

**2018 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD V: PRINCIPLES OF
COMMON LAW**

Tuesday, 15 January 2019



2018 Overseas Lawyers Qualification Examination

Head V: Principles of Common Law

Part A (Constitutional Law & Introduction to Legal System)

Question 1 (25 marks)

"The jury system in Hong Kong is a relic of the past. It is not very efficient in terms of costs or in dispensing justice."

- (a) **Do you agree or disagree with the above statement? Support your reasons by describing the function of a jury in a trial in Hong Kong and the advantages and/ or disadvantages of such a system.**

(10 marks)

Hong Kong residents have the right to seek judicial review in the courts of the acts of the executive authorities and their personnel. Various independent organizations, including the Office of the Ombudsman, exist also to enable citizens in Hong Kong to challenge maladministration and inappropriate decisions made by executive authorities.

- (b) **Advise how the process of judicial review and the Ombudsman help aggrieved Hong Kong citizens. Describe the two forms of recourse mentioned above, the powers and limitations of the judicial review process and the Ombudsman respectively and how the two forms of recourse interact with each other.**

(15 marks)

(See over the page for a continuation of Part A)

Question 2 (25 marks)

"There is hardly any aspect of the education, welfare, health, employment, housing, income and public conduct of the citizen that is not regulated by statute." - David R. Miers and Alan C. Page, *Legislation*, 2nd edition (London: Sweet & Maxwell, 1990), page ix.

- (a) Give an overview of the law-making function of Hong Kong's Legislative Council and in the process, distinguish between Government bills and Members' bills as well as highlight where the balance of powers lies between the legislature and the executive.**

(13 marks)

"It is to the glory and happiness of our excellent constitution, that to prevent injustice no man is concluded by the first judgment; but that if he apprehends himself to be aggrieved, he has another Court to which he can resort for relief; for this purpose the law furnishes him with appeals, with writs of error and false judgment." – *Lord Pratt CJ, R v Cambridge University, ex parte Bentley* (1723) 1 Str 557.

- (b) Give an account of the Hong Kong courts' criminal jurisdiction and their functions. Discuss if the above obiter dictum is still true for Hong Kong's criminal law courts.**

(12 marks)

End of Part A

Part B (Law of Contract)

Question 3 (25 marks)

- (a) Nancy sells a car to Mandy. After the sale is over, Nancy promises Mandy that none of the tyres is a retread. This is not true. **Advise Mandy.**

(3 marks)

- (b) Ben owes David HK\$50,000. Fred comes along and promises Ben HK\$5,000 if Ben pays David the HK\$50,000. Ben pays David the HK\$50,000. Fred fails to pay Ben HK\$5,000. **Advise Ben.**

(4 marks)

- (c) Anne runs a clothes shop next to Charlotte's shoe shop. Anne is unhappy about a huge sign Charlotte has put up outside Charlotte's shop abutting Anne's shop. Anne's repeated complaints regarding the sign have been largely ignored by Charlotte. That is until Anne threatened to go to the High Court to seek an order to have the sign removed. To avoid trouble, Charlotte promised Anne to take down the sign if Anne will agree not to go to court. Anne has agreed to this proposal.

Meanwhile Charlotte has spoken with her friend, Emily, who teaches land law at university. She advised Charlotte (correctly) that the erection of the sign (in the position it is in) is lawful and the size of the sign is well within the legal limit. Charlotte then promises to pay Emily HK\$1,000 for her advice as soon as Charlotte has a chance to go to the bank.

Charlotte has still not removed the sign and has so far failed to pay HK\$1,000 to Emily.

Advise Anne and Emily.

(18 marks)

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

Question 4 (25 marks)

IIL, a Hong Kong company, and China Gas, a People's Republic of China ("PRC") company, entered into an agreement whereby China Gas will build a gas plant (the "Gas Plant") for IIL in Hunan, PRC using gas from the Changsha Landfill 20 km away (the "Agreement"). The Agreement provides that the Gas Plant will include land permitted for use for a gas plant (the "Land"), a pipeline from the Changsha Landfill with extraction rights for 70 years and rights of way along its passage to the Gas Plant as well as land with user rights for 70 years for the use of the Gas Plant and that the Gas Plant shall be ready for production within 48 months from date of the execution of the Agreement and commencement of work shall take place within 180 days of the execution of the Agreement. The building work shall be in 4 stages.

Before entering into the Agreement, China Gas produced to IIL a Valuation Certificate purporting to have been issued by an independent certified land valuer, certifying that the value of the Land is RMB 150 million on the open market as at date of valuation. China Gas also provided documentation that the Land was ready for transfer to IIL with full rights to enable IIL to take gas from the Changsha Landfill, to transport the gas from pipes along a designated route and to operate the Gas Plant.

The cost (inclusive of the Land) of HK\$400 million is to be paid by IIL to China Gas in stages as follows:

- (1) within 30 days upon the execution of the Agreement, HK\$150 million, to cover the cost of the Land (and the Land and all rights pertaining thereto shall be transferred to IIL within 30 days of this payment of the first HK\$150 million);

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

(2) within 7 days upon the happening of the following events:

- a. The issue of a certificate by China Gas Construction, a subsidiary of China Gas, the project manager appointed by China Gas and IIL (the "Project Manager") of date of commencement of building work, HK\$50 million;
- b. The issue of a certificate by the Project Manager of completion of each of 4 stages of building work as defined in the Agreement, HK\$50 million.

IIL has on site its own supervisory and management team and China Gas and the Project Manager shall provide IIL with access to all information relevant to the performance of the Agreement.

The Agreement contains the following clause:

"This agreement shall constitute the entire contract of the parties hereto with respect to the object hereof and supersedes all prior oral or written agreements, representation and contracts with respect to the object hereof."

Upon the execution of the Agreement, IIL also signed on the same day, an agreement with Hunan Gas whereby IIL agreed to supply gas to Hunan Gas and Hunan Gas will take such gas (the "Hunan Agreement") 60 months from the date of the execution of the Agreement (between IIL and China Gas). Both the Agreement and the Hunan Agreement are governed by Hong Kong law. There is no restriction against assignment in either the Agreement or the Hunan Agreement.

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

The first payment of HK\$150 million was duly paid by IIL to China Gas but the land rights were not transferred within the 30 days of this payment as agreed. Nothing happened in the next few months and meanwhile 180 days after the execution has passed and there is still no sign of commencement of works either on the pipeline or the Gas Plant. The Project Manager has recently issued the Certificate of Commencement of Works and a demand for payment of HK\$50 million has been sent by China Gas to IIL. Meanwhile, IIL's on-site manager has discovered that the person who signed the valuation report was in fact not a registered valuer. He then commissioned another valuation report from a registered valuer who valued the Land at RMB 50 million, the reason for such a large discrepancy being that the transactions used by the previous valuer were directly based (with no adjustment or discussion of the reasons for comparability) on general commercial property values in the City of Changsha and some transactional comparables were in fact non-existent. It was also discovered that the Land was granted to China Gas for only RMB 50 million by the local authority 3 months before the Agreement by an administrative order (never disclosed to IIL).

The CEO of IIL has come to you for advice and asks if he could walk away from what is turning out to be a potentially sour deal and if so, what are the consequences with regard to the Agreement with Hunan Gas.

(25 marks)

(See the next page for a continuation of Part B)

Question 5 (25 marks)

The Hong Kong Jockey Club ("the Club") has decided to host the Asian Championship Horse Racing Meeting ("the Race") on 5, 6 and 7 September 2018.

To accommodate the larger anticipated attendance, the Club decided to undertake some construction works to its Shatin racecourse as follows:

- (1) The Club entered into a contract with Tarzan Builders ("Tarzan Builders") to:
 - extend the current car parking capacity by building an extension carpark next to the current carpark (the "Extension"); and
 - widen the existing access road to the current carpark - the access road would have a new lane which would lead to the entrance to the extension carpark.

Tarzan Builders were required under the contract to complete the Extension by 31 July 2018.

The Club paid a deposit of HK\$2,000,000 on signing the contract. The balance of HK\$18,000,000 was required to be paid by 31 August 2018.

- (2) To upgrade the seating, the Club also contracted with Allsides Ltd. ("Allsides") to replace all the seats in the race stands. The seats were to be of four different colours to designate different sections of the race stands. It was stated in the contract that the seats were to be in place by 31 July 2018. The cost for the seating work was HK\$5,000,000.

It was intended that two local race meetings would be run at the Shatin racecourse during August 2018 to test out the new facilities before the Race.

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

The following events have occurred:

- (i) There was heavy rain in Hong Kong in mid-July 2018 and the whole of the Shatin racecourse, being low-lying, was flooded. The Race had to be cancelled and could not be rescheduled as the overseas jockeys, trainers and horses were all scheduled to appear at other races overseas for the rest of the year.
- (ii) The Extension, where cement and paintworks were still very wet and being left to dry, was also flooded as part of it was at sub-basement level. Some of the cement has fallen off and the paintwork has been ruined as the floodwaters have left water marks. The access road has also been flooded. As proper drainage had not yet been put in place, the flooding made it impossible for carpark to be built in the area. Tarzan Builders had paid out approximately HK\$1,000,000 in expenses for workers and materials.
- (iii) Allsides was running behind schedule in their replacement of the seats and hurriedly finished installing them on 31 July 2018. Some of the seats were badly fitted and rocked to and fro, while some of the seats were of the wrong colour. As a result, admission to the 2 local races in August 2018 had to be limited.
- (iv) Ms. Wong owns a flat in Shatin which has an unobstructed view of the Shatin racecourse. She rented it out through Air BnB for the three days of the Race for HK\$10,000 to Mr. and Mrs. Smith ("the Smiths") from Australia. The Smiths had paid a deposit of HK\$2,000 on entering into the contract with Ms. Wong, and were supposed to pay the balance of HK\$8,000 on the first day of the Race. The Smiths have now notified Ms. Wong that they will no longer travel to Hong Kong since the Race has been cancelled.

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

Advise, with an explanation of the law involved:

(a) the Club in respect of:

(i) Tarzan Builders' claim against the Club for the balance of HK\$18,000,000, i.e. the balance of the monies they say are due; and
(9 marks)

(ii) Allsides' claim against the Club for the full amount of HK\$5,000,000 for supply of the seating.
(8 marks)

(b) Ms. Wong who is seeking to recover the balance of HK\$8,000 from the Smiths. (Ignore any discussion of payments that need to be routed through Air BnB.)
(8 marks)

In relation to the contract between the Club and Tarzan Builders, you can assume that there is no force majeure clause or any provision which requires Tarzan Builders to rebuild in a force majeure situation or that it bears all of the risk up to and including completion of all the building works. You can also assume that the deposit was paid by the Club to Tarzan Builders.

End of Part B

Part C (Introduction to Law of Torts)

Question 6 (25 marks)

Angel owns a small successful restaurant, Angel's Adventure ("AA") in Shatin, Hong Kong. AA specializes in making noodles and dumplings. Angel is at AA everyday supervising her business. The restaurant was very busy on Saturday, 8 September 2018 when a number of incidents occurred.

At 7:00 p.m., Betty, who was working in the AA kitchen, was carrying a large container of boiling water used for noodle making. The container was very heavy and Betty suddenly dropped the container as it was too heavy for her to carry. Charles, an employee of AA, who was in the kitchen, was badly burnt by the boiling water as was Betty.

Danielle, a customer in the restaurant, upon hearing Betty's and Charles' screaming in pain after being burnt, ran towards the kitchen to see if she could help. On entering the kitchen, Danielle slipped on the water that had been spilt on the floor and fell, suffering severe abdominal injuries.

Betty, Charles and Danielle were taken to hospital immediately by ambulance. Following these events, the following facts have been established by independent witness statements, police and hospital reports:

- a) At the time of the injury to Betty, she was a convicted prisoner serving a prison sentence under the custody and control of the Hong Kong Prison Service ("HKPS"). As part of its programme to prepare prisoners for their release and return to society, the HKPS operates a day-release programme. Under this programme, Betty was granted day-release to work for an approved employer.

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

AA was an approved employer. Betty worked for AA for 3 days a week returning to prison at the end of each working day. AA did not pay Betty for her work and agreed with the HKPS that any prisoners assigned to them would not be given dangerous work.

- b) Betty had on several occasions told Angel that she found it difficult to carry the container of boiling water. Angel merely told Betty to get another person to help her carry the boiling water.
- c) At the time she slipped on the wet floor, Danielle was five months pregnant. The fall severely injured her unborn child, Edward, who was born with severe physical deformities as a result of Danielle's fall.

Discuss any tort actions that the injured parties might bring to recover damages for their injuries and losses. Support your discussion with reference to the relevant principles and cases.

(25 marks)

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

Question 7 (25 marks)

In Glofcheski, Tort Law in Hong Kong (Revised Fourth Edition 2018) page 184, the author states:

"In Robinson v Chief Constable of West Yorkshire Police [2018] 2 WLR 595... The court confirmed (if indeed it was necessary to do so) that the three-fold Caparo test was not a pre-requisite for a duty of care in all cases, and did not apply to straightforward cases involving the infliction of injury, what the court called positive acts as opposed to omissions. On that point Robinson merely confirmed what was already the practice of Hong Kong courts."

Discuss the practice and approach of the Hong Kong Courts for determining the existence of a duty of care in a negligence claim. In your discussion, refer to the relevant cases and principles used by the Hong Kong Courts on this issue.

(25 marks)

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

Question 8 (25 marks)

Jack has spent a considerable amount of time driving his car around a public carpark in Central looking for a vacant parking space. He finally sees a vacant space and stops his car to reverse into the space. Ken, who has just entered the carpark, sees the same vacant space and drives directly into it, preventing Jack from parking in it.

Jack is very angry at Ken parking in what he considered should be his parking space, and jumps out of his car cursing Ken and waving his fist at Ken. Jack says to Ken, "If I were not in a hurry to attend an important meeting, I would punch you for taking my parking space."

Despite Jack's words, Ken was frightened at Jack's abusive language and threatening behaviour and runs over to Jack to try to calm him down. Jack, fearing that Ken is about to attack him, punches Ken, causing him to fall to the ground.

Lenny, a friend of Ken who was a passenger in his car, on seeing Ken fall to the ground, gets out of the car and says to Jack in a loud voice, "I am arresting you for punching Ken. Don't move! I am going to call the police. Stay where you are until the police arrive." As Lenny is a very large man, Jack reluctantly obeys Lenny. Jack stands still and does not move. The police are called by Lenny and when they arrive, they take statements from Jack, Ken and Lenny.

Advise all parties as to their possible tort claims arising from the events described. Discuss all relevant causes of action together with the relevant legal principles and cases in your answer.

(25 marks)

End of Part C

Part D (Criminal Law)

Question 9 (25 marks)

David, a drugs abuser for many years, had a long-standing grudge against his neighbour, Winnie. One evening, David was high on drugs after consuming some cocaine. He armed himself with a hammer and followed Winnie into a lift when she was on her way home. Inside the lift, David repeatedly assaulted Winnie with the hammer. She put up a strong resistance in defending herself. He was afraid she might scream for help, so he gagged her with a piece of cloth and bound her neck, hands and legs with a rope. David then fled.

The police arrived at the scene to investigate and found Winnie dead. The forensic pathologist who conducted the post mortem concluded by saying:

"There were 16 areas of injury on the victim's abdomen, arms and legs. A long piece of rope was secured tightly with a knot at the back of the neck. The rope passed over the back of the body to loop around the ligature which tied the hands and legs together. The victim had been trussed up without hope of escape. The autopsy findings indicated that the death of the victim resulted, not from the bodily injuries, but from ligature strangulation caused by the rope around her neck."

David was subsequently arrested for the offence of murder. In a video-recorded interview, he voluntarily admitted that assaulting Winnie was a reprisal attack, but denied that he had any intention to kill the deceased. He also told the police that he, at the time of the offence, did not know what he was doing as he was intoxicated by drugs. A psychiatrist confirmed that at the time of the killing, David was suffering from a psychosis induced by long-term cocaine consumption and that he was unable to resist taking the cocaine.

(See the next page for a continuation of Question 9)

- (a) Briefly discuss the evolution of mens rea for murder. (7 marks)
- (b) Should David be liable for murder if he did not intend to kill Winnie?
(8 marks)
- (c) Explain what possible defence or defences to the murder charge David may rely on.
(10 marks)

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

Question 10 (25 marks)

Tommy was seen acting furtively inside a department store. Police officers in plain clothes thus placed him under close observation. He was served by a salesman in the store. He asked to buy an expensive diamond ring. He produced a Visa credit card ("the Card") in order to settle payment. The salesman proceeded with the transaction but the card centre declined payment. Tommy quickly took back the Card and left the shop. The police officers then intercepted Tommy. He, after admitting to the police that he had picked up the Card on the street half-an-hour earlier, remained silent. Subsequent police investigation confirmed from Cindy, the true owner of the Card, that she had lost the Card about half-an-hour before Tommy was arrested.

The police later took Tommy to his residence, where he lives alone, for a search. Three stolen motorcycles were found inside his house. It was subsequently ascertained that they had been stolen between 3 and 5 months ago. A large number of tools, including spray-painting guns and metal grinders, were found. The spray-painting equipment can be used to disguise a stolen motorcycle and the grinders can be used to remove chassis or engine numbers stamped on the metal. It was discovered that this had been done to all three motorcycles that were recovered. All of the motorcycles now had a different number plate and had been registered in Tommy's name.

What charge(s) (and on what basis) is likely be brought against Tommy in respect of-

- (a) the Card, (9 marks)**

- (b) his attempt to use the Card to purchase the diamond ring, and (8 marks)**

- (c) the three motorcycles found in his house. (8 marks)**

[Note: The facts of Question 10 are designed to be equivocal, inviting candidates to identify and discuss the issues of the case.]

End of Test Paper