

**THE LAW SOCIETY OF SCOTLAND
EXAMINATIONS**

PROCEDURE

Wednesday 26 July 2023

**8.30am – 11.30am
(4 hours)**

Candidates should attempt FIVE questions only.

Reference to Statutory Authority is expected in all questions attempted.

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Question 1

Several years ago, Jenny underwent surgery for removal of a pre-cancerous growth. The growth was not entirely excised and a cancerous growth formed. Jenny had to undergo major surgery to have the cancerous growth removed. Jenny is now cured but she has obtained a report expressing the view that the failure to completely remove the pre-cancerous growth was negligent. She has been advised to raise an action for damages for personal injuries against the NHS Trust in the Sheriff Court.

- a) What Chapter of the Ordinary Cause rules contains the procedural rules relative to personal injury actions?
- b) What form should be used for the Initial Writ?
- c) If defences were lodged by the NHS Trust on the date of this exam, when would the adjustment period be likely to end, and within what period would a proof be likely to take place?
- d) If the NHS Trust, by reason of an administrative error, failed to lodge Defences on time and Jenny obtained decree in absence, what steps could the Trust take to try to remedy its error and defend the action?
- e) During the course of the action, Jenny discovers that, rather than being completely cured, there is a 30% chance of the cancer returning. She is reluctant to settle the action on a full and final basis because, if the cancer does return, she may need a lot of extra treatment and incur further medical costs. Is there anything that can be done to alleviate her concern?
- f) In due course, the NHS Trust admits liability. Jenny needs money to undertake modifications to her house as a result of disabilities arising from her treatment. The cost of the modifications is relatively small as against the overall sum she is likely to be ultimately awarded in damages. Is there anything that can be done to enable Jenny to get some money from the Trust prior to the ultimate determination of the action at proof?

Question 2

- a) Explain the difference between preliminary pleas in law and pleas on the merits.
- b) What is the appropriate preliminary plea for a defender to take where he or she considers that they are not subject to the Scottish court's jurisdiction?
- c) The court sustains the preliminary plea sought re question (b). What decree will the court pronounce in the defender's favour?
- d) What is the appropriate preliminary plea for a defender to take where he or she considers that there is another court or Tribunal which would be a more appropriate forum to determine the issue in dispute between the parties?
- e) Draft the preliminary plea that a defender would insert into his or her Defences if wishing to challenge the relevancy and specification of the pursuer's pleadings.

Question 3

You act for Jenny Brown who lives in Nairn. In June 2021 she was involved in a road traffic accident on the A9 near Inverness. There was another driver involved - Penny who lives in Glasgow. Jenny says that the accident was caused by Penny and there is evidence available that supports her position.

- a) If Jenny wished to raise an action for damages, in which Sheriff court or courts could she do so and on what basis?
- b) If the accident had taken place in June 2018, and an action was not raised until the date of this exam, what particular line of defence would be available and why?
- c) Once proceedings are raised, you discover that a key eye witness to the accident is about to emigrate to Hawaii in 3 months' time and may not be available as a witness at the Proof. What could be done to obtain the evidence of the witness before their departure?

Question 4

- a) Prior to every First Diet in the Sheriff Court which two documents must be lodged by the defence in every case?
- b) You are instructed by Paul who has an upcoming First Diet in the local Sheriff Court. He faces a number of charges. What steps must you take to properly represent his interests in respect of each charge at the First Diet?
 - i. Paul is charged with an assault upon Martin. Part of the evidence against him is a police interview which was recorded in which he admitted committing the offence. Paul advises that he admitted the offence because he was told by the police that if he did make the admission, he would be released from police custody.

- ii. Paul is charged with the theft of a motor vehicle. He states that he was not involved in the theft of the motor vehicle but that his identical twin called James was involved in the offence. Additionally, on the night that the offence was committed John was at home with his girlfriend Mary.
- iii. Paul is charged with an assault by shouting and swearing at David and threatening David that he Paul and his friend John would come to his house and seriously assault him. Paul accepts shouting these threats.
- iv. Paul is facing an allegation of sexual assault on a 35-year-old woman contrary to Section 3 of the Sexual Offences (Scotland) Act 2009. He advises you that he had met this woman in a nightclub and thereafter they had gone to his motor vehicle and engaged enthusiastically in sexual activity which now forms the basis of the charge. He states that he has heard from his friend John that this woman regularly makes false accusations of sexual assault and indeed pled guilty to making a false allegation of sexual assault only last year in the local Sheriff Court.

Question 5

- a) You are consulted by Craig who has a summary complaint in a local Sheriff Court with a pleading diet next month.
 - i. He is charged with a contravention of the Road Traffic Act 1988 in that being the owner of a motor vehicle he caused or permitted his friend to drive the motor vehicle without insurance. He advises that the motor vehicle had been sold by him to a third party about three weeks before the date when this offence is alleged to have occurred. He cannot remember the name of the person to whom he sold the vehicle.
 - ii. He is also charged with an assault upon a man called Ian by striking him to the face. He advises that he did strike Ian but this was because Ian had struck him with a knife on the body and indeed the knife had cut through the very jacket that he was wearing at the meeting with you today. The incident occurred in the presence of Craig's wife, Lynda.
 - iii. He is charged with dangerous driving whereby he lost control of his motor vehicle and skidded off the road and into collision with a tree. He states that the vehicle skidded off the road because of the presence of oil on the road surface. He has dash-cam footage of the incident as it occurred. There was a passenger in the car, his friend Harry, who gave a statement and signed it in the presence of the police officers who attended. He is worried however that Harry has now gone backpacking in Australia and cannot be traced.

What pleas should be tendered on Craig's behalf and what further steps, if any, need to be taken prior to the trial to properly represent Craig?

- b) You are consulted by Max. He has represented himself in a trial at the Sheriff Court and been found guilty and fined. He states the Procurator Fiscal said to him on leaving the Court he intended to appeal the sentence. Max is worried it is not yet 'all over.'

Advise Max as to any grounds of appeal the Procurator Fiscal may have and any relevant time limits.

Question 6

- a) You are consulted by Fraser who is in custody and who has no previous convictions. He is charged with assaulting his partner Ann. When you speak with the Procurator Fiscal, the Procurator Fiscal advises that they are agreeable to him being admitted to bail on the 'standard conditions' with a special bail condition not to contact Ann directly or indirectly and to reside at a different address from her. Your client simply wants to go home.

- i. What are the standard conditions of bail?
- ii. What legal argument can you deploy to try and prevent the application of the additional bail condition referred to by the Procurator Fiscal?

Despite your best efforts, the additional condition of bail has been imposed. As your client leaves custody he asks you to apply to the Court to ask the Sheriff to change his mind.

- iv. Is it competent to ask the Sheriff to consider the matter again and if not, why not?
- v. If it is not competent to ask the Sheriff to consider the matter again is there any remedy that allows you to have the additional conditions removed?

A week later your client consults with you to advise that his partner has had a fall and is immobile. She is now currently residing alone and needs help on a daily basis. He wants to return home to help her and he advises that she wishes him home to help her. The trial is still three weeks away.

- vi. What steps, if any, can you take to facilitate his return home immediately?
- vii. What would be the legal basis for taking this step?

- b) You are consulted in your office by Julie. She has attended Court at the local Justice of the Peace Court and has plead guilty to a minor breach of the peace. She does not currently work and receives benefits from Social Security of £70 per week. She has been fined £1000 and been given 30 days to pay the fine in full. Your client is worried that she simply does not have the means to pay the fine and wonders what can she do about the sentence that was imposed upon her.

Advise your client:

- i. Is there any right of appeal in relation to the sentence.
- ii. What is the method of appeal if it is applicable.
- iii. What is the time limit for any such applicable appeal.
- iv. If an appeal is to be marked what would be the grounds of appeal that you wish to advance.

END OF QUESTION PAPER