
**1997 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Wednesday, 29 October 1997



HEAD II: CIVIL AND CRIMINAL PROCEDURE

TEST PAPER

29 October 1997

Instructions to Candidates

1. The duration of the examination is 3 hours and 30 minutes.
2. This is an open-book examination.
3. There are **FOUR** questions in this paper. **EACH** must be answered.
4. Each question has the value noted on the question paper. You are urged to apportion your time in accordance with the relative value of each question. No marks can be awarded to a question for which there is no attempted answer.
5. Do not take either this question paper or any answer booklets with you when you leave the examination room.

1997 Overseas Lawyers Qualification Examination

Head II : Civil and Criminal Procedure

Question 1 (25 marks)

Andrew Adams and Brian Black, aged 21 and 23, had recently passed their accountancy examinations and were celebrating their success in Wanchai one night. They had each consumed a considerable amount of alcohol.

As they were on their way home in the early hours of the morning they noticed three motor cycles parked outside a nightclub. Andrew managed to start up one of those motorcycles and rode it a short distance. He then invited Brian to get onto the passenger seat. Brian did so and Andrew drove the motorcycle around the block with Brian as his passenger.

Andrew then started up each of the other two motor cycles in turn and rode each one around the block with Brian as his passenger.

The first two motorcycles were returned to where they were originally parked but as Andrew was trying to park them each motorcycle fell over.

As they returned to the spot where the motor cycles were parked on the third motor cycle, two police officers, Inspector Grief and Sergeant Sin arrived and asked them what they were doing making so much noise. Andrew swore at the officers and told them to mind their own business. Brian also became abusive and shouted out that the officers were "highly paid interfering fools with nothing better to do than stopping people having fun."

When Inspector Grief asked Andrew to produce his driving licence Andrew punched him in the chest and ran away. Inspector Grief fell to the ground, cutting his head on the road surface and suffering a severe concussion. Andrew escaped. Brian tried to run away but, because of the amount of alcohol he had consumed, fell down in the road and was arrested by Sergeant Sin. The owners of the motor cycles then arrived and told Sgt. Sin they had not given anyone permission to take the motorcycles. Sgt. Sin arrested Brian for theft of a motorcycle.

Brian was taken to Wanchai police station where he was placed in the cells. When later questioned by Sgt. Sin he admitted he had ridden on three motorcycles. He was subsequently charged as follows:

Statement of offence: Taking conveyance without authority contrary to section 14(1) of the Theft Ordinance, Cap. 210, Laws of Hong Kong.

Particulars of offence: Brian Black, on (day of offence) 1997 at Lockhart Road, Wanchai in Hong Kong, you allowed yourself to be carried on motor cycles, CY 123, DE 456 and FG 789, knowing them to have been taken without lawful authority.

(Note a copy of s.14 Theft Ordinance is attached)

Brian was charged by Superintendent Hardy. By this time the effect of the alcohol had worn off and Brian was very worried about his situation. Hardy told him that Inspector Grief had been seriously injured and that when Andrew was found he would be charged with unlawfully and maliciously wounding him contrary to s. 19 of the Offences Against the Person Ordinance (copy attached). He told Brian that the offence with which he was charged was a minor one and if he pleaded guilty he would at most receive a small fine. He also said that if Brian agreed to help them find Andrew, they would put in a good word for him with the magistrate. Hardy also added that if Brian did not co-operate by pleading guilty and by helping them find Andrew "he might well find himself charged with wounding Inspector Grief". When Brian asked him whether he could see a lawyer, Inspector Grief advised him not to complicate things by involving a lawyer.

Brian was kept in police custody until he was brought before a magistrate two days after being charged. He was unrepresented and pleaded guilty to the charge under s. 14(1). He was convicted as charged. The statement of facts handed to the magistrate by the prosecutor included reference to Andrew punching Inspector Grief and the injury he sustained. In mitigation Brian told the magistrate he was very sorry for what had happened, though he could not remember much about it now. He added he had not appreciated he was doing anything wrong, and did not think he had done anything wrong but had pleaded guilty simply to save everyone's time. The magistrate said he was very concerned about the serious injury to Inspector Grief, that it was "time to make an example of young men who attack police officers" and remanded Brian in custody for three weeks for pre-sentence reports. He told Brian he would likely receive a prison sentence but in any event the remand in custody "would give him time to think about what he had done". Brian has no previous convictions of any kind.

You have now been asked to visit Brian in custody at Lai Chi Kok Reception Centre and advise him on the following matters:

- 1) **Can he change his plea at his next appearance before the magistrate? Give reasons for your advice.**
- 2) **Could he wait to see what sentence the magistrate imposed and then try to change his plea? Give reasons for your advice.**
- 3) **What, if anything, should the magistrate have done in view of Brian's mitigation? Give reasons for your advice.**
- 4) **What if anything should the prosecutor have done in view of Brian's mitigation and the magistrate's comments? Give reasons for your opinion.**
- 5) **What action might be taken if Brian does not change his plea and is sentenced to three months' imprisonment. Give reasons for your opinion.**

Question 2 (25 marks)

- A. Mai died intestate on 27 December 1992 leaving her husband Chan, daughter Mary age 17 years and son John aged 10 years. By Letters of Administration granted on 17 April 1993, Wong became the sole administrator of the deceased's estate valued at approximately \$280,000. Pursuant to the provisions of the *Intestacy Ordinance* the distribution of the estate, less expenses, is as follows:

$$\begin{aligned} H &= 1/2 \text{ share} = \$50,000 \text{ set amount plus } \$115,000 \\ D &= 1/4 \text{ share} = \$ 55,000 \\ S &= 1/4 \text{ share} = \$ 55,000 \end{aligned}$$

Neither Mary nor John have yet received their share of the estate and they allege that Wong has abused his duty as Administrator in the sale of Mai's assets, and now want an order from the court requiring Wong to account for the distribution of the estate and expenditures.

Advise Mary and John as to the following, briefly stating the reasons for your answers to questions (i) and (ii):

- (i) **In which court should an action be commenced?**
- (ii) **State the name of the appropriate mode of commencement of proceedings best suited to this type of action.**
- (iii) **Name and describe the parties to the proposed action, as they would be named and described on the court documents.**

[8 marks]

- B. Court of First Instance Judge Lee dismissed an application for an order by a firm of solicitors seeking to set aside a District Court Judge's order of costs against the firm on the basis that the Court of First Instance had no jurisdiction to make such an order. The proper forum should be the Court of Appeal.

On the basis that the applicant firm had been advised prior to their application that their approach was irregular and constituted an attempt to appeal 'through the back door', Judge Lee ordered costs of the application in the Court of First Instance against the applicant firm to be *taxed* and paid forthwith on a "*full indemnity basis*".

- (i) **Advise the firm as to the meaning of this order for costs.**

In his judgment Judge Lee said that 'in the circumstances of the application he was inclined to make a "*wasted costs order*", but declined to do so and proceeded to make the order as above.

- (ii) Explain the significance of a 'wasted costs order'? What difference would this have made to the firm?

The firm is unhappy with this decision and want to appeal it in the Court of Appeal.

- (iii) Advise the firm whether or not you can file an Appeal on their behalf in the Court of Appeal. Give reasons for your answer.

[9 marks]

- C. You act for Lam the plaintiff in a claim against Surprise Gourmet Co, run by Chow and Fong, proprietors of a restaurant called Parsley Pie, for damages sustained as a result of food poisoning after eating frog's legs at the Parsley Pie. Lam has just been awarded damages for \$360,000.

The judgment debt has not been paid. You have started making enquiries through a private investigation agency (the 'agency') concerning the assets of the firm, in preparation to advising Lam as to how she can recover her judgment debt.

You have received the following information from the agency:

"It appears that Chow has left Hong Kong and taken up permanent residency in Honolulu, and the Parsley Pie is now being run solely by Fong. However, Chow has a 1/3 interest in a flat in Tai Koo Shing owned by himself and his 2 sisters. The premises of the Parsley Pie are leased to Chow and Fong, but all the furnishings, including cutlery, crockery and kitchen equipment are owned by Surprise Gourmet Co. Fong owns 2,000 shares in a private company called Hello Dolly Ltd, a highly profitable manufacturer of dolls and toys. Fong has a bank account with the Hang Seng Bank, but the amount contained in it is unknown."

Advise Lam as to how the judgment might be enforced. Give reasons for your answer.

[8 marks]

Question 3 (25 marks)

- A. Alpha is a limited company registered in Hong Kong engaged in the supply of quality furniture. It is the agent of an Italian manufacturer of furniture called Roccoco Antica Limited. ('Roccoco') On 20 November 1996 Bob (an individual), placed an order with Alpha for a mahogany dining table and 12 mahogany chairs made by Roccoco for the sum of \$320,000. The table and chairs were delivered by Alpha to Bob on 18 January, 1997. Bob paid \$70,000 by cheque to Alpha on delivery. Alpha's claim is for the balance of the purchase price of \$250,000.

You act for Alpha. A Writ has been issued naming Bob as defendant but not yet served. You have instructions from Alpha to effect service upon Bob.

Your law clerk personally attends Bob's flat with the Writ and Acknowledgment of Service. He knocks on the door which is opened by a person who says that she is Bob's wife. She says that Bob left the flat and the family 3 weeks ago, but usually comes back every week to collect his mail. Your law clerk hands the Writ to her to give to Bob.

Advise whether or not service was effective. Give reasons for your answer.

[5 marks]

- B. You act for Bob. The Writ has been served. When giving instructions for his Defence, Bob tells you that the reason he has not paid the balance of the purchase price is that one of the chairs was defective. During a dinner party one of the chairs collapsed and guest Gus suffered an injury to his spine and broke his leg.

Gus has now issued a Writ against Bob for damages for personal injuries on the grounds of negligence (tort). Bob tells you that he has received advice from carpenter Chu who told him that the struts on the chair were 'poorly constructed from inferior wood and the wrong type of glue was used'.

In the proceedings commenced by Gus as plaintiff, Bob issues a Third Party Notice against Roccoco as manufacturer of the chair. Roccoco files an application for a Stay of Proceedings on the ground that any proceedings against it should be brought in Italy as that is where the chair was made.

Advise Bob as to the likely prospects of success of this application giving reasons for your answer.

[5 marks]

- C. Assume (for argument sake) that the application for Stay of Proceedings was unsuccessful, and the action has continued to be heard in a Hong Kong court. You now act for Gus:

Gus recently heard from a friend who works for the Hong Kong Consumer Council that the Council has received a lot of letters from people who had complaints about furniture made by Roccoco imported from Italy.

You file an application for an Order for Specific Discovery on behalf of Gus against the Hong Kong Consumer Council and Roccoco for the production and inspection of 'all letters of complaint and documents concerning furniture made by Roccoco Antica Ltd.'

Advise, with reasons, as to the likelihood of success of this application?

[5 marks]

- D. You are now acting for Bob. Bob comes to see you in your office. He has recently heard some disturbing news about Gus, and gives you the following information:

- Gus is a finance investment advisor, a partner in a firm called Bingo Co. He is Mexican, and apparently owns a lot of property in Mexico. His wife is the daughter of a high ranking Mexican government official. He and his family spend all their holidays there.
- Gus is a connoisseur of fine wines and is reputed to have a collection of very expensive champagnes from France. His wife is also known in Hong Kong to wear only the finest ruby and diamond jewellery. Gus also owns his flat in Old Peak Road, though it is subject to a mortgage to the Standard Chartered Bank.
- Bob has heard rumours, mainly from his friend Fan whom he has known for many years and who is also a financial advisor in a Hong Kong firm, that the Bingo Co is not doing very well in the business place. Two junior advisors have been recently fired with no explanations or compensation package.
- Bob has also read in yesterday's South China Morning Post Business pages that the Bingo Co is among a number of firms and companies under scrutiny by the Hong Kong Securities Commission for 'irregular practices in the financial advisory business'.

Bob is concerned that Gus may soon leave Hong Kong and he will be left with a lot of litigation bills. He is confident that he can successfully defend Gus's claim.

Advise Bob as to what he could do to protect his interests. Give reasons for your answer.

- E. Bob's wife Bonny is a very keen shopper. While browsing in one of the very expensive boutiques in Central she slipped on the marble floor, fell over and suffered a fracture to her skull. She also incurred other losses, including:

torn Lacroix dress	\$28,500
broken Paloma Picasso glasses	\$ 6,500
hospital bills	\$78,000 and continuing

You have filed a Writ on her behalf claiming damages for personal injuries loss and damage in the High Court against the shop. She says that there was 'a slippery fluid' on the floor which she did not see causing her to fall'. The Defendant shop has filed a defence and the action proceeds. Shortly before the trial, the Defendant pays \$150,000 into court.

Explain the purpose of this step and advise Bonny whether or not to accept the money.

[5 marks]

Question 4 (25 Marks)

You act for Kai Tak Limited, a company registered and carrying on business in Hong Kong. You are taking instructions from Winnie Tam, Kai Tak's managing director. Kai Tak has sued: (i) New Fashion Limited ("New Fashion"), a company registered and carrying on business at 5th Avenue, New York, U.S.A., and (ii) Charles Mok, New Fashion's Hong Kong representative, for breach of contract. Kai Tak has claimed damages of HK\$900,000.

The contract between New Fashion and Kai Tak is for the sale by Kai Tak to New Fashion of 3,000 dresses. New Fashion intended to resell the dresses in the USA. Kai Tak delivered the dresses to New Fashion but New Fashion has refused to pay Kai Tak. New Fashion says that the dresses which Kai Tak delivered are not the dresses which New Fashion ordered. New Fashion did not make this complaint until it was sued, which was twelve months after delivery of the dresses. It has not tried to return the dresses and it has not asked for replacement of the dresses.

Kai Tak has given you the following documents:-

- (1) a copy of the letter ("the contract letter") from Charles Mok to Winnie Tam of Kai Tak confirming the terms of the contract; and
- (2) a copy of the delivery slip, which was signed by one of New Fashion's employees below the words "received in good condition".

The dresses described in the contract letter are identical to those described on the delivery slip.

The contract was made in Hong Kong between Kai Tak and Charles Mok as New Fashion's representative. You have prepared the writ and statement of claim and you want to serve them on the defendants.

- (a) **Draft an affirmation in support of Kai Tak's application to the Court to serve the proceedings on New Fashion Limited.**
- (b) Assume now that you represent Kai Tak. Discovery has taken place but there has not yet been a Summons for Directions. You have asked the trainee solicitor who is assisting you with this case to prepare Winnie Tam's witness statement. The trainee has never before prepared a witness statement and he has asked you the following questions.
 - (i) What is the purpose of the witness statement?
 - (ii) Should he put anything in the statement about the conversations Winnie Tam had with Charles Mok when they were agreeing the terms of the contract?
 - (iii) Can Winnie Tam give evidence at the trial on matters which are not covered in her witness statement?

Please answer the trainee's questions.

- (c) Witness statements have now been exchanged. You have received a witness statement from New Fashion's lawyers signed by Mabel Leung. However, before the trial you are informed that Mabel Leung will not be called as a witness for New Fashion.

What steps can you take to bring her evidence before the court?

(2) For the purposes of subsection (1)—

“firearm” includes an airgun or air pistol;

“imitation firearm” means anything which has the appearance of being a firearm, whether capable of being discharged or not;

“weapon of offence” means any article made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use;

“explosive” means any article manufactured for the purpose of producing a practical effect by explosion, or intended by the person having it with him for that purpose.

(3) Any person who commits aggravated burglary shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for life.

13. (1) Subject to subsections (3) and (4), where the public have access to a building in order to view the building or part of it or a collection housed in it, any person who without lawful authority removes from the building or its grounds the whole or part of any article displayed or kept for display to the public in the building or that part of it or in its grounds, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 5 years.

Removal of articles from places open to the public.
1968. c. 60. s. 11.

(2) For the purposes of subsection (1)—

“collection” includes a collection got together for a temporary purpose, but references in this section to a collection do not apply to a collection made or exhibited for the purpose of effecting sales or other commercial dealings.

(3) It is immaterial for the purposes of subsection (1) that the public's access to a building is limited to a particular period or particular occasion; but where anything removed from a building or its grounds is there otherwise than as forming part of, or being on loan for exhibition with, a collection intended for permanent exhibition to the public, the person removing it does not thereby commit an offence under this section unless he removes it on a day when the public have access to the building as mentioned in subsection (1).

(4) A person does not commit an offence under this section if he believes that he has lawful authority for the removal of the thing in question or that he would have it if the person entitled to give it knew of the removal and the circumstances of it.

14. (1) Subject to subsections (2) and (3), any person who, without having the consent of the owner or other lawful authority, takes any conveyance for his own or another's use, or knowing that any conveyance has been taken without such authority, drives it or allows himself to be carried on or in it, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 3 years.

Taking conveyance without authority.
1968. c. 60. s. 12.

(2) Subsection (1) shall not apply in relation to pedal cycles or rickshaws, but, subject to subsection (3), any person who, without having the consent of the owner or other lawful authority, takes a pedal cycle or rickshaw for his own or another's use, or rides a pedal cycle or rickshaw knowing it to have been taken without such authority, shall be guilty of an offence and shall be liable on conviction to a fine of \$500.

(3) A person does not commit an offence under this section by anything done in the belief that he has lawful authority to do it or that he would have the owner's consent if the owner knew of his doing it and the circumstances of it.

(4) For the purposes of this section—

“conveyance” means any conveyance constructed or adapted for the carriage of a person whether by land, water or air, except that it does not include a conveyance constructed or adapted for use only under the control of a person not carried in or on it, and “drive” shall be construed accordingly; and

“owner” in relation to a conveyance which is the subject of a hiring agreement or hire-purchase agreement means the person in possession of the conveyance under that agreement.

Abstracting of
electricity.
1968, c. 60, s. 13.

15. Any person who dishonestly uses without due authority, or dishonestly causes to be wasted or diverted, any electricity shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 5 years.

Dishonest use of
public telephone
or telex system.
1968, c. 60, Sch. 2,
Pt. I, Para. 8.

16. Any person who dishonestly uses a public telephone or telex system with intent to avoid payment shall be guilty of an offence and shall be liable on conviction to imprisonment for 2 years.

FRAUD AND BLACKMAIL

Obtaining
property by
deception.
1968, c. 60, s. 15.

17. (1) Any person who by any deception (whether or not such deception was the sole or main inducement) dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 10 years.

(2) For the purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and “obtain” includes obtaining for another or enabling another to obtain or to retain.

(3) Section 7 shall apply for the purposes of this section, with the necessary adaptation of the reference to appropriating as it applies for the purposes of section 2.

Definition of loaded arms.
1861 c. 100, s. 19.

18. Any gun, pistol, or other arm which is loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or any other destructive material, shall be deemed to be loaded arms within the meaning of this Ordinance, although the attempt to discharge the same may fail from want of proper priming or from any other cause.

(Amended, 51 of 1911, Schedule)

Wounding or inflicting grievous bodily harm.
1861 c. 100, s. 20.

19. Any person who unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and shall be liable to imprisonment for 3 years.

(Amended, 30 of 1911, ss. 2 and 5)

Attempting to choke, etc., in order to commit indictable offence.
1861 c. 100, s. 21.

20. Any person who—

(a) by any means whatsoever, attempts to choke, suffocate, or strangle any other person; or

(b) by any means calculated to choke, suffocate, or strangle, attempts to render any other person insensible, unconscious, or incapable of resistance,

with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony, and shall be liable to imprisonment for life.

(Amended, 30 of 1911, ss. 2 and 5)

Using chloroform, etc., in order to commit indictable offence.
1861 c. 100, s. 22.

21. Any person who unlawfully applies or administers to or causes to be taken by, or attempts to apply or administer to, or attempts to cause to be administered to or taken by any person any chloroform, laudanum, pepper, or other stupefying or overpowering drug, matter, or thing, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony, and shall be liable to imprisonment for life.

(Amended, 30 of 1911, ss. 2 and 5)

Administering poison, etc., so as to endanger life or inflict grievous bodily harm.
1861 c. 100, s. 23.

22. Any person who unlawfully and maliciously administers to, or causes to be administered to or taken by, any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and shall be liable to imprisonment for 10 years.

(Amended, 30 of 1911, ss. 2 and 5)

Administering poison, etc., with intent to injure, etc.
1861 c. 100, s. 24.

23. Any person who unlawfully and maliciously administers to, or causes to be administered to or taken by, any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanor, and shall be liable to imprisonment for 3 years.

(Amended, 30 of 1911, ss. 2 and 5)