

**2017 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD V: PRINCIPLES OF
COMMON LAW**

Monday, 18 December 2017



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Head V: Principles of Common Law

Part A (Constitutional Law & Introduction to Legal System)

Question 1 (25 marks)

Olga, originally from Russia and now a permanent resident of Hong Kong, set up a small restaurant in Wanchai half-a-year ago.

The contractor who designed and carried out the renovation of Olga's restaurant claims that Olga owes him fees and expenses exceeding HK\$1,400,000 and has threatened to take Olga to court to recover such fees and expenses.

Boris booked the whole of Olga's restaurant for a private function on the night of 15 November but cancelled the booking at the last moment. Boris had agreed in advance and in writing with Olga a cancellation charge of HK\$20,000, but has so far failed to pay it. Olga wants to recover that charge.

Olga's restaurant was burgled on the night of 30 November. The police caught the burglar inside the restaurant with a handgun.

Olga is unfamiliar with the Hong Kong legal system.

(a) Explain to her:

- (i) the major law courts in Hong Kong and give an overview of such courts and their jurisdictions; and**

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

- (ii) Explain the differences between civil and criminal litigation in Hong Kong and clarify who may instigate what proceedings, the rights and considerations involved and the different standards of proof required. Also, you should, in light of the facts set out above, advise Olga in which law courts she is likely to appear or become involved.**
- (18 marks)**

Olga tells you she speaks no Chinese and passable English only. She is concerned that this may be a disadvantage to her in Hong Kong law courts.

- (b) Advise if Olga is right to be concerned.** **(2 marks)**

Olga is worried that, if she is taken to court by the contractor, a jury may award a penalty against her which may be more than the HK\$1,400,000 claimed by the contractor.

- (c) Advise Olga who is eligible to serve as a juror in Hong Kong, what the duties of such jurors are and whether Olga's worry is well founded.**
- (5 marks)**

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

Question 2 (25 marks)

- (a) "Equity follows the law" and "He who comes to equity must come with clean hands" are two often quoted maxims of equity. **Explain what they mean and how the Common Law and Rules of Equity are operating in Hong Kong.**

(3 marks)

- (b) Under the Basic Law, the Legislative Council's functions include the making of laws, approving budgets and public expenditure and monitoring the work of the government in general. **Give an overview of the law-making function of the Legislative Council.**

(11 marks)

- (c) **Besides statute law enacted in Hong Kong, what are the other sources of law in Hong Kong?**

(11 marks)

End of Part A

Part B (Law of Contract)

Question 3 (25 marks)

Goliath Limited ("Goliath") is a major smart phone manufacturer in Korea. It sources components from around the world and is one of the world's largest manufacturers of smart phones. David Limited ("David") is a maker of lithium ion batteries in China. It is a rather small company but has been supplying Chinese smart phone manufacturers and is gathering a good reputation as a reliable volume supplier.

Goliath has been working on a new model smart phone and heard of David's reputation as a reliable and cost-effective supplier. After contacting David, Goliath decided to explore doing business with David. As part of a due diligence process, Goliath stationed a technical team at David's factory in China for three months to test different batteries intended to be supplied with a prototype of the new smart phone.

After these three months of testing, Goliath and David signed a Supply Agreement for ten million Type A rechargeable lithium ion batteries ("Type A batteries") for US \$5 each, to be supplied by David to Goliath for installation into the new smart phone to be manufactured and sold by Goliath. In the Supply Agreement, David warrants that the Type A batteries will have capacity of 3,500 milliampere hour between charges with charger supplied by Goliath and good for at least 1,000 recharges, and that the batteries will be fit for their purpose. The Supply Agreement is governed by Hong Kong Law with exclusive jurisdiction conferred on the Hong Kong Courts.

The marketing for the smart phone gave Goliath a great deal of confidence and it sent a purchase order for 5 million of the Type A batteries. The batteries were delivered and when the smart phone was launched, all 5 million of the smart phones were sold out quickly, with the result that Goliath immediately put in an order for the rest of the 5 million Type A batteries.

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

Meanwhile, a week after the launch of the smart phones, a number began to explode, and some even exploded while stored in luggage cabinets of airplanes while in flight. Explosions of the smart phone then began to be reported from around the world. To manage the crisis, Goliath made a global recall of the smart phones and announced that it would stop selling the smart phones until the problem was identified.

Both David and Goliath decided to appoint Professor Donald Quixote, Professor of Electrical and Electronic Engineering of the Massachusetts Institute of Technology's Digital Communications Laboratory to find out what the problem was. Eighty of the returned exploded smart phones (with accessories, including charger) were supplied for Professor Quixote's examination. Also eighty new smart phones were provided to Professor Quixote. After two weeks, Professor Quixote provided the following report to David and Goliath:

1. Of the eighty exploded phones returned, seventy were found to contain Type A batteries produced by David. 10 contained batteries produced by unknown manufacturers.
2. The seventy batteries supplied by David were too tight to fit into the smart phones and as a result of this, the smart phones were prone to overheat and thereby exploded. Due to the fact that the smart phone was very thin, a 50 microns deviation would be enough to cause the heating problem. Most of the Type A batteries were between 60 – 80 microns oversize.
3. The smart phones with the unknown manufacturer's batteries did however fit well and on testing they had no problems.
4. All batteries tested had the electrical capacity warranted and therefore electrical properties could not be a cause of the problems.

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

Goliath then conducted a survey of the unsold stock among their dealers and found similar deviations of over 50 microns in the Type A batteries supplied by David. Meanwhile, three class actions have been filed in the United States Federal Courts seeking over US \$1 billion in damages in each case.

On the strength of this evidence, Goliath sought offers of compensation from David. David said that the batteries supplied were within normal manufacturing tolerances and Goliath during the three months of due diligence should be aware of the manufacturing tolerances that David was capable of. With negotiations at a standoff, Goliath started an action in the High Court alleging breach of warranty on the part of David and seeking the following damages and relief:

- (1) Price of the 5 million Type A batteries bought at US \$5 each, US \$25 million;
- (2) Loss of profit for 10 million smart phones at US \$100 each, US \$1,000 million;
- (3) Payment of claims from exploded phone owners, so far US \$1 million;
- (4) An indemnity for all other claims made against Goliath, including claims in the US Class Actions;
- (5) Damages for loss of commercial reputation;
- (6) Interest*;
- (7) Costs*.

You are acting as the Hong Kong Law Firm Partner engaged by David to defend the case in the Hong Kong High Court. **Explain to the Chief Executive Officer of David its possible defences to the action both as to liability and quantum (except on items (6) and (7) which are questions of procedural law which should be addressed by David later).**

[*No need to deal with items (6) and (7) of these claims in your answer.]

(25 marks)

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

Question 4 (25 marks)

Tower Fitness, a popular gym, set up a large sign at its front entrance which reads as follows:

"Anyone using the gym does so at his own risk. We are not responsible for any loss or damage to property or any injury, however caused."

On Friday morning, before lectures, four law students Henry, Ian, John and Ken are at Tower Fitness. They have recently started doing an exercise routine called "Turbo Move", which has become very popular. "Turbo Move" involves the use of some gym equipment and is done to a series of music settings which vary the pace of the exercise routines as the routine progresses.

While they are working out, a deafening high screech suddenly fills the exercise room. Apparently the gym technician who was in charge of the music had carelessly handled the speakers. Shocked by the sound, everyone in the class put their hands to their ears. Caught off balance, all four boys fall down in the middle of their exercise routine. Henry rips his expensive "Prida" gym pants which cost him HK\$ 2,500. Ian complains of great pain in his elbow (as it turns out, Ian had fractured his elbow in the fall and is unable to do his part-time job as a cashier at a fast food shop for two weeks, and will lose HK\$2,000 in salary). John lets go of the weights he was holding which fall onto, and shatter a box of crystal flowers he had bought for his girlfriend (he had brought the box into the gym to show Ken). The crystal flowers had cost John HK\$1,000.

Ken, who is unhurt, offers to drive Henry and John to the lecture and to drive Ian to the doctor. As they have been delayed at the gym, Ken realises that his car has been in Watson Car Park for more than two hours.

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

Watson Car Park has a large sign at its entrance which reads as follows:

"First 2 hours' parking are free. Thereafter parking charges of HK\$600 per hour will apply."

Ken's car has been in the car park for 2 hours 5 minutes. He refuses to pay and drives away through an open gate of the car park. He subsequently received a demand for payment from Watson Car Park, which has been able to track his details through the close-circuit camera which has recorded the licence plate of his car.

You should assume that any part of an hour is counted and charged as a whole hour.

What are:

- (a) **Henry's, Ian's and John's rights against Tower Fitness; (15 marks)**

- (b) **Ken's defence against paying the parking charge from Watson Car Park; and (6 marks)**

- (c) **if Ken's defence against paying Watson Car Park fails, his claim against Tower Fitness for the parking charges. (4 marks)**

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

Question 5 (25 marks)

Abraham's son, Isaac, aged 21, had graduated with a bachelor's degree in accounting from a UK university and was offered a training contract by a major accounting firm in London. However, at Abraham's request, Isaac returned to Hong Kong to study theology at the Baptist Theological Seminary ("Seminary") (a training college for pastors/ ministers).

Students are contractually obliged to live at the Seminary and be non-smokers and teetotalers during the one-year course. Isaac therefore gave up smoking and drinking alcohol.

Abraham, worried that Isaac would start smoking and drinking again under the pressure of tackling a new and unfamiliar course and preparing for the examinations, promised to pay Isaac HK\$5,000 if he did not smoke or drink at all until he had completed the course. Abraham also promised to buy Isaac an iPad if he passed the examinations.

Abraham is a pastor in charge of Eastern District Baptist Church and asked Isaac to prepare a report on the taxation and finances of the church. He was pleased after reading the report and said he would give Isaac HK\$10,000 for his hard work.

Isaac passed his examinations and has not started smoking or drinking again. Abraham has not made either of the promised payments or bought the iPad. Isaac seeks your advice as to whether Abraham is legally obliged to do so. **Advise Isaac.**

(25 marks)

End of Part B

Part C (Introduction to Law of Torts)

Question 6 (25 marks)

Amy is a keen marathon runner and trains each day by running along a footpath next to a busy highway near her home. One morning earlier this year as she was on her daily run, she received a call on her mobile phone telling her that her husband had suffered a heart attack at home. Amy immediately decided to run home by the shortest route possible. Without looking she jumped over the barrier separating the footpath from the highway intending to run across the highway to her home.

Amy landed on the highway in front of a bicycle being ridden at high speed by Bruce. Seeing Amy land in front of his bicycle, Bruce instinctively swerved to avoid hitting Amy and fell off his bicycle suffering severe head injuries.

Soon after this accident an ambulance was called to take Bruce to hospital. The Ambulance Company charges for its services. On the way to the hospital the ambulance stopped at an intersection for a red traffic light. Whilst the ambulance was stopped, a sudden gust of wind blew a large branch off a tree located near the intersection on land owned by Cathy. The branch fell onto the ambulance, damaging it badly and injuring Bruce's legs. Another ambulance eventually took Bruce to hospital.

Following these events, the following facts have been established by independent witness statements, police, and hospital reports:

- a. If Bruce had been wearing a bicycle helmet (which he was not) his head injuries would have been less severe.

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

- b. Bruce was riding on the highway in breach of the Road Safety Regulations which prohibit bicycle riding on the highway on which he was injured. Breach of these regulations can be punished by a fine and/or imprisonment.

- c. Cathy has the trees on her property regularly inspected by a professional tree safety company.

Advise parties who have suffered injury, damage or loss on any tort actions they might bring to recover damages for their injuries, damage or losses. Support your discussion with reference to the relevant principles and authorities.

(25 marks)

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

Question 7 (25 marks)

Alfred and his wife Betty decided that they wished to move to a quiet rural area of Hong Kong as they were soon to retire from their stressful jobs in Central, Hong Kong. After a lot of searching they found a suitable house in a small village in the Sai Kung area of the New Territories. They chose their house because of its sea view and the quiet surrounding countryside.

When Alfred and Betty inspected the house they bought, they met their immediate neighbour, Charles, whose property was vacant. When Alfred and Betty moved into their house six months after buying it, they discovered that Charles had established a car repair business on his property, erecting a two-story workshop for his business. This building has blocked their sea view. The car repair business is extremely noisy with a lot of hammering and banging.

Alfred and Betty have spoken to Charles about the noise from his business and politely asked if he could shut the doors to his workshop when working to contain or reduce the noise. They also asked Charles if he could restrict the hours of his business to lessen their inconvenience. Charles reacted with hostility to these requests. He kept his workshop doors open and worked even longer hours and on Sundays which he had not previously worked.

Charles had obtained the necessary permission and approvals to construct the two-story building and to operate a car repair business on his property.

Alfred and Betty had planned to operate a dog breeding business in their retirement on their property. They had purchased at considerable expense many pedigree dogs for their business. The noise from Charles' car repair shop has made their dogs nervous and unable to breed.

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

Alfred and Betty seek your advice as to whether they have any legal remedies in respect of the loss of their sea view and the noise from Charles' business.

(25 marks)

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

Question 8 (25 marks)

In *White v Chief Constable of South Yorkshire* [1999] 2 AC 455 Lord Steyn said:

"Policy considerations have undoubtedly played a role in shaping the law governing recovery for pure psychiatric harm. The common law imposes different rules for the recovery of compensation for physical injury and psychiatric harm."

Discuss with reference to the relevant cases:

- (a) The policy concerns that have shaped the law governing recovery for pure psychiatric harm and how these policy concerns have been dealt with in the rules developed by the courts for pure psychiatric harm claims, and**

(10 marks)

- (b) What rules have the courts developed to deal with pure psychiatric harm claims.**

(15 marks)

End of Part C

Part D (Criminal Law)

Question 9 (25 marks)

Albert, 50 years of age, and his girl friend Bobo, 22, have been cohabiting together for 2 years. About 3 months ago, Albert began to suspect that Bobo was being unfaithful to him. This led to a deterioration of the relationship between them. Upon returning home one evening, Albert accused Bobo of having gone out with another man. An argument ensued. Bobo taunted Albert as to his looks, old age and sexual prowess compared to the other men that she had been with before and admitted to having been with another man just an hour before. On hearing this, Albert became enraged and wanted to teach Bobo a lesson by slashing her face with a knife. He fetched a knife from the kitchen and, in a fury and out of control, stabbed Bobo a number of times. Bobo died as a result of the stabbings.

After killing Bobo, Albert called up his friend, Charles, to come up to his apartment to help dispose of the body. They put the deceased into luggage and dumped the corpse into the sea.

Both Albert and Charles were arrested. The forensic pathologist found 14 cut wounds over Bobo's face and 2 fatal stab wounds in her vital organs. Given the number of wounds and the nature of the attack, the forensic expert concluded that the infliction of violence on Bobo was a "frenzied attack".

(a) What criminal liability, if any, may Albert and Charles have for the death of Bobo?

(15 marks)

(b) What possible defence, if any, may be raised by Albert?

(10 marks)

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

Question 10 (25 marks)

Jim has set up a company with his business partner Joe in Hong Kong. Sherry is the personal assistant and secretary to Jim. The company is called “Scumco General Trading” (“Scumco”). Jim decides to import into Hong Kong diamonds from various places overseas. Joe has been informed about this project. But, Joe does not take any active part in the day-to-day running of Scumco. He simply shares any profits or losses.

Jim has become aware of two sellers of diamonds in different parts of the world. Deal 1 is from X, a diamond dealer operating from Dubai. Jim has dealt with X previously and knows that he can be untrustworthy. After paying the price, Jim collects the diamonds from the airport in Hong Kong. It turns out that the diamonds have been stolen from the real owner in Dubai.

Deal 2 is from Y. Y operates from Amsterdam. Y has given Jim a Bill of Sale for these diamonds and a receipt for the price. The price was below market value but was not very cheap. Jim collects the parcel containing the diamonds from DHL. Having already sold the diamonds to Rebecca (a third party), the diamonds turn out to be fake. Also, in the parcel containing the fake diamonds is a quantity of cocaine.

Sherry has assisted Jim with the above deals. She has dealt with paperwork and has had direct contact with the sellers.

Deal 1.

Jim, Joe and Sherry are charged with conspiracy to handle or receive stolen goods. Jim is alternatively charged with a substantive count of receiving stolen goods.

(See the next page for a continuation of Question 10)

Deal 2.

Jim, Joe and Sherry are charged with conspiracy to defraud and an alternative charge of attempting to obtain property by deception. They are also charged with trafficking in dangerous drugs.

Explain and discuss the possible criminal liability of Jim, Sherry and Joe. Discuss all issues relevant to either possible guilt or possible innocence.

(25 marks)

End of Test Paper