Chartered Trading Standards Institute qualifications

# Examiners report

## Trading Standards Qualification Framework

## CSCATS: Law of Contract Examiners' Report November 2017

### General

46 students attempted the examination
11 Candidates achieved marks between 0-39%
21 Candidates achieved marks between 40-49%
6 Candidates achieved marks between 50-59%
6 Candidates achieved marks between 60-69%
2 Candidates achieved marks between 70-79%
The highest mark was 78%

Students generally seemed to find this a more difficult paper than others. Due to the nature of the subject, a background in Civil law helps. If this is not your background, it is advisable when sitting the paper to have attended the accredited course for Law of Contract by the Training Together Partnership.

Many of those who passed did so because they scored well on a couple of questions from sections B and C. However, a pass is a pass, so well done to those who made it through. Sections B and C therefore produced generally, better answers.

## Section A

Q1. Many thought the answer to this question lie in copying out the relevant parts of the Consumer Rights Act. As it is an open book exam, this was never going to be that easy. Whilst there may not be many cases that have reached the appellate courts to act as precedent in this area, the Act does state that digital goods can, in most instances, be treated as goods and thus old cases can be used to highlight examples. Some students gave very good practical examples and synopsis of the rights: all products - whether physical or digital - must meet the following standards:

Satisfactory quality: goods shouldn't be faulty or damaged when you receive them. You should ask what a reasonable person would consider satisfactory for the goods in question. For example, cheap-shop products won't be held to as high standards as luxury goods.

Fit for purpose: the goods should be fit for the purpose they are supplied for, as well as any specific purpose you made known to the retailer before you agreed to buy the goods.

As described: the goods supplied must match any description given to you, or any models or samples shown to you at the time of purchase. Most knew that if digital goods are sold as goods, such as a film on a cd, then consumers have the right to reject, which does not exist if they download a film.

Q2. This question was answered by all but a few, who remembered what a product was and used some relevant case law to highlight the points. Some used practical examples and also explained that a product can also be a component part of a complex product such as the motor in a washing machine. Hence blood can be a product, A and Others v National Blood Authority & Others [2001]. Or a dishwasher bottle as in Tesco Stores Ltd v Connor Frederick Pollard & Lorraine Ann Pollard [2006].

Q3. Most candidates understood the basics and quoted Nash v Inman. Most, but not all, Scottish candidates appreciated that the age of consent is 16 in Scotland, as stated in the Legal Capacity (Scotland) Act, as opposed to 18 in England and Wales. Better marks were awarded for a greater use of case law to expound on the principle of legal capacity, such as Doyle v White City and De Farncesco v Barnum. Many appreciated that those under the age of legal capacity could contract for necessaries. The examiner did find some spelling mistakes, however, there were no deductions of marks taken in these cases.

Q4. Most had a reasonable stab at this question; again marks were not accrued for merely copying out the relevant section from the Act, but giving relevant case law. Whilst some marks were awarded for descriptions of the case, the greater mark was given for the actual names. Examples used: the underpant case- Grant v Australian Knitting Mills, exploding coal- Wilson v Rickett Cockerill and hot water bottle- Priest v Last.

Q5. Most students recognised that one cannot contract for an illegal act and most did in fact state this. Generally achieving 2-3 marks. Most but not all highlighting Everet v Williams, or the highwayman case. Pearce and Another v Brooks AKA the prostitute case or for our Scottish students Barr v Crawford, was often quoted.

## Section B

Q6. Only 10 students answered this question and the marks varied from 0 to 18. Five of the ten gaining over half marks. There is liability under Contract, Tort/delict and Product liability.

The manufacturer will be liable under Tort/Delict as per Donaghue v Stevenson however, they must be negligent. If they take reasonable precautions then they should be OK. I expected the students to use the various aspects of case law in this area such as Watson v Buckley, Osbourne, Garrett & Co.[1940], Stennett v Hancock & Peters [1939], Smith v Littlewoods Organisation Ltd [1987], Daniels & Daniels v White & Tabard [1938].

The law of delict is similar to negligence. A delict is the act of a person that in a wrongful and culpable way, causes harm to another. There are five elements of a delict

- Act
- Wrongfulness
- Fault
- Causation
- Harm

In both cases delict or negligence damages are usually sought as compensation.

Under contract law only the parties to the contract have privity (unless there are rights provided under Contract Rights of Third Party Act 1999) hence only they can claim, there must be a breach either of statutory provisions; such as fitness for purpose, satisfactory quality or description under the CRA 2015 or common law provisions. Case law needs to be provided; Godley v Perry 1960 being a good example. The injured party must have privity and can then sue the person from whom they purchased it and liability then moves up the chain to the manufacturer in GB or person who first imported it. However, if any of the parties in the chain go out of business then liability ceases and someone is left with the bill, who may not, ultimately, be at fault. This could be the purchaser if the shop where they purchased the item has gone out of business.

So, whilst there are remedies under contract and tort, there are limitations.

On the other hand, when the student examines Product liability under Part 1 of the Consumer Protection Act 1987, the consumer needs to show that there is a defect. If there is and it has caused damage then the liability on the manufacturer is absolute and damages can be claimed for both damage to the person and property. However, the item itself cannot be claimed. This is because this will be covered in contract.
Damage covered by the Act includes:
Death
Personal Injury
Damage to Property must be private property not business use.
(over £275) This lower threshold applies only to personal property not personal injury. This £275 minimum takes in to account contributory negligence so if actual damage was £400 and the victim was found to be 50% contributorily negligent, then damages would be awarded of £200 i.e. below the threshold.

If the fault does not relate to the item sold, but it is a component part of something else. For example if the defect is in the thermostat of a tumble drier and all the manufacturer of the tumble drier has done is to incorporate the thermostat in to the assembly, then it will be the thermostat manufacturer who is at fault. The liability will extend to the manufacturer, who is in the EU or the first importer in to the EU.

A comprehensive answer will have case law to explain it such as Abouzaid v Mothercare 2001 or A and Others v National Blood Authority and Others [2001].

Liability is limited to 10 years after supply (Time limit starts when product is supplied not when manufactured) This has an implication for suppliers as records are normally kept (if at all) for 6 years being the normal time for liability under contract and tort.

Q7. The more popular question of the section B questions with 36 attempting it with the marks varied between zero and 25. Many recognised the requirements of this question and relevant case law, answering it competently. Students outlined the various elements of a contract, the first element to look at is was: there been an offer such as Carlill & Carbolic Smoke ball Company? The offer can take various forms but needs to be a positive act, as in Wilkie v London Passenger Transport Board. A request for information usually is not an offer: Clifton v Palumbo. When looking at counter offer, students expounded on the cases which were a counter offer and some compared them to those which were ruled on merely asking for more information. Hyde v Wrench [1840] which confirmed that a counter offer negates the original offer which can be contrasted with Stevenson v McLean (1880) ruled as a request for information.

Intention: often stated as an intention to create legal relations. Do the parties intend to be bound by a legal contract?

An explanation that this can be a grey area leading to contrasting decisions at various times, was provided by some students.

Social agreements are generally not legally binding. For example: a promise by a father to give extra pocket money to his child for doing well in exams. However, the courts have looked at this aspect of intention and ruled that in some cases there is none such as Coward v M.I.B (1963) and Balfour v Balfour (1919), whereas in others it can be found: Merrit v Merrit (1970). And Albert v MIB (1971).

Students may bring in practical examples where perhaps a social agreement is arranged for a lift to work which compares with Coward and MIB. By contrast some councils only offer a car parking space if the workers share a car and offer the intranet or notice board at work as a place to recruit other people to share. This would tend towards a formal agreement similar to Albert v MIB [1971].

In terms of acceptance most realised that the general rule is that the offeror must receive the acceptance before it is effective: Entores v Miles Far East Corporation and it has to be communicated to the other party Foakes v Beer. You can have agreement by conduct as in Brogden v Metropolitan Railway. Acceptance may be defined as an unconditional assent, communicated by the offeree to the offeror, to all terms of the offer, made with the intention of accepting.

Whether an acceptance has in fact occurred is ascertained objectively from the behaviour of the parties, including any correspondence that has passed between them Taylor v Allon, and Day Morris Associates v Voyce, ruled that the offeror can waive the need of communication of acceptance.

## Section C

Q8. 26 students attempted this question achieving marks from 3 to 21. One of the problems was that some students tacked between outlined problems in contract and then tort/delict and back again to contract.

It would have been better to analyse one area such as contract and then move on to the next topic and it would have helped students to attain better marks.

This scenario is similar in situation to Thornton v Shoe Lane Parking 1971, Many students quoted this and also that it hinges on where the contract was formed, as terms cannot be implied into a contract after this point, unless with the agreement of both parties, Olley v Marlbrough Court 1949.

A contracting party seeking to rely on an exemption clause to avoid or limit liability must show that the act complained of comes strictly within the terms of the clause. If it is in any way ambiguous then it will be interpreted against the party attempting to enforce it this is referred to as the contra proferentem rule.

As Pattie purchases the ticket in the car park but does not see the terms until after that point then I expected an argument that any subsequent exclusion clauses do not apply. The other aspect is that under The CRA 2015, negligence cannot be excluded from a

consumer contracts. 65 (1). A trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence. (2)Where a term of a consumer contract, or a consumer notice, purports to exclude or restrict a trader's liability for negligence, a person is not to be taken to have voluntarily accepted any risk merely because the person agreed to or knew about the term or notice. Other elements can be excluded but only those which are not deemed unfair. White v Warwick [1953].

A contract has been formed and using Hadley v Baxendale; the reasonable damages flowing from the breach can be claimed. However, there is also negligence/delict as a duty is owed to the users of the car park and I expect the students to look at this in respect of the injury and the resultant expenses racked up by Pattie.

If Pattie had been using the car park regularly then the terms could be imputed into the contract dependent upon the reasoning of the candidates as to why/why not, as Spurling v Bradshaw 1956. However, negligence for death or personal injury cannot be exempted.

Q9. Marks varied between 3 and 22 the main problem again being that students did not separate out CRA and CPA and confused the answers, as the rights and remedies are not that similar. The other negative aspect was the fact that quite a few did not separate the answer in to parts a and b.

Many students had the lady in the flat below suing the supplier of the faulty component Shodihatsu under contract, when there was no privity. A few also threw in due diligence defence cases for product liability and contract law; not really relevant. Perhaps had they looked at defences under product liability that would have been more productive.

Although the question asked for an analysis under part 1 of the Consumer Protection Act 1987 and the Laws of Contract many chose to give answers under Tort/delict. Marks cannot be attributed to answers that do not correspond to the question asked.

I expected the students to look at aspects of product liability and contract and highlight the pitfalls. For example, in contract, they can only sue those to whom they are contracted in this case Dahls, it would not be likely that Mrs Swiftarf could claim under contract law, but Arfur could claim under contract. As regards part 1 of the CPA then is there is a defect? I expected students to highlight what it was and the resultant consequences? I expected case law such as A and Others v National Blood Authority and Others [2001]. They also needed to demonstrate that the problem is in respect of a component and if the various businesses in the chain can show from whom they purchased the product, using receipts or invoices, then liability feeds up the chain. Liability last 10 years from supply so that the supply in 2013 is no problem to claiming under these provisions. They may try to demonstrate a state of the art defence, as Abouzaid v Mothercare. But if there is a defect then liability is absolute. Under CPA Mrs Swiftarf can show that the defect caused damage and can claim for her loss. Arfur can claim for all losses flowing from the breach apart from the cost of the machine itself. However, as it breaches contract law provisions he can claim under this for the cost of the washer.

There is a breach of contract under common law provisions and under the CRA s.9 as it could be not of satisfactory quality as in Wilson V Ricket Cockerell, 1954 or not fit for purpose s. 10 as Priest v Last 1903. Arfur can claim for breach of contract from Dahls damages naturally flowing from the breach, Hadley v Baxendale, but Mrs Swiftarf has no

privity as in Daniels & Daniels v White & Tabard [1938] 4 All ER 258 and therefore has no claim under contract. Under CRA Arfur cannot reject the washer as it is beyond the 30 days he can claim for the cost, which would be reduced by a percentage for wear and tear. He could also accept a replacement if he wishes.

I expected the students to translate the answer to cover Arfur, Mrs Swiftarf, Deadpool and Shodihatsu.

Q10. 29 students attempted this question, with marks ranged from 3 to 14. To make it easier for students they should have broken it down to its component parts, contract law, CPA and unfair terms. There is also an element of service in the contract, hence reasonable care and skill can be implied in to the contract under The CRA 2015 S. 10 provides that:

The contract is to be treated as including a term that the goods are reasonably fit for that purpose, whether or not that is a purpose for which goods of that kind are usually supplied if, before the contract is made: the consumer makes known to the trader, or credit broker, (expressly or by implication) any particular purpose for which the consumer is contracting for the goods. This would indicate that the goods are not fit for their particular purpose. Was Ivanta shown the fibre content before her purchase? If so then it could be that she has accepted the goods with that description of content, Griffiths v Peter Conway Ltd [1939]?

It could be argued that the onesie is not of satisfactory quality ."Goods are of a satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all other relevant circumstances. There is a further definition under this section which I expect the student to allude to in their answers, the term implied does not extend to any matter making the quality of the goods unsatisfactory-

a) which is specifically drawn to the buyer's attention before the contract is made,

b) where the buyer examines the goods before the contract is made, which that examination ought to reveal, or

c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample." Grant v Australian Knitting Mills [1936].
But it does not mention that because they are reduced because of a specific fault that exempts liability for any other. This would be seen as an unfair term under the CRA. Under section 11 CRA "Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description." Beale v Taylor 1967.

There are common law remedies such as the right to rejection and also remedies under CRA, other than rejection, although in this instance a reduction would be of no use but a replacement would be OK if made of the correct fabric content. I expected the students to outline the various options and what Ivanta would expect in damages.

Under part 4A of CPRs 27A.—(1) A consumer has a right to redress under this Part if—the consumer entered into a contract with a trader for the sale or supply of a product by the trader (a “business to consumer contract”), and they engaged in a prohibited practice, or a misleading action, which under regulation 5 of the CPRs includes aspects of composition.

In terms of remedy under the CRA Ivanta has a right to reject the goods within 30 days or a replacement or repair. Repair is not possible leaving the other two. Under part 4A of the CPRs she can ask for a reduction in price up to the whole amount for a very serious breach. In this case it would seem that is reasonable as she cannot wear it.

Students will have needed to outline which remedy they would advise, as Ivanta cannot claim for both. This should have been an easy question for many. Again, students did not read the question carefully and answer what was asked. Stating a list of consumer rights will not provide marks. The examiner expected you to apply and answer the scenario.