' proper and careful preparation for the 2009 Examination. Mindful that generally those who performed badly on the criminal questions also performed badly on the civil questions, this would seem to confirm the findings of previous years that a lack of preparation for the examination will be identified. Candidates would therefore, be well advised to prepare thoroughly for the examination and to focus upon careful planning and prioritising the content of their answers, which answers should address the precise questions set in a logical and practical manner demonstrating the candidates' knowledge.