

**2016 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Friday, 11 November 2016



**HEAD II: CIVIL AND CRIMINAL PROCEDURE
TEST PAPER**

11 November 2016

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 YOU WERE INSTRUCTED TO ANSWER TAKING INTO ACCOUNT THE ANSWERS WITH THE LOWEST SCORES.**
- 6. Start each question 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. An examiner will be present for the first 30 minutes of the examination. Any questions relating to the paper must be raised in that period. Questions raised after the first 30 minutes will not be entertained.**
- 9. Do not take either this question paper or any answer books with you when you leave the examination room.**

2016 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

Last month your client, Wan Yat Man ("**Wan**"), was convicted of two counts of indecent assault contrary to s 122(1) of the Crimes Ordinance, Cap 200, of a woman travelling on the Mass Transit Railway ("**MTR**"). The trial took place in the Magistrates' Court at Tuen Mun. The prosecution case was that on 12 December last year the complainant was travelling to work in a train on the Tsuen Wan line when she felt something rubbing against her right buttock. She turned around to see a man standing behind her putting his hand in his pocket. She felt sure that he had touched her buttock. As she was in a hurry to get to work, she did not stop to complain. Nearly two months later, on 12 February this year, she was again travelling to work. She alighted from the train at her stop and stepped onto the escalator to exit the station. Immediately after stepping onto the escalator she felt someone pinching her right buttock. She turned to find standing behind her the same man who had touched her on the earlier occasion in the carriage. She was sure it was the same man since on the earlier occasion she had noted that he had a distinctive mole mark on his left cheek, was balding significantly and wore thick, black-rimmed glasses. On stepping off the escalator the complainant turned to confront the man and called out to MTR security officers to assist her in stopping the man from escaping. The police were called to the scene where the complainant repeated her story and the defendant was arrested and later charged. The police did not ask the defendant to participate in an identification parade.

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

While giving evidence at the trial, the complainant identified the man who had assaulted her on both occasions as the defendant, who was present in the courtroom. The defendant gave no evidence but Counsel for the defence denied the charges and claimed the case was a misunderstanding. The magistrate convicted the defendant of both charges and sentenced him to 2 months' imprisonment.

Questions:

- (1) Your client has instructed you to appeal against his conviction on the basis that he was wrongly identified by the complainant at trial. Evaluate this as a ground of appeal.**

(7 marks)

- (2) Can your client seek bail pending appeal? Describe any necessary procedures to be complied with if bail is sought.**

(6 marks)

After the trial concluded you realised that the MTR had CCTV cameras in place recording footage in the station which may have assisted you in preparing your client's defence to the second charge. This footage was viewed by the police during their investigations, but as it did not record the area at the bottom of the escalator where the alleged second assault took place, it was not seized. The police did not consider it relevant. The footage has since been destroyed by the MTR. You made no request for unused materials in relation to the case before or during the trial.

Question:

- (3) Evaluate whether the prosecution's failure to seize and disclose the footage constitutes a good ground of appeal against conviction for your client.**

(8 marks)

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

The Court of First Instance has heard and dismissed your appeal. Your client wishes to appeal the case further.

- (4) In which court would any further appeal be heard, what time limit must be met for filing an appeal and what tests must be complied with in order for the court to hear the appeal?**

(4 marks)

[25 marks in total]

Question 2 (25 marks)

You represent a 50-year-old cook who has been charged with the rape of a young girl aged 13, contrary to section 122 of the Crimes Ordinance, Cap 200. The girl went missing from the park near the estate where she was living at 4:30 p.m. in the afternoon on 15 December 2015. She was located by her mother at 8:00 p.m. that evening on a street near the estate. She told her mother that a man had offered to buy her tea. He took her to a local café where he followed her to the toilet and raped her before releasing her.

That evening your client was arrested at his place of work. He has two previous criminal convictions for sexually assaulting children and lives near the park. Under caution he denied the offence.

Question:

- (1) **At which level of court would this case likely be tried? Does your client have the right to choose the venue for trial?**

(4 marks)

In conference today your client told you he was at home all afternoon on 15 December 2015, before his shift at work began at 6:30 p.m.

Question:

- (2) **Do you need to alert the prosecution to this information? What steps, if any, should you take in light of these instructions?**

(7 marks)

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

The girl made a video-recorded statement to police about the incident on the day of the offence. The prosecution has given notice that they will rely on the video as the girl's evidence-in-chief as she is deeply traumatized at the idea of giving evidence in court.

Question:

- (3) Can the prosecution use the video in lieu of calling the girl to give evidence-in-chief and must the girl give evidence in the trial? Give authorities for your answer.**

(8 marks)

At the end of the trial, your client was convicted and sentenced to 12 months' imprisonment. The prosecutor is angry about the sentence as it does not reflect the usual tariff.

Question:

- (4) Is it possible for the prosecution to appeal the sentence given? In which court would such an appeal be heard? Identify any time limits or tests which would need to be complied with.**

(6 marks)

[25 marks in total]

Question 3 (25 marks)

You are instructed by Mr. Lau to claim damages for an unfortunate injury suffered by his 12-year-old daughter. The girl was a passenger in a taxi, on her way to a violin lesson, when the taxi crashed into the central divider on a main thoroughfare, and toppled over. Sadly, her right arm was broken, and she will never be able to play the violin again. You have obtained counsel's advice that there is a good cause of action against the taxi driver (who was driving too fast) and the driver of a Mainland-registered vehicle which dangerously cut into the taxi's lane.

Question:

- (1) Counsel also advised that it would be necessary to appoint a "next friend" to conduct the proceedings on behalf of the girl. **With reference to the relevant provisions of the Rules of the High Court ("RHC") Order 80, explain to Mr. Lau why this step is necessary, what the role of a "next friend" is and how to go about appointing one.**

(8 marks)

You have issued a writ naming the taxi driver as 1st defendant and the driver of the Mainland-registered vehicle as 2nd defendant. The writ has been served on the 1st defendant in the usual way.

Question:

- (2) The 2nd defendant has returned to the Mainland. You have his address in Shenzhen in the Mainland. **What steps are necessary to serve the writ on the 2nd defendant?**

(10 marks)

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

After trial, judgment is given for the plaintiff for damages of HK\$1,500,000. Liability is apportioned $\frac{2}{3}$ against the 1st defendant and $\frac{1}{3}$ against the 2nd defendant.

Question:

- (3) The court calls for submissions on costs. **Prepare brief submissions (which may be in point form) as to what costs order the plaintiff would seek.**

(7 marks)

[25 marks in total]

Question 4 (25 marks)

You have recently been appointed by Sure-Fire Profit Limited (in receivership) ("SFP") to take over its legal affairs from its previous solicitor, Mr. Arthur Po ("Po"). Po, a sole practitioner, unfortunately had to retire and wind up his firm, Po & Co., after he suffered a severe heart attack in June 2016. Amongst the papers you have taken over is an unserved writ issued on 31 October 2015, endorsed with a full statement of claim, in which SFP brings debt claims against Mr. Cyril Wu ("Wu"), a Hong Kong businessman. SFP claims in respect of two instalments of a loan made to Wu which are overdue for repayment. The first instalment of HK\$5 million was due to be repaid on 1 December 2009, and the second instalment of HK\$8 million was due to be repaid on 1 December 2012.

You have just spoken to the Receiver of SFP. He tells you that the writ was issued as a precaution, to prevent the first instalment becoming limitation barred. Initially there were discussions by telephone with Wu in the hope of negotiating a repayment schedule. Wu was sent a copy of the writ by e-mail, but it was not served, initially because Wu was taking a 6-month around-the-world yacht trip. By May 2016 Wu had returned home, but in the meantime the Receiver had forgotten about the writ. The Receiver says he understands Wu has extensive business interests in Mainland China, and is thought to spend a lot of time there.

Questions:

- (1) The Receiver has now e-mailed you to say he would still like to pursue Wu for both instalments, and to ask for your thoughts on this. **Draft a note containing your preliminary advice to him on the way forward and the chances of success, including any further information you need.**

(10 marks)

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

- (2) **Using the information given above, draft an affidavit or affirmation in support of an ex parte application to renew the writ. You need draft only the substantive text, omitting the heading and other formal parts of the document.**

(10 marks)

- (3) Assume now that the validity of the writ is extended by the court, and you duly serve it on Wu by posting it through the letterbox of his usual address. The posting takes place on Saturday, 25 July at 7:00 p.m. **If he does not respond, what is the earliest date on which you could apply for judgment in default of Acknowledgment of Service? Set out your reasoning.**

(5 marks)

[25 marks in total]

Question 5 (25 marks)

May Wong ("**May**") is the sole shareholder and director of August Limited ("**AL**"). AL is a company registered in Hong Kong and owns and runs a beauty salon and spa in Central (the "**Spa**"). AL used to employ June Chan ("**June**"), who was the general manager of the Spa. As May is a practising doctor and owns her own medical clinic, she left the day-to-day running of the Spa to June. Last month, June resigned with immediate effect and left the employ of AL. June told May that she planned to do some further studies abroad, and that was why she wanted to quit her job.

Two weeks ago, when May was on the way to the Spa, she bumped into her friend, April Fong ("**April**"), who is also a client of the Spa. April told May that:

- June had opened her own beauty salon and spa in the building next to the Spa in Central;
- June had contacted April to ask April to attend her new spa's grand opening event next week;
- June's new spa seemed to be offering services and packages very similar to the Spa but the prices were slightly lower than those offered by the Spa; and
- April's friends who were also customers of the Spa had also been approached by June.

After that conversation with April, May immediately returned to the Spa and made some enquiries. One of her junior staff told her that just before June left her employ, she was always staying at the Spa until late hours and the junior staff saw June printing out voluminous documents from the Spa's computer and making copies of many documents. The junior staff also saw June making appointments to see many of the Spa's customers one to two weeks before she left the employ of AL.

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

May suspects that before June left AL's employ, June had taken away with her the Spa's client list and other confidential information, and had solicited some of the Spa's clients.

In recent months the Spa's business has gone downhill and it has been sued by several of its suppliers for non-payment for goods ordered. May believes that the Spa's decline in business was mainly because June had solicited away many of the Spa's clients and is setting up a rival business directly in competition with the Spa.

Questions:

- (1) May approaches you for advice. She tells you that June signed an employment contract with AL when she first joined AL as general manager. May cannot now locate her copy of the contract, but she recalls that there are non-solicitation clauses in that contract together with a restrictive covenant which prohibits June from setting up or participating in businesses in direct competition with the Spa in Central within 6 months of the termination of her employment contract. **Assuming that these non-solicitation and non-competition covenants (the "Covenants") are enforceable, advise May and AL whether AL is entitled to obtain an interlocutory injunction against June and her company to stop June's further breach of the Covenants and to force June to return the Spa's client list and confidential information. Also advise May and AL as to the likelihood of success of such application and whether any further information and/or investigations are required.**

(15 marks)

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

- (2) Assume that you act for June and her company, and it is now January 2017. AL commenced action against June and her company seeking an injunction to enforce the Covenants and damages. An interlocutory injunction was granted on 30 November 2016, restraining June from setting up her business until March 2017. The court also ordered a speedy trial of the action. **With reference only to the facts set out in (1) above, advise June whether she is entitled to seek security for costs against AL and the likelihood of success of such an application. If any further information and/or investigations are required, give details of them in your answer.**

(5 marks)

- (3) You continue to act for June and her company and it is still January 2017. June wants to explore the possibility of settling the action as soon as possible, as she does not want the opening of her new business to be postponed further by the litigation. **Advise June what action she might best take to provoke settlement of the action.**

(5 marks)

[25 marks in total]

END OF TEST PAPER