

## **Examiners' Comments on the 2023 Examination**

### **Head II: Civil & Criminal Procedure**

#### The Overall Performance of Candidates

1. The number of candidates who sat the Head II paper in 2023 was 86, up from 61 in the previous year. 36 candidates were given overall pass marks, resulting in a pass rate of 42%. This is a decline from the pass rate in the previous year where 39 out of 61 candidates were given overall pass marks. Pass rates seem to fluctuate and it is likely certain types of question may lead to higher and lower pass rates. The pass rates for the last five years have been 31% (2019), 77% (2020), 32% (2021), 64% (2022) and now 42% (2023).

#### 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. The overall pass rate for criminal procedure was 47%.

#### **Question 1 (pass rate 41%)**

7. Question One is divided into 8 small parts.
8. For part 1: No one mentioned the first thing is to contact the students' respective consulates. Some answered: say sorry; no case to answer; they took drugs; one said there is a defence to the charge without specification; one mentioned the detention period is 72 hours
9. For Part 2: no one mentioned the accused does not have roots in Hong Kong. One mentioned to report to the Independent Commission Against Corruption (ICAC)
10. For part 3: one answered request for further particulars and Pre Action Discovery
11. For part 4: One answered: "Students have conflict but no common assault."
12. For part 5: this is a guideline not tariff
13. For Part 6: one answered to pay off the victim and offer to settle with the victim
14. For Part 7: there is a new term used 'rectified pleadings'
15. For Part 8: how can one claim an acquittal
16. Question One is a simple straight forward question and the blank books answered reflect the standard this year has fallen sharply.
17. No marks were deducted for deciphering the handwriting.

#### **Question 2 (pass rate 50%)**

18. This Question is divided into 4 parts examining 3 different areas.
19. Question 2(1) examines candidates' basic knowledge in handling a bail application. This part is relatively straight forward. Most of the candidates were able to grasp as well as to apply the fundamental principles. Some candidates gained very good marks in this part.
20. Question 2(2) is also relatively straight forward. The issue is the importance of timely guilty plea. One third full credit of discount for guilty plea would only be given when the plea was entered at the first opportunity. The percentage of discount for guilty plea would be progressively reduced at the later stages of the proceedings. Most of the candidates gained good marks in this part.

21. Question 2(3) and (4) are relatively difficult parts of this Question concerning the reversal of plea. For Question 2(3), candidates are expected to pick up the point that the accused specifically made a qualification of his plea by saying “compensated dating” which vitiated the important element of the offence of rape. This led to the issue whether it was a defence of consensual sexual intercourse. The accused’s qualification is arguably making his guilty plea equivocal. Unfortunately, most of the candidates did not analyse the facts and apply the law to the facts.
22. For Question 2(4), candidates are expected to pick up the point that the accused may raise the argument of “in the interest of justice” even if his guilty plea was unequivocal. Only few candidates could identify this point.
23. The overall performance of the candidates who answered this Question was fair.

### ***Civil Procedure***

24. The overall pass rate was 49% on the civil procedure side, which is down from 62% in the previous year but almost identical to the pass rate of 48% in 2022. The pass rate varied markedly for the three civil procedure questions ranging from 22% who passed Question 3, through 52% passing Question 4 up to 72% who passed Question 5. This probably reflects the subject matter of the questions. So Question 3 (pre-action discovery) is likely a less familiar subject to candidates than Question 4 (sanctioned offers) and particularly Question 5 (enforcement of a monetary judgment). This year's questions did not allow references to a precedent, such as drafting a pleading, which candidates often seem to find easier than answering questions on specific points of civil procedure.

### **Question 3 (pass rate 22%)**

25. Question 3 related to a typical personal injury claim, coupled with a counterclaim by the defendants against the plaintiff in the original action and an additional party.
26. There were two questions set to test the candidates' understanding of (i) pre-action discovery against non-parties (which is not uncommon in a case where the potential defendants are insured and the discovery is made against his insurers), (ii) the relevant procedures and exceptions which may be relied upon to object to a request for discovery, (iii) ability to attend to details, (iv) application of Ord 15, r3, (v) familiarity of titles to proceedings and (vi) relief which might be sought.
27. The overall total marks of this questions were low mainly because of the second question. The first question was relatively straight-forward, but many candidates did not get high marks because either they did not state all the three requirements which had to be shown to seek pre-action discovery against a non party, and many also did not go further to give a brief analysis or explain why the discovery was relevant and went to assist in the fair disposal of the matter. Of note also is that many candidates did not spot the difference between pre-action (non-party) discovery and discovery after proceedings have been commenced.

28. The second question asked candidates to produce a proforma pleading for a counterclaim without the actual substance of the pleaded counterclaim. This therefore required attention to the correct heading, the parties, the way the parties are referred to in a counterclaim, the title and the prayer for relief.
29. Most candidates got low marks on this question because of an inability to focus on detail and making simple errors.

**Question 4 (pass rate 52%)**

30. Question 4 was about the sanctioned offer procedure under RHC O 22, whereby a plaintiff can propose settlement to the defendant, with costs and interest sanctions if the defendant refuses but ultimately fails to do better.
31. The question consisted of two parts. Part (a), which was allocated the bulk of the marks, asked candidates to draft a letter to the client in a personal injury claim, explaining the procedure and asking for further instructions. Part (b) asked candidates to draft the sanctioned offer for client's approval.
32. The performance of candidates on part (a) was, on the whole, very good. However, it was noted that many of the answers were rather general, and could well have been copied out from pre-prepared notes. That is the risk of an open-book exam. Higher marks were awarded to answers which were clearly focused on the individual client's case.
33. Candidates tended not to do quite as well on part (b), although the overall pass rate was acceptable. This part required candidates to think for themselves, as they could not have anticipated the particular factual circumstances set out in the question. A few candidates who answered part (a) adequately were unable to think for themselves and were given fail marks on part (b).
34. Overall the pass rate on question 4 was acceptable and it was pleasing to note that the majority of candidates had a least a basic knowledge of this important new procedure.

**Question 5 (pass rate 72%)**

35. Question 5 was a straight forward question testing the candidate's knowledge on the various ways to enforce a monetary judgment obtained in the High Court of Hong Kong by reference to the facts given. A typo in the paper was found on the day of the examination but it was clarified with all candidates immediately and at the end, nobody was misled as to what he or she was required to answer.
36. In general, candidates did not have much of a problem in identifying all or some of the 6 ways of enforcement set out in Paragraph 10 of the Syllabus. The difference between good and bad answers generally lay in the quality of the analysis and application.
37. This examination is on, inter alia, "Civil Procedure" and the Question did ask the candidates to "... set out in brief the procedure for each means of enforcement proposed ..." so some candidates could have done better if they had made direct/more reference to The Rules of the High Court as opposed to The High Court Ordinance although the latter is the enabling statute.

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