

**2016 OVERSEAS LAWYERS  
QUALIFICATION EXAMINATION**

**HEAD V: PRINCIPLES OF  
COMMON LAW**

**Monday, 19 December 2016**



# **Head V: PRINCIPLES OF COMMON LAW**

## **TEST PAPER**

**19 December 2016**

### **Instructions to Candidates:**

- 1. The duration of the examination is 2½ hours (which includes 30 minutes designated as reading time).**
- 2. You are not permitted to bring into the examination any books, documents or other materials.**
- 3. At the commencement of the 30 minutes' reading time, you will be supplied with 10 questions, together with an English dictionary and a copy of The Law Student's Dictionary by J. E. Penner.**
- 4. You will be permitted 30 minutes to consider the test questions, to choose 4 questions upon which you will be examined (one from each of Parts A, B, C and D of the test paper) and make notes on the questions supplied.**
- 5. At the expiry of the 30 minutes' reading time, you will be called before a panel of 2 to 4 Examiners who will assess your understanding of the topic or subject concerned.**
- 6. Where a question has two sections, you must answer both sections of the question. Each question is worth 25 marks.**
- 7. Wherever possible, support your answer with reference to decided cases and legislation.**
- 8. During the oral examination, you may consult only the notes that you have made during the 30 minutes' reading time on the questions supplied.**
- 9. Do not take this question paper with you when you leave the examination room.**

# **2016 Overseas Lawyers Qualification Examination**

## **Head V: Principles of Common Law**

### **Part A (Constitutional Law & Introduction to Legal System)**

#### **Question 1 (25 marks)**

- (a) **List the major law courts in Hong Kong and describe what types of cases are heard in each of them.**

**(7 marks)**

- (b) **Discuss the arguments for and against prospective overruling. Is it appropriate for the court to order that its decision should have effect only prospectively?**

**(12 marks)**

- (c) **List and describe the ways in which a court can decline to follow a previous decision that has been handed down.**

**(6 marks)**

*(See the next page for a continuation of Part A)*

**Question 2 (25 marks)**

- (a) **What do you understand by the following terms: "an inquisitorial system" and "an adversarial system"? Is the Hong Kong legal system an inquisitorial system or an adversarial system or both? Give examples to illustrate your answer.**

**(2 marks)**

- (b) **The Jury Ordinance was among the earliest ordinances passed in Hong Kong. Describe the practice of trial by jury in Hong Kong. Who can be a juror? What is the function of a jury in a trial? Is the practice of trial by jury flawless? What would be your concerns over such a practice?**

**(9 marks)**

- (c) **Why is there a distinction between public and private law in Hong Kong? Give examples to illustrate your answer.**

**(2 marks)**

- (d) **Hong Kong citizens are subject to a plethora of administrative decisions and constitutional constraints in their daily lives. Discuss what recourse exists for someone who feels that he or she has been subjected to unfair treatment or judgement within the Hong Kong legal system.**

**(12 marks)**

**End of Part A**

## Part B (Law of Contract)

### Question 3 (25 marks)

Crypto, 17, has with friends created an on-line game called Nomekop, of which the market is beginning to take note. He is a fitness addict and has been working out at Red Bears Fitness ("**Red Bears**"), paying every three months for a personal trainer. The cost for every three months was HK\$60,000 (on the basis two hours' personal training each time, five times a week), which Crypto paid in advance. On the day before his 18<sup>th</sup> birthday, the Manager of Red Bears, knowing of Crypto's success enticed Crypto into signing a fitness contract for ten years at HK\$ 2 million (representing a discount of HK\$400,000 to his current rate), the HK\$ 2 million to be paid by four installments of HK\$ 0.5 million each, beginning right after his current three months' payment expired. The following day Crypto came as usual for his workout but unfortunately slipped and hurt himself badly. He is now in a coma in intensive care in hospital. His parents have hired you as Solicitor to seek compensation from Red Bears. After receiving your first letter, Solicitors for Red Bears wrote back as follows:

"Dear Sirs,

Much as our client regrets the incident, the contract signed by your client has the following exemption clause:

*"All clients are reminded that they use the Fitness Center at their own risk. Red Bears is not responsible for any accident in the Fitness Center unless it is proven that this was caused by willful negligence of Red Bears or its staff in which event the total compensation payable cannot exceed the amount payable by the client under the current terms of his contract with Red Bears."*

*(See the next page for a continuation of Question 3)*

Red Bears denies that the accident was caused by any negligence on their part, let alone willful negligence.

Furthermore, your client has signed a contract which requires him to pay HK\$ 2 million by four installments beginning from 1 April 2017, a copy of the contract is enclosed. We look forward to receiving your first cheque by due date, failing which our client may start legal proceedings without further notice."

**Advise Crypto's parents as to Crypto's rights and liabilities under Hong Kong Contract Law.**

**(25 marks)**

*(See over the page for a continuation of Part B)*

#### **Question 4 (25 marks)**

In March 2016, Betty signed a written contract with the Grand Hotel, a 5-star hotel in Tsim Sha Tsui, reserving the hotel's Rose Ballroom as the venue for a dinner reception to be held on 12 September 2016, to celebrate her mother's 80<sup>th</sup> birthday, which fell on that day. It was provided in the contract that the reception would be for 96 people, to be seated at 8 tables. The cost of the reception amounted to HK\$100,000 and the choice of food and beverages, plus other relevant terms, were agreed and set out in the contract.

Betty's mother, Abby, especially wanted the reception to be held in the Rose Ballroom because Abby and those of her friends who had been invited to the reception lived nearby and, all being keen ballroom dancers, could dance on the ballroom's vast dance floor after dinner.

Betty rang the Grand Hotel to check on certain arrangements a fortnight before the reception and was told that there had been a mistake over the dates. When Betty made the contract, the Rose Ballroom had in fact already been booked for another event on that night.

On learning this, Betty immediately attempted to find another location for the reception. The only 2 possibilities were a traditional Chinese restaurant, the Happy Shanghai & Cantonese Restaurant, which could offer a function room and limited catering, for HK\$80,000, and the Opulent Hotel, another 5-star hotel in Tsim Sha Tsui. The Opulent Hotel was able to offer an equivalent provision to the Grand Hotel,

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

but at a price of HK\$120,000. Betty booked the Opulent Hotel, and the reception took place there. It went smoothly, but Abby was very disappointed at the change in venue because the dining hall at the Opulent Hotel was carpeted and not designed for ballroom dancing. As a result of all the worry and extra work caused by the change of venue, Betty suffered a breakdown, and several months later was still receiving treatment for depression.

**Advise Betty, on the basis that the Grand Hotel has accepted that the mistake over the booking was entirely its fault.**

**(25 marks)**

*(See over the page for a continuation of Part B)*

### **Question 5 (25 marks)**

Cindy teaches yoga in Kowloon. As the economy has taken a downturn, she sees that fewer people are registering for classes. Worried about the falling business, Cindy decides to promote the yoga class and encourage more people to join. She places an advertisement in the free weekend newspaper.

The advertisement in the Saturday edition reads as follows:

"Don't miss out on a special deal! Ten-lesson yoga course for the price of five lessons. The first five students to contact me will get this introductory discount. Just turn up at the first class to see if you are one of the lucky winners. You should complete the application form at the bottom of this advertisement and direct it to the address given."

At the bottom of this advertisement is a tear-off form on which applicants can write their name and contact details.

In the following week, several events occur.

On Monday, the following happen:

- Alice (who happens to live in the same street as Cindy) stops by Cindy's building after work, and writes a note giving her contact details, and puts it through the letterbox on Cindy's door. She does not use the special form on the advertisement.
- Bernice uses the special form, and puts her letter in the post. Unfortunately, it is misdirected and is not delivered for three weeks.

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

- Christine fills in the special form, and delivers it by hand to Cindy's address. She did not put the form properly into Cindy's letterbox, with the result that the form fell out onto the lobby floor, and was swept away by the building cleaner.

On Tuesday:

- Daisy (who thinks the class will be a nice present for her sister) puts her sister's name and other details on the special form, and posts it to Cindy.
- Emily makes three photocopies of the special form, fills in her details on all of them, and posts them to Cindy.

Cindy receives the various communications in this order: first Alice's note, then Emily's three photocopied forms, then Daisy's form.

The following Saturday, Alice, Bernice, Christine, Daisy's sister and Emily (together with her friends, Felicity and Grace) all turn up at the first class and demand the introductory discount.

**Advise Cindy.**

**(25 marks)**

**End of Part B**

## Part C (Introduction to Law of Torts)

### Question 6 (25 marks)

Outdoor Challenge ("OC") is a commercial business which offers arduous hiking activities in Hong Kong. OC advertises that it hires only government certified hiking instructors for its outdoor activities.

In early June 2016, OC arranged a small group hike for two paying clients, **Albert** and **Bill**. The instructor leading the hike for OC was **Charles**, an employee of OC. Although **Charles** had a lot of experience with hiking in the New Territories, he wanted to be certain that the route they would be hiking on was safe, as it included crossing several mountain streams on foot.

**Charles** consulted "A Guide to Hong Kong Hiking" ("**Guidebook**") published by Hong Kong Adventures ("**HKA**"), a non-profit organization dedicated to promoting safe hiking in Hong Kong. The Guidebook said that in June it was safe to walk across the streams that **Charles** planned to cross on the hiking trip.

On 30 June 2016 **Charles** set off on the hiking trip with **Albert** and **Bill**. The weather was fine and the group of three hikers made progress, crossing several streams with no problems.

At about 4:00 p.m. the three hikers were crossing a stream when they heard the loud sound of rushing water. They were hit by a wall of water and all were swept downstream. Fortunately, all three of them were rescued by another group of hikers who were on the riverbank downstream.

*(See the next page for a continuation of Question 6)*

All of the three hikers suffered injuries as a result of being swept downstream by the water. **Albert** had a broken leg, **Bill** a broken wrist and **Charles** a serious head injury.

The hiking group that had rescued **Albert**, **Bill** and **Charles** carried them to a nearby road where they were picked up by two ambulances. **Charles**, because of his serious injuries was put into the first ambulance to leave. **Albert** and **Bill** were taken to hospital in the second ambulance.

The ambulance taking **Charles** to the nearby Hoi Ha Healthy Hospital ("**HHHH**") arrived without incident. As the ambulance taking **Albert** and **Bill** was on the way to the **HHHH**, the driver received a call on his mobile phone from his girlfriend. The driver got into a lengthy conversation with her about where they would go for dinner that night. The driver was so busy talking to his girlfriend that he took his eyes off the road and crashed into a tree. As a result of this crash **Albert** was killed. **Bill** suffered no further injuries in the crash.

Following these events independent Police, Labour Department and Hospital Authority investigations have established the following facts:

- a. When **OC** hired **Charles** they failed to check if he was a government certified hiking instructor. **Charles** has significant hiking experience but is not certified by the government.
- b. The **HKA** in preparing its publication "A Guide to Hong Kong Hiking" failed to check if June was a safe month for crossing mountain streams.

*(See over the page for a continuation of Question 6)*

- c. June is not a safe month for crossing mountain streams in Hong Kong. In June there is a high risk of sudden cloud bursts on the mountain tops, which result in a huge volume of water being sent downstream. This is what happened on 30 June 2016.
- d. **Charles** was a foreign student and was illegally working for **OC** as a hiking instructor in breach of the provisions of his student visa which did not permit him to be employed in any capacity (Immigration Ordinance Cap 115).
- e. The driver of the ambulance which crashed and killed **Albert** was convicted of "causing death by dangerous driving" (Road Traffic Ordinance Cap 374).
- f. The ambulance driver was employed by **HHHH** which provided ambulance services.
- g. **Albert** was married with a non-working wife and had two children aged 3 and 5 years.
- h. **Bill's** broken arm has healed but will always be weak. He will be unable to pursue his ambition to be a professional piano player.

**Advise all parties suffering loss or damage as to their possible tort claims. Support your advice with reference to relevant causes of action, legal principles and authorities.**

**(25 marks)**

*(See the next page for a continuation of Part C)*

### **Question 7 (25 marks)**

In the case of *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56, 58 Lord Phillips stated:

"The law of vicarious liability is on the move...In *Lister*, Lord Clyde said that cases of sexual abuse by an employee should be approached in the same way as other cases in the context of vicarious liability. Nonetheless the courts have been tailoring this area of the law by emphasizing the importance of criteria that are particularly relevant to this form of wrong. In this way the courts have succeeded in developing the law of vicarious liability so as to ensure that a remedy for the harm caused by abuse is provided by those that should fairly bear that liability...The precise criteria for imposing vicarious liability for sexual abuse are still in the course of refinement by judicial decision."

**Discuss how in recent years the law of vicarious liability has been "on the move" and how the English and Hong Kong courts have modified the traditional approach for determining vicarious liability.**

**(25 marks)**

*(See over the page for a continuation of Part C)*

**Question 8 (25 marks)**

**Discuss ALL of the following questions with regard to the Tort of Defamation.**

- (a) **What is meant by the expression "right-thinking members of society" and why is this concept important?**

**(10 marks)**

- (b) **What is the difference between libel and slander and what is the significance of the difference between these two concepts?**

**(5 marks)**

- (c) **What are the elements of the defence of "fair or honest comment"?**

**(5 marks)**

- (d) **What remedies are available for defamation?**

**(5 marks)**

**End of Part C**

## **Part D (Criminal Law)**

### **Question 9 (25 marks)**

- (a) In criminal law, what, if any, distinction is there between the concepts of 'recklessness' and 'gross negligence'.

**(10 marks)**

- (b) Explain how the meaning of recklessness has changed with reference to the cases of *R v Cunningham* (1957), *MPC v Caldwell* (1982) and *R v G & R* (2003). Which of these cases is/are followed in the courts of Hong Kong?

**(15 marks)**

*(See over the page for a continuation of Part D)*

**Question 10 (25 marks)**

Charles is married to Diana but the marriage is an unhappy one and Charles decides to kill Diana. Charles asks his friend Fred, who is a pharmacist, if Fred can supply a poison. Fred asks Charles why he wants to buy poison. Charles tells Fred that he wants to kill insects in his home. Fred agrees to sell poison to Charles but warns Charles that the poison is very strong and can be lethal to humans. Charles takes the poison home. That evening, Charles cooks dinner for Diana and their daughter, Jane. He puts the poison in the food which he serves to both Diana and Jane. Charles does not eat anything himself saying that he is not hungry. After eating the meal, both Diana and Jane become ill and Jane dies. Diana survives but the effect of the poison has caused an injury to her brain which results in her becoming totally paralysed.

**Discuss the criminal liability, if any, of Charles and Fred for the death of Jane and the injury to Diana.**

**(25 marks)**

**End of Test Paper**