

Examiners' Comments on the 2014 Examination

Head II: Civil & Criminal Procedure

The Overall Performance of Candidates

1. The number of candidates this year returned to a more typical 61, following a dip in 2013. Of those 61 candidates, 46 passed Head II, resulting in a pass rate of 75%.

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.

6. At 75% the pass rate for Head II was up from 2013 (71%).

Performance on individual Questions

7. Questions 1 and 2 addressed issues of criminal procedures.

Question 1

8. Question 1 had three parts on which marks were awarded. The first part was very poorly answered. Many did not identify that the discretion to allow/deny a reversal of plea should be exercised judicially and after proper enquiry. Candidates failed to explore what amounts to a “proper enquiry” and very few recognised the need to consider the possibility that the defendant’s plea had been entered under duress. The second part of the question simply required candidates to identify the court which hears appeals from the magistracy and describe its powers. In answering the third part of the question, some candidates erroneously suggested the defendant appeal further to the Court of Appeal and many threw easy marks away by not mentioning the tests to be applied and powers of the Court of Final Appeal (i.e. failing to answer the question put).

Question 2

9. Question 2 had three parts. The first part required candidates to identify the possible and likely venue for a pick pocketing case. Candidates that read ahead would have realised that enhancement of sentence was an issue and some then opted for District Court over the Magistracy. Candidates were not penalised for choosing one court over the other, provided they discussed the options properly. The second part required candidates to explore possible grounds of appeal against sentence. While custody was the only real sentencing option, the length of sentence imposed required discussion and evaluation and this was done quite well, for the most part. Marks were lower for those candidates who ignored the tariff/handled the enhancement issue poorly. Some candidates failed to read the question and discussed appeals against conviction. The third part of the question was well answered.
10. Questions 3, 4, and 5 addressed issues of civil procedure. The questions raised issues which could well land on the desk of a newly-admitted solicitor. The answers being sought were pitched at the level of sophistication to be expected of a lawyer at that stage, which in some cases was simply to spot the issue being raised. In many cases we were looking for common sense application of the law, rather than just a recitation of black letter rules.

Question 3

11. Question 3 was split into 3 parts: part 1 – on summary judgment, strike-out and settlement – worth 10 marks; part 2 – on expert evidence – worth 8 marks; and

part 3 – on factual witness evidence and subpoenas – worth 7 marks. This question was very well answered, as reflected in the high pass rate.

Question 4

12. Question 4 was split into 2 parts: part 1 – on discovery – worth 8 marks; part 2 – on the boundaries of litigation privilege – worth 17 marks. The overall standard of answer was good.

Question 5

13. Question 5 was split into 4 parts: part 1 – on *Mareva* injunctions and interim protection measures – worth 12 marks; part 2 – on partners as plaintiffs – worth 3 marks; part 3 – about service out of the jurisdiction – worth 6 marks; part 4 – about service on partnerships – worth 4 marks. The standard of answer was again very good.
14. The general standard of answer and pass rates on the civil questions were pleasing. However, some candidates are still missing marks by failing to pay attention to the whole question. For example, if the question asks for the factors taken into account on the grant of a particular application and the procedure for making the application, a significant number of candidates list the factors but fail to say what the procedure is.
15. It also bears repeating that this examination is a test of the ability to apply legal knowledge in order to give practical advice to a client. In an open book examination mere recitation of the legal principles is insufficient to get high marks – these are reserved for the candidate who demonstrates an ability to apply that knowledge to formulate advice.

Conclusion

16. Despite the poor performance on Question 1 of the paper, we are pleased to note a slight increase in the pass rate for this Head.

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