

**2021 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD V: PRINCIPLES OF
COMMON LAW**

Tuesday, 25 January 2022



2021 Overseas Lawyers Qualification Examination

Head V: Principles of Common Law

Part A (Constitutional Law & Introduction to Legal System)

Question 1 (25 marks)

- (a) Who has the burden of proof, and what is the standard of proof, for civil and criminal cases?

(10 marks)

- (b) Discuss the types of civil action that are dealt with in the District Court.

(15 marks)

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

Question 2 (25 marks)

(a) What is the doctrine of *stare decisis*?

(5 marks)

(b) Can the Court of Final Appeal depart from its previous decisions?

(5 marks)

(c) Can the Court of Appeal depart from its previous decisions?

(15 marks)

End of Part A

Part B (Law of Contract)

Question 3 (25 marks)

A few months ago, Alan, a musician, purchased a professional sound system from Rob for HK\$80,000. As Alan was a bit short of cash, it was agreed that he could pay Rob in two instalments of HK\$50,000 and HK\$30,000 respectively, three months apart. However, at the end of three months after paying the initial HK\$50,000, Alan failed to pay the second instalment.

Rob found out that Alan had lost his job shortly after making the purchase. Last Monday, Rob met Alan, and, feeling sympathetic, he told Alan that if he paid HK\$18,000 of the outstanding amount within one week, Rob would “let him off” with the remaining HK\$12,000.

Alan paid HK\$18,000 to Rob on Thursday.

On Friday, Alan was notified that he had been successful in one of his job applications and that he could start work on the following Monday, at a salary which was much higher than his previous job.

Rob has heard about Alan’s new job and that Alan will be earning more than sufficient money to pay the full price of the sound system. He approaches Alan to ask for the remaining HK\$12,000, but Alan says that since Rob agreed to accept the amount of HK\$18,000 in settlement of the balance payment for the purchase, he would not be paying more. Rob is upset and now wants to claim the remaining HK\$12,000 from Alan.

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

- (a) Advise Alan whether Rob has a good claim against him for the balance of HK\$12,000.

(15 marks)

- (b) Alan now remembers that when Rob agreed to take HK\$18,000 in payment of the outstanding sum, he felt so grateful for Rob's gesture that he gave Rob some much sought-after concert tickets to an upcoming concert by The Low Moons, a popular band. He told Rob that the tickets were given "in consideration of your kindness".

How does this affect your advice in (a)?

(10 marks)

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

Question 4 (25 marks)

Ben is a professor of botany (the study of plants) at Kowloon University. He is also a keen farmer and owns a small plot of land in Sai Kung, New Territories, Hong Kong where he grows plants and vegetables. He has started to grow some melons in anticipation of participating in the annual Hong Kong Home Grown Produce Competition. He is very proud of the many prizes he has won for his outstanding melons.

Ben needed to buy some fertilizer and visited Bloom N Grow, a well-known shop which sells gardening supplies such as tools, seeds and fertilizers. Ben studied the chemical composition of the different brands written on the packets, since he noticed that there was a wide price range amongst the brands. He had always used a top brand, but wanted to find something cheaper.

Ben asked Matt, a temporary shop assistant, for recommendations on which brand to buy. Matt was not familiar with growing plants or fertilizer composition. He suggested that Ben should try the new (and cheaper) “Grow High” brand. Ben was in a hurry and decided to buy a bag of “Grow High”.

The sales invoice stated:

- “1. *Bloom N Grow will refund the purchase price paid for goods which do not meet recognised quality standards with any product.*
2. *Bloom N Grow does not give any undertaking as to the suitability or fitness of goods purchased for any particular purpose.*
3. *Any damages or compensation payable shall not exceed the purchase price of the goods sold.”*

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

Ben did not read the invoice but quickly signed it and paid for the fertilizer.

Ben followed the instructions on the fertilizer pack and sprayed the leaves of his melon plants. That night there was heavy rain, which washed away most of the fertilizer before it took effect. Ben did not realise this as this was the first time he had used fertilizer in a spray form.

Ben's melon plants grew poorly and could not be entered into the Hong Kong Home Grown Produce Competition. He was upset and embarrassed and was unable to concentrate on work. His end-of-year university appraisal was poor and he failed to get the salary rise that he was expecting,

Ben wishes to sue Bloom N Grow for the purchase price of the fertilizer, loss of the competition prize money, loss of the salary increase he was expecting, doctor's fees and stress medication.

Bloom N Grow denies liability, and argues that it is also protected by the invoice terms and the maximum amount of its liability is the purchase price paid by Ben.

- (a) Are there any legal grounds on which Ben may make a claim against Bloom N Grow? (10 marks)**
- (b) If the above grounds are valid, and Bloom N Grow is in breach of the sales contract with Ben, what is the impact of the three terms that are written on the invoice? (8 marks)**
- (c) If Bloom N Grow is liable to Ben and cannot claim protection from the terms written on the invoice, what would be the remedies available to Ben? (7 marks)**

End of Part B

Part C (Introduction to Law of Torts)

Question 5 (25 marks)

In Gkofcheski, Tort Law in Hong Kong (Revised Fourth Edition 2018) p. 158, the author states:

“Duty of care serves to carve out the boundaries of liability in negligence. Not everyone who causes injury will bear responsibility. Only those found to owe a duty of care will be answerable for any damage caused. Duty of care is an issue of law, and as such carries influence as precedent. The judges have this in mind in deciding cases on duty of care. Thus, there is a large policy dimension in the determination of this issue.”

Discuss, with reference to relevant principles and cases:

- (a) **How important precedent is in determining the existence of a duty of care in a negligence claim;**
(5 marks)
- (b) **How the Hong Kong courts determine the existence of a duty of care in a negligence claim; and**
(10 marks)
- (c) **How policy is involved in determining the existence of a duty of care in a negligence claim.**
(10 marks)

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

Question 6 (25 marks)

Albert Au owns a popular discount store in Taipo, New Territories, Hong Kong, Albert's Adventures ("AA"), which sells all kinds of household goods.

In order to protect the safety of his customers and to comply with the law during the COVID-19 pandemic, Albert requires all persons entering AA to wear a face mask.

Albert has a person posted at the only entrance to AA to ensure all persons entering AA wear a face mask.

On 30 June 2021, Bert Bong ("Bert"), a large 20-year-old youth, was on duty at the entrance to AA. Bert was a convicted prisoner permitted to work on day release from prison. The Hong Kong Prison Service had agreed with Albert that Bert could fulfill his day release conditions by working at AA. Bert works 15 hours a week at AA. He was given basic training on how to deal with customers entering AA and to politely refuse entry to anyone not wearing a face mask. Bert is not paid for his work at AA.

Whilst on duty at the entrance to AA on 30 June 2021, Bert noticed an old woman, Christine Chan ("Christine"), not wearing a face mask approaching the AA's entrance. Bert immediately ran towards Christine cursing at her and yelling at her not to enter AA. As Bert approached Christine, he waved his fist at her and said, "If you were not an old lady, I would pick you up and throw you out of the store if you try to enter without a face mask."

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

As Bert approached Christine, he slipped on a puddle of water that had formed at the AA entrance following a recent heavy rain shower. As a result of slipping, Bert fell over and landed on Christine knocking her over. As a result of the fall, Bert suffered a hand injury and Christine a serious head injury.

Don Ding (“Don”), a passing pedestrian, noticed Bert and Christine falling over and immediately ran over to help them. In doing so, Don also slipped on the puddle of water at the AA entrance and fell over suffering a serious leg injury.

Advise ALL parties suffering loss or injury as to their possible tort claims for recovering damages for their losses and injuries. Discuss all relevant causes of action and defences together with the relevant legal principles and cases.

(25 marks)

End of Part C

Part D (Criminal Law)

Question 7 (25 marks)

INTRODUCTION

1. A has been in the business of trading diamonds in Hong Kong for over 15 years. He has a small office in Kowloon. A sources his diamonds from Z who is based in Antwerp, Belgium.
2. The trading of diamonds is by way of consignment. This means that A will receive diamonds from Z and in turn, will attempt to sell them. The property/ownership remains with Z.
3. The trading of diamonds, worldwide, is characterised by way of trust and reputation. The diamond dealers know each other and rely on each other's reputation. The documentation is simple and sparse. A consignment document will identify the particular stone by reference to colour, identity and specific numbering. A and Z have been in business for many years and there has never been any issues or difficulties between them. A keeps Z's diamonds in his safe. He sells them to other dealers who sometimes pay immediately or within 30 days. Successful sales are noted and each month A accounts to Z with the proceeds less his commission.
4. Due to the COVID-19 pandemic, business has been very bad over the past 12 months. A has suffered badly and has been chased by debt collectors in respect of outstanding rent and credit card expenditure.

(See the next page for a continuation of Question 7)

5. A decides to take some of Z's diamonds to a pawnbroker. He deposits 4 stones and receives HK\$500,000. The value of these 4 stones are approximately HK\$1 million.
6. A then sent to Z a postdated cheque in the sum of HK\$500,000. He enclosed a short note which stated: "Please see attached. As you will see, this is dated one month from today's date. I can assure you that there will be monies in my account at that time. Please consider this to be a good faith payment."
7. Z presented the cheque he had received from A. The cheque was returned to drawer with a note from the bank "no funds in the account". Z sent an email to A stating that he was devastated that the cheque had not been met on presentation.
8. However, A's financial position deteriorated. He was not able to trade his way out of his difficulties. He was not in a position to redeem Z's diamonds from the pawnbroker.
9. Z had not received any updates from A as to the diamonds that were placed on consignment. He demanded the return of all his diamonds. A informed Z that he is hopeful that he will be able to sell them and told him not to worry. Z then finds out from another diamond dealer that the pawnbroker had sold the diamonds that were consigned and placed with A.
10. Z immediately files a police report with the Hong Kong Police Force. The Police investigated. Subsequently A was arrested and charged.

(See over the page for a continuation of Question 7)

- (a) **Identify the offence(s) which may or have been committed by A.**
(8 marks)
- (b) **Particularise the actus reus and mens rea in respect of each offence that you have identified.**
(8 marks)
- (c) **What defences are open to A in respect of charges that would be laid against him?**
(9 marks)

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

Question 8 (25 marks)

Ken and Daisy were lovers and were in the habit of consuming methamphetamine hydrochloride, commonly known as 'Ice'. In the morning on 14 February 2019, they were consuming Ice at home with their friend, Irene. Shortly afterwards, Irene fell asleep. She was woken upon hearing Ken and Daisy shouting and screaming at each other. Daisy kept yelling at Ken, "How dare you hit me first!". She saw Ken and Daisy were fighting with each other and each was bleeding. Irene's efforts to stop the fight were unsuccessful. Irene's hands and clothing were covered in blood from her efforts to stop the fight. She could not say what it was that caused so much bleeding when Ken and Daisy were fighting.

In a state of panic, Irene rushed to the nearby police station for help. She led two officers back to the scene where they found Ken sitting on a chair, breathing heavily. Daisy was lying on the floor and bleeding profusely. The officers quickly arrested Ken.

Daisy was conveyed to hospital where she was certified dead. An autopsy revealed multiple injuries to her head. Ice was detected in a blood sample taken from Daisy. A test on a sample of Ken's urine that was collected after his arrest also revealed the presence of Ice.

In a video interview, Ken told the police under caution:

- (i) At the time he assaulted Daisy, he did not have an intention to kill her or an intention to cause her grievous bodily harm;
- (ii) He assaulted Daisy as she had repeatedly kicked, scratched and punched him. He felt intense pain all over his body as a result;

(See over the page for a continuation of Question 8)

- (iii) He had a long history of drug abuse. He was, moments before the killing, fighting with Daisy over who would take the remaining quantity of Ice.

Ken was medically and psychiatrically assessed by various doctors after the arrest. The doctors expressed the opinion that-

- (i) Multiple injuries were detected all over Ken's body after he was arrested;
- (ii) Ken was addicted to Ice, a drug which can cause mind-altering effects on the user, such as hallucinations, delusions and paranoia;
- (iii) The killing took place whilst Ken was experiencing a psychotic episode triggered by his consumption of Ice;
- (iv) Ken had been abusing Ice for over 10 years. He was suffering from a persistent and active psychotic disorder.

Ken was charged with the offence of murder, contrary to the common law.

- (a) Discuss what possible defence or defences Ken can rely on regarding the murder charge against him.**

(17 marks)

- (b) Assume that Ken is not a drug addict, but instead an occasional drinker, and he kills Daisy when he is under the influence of alcohol. Explain whether Ken can rely on drunkenness as a defence.**

(8 marks)

End of Test Paper