

**2019 OVERSEAS LAWYERS  
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND  
CRIMINAL PROCEDURE**

Wednesday, 6 November 2019





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**Head II: Civil and Criminal Procedure**

**Question 1 (25 marks)**

At about 20:06 hours on 8 August 2019, a police officer on duty in uniform ("P") was patrolling at Wong Tai Sin MTR Station, Kowloon, Hong Kong and saw a male young person ("X") playing with a mobile phone alone at a location near Exit B. When X noticed that P was approaching, X immediately and nervously put the mobile phone into the left pocket of his trousers and attempted to flee. P stopped X and asked to see the mobile phone. P found that there were two 'upskirt' photographic images of women captured by the phone.

P immediately arrested X and cautioned him for suspected offences of 'upskirt' photography without the consent of the subject women.

Under caution, X initially remained silent. However, after P told him in a strict and threatening tone that there was no chance for him to avoid prison and that for his own benefit, he had better tell the truth, X admitted that that mobile phone belonged to him. He stated that he put his mobile phone under an unknown woman's skirt and took a photo of her secretly at about 19:00 hours on 7 August 2019 (i.e. one day earlier) at Mongkok MTR Station.

Under further caution, X further stated that due to great study pressure and stress, he had repeated the action and again put his mobile phone (i.e. the same phone) under another woman's skirt and secretly taken a photo of her at about 20:00 hours on 8 August 2019 at Wong Tai Sin MTR Station.

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

P seized X's mobile phone and took X to Wong Tai Sin Police Station for conducting further enquiries and investigation.

Inside Wong Tai Sin Police Station, a cautioned video-recorded interview was conducted with X by another police officer, Q. At the commencement of the interview, Q reminded X of what he had said, under caution, to P, at the MTR station and told him that he (X) had no choice but to repeat the same admissions for the video-recorded interview. X then repeated, on video, the same admissions he had made to P at the MTR station. Shortly after the video-recorded interview concluded, at around 23:30 hours on 8 August 2019, a house search of X's home situated in Homantin was conducted and a number of obscene photographs, found stored in his personal computer, were seized by the police.

X was detained overnight at Wong Tai Sin Police Station. He was later charged with two counts of "Obtaining access to computer with a view to dishonest gain for oneself or another, contrary to section 161(1)(c) of the Crimes Ordinance, Cap. 200, Laws of Hong Kong" in relation to the 'upskirt' photos found on his phone at the MTR station.

X is aged 24 and today is the day of his first court appearance at Court No.1 of Kowloon City Magistracy for plea. You are a Duty Lawyer who is instructed to represent X. X is the sole child of a decent middle-class family. He is pursuing a Bachelor of Laws degree (and is in his final year) at The University of Hong Kong. His father is a highly respected doctor and his mother the principal of a well-known secondary school. X's family are supportive of him.

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

## Questions:

- (1) **What would you advise X to do before plea is taken?** (6 marks)
- (2) X intends to plead not guilty to both charges. The prosecution have told you they would object to bail on the basis that there are potential further charge(s) to be laid for the obscene photographs stored in X's computer. You have instructions to apply for bail for X.
- (i) **What submissions would you make to secure bail?** (4 marks)
- (ii) **If the Magistrate refuses your bail application, what can X do?**  
(2 marks)
- (3) The trial has now concluded. X has been convicted of the two charges relating to the 'upskirt' photos in contravention of section 161(1)(c) of the Crimes Ordinance, Cap. 200. In convicting X, the magistrate relied on his admissions to the police, despite X challenging the admissibility of the admissions in a voir dire. **Advise X whether there are any grounds upon which he might appeal against these convictions.**  
(8 marks)
- (4) X was sentenced to 12 months' imprisonment for each charge, the sentences to run consecutively, resulting in a total of 24 months' imprisonment. No reports were called for prior to the sentence being passed. **Irrespective of any appeal against conviction, advise X whether there are any grounds upon which he should appeal against his sentence.**  
(5 marks)

**[25 marks in total]**

## Question 2 (25 marks)

In the early morning of 16 August 2019, Denis Fong, aged 35, a Hong Kong estate agent, was arrested by Hong Kong police while attempting to drive through the Lok Ma Chau control point at the border between Hong Kong and the Mainland in his car. He was intending to take a break from work, by visiting the Mainland and meeting up with friends for a couple of weeks.

The police involved had received a tipoff and searched both Denis and his car. The officer who conducted the search of Denis' person found, in his right trouser pocket, a packet containing 13 grammes of a white substance. The substance was later confirmed by the Government Chemist to be metamphetaime hydrochloride, commonly known as "ICE". The "ICE" had been placed into several small individual plastic packets.

Under caution, Denis told police that the drugs were all for his own consumption. He claimed that he had bought the total amount at a discounted price and the 13 grammes were intended to last him for his 2-week trip. The police did not believe the drugs were for his own use and later the same day Denis was charged with trafficking in dangerous drugs, contrary to s. 4(1)(a) and (3) of the Dangerous Drugs Ordinance (Cap. 134).

### Questions:

- (1) Concerned that trafficking in dangerous drugs is a much more serious charge than possession of dangerous drugs, Denis wants to challenge the charge laid. **Can he challenge the police's choice of charge? Advise him of any action he can take, before the trial commences, to have the charge against him reduced to one of possession of dangerous drugs.** (6 marks)

*(See the next page for a continuation of Question 2)*

- (2) If Denis is unsuccessful in having the charge reduced and he decides to plead guilty to the charge of trafficking in dangerous drugs, can he still claim the drugs were for his own consumption? How could he bring evidence of this fact to the court's notice?**

**(6 marks)**

Assume that the charge is not reduced and Denis pleads guilty to trafficking in 13 grammes of "ICE". The court accepts, however, that Denis purchased all the "ICE" for his own use. Using a starting point of 18 months' imprisonment (the tariff for possession), the judge increased the sentence to 27 months to take into account the fact that Denis was caught taking the drugs over the border, then reduced the total of 27 months by one-third for the early guilty plea and arrived at a sentence of 18 months' imprisonment. The Judge justified his sentence by stating: "To do otherwise would ignore the reality of the situation, which is that there was no intention by the Defendant to supply others."

**Question:**

- (3) The Prosecution are not happy with the sentence passed on Denis. Can they challenge it? Identify the grounds for and procedures which should be used to challenge the sentence and the possible results of such a challenge.**

**(13marks)**

**[25 marks in total]**

### **Question 3 (25 marks)**

Your firm represents Ms. Mavis Mo Pak Shuet ("Ms. Mo") in her personal injury claim resulting from a road accident which occurred in June 2016.

Ms. Mo was a passenger in a taxi which she flagged down in Central, asking the driver to take her home to Robinson Road. She is a 52-year-old housewife who had been shopping for a new dress to wear at the forthcoming celebration of her daughter's graduation from university.

During the journey Ms. Mo noticed that the taxi-driver had a bank of mobile telephones and other electronic devices in front of him. The driver was watching the devices, sending and receiving messages and talking animatedly. When the driver narrowly missed hitting a pedestrian, Ms. Mo scolded him.

A short time later, the taxi crashed into the back of a public light bus which had stopped to pick up a passenger. It was raining heavily at the time.

Ms. Mo had recently had an operation to remove a malignant mole on her shoulder. She found it painful to use a seatbelt. As a result she had pulled it in front of her during the journey but had not fastened it.

Ms. Mo was thrown forward in the accident. Her face hit a screen which was affixed into back of the headrest in front of her. She suffered cuts and bruises to the forehead. At the same time her false teeth were dislodged and she was so embarrassed that she left the taxi and hurried home on foot, without paying the taxi fare.

Several passengers in the back of the public light bus also suffered minor injuries.

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



Ms. Mo did not seek medical treatment. However, she was unable to attend her daughter's graduation party. She was simply too embarrassed to show her injured face in public.

The next day Ms. Mo saw a video of the accident in the online edition of the Pineapple Daily newspaper. It had apparently been taken from a camera mounted at the front of another public light bus which had been travelling immediately behind the taxi. From the video, she could see that the taxi's registration number was MX 234. The video also showed a brief interview with the taxi-driver who identified himself as Mr. Mak and complained about how difficult it is for taxi-drivers to make a living.

Later enquiries undertaken by your firm established that the registered owner of the taxi is ABC Taxi Limited, and that the driver was Mak Chung Shing, who had hired the taxi for that shift.

Mr. Mak is 46 years old and has worked as a taxi-driver for 25 years. He is married with 2 children and has lived in a public housing estate in Hung Hom, Kowloon since 1999. After the accident, he was convicted of careless driving, his 17<sup>th</sup> such conviction.

Your firm has been instructed by Ms. Mo to commence proceedings to claim compensation for the accident. You have obtained a medical report which confirms that there is a small permanent scar above Ms. Mo's left eyebrow. You have also obtained counsel's advice to the effect that Ms. Mo's damages should be around HK\$750,000 gross.

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

Ms. Mo claims that she tried to conceal her facial injury from her husband, for fear he would lose interest in her. However, she says, her husband later found a girlfriend in Dongguan, PRC. When Ms. Mo found out last month, she decided to take legal action.

**Questions:**

- (1) **Having regard to the provisions of the Limitation Ordinance (Cap. 347), are there any time issues which may arise in Ms. Mo's proposed action? Discuss.**

**(10 marks)**

- (2) **Draft a writ of summons to commence court proceedings on behalf of Ms. Mo, showing the complete heading (including the court, and the names of the parties) and a general indorsement of claim. You do not need to set out the purely formal parts of the prescribed form of writ. You may assume any facts not inconsistent with those set out above. You may add notes explaining any part of your draft.**

**(15 marks)**

**[25 marks in total]**

## Question 4 (25 marks)

### Facts

You act for 78-year-old Madam Wang ("Wang"), who has received a demand dated 30 June 2019 from her bank (the "Bank"). The Bank threatens High Court proceedings to obtain possession of her flat in Conduit Road, which she owns jointly with her son Kwan. The Bank says that on 11 November 2013 Kwan and Wang mortgaged the flat to the Bank to secure sums owed by Dominant Limited ("Dominant") to the Bank. Dominant is a Hong Kong-incorporated company of which Kwan is the sole director and shareholder, and he has guaranteed Dominant's borrowings to the Bank. The total amount now owed by Dominant and secured by the mortgage is HK\$8 million.

Wang remembers signing a document which she now understands was the mortgage, but says at the time she did not understand its effect. She has been totally reliant on Kwan to look after her affairs since her husband died in 2000, and simply did what he told her. She executed the mortgage at the Bank manager's office in the presence of the Bank manager, the Bank's solicitor and Kwan. The process only took about 5 minutes. No one present explained to her the risk of entering into the mortgage - that she might lose her home. She was not asked if she wanted independent legal advice. The Bank manager just said it was a standard form document and that she should sign it because her son had already done so and it was similar to other bank documents which she had signed for her son before. The document was in English, which Wang cannot speak. She was not given a copy.

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

To investigate this account, last week you asked the Bank to provide copies of:

- Any telephone or written communications between staff of the Bank discussing the mortgage;
- All attendance notes of meetings between Wang and the Bank between 2013 and 2018; and
- All practice manuals, internal guidance, procedures and written policies to be followed by the Bank's staff when attending the execution of mortgages.

The Bank has declined, saying that any such documents are not readily available because some will be stored in their back office and others have been converted into electronic form.

### **Questions:**

- (1) Draft a letter to Wang advising her how pre-action discovery of these materials may be obtainable at this stage, and outlining the procedure, including the consequences of the application failing.**

**(15 marks)**

- (2) Assuming you are the advocate on such an application, prepare in bullet point form a note of the submissions you will make to the court in support of your application.**

**(10 marks)**

**[25 marks in total]**

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

You act for Fred's Fresh Fish Limited ("Fredco"), a Hong Kong company which supplies seafood to the catering industry, on terms which include 60 days' credit. One of the company's longstanding customers is Wallace Nip ("Wallace"), who runs a sole proprietorship business as the "Celestial Dynasty Fishball Company" ("Celestial"). However, Celestial has recently been extensively criticised in the press and on social media for allegedly adulterating its fishballs with sawdust, and the business is now in financial difficulties. Fredco has outstanding invoices totalling HK\$8,500,000 for sales of fish to Celestial, which have not been paid. All but HK\$1,000,000 of those invoices are past their 60-day credit period and are therefore now overdue. The remaining HK\$1,000,000 will be overdue in 45 days.

Last month Fred Lam ("Fred"), the Managing Director of Fredco, encountered Wallace by chance at the Happy Valley Racetrack ("Racetrack"), and he complained about the overdue account. Wallace, to pacify Fred, wrote out a cheque to Fredco for HK\$5,000,000, and promised that he would pay the rest soon. However, Wallace's bank dishonoured the cheque on presentation, and no further payment has been forthcoming. Instead, Wallace has recently sent Fred a letter making vague allegations that for several years now Fredco's fish supply has been unfit for human consumption and could not be used for making fishballs. No such allegation has ever been made before.

Such a large unpaid account has put a strain on Fredco's cashflow too. Fred has now instructed you to take action to recover the unpaid bills. He is convinced by Wallace's demeanour at the Racetrack that he has enough money to pay. Your instructions are to take whatever action will result in a money payment as quickly as possible.

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

**Questions:**

**(1) What litigation steps will you take to attempt to get a quick payment of the sums owed to Fredco? Discuss whether a different approach is appropriate (and if so, why) for:**

- (i) the HK\$5,000,000 covered by the dishonoured cheque;**
- (ii) the HK\$1,000,000 which is still within the 60-day credit period; and**
- (iii) the remaining HK\$2,500,000;**

**and what the possible outcomes from those approaches are.**

**(15 marks)**

**(2) Focusing on just the HK\$5,000,000, draft an appropriate supporting affidavit or affirmation for your proposed approach, including the headings showing the court and the names of the parties.**

**(10 marks)**

**[25 marks in total]**

**END OF TEST PAPER**