

Specialist Accreditation Scheme



2020 Personal Injury Assessment Requirements



The 2020 Personal Injury Assessment Requirements should be read in conjunction with the 2020 Guide to Application and Assessment. These documents will assist practitioners in understanding and preparing for the assessment process.

Please note that this document has been produced for all Personal Injury Law candidates. References to clients include claimant/plaintiff and defendant/insurers.

Included are:

- the performance standards which are the benchmark for competent practice in this area
- the performance criteria which form the basis for assessment
- the list of the core skills and knowledge areas which underpin the performance standard to assist with assessment preparation, and
- The methods and dates of assessment which applicants are required to undertake.



Performance standards

The standard of an Accredited Specialist

The standard of an Accredited Specialist in Personal Injury Law is that of a 'specially competent practitioner' in the core skills and practical capabilities in their selected area of practice, as assessed against the spectrum of capability of all practitioners in that area of practice. This standard is to be distinguished from the idea that the Scheme requires the highest technical legal knowledge across all aspects of the selected area of practice.

This is the 'performance standard' referred to in this document.

Core skills and knowledge areas

In accordance with the performance standard, candidates seeking Specialist Accreditation in Personal Injury should be able to demonstrate:

- knowledge of the relevant law, procedures and ethical considerations and
- the core skills.

Core skills

1. Taking instructions and preliminary investigations

1.1 Conducting cases efficiently, effectively and expeditiously

The specialist Personal Injury lawyer:

- takes the initiative to promote the client's case
- is commercially responsible and guards against wasteful procedures and over-servicing
- develops and maintains efficient and disciplined office procedures, including a diary system for time limitations
- is sympathetic, objective, professional and courteous.

1.2 Helping the client to gain a realistic understanding of the case

The specialist Personal Injury lawyer:

- Advises on costs involved including party-party, regulated and solicitor-client costs and provides a complying fee agreement
- discusses and enters into a fee agreement
- advises clients of any applicable restrictions on recovery of costs
- provides realistic advice in relation to the likely outcome of the claim, including liability and damages issues and risks and



- advises client of the implications of verdict /settlement and the impact settlement may have on Centrelink and/or Workers Compensation entitlements, NDIS.

1.3 Understanding the legislative framework

The specialist Personal Injury Lawyer:

- Advises on any statutory benefits available under relevant legislation
- Discusses thresholds, caps and limitation periods
- Can articulate the most appropriate course for their client taking into account their client's individual circumstances
- Understands the policy objectives of the relevant legislation and is able to apply that understanding to their client's needs and advise on the most appropriate course of action
- Acts to secure and protect their client's statutory rights and entitlements within legislated timeframes.

2. Advice on prospects

2.1 Eliciting information from the client

The specialist Personal Injury lawyer:

- has the ability to communicate with clients of all walks of life to elicit all relevant details relating to liability, damages or compensation
- identifies available defences and considers admissions of liability, grounds for privilege, third party proceedings and cross claims and
- obtains relevant details of the claimant's pre-incident life, education, work history etc, the consequences of the injuries and the changes which the injuries have had on the client's life i.e. the development of a "before and after" picture of the client.

2.2 Obtaining information and evidence

2.2.1 Liability

The specialist Personal Injury lawyer:

- demonstrates knowledge of the appropriate sources e.g. police reports, clinical records
- obtains factual reports and interview transcripts
- takes statements from all relevant witnesses as expediently as possible
- where deemed appropriate, engages experts and ensures reports of experts comply with legal and procedural requirements, and
- where necessary attends the scene of the incident, as expediently as possible.



2.2.2 Medical evidence on injury – condition, cause and prognosis

The specialist Personal Injury lawyer:

- obtains clinical information from hospitals, the ambulance services, treating health practitioners and seeks opinion from appropriately qualified medico-legal experts;
- if necessary, conducts an investigation of previous clinical history;
- obtains details of the likely cost of any future treatment, therapy and care;
- is familiar with clinical terms, technology and the medical and other health practitioners who are available to give clinical and expert opinions and
- ensures that the experts address the important questions of evidence e.g. causation, prognosis, life expectancy

2.2.3 Evidence on injury - loss and damage

The specialist Personal Injury lawyer:

- when appropriate, obtains details of work history, income, ability, duties, prospects for promotion, redundancy and retirement, business growth and development, personnel records, professional qualifications and references, academic records, etc
- if necessary, engages and qualifies an appropriate expert to assess past and future economic loss and
- where appropriate, arranges surveillance of the claimant.

2.2.4 Additional facts/evidence

The specialist Personal Injury lawyer:

- uses initiative and a knowledge of formal and informal procedures including:
 - discovery before action searches and statutory mechanisms to obtain hospital and other government records
 - subpoenas to produce documents and
 - interlocutory proceedings e.g. discovery, interrogatories, notices to produce and notices to admit facts.



3. Litigation and dispute resolution

3.1 Assessing liability

The specialist Personal Injury lawyer:

- analyses the strengths and weaknesses of the client's case in the light of the available facts and the current law
- considers the identity of the correct respondent/defendant, the probable evidence of the opponents, expert reports, probable defences, the possibility of cross-claims and the likely availability, demeanor and credibility of all parties and witnesses
- assesses the likelihood of success, and
- certifies as to reasonable prospects of success where applicable.

3.2 Assessing compensation

The specialist Personal Injury lawyer:

- properly assesses all potential statutory entitlements and benefits
- adopts a realistic approach to the quantification of heads of damage and the calculation of entitlements
- considers questions of insurance and the other party's ability to pay
- evaluates the strength and extent of the clinical evidence, based on knowledge of clinical terminology and investigative procedures, and
- considers obligations and entitlements to receive National Disability Insurance Scheme (NDIS) support and assistance, social security and other rehabilitation services.

3.3 Determining the appropriate forum

When determining the appropriate forum the specialist Personal Injury lawyer applies the principles regarding:

- the nature and quantum of causes of action
- the appropriate jurisdiction and
- the advantages and disadvantages of various forums, including various methods of alternative dispute resolution.

3.4 Considering tactics

The specialist Personal Injury lawyer:

- determines when to pursue statutory entitlements
- when to commence, proceed with, defer or attempt to settle a claim
- if appropriate, uses any of the following to advance the client's position:
 - expedited hearings
 - split trials on liability and damages
 - interlocutory proceedings
 - proposals of settlement conferences or mediations
 - offers of compromise/Calderbank letters
 - requiring experts to be available for cross-examination
 - seeking agreement on the quantum of various heads of damage
 - choice of venue.

3.5 Advising the client on a course of action

The specialist Personal Injury lawyer:

- advises the client on possible courses of action, including alternative dispute resolution, need to compromise, settlement options and the likely duration, cost and outcome of litigation
- considers joining other parties to the proceedings and time limitations
- considers costs regulation and complies with duties to disclose involving costs
- remains objective and realistic and
- decides final strategy in consultation with the client.

4. Conducting personal injury cases

4.1 Preparation

The specialist Personal Injury lawyer:

- accurately prepares all necessary documentation in accordance with the rules of the forum, common law and statutory provisions
- ensures that documents reflect the client's instructions or the terms of any agreement
- draws pleadings which identify all relevant parties and disclose proper causes of action, heads of damage or defences, and
- if required, prepares documents for the appointment of tutor/next friend.

4.2 Briefing counsel

The specialist Personal Injury lawyer:

- considers whether briefing counsel is appropriate
- briefs counsel skilled in the appropriate field
- takes an active role in liaison between the client and counsel
- monitors the presentation of the case, where appropriately undertaken by counsel
- does not abdicate to counsel responsibility for preparing the case and advising the client
scrutinises counsel's fee agreement and seeks consent and acknowledgement from their client to engage counsel
- considers counsel's views and advice on prospects, strategy and preparations.

4.3 Reviewing evidence

The specialist Personal Injury lawyer:

- reviews the file to ensure the preservation of evidence and updates evidence of loss
- considers the opponent's material and
- reviews which reports will be used and which experts should be called as witnesses or be required for cross-examination and calls on CCTV footage where applicable.

4.4 Damages

The specialist Personal Injury lawyer:

- applies common law principles, statutory provisions and comparable verdicts
- considers and calculates the various heads of damage in relation to future loss, including loss of income, medical, therapy and rehabilitation costs, the value of care provided voluntarily to and by the claimant and/or commercially (as appropriate), the recurring cost of special equipment, home and transport modifications
- applies the appropriate discount rates and actuarial tables and takes into account adverse contingencies, the vicissitudes of life and life expectancy, and deferrals of loss
- obtains particulars of and calculates the total of out-of-pocket expenses
- considers whether out-of-pocket expenses are reasonable and necessary and arise out of the injury
- applies relevant and up to date principles and statutory provisions to the calculation of all heads of damage
- considers potential deductions/recoveries by the Department of Human Services (Medicare and Centrelink), NDIS, private health insurers and otherwise, and
- considers and calculates entitlement to interest.



4.5 Negotiating settlements and outcomes

The specialist Personal Injury lawyer:

- demonstrates an appreciation of when and how to negotiate and the comparative advantages and disadvantages of various approaches
- prepares submissions/assessments/position papers as appropriate
- assesses the known attitude and likely approach of the other parties and the strength of the opponent's case, and
- in appropriate cases, considers structured settlements.

4.6 Preparing for and conducting hearings

The specialist Personal Injury lawyer:

- considers the forum rules and practice notes and general procedures and pursues the correct course prescribed by the forum
- where appropriate, is acquainted with joint expert conclaves and concurrent expert evidence
- marshals the evidence
- issues subpoenas, directions for production or notices to produce
- confers appropriately with counsel
- requires witnesses for cross-examination as necessary
- determines availability of witnesses
- ensures adequate instruction of counsel at hearings
- ensures efficient and considerate calling of witnesses
- keeps the client informed, and
- advises the client on prospects of appeal/re-hearing.

4.7 Resolution

The specialist Personal Injury lawyer:

- ensures all documents, terms of settlement, agreements to settle and forms of judgment are properly prepared and, if requires, lodged or filed
- seeks court approval where appropriate
- notifies proper authorities, including Department of Human Services (Medicare / Centrelink) and NDIS, and any bodies to whom there may be contractual rights of recovery, such as a private health insurer
- provides the client with all relevant documents and advises on resolution
- advises the client of relevant dates, for example, payment of interest, rehearing or appeal, and any other arrangements which need to be made

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- takes steps to ensure that settlement monies are paid promptly
- records instructions with regard to finalisation of the claims
- pays all outstanding accounts/expenses
- prepares final accounts and complies with proper accounting procedure
- where appropriate, promptly prepares and sends assessment of costs and
- claims interest on outstanding settlements or judgments when not paid within time

General core knowledge

1. Legal principles

Common law principles as modified by statute:

- liability in negligence, including duty of care, breach, causation, the burden of proof and recoverable damage principles
- liability in public and private nuisance
- liability for trespass to the person
- liability for intentional torts under the *Civil Liability Act 2002*
- liability in contract
- liability under the Australian Consumer Law
- defences and partial defences including voluntary assumption of risk, obvious and inherent risk, contributory negligence, intoxication, fraud, illegality and failure to mitigate loss
- assessment of heads of damages
- Choice of Law rules applicable in interstate and international torts and
- time limitations under the *Limitation Act 1969* and various statutory schemes
- both statutory and common law principles as to when cause of action arises, e.g. with the onset of disease.

2. Court proceedings

2.1 Case management

- *Uniform Civil Procedure Rules*
- applicable practice notes
- case management processes
- professional negligence lists
- pre-trial conferences/status conferences/call overs, and
- arbitration hearings, settlement conferences, mediations and any other ADR processes.

2.2 Defence of proceedings

- appearances and defences
- cross claims
- specific pleadings, including the need to plead specific defences, whether under the *Civil Liability Act 2002* (NSW) or otherwise and
- applications for security for costs.



2.3 Interlocutory procedures

- particulars, whether further and better or required under Court rules
- pre-commencement or post-commencement discovery
- interrogatories
- subpoenas
- offers of compromise/Calderbank letters
- Notices to Produce
- Notices to Admit and
- Notices of Motion

2.4 Special procedures in cases of legally disabled

- tutor documents
- settlement of claims for "legally" disabled, and
- appointment of a trustee.

2.5 Settlement and judgement procedures

- procedures for judgment, and
- preparing agreements for settlement, consent judgments and orders for judgment.

2.6 Re-hearing/reviews/administrative appeals/appeals

- leave to appeal from interlocutory judgments
- judicial reviews from administrative decisions
- leave to appeal from Supreme Court, District Court and Workers Compensation Commission decisions
- requests for re-hearing from arbitrations and administrative assessments
- appeals to Court of Appeal from the District Court and Supreme Court, and
- applications for leave to appeal to the High Court.



Core Knowledge areas

NOTE

All assessments will be based on the law and procedures applicable as at 1 April 2020.

Candidates will be expected to display a working knowledge of the common law principles and legislative schemes listed below and procedures in all of the following 5 core areas

1. Motor Vehicle Accidents
2. Public Liability & Occupiers Liability
3. Work injury
4. Medical Negligence
5. Dust Diseases.

1. Motor Vehicle Accidents

A specialist Personal Injury Lawyer demonstrates the knowledge of a specially competent practitioner on:

- where legal representation is restricted
- dispute processes under both schemes
- the entitlement to, and parameters of, statutory benefits
- restrictions to common law under both schemes
- the use of medico-legal evidence, including any applicable restrictions
- SIRA's various dispute mechanisms and the potential for review of any decisions
- preparation of written submissions in dispute processes
- indemnity issues
- liability issues and the associated possible restrictions to statutory benefits and/or damages
- assessments of whole person impairment and the dispute processes arising therefrom
- time limitations
- application of the Motor Accident Guidelines and AMA Guides to the Evaluation of Permanent Impairment (4th Edition)
- cost regulations



2. Public liability and Occupiers Liability

A specialist Personal Injury lawyer demonstrates the knowledge of a specially competent practitioner on:

- the applicable common law principles with respect to occupier's liability, together with the provisions and the ambit of operation of the *Civil Liability Act 2002* (NSW) [CLA];
- leading cases on occupier's and public authorities liability, including road authorities, and the statutory modification of common law principles;
- the areas of investigation to garner evidence to mount or meet a claim for damages;
- medical information to advise the prospective Plaintiff or Defendant as to legal costs limitations under the *Legal Profession Act 2004* (NSW) and implications for costs recovery by the prospective Plaintiff;
- medical, lay and expert evidence to assess the solicitor's obligations in signing a Certificate under s 347 of the *Legal Profession Act 2004* (NSW);
- prospects of success, associated risks and judicial interpretation (particularly by the NSW Court of Appeal) of similar claims;
- instructions to proceed with or defend claims and obtains appropriate expert evidence to support or meet claims; and
- use of CCTV footage where applicable.

3. Work Injury

A specialist Personal Injury lawyer demonstrates the knowledge of a specially competent practitioner on:

- statutory benefits and entitlements
- limits, caps and thresholds in relation to statutory benefits provisions concerning the notification of a claim and requirements to make a claim or respond to a claim for compensation
- procedural requirements
- the SIRA Guidelines, Benefits Guide, AMA Guides to the Evaluation of Permanent Impairment (5th edition), Commission Practice Notes, WIRO ILARS policy
- costs regulations and duty to disclose.
- work injury damages including thresholds, time limits procedures and heads of damage

4. Medical Negligence

A specialist Personal Injury lawyer demonstrates the knowledge of a specially competent practitioner on:

- the applicable common law principles with respect to medical negligence for each of trespass, informed consent, standard of care and treatment error claims;
- issues around identifying a proper defendant and their potential insurance cover;
- how limitation periods are applied, particularly in considering discoverability of a potential claim;
- leading cases on medical negligence and the statutory modification of common law principles (including the Civil Liability Act 2002 (NSW)), other relevant legislation (such as the Australian Consumer Law), and alternative causes of action, including under contract;
- issues of clinical practice which impact on liability, including duties to third parties and doctor-patient confidentiality
- Court rules, practice notes and other practices concerning medical negligence matters including expert witness briefing protocols, expert witness conclaves and concurrent expert evidence.
- assessing damages, particularly involving catastrophic claims, and both under the *Civil Liability Act* and under the common law where that act does not apply
- the potential relevance and use of information from other forums, including root cause analysis, coronial processes and regulatory/disciplinary matters

5. Dust Diseases

A specialist Personal Injury lawyer demonstrates the knowledge of a specially competent practitioner on:

- how to investigate a claimant's exposure history
- how to locate relevant insurance of a defendant
- principles of foreseeability, breach of duty, causation and apportionment as they apply to dust litigation
- the main types of dust diseases
- procedural requirements of the Claims Resolution Process, including Contributions Assessment
- how to manage disputes about insurance
- heads of damage and the Tribunal's approach to each (including the relevance of Dust Diseases Authority) and
- appeal rights.

1. Core legislation

All legislation mentioned is to be considered as amended at **1 April 2020**

- *Australian Consumer Law*
- *Civil Liability Act 2002 (NSW)*
- *Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW)*
- *Civil Procedure Act 2005 (NSW)*
- *Uniform Civil Procedure Rules 2005 (NSW)*
- *Compensation to Relatives Act 1897 (NSW)*
- *Competition and Consumer Act 2010 (Cth)*
- *Employees Liability Act 1991 (NSW)*
- *Evidence Act 1995*
- *Law Reform (Miscellaneous Provisions) Act 1944 (NSW)*
- *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)*
- *Law Reform (Miscellaneous Provisions) Act 1965 (NSW)*
- *Law Reform (Vicarious Liability) Act 1983 (NSW)*
- *Legal Profession Uniform Law Act 2014 (NSW)*
- *Legal Profession Uniform Law (NSW)*
- *Legal Profession Uniform Regulations 2015 (NSW)*
- *Legal Profession Uniform General Rules 2015 (NSW)*
- *Limitation Act 1969 (NSW)*
- *Motor Accidents Compensation Act 1999 (NSW)*
- *Motor Accident Guidelines 2015*
- *Motor Accident Guidelines 2017*
- *Motor Accident Injuries Act 2017 (NSW)*
- *Motor Accident Injuries Regulation 2017 (NSW)*
- *National Disability Insurance Scheme Act 2013 (Cth) – Chapters 1, 3 and 5*
- *Workers' Compensation Act 1987 (NSW)*
- *Workplace Injury Management and Workers Compensation Act 1998 (NSW)*
- *Workers Compensation Regulation 2016 (NSW)*
- *Workers Compensation Commission Rules 2011*



2. Non-core legislation

Candidates should also be aware of the general provisions of these Acts but assessment tasks may not directly refer to them.

- *Choice Of Laws (Limitation Periods) Act 1993 (NSW)*
- *Civil Aviation (Carriers Liability) Act 1959 (Cth)*
- *Civil Aviation (Carriers Liability Act) 1967 (NSW), s 5*
- *Companion Animals Act 1998 (NSW)*
- *Dust Diseases Tribunal Act 1989 (NSW)*
- *Dust Diseases Tribunal (Standard Presumption-Appportionment) Order 2005 (NSW)*
- *Dust Diseases Tribunal Regulation 2019 (NSW)*
- *Dust Diseases Tribunal Rules 2019 (NSW)*
- *Government Information (Public Access) Act 2009 (NSW)*
- *Health Records and Information Privacy Act 2002 (NSW)*
- *National Redress Scheme for Institutional Child Sexual Abuse Act 2018 – Chapters 1-3*
- *National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018 (Cth).*
- *NSW Trustee & Guardian Act 2009 (NSW)*
- *Privacy Act 1988 (Cth)*
- *Safety Rehabilitation and Compensation Act 1988*
- *Sporting Injuries Insurance Act 1978 (NSW)*
- *Service and Execution of Process Act 2002 (Cth)*
- *Transport Administration Act 1988 (NSW), s 121*
- *Workers' Compensation (Dust Diseases) Act 1942 (NSW)*
- *Workers Compensation Legislation Amendment Act 2012 (NSW)*
- *Work Health and Safety Act 2011 (NSW)*



Methods of assessment

1. Mock File

Release date: Wednesday 13 May 2020

Due date: Wednesday 3 June 2020

Candidates will be given a mock file and will be required to complete specific tasks, which may include instigating inquiries, preparing pleadings, drafting a letter of advice including a **detailed assessment of liability and damages**. The mock file will assess the candidate's ability to deal with more complex issues. Candidates will choose from a claimant/plaintiff file or a defendant/insurer file in one of the following core areas:

1. Motor Vehicle Accidents
2. Public Liability & Occupiers Liability
3. Work Injury
4. Medical Negligence
5. Dust Diseases

Assessment criteria

Candidates will be assessed on the following performance criteria. Candidates will be required to perform each criterion to the level of the performance standard.

- a) ability to identify relevant issues from a given fact situation
- b) ability to provide practical, clear, realistic and accurate advice
- c) depth of knowledge of the law and core skills in applying that knowledge to the given fact situation
- d) knowledge of procedural rules and practices, and
- e) use of clear and concise language.

NOTE: Candidates are permitted to make their own assumptions where the set of facts is silent, or it is necessary to complete set tasks. You will be required to identify and enunciate those assumptions.



2. Written examination

Date: Saturday 25 July 2020

Venue: The Law Society of New South Wales

The written examination is closed book with 3 hours plus 20 minutes reading time.

The 2018 Personal Injury written examination will consist of:

Part A

Containing 2 (unseen) problem questions i.e. hypothetical cases, in which candidates will be asked to advise the parties on matters such as possible causes of action, possible defences, appropriate jurisdiction and relevant legislation. The cases will cover the core areas of motor vehicle accidents, work accidents and civil liability generally.

Part B

Contains up to 20 questions out of a pool of up to 80.

The 80 questions will be issued to candidates approximately two weeks in advance of the examination. The questions will require short answers ranging from a few lines to a maximum of half a page. These questions will examine basic knowledge and understanding of legal principles and legislative schemes, the calculation of damages including use of actuarial tables, and medical terminology.

Assessment criteria

Candidates will be assessed on the following performance criteria. Candidates will be required to perform each criterion to the level of the performance standard.

- a) accurate knowledge of the common law and legislative schemes;
- b) identify relevant issues given the facts
- c) provide concise and clear advice applying law to the facts
- d) knowledge of procedural rules and practices and
- e) coming to a conclusion.



3. Peer interview

Date: Sunday 26 July 2020

Venue: The Law Society of New South Wales

Candidates will be advised of their peer interview time in early-July.

Candidates will be interviewed by a panel of two assessors when they will be questioned as to how they would deal with a typical professional situation in order to assess the candidates understanding of the area, their ability to plan and to communicate ideas as well as their capacity to run matters efficiently and any office/file management and ethical issues.

The assessment will be recorded.

Assessment may include any of the performance standards, and refer to work presented in the mock file.

Assessment criteria

Candidates will be assessed on the following performance criteria. Candidates will be required to perform each criterion to the level of the performance standard.

- a) acknowledgement of any errors in the mock file
- b) ability to defend position
- c) demonstrate knowledge and understanding
- d) understanding of ethics and professional standards
- e) clear communication, and
- f) presentation.