C A R I B B E A N E X A M I N A T I O N S C O U N C I L

REPORT ON CANDIDATES' WORK IN THE CARIBBEAN ADVANCED PROFICIENCY EXAMINATION®

MAY/JUNE 2013

LAW

GENERAL COMMENTS

The total number of candidates writing the CAPE LAW examination, in both units, continues to increase. In 2013 while the number of candidates sitting Unit 1 remained consistent, the number sitting Unit 2 increased from 815 (2012) to 1118 (2013). In both units, 85 per cent of the candidates obtained Grades I–V.

The examinations for each unit consisted of the following papers:

- Paper 01 — Multiple-Choice items
- Paper 02 — Extended Response items
- Paper 031 — School-Based Assessment (SBA)
- Paper 032 — Alternative to SBA

Paper 01 comprised 45 compulsory multiple-choice questions, 15 based on each module. The score on this paper contributed 30 per cent to candidates' overall score. This year, the mean on Paper 01 was 51 per cent for Unit 1 and 55 per cent for Unit 2.

Paper 02 comprised six essay or problem-type questions (two based on each module). Candidates were required to answer a total of three questions, one on each module. The score on Paper 02 contributed 50 per cent to candidates' overall score. For Paper 02, the mean was 48.22 for Unit 1 and 42.82 per cent for Unit 2.

There were some weaknesses in areas of elementary principles of law which indicated a lack of awareness of basic principles. Many candidates demonstrated an inability to adequately address problem questions: answers were poorly constructed and generally disorganized. Candidates should be reminded to utilize an answer plan to assist them in producing lucid responses thus improving their chances of gaining points awarded for coherence. Possible mock trials can be used to depict application of the relevant law to the facts of the scenario given. This would enhance the candidates' understanding and better equip them with the ability to transfer this understanding when answering examination questions.

It is strongly recommended that the following formats for answering questions be taught: FILAC (**F –** Facts, **I –** Issues, **L –** law, **A –** Application of law to facts, **C –** Conclusion) or IRAC (I – issues, R – Relevant Law, A – Application of law to facts, C – Conclusion). If either of the formats is followed, answers will be more structured, and candidates would be able to address the issues as required by the questions.

Teachers and candidates are encouraged to carefully read the exemplars posted on the website, and to use them as models for answering questions.

DETAILED COMMENTS

UNIT 1 – PUBLIC LAW

Paper 02 – Extended Responses

Module 1: Caribbean Legal Systems

For this module, Question 1 was more popular than Question 2. Approximately 63 per cent of candidates responded to Question 1.

Question 1

Part (a) required candidates to describe the hierarchy of the court system in a named Commonwealth Caribbean state showing how it facilitates the doctrine of judicial precedent. Candidates were expected to define the terms *judicial precedent* and *stare decisis* and show how the doctrine is applied within the hierarchical structure of the court system. They were also expected to point out the fact that in Commonwealth Caribbean states where the Privy Council is the final court of appeal, the decisions of that court are binding on the court of appeal and lower courts; whereas in Commonwealth Caribbean states where appeals to the Privy Council have been abolished, for example Guyana, Belize, Barbados, the decisions of the Privy Council are of persuasive value while decisions of the Caribbean Court of Justice are binding. Candidates were also expected to explain the terms *ratio decidendi* and *obiter dicta*. The mean on this question was 15.02 or 60 per cent.

The majority of candidates was able to answer this question adequately. There was good use of relevant legal references and examples to demonstrate their understanding of the doctrine of precedent. However, too many candidates ignored the fact that the question was a structured question comprising Parts (a) and (b) and chose to answer both parts as a single essay. Candidates need to recognize that the structured questions are geared towards assisting them in obtaining maximum marks in the questions.

Many candidates spent too much time on the discussion of the history of the Commonwealth Caribbean and its development which was irrelevant to the question. Some candidates were not aware of the structure of the courts in their own territory; others omitted certain courts or assigned the wrong duties to courts. Some candidates were also unclear about the territories that have the Caribbean Court of Justice (CCJ) as their final appellate court and those that have retained the Privy Council; other candidates were of the opinion that the juvenile, family, gun, and industrial courts form part of the formal court structure. A number of candidates also failed

to identify and define key terms such as *judicial precedent, stare decisis, ratio decidendi* and *obiter dictum.*

In some cases the answer structure was poor and candidates failed to express themselves in a cohesive or chronological manner, making valid points but failing to explain or complete their thoughts. Some answers were repetitive, demonstrating insufficient knowledge of the subject area. Many of the candidates failed to cite relevant cases and/or principles and some of those who made an attempt showed a lack of understanding of the principles. Another problem was that candidates cited cases that were not relevant to the question such as *NICS and AG, Hinds* v. *R, R* v. *R, R* v. *Phillips, R* v. *Thornton* among others. They also referred to many cases involving constitutional law as well as some fictitious cases.

A large number of candidates did well on Part (b) of the question. It required candidates to identify and explain two advantages and two disadvantages of judicial precedents. For maximum marks, candidates were required to be coherent in their discussion and to demonstrate an understanding of the impact and effect of judicial precedent. Generally, candidates who did not understand the term *judicial precedent* were not able to identify the advantages and disadvantages; some candidates simply repeated the incorrect information from Part (a) or discussed elaborate scenarios that were irrelevant and incorrect.

Question 2

Most candidates who selected this question performed very well on it. Generally, candidates demonstrated a good understanding and sound knowledge of the subject area. The mean for this question was 14.39 or approximately 60 per cent.

Most candidates were able to cite relevant cases and examples of the three rules of statutory interpretation. Good candidates were able to demonstrate their sound knowledge of the subject area and its application by accurately identifying the relevant rule to be applied to the case being decided by Justice Silas. However, many candidates were unclear about the definition of the different rules of statutory interpretation and this was reflected in the entire essay, for example many candidates tended to confuse the *Golden Rule* with the *Mischief Rule*. Some did not identify the different stages of the *Mischief Rule* that the judge would need to apply hence they were unable to obtain maximum points.

Some candidates spent a lot of time on unnecessary and irrelevant information. There were some candidates who failed to demonstrate an understanding of the *Golden Rule* and when the judge should apply this method. They seemed to confuse the legal with the biblical meaning of the *Golden Rule*. Some candidates wasted time repeating the facts of the question in their answers. There were candidates who chose to ignore the structured nature of the question by incorporating

their answers to Part (b) in Part (a) and vice versa. This resulted in them omitting other areas that were required by the question.

Module 2: Principles of Public Law

In this module, more candidates selected Question 3 than Question 4. Approximately 70 per cent of the candidates attempted Question 3.

Question 3

Part (a) required candidates to give a description of

- the role of Parliament in Commonwealth Caribbean constitutions for example, Parliament as the supreme law-making authority of the State; executive usually drawn from members of Parliament;
- the Doctrine of Parliamentary Sovereignty and how this is related to the Caribbean for example, Acts of Parliament must be obeyed; Parliament has full control of its internal proceedings;
- Constitutional Supremacy, for example, Acts of Parliament must conform to the constitution; Parliament must follow special procedures for amending the constitution; the courts can review Acts of Parliament for offending the constitution;
- the role of the courts in resolving the tension between Parliament and the constitution, for example, the constitution gives the court the power to ensure its supremacy; judicial review as the mechanism by which the courts control Acts of Parliament.

Generally, candidates demonstrated an understanding of the concepts: *Constitution, Parliament,* and *Constitutional Supremacy* referring to *Hinds* v. *R* and *Parliamentary Sovereignty*. Many candidates however referred to other cases for example, *Maharaj* v. *AG* and *Thomas* v. *AG* with incorrect application of the principles, indicating a general lack of understanding of the cases and their importance to public law. There were also candidates who discussed separation of powers which was irrelevant to this question. Some also combined Parts (a) and (b), making it difficult to distinguish the sections.

In Part (b), candidates were expected to briefly explain the role and function of the public service in Commonwealth Caribbean states, for example, necessary for effective governance. They were also required to state the methods by which public servants are protected under the constitution, for example, use of service commissions, provisions relating to appointment, discipline, removal and security of tenure. In addition, candidates were asked to explain the ways by which the courts have provided additional protection, for example, judicial review applications, removal of public servants only for reasonable cause, ensuring that the provisions of the constitutions are

followed, and the application of principles of natural justice to discipline and termination of employment of public servants.

Many candidates demonstrated a lack of understanding of the term *public servant* defining a public servant as 'the public, civilian or ordinary citizen'. Some candidates also failed to demonstrate an understanding of the role of a public servant. Many candidates interpreted *protection* to mean police protection and other types of protection. They spoke mainly of citizens and citizens' rights protected by the constitution, the Ombudsman protecting the rights of public servants and citizens, the Bill of Rights or the constitution providing protection and some repeated their answer from Part (a). Few candidates displayed knowledge of the existence of service commissions and their functions. However, some candidates discussed the Public Service Commission, and also referred to the Judicial Service Commission and trade unions.

Question 4

Part (a) required definitions of the terms *judicial review*, *locus standi* and a discussion of factors such as the merits of the case, the importance of the issue, the importance of vindicating the rule of law, the likely absence of respective challenges, and the nature of the breach of duty against which relief was sought. However, many candidates misunderstood the question and confused *locus standi* with *stare decisis*. Several of them showed a lack of knowledge and understanding of the factors taken into consideration by the courts in determining *locus standi*. Instead, they discussed the grounds for judicial review and could not gain many marks as the question did not require this.

Part (b) was an application question based on grounds for judicial review, and it required candidates to apply the facts to the principles of law and advise Bill on any grounds that he may have for judicial review, for example, natural justice, breach of fundamental rights, and bias. Most were able to identify the issues and cite relevant cases for example, *Maharaj* v. *AG*, *Ridge* v. *Baldwin*, *Mc Gill* v. *Porter*, and advise Bill adequately. There were however, some candidates who mentioned natural justice but were unable to explain the law and consequently did not score many marks. Few candidates referred to *Reese* v. *Crane*. There were some candidates who discussed the role and function of a jury which was unrelated to this question.

Module 3: Criminal Law

For this module, Question 6 was more popular, with approximately 54 per cent of the candidates responding to it. The mean for Question 5 was 13.37 or 53 per cent while that for Question 6 was 14.07 or 56 per cent.

Question 5

Part (a) was an application question requiring knowledge and application of the principles of law relevant to assault and rape. The *mens rea* of rape was generally poorly discussed. Candidates failed to discuss the fact that recklessness is also an element of the *mens rea*. Those students who discussed *mens rea* looked at intention and recklessness.

Some candidates defined assault as the intent to cause injury; however, mere assault does not require such an intent. Most candidates did not go on to explain that the victim must apprehend immediate unlawful violence which is an important element in the *mens rea* of assault. Some did not distinguish between *an assault* and *a battery*; they defined an assault as 'the actual infliction of force on a person'. Some candidates concluded that the rape was the assault instead of the victim apprehending immediate personal violence by the mere pointing of the gun. Few candidates identified recklessness as an adequate *mens rea* for assault.

Generally, candidates showed limited understanding of the defence of intoxication. Some referred to intoxication as an element of *mens rea* instead of a defence to crimes of specific intent; most did not recognize that voluntary intoxication would not be a defence to rape and assault as they are crimes of basic intent. The concept of prior fault was never mentioned as discussed in the case of *R* v. *Majewski*.

The application of case law was not adequately treated; candidates cited cases but did not apply the principles stated therein correctly, for example, *R* v. *Tandy* was often cited as a case where the defence of diminished responsibility was successfully raised. In fact, the opposite is true. The defendant was convicted of murder because the defence failed. The case can be cited but it must be noted that the defence failed and the reasons for this must be provided.

For Part (b), many candidates demonstrated a misunderstanding of the case of *R* v. *R* and its applicability to the marriage scenario given in the question. Candidates often failed to indicate the jurisdiction to which they referred when discussing the relevant acts and often misunderstood the act.

Model Answer

Question 5

(a) The issues arising from the question are whether Brian can be held criminally liable for the crimes of:

- Assault
- Rape

Rape is defined as unlawful sexual intercourse with a woman/another person whether by fear, force or fraud and without the victim's consent. The defendant must have knowledge that the victim did not consent or was reckless as to whether the victim consented or not. (*Candidates must check the specific section in their statute that defines rape as this varies across jurisdictions*.)

In order for Brian to be held liable for rape the *mens rea* and the *actus reus* must coincide. The *actus reus* constitutes two key elements: penetration of the victim by the defendant and lack of consent by the defendant. The prosecution has the responsibility for proving these elements. Penetration is complete even if it is not full penetration. The slightest penetration will suffice. Penetration is also treated as a continuing act. In *Kaitamaki* v. *R*, the defendant broke into a young woman's flat and twice raped her, his defence was that at the time he penetrated her, he thought she was consenting, however when he became aware that she was not consenting he did not withdraw. The court held that sexual intercourse comes into existence upon penetration and ends only on withdrawal. Therefore, it is still considered as penetration even if there was no fresh penetration. From the question, it is said that Brian had sexual intercourse with Martha. It can therefore be concluded that Brian in fact penetrated Martha.

The second element of the *actus reus* of rape is the lack of consent from the victim. Consent must be real and not obtained through fear, force or fraud. In *R* v. *Olugboja*, the defendant, who offered the victim a ride home from a disco, took her to his home instead. The defendant turned off the lights and told the victim to take off her trousers. She was crying and complied out of fear and did not resist, struggle or scream. The defendant was still convicted of rape. The court held that there is a difference between consent and submission, and even though every consent involves submission, it by no means follows that mere submission involves consent. The question presented states that Brian entered the guest room and pointed the gun at Martha when she resisted having sexual intercourse with him and then had sexual intercourse with her. It can be argued that Martha submitted out of fear and subsequent consent was not real. Martha's resistance also demonstrates a

lack of consent. It can therefore be concluded that Brian had sexual intercourse with Martha without her consent.

As it relates to the *mens rea* for rape, Brian must have known that Martha did not consent or was reckless as to whether Martha did not consent or was reckless as to whether Martha consented. The question tells us that Martha removed herself to the guest room and tells Brian that the relationship is over. The question also tells us that Martha resisted having sexual intercourse and that Brian pointed a gun at her when she resisted. This provides evidence to argue that Brian did have knowledge that Martha did not consent and thus used force to gain consent. The *actus reus* and *mens rea* for rape is thus satisfied.

Brian could however raise the defence of intoxication from the fact that at the time he was drunk. In *DPP* v. *Majewski*, the defendant had taken a substantial quantity of drug and then went to a pub and had a drink. He assaulted a police officer and claimed he had no recollection of the events due to his intoxication and thus argued that he lacked the *mens rea* of the offences due to his intoxicated state. The court held that the crime was one of basic intent and therefore his intoxication could not be relied on as a defence. A crime of basic intent is one that requires a *mens rea* less than intention. Rape is a crime of basic intent as it also has the *mens rea* of recklessness.

Following the decision in *DPP* v. *Majewski*, voluntary intoxication would not be a defence to a crime of basic intent. Therefore, if Brian's defence was voluntary intoxication, he could not rely on intoxication as a defence and would be liable for rape.

Brian is also charged with assault. An assault is an act by the defendant which causes the victim to reasonably apprehend immediate and unlawful personal violence. A mere threat is sufficient to satisfy the *actus reus*. The defendant must also have intended to cause the victim to apprehend immediate and unlawful violence or was reckless whether such apprehension was caused. The defendant's recklessness is determined subjectively as decided in *R* v. *G* and *R* v. *Cunningham;* that is the defendant must actually foresee the risk of causing apprehension of violence. In *Logdon* v. *DPP*, the defendant pointed an imitation gun at a woman. The woman was terrified and the defendant then told her it was not real. The court held that an assault had been committed as the victim apprehended immediate and unlawful personal violence and the defendant was reckless as to whether she would apprehend such violence.

Brian pointing a gun at Martha would be sufficient to cause her to apprehend immediate and unlawful personal violence. Also, Brian pointed the gun at Martha after she resisted having sexual intercourse. It can be argued that Brian intended to cause Martha to

become fearful and submit to having sexual intercourse with him. Brian therefore intended to cause Martha to apprehend immediate and unlawful personal violence or at the least, was reckless as he must have foreseen the risk of causing such apprehension.

The discussion relating to intoxication above would also apply to the charge of assault as assault is also a crime of basic intent and therefore voluntary intoxication would not be a defence to assault. However, if Brian was involuntarily intoxicated he could successfully plea the defence and avoid liability for the offence.

(b) Had Brian and Martha been married, the advice would be different. In *R* v. *R*, the House of Lords held that a man could rape his wife if

(i) they have been separated
(ii) there exists a separation agreement in writing between the spouses
(iii) there are proceedings for the dissolution of the marriage or for a decree nisi
(iv) there is an order or injunction for non-cohabitation or non-molestation.

In some jurisdictions, this has been codified in statute, for example, Section 4 of the Sexual Offences Act of Trinidad and Tobago and Section 5 of the Sexual Offences Act of Jamaica. From the facts of the question, Brian and Martha would not have satisfied any of the four circumstances outlined in *R* v. *R* before a husband can be liable for rape of his wife. If married therefore, Brian would not have been liable for the rape of Martha.

Question 6

Generally, candidates answered Part (a) of this question better than Question 5 and a number received full marks. However, some candidates dealt inadequately with the issue of criminal liability for omission to act; it was treated as transferred malice, lack of *mens rea*, recklessness, or strict liability. This clearly shows an inability to differentiate the *actus reus* from the *mens rea*. The question required a discussion of omission at common law but some candidates were unable to distinguish between common law and statute, and as such answers in respect of statutory omission to act were also provided. Some candidates confused omission (relating to the *actus reus*) with the tort of negligence and cited examples of negligence as authority for criminal liability omission.

For Part (b), candidates' discussion of provocation often revealed failure to grasp the concept. The difficulty was even greater with diminished responsibility. Many confused the defence with insanity, automatism, intoxication or the Tort of Negligence. While diminished responsibility is an abnormality of the mind (partial insanity) which may be caused by an inherent disease, unlike insanity, it is not a disease of the mind. Some candidates also failed to point out that

diminished responsibility is a defence to murder in certain situations, while automatism is a denial of the *actus reus* and a general defence. Even though the question clearly required candidates to make reference to cases or examples, some candidates lost marks as they failed to provide case law or examples to support their response.

Paper 032 – Alternative to School Based Assessment (SBA)

The number of candidates who sit this paper is showing an increase. This year, 20 candidates sat this paper for Unit 1 compared with four in 2012 while 23 sat the examination for Unit 2 compared with 14 in 2012. Candidate performance is also showing improvement as an increasing number of candidates earned more than 50 per cent of the total score.

Part (a) expected candidates to discuss and elaborate on the reasons the written constitution is the most important source of law in the Commonwealth Caribbean with the use of relevant cases clearly explained. In Part (b), candidates were expected to discuss equity and its development, importance, rights and remedies, with the use of maxims and relevant cases clearly explained.

Stronger candidates mentioned and elaborated on all points concerning the importance of the constitution, used relevant cases and maxims to explain their answer, demonstrated an excellent understanding of the constitution and equity, and were consistent and very coherent throughout.

Candidates needed to mention the reason equity came into being, the fact that it is based on the principles of natural justice and fairness, and used cases to support their answer. For the most part, answers were fairly coherent.

Some candidates answered Part (a) satisfactorily and Part (b) poorly. Some answers were more from a social than a legal perspective; too much time was spent focusing on human conduct and behaviour in relation to the rights of persons under the constitution. Candidates needed to mention cases in Part (a). In Part (b), candidates needed to explain the case cited and its relevance to equity.

UNIT 2 – PRIVATE LAW

Paper 02 – Extended Responses

Module 1: Tort

For this module, Question 2 was slightly more popular than Question 1. Fifty-three per cent of the candidates elected to do Question 2. The mean on Question 1 was 10.33 or 41 per cent while the mean on Question 2 was 53 per cent.

Question 1

In this question, candidates were required to identify the issues arising under the tort of Vicarious Liability, apply the relevant law to the facts and conclude whether Pete and Kallaloo Company were liable for the injury of Andy. Candidates were also expected to discuss whether the defence of contributory negligence was available to Pete and the Kallaloo Company to reduce any damages paid to Andy.

Most candidates were unable to identify all the important issues in order to obtain maximum points; many did not discuss negligence and vicarious liability in advising the company and Pete. Candidates, however, showed a good grasp of the elements of negligence such as duty of care, breach of duty, foreseeability and remoteness of damage but failed to apply the cases relevant to their discussion. Many candidates correctly identified the issue of express prohibition when addressing the sign placed in the company's vehicle; however, some discussed occupier's liability because of the sign, while others incorrectly referred to exclusion clauses which were not relevant to this question. In some instances, candidates confused employer's liability with vicarious liability; others did not understand the concept of *course of employment* and were unable to identify when a tort was committed in the course of employment. Many candidates showed an understanding of damages and the effect of contributory negligence in assessing damages.

Question 2

This question required candidates to apply their knowledge of defamation to a case. It required candidates to show a clear distinction between defamation and slander, to use decided cases to discuss whether the aggrieved person could succeed in a case of defamation against a newspaper and also to discuss any defence the newspaper may put forward.

Most candidates understood the question, were able to identify the issues and demonstrated a good understanding of the elements and types of defamation supported by the pertinent cases. However, more attention needs to be placed on the explanation of defences involving

defamation. Many candidates were unable to distinguish between qualified and absolute privilege. Overall, candidates did quite well in this question.

Module 2: Law of Contract

There was no clear preference for the two questions on this module, as approximately 50 per cent of candidates responded to each question. Question 4, however, had a higher mean (12.71 or 51 per cent) as against 10.45 or 42 per cent for Question 3.

Question 3

Part (a) required candidates to clearly explain any three methods by which a contract may be discharged, for example, performance, agreement, breach, frustration. Candidates were expected to discuss the relevant issues and cite appropriate cases in order to obtain maximum marks for this section.

Candidates showed limited understanding of what it means to discharge a contract and often confused discharge with the formation of a contract. Many candidates placed too much emphasis on the formation of a contract, revocation of a contract and pre-contractual terminology used for discharge. Candidates misinterpreted breach of contract, often confusing it with performance; revocation was confused with agreement. Some candidates were unable to clearly explain the ways in which a contract can be discharged and few candidates applied the relevant cases.

Part (b) required candidates to define the doctrine of *Privity of Contract* and explain the exceptions to the doctrine using decided cases to illustrate their answer.

Most candidates showed a basic understanding of the *Doctrine of Privity*, but a number of them failed to adequately develop the impact of exceptions to the doctrine. Candidates need to place greater emphasis on studying and applying the relevant case law.

Model Answer

Question 3

(a) Discharge of a contract brings a contract to an end. There are four ways to discharge a contract — by agreement, performance, breach or frustration.

Performance occurs when each party discharges his obligations under the contract precisely and completely. This has been illustrated by the well-known case of *Cutter* v.

Powell [*1795*]. Cutter agreed to serve as a second mate on a ship travelling from Kingston, Jamaica to Liverpool for the sum of 30 guineas. He died during the voyage. The court found that his widow was unable to claim the part of his wage relating to the period before his death because he had not fulfilled his whole contractual obligation. This rule has since been relaxed and in some instances substantial or partial performance would be acceptable: *Planche* v. *Colbum; Hoeing* v. *Issacs*.

Agreement is essential to the formation of a contract and since a contract is formed by agreement, it can be discharged by agreement. *Berry* v. *Berry [1929]* is a case in point where a party who agreed to discharge a contract was barred from suing because the contract was coming to an end.

A contract may also be discharged where a breach occurs. A breach of contract may arise for varied reasons such as non-performance or defective performance: *Hochester* v. *De La Tour*.

The final method of discharge is by frustration. A contract is frustrated where an unexpected or rather unanticipated event occurs which makes the performance of the contract impossible. *Krell* v. *Henry* [*1903*] is an excellent case in point since the room was leased for the sole purpose of viewing the coronation of Edward VII but the illness of the king cancelled the procession and the court held that the cancellation of the procession discharged the parties from their obligations under the contract.

(b) It can in fact be agreed that the *Doctrine of Privity* confers rights and obligations on none other than the parties to a contract. The basic rule in the *Doctrine of Privity* is found in the case of *Dunlop* v. *Selfridge* [*1915*] where the court held that Dunlop, the tyre manufacturer, could not sue a customer of Selfridge for selling below the agreed price, but the company to whom Dunlop sold tyres.

However, while it seems reasonable that persons who are not parties to a contract should not carry the burden of a contract, it often seems unfair that such persons cannot reap the benefits especially when the contract is made for their benefit. This can be seen in the case of *Tweedle* v. *Atkinson* where a man was not able to enforce a payment due to him under a contract even though the contract was made specifically for his benefit.

It should therefore be no surprise that the law eventually developed exceptions to the *Doctrine of Privity* and in this regard Freitel is correct in that, that is now only a general rule that the doctrine does not confer rights and obligations on third parties.

Statute has created several exceptions in law such as the *Married Women's Property Act*, which secures property for a woman after her husband's death in varied situations including employment, *The Contracts (Rights of Third Parties) Act, 1999*. Collateral contracts are another exception: *Shanklin Pier* v. *Detel* [*1951*].

The doctrine of agency is another exception as the party on whose behalf an agent acts has certain legal rights to take legal action in his own interest as the contract was made on his behalf. Another exception is where the person is a beneficiary under a Trust.

Other exceptions include:

- Remedies of contract
- Restrictive covenants

Question 4

Part (a) required candidates to explain two types of misrepresentation, using decided cases. Most candidates were able to clearly explain the types of misrepresentation and gave clear examples with decided cases.

Part (b) was an application question which in Section (i), required candidates to explain the issue — whether the exaggerated statement made by Jamen Ltd amounted to a misrepresentation in circumstances where Bolden Ltd sought independent advice. Most candidates accurately identified the issues in this section but few used cases to support their approach to the question and accordingly few got the marks for use of case. Candidates must be reminded that the authority for their legal position comes from case law or statute.

Part (b) (ii) proved to be more challenging to a number of candidates who were unable to establish whether a misrepresentation had been made and the type of misrepresentation made, if any.

Candidates need to take greater care with the use of grammar and spelling; there were too many misspelt legal terms and ordinary words that they should be able to spell. Candidates should take care to structure their sentences and essays logically. A significant number of candidates used incorrect terminology for the types of misrepresentation.

Model Answer

Question 4

(a) A misrepresentation is an untrue statement of fact made by one party to the contract to the other party, which, although not forming a term of the contract is an inducement. There are three kinds of misrepresentation, namely: fraudulent, negligent and innocent. Two types will be explained: fraudulent and negligent misrepresentation.

Fraudulent misrepresentation is false representation of a material fact which is made with the knowledge or belief that it is false. An element of dishonesty is required. In *Derry* v. *Peek*, a company advertised steam powered trams for persons to purchase shares at a time when animal powered trams were in use. Derry went on the assumption that the Department of Trade and Industry would grant the relevant permission. The permission was not granted; the company was wound up and the directors sued for fraud. The court held, amongst other things, that fraud is proven when it is shown that a false representation has been made knowingly.

Negligent misrepresentation is a false statement made by a person who had no reasonable grounds for believing the statement to be true or being reckless or careless as to whether or not the statement is true. In *Gasling* v. *Anderson [1972]*, Ms Gasling, a retired school mistress, entered negotiations for the purchase of three flats. Her agent in the negotiations represented that the garage would come with the flat with parking area. The sale went through. The planning permission was later refused. It was held that her agent made a negligent misrepresentation as he made a statement without reasonable grounds for believing it to be true. Ms Anderson was liable for the acts of her agent and had to pay damages.

On the other hand, innocent misrepresentation is a false statement made by a person who had reasonable grounds to believe that the statement was true, not only at the time it was made but also at the time when the contract was entered into. In *Oscar Chess Ltd* v. *Williams*, Williams bought a car from Oscar Chess Ltd. The claimants took Williams' car as part-exchange. Williams had described the car as a 1948 model and was allowed £290 on the car. It was later found to be a 1939 model. It was held that the contract could be set aside in equity for innocent misrepresentation.

(b) (i) Bolden Ltd purchased a mine from Jamen Ltd. Jamen Ltd gave exaggerated statements regarding the earning capacity of the mine. However, Bolden Ltd also had the mine checked by its own expert agents. Six months later Bolden Ltd found that the statements made by Jamen Ltd had been inaccurate and sought to rescind the contract.

On the facts stated, in order to rescind the contract Bolden Ltd would have to establish fraudulent or negligent misrepresentation on the part of Jamen Ltd and to show that the fraudulent misrepresentation induced Bolden Ltd to enter into the contract.

The case of *Attwood* v. *Small* (1838) is instructive. In that case, the purchaser of a mine elected to verify exaggerated (but not fraudulent) statements of its earnings by commissioning a report from its agents. This failed to reveal the defects in the mine. It was held that he could not rescind the contract because he relied on the report not the statement.

Bolden Ltd is therefore advised that based on the aforementioned, it may not be able to rescind the contract with Jamen Ltd and should therefore seek to take action against its own expert agents for negligent misrepresentation as illustrated in the case of *Headly Bryne* v. *Heller and Partners Ltd [1963*].

In the *Headly Bryne* case, the appellants were advertising agents and the respondents were merchant bankers. The appellants had a client called Easipower Ltd. The appellants represented Easipower as having good credit worthiness and relying on this, the appellants placed orders for advertising time and space for Easipower Ltd. Easipower went into liquidation and the appellants lost over £17,000. It was held by the court that but for the respondents disclaimer, they would have been liable.

It may therefore be a viable option for Bolden Ltd to sue the expert agents and should there be no disclaimer, it may be successful.

(b) (ii) Fraudulent misrepresentation requires an element of dishonesty for the party to succeed against the maker of the statement. On the facts there appears to be no evidence of this and accordingly the exaggerated statements would amount to a mere puff unless it can be proven that they were made knowingly and carelessly. It is submitted that had Bolden not sought advice from its own expert agents, it may have been able to take legal action to rescind the contract with Jamen Ltd and further investigation may have confirmed whether the basis of the suit would be fraudulent or negligent misrepresentation.

Module 3: Real Property

The questions testing this module had the lowest means on the paper. The mean for Question 5 was 9.71 or 39 per cent and that for Question 6 was 7.89 or 32 per cent. Question 5 was more popular as 65 per cent of the candidates elected to answer it.

Question 5

This question invited candidates to describe the characteristics of easements and apply the requirements for acquisition of an easement by presumed grant (prescription) to a problem type question.

Part (a) was relatively straightforward; however, many candidates found it difficult to cite relevant cases to support the requirements for a valid easement. Capable candidates outlined cases including: *Re: Ellenborough Park (1955), Voice* v. *Bell (1993), Hill* v. *Tupper (1861-73), Copeland* v. *Greenhalf (1952), and London and Blenheim Estates Ltd* v. *Ladbroke Retail Parks Ltd (1993).*

Part (b) required candidates to make a systematic examination of the facts and to outline with appropriate proof whether there was acquisition of an easement by prescription.

Acquisition by Prescription is based on acquiescence by the servient owner in allowing somebody to exercise what amounts to an easement over his land for a long time without doing anything to stop him (*Dalton* v. *Angus*). The requirements for prescription are that the long enjoyment must be:

(a) As of right: The enjoyment must not be by force, in secret or by permission (*nec vi, nec clam, nec precario*).

(b) Continuous: This requirement does not necessarily demand that the use be non-stop or continuous on a 24-hour basis, rather, the degree of continuity needed depends on the type of easement claimed.

(c) In fee simple: The user cannot ripen into an easement unless it is by or on behalf of a fee simple against another fee simple owner.

Most candidates were able to define an easement; however, most were unable to apply the legal principles to the facts of the problem. The majority were not able to develop a logical, well-developed response and therefore were not successful in earning scores in the higher ranges. Again, many candidates failed to support their responses with relevant cases. Few candidates cited relevant cases including: *Liverpool Corporation* v. *Coghill (1918), Tehidy Minerals Ltd* v. *Norman (1971), Bridle* v. *Ruby (1989),* and *Mills* v. *Silver (1991).*

Many candidates incorrectly stated that an easement is given because there is no other means/route of getting to the ‘other’ property. Candidates from particular jurisdictions where their beaches are all public property, mistakenly focused on detailed discussions regarding right

of entry to beaches as acquisition of easements, which, unfortunately did not earn them any marks. Some candidates erroneously used the term *appurtenant* as a synonym for *nexus*. A few candidates were unable to differentiate between prescription and adverse possession. Some also missed a mark by not identifying that the right to pass over land must be the land of another person. Several candidates did not grasp the concept of which land owner was dominant and which was servient. Many candidates went into a discussion on the differences between easements and licences which was not relevant given the parameters of the question and thus failed to earn any marks. Several candidates erroneously listed the requirements for prescription as the requirements for easement.

Question 6

This question required that candidates apply legal rules relating to the implied covenants of the landlord/lessor and the consequences of breach of covenant by the tenant/lessee by analysing a fact scenario.

In Part (a) (i), few candidates outlined the implied covenants of the landlord (quiet enjoyment, non-derogation from grant, and fitness for habitation) with supporting cases that were relevant — *Browne* v. *Flower (1911), Aldin* v. *Latimer, Clark, Muirhead and Co (1894), Newman* v. *Real Estate Debenture Corporation Ltd (1940), Smith* v. *Marrable (1843), Wilson* v. *Finch-Hatton (1877), Ram* v. *Ramkissoon (1968), Kenny* v. *Preen (1962), Browne* v. *Flower (1911), Tapper* v. *Myrie (1968) and Port* v. *Griffith (1938).*

General observations regarding this part of the question were:

- Many candidates confused the landlord with the tenant when answering this section of the question and therefore gave the implied covenants of the tenant or lessee and not that of the landlord/lessor. Additionally, some candidates merely narrated the expressed covenants of the tenant/lessees as stated in the question to be that of the landlord.

- Candidates who were able to outline steps for the termination of the lease [Part a (ii)] explained forfeiture for breach of covenant, ejectment proceedings and notice to quit. Possible supporting cases included *Duplessis* v. *Moore (1993) and Patrick* v. *Beverly Gardens Development Co. Ltd (1974).*

In Part (b), few candidates were able to demonstrate that they had the requisite knowledge and understanding of the law to evaluate the given facts or possibly had not managed the examination time efficiently and therefore could not complete this section of the question. Capable candidates were able to outline the conditions under which a tenant may obtain relief from forfeiture — *Gill* v. *Lewis (1956).* Other competent candidates explained that the flood was

an *Act of God* and that the court was likely to consider prorating rent payments as being just and equitable, explaining that the landlord is liable for repairing conditions that seriously affect the property's habitability and that the landlord has insurable interest in the property and is most likely to have insured it against *Acts of God* such as flooding.

Many candidates, however, incorrectly interpreted the term *relief* to mean release from pain, anxiety and distress and said the tenant/lessor would get relief by being evicted. In law, this term means *recovery of rights, protection, redress or benefit likely to be obtained by an order or judgement of the court*. Due to this mistake, these candidates failed to earn marks for their responses. The term *damages* was interpreted as meaning harm or loss and not in its legal sense as *monetary compensation*.

Recommendations

Candidates are advised to

- manage their examination time wisely. Too often they short-changed themselves by writing long responses to their first and second questions and then either not completing questions attempted towards the end of the paper, or making half-hearted attempts at such responses.
- develop a good writing style fostered by reading legal texts and writings.
- indicate, where applicable or required, the jurisdiction to which a particular area of law applies. (Note, especially, those questions that require reference to 'a named Commonwealth Caribbean state'.)
- show greater care in complying with the instructions given when responding to examination questions. Candidates are reminded to
  - write on both sides of the paper and start each answer on a new page as instructed on the answer booklet.
  - note questions attempted in order of response, on the cover page of scripts.
  - record both candidate and centre numbers in the space provided on the cover page, and throughout the answer booklet where required.
- pay special attention to the use of the convention of written English.
- use clear, legible handwriting.

Teachers are encouraged to

- remind students of the FILAC or IRAC method of answering questions and assist them in using these methods.
- give students enough practice in answering questions that have overlapping areas.
- teach students to develop their answers logically and to be coherent in their writing.

- give students practice in analysing questions and responding carefully. Too many students tend to write all they know about a topic instead of identifying the relevant information and properly applying same to the issues identified in the questions.
- spend time explaining key terms so students get a clear understanding.
- make the topics more relevant by finding ways to link the content to the students' own experiences as well as current events.
- help students develop the skill of tailoring their responses to what is required in the question.
- remind students of the importance of knowing cases so they can use relevant ones.
- provide opportunities for students to practise answering past examination questions.

Further Comments

- Candidates wasted time restating the facts in the question or giving a whole treatise on information which they had but which was not relevant to the question.
- Grammar and spelling were generally poor among candidates.
- Teachers need to break down complex definitions given to students.
- Candidates are encouraged to utilize relevant case law or illustrations for the examinable area.

Paper 031 – School-Based Assessment (SBA)

This year's SBAs were generally satisfactorily done. There were a few areas found to be quite good such as the presentation of findings. However, students tend not to uphold the same standard in their discussion of the findings and their recommendations. Common shortcomings displayed by students are listed below, together with recommendations for improvement.

Increasingly, students are submitting SBA reports that are not in accordance with the requirements set out for conducting the research. Students must be instructed to use the stipulated guidelines as set out in the syllabus.

Further, we advise against using topics such as *Defamation, Negligence, Public and Private Nuisance* and *Murder*, as these topics in and of themselves are too broad and are not focused enough to meet the required standard outlined in the syllabus and within the stipulated word limit. Topics should be carefully chosen and narrowed (by using a thesis statement) to allow for adequate discussion and analysis.

Teachers are urged to ensure that the requirements are followed and the projects are vetted so that the students do not go off on tangents. As such, guidance can be obtained from pages 31 to 36 of the syllabus, which sets out in detail the requirements and format of the SBA.

Attention is drawn to the habit of some students to embark upon a lengthy introduction of the subject matter, and in some cases, acknowledgements, which are not a part of the scheme outlined in the syllabus and for which no marks are awarded.

Title and Table of Contents

Most assessment papers contained a title and a table of contents as stipulated in the syllabus. However, there were students who presented the project without a table of contents and others without a clearly stated title. Additionally, a few projects were based on topics that were too broad, vague or unrealistic for the students to actually formulate clear aims and objectives.
Project titles should be specific and suitable for detailed research.

Aims and Objectives

Most projects had clearly stated aims and objectives, which allowed the students to conduct focused research. However, some students presented aims and objectives that were unclear and others that were unrealistic. This often occurs when the topics are not specific, and as a result students are unable to identify the most suitable methodology for their project. This adversely affected the overall grade obtained by the students.

Also, some topics tended to be purely sociological or historical in nature and were not appropriate to discussion of the law. As a result, the research presented lacked clarity and relevance. Often, students cited laws which were not applicable to the local jurisdiction, or the scope of the research.

Aims and objectives should be specific, concise and appropriate for in-depth research.

Methodology

A majority of the students were able to distinguish between primary and secondary sources of data. However, a significant number of them still failed to properly select an appropriate sample and sample size. Students also failed to provide sufficient detail of the data collection methods used. Students did not justify the chosen method applied to the research. At times, the method(s) stated in the methodology was not reflected in the body of the research, for example, where the method of observation or interview was used.

It is recommended that students use a combination of both primary and secondary methods as this tends to allow for greater validity and reliability of their interpretation, analysis and conclusions. Also, students must justify why they are using the sources they selected and when

conducting an interview, they must state the name of the interviewee, date, time and place of interview/s. When using questionnaires students must state the sample size and sample location.

Findings

Several students did an excellent job in recording their findings. This was evident in projects that had clearly stated aims and objectives and applied the relevant methodology.

Some students failed to present the legal findings they intended to rely on in their discussion. They only presented findings from the interview and/or the questionnaires. Also, in some projects students presented charts/diagrams without stating what they represented. Many did not apply the proper citation of their cases, and as such they are urged to take note of citation requirements.

Some students did not distinguish between the *Findings* and *Discussion of Findings*; but instead merged the two under the heading *Report* or *Literature Review*. This negatively affected the grades awarded, as examiners had to allot grades for the required headings based on the information provided.

It is recommended that students organize their project as set out in the syllabus and have a heading, *Presentation of Findings* which is separate from *Discussion of Findings*. Students should also present their findings based on the results of the questionnaires and/or interviews conducted and state clearly what each represents. Also, students should present the legal findings they intend to rely on in their discussions, for example, legislation, case law and statistics.

Discussion of Findings

The level of legal analysis required for this section was unsatisfactory overall. Whilst some students did excellent presentations of their findings, they failed to analyse and interpret the data.

Most students failed to identify the relevant law in the *Findings* and consequently, failed to interpret and analyse the appropriate legal principles in support of the stated aims and objectives.

Recommendation: Students should analyse and interpret both primary and secondary data collected to come to a conclusion based on their aims and objectives.

Students should also state the limitations whether it be in the legislation, case law, or agencies/ bodies.

Recommendations

A few students displayed knowledge of what was expected of a recommendation. However, there is room for great improvement in this area. Many students used the recommendations as a conclusion, only recapping what the project was about. A few others presented well-written recommendations but these were not supported by the findings of the research.

Students are reminded not to use the recommendations as a conclusion, but should state what they are proposing based on their findings, for example, changes or improvements to be made to the legislation.

Recommendations should be plausible and supported by the relevant laws, where possible.

Bibliography

The vast majority of students were not able to properly cite secondary sources, including cases, journals, textbooks, and internet sources. It is to be noted that search engines such as Google.com, lawteacher.com/net, Wikipedia.com and Ask.com are not in and of themselves credible/proper reference sites.

Students and teachers are reminded that the syllabus contains properly cited reference materials to include texts and cases.

Communication

Overall, the use of the English language and level of communication displayed in the research projects was satisfactory.

Students should spend more time proofreading their projects and utilizing the dictionary and other spell check resources.

Word Limit

Some research projects were in excess of the word limit. It is recommended that the stipulation in the syllabus that students with projects in excess of the prescribed word limit be penalized, be enforced.

Recommendations

- Students' names recorded on the assignments and internal assessment forms must be consistent with the names at registration.
- Comments and marks by teachers are to be erased before SBAs are submitted as samples.
- Careful note must be taken of syllabus requirements to ensure compliance.

Recommended Methodology for Answering Questions

The following seven-point approach is recommended to students when answering questions, not only for the examinations, but also when preparing their assignments and as a general practice. Success is guaranteed from following these guidelines.

- Students must follow instructions. Responses should not be merged, for example, Part (a) must be answered separately from Part (b).
- Students must use language that is grammatically correct, formal and impersonal, not general, vague or colloquial.
- Students are encouraged to use the IRAC format when answering problem-type questions.
- The conclusion should relate to the problem and should not be a fanciful construction that bears no relation to the facts, or that simply rewrites the facts.
- Students must support their responses with legal authority, namely:
  - Case Law
  - Statute
  - Legal writers
- Students must deal with issues and applicable law, refraining from restating the question, except in so far as a principle of law relates to stated facts. They should strive to answer the questions precisely.