
2005 OVERSEAS LAWYERS QUALIFICATION EXAMINATION

HEAD II: CIVIL AND CRIMINAL PROCEDURE

Wednesday, 2 November 2005



HEAD II: CIVIL AND CRIMINAL PROCEDURE

TEST PAPER

2 November 2005

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 FIVE questions in this paper. ANSWER ANY FOUR QUESTIONS ONLY.**
- 4. You must write your answers to any of:**
 - the Criminal Questions (Questions 1 and 2) in Answer Book 1**
 - the Civil Questions (Questions 3, 4 and 5) in Answer Book 2**
- 5. IF YOU ATTEMPT MORE QUESTIONS THAN YOU HAVE BEEN INSTRUCTED TO ANSWER :**
 - (a) THE EXAMINERS WILL MARK ALL QUESTIONS THAT HAVE BEEN ATTEMPTED AND NOT DELETED; AND**
 - (b) IN COMPUTING YOUR FINAL MARK, THE EXAMINERS WILL COUNT THE MARKS FOR THE NUMBER OF QUESTIONS THAT YOU WERE INSTRUCTED TO ANSWER TAKING INTO ACCOUNT THE ANSWERS WITH THE LOWEST SCORES.**
- 6. Start each answer on a separate page of your answer book.**
- 7. 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.**
- 8. Do not take either this question paper or any answer books with you when you leave the examination room.**

2005 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks in total)

You are a solicitor employed by AB Chan & Co. A Brian Chan (BC) visits your firm's office and tells you that his friend William Wong (WW) aged 18 was arrested at his (WW's) home in Wong Tai Sin in Kowloon at midnight last night. BC says that the officers told WW's mother that WW was wanted in connection with a 'chopping' case that had occurred in a public playground in Wanchai on Hong Kong Island at 9:30 p.m. yesterday evening. Neither BC nor WW's mother know which unit the officers were from, and they were in plainclothes. BC wants you to visit WW in police custody to give him legal advice for an agreed fee.

Questions:

- (i) What procedure would you follow upon receiving BC's instructions? What advice would you give BC and what, if any, specific instructions would you seek from him? (5 marks)
- (ii) What action would you take to find out where WW is detained? (2 marks)

You eventually find out that WW is detained by a Regional Crime Unit on Hong Kong Island and you go there to interview him. Upon arrival, you speak to the Duty Officer ('DO') who says the Officer in Charge of the Case ("OC") Senior Inspector Tsang (SIPT) is out but will come back in 2 hours' time. He says he will ask the OC upon his return whether he has any objection to you visiting WW.

Question:

- (iii) What would your response be? (2 marks)

(See over the page for a continuation of Question 1)

The Duty Officer ('DO') subsequently confirms that you may interview WW but says there is no interview room available, and for security reasons, the interview must take place in an area of the police station covered by a closed circuit television camera.

Question:

(iv) What would your response be? (4 marks)

Subsequently you are told by the DO that an interview room is now available. On your way there, you meet SIPT who tells you that he is the OC Case. He says WW was arrested for Wounding With Intent contrary to section 17 of the Offences Against the Person Ordinance*. He says that WW and 5 other males of similar age are suspected of attacking with knives a member of a rival gang. The victim suffered multiple laceration wounds in the attack and is critically ill in hospital. He says the police will soon interview WW under caution about his part in the alleged crime, and that the interview will be video recorded. When you interview WW he tells you he was part of the attack but he had not in fact chopped the victim.

Question:

(v) What advice would you give WW about the intended video recorded interview and why would you give that advice? (5 marks)

Whilst you are interviewing WW he says that he believes that if the other suspects are arrested they will tell the police that he was the person who chopped the victim and was the ringleader behind the attack.

Questions:

(vi) What advice would you give him and why would you give that advice? (4 marks)

(vii) WW asks you whether he will be able to get bail, either now or in future. What advice would you give? (3 marks)

* [NOTE: section 17 of the Offences Against the Person Ordinance, Cap. 212 is attached at Appendix No.1 at the back of the Test Paper.]

Question 2 (25 marks)

You act for Ivan Ho, aged 20. He is charged with indecent assault contrary to section 122 of the Crimes Ordinance, Cap. 200*. He has been on cash bail of HK\$2,000 since his arrest.

At his trial before a magistrate the prosecution case was that Ho twice rubbed his open palm against the buttock of a female (PW1) whilst riding on the Mass Transit Railway between Central and Admiralty. On each occasion the contact lasted for about 10 seconds. Ho contends that the touching was accidental.

You cross-examined PW1 and a witness to the incident (PW2) on the basis that the touching was accidental. On your advice Ho elected not to give evidence in his defence. He had no witnesses to call in his defence.

Despite your best efforts Ho was convicted: the magistrate stating that he was certain he had heard the truth from PW1 and PW2 and that Ho had deliberately touched PW1's buttock as she alleged and that the touching amounted to indecent assault.

You then addressed the magistrate in mitigation. Ho has just started the second year of an engineering degree at Hong Kong's Most Excellent University. His first year results were very good. He is a member of the university swimming team. He recently received an award for saving the life of a young child who had got into difficulties whilst swimming in the sea. He comes from a good family: his father is the Principal of a secondary school and his mother runs her own interior design business. You produced a reference letter from Ho's university tutor stating that the incident is completely out of Ho's character and asking no custodial sentence be imposed because of the adverse effect this would have on his university studies. You ask the magistrate to impose a non-custodial sentence so that Ho can continue his university studies.

The magistrate then remands Ho in custody for 3 weeks for a report from the Probation Service. No other reports are called for. When you asked the magistrate to consider bail pending sentence, the magistrate stated "Certainly not, we will take things step by step, nothing is ruled out at this stage." Ho asks you whether he can appeal conviction at this stage and what if any action can be taken about the refusal of bail pending sentence.

(See over the page for a continuation of Question 2)

Question:

- (i) **How would you advise Ho and what, if any, action would you take?**

(8 marks)

Ho is still in custody on the sentence day. The Probation Report does not recommend probation. The report describes Ho as “remorseful, having learned his lesson and unlikely to act as foolishly again, and probation is therefore not deemed necessary.” Without asking you to address him further the magistrate states “Imprisonment is the only appropriate sentence for indecent assault on the MTR”. He imposes four months immediate imprisonment and orders Ho to pay \$10,000 costs. He was given one month within which to pay the costs.

You see Ho in the cells and he instructs you that he accepts his guilt and does not wish to appeal conviction but he wants you “to get the prison sentence and the order for costs set aside”.

Questions:

- (ii) **How would you advise Ho, and what action would you recommend in the circumstances of this case?**

(8 marks)

- (iii) **In the action you recommend Ho to take, what sentence would you propose to the court should now be imposed upon Ho in all the circumstances of this case and why would you propose that?**

(9 marks)

* *[NOTE: section 122 of the Crimes Ordinance, Cap. 200 is attached at Appendix No.2 at the back of the Test Paper.]*

Question 3 (25 marks)

You receive a letter from XYZ Limited (“XYZ”), a Hong Kong company which manufactures electronic components. XYZ has been in litigation in the Hong Kong Court of First Instance with a Hong Kong partnership, Ng & Co., a firm which sells computers in China, to recover the price of components sold to the firm. The Writ of Summons was served on Ng & Co. by registered post to its office in Wanchai and its partner Au acknowledged service on behalf of the firm to contest the proceedings. After trial, judgment was entered on 30 August 2005 against Ng & Co., in the name of the partnership, for the sum of HK\$15 million, together with interest of HK\$1.2 million and costs.

Ng & Co. has failed to settle the judgment debt. XYZ wishes to retain your firm to execute the judgment against Ng & Co. XYZ informs you that it is very concerned that Ng & Co. may have insufficient assets to satisfy the judgment. The instructions letter informs you that XYZ’s former solicitors commissioned enquiry agents in Hong Kong to investigate Ng & Co. The enquiry agents have established the following:-

1. Ng & Co. has 3 partners: Au, Chan and Wong. Au is in charge of the day to day running of the firm while Chan from time to time assists in the business. Wong basically leads a retired life and is residing in a big house owned by him in Beijing most of the time.
2. Ng & Co. has a single bank account with Bank of South China.
3. Ng & Co. operates from an office in Wanchai, the joint registered owners of which are Au, Wong and a third party.
4. Ng & Co.’s main customer is Panda Ltd, a PRC company trading in Shanghai with no branch office in Hong Kong. Panda Ltd owes Ng & Co. around HK\$2 million under several outstanding invoices.
5. Au owns 30% of the shareholding in Big Spender Ltd, a private company registered in Hong Kong carrying on prosperous Night Club business in Wanchai.
6. Chan is the registered owner of a flat in Tuen Mun which he purchased in 1997 for HK\$5 million but which is charged to Bank of West China to secure an amount stated to be HK\$2 million.

(See over the page for a continuation of Question 3)

7. There is a rumour of the possible dissolution of Ng & Co. because of a fierce argument between Au and Chan. The enquiry agents have established that Chan has substantial private funds, although it is not clear what these amount to or the structure through which they are held. Furthermore, the enquiry agents have discovered Chan has applied to emigrate to Canada and he has announced to customers of Ng & Co. that he intends to take up his immigration rights in the next month and to sell up his Hong Kong assets.

Question:

XYZ requests you to provide a letter advising on what steps should be taken to enforce the judgment against Ng & Co. bearing in mind the information obtained by the enquiry agents. XYZ also asks what documents you require to enable you to proceed and the likely timetable for taking the various procedural steps.

Question 4 (25 marks)

Your client is a Hong Kong stockbroking company, China e-Securities (Asia) Limited ("e-Securities").

On 17 June 2005, e-Securities received a call from Mr. Charles Au, a representative of another Hong Kong stockbroking company, American Investments (Hong Kong) Limited ("AI"), enquiring about buying a large number of shares (40 million - about 6 per cent of the issued share capital) in a Hong Kong listed company, Global Greater Chinese Holdings Limited ("Global"). e-Securities believed it was approached because it has links with Global.

e-Securities' Managing Director, Mr. Vincent Kwok, spoke to the Chairman of Global, Mr. Li Fan, over the weekend of 18 and 19 June 2005, who indicated interest in selling shares, but only 30 million, as he wanted to keep the transaction below 5 per cent of the issued share capital. He also stressed that under no circumstances must e-Securities disclose to AI on whose behalf they would be acting in selling the shares. On 20 June 2005, on instructions of Mr. Kwok, Mr. Albert Chan, one of the senior dealers of e-Securities initiated what turned out to be a number of telephone calls with Mr. Charles Au. As a result of these calls, which were all recorded in accordance with the Securities and Futures (Keeping of Records) Rules, a price of HK\$ 1.08 per share was agreed on 20 June 2005. There was no discussion about timing of the sale and purchase.

When Mr. Kwok spoke to Mr. Li Fan in the evening on 20 June 2005, to confirm the transaction, Mr. Li Fan said he was happy with the price but said quite a lot of his family's shares were tied up at that moment and it might take a week or more before the trade could be completed. He asked e-Securities to go back to AI and put the transaction "on hold". In the morning on 21 June 2005, during a further conversation, Mr. Chan told Mr. Au about the problem. Mr. Au said that he would "consider" a deferral of completion of the trade, but only if it would be a very short deferral. It appeared that AI or their client (it was not clear to Mr. Chan whether AI were buying their shares for their own account or for a client of AI) thought that the price of Global's shares was likely to surge upwards in the near future. But, when Mr. Kwok reported the position back to Mr. Li Fan later the same day, Mr. Li Fan said that he was considering not selling the shares at all or at least not so many of them.

(See over the page for a continuation of Question 4)

Over the next two days, 22 and 23 June 2005, AI and e-Securities exchanged drafts of agreements for the sale and purchase of the shares. The price remained the same but each party proposed different dates for completion. These drafts were exchanged under cover of faxes. Some of the faxes were marked "without prejudice and subject to contract". Others were just marked "subject to contract".

Finally, in the evening on 23 June 2005, Mr. Li Fan indicated to Mr. Kwok that he did not want to sell any of the shares. Mr. Chan informed Mr. Au in the morning on 24 June 2005 that e-Securities would not be proceeding with the transaction. AI then gave e-Securities until the end of 24 June 2005 to confirm the transaction. e-Securities did not do so. On 30 June 2005, AI wrote to e-Securities confirming that they had by then bought 30 million shares in Global in the market at an average price of HK\$ 1.58 per share, and demanded that they be paid HK\$ 15 million, that being the difference between the price agreed on 20 June 2005 and the price they paid for the shares in the market. Mr. Li Fan told Mr. Kwok by telephone that as far as he was concerned there was no binding agreement and urged e-Securities to reject the demand and deny liability. Mr. Kwok indicated to Mr. Li Fan that e-Securities and their in-house lawyers were not so sure that the agreement was not binding, and pointed out that they had relied on Mr. Li Fan's instructions in respect of the proposed sale of the shares. Also, as e-Securities' financial year-end was 30 June 2005, they were going to have to write to their auditors, and also to the regulator, the Securities and Futures Commission, indicating that they considered that probably there was a binding agreement. On 4 July 2005, e-Securities wrote to AI, denying liability on the ground that there was no binding agreement.

On 7 July 2005, AI issued a Writ of Summons in the Hong Kong High Court with a short Statement of Claim endorsed on it. This was served (together with the necessary ancillary documents required under the Rules of the High Court) by leaving it at e-Securities' registered office in the evening of the same day. The Writ of Summons names e-Securities as the sole defendant. The Statement of Claim is a short one: see Annex 1 to this question below.

Questions:

- (a) **What procedural steps will e-Securities need to take in respect of the Plaintiff, AI? Include in your answer the date on which under the Rules of the High Court e-Securities will be obliged to serve its Defence.**

(4 marks)

(See the next page for a continuation of Question 4)

- (b) In order to protect itself fully, what procedural steps, if any, will e-Securities need to take in respect of Mr. Li Fan? *(3 marks)*
- (c) In what respects, if any, are the contents of the Statement of Claim deficient? Procedurally how would you deal with any deficiencies that you can identify? *(8 marks)*
- (d) On discovery, in respect of the communications involving e-Securities mentioned above, what will have to be disclosed and in which part(s) of e-Securities' List of Documents? *(10 marks)*

(See over the page for a continuation of Question 4)

Annex 1 to Question 4

STATEMENT OF CLAIM

1. The Plaintiff is a Hong Kong stockbroker.
2. The Defendant is a Hong Kong stockbroker.
3. The Plaintiff agreed to buy from the Defendant 30 million shares in Global Greater Chinese Holdings Limited at a price of HK\$ 1.08 per share.
4. Ultimately, the Plaintiff had to buy the shares at a price of HK\$ 1.58 per share from the market.

PRAYER:

The Plaintiff claims:

1. Damages.
2. Interest.
3. Costs.

Dated 7 July 2005
Andrew B.C. Doo & Co
Solicitors for the Plaintiff

Question 5 (25 marks)

Assume that today is 25 July 2004¹. You are a solicitor with Messrs Law & Partners. You meet Mr. Mo Zhun-chak, a university professor earning a monthly salary of around \$100,000, at your office. Mo tells you that on 1 August 2001 he purchased from Problematic Equipment Ltd a new model FE 9413 Fitness Equipment (“the Equipment”) at a price of \$60,000 as a birthday present for his niece, Mo Gu-gu. The following morning, after his niece had tried the Equipment for half an hour, she complained of having severe neck pain. Mo immediately took her to the hospital and she was diagnosed as suffering from severe bone fractures and dislocation of joints. After an urgent operation, the orthopedic specialist said unfortunately there remained some permanent damage to her spine and she was assessed to have 15% permanent impairment to the whole person.

Mo reported the matter to Problematic Equipment Ltd shortly after the injury. Their manager, Ng Fu-chak, said they would investigate the matter and prepare a thorough report on the incident. He said as a responsible company they would withdraw the Equipment from the market in case there was any safety problem. Ng then took back the Equipment from Mo and refunded the price. However, when Mo chased Ng for the report a couple of weeks later, Ng said the report was sent to their lawyers and so was privileged from production. At that time, Mo was too busy and so did not pursue the matter further. Yesterday, Mo learned that Problematic Equipment Ltd had been awarded the Best Manufacturer of the Year, apparently on the basis of its FE 9413 Fitness Equipment. Mo is furious and so wants your advice as to whether legal proceedings can now be taken to recover damages suffered by his niece. Mo also wants to know if he has any legal right to obtain a copy of Problematic Equipment Ltd’s report on the incident, as he believes it would reveal the existence of the Equipment’s safety problems. He also wants to show the report to the media so that other people would not be fooled into buying this unsafe equipment.

(See over the page for a continuation of Question 5)

1 Candidates may assume that at the relevant time in order to pass the means test for the Standard Legal Aid Scheme and for the Supplementary Legal Aid Scheme, the total financial resources of the applicant must not exceed \$155,800 and \$432,900 respectively.

Mo says he is prepared to pay for the legal costs for obtaining legal advice and undertaking initial investigations or legal proceedings, but he is reluctant to bear the huge legal costs for his niece for full-blown litigation. Mo says his niece's parents died in an accident when she was a child, leaving her only a modest legacy. She has since been living with Mo, who takes care of her living and educational expenses. She is now studying computer sciences at the University of Hong Kong. Her legacy together with the accrued interest now amounts to just over \$160,000.

Question:

- (a) **Please explain the advice you should give Mo, stating if necessary what further information and/or investigation you would need at this initial stage.**

(13 marks)

FURTHER FACTS

Assume that proceedings were duly instituted in the Court of First Instance against Problematic Equipment Ltd, which contested the claim. Soon after the filing of defence, Problematic Equipment Ltd duly made a payment into court on 15 September 2004 in the sum of \$900,000 pursuant to O 22 r 1. Your client did not accept the payment into court and the proceedings continued. The action has been set down for trial to commence about 3 weeks later.

Today you receive a letter marked "without prejudice save as to costs" from the defendant's solicitors setting out an offer from the defendant to pay "\$1,500,000 in full and final settlement of all the plaintiff's causes of action and each party shall bear its own costs." The offer is stated to be non-negotiable and open for acceptance within 14 days. You have recently received counsel's advice (with which you agree) that your client should have a very strong case on liability, but the damages to be awarded by the Court (inclusive of interest) would likely be in the range from \$700,000 to \$1,000,000.

(See the next page for a continuation of Question 5)

Legal costs so far incurred on your side are around \$900,000 and you have not yet delivered the brief to counsel for the trial. Further legal costs to be incurred until conclusion of the trial will be around \$2 million. You believe the legal costs already incurred or to be incurred by the defendant should be comparable.

Your client wants your advice as to whether there is any adverse consequence in not accepting the offer and whether the offer should be accepted. Your client also wants to know whether the earlier payment into court could/should be accepted.

Question:

- (b) Please explain the advice you should give to your client, stating if necessary what further information and/or investigation you would need.**

(12 marks)

Appendix No. 1 (Question 1)

Chapter: 212	Title:	OFFENCES AGAINST THE PERSON ORDINANCE	Gazette Number:
Section: 17	Heading:	Shooting or attempting to shoot, or wounding or striking with intent to do grievous bodily harm	Version Date: 30/06/1997

Any person who-

- (a) unlawfully and maliciously, by any means whatsoever, wounds or causes any grievous bodily harm to any person; or
- (b) shoots at any person; or
- (c) by drawing a trigger or in any other manner, attempts to discharge any kind of loaded arms at any person,

with intent in any of such cases to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of an offence triable upon indictment, and shall be liable to imprisonment for life.

Appendix No. 2 (Question 2)

Chapter: 200 Title: CRIMES ORDINANCE Gazette L.N. 29 of
Number: 1999
Section: 122 Heading: **Indecent assault** Version Date: 01/02/1999

(1) Subject to subsection (3), a person who indecently assaults another person shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.

(2) A person under the age of 16 cannot in law give any consent which would prevent an act being an assault for the purposes of this section.

(3) A person is not, by virtue of subsection (2), guilty of indecently assaulting another person, if that person is, or believes on reasonable grounds that he or she is, married to that other person. (Replaced 90 of 1991 s. 7)

(4) A woman who is a mentally incapacitated person cannot in law give any consent which would prevent an act being an assault for the purposes of this section, but a person is only to be treated as guilty of indecently assaulting a mentally incapacitated person by reason of that incapacity to consent, if that person knew or had reason to suspect her to be a mentally incapacitated person. (Amended 81 of 1997 s. 59)

END OF TEST PAPER