

**UNIVERSITY OF HONG KONG
FACULTY OF LAW
BACHELOR OF LAWS EXAMINATION
LLB I FIRST YEAR EXAMINATION
1999-2004**



UNIVERSITY OF HONG KONG

FACULTY OF LAW

Main Examinations for LLB Year I (Dec. 1999)

	Name of Paper	Date of Exam.	Time
1	The Legal System (LLAW1008)	16-Dec-99	9:30am - 11:50am
2	Law of Contract (LLAW1001)	20-Dec-99	2:30pm - 4:15pm

The University of Hong Kong
Bachelor of Laws: First Examination
LLAW1008 Legal System

16 December 1999

Time : 9:30 am - 11:50 am
(First 20 minutes reading time)

This paper consists of 2 pages and 4 questions.
Answer any TWO Questions.

1. 'State power is not the only great antagonist against which the rule of law must for ever be addressed; the rule of law should equally protect the weaker, underprivileged sections of society against those who can exercise physical, economic or industrial force.'

Discuss the role of the rule of law in light of this statement. Please support your answer by reference to examples in Hong Kong.

2. 'In the common law system, a judge enjoys the sole and exclusive power to interpret the statute, to determine the nature of the common law to be applied, to apply the law to a particular instance, and at the same time to create a precedent to be followed by other courts. In discharging his task he is only bound by precedents and statutes. In truth, judicial decisions are themselves a final source of law.'

Discuss critically:

- (1) whether this statement is an accurate description of the Hong Kong legal system; and
(2) if judges are a final source of law, then, in a democratic society, by what right do these unelected officials take on this legislative role?
3. 'By making the law predictable, precedent also makes it predictable that law will be suitable for old social conditions but not for those that presently obtain. Law is certain but also certainly outdated. Law is consistent but also consistently wrong.' (F Cownie & A Bradney, *English Legal System in Context* (Butterworths, 1996), p 87)

Discuss this statement critically and explain how judges achieve flexibility through the identification and application of the ratio in the common law system. Illustrate your answer with examples.

4. 'Consumerism and professionalism do not always sing the same tune. What is best for the consumers may not always be the best for the community at large.' Discuss this statement critically with reference to:

- (1) the retention of scale fees in conveyancing; and
- (2) the organisation of a divided (non-fused) legal profession.

In your discussion you should identify the public interest, if any, to be protected and how consumerism is in conflict with professionalism. You may (but are not required) to include other aspects of the legal profession in your discussion.

THE UNIVERSITY OF HONG KONG

Department of Law
LLAW1001
Law of Contract
Mid-term Examination
1999-2000

Date: December 20, 1999

Time: 2:30 to 4:15 p.m.
(including 15 minutes reading time)

Instructions to candidates:

1. The time for this examination is 1 hour and forty-five minutes. This time period includes 15 minutes reading time.
2. Please answer **both** questions.
3. Question 1 counts for **60%** of the mark and question 2 counts for **40%**.
4. This paper consists of 3 pages, including this one.

Question 1 (60%)

Alex, based in Hong Kong, has a smart telex machine which can store outgoing messages for transmission at pre-set times. This is a convenient device to reduce transmission charges by sending messages at designated discount periods, such as from midnight to 5 a.m. Hong Kong time.

On November 27, in a telephone conversation, Bill offered to sell to Alex his Mercedes Benz parked in Hong Kong unused. In the afternoon of December 1, Alex typed an acceptance to Bill at his Long Island (New York) home. Alex saved this message and set the time for transmission at 5 a.m. Hong Kong time. Promptly at 5 a.m. the telex was sent.

At Bill's end, the telex machine was out of paper. Fortunately, Bill's machine is also a smart machine. It can save incoming messages and the "out-of-paper" signal triggered the saving function. However, while the message was being saved, contractors working in the basement blew a fuse and cut off all electricity supply. Electricity was soon restored, but Alex's message had been lost.

Bill arrived home at 7 p.m. (New York time) and saw the "out-of-paper" light and the time indicator of his telex flashing. He refilled the paper tray and checked the "New Message File". There was a message from Charles offering to buy his car. Bill immediately sent a telex to Alex revoking his own offer to sell and another telex to Charles accepting Charles' offer to buy. The telex to Bill arrived at Bill's house at 7:05 a.m. (Hong Kong time). The telex to Charles arrived at Charles' house at 7:10 a.m. (Hong Kong time).

At 7:30 p.m. (New York time) Bill's wife came home and told him that the flashing time-indicator meant that the electricity supply to the telex machine had been interrupted. She then checked the telex for a list of incoming and outgoing telexes. They found Alex's telex number listed as an incoming telex at 5 p.m., but still could not find the actual telex. Bill immediately sent another telex to Charles revoking his acceptance. This telex arrived at Charles' house at 7:35 a.m. (Hong Kong time).

Charles has a habit of jogging in the morning. That morning, he left his house as usual at 7:15 a.m. (Hong Kong time). As he was leaving, he could see that there was a message in the telex, but he did not bother to read it then. When he returned at 8:00 a.m. (Hong Kong time) he read both telexes from Bill.

Both Alex and Charles have claimed the car from Bill. Advise him.

Question 2 (40%)

Albert entered into an agreement with Bill Movers to move the contents of his house. On the agreed date, Bill Movers came promptly and quickly loaded Albert's furniture and drove to Albert's new apartment. They unloaded the truck and while the furniture was left on the sidewalk, told Albert that they were going for a tea-break. At that time the sky darkened and it seemed that it was going to rain soon. Albert promised to pay Bill Movers extra tea money if they finished the job before taking their tea break.

Is Albert's promise to pay the extra tea money supported by consideration?

- End of Paper -

Main Examinations for LLB Year I (May, 2000)			
	Name of Paper	Date of Exam.	Time
1	Law of Contract (LLAW1001/ 1002)	12-May-00	9:30am-1:00pm
2	Law of Tort I & II (LLAW1005/ 1006)	15-May-00	9:30am-1:00pm
3	Law and Society I & II (LLAW1003/ 1004)	20-May-00	9:30am-12:45pm
4	The Legal System (LLAW1008)	29-May-00	9:30am-11:50am
Supplementary Examinations for LLB Year I (August, 2000)			
1	Law of Tort (LLAW1005/ 1006)	12-Aug-00	9:30am-1:00pm
2	Law and Society I & II (LLAW1003/ 1004)	14-Aug-00	9:30am-12:45pm
3	Law of Contract (LLAW1001/ 1002)	18-Aug-00	9:30am-1:00pm

THE UNIVERSITY OF HONG KONG

Department of Law
LLAW1001/LLAW1002
Law of Contract Examination

Date: 12 May, 2000

Time: 9:30 a.m. to 1:00 p.m.
(Reading time: the first 30 minutes)

Instructions to Candidates:

1. The time for this examination is three hours and thirty minutes. This time period includes 30 minutes reading time.
2. You are required to answer any **three (3)** of the following five (5) questions.
3. All questions are of equal weight. Allocate your time accordingly.
4. This paper consists of 6 pages including this one.
5. Plagiarism will be penalized.

1. Fook.com Ltd. (“Fook.com”) was incorporated in February 1999 by Golden Boy (“GB”) with a grand vision. GB did not have any specific business plans for the new company. He only knew that he should go into the “hi-tech” business.

First, he must raise some funds in the stock market. Fook.com applied for a listing on the stock exchange by way of a public offer of shares. A thick glossy prospectus was prepared by the directors and executives of Fook.com with the help of financial advisers. In the prospectus, Fook.com described the power and potential of technology and the future of Hong Kong as a knowledge-based economy. In the section entitled “Risk Factors”, there were these statements:

(1) The present directors do not foresee the possibility of the corporation being in a position to pay any dividends or having any assets of determinative value. (2) The continued existence of the company is questionable. Insolvency may result at any time. (3) No representation is made that this prospectus should be relied on. (4) No representation is made that the director and executives have any capacity that can benefit the company in any way.

GB was named in the prospectus as the mastermind, controlling shareholder and the Chairman of the Board of Directors.

Long before the prospectus was issued, people had started talking about Fook.com shares and the fortunes that could be made. Excitement mounted by the day, with overwhelming media coverage of the exploits of GB and his conquests. As soon as the prospectus and application form for shares were available to the public, lines formed outside the distribution points.

Choi Po (“CP”) sells vegetables in the market near one of the distribution points. When she saw the lines, she immediately closed her stall and got in line. Experience has taught her that there must be something worth lining up for.

CP received 10,000 shares of Fook.com at the issue price of \$1.88. The price rose immediately to \$8.88 on the first day of trading. CP kept her shares because she expected the price to continue to rise to the \$12 predicted by analysts on the basis of the prospectus. It never did. Three months later, the company was insolvent. CP’s son has since found an untrue statement in the prospectus and urges CP to sue Fook.com, GB and the other directors.

CP has come to you for advice. Advise her.

2. Honest Labourer (“HL”) bought a flat from Big Developer (“BD”). Within two months after he moved in, HL noticed cracks in the walls. Soon, more and larger cracks appeared. The floor seemed to have sunk unevenly so that all the doors and windows were misaligned. His neighbours were all in the same situation. They discovered that the cause was BD’s omission of an essential procedure to ensure proper subsidence of the soil before building. Due to this omission, BD made extra profits of \$1 million per flat.

BD denied all wrongdoing. He asserted that (a) despite the subsidence, the flat was safe; (b) the value of the flat has not been diminished because of the problem. His views are supported by independent engineers and valuers.

HL did not want to live in the flat anymore. However, despite expert evidence on the value of the flat, he knew that he could only recover 80 percent of the “market price” (\$5 million) if he sold the flat and moved away.

Assume BD’s omission constitutes a breach of an express term in the contract; advise HL of the remedies he would be likely to obtain.

3. Ada is a university lecturer. She has decided to take up the University's offer of loans to buy her own home instead of living in staff quarters. With her salary, she could only buy a small run down house on an outlying island. Because the house was in a poor condition, she retained the services of Ben, a builder.

On 2 January, 2000, Ada and Ben agreed that Ben would renovate both the interior and the exterior of the house for the sum of \$200,000. It was agreed that Ben would finish the work on or before 1 March, 2000; that Ada would immediately pay Ben \$30,000 in advance and pay the remaining \$170,000 when Ben finished the work.

On 8 February, Ada visited the site to inspect Ben's progress. She nodded happily when she saw that Ben had done a good part of the work. While she was there chatting with Ben, the lights and other electric appliances suddenly turned themselves off, except for the burglar alarm which sounded. Ada had been under enormous pressure at the university and the alarm drove her crazy. She screamed, "Turn the alarm off!!!". Ben and his workmen were worried about the sudden cut of electricity too and scrambled around looking for the switch for the burglar alarm. In the confusion, they switched on the gas and knocked over some cans of kerosene. When the lights and electric appliances turned themselves on, Ben lifted the telephone to call his office for help in cleaning up. The spark from this switch and the gas and kerosene combined to make a huge fire which totally destroyed the house.

Ada and Ben later learned that the problem originated in a voltage dip at Kowloon Electricity Company.

Ada has refused to compensate Ben for the work he had done before the fire and has further claimed a refund of the \$30,000 paid in advance.

Advise Ben.

4. Answer (a) **or** (b):

(a) Explain the difference between a liquidated damages clause and a penalty clause and the implications of *Philips Hong Kong v. Attorney General* [1993] 1 HKLR 269.

OR

(b) Explain the extent to which the law regulates the use of exemption clauses. Is the law good, bad or indifferent?

5. Answer (a) or (b):

(a) If you were a judge of the Court of First Instance, would you follow *In re Selectmove* [1995] 1 W.L.R. 474? Give reasons.

OR

(b) Purchasers of flats from the Cheung Kong Group could not pay for their flats because of the decline in the real estate market. They protested outside Cheung Kong's office demanding "help" to complete their purchases. Mr. Li Ka-shing said, "Cheung Kong has not done anything wrong. It has no legal duty to help. Purchasers should respect the sanctity of contract and help themselves."

Discuss.

UNIVERSITY OF HONG KONG
Bachelor of Laws

LAW: LAW OF TORT I and II (LLAW1006 and 1005)

15 May 2000
5 pages - 8 questions

Time: 9:30 am – 1.00pm
(including 30 min. reading time)

Answer FOUR (4) questions: one of these MUST be question 1. You must also answer THREE of questions 2-8.

Question 1 (*This question is compulsory. The paragraphs in bold on page 1 give the background facts, and students must answer EITHER section (a) OR section (b) set out after the facts.*)

A dredger is a large boat which can lift mud from the bottom of the sea, and carry it to another place, the dumping site, where it will be dropped or pumped out.

The Dutch Dredging Company (Hong Kong) (DDC) had a contract to clear toxic (poisonous) mud from Henny's Bay, a site which is to be developed as a theme park. They used a dredger called the Queen Juliana - which you can call the QJ. The QJ is supposed to drop the mud in an area designated by the Marine Department for dumping, well away from fish farms and residential areas.

One day, the person in charge of the QJ was Henk. The regular master of the QJ was sick, but the DDC decided that it could not afford to wait until the regular master recovered. So the DDC put Henk in charge, rather than lose money, even though Henk had only worked on dredgers for a few weeks and was not licenced to be in charge of a boat in Hong Kong waters.

Suddenly Henk received a phone call from head office in Kowloon: the Hong Kong Observatory had announced that an unexpected storm would soon reach Hong Kong. Henk was very alarmed and was afraid that the QJ would sink. He decided to dump the mud just where the dredger was and head back to base. In fact this was quite unnecessary: the dredger was very stable and in no danger of sinking, and a more experienced person than Henk would have known this.

The consequences were disastrous. The toxic mud dumped from the dredger contaminated the water. The current - being the usual flow of water in that part of Hong Kong - carried the poison towards a bay which included a bathing beach and a number of fish farms.

Q. 1 continued on p. 2

Now answer **EITHER (a) or (b)**

(a) Discuss the negligence liability of Henk and the DDC to Mr Chan, Mr Leung and the owner of the Dragon Restaurant:

A large number of fish in the fish farm of a Mr Chan were killed by the poison mud. Mr Chan reckons that the value of the fish which died was \$20,000.

No-one would buy any fish from fish farms in the bay because they were afraid it was poisoned. So all the fish in fish farms in the bay had to be killed. A Mr Leung lost about \$20,000 when the fish in his farm were killed because they could not be sold, even though there was no evidence that they were actually contaminated.

The Dragon Seafood Restaurant in the next bay lost \$20,000 because customers stopped coming, fearing that the fish were poisoned.

OR

(b) Assuming that Henk and the Dutch Dredging Company were liable in negligence - consider only the negligence actions of Agnes and Thomas. Include in your discussion the question of whether they can recover anything for the loss of Johnny.

The poisoned water flowed on to the Dragonfly Beach where children were playing in the water. One of the children, Johnny, died from the poison. His mother, Agnes, was not in the water but, seeing her son coughing and struggling in the water, rushed into the sea to pull him out. She was also poisoned by the water. In fact one would not normally expect an adult to die from the effects. However, after 6 months, it became clear that Agnes was unusually sensitive to the poison in question. While other people would have been sick for a month or so, due to this sensitivity Agnes will never recover. In fact, she gradually wasted away and is confined to bed, suffering great pain.

Agnes' husband, Thomas, was not at the beach but came to the hospital a few hours later to find his wife in bed and seriously ill and his son dead, with an expression of terrible agony on his face.

Thomas had to give up his job and look after Agnes, which he found very stressful. He has now been diagnosed as suffering from psychiatric illness, as a consequence of stress.

End of q. 1.

2. 'Recent judicial developments have cut a swath through the tort of nuisance and greatly curtailed its potential as a mechanism for the regulation of intrusive activities as between neighbouring land users'.

Do you agree or disagree with this statement? Explain your answer with reference to the recent judicial developments referred to in the quotation. You may include in your discussion the related tort action of *Rylands v Fletcher*.

3. Andy was the manager of a restaurant. There was a toilet in the restaurant for use by staff and customers. In order to prevent others from entering the restaurant just to use the toilet, Andy posted a sign on the door, which read 'Customers Only May Enter Restaurant.'

The restaurant had recently installed an automatic door that would open when activated by a human presence. Andy noticed that the door developed a tendency to close rather suddenly, and made a mental note to have it repaired. However, Billy, the six year-old son of the neighbouring shopkeeper who played in the area, was intrigued by the door, and for fun he entered to activate the door. The door suddenly closed, causing him to be injured.

Andy then replaced the sign with one that read 'Caution! Faulty Door. Management Not liable For Injuries'. The same day Sally, a nearby shopkeeper, whom Andy knew and who often used the restaurant toilet, came to use the toilet and was injured when the door suddenly closed on her.

Andy then closed for business temporarily, and arranged for the door to be fixed by Peter, an electrician. While Peter was trying to fix the door, it suddenly closed and injured him.

Andy arranged for another contractor, referred to him by a friend, to fix the door. When it was finally fixed, the restaurant re-opened for business. Unfortunately, the door closed suddenly and injured a customer, Zoe.

Advise Andy of his possible tort liability.

4. Chan was employed by the X Company as a glass fitter. One day he was standing on scaffolding and installing some windows on a partially constructed building. John was a worker on an upper floor. During his tea break, John was joking with a workmate, and dropped a tool. The tool hit Chan on the head. Chan was wearing an outdated work helmet, which he had borrowed from a friend. He preferred this helmet to the one offered to him by his supervisor. The helmet proved insufficient to take the blow, and Chan suffered head injuries as a result.

Q. 4 continued on p. 4

A relevant piece of legislation reads: 'Employers on construction sites shall ensure that all scaffolding workers wear protective head gear of one of the approved types listed in Schedule A'. There is a fine of up to \$5000 for a violation of this provision.

Advise Chan on all of the possible tort actions that may be available to him. [Note: Do not advise on a possible ECO claim. You may assume that such advice has already been given.]

5. Adrian held a hot-pot party at his house in the New Territories. During the party, some unfortunate events transpired.

One of the guests, Bob, apparently as a practical joke, suddenly withdrew the chair on which another guest, Tom, was about to sit. Tom fell to the floor, but was not hurt.

Tom got up and shook his fist threateningly in Bob's direction. Bob was not frightened, because he was much larger and stronger than Tom. When Bob showed no remorse and proceeded to ignore Tom, Tom threw his beer glass at Bob. The glass missed Bob and hit Jerry, who fell to the ground, injured and bleeding.

Tom withdrew to the roof terrace, where he soon fell asleep. Adrian then locked the door of the roof terrace, and cleared the guests out of the flat. These measures effectively prevented Tom from leaving, as it was a two storey building. Adrian did this in order to arrest Tom. On the following day, Adrian returned with a police officer, Dan. Dan said nothing to Tom, and, despite Tom's offer to cooperate and go the police station willingly, Dan placed Tom in handcuffs and took him by police van to the police station. There, Tom was charged with a criminal offence for which he was eventually convicted.

Advise the parties with respect to tort actions they may bring, and available remedies.

6. Tim worked as a dismantler of scaffolding. He signed a contract with MCo, a construction company, which included the following terms:

- i) Tim (hereafter the 'contractor') shall report to work at sites designated by MCo (hereafter the 'Company'), as required by the Company, at 8am every Monday to Saturday.
- ii) The contractor shall remove scaffolding as instructed by the Company.
- iii) The contractor is free to take outside contracts on completion of tasks assigned by the Company, and on obtaining prior approval from the Company.
- iv) The contractor shall provide any required safety equipment.

Q. 6 continued on p. 5

- v) The contractor shall be paid monthly, at the rate of \$.05 per scaffolding pole removed, or \$300 per day, whichever sum is larger.
- vi) The contractor may take vacation only on giving notice and obtaining prior approval from the Company.

One Sunday afternoon, Tim returned to an MCo jobsite. He had been asked to report to the site by an MCo supervisor, in order to help interview some applicants for scaffolding jobs. Soon after entering the job site, there was a sudden explosion. Tim was hit by debris from the explosion, and was seriously injured. It was later reported in the newspaper that an unexploded bomb from WW2 was excavated by a machine on the building site, causing a large explosion and damage in the area. Tim, who had not been wearing his safety helmet at the time, suffered head and spinal damage resulting in paraplegia (permanent paralysis of the legs).

Advise Tim regarding the likelihood of success of a claim under the Employees' Compensation Ordinance, and the method of calculation of any award. He was 40 years old at the time of the accident.

7. Wong worked as an unlicensed hawker. One day after work he invited his friend Chui to a pub, where they drank some beer together. Wong asked Chui for a ride home on the back of Chui's motorcycle. Chui agreed, but said: 'as I have been drinking beer, you must ride at your own risk'. Wong agreed. Unfortunately, Chui lost control of the vehicle while making a routine right hand turn. The vehicle overturned, and Wong was killed.

Wong was 40 years old at the time of the accident, and was earning \$20,000 per month from his business. He had recently purchased a small flat, on which he was making monthly payments. He had been living in the flat with his unemployed 30 year-old girlfriend, Mary, and her five year-old son Terry. Mary was three months pregnant at the time (the child was fathered by Wong). Wong is also survived by his 60 year-old mother, to whom he paid a monthly allowance.

Advise the claimants in the previous paragraph on the appropriate tort action that they may wish to bring against Chui, and the likelihood of success of that action. Then, assuming that the tort action is successful, advise the claimants as to the approximate damages (if any) that each can expect to obtain.

8. "Human rights have nothing to do with the law of tort"

Discuss.

END OF QUESTION PAPER

**The University of Hong Kong
Bachelor of Laws (LL.B.) Examination**

Law and Society I & II (LLAW 1003 & 1004)

Date: 20 May 2000

Time: 9.30 am – 12.45 pm (including 15 minutes reading time)

Instructions to Candidates: **Please answer (4) questions, two (2) of which must be from Part I, and the other two (2) from Part II.**

Part I

1. 'The most important aspect of the eighteenth century conception of exchange is an equitable limitation on contractual obligation. Under the modern will theory, the extent of contractual obligation depends upon the convergence of individual desires. The equitable theory, by contrast, limited and sometimes denied contractual obligation by reference to the fairness of the underlying exchange.'

- Morton J Horwitz, *The Transformation of American Law* (1977)

Examine how this shift in the regulation of fairness of contracts by courts has accompanied the development of the market economy.

2. Compare and contrast the operation of the concepts of property and labour in subsistence, command, and market economies.

3. Article 109 of the Basic Law provides that the Government of the HKSAR 'shall provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial centre'.

What kind of economic system do we have in Hong Kong? What is the 'legal environment' for the maintenance and development of this system?

4. The processes of globalization will have a significant impact upon the future development of the Hong Kong economy and society. What is the role of law in these processes? To what extent is law a positive infrastructural factor that brings benefits for Hong Kong with respect to these processes?

Part II

- 5 How do Plato's and Aristotle's views of human nature shape their visions of the ideal society?
6. In the light of modern anthropologists' studies of stateless societies and how stateless societies evolved into states, assess the persuasive force of Hobbes' theory of social contract.
7. A country emerging from military dictatorship invites several scholars to a conference to discuss what is the new form of government that it should establish. One of them is a specialist on Locke and Rousseau, and she is asked to write a paper on 'Moving Towards a Modern Democracy'. You are her research assistant and you are asked to produce a first draft of the paper.
8. In the light of your knowledge of the economic, social and ideological forces that contributed to the rise of liberal constitutional democracy in the West, evaluate the prospects for the development of liberal constitutional democracy in twenty-first century China.

*** the end ***

UNIVERSITY OF HONG KONG

BACHELOR OF LAWS: SUPPLEMENTARY EXAMINATION
(1999-2000)

THE LEGAL SYSTEM
(LLAW1008)

29 May 2000

Time: 9:30 am -11:50 pm
(Reading Time: The first 20 minutes)

This paper consists of 9 pages and 4 questions. Candidates are required to answer any TWO (2) questions.

1. 'The organisation of any legal system depends ultimately on the values of society in which the legal system operates.'

Discuss this statement critically. What are the values that the Hong Kong legal system tries to protect?

2. What observations would you make on the nature of the common law from the decision of the House of Lords in *Derbyshire County Council v Times Newspaper* [1993] AC 534? A copy of the judgment is attached.

3. A major obstacle to access to justice is the high legal cost involved in litigation. Discuss whether legal costs could be lowered by the re-organisation of legal professional practice and/or other reform. What are the disadvantages of these options?

4. You are the Director of Legal Aid. You have to decide whether to grant legal aid in the following cases:

- (a) The applicants are Vietnamese boat people who have been detained in closed camps for over 6 years, pending repatriation to Vietnam. Until the Vietnamese Government has indicated that it is willing to take these boat people, they cannot be repatriated and they will be remanded in close camps. The Vietnamese Government has not indicated whether it will receive these boat people, although their identity papers and other relevant documents have been lodged with the Vietnamese Government for at least 4 years. There is no indication when approval (or refusal) from the Vietnamese Government would be given. The boat people applied for legal aid to apply for habeas corpus on the ground that their indefinite and continued detention is unlawful. Counsel who acted voluntarily for

them in relation to this application for legal aid is of the opinion that there is a reasonable prospect of success in their habeas corpus applications. The Hong Kong Government is eager to repatriate them to Vietnam, or any other country, as soon as possible. The Chief Secretary has sent around a memo to the head of all departments of the civil services (including the Director of Legal Aid), urging them to help facilitate the implementation of this policy. The general public, and political opinion from certain quarters, strongly believe that the habeas corpus action is a delaying tactic on the part of the Vietnamese boat people trying to frustrate the Hong Kong SAR Government's plan of repatriation.

- (b) Lee, an active member of a political party called 'Your Rights', has applied for legal aid to challenge the constitutionality of the functional constituencies election system in Hong Kong. Lee is a housewife and does not belong to any functional constituency. She argues that the functional constituencies election system constitutes a violation of the principle of equality before the law under the Bill of Rights. Your Rights has been campaigning for years that the functional constituencies election system should be abolished. Lee's application for legal aid has been widely publicized in the media. It has also been suggested that the legal action is politically motivated. You may assume that there are merits in her argument, and that Lee satisfies the means test. The legal aid officer who handled this case took the view that there was no tangible benefit to Ms Lee in the litigation, and therefore it would be a waste of public resources to grant legal aid. The application is forwarded to you to make the final decision.
- (c) Elsa, a Filipino maid, has been charged with an offence of theft. It is alleged that she stole a ring and some jewellery from her employer. Elsa denies the charge. She says that the ring and the jewellery were given to her by the husband of her employer, who wished to have an affair with her. The husband has dismissed such allegations as frivolous. Circumstantial evidence also suggests that Elsa's story was incredible. Elsa was convicted of an offence of minor shoplifting 3 years ago.

Give reasons for your decision. (All parts carry equal marks.)

***** End of Paper *****

UNIVERSITY OF HONG KONG
Bachelor of Laws: Supplementary Examination
(LLAW1005/LLAW1006)
LAW: LAW OF TORT

August 12, 2000

Time: 9:30 am to 1 pm
(including 30 mins. reading)

4 pages - 9 questions

ANSWER ANY FOUR (4) QUESTIONS

1. Ada was the owner of a restaurant. She wanted to increase the profitability of the restaurant so decided to have it renovated. She planned to upgrade the menu, attract a rich clientele and increase the prices. She retained Bob, an architect/engineer, to advise on design and layout and to supervise the renovations according to a specific timetable. She explained to Bob that she hoped to increase her profit margin through these renovations. Bob in turn retained subcontractors to be responsible for the various aspects of the renovation. Among these was Charles, an electrician whose contract with Bob required him to rewire the building.

The work was completed within the timetable and the restaurant reopened. However, the design and layout of the restaurant that was recommended by Bob proved inappropriate, because it failed to fully utilize the floor space and achieve the desired seating capacity. According to Ada's estimate the design and layout error caused a 10% loss of usable table space.

One week after the restaurant's reopening, the restaurant suffered a power failure. This occurred because Charles had used faulty circuitry when rewiring the restaurant. The food in the large refrigerators went bad due to the lack of electrical refrigeration, which in turn caused a 2-day closure of the restaurant while the food was restocked. Ada had to replace the faulty circuitry and wiring at her own expense.

Ada wishes to sue Bob for damages arising from the improper design and layout, and Charles for damages arising from the installation of the faulty circuitry. **Advise Ada regarding the duty of care in these tort actions.**

2. One evening, Dana's grandmother, Mrs. Wong, suddenly suffered a stroke. Dana put Mrs. Wong into her car, and was anxious to rush her to the hospital for treatment. As she drove the car quickly through a steep, winding part of Clearwater Bay Road, Dana suddenly came upon an unlighted, parked vehicle owned by Edward. Edward was waiting for a friend who was robbing the 7eleven store nearby. Edward was to provide the getaway car. Due to her speed, and the fact that Edward's vehicle was unlighted, Dana had little time to avoid Edward's car, and panicked. She applied the brakes too late, and hit Edward's car, pinning him inside the car and causing him some personal injury. Dana and Mrs. Wong were not hurt in the collision.

Thirty minutes later, 2 ambulances arrived to assist the victims and take them to hospital. The ambulance carrying Edward to the hospital was involved in a separate accident when a dog suddenly jumped in the path of the ambulance, causing the driver, through no fault of his own, to swerve and crash into a post. Edward suffered further severe injuries in this accident.

The second ambulance took Mrs. Wong to the hospital. She received treatment for her stroke, but sadly, suffered permanent brain damage. The evidence shows that if she had not been delayed by the collision on Clearwater Bay Road, she would have had a 50 chance of complete recovery.

Advise Edward and Mrs. Wong in their negligence actions against Dana.

3. "The trespassory torts protect human rights". **Discuss.**

4. Molly purchased some land near Yuen Long. Although the property included a 4-storey block of flats, all the tenants had moved out. Initially, Molly took little interest and allowed the property to deteriorate somewhat. At various places on the property there were signs saying: "Trespassers not welcome. Enter at your own risk".

Every day, Teri took a short cut over Molly's property on her way to the market. The property was fenced, but at one or two points the fencing had collapsed and passersby could walk through, and in fact regularly did so. One day when Teri was walking through Molly's property, she was injured by a loose piece of roofing that had been blown off the roof by the wind.

Valerie, aged 7, often played with her friends on Molly's property. She was badly injured while playing on an abandoned motor vehicle on the property.

In the meantime, Molly decided to repair the premises and use them as an office for one of her businesses. Bill, an employee of a roofing firm hired to install new roofing, was injured when he fell through a part of the roof that had become weak due to rotting from the weather.

Finally, the office space was ready. Sam, One of Molly's clients, entered and saw a sign that read: the owner takes no responsibility for injuries to visitors". Sam did not see that the floor of the entranceway had just been washed with a mop. He slipped on the wet floor and was injured.

Advise Molly regarding her possible tort liability.

5. Allie Cheung, a student in the BA English Literature course at Kowloon University, was accused by her teacher of plagiarism in her term paper. Rather than face disciplinary proceedings, Allie quit the university (the plagiarism charge was never pursued and so was never proved). William, a lecturer, learned some of these facts and told a number of colleagues at lunch that "BA student Allie Cheng has recently been caught cheating". Unfortunately, there was a real Allie Cheng who was a BA student in History. William's colleagues believed the story referred to her. One of them dismissed Allie Cheng from her part time job as research assistant.

Meanwhile, another lecturer, Tom, posted a picture of Allie Cheung on the student notice board. The picture contained the caption "don't cheat or you too will pay the consequences".

Advise Allie Cheng in her action against William, and advise Allie Cheng in her action against Tom.

6. Entertainment Inc. held a licence granted under the Outdoor Entertainment Sites Ordinance to operate a stadium in Happy Valley. On some Saturday nights, Entertainment Inc. held pop music concerts at the stadium. The concerts were sold out and very noisy, and normally concluded by 11 pm.

Norbert, who was a nearby resident, was an early sleeper. In fact he went to sleep every night at 7 pm. He was unable to sleep on those occasions when a concert was held at the stadium, due to the high level of noise.

Pierre owned a nearby restaurant. The vibrations from the high-density sound amplifiers used in the stadium were so great that the windowpanes in Pierre's restaurant would rattle. On a few occasions, the vibrations actually caused some windows to shatter, and on one such occasion Catherine, a waitress, was injured.

Before one of the concerts involving a famous local performer, the crowd queued up outside the stadium in large numbers. The stadium's doors were not opened until shortly before the start of the show. The huge crowd caused congestion in the streets, and prevented the flow of traffic. As a result John was delayed in getting to the hospital for much needed medical treatment, and suffered a worsening of his condition as a result.

Advise Norbert, Pierre, Catherine and John as to their rights in tort. (Do not advise in negligence. You can assume that the parties have already received any such relevant advice).

7. Negligence law arguably performs a number of functions within society and the legal system. **Identify one such function, and write an essay critically assessing that function.** Be sure to explain how tort law performs that function, and whether or not it does so effectively. Use case law examples where appropriate.

8. The Hong Kong Children's Product Safety Ordinance (no.80 of 1992) contains the following provisions:

5. No person shall manufacture, import or supply a children's product listed in the 1st Schedule unless the product complies in all respects with the specification established for that product in the 2nd Schedule.

31. A person who commits an offence under s.5 shall be liable on first conviction to a fine of \$100,000 and to imprisonment for 1 year, and on subsequent conviction to a fine of \$500,000 and to imprisonment for 2 years."

One day, Bobo was injured while "double-riding" her bicycle (her brother John was the passenger), when the back wheel fell off and the bicycle collapsed. The bicycle was manufactured by the X Company, and was a 1st Schedule product but did not meet the specifications in the 2nd Schedule.

Advise Bobo of her chances of succeeding in an action for damages for breach of statutory duty, identifying any additional information you feel may be needed to complete your advice.

9. Ho and Man work on a construction site. They are scaffolders. They are employed by Tin. Tin is employed by the main contractor as the scaffolding subcontractor. Ho and Man signed contracts with Tin which describe their status as "subcontractors".

Tin instructed Ho and Man to install the scaffolding in a certain way. Ho thought he knew better and did it in a different, but quicker, way. In consequence, the scaffolding was not as well constructed, and part of the scaffolding fell onto Man, who was taking his tea break at the time. Man was killed.

Man's widow, who has been appointed administratrix of Man's estate, seeks your advice. **Advise Man's widow regarding available actions and claims on her own behalf and on behalf of the estate.** (For the purposes of this question do not advise regarding occupier's liability or breach of statutory duty. You can assume that Man's widow has already received such advice).

END OF PAPER

**The University of Hong Kong
Bachelor of Laws (LL.B.) Examination (Supplementary)**

Law and Society I & II (LLAW 1003 & 1004)

Date : 14 August 2000

Time : 9.30 am – 12.45 pm (including 15 minutes reading time)

Instructions to Candidates : **Please answer (4) questions, two (2) of which must be from Part I, and the other two (2) from Part II.**

Part I

1. Compare and contrast the concepts of contract and labour in subsistence, command and market economies.
2. “It has long been recognised by social and economic historians that the emergence of capitalism was accompanied by changes in the concept and institutions of property.”

Discuss.
3. Describe the principal features of Hong Kong’s economy and examine the role of law in the operation of this economic system.
4. What do you understand by “globalization”? To what extent will globalization affect the law and legal institutions of Hong Kong?

Part II

5. What are the circumstances in which a stateless society may evolve into a state? Is the existence of the state a good thing?
6. “The political and legal philosophies of Plato and Aristotle were developed more than two thousand years ago. They are completely out-of-date and totally irrelevant to modern society.”

Discuss.
7. Hobbes, Locke and Rousseau all use the idea of the “social contract” in explaining the state. Whose views do you find most persuasive?
8. What are the characteristics of the Chinese political tradition? Is it likely that mainland China will become a liberal constitutional democratic state in the foreseeable future?

* * * the end* * *

THE UNIVERSITY OF HONG KONG

Department of Law

Bachelor of Laws Examination (Supplementary)

Law of Contract
(LLAW1001/LLAW1002)

Date: August 18, 2000

Time: 9:30am - 1:00pm
(Reading time: the first 30 minutes)

Instructions to Candidates:

1. The time for this examination is three hours and thirty minutes. This time period includes 30 minutes reading time.
2. You are required to answer **three (3)** of the following **five (5)** questions.
3. All questions are of equal weight. Allocate your time accordingly.
4. This paper consists of 6 pages including this one.

1. Next Day Delivery Services Ltd ('Courier') operates courier services worldwide. It has many outlets in Hong Kong and runs many advertisements on the television and in print. The theme of its advertisements is next day delivery anywhere in North America. Alex is a struggling architect who had been working on an entry for the contest for the design of the tallest building in New York. He finished the job on 31 March, 2000. As the deadline was 12:00 noon on 3 April, 2000, he decided to send his precious drawings by Courier because he had seen its advertisements.

He took the drawings to Courier's pick-up point in the Central District. There was a long line at the counter and while he was waiting he flipped through the brochures left around the office. One stated: "In by 12:00 noon, delivered anywhere in the U.S. by 12:00 noon the next day". Alex felt safe, as it was then only 10:00 a.m., 1 April; he had an extra day to spare. He filled out a form in quadruplicate, giving the addresses of the recipient and himself, and signed it. He paid \$2,000 and the clerk tore off one part of the form and gave it to him. He stuffed it in his pocket without reading and went home and waited.

On 7 April, his drawings were returned to him because they had arrived at noon on 4 April, one day past the deadline. Courier has demanded \$2,000 for returning the items.

Alex has come to you for advice and you discover the following clause on the back of the form Alex signed:

Unless the customer makes a special declaration of urgency, our liability for any loss arising under this contract is limited to \$10,000.

Under the terms of the contest, the winner of the contest will not necessarily be awarded the architectural contract, but will be awarded a cash prize of US\$50,000 at a ceremony starring, inter alia, Mr. Pei. The architectural contract, if awarded, will probably bring profits of U.S.\$20 million.

Advise Alex.

2. Sam, the restaurateur, wanted to sell his restaurant. On 3 January 1999 he placed an advertisement in the newspaper as follows:

Flourishing restaurant for sale \$50,000,000. Famous patrons. Monthly profits \$500,000.

Bosco was attracted by the advertisement and found from Sam's records that the advertisement was correct. Regular patrons included people like Martin Lee and Emily Lau as well as movie stars like Jacky Chan. To assure Bosco that everything was as it seemed, Sam told Bosco that the only reason for selling was his plan for retirement. Bosco asked Sam to give him one month to arrange financing.

In February, Bosco returned and they entered into a contract for the sale and purchase of Sam's business which included these terms:

1. Bosco shall pay the price of \$50,000,000 as follows:
\$20,000,000 on signing this contract and two instalments of \$15,000,000 each respectively on 15 May 1999 and 15 August 1999.
2. Sam represents and warrants that the average monthly profits of the business have been \$500,000.

Bosco paid \$20,000,000 and took over the business. In the first five months he made only \$250,000 each month. Nevertheless, Bosco made the other two instalment payments on time. However, six months after the sale, Sam opened a restaurant in the next block and the famous patrons stopped going to Bosco's restaurant.

Advise Bosco.

3. Answer (a) **or** (b):

(a) Is there any difference between *Chan Woon-hung v. Associated Bankers Insurance* and *H Glynn (Covent Gardens) v. Wittleder* [1959] 2 Lloyd's Rep. 409 that can justify the different results?

Or

(B) "Promissory estoppel should be available as a sword and not simply a shield. The fight against inequity ought not to be limited by technicalities."

Discuss.

4. In January 1999, Taipei Entertainment Co. Ltd. (“T Co”) agreed to arrange a concert for Peter, Paul and Mary (“PPM”) at Taipei from 30 July to 2 August. T Co paid PPM \$5 million by way of advance payment and agreed to pay the balance of \$50 million on 4 August.

PPM arrived at Taipei on 28 July and attended rehearsals that evening. Unfortunately, Peter and Paul quarrelled with Gi-gi, a representative of T Co. The next morning, PPM took the first flight back to Hong Kong. The top management of T Co were furious with Gi-gi for having offended PPM. Throughout the day on 29 July, the managing director of T Co tried desperately to reach PPM to apologise and to persuade them to return to Taipei for the concert. He could not make contact.

At midnight on 29 July, a power failure occurred in Taiwan. T Co’s theatre did not return to normal until 3 August.

Advise T Co of its rights and obligations as regards PPM.

5. Peter is a poor little rich boy. His father died more than 10 years ago; his mother remarried and Peter could not get on with his step-father. So when he was admitted to the Kowloon University at age 16, Peter chose to live in hall and during the three years at the University, he went home only once. Spending so much of his time on campus, he got to know the Warden, Tom, and his family very well. Tom was everything Peter wanted in a father and Peter went to Tom with all his problems, large and small. Tom was always ready with good advice which was gratefully accepted by Peter.

Soon after Peter's graduation, Tom went to him with a proposal. Tom explained that he wanted to leave the University and go into the publishing business. He was confident of success, but needed capital. He had the brains, Peter had the capital, and they would be great partners, he said. Specifically, he said that he had a firm, Tom Kee, and that the Kowloon Bank was willing to lend to the firm if a rich person guaranteed the loan. Peter did not need much persuasion since he thought Tom was the most talented person on earth. They went to Tom's solicitors and signed a contract whereby Tom agreed to sell 50% of the firm to Peter. They did not wait, however, for the completion of the contract before going to the Kowloon Bank.

At the Kowloon Bank, Tom introduced Peter to the bank manager as his former pupil. The management pulled out Tom's file and handed the documents to Peter. The documents showed a \$10 million loan to Tom Kee to be guaranteed by an unlimited personal guarantee of Peter. Tom Kee was described as a sole proprietorship owned by Tom. The manager started to tell Peter about the transaction, but Peter stopped him, saying, "Tom told me all about it already. I trust him; he is like a father to me." Having said that, Peter signed the guarantee and handed it back to the manager. At that moment, the telephone rang and the manager picked up the phone. By the time he finished the conversation, Peter and Tom had left.

Kowloon Bank disbursed the loan proceeds to Tom Kee. Tom left the University to devote all his time and attention to the business. Unfortunately, he had lived in the ivory tower for too long to be able to survive. Tom Kee failed within three months. Kowloon Bank has demanded payment from Peter under the guarantee.

Advise Peter.

Main Examinations for LLB Year I (Nov, 2000)			
	Name of Paper	Date of Exam	Time
1	Introduction to Chinese Law (18215)	30/11 2000 - 05/01/2001	
2	Introduction to PRC Law (Section I) 18215	30/11/2000 - 05/01/2001	
Main Examinations for LLB Year I (Dec, 2000)			
	Name of Paper	Date of Exam	Time
1	Practical Chinese Language Course for Law Students	11-Dec-00	2 30pm-4 30pm
2	Legal System (LLAW1008)	15-Dec-00	9 30am-12 00am

UNIVERSITY OF HONG KONG

LLB Examination (2000)

LAW: INTRODUCTION TO CHINESE LAW (18215) – (By Dr Nanping Liu)

This is a Take-home Exam (November 30, 2000 – January 5, 2001). It constitutes 70% of the final mark in the course. General Requirements are set out as follows:

- A. You shall choose one of the following questions.
- B. Your answer should be typewritten, double space;
- C. Your answer shall be between 4500 –5000 words in length;
- D. Return your answer to the Front Desk of General Office by 5:00 p.m. January 5, 2001; late submission will be penalised (10 marks per day);
- E. Citations are not required, but encouraged.
- F. Do not plagiarise books, articles and answers of your classmates!

CANDIDATES MUST ANSWER ONE OF THE FOLLOWING QUESTIONS.

EITHER

Question 1

Chinese law and the Chinese legal community adopt some terminology which is similar to that in the West, such as equality before the law (art. 33, The 1982 Cons.), freedom of speech and so on (art. 35. The 1982 Cons.), division of functions and checking each other (art.135, The 1982 Cons.) (This term sounds like the “separation of powers” in the West), (semi)-judicial review (used by some Chinese scholars).

Compare the meaning of all of these terms with those in the West and discuss in particular the differences between them, the reasons for the differences and whether China is ready for a western style of constitutionalism today (Please give the reasons for your answer).

OR

Question 2

This course has provided a general picture of the Chinese legal system through coverage of some major substantive law areas, in particular, criminal law, civil law (including the sub-areas of business organisations, contract and marriage law), administrative law system, dispute resolution and so on.

You shall choose one of the legal concepts or the principles or the rules (“the concept(s)” for short) in these areas or the sub-areas, and your choice should at least cover

three of these areas or the sub-areas. You shall compare your chosen concepts with their counterparts in your jurisdiction, explain the differences between them and discuss any improvements of the concept(s) if necessary. (If you choose not to make any proposal for improvement of the concept(s), you should provide an analysis of “why not”. For example, you may consider the concept works well with the Chinese society and there is no need of improvement. However, you should discuss why it works well and so on).

INTRODUCTION TO PRC LAW (Section I)
18215 (LLAW2009)

Li Yahong

-
- This is a take-home exam (30 November 2000 – 5 January 2001)
 - You shall choose ONE out of the two questions below and write an essay on it
 - The essay should be typewritten, double-spaced, 4500-5000 words in length, and will be penalized if it exceeds the maximum limit (eg 10 marks per extra 50 words).
 - You may refer to textbooks, DMs and any other sources. Citations are included in the word limit.
 - Do not plagiarize books, articles and answers of your classmates!
 - Return your essay on 5 January 2001 to the front desk of faculty general office, late submission will be penalized (eg 10 marks per day)
 - The mark for the essay will count 70% of your final grade.
-

Although the principle of judicial independence is enshrined in the PRC Constitution and other laws, its implementation has been circumscribed by the interference of various factors. **Is the principle of judicial independence the same as that in the Western countries? What are those factors and how do they constrain judicial independence in China?**

The revised 1996 PRC Criminal Procedure Law (CPL) has made impressive progress in protecting the defendants' rights in the areas of pre-trial detention, the right to counsel, and trial proceedings. However, gaps between the standards of international law and the CPL still exist and violations of the defendants' human rights still persist in the Chinese criminal justice system. **Discuss and give your personal comment on this statement with illustrations.**

-End of paper-

THE UNIVERSITY OF HONG KONG

DEPARTMENT OF CHINESE

CHINESE LANGUAGE ENHANCEMENT PROGRAMME

CLAW1009. PRACTICAL CHINESE LANGUAGE COURSE FOR
LAW STUDENTS

December 11, 2000

2:30 pm - 4:30 pm

Instructions to candidates:

1. This examination paper comprises **FOUR** printed pages.
2. Answer **ALL** questions.

甲部 (25%)

- 一、請把下列各句中可以簡化的繁體字轉換為簡化字，括號內的數字為該題中可以轉換為簡化字的數目，重複的包括在內。

注意：只需在答題簿寫上題號和規範寫法。

1. 每次，扶貧隊伍深山造訪前，總會在市內買點物資手信，送給當地村民。(10)
2. 歷代帝王之所以重視陵寢的建設及其朝拜祭祀的禮儀，無非是作為推崇皇權和維護身分等級制度的一種手段。(13)
3. 在漫長的鐵道線上，鋪墊著成千上萬根枕木，它們任憑日曬雨淋，風冰凍，不容易腐爛，忠實地擔負著它的職責。(17)
4. 今年元夜時，月與燈依舊。不見去年人，淚濕青衫袖。(7)
5. 利用電腦來創作音樂已經流行了好一段日子，很多人已在家中添置了能接駁電腦的鍵琴，開始他們的創作路。(12)

二、請把簡化字轉換為繁體字。

注意：只需在答題簿寫上題號和規範寫法。

- 1 补 2 关 3 碍 4 尘 5 冈 6 仓 7 忱
8 跃 9 亲 10. 艺 11 壳 12 亏 13 监视 14 舰只

乙部 (25%)

三、請改正下列句子中的語病。

1. 山東的花生是中國生產量最多的省份。
2. 昨天是遞交認購新股申請表截止日期的最後一天，地鐵公司已收到數萬份申請表。
3. 為了有效減少駕駛者酒後駕駛，使警方採取一連串的打擊措施。
4. 偉明和立仁的爸爸到學校出席家長教師會的會議。
5. 教協強烈要求董建華在施政報告中，公開宣佈：取消語文基準試，終身進修並超越基準。

四、請改正下列句子用詞的毛病。

1. 這些年輕科學家以無所不為的勇氣，克服重重困難，去探索大自然的奧秘。
2. 陝西剪紙粗獷樸實，與江南一帶細緻工整的風格相比，真是高下立見，各有千秋。
3. 昨天大埔工業村一幢大廈發生火警，職員爭相走避，場面壯觀。
4. 參與立法會港島區補選的候選人正積極煽動選民，呼籲他們踴躍投票。
5. 陳校長在教育界貢獻良多，委實罄竹難書。

丙部 (25%)

五、以下哪一條條文較能體現中文法規的嚴謹周密?

《香港特別行政區基本法徵求意見稿》	中央人民政府負責管理香港特別行政區的防務。
《香港特別行政區基本法》	中央人民政府負責管理香港特別行政區的防務，香港特別行政區政府負責維持香港特別行政區的社會治安。

六、評比以下三則文字的表達方法。

《香港特別行政區基本法徵求意見稿》	香港居民，不分國籍、種族、民族、語言、性別、職業、宗教、信仰、政見、教育程度、財產狀況，在法律面前一律平等。
《香港特別行政區基本法》	香港居民在法律面前一律平等。
《澳門特別行政區基本法》	澳門居民在法律面前一律平等，不因國籍、血統、種族、性別、語言、宗教、政治或思想信仰、文化程度、經濟狀況或社會條件而受到歧視。

丁部 (25%)

七、

以下為一則讀者投訴，內容屬實，但百好公司不願更改優惠辦法。請以該公司負責人的名義函覆林小姐，覆函須嚴格遵照公函格式。

讀者林小姐電話投訴：富康花園百好停車場有所謂“免費優惠”，顧客在富康商場消費 200 元可獲一小時免費泊車，400 元可獲兩小時，最多 3 小時。所謂“免費優惠”的條件苛刻，既要求高消費額；又每次要出示三張或以上的即日發票，十分麻煩；最後發票被收去後，不獲發還，手法異常霸道。林小姐極度不滿，質疑該公司的誠意及處事是否合法。

2000 年 1 月 8 日《遠東日報》

八、

代擬一則通告，勸喻住客切勿高空擲物，以保持居住環境清潔。

-完-

The University of Hong Kong
Bachelor of Laws: First Examination

LLAW1008 Legal System
(2000-2001)

15 December 2000

Time : 9:30 am - 12:00 am
(First 45 minutes reading time)

This paper consists of 7 pages and 5 questions. You have to answer TWO questions, which must include the question in Part A, which is COMPULSORY, and One Question from Part B.

PART A (COMPULSORY QUESTION: 50%)

YOU MUST ANSWER THIS QUESTION.

1. Read the attached judgment of the Court of First Instance in *So Wing Kwong v Cheng Chi Kwong* [1999] 4 HKC 831 (extract only) and answer the questions below. This is a case on vicarious liability in tort. Vicarious liability means the liability of an employer for a tortious wrong committed by his employee in the course of employment. In general, an employer is vicariously liable for the tortious acts of his employee, but not that of an independent contractor. Bailment means entrusting someone (a bailee) with the possession of tangible goods, such as a box or a car; the person who entrusts is called a bailor.
 - (1) Who are the parties to this case?
 - (2) What are the issues in this case?
 - (3) How did the second defendant argue his case? What did the court decide?
 - (4) How did the court deal with *Chowdhary v Gillot* [1947] 2 All ER 541?
 - (5) What is the ratio of this case? [There could be more than one ratio in this case: please identify all of them.]
 - (6) What would be the implications of this case to owners of vehicles who left their vehicle for valet parking? What advice would you give them?

PART B (50%)

YOU CAN ANSWER ANY ONE QUESTION FROM THIS PART.

2. Henry was married to Anna for 6 years. Their relationship deteriorated recently. On 6 March 2000, Henry returned home at 2 am, half-drunk, and insisted on having sexual intercourse with Anna. Anna refused. Henry overpowered her and had sexual intercourse with her, while Anna struggled fiercely throughout the process and was injured. She reported to the police the following day. Henry was charged with the offence of raping his wife.

The law as it stood on 6 March 2000 was that the offence of rape was made out by unlawful sexual intercourse without consent. The law on consent was governed by the common law, under which marriage was regarded as an unequivocal consent to sexual intercourse. Accordingly, a husband cannot be guilty of raping his wife.

On 1 July 2000, the Court of Final Appeal held in the decision of *HKSAR v K* that the common law doctrine of consent by marriage was outdated and placed a woman at a subservient position to her spouse. This could hardly be justified in modern society. Accordingly, the Court of Final Appeal overruled a long line of case law dating back to the 19th century and held that marriage was no longer an impediment to consent. The question of consent was a matter of fact and whether the victim was a spouse of the defendant was irrelevant.

At the trial on 15 August 2000, counsel for Henry argued forcefully that what Henry did on 6 March 2000 did not constitute a criminal offence under the law at that time, and that *HKSAR v K* should not operate retrospectively, especially when personal liberty was at stake. He argued that the change in the law of consent was an appropriate matter for the legislature, and had the change been done by legislative amendment, it was almost certain that the legislative amendment would not have retrospective effect. He criticised the declaratory theory as an unjustified ‘myth’ and a ‘fairy tale’, relying on *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.

On 20 August 2000, Henry was convicted by the Court of First Instance of the offence of rape. The decision of *HKSAR v K* was followed. The trial judge, in directing the jury, told the jury that under the declaratory theory, *HKSAR v K* operated retrospectively.

Do you think that the declaratory theory can be justified? You should address and discuss the submission of Henry’s counsel and any recent attack on the declaratory theory in your answer. Should the conviction of Henry be upheld? How can you reconcile the need for certainty and the retrospective operation of the common law? [In answering this question you may assume that there is no other legal authority from Hong Kong or elsewhere on the question of consent in marital rape.]

3. Discuss, in the light of decided cases, whether the decisions of the Privy Council and the

House of Lords before 1 July 1997 are binding on the courts of the Hong Kong Special Administrative Region after 1 July 1997.

4. After the interpretation of the Basic Law by the Standing Committee of the National People's Congress in June 1999 which reversed the decision of the Court of Final Appeal in *Ng Ka Ling v Director of Immigration*, the Hon Mr Martin Lee commented that 'the rule of law has died in Hong Kong.' Discuss, by reference to at least 3 examples after 1 July 1997, whether you agree with the comment of Mr Martin Lee.

5. Discuss whether the civil justice system in Hong Kong is accessible to the public, and what reform in the civil justice system you would like to introduce to improve public access to justice. What do you think would be the major obstacles to the reform you propose? [You should cover both procedural reform in the civil justice system as well as legal aid.]

***** End of Paper *****

A **SO WING KWONG v CHENG CHI KWONG & ORS**

COURT OF FIRST INSTANCE
PERSONAL INJURIES ACTION NO 1098 OF 1997
DEPUTY JUDGE LONGLEY
4, 24 NOVEMBER 1999

B

Deputy Judge Longley: The plaintiff's claim for damages for personal injuries arises out of an accident which occurred at around 6:45pm on 17 January 1996 when he was crossing Bonham Strand on foot after leaving work. He was struck by a private car driven by the first defendant. Shortly before the accident that private car had been entrusted by the second defendant, who had use of the car that evening, to those operating a car parking service on behalf of the third defendant, the Fook Hing Hot-Pot Seafood Restaurant in Queen's Road West, while he and his colleagues had a meal at the restaurant. When the accident happened, the first defendant, who had only that day been engaged to perform car parking services, was driving the car endeavouring to find a car parking space. Despite having knocked the plaintiff down and damaging the wing mirror and windscreen of the car, the defendant drove off. Fortunately a passer-by managed to take down the number of the vehicle.

C
D
E The plaintiff claims that both the second and the third defendants are vicariously liable for the negligence of the first defendant.

No issue as to liability arises in respect of the first defendant. Interlocutory judgment in default of defence with damages to be assessed was entered against him on 27 March 1998. He did not appear at the trial either in person or by counsel.

F Liability remains a live issue in respect of the second and third defendants. Only the second defendant appeared at the trial and he was represented by Mr HY Wong.

G Quantum remains a live issue in respect of the first and third defendants but not in respect of the second defendant. It was agreed between the plaintiff and the second defendant that in the event of the plaintiff establishing liability against the second defendant, the damages should be \$500,000 inclusive of interest.

H *Liability*

The first issue insofar as liability is concerned is whether the accident was caused by the negligence of the first defendant. Only the plaintiff gave evidence as to this issue which was to the effect that he had checked to see if any vehicle was approaching before he stepped onto the road. There was none. After stepping onto the road, he heard the noise of an engine of a car to his right. He stopped but was unable to make it back to the pavement before he was struck by the car. He believed that the car was

being driven at high speed. His evidence of negligence is supported by the admission made by the first defendant in his statement to the police that he failed to check the condition on the pavement on his left and just kept looking ahead. It is also supported by the failure of the first defendant to stop after the accident which suggests that he knew that he was at fault.

I find that the accident was caused by the negligence of the first defendant. There was no evidence of any contributory negligence on the part of the plaintiff.

In so far as the third defendant is concerned, the main issue on liability is whether the first defendant was its employee driving in the course of his employment. There was no evidence at the trial to support the allegation pleaded in the third defendant's defence that those operating the car parking service outside its restaurant were not employees of the third defendant but operating a separate business providing car parking services.

The evidence before the court clearly indicates that those operating the car parking service were employees of the third defendant and that the first defendant had been employed that day. In particular in his police statement, Mr Hui Man Pow, who said that he accepted the keys of the car from a person who must have been the second defendant and who engaged the first defendant as a car parking boy at a wage of \$150 for that night, described himself as 'head of the parking department' of the third defendant which he had joined in December 1995.

I am accordingly satisfied that the third defendant is vicariously liable for the negligence of the first defendant.

The principal issue in this trial has been the liability of the second defendant for negligence of the first defendant.

There was no dispute that the second defendant had driven his colleagues to the restaurant in the vehicle and had handed over the keys to those operating the car parking service. There was a conflict between his statement to the police in which he said that the owner of the car was a friend who had lent it to him and his evidence in court in which he said that the car had been lent to the company. The discrepancy is not material as Mr Wong has conceded that as a matter of law it makes no difference so far as liability is concerned and that the second defendant was in the same position as the owner of the vehicle when he entrusted it to the third defendant to park.

That concession on behalf of the second defendant, accords with the observations of Eveleigh J in *Nottingham v Aldridge* [1971] 2 QB 739 at 752 when he laid down what Mr Chow for the plaintiff maintains is the true test to be adopted by the court in considering whether the second defendant is vicariously liable for the first defendant's negligence:

I am prepared to accept Mr. Morris's contention that ownership of a motor vehicle is not required as a matter of law to impose liability upon another for

A the acts of a driver who is not his servant but in such a case, *it must in my view be established that the driver is driving in a genuine representative capacity, that is as an agent for and on behalf of the principal and as one to whom there has been a delegation of a task or duty.* (My emphasis)

B It is submitted on behalf of the plaintiff that the first defendant was driving the vehicle in a genuine representative capacity ie as agent for and on behalf of the second defendant. Instead of driving a vehicle to a car park himself, the second defendant delegated the task to the third defendant which carried out the task through its employee, the first defendant.

C Mr Wong argues that that passage lays down only part of the test to be applied. Not only must the driver be driving as the agent for and on behalf of the principal and as one to whom there has been a delegation of a task or duty, but the defendant must retain in addition a right to control the vehicle. He argues that the latter part of the text is not satisfied in this case as the second defendant had surrendered the right to control the vehicle to the third defendant. He relies upon para 5-66 in *Clerk & Lindsell on Torts* (17th Ed) in support of this contention and in support of his further contention that a bailment of chattel (which he said occurred in this case when the car was transferred to the third defendant) amounts to abandonment of the right to control the vehicle. He relies upon the judgment of Streatfield J in *Chowdhary & Anor v Gillot & Ors* [1947] 2 All ER 541, as authority for his argument as to the effect of bailment.

E I am not persuaded by Mr Wong's arguments. *Chowdhary v Gillot* is, in my view, of limited significance to this case. It was not a case where the owner of the car was being sued for injuries caused by the driver to a third party but was an action by the owner for injuries he himself had sustained. It related not to the transfer of control of the vehicle but to transfer of an employee. It is certainly not authority for the proposition that whenever there is a bailment of whatever kind, the owner (or the person in the position of the owner) surrenders control and cannot thereafter be vicariously liable for the negligence of person who is driving on his behalf to whom there has been a delegation of a task or duty.

F Even if the retention of a right to control had been a necessary element before there could be vicarious liability, I am satisfied that the mere fact of a bailment would not in itself mean the owner of the vehicle (or a person in the position of an owner) had abandoned the right to control. It would depend in each case on the purpose of the bailment.

G In any event, I am not satisfied that the retention of a right to control beyond that implicit in the delegation of a task or duty to an agent is a necessary element before vicarious liability can be established. In *Norton v Canadian Pacific Steamships Ltd* [1961] 1 WLR 1057, Pearson LJ had referred to the evidence before the court that the defendants did not exercise or have any right of control of the use of the bogies to which that

case related. Yet he made no reference to that factor when setting out the test (at p 1063): A

In my opinion, the reason in *Ormerod's* case is based on the same principle. The owner of a car when he takes or sends it on a journey for his own purposes, owes the duty of care to other road users and if any of them suffers damage from negligent driving of the car whether by the owner himself or by an agent to whom he has delegated the driving, the owner is liable. B

My view is strengthened by the remarks of Lord Wilberforce in *Launchbury v Morgans* [1973] AC 127 at 135 in which he set out the circumstances in which the common law has attributed vicarious liability: C

The owner ought to pay, it says, because he has authorised the act, or requested it or because the actor is carrying out a task or duty delegated or because he is in control of the actor's conduct.

In other words, control is simply an alternative basis for vicarious liability. D

I am satisfied on the evidence that at the time of the accident, the first defendant was driving the vehicle in a genuine representative capacity as agent for and on behalf of the second defendant. The second defendant had delegated the task of parking the vehicle to the third defendant which carried out that task through its employee, the first defendant. E

I reject the argument for the second defendant that simply because the first defendant appears to have been trying to find a place to park the car other than at the usual construction site used by the third defendant he was on a frolic of his own. I find the second defendant vicariously liable for the negligence of the first defendant.

Main Examinations for LLB Year I (May, 2001)			
	Name of Paper	Date of Exam.	Time
1	Law and Society I & II (LLAW1003/ 1004)	18-May-01	9:30am-12:45pm
2	Law of Tort I & II (LLAW1005/ 1006)	21-May-01	9:30am-1:00pm
3	Law of Contract (LLAW1001/ 1002)	25-May-01	2:30pm-6:00pm
4	The Legal System (LLAW1008)	1-Jun-01	9:30am-12:00am
Supplementary Examinations for LLB Year I (August, 2001)			
1	Law of Tort (LLAW1005/ 1006)	14-Aug-01	9:30am-1:00pm
2	Legal System (LLAW1008)	17-Dec-01	2:30pm-5:00pm

University of Hong Kong
Department of Law

LAW AND SOCIETY examination (LLAW1003 & LLAW1004)
18 May 2001

9 30 am – 12 45 pm
(reading time the first 15 minutes)

Please answer any four (4) questions. All questions are weighted equally.

- 1 Is it better to live in a stateless society than in a State? Give reasons for your answer
- 2 Critically discuss Plato's and Aristotle's views on justice, law and the ideal form of government
3. Compare and contrast the political philosophy of Hobbes and Locke. Which would you prefer?
- 4 Is Chinese Confucian thought inconsistent with the modern idea of human rights?
- 5 Critically examine arguments **for** and **against** cultural relativism.
- 6 Answer EITHER (a) OR (b).
 - (a) Do you agree that Hong Kong's economy is the "freest economy in the world"? How important is the Rule of Law to Hong Kong's economy?
 - (b) What is Weber's theory of law and economic development? To what extent is it applicable to the case of contemporary China?
7. Is "equality of all human beings" a universally accepted value? Should the principle of equality be extended to all sentient creatures or to all beings that can feel pleasure or pain?

8. Answer BOTH (a) AND (b):

- (a) How does globalisation affect the protection and enjoyment of human rights? Illustrate and support your arguments.
- (b) Outline and examine factors that can modify the negative effects of globalisation.

**** the end ****

UNIVERSITY OF HONG KONG
Bachelor of Laws

LAW: LAW OF TORT I AND II (LLAW 1005 AND 1006)

21 May 2001
5 pages, 11 question

Time: 9:30am – 1:00pm
(including 30 minutes reading time)

Answer FOUR (4) Questions

1. The Western Clinic ('the clinic') was a private psychiatric clinic specializing in the treatment of drug addicts. It had a small but open lobby where sofas were located in full view of the reception and check-in counter. One day a man was seen sitting on the sofas and loitering in the lobby throughout the entire afternoon, and into the early evening. His name was Gary, a former patient of the clinic with a criminal record for violence. Despite his appearance (he was poorly dressed, unshaven and dirty), he was ignored by the clinic staff.

Sometime that evening Mark, a nurse employed by the clinic, was found brutally beaten in a 2nd floor pantry. His money and the watch he was wearing were stolen. Mark suffered permanent brain damage in the attack. Mark's fiancée Karen, who came to meet him after work, was the first to find him, and saw him in this condition. Karen has tried to provide care for Mark, but since the accident, Karen has been diagnosed as suffering from psychiatric injury.

The investigation showed that the attack was committed by Gary. Gary had followed Mark into the lift and to the pantry, where he committed the attack. Gary has not been seen again since the attack.

With reference to relevant case law, advise Mark and Karen in their negligence actions against the clinic. (You are not required to consider actions against Gary).

2. The defendant company (D) operates a factory manufacturing steel pipes. D's operations were very noisy, and over a period of many months D committed a number of violations of the Noise Control Ordinance Regulations, in that it exceeded and continues to exceed noise levels permitted by the Regulations. The Ordinance and Regulations say nothing about the availability of a cause of action for damages in the event of a breach. After each conviction, D paid the fine determined by the court.

The P family lives nearby. They complain that family activities have been disrupted by the noise from D's factory. Moreover, some of them now suffer from hearing defects as a result of the noise, and wish to sue D. They seek your advice.

What actions may be available to the P family, and what remedies? With reference to relevant case law, advise the P Family as to the likelihood of success of each of those actions, and give reasons to support your advice.

3. 'The reasonable person standard, far from being objective, is more likely to reinforce existing inequalities and stereotypes through the introduction of socially determined and often crude conceptions of what is "ordinary" or "normal".'

Critically assess this statement with reference to relevant case law. In particular, consider whether the reasonable person standard as applied by the courts is in fact objective. Do you agree that the reasonable person standard may have the effect of preserving existing inequalities and stereotypes? How might this occur?

4. Edmund is a 42 year-old mini-bus driver, who drives a mini-bus for the Lucky Transport Company. His contract requires him to drive during weekdays between Pokfulam and North Point, although he can vary the route depending on the time of day, and his own assessment of the traffic conditions and passenger demand. He normally works from 8am to 6pm, and is paid a commission based on the paid fares. In a normal month he is able to earn approximately \$20,000. On weekends he sometimes drives as a substitute driver on a different route for another transport company.

On the day in question a passenger shouted 'stop please'. Edmund did not stop because he was in a no-stop zone. The passenger proceeded to shout at Edmund. Edmund stopped the mini-bus, and recognized the passenger as Bill, the lover of Edmund's wife from whom he was now separated. Edmund was still very angry with Bill over the affair with his wife, and insisted that Bill disembark immediately. Now Bill refused to do so, and struck Edmund on the head. Edmund was seriously injured and was hospitalized, and three months later died from the injuries.

Edmund's current girlfriend Jane, with whom Edmund has been living, and her children by a previous marriage, with whom he has also been living, now seek your advice regarding a claim under the Employees' Compensation Ordinance.

With reference to relevant case law, advise Jane and her children regarding the likelihood of the success of a claim under the Employees' Compensation Ordinance, and the types and amount of compensation that might be payable.

5. Tort law performs important functions beyond that of compensation for injury. The more important of these include accident reduction, wealth maximization, and loss distribution.

With reference to tort law principles, any relevant statutory regimes, and relevant examples from the case law, explain how, and how well, tort law is able to perform these functions.

6. Keung Chong Holdings Corporation (Keung) acquired some land on which to locate its new office headquarters. The work to construct the new tower block was contracted to Zed Construction Company (Zed). Zed in turn subcontracted the specialized aspects of the construction work to other companies. Zed subcontracted the decorative cladding to Ace Cladding Co (Ace), a company recommended by Keung to Zed because Keung had used Ace to install the cladding in Keung's other buildings. Upon completion of the tower block, Keung moved into the new premises.

Ten years after completion, the decorative cladding panels on the outside of the building proved defective and began to crack and fall off. Inspection of the cladding has revealed that all of it is defective and must be repaired immediately. Keung has arranged for the repair by another cladding specialist.

With reference to relevant case law and any relevant statutory provisions, advise Keung regarding any negligence action it may have regarding the defective cladding and the cost of its repair. Be sure to advise Keung regarding any difficulties it may encounter in bringing the action.

7. Assume the same facts as in Question 6. Before the repair could be undertaken, some of the cladding fell onto the street below. It landed on two pedestrians, Henry and Frederick. Henry, a 50 year-old lawyer, was 100% disabled by the accident and can no longer work. He had been earning \$100,000 per month before the accident. Frederick, a 30 year-old off-duty policeman, was badly injured and died three weeks after the accident. He had been earning \$20,000 per month at the time of the accident. He had been living with his unemployed wife Jane, and her child from a previous relationship, Teri, aged seven. Jane's 67 year-old mother Amy also lived with them.

You must answer BOTH (a) and (b).

a) **With reference to relevant case law, advise Henry regarding any negligence action he may have regarding his injuries. Assuming that you have argued for a successful result in the negligence action, be sure to explain in general terms the assessment of the damages that Henry can expect to be awarded.**

and

b) **With reference to relevant case law, identify the parties who may bring an action for damages arising from Frederick's death. Advise them regarding any negligence action that may be brought in their favour. Be sure to explain, with reference to any relevant statutory provisions, the assessment of damages that can be expected for each.**

8. The IceBlue website hosts a bulletin board for those interested in Hong Kong politics. Contributors to the discussions may post their comments anonymously. IceBlue makes no systematic effort to review or screen messages, though it is possible for a request to be made for a message to be removed on various grounds including "defamatory content". One discussion thread is "the performance of LegCo members". One of the contributors wrote that a LegCo member (named as Artemus Chow) has "since the last election only made speeches about issues relating to matters which are connected with his profession, and is clearly using LegCo to advance his career rather than the interests of his constituents". The item remains on the website for three weeks until Artemus requests its removal. Artemus suspects that the author of the comment is his ex-wife Priscilla, who is still angry with him. He wants IceBlue to disclose the name of the correspondent, and then plans to sue both IceBlue and the correspondent.

Artemus says that it is probably true that by chance all of his speeches since the election have been relevant to his profession, but insists that the statement about his advancing his career is quite untrue.

Artemus would like to know whether his defamation action is likely to succeed. Artemus also wants to know whether he can compel the release of the name of the writer, and whether he can hold IceBlue as well as the writer liable. He wonders whether there are any defences open to the author or IceBlue. With reference to relevant case law, advise Artemus on all of these matters.

9. Andrea was passing by the Emerald hotel when she realized that she needed to go to the toilet. She entered the hotel and arrived at the lobby bathroom, and entered the bathroom. Once inside she saw a notice that read 'wet floor - cleaning underway – do not use.' Andrea slipped on the floor, which had become very wet due to flooding from an overflowing toilet, fell, and was injured.

Ben, a professional plumber who ran his own business, was called to repair the overflowing toilet. He completed the repair of the overflowing toilet. However, he was injured when he slipped on the wet floor that was still full of water not yet cleared by Emerald's maintenance crew.

Later, the cleaning notice was removed and was replaced by a notice posted on the outside of the bathroom door, that read 'private - bathroom for use by registered hotel guests only – others use at your own risk – hotel guests can obtain key at reception.' Candy, a shopper, read the notice but found that the door did not require a key after all. A small piece of cardboard had been stuffed into the lock mechanism of the door, permitting free access without a key. Candy noticed other people coming and going freely, including hotel staff members. Once inside, Candy slipped on the floor, which again was wet, from the overflowing toilet that Ben had improperly repaired. Sally was injured.

With reference to relevant case law and statutory provisions, advise the Emerald Hotel of its possible tort liability.

10. Chow was a newly qualified mini-bus driver. One of his passengers, Ng, suddenly started choking and gasping for air and passed out. In fact, Ng had suffered a stroke. Chow decided to drive quickly to the nearest hospital. He accelerated and, due to his high speed, he started to cross over to the opposing lane as he was approaching a bend in the road. At this stage a car driven in the opposing lane by Leung approached at a rapid speed. Leung had stolen the car a week earlier and was now delivering the car to a triad gang specializing in smuggling cars to China. Due to the high speed of both vehicles Chow was unable to avoid Leung and the cars collided.

Both Chow and Leung were injured. Ng suffered further head injuries, and died shortly after arrival at the hospital. The medical evidence was unclear as to whether Ng would have died if he had not suffered the head injuries in the collision.

With reference to relevant case law, advise Chow and Leung regarding their negligence actions against each other, including any available defences. Advise Chow and Leung regarding the negligence action that might be brought against them by Ng's legal representative, and their respective responsibility for damages that might be payable.

11. This question has two parts. If you choose to answer this question, you must then choose either (a) or (b). You may not choose both. If you mistakenly choose both, only one of your answers will be credited with marks.

(a) John was a tall, heavily built man hired by X, a businessman, to collect a debt owed to X. John went to the business premises of Victor, the debtor, to demand payment. He walked through the reception area into the private offices, blocking the doorway of Victor's office, and insisted that he wasn't leaving until he was paid. He threatened Victor that he and his family would be injured if Victor did not pay the debt. Victor's wife Clara was with Victor in his office. She fainted, hit her head on the floor, and eventually suffered from nervous shock. After some minutes John decided that he had better leave. He threatened that he would return if the debt was not paid. He saw Michael, a clerk, and while rushing past him, knocked him to the floor. Michael was not injured.

With reference to relevant case law, advise Victor, Clara and Michael regarding the tort actions that they may bring, the types of damages that might be awarded by the court, and any other remedy that might be available.

OR

(b) 'If you want to know when you have the right to lay hands on another person, you must have a good understanding of the defences to an action in trespass.'

Illustrate this proposition as applied to the defences of consent and legal authority, making reference to relevant cases and legislation as appropriate.

- end of examination paper -

UNIVERSITY OF HONG KONG
Department of Law

LAW OF CONTRACT (LLAW1001&1002)

FINAL EXAMINATION

(2000-2001)

Date: May 25, 2001

Time: 2:30 - 6:00 p.m. (including 30 minutes reading time)

Instructions:

1. This paper consists of six questions. Choose and answer any **THREE QUESTIONS**. No additional credit will be given for answering more than three questions. All questions are weighted equally.
2. **Read the questions carefully** before deciding which questions to answer. Once you have decided, read the questions you have selected again and make sure that you understand them.
3. **Reading period:** during the 30 minute reading period you may not write in your answer book. However, you may look through your materials and make notes.
4. **Materials:** This is an open book examination and you may refer to any materials that you have brought with you into the examination. No materials are provided to you (apart from the question paper and the answer book). You may not share any materials with another student. You are reminded that plagiarism is prohibited and punishable.
5. This examination counts for 60% of the final mark in this subject. The remaining 40% is determined by the coursework and class participation marks during the year.

Question 1

Cindy owns an antique shop. Recently, she purchased a number of beautiful antique chests (from a wealthy old man who lives on the Peak but is moving soon to Canada). Cindy hired John (who operates a moving business) to transport the chests. They agreed that John and his staff would collect the chests and deliver them to Cindy's shop on Hollywood Road, by 2:00 p.m. Friday, for a total price of \$5,000. When Cindy hired John, she made it clear that she had to have the chests in her shop by no later than 2:00 p.m. on Friday as she planned to hold a special exhibit (for selected customers) on Saturday and needed time to polish the chests. John reassured her, saying: "You can count on us. I guarantee that we will be on time."

John and three of his employees collected the chests early Friday morning. However, the chests were made of a much heavier wood than they expected. The doorways in the flat were also very narrow and John's workers had to take some of the doors off the hinges in order to get the chests through. As a result, it took three hours just to move the chests out of the flat. Then, as they started to load the chests onto the truck, one of John's employees strained a muscle in his back and had to go to the clinic.

As a result of these problems, the truck did not get to Hollywood Road until 1:30 p.m., and John's two remaining employees were complaining that they needed lunch. John told Cindy that they would park the truck near the shop, take a 30-minute lunch break, and then start to unload the chests. Cindy was not happy about this. The weather looked threatening and she did not want her valuable chests to get wet in the rainstorm that was predicted. Cindy demanded that the chests be moved inside her shop immediately and threatened to sue John for breach of contract. But John knew that this was an empty threat and he did not want to push his tired and hungry workers. Indeed, after their long hard morning, John and his workers were enjoying the sight of Cindy's rage. Simply for fun, John decided to tease Cindy a bit, saying: "Oh, my back is starting to hurt now as well -- I also might have to go to the clinic." John's workers laughed and said that they too were feeling very unwell and needed a good long rest. Although they were only teasing, Cindy interpreted these comments as threats. In desperation, she suddenly pulled John aside and whispered in his ear: "Look, if you can get them to move these chests into my shop by 2:00 p.m., I will pay you an extra \$3,000". Hearing this, John leaped up and said very loudly: "Come on guys, I promise to pay you each an extra bonus of \$400 if we get the job done now." The workers stopped eating and John moved the truck to the pavement right outside Cindy's shop. Working very hard, they managed to unload the chests by 2:00 p.m.

When the work was done, John went inside the shop. Cindy held out a check for \$5,000 and asked John to write "paid in full" on the bill. John knew that his workers were expecting a bonus so he demanded \$8,000. Cindy and John argued for about 15 minutes. Meanwhile, a police officer was approaching John's truck, which was parked illegally. Seeing an opportunity to get rid of John, Cindy suddenly held out \$300 in cash and said: "Here is an extra \$100 for each of you, more than you deserve. You can have it if you write 'paid in full' on this bill." Fearing that he would get a ticket from the police if did not move his truck quickly, John wrote "paid in full" and signed the bill. He then grabbed the cheque for \$5,000 and the \$300 in cash and left.

Advise John.

Question 2

The Government decided in 1999 that all Universities in Hong Kong were to be financed on the basis of research produced over a three-year period. Fearing that it might be left behind in the race for funding, the University of Pokfulam hired additional researchers. Nelly, who had just graduated from Princeton School of Law, was hired on a three-year contract as a Research Officer and asked to produce a total of ten papers during the next three years. According to the terms of the contract, Nelly would not receive a monthly salary but would be paid \$100,000 for every paper submitted and approved by the University Special Research Committee.

For the first year, all went well. Two of Nelly's papers were approved by the University, and she was accordingly paid. However, following the appointment of a new Secretary for Education in January 2000, the Government announced a change of policy. Funding for Universities would no longer be based on research but on other criteria, including good teaching. The following month Nelly received a letter from the University informing her that her services were no longer required. In the same letter Nelly was offered another job as Director of Mooting, for which she would be paid 50% of her present pay.

Nelly ignored this letter and for the next 4 months she continued to travel around the South Asia region, conducting research and writing. She completed a total of three papers which she delivered personally to University Special Research Committee. But Tamara, Chairperson of the Committee refused to accept delivery of the papers from Nelly, telling her that the contract between Nelly and the Pokfulam University had already been terminated. The following week Nelly called a press conference at which she denounced the change of policy by the Government and further announced her intention to sue the University of Pokfulam. However, Nelly did not sue the University because she did not have enough money to pay the anticipated legal fees.

By the end of 2000, the local press had been publishing articles on this policy change by the Government including interviews in which Nelly continued to threaten to sue the University. As the University became increasingly concerned about the adverse publicity, Nelly also grew tired of her press campaign. Besides, she also needed \$100,000 to pay up her accumulated rent and debts.

When Tamara heard that Nelly was in debt, she went to her and offered to pay her \$100,000 if Nelly would agree in writing to give up all her claims under her contract with the University. Nelly believed that the University of Pokfulam owed her more than \$100,000 under the contract, and she did not want to give up her rights. But then Tamara said: "We are friends with your landlord and we can have you thrown out by tomorrow if we wish."

The next day Nelly was paid the \$100,000 when she agreed to sign the document promising not to make further claims against the University.

Advise Nelly.

Question 3

Carole is a regular customer at Ron's Repair Shop. Recently, she brought her car in to have new brakes installed. Ron has a strict policy that customers must show an identity card and sign a form acknowledging receipt of their car. (This is to ensure that his employees do not accidentally allow someone other than the owner to take away a car.) Thus, when Carole came to collect her car and pay for the new brakes, the manager gave her one of these forms. Carole signed the form (in duplicate), gave one copy to the manager and stuffed the other copy in her bag. Although Carole had signed several similar forms over the years she had never noticed the reverse side, which contained the following (in Chinese and English):

Ron's Repair Shop's Standard Terms

Ron's agrees to repair your car on the following conditions:

- (1) Defective parts or labour will be replaced at no cost only if the customer notifies us of any defects within one month; otherwise Ron's Repair Shop accepts no liability for loss or damage caused by any repair work.
- (2) Ron's Repair Shop accepts no liability for loss or damage to a car left at this shop and advises customers to obtain insurance against theft and vandalism.

After Carole paid for the new brakes and collected her car, she started to drive home. She reached down to turn on the radio and was surprised to find that the radio and tape player (which she had purchased and installed only 6 months ago) had been removed. All that was left was a "false front", with nothing behind it. (This was because a thief had broken into her car one night while it was at Ron's Repair Shop. The employee who had been working on the car forgot to lock it, making it easy for the thief to get into the car.)

Carole was very upset about the missing radio and tape player, so she immediately turned around and started driving back to the Ron's Repair Shop to complain. On the way, she had to drive down a steep hill. A truck stopped suddenly, and Carole applied her brakes. Unfortunately, the new brakes were defective and failed to work. As a result, Carole's car crashed into the truck. Her car was damaged, and she was badly injured. She was in the hospital for three weeks and then in a rehabilitation centre for three more weeks. When she finally got home, she telephoned Ron's Repair Shop and told Ron the entire story. Ron sent Carole a nice "get well card". But inside the card, he placed a copy of *Ron's Repair Shop's Standard Terms*, which he maintains exclude any liability for Carole's losses.

Carole is angry and wants to sue Ron for the value of the stolen radio and tape player, the damage to her car, and the injuries that she suffered.

Advise Carole as to her rights under the law of contract.

Question 4

In August 2000, Remedios, a first year law student at Precision University, saw the following notice on the board in the Law School:

Complete set of Contract lecture and tutorial notes for Sale. Price \$5,000. Notes compiled by 1999 Prize Winner. Telephone 9090-8000.

Remedios telephoned and spoke to Pablo who said: "I guarantee you will do well with these notes. They are complete and up to date. There is no change in the course from 1999 to 2000." Remedios agreed to meet Pablo the next day to receive and pay for the notes. At the meeting Remedios said: "It is very important for me not to fail. My father will stop paying for my education unless I pass all my examinations on first attempt. Moreover, my father has also promised to buy me a car if I do well in Contract." After this conversation Remedios paid Pablo the \$5,000 and took the notes.

Later he discovered that:

- a. Pablo was placed first in Contract in 1999 but did not receive the prize because Contract was the only subject he was studying, and he was not eligible for the prize.
- b. The notes did not refer to the case of *Work v Hard*, decided by the CFA in July 1999.
- c. The lecturer and tutor who taught Pablo in 1999 were on leave, and different teachers were assigned to teach Contract in 2000. Pablo did not know this at the time of his telephone conversation with Remedios. He learned of it just before he received payment for the notes but did not tell Remedios.
- d. Pablo had sold 20 copies of his notes to other classmates of Remedios.

Remedios failed Contract at the end of the 2000 academic year.

Advise Remedios as to whether he has any action against Pablo and what damages he might be able to recover.

Question 5

On December 10, 2000, Cleaners Inc. emailed the following letter to 5,000 people in Hong Kong (using a list of email addresses obtained from a marketing company):

Special Package: we will clean your apartment once each week, for one year, for a total of \$10,000. To accept, print out this letter, add your name and address, sign it, and mail it to our office by December 15, 2000.

Mrs. Wong printed out the letter and wrote the following on it: "I accept your offer. As I will be away from Hong Kong in August, I will not need your services in that month. As a substitute, I will have two cleanings per week in September." Mrs. Wong then signed and mailed the letter to Cleaners Inc.

On December 13, Alice (the manager at Cleaners Inc.) opened this letter and telephoned Mrs. Wong, who was not at home. Alice left the following message on her answer machine: "Sorry, but no changes to the schedule are allowed. Please confirm in writing whether you want the Special Package. If I do not receive your answer by 5:00 p.m. on December 15 then I will assume that you are not interested."

Later that day, Mrs. Wong played the telephone message. She printed out a new copy of the Special Package email from Cleaners Inc., wrote: "I confirm my acceptance" on it, and tried to fax it to Cleaners Inc.'s fax number. However, the fax line was constantly engaged on December 13 (because Alice's son was faxing personal "Happy New Year" letters to his friends in Canada). Frustrated that she could not get through, Mrs. Wong finally took the letter to the post office and mailed it (at 4:00 p.m. on December 13). (This letter was delivered to Cleaners' Inc. on December 15, at 3:00 p.m.)

Meanwhile, on the morning of December 14, Alice learned from her staff that 3,000 people had signed up for the "Special Package". Fearing that she would not be able to hire enough cleaners, Alice e-mailed (at 11:00 a.m. that day) the following message to the same 5,000 people who had received the original "Special Package" e-mail:

As we have already received the maximum number of clients for the "Special Package" cleaning service, this offer is no longer open for acceptance.

Mrs. Wong did not check her emails at all on December 14 because she was packing for a trip to the USA. On the morning of December 15, she quickly e-mailed her flight information to her friend in the USA. While using her computer, Mrs. Wong noticed that she had several "incoming" e-mails, but she did not have time to open and read them as she was hurrying to the airport. On December 30, Mrs. Wong returned to Hong Kong and finally read all her e-mails, including the email from Cleaners Inc. Mrs. Wong telephoned Alice and insisted that she was entitled to receive the Special Package. Alice is already over-committed so she wants to know if Cleaners Inc. is contractually bound to provide Mrs. Wong with the Special Package.

Advise Alice.

Question 6

Noel made arrangements for his graduation party, to be held on 30 March at the Fragrance Harbour View Hotel. Noel booked the hotel's reception hall with a sitting capacity of 250 guests, and 5 suites for his out of town guests. Immediately after the reception, Noel planned to fly to London to begin work with a leading firm of accountants. Noel agreed to pay \$10,000 for the reception hall, \$125,000 for the guest dinner, and \$15,000 for the 5 suites. Under the terms of agreement, Noel is to pay \$25,000 on signing the agreement, \$50,000 on 28 March, and the balance on 30 March. Noel signed the contract and made the initial agreement of \$25,000.

On 27 March, Noel was speeding down Pokfulam Road with two former classmates. At the same time he was on the phone instructing hotel staff on some party arrangements. When he arrived at the Mount Davis Road intersection, Noel failed to notice the red light, drove straight into a minibus, and was seriously injured. Noel cannot attend the graduation ceremony and wants to cancel the party at the Fragrance Harbour View Hotel. When he contacted the hotel on 28 March, he was told that the hotel had already decorated the hall, prepared all the food, and mixed all the cocktails.

Advise Noel.

End of Examination Paper

The University of Hong Kong
Department of Law

Bachelor of Laws: Supplementary Examination
Legal System
(LLAW 1008)

Date: 1 June 2001
Time: 9:30 am - 12:00 am
(Reading time: First 45 minutes)

This examination paper consists of 6 pages with 5 questions. All candidates have to answer 2 Questions. Question 1 is COMPULSORY.

Question 1 (Compulsory)

Read the attached judgment of Lord Donaldson MR in the case of *Re C (A Minor) (Wardship: Medical Treatment)* [1989] 2 All ER 782 and answer all of the following questions:

- (1) Why is this case called *Re C*? Is it contrary to the general principle that all court proceedings should be made public?
- (2) Who are the parties to this case?
- (3) What did the applicant want from the court? Why was it necessary to bring this matter to court? What was the dispute in this case?
- (4) How did Lord Donaldson MR distinguish this case from *Re B (A Minor) (Wardship: Medical Treatment)* [1981] 1 WLR 1421? Do you think Lord Donaldson MR was right in distinguishing *Re B*? What would be the difficulties that you envisage in his approach?
- (5) What is the ratio of this case?
- (6) Do you agree with the decision of Lord Donaldson MR? Should the court be making this kind of decision?

Question 2

‘Any legal system ultimately rests on a set of values.’ Evaluate this statement critically. What are the values that underlie the Hong Kong legal system, and how do you reconcile these values with the principle of ‘One Country, Two Systems’? Refer to any recent examples to illustrate your answer.

Question 3

‘After the landmark case of *Donoghue v Stevenson* was decided, the manufacturer in that case made a public statement in the press that the decision of the House of Lords was regrettable and unfair. The manufacturer had taken the best legal advice when the consumer lodged the complaint, and the essence of all the legal advice it received was that the manufacturer owed no duty of care to the ordinary consumer. Even the court at first instance and the Court of Appeal agreed with this state of the law, until it was changed by five wise men in the House of Lords. They made the decision with no public consultation, no social evidence, and no discussion of general policy and ramifications, and yet the decision was made with retrospective effect. Had the introduction of a new tort of negligence been discussed by Parliament, which should have been the case, the new law would never apply retrospectively. The manufacturer would then not be adversely affected by a legal principle which it could not possibly have foreseen with all due diligence.’

Comment critically on this hypothetical statement in relation to the nature of common law.

Question 4

The Chief Justice has set up a working party in the year 2000 to review the civil justice system so as to ensure that the civil justice system is accessible to every ordinary member of the public. What do you think would be the two most important issues that the working party should address? Give reasons to support your choice. What solutions would you propose to enhance the accessibility of the legal system?

Question 5

In *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank* [1985] 3 WLR 317, the Privy Council held that on matters of English law, the House of Lords was the final arbiter and the Privy Council would consider itself bound by the decision of the House of Lords. The law previously in force in Hong Kong, including the common law, was preserved by the Basic Law. The Interpretation and General Clauses Ordinance (Cap 1) defines ‘common law’ as the ‘common law in force in Hong Kong’, which means English law in the context of ‘law previously in force in Hong Kong’. Therefore, the decisions of the House of Lords on English law remain binding in Hong Kong after 1 July 1997.

Discuss this argument critically. Do you agree with it?

***** End of Paper *****

Re C (a minor) (wardship: medical treatment)

COURT OF APPEAL, CIVIL DIVISION
LORD DONALDSON OF LYMINGTON MR, BALCOMBE AND NICHOLLS LJJ
19, 20 APRIL 1989

Ward of court – Jurisdiction – Medical treatment – Terminally ill baby – Nature of medical treatment to be administered to ward – Whether aim of treatment should be to ease suffering or to achieve short prolongation of life.

783

LORD DONALDSON OF LYMINGTON MR. Before coming to the substance of the appeal there is one preliminary matter with which I should deal. Experience suggests that it is no longer possible to rely on good sense, taste and sensitivity to protect parents from the invasion of their personal grief in a situation such as this. Nor does this protect health and local authorities and their officers from being harassed when making difficult decisions. For this reason the judge imposed a wide ranging injunction in the interests of C forbidding any inquiries directed to ascertaining the identity of C, her parents, the local authority, the area health authority and the hospital medical practitioners and staff having, or having had, care of C. This injunction also extended to restraining the media by itself, its servants, agents or otherwise from publishing any material which will identify or assist in identifying any of those persons or bodies.

I personally regret the necessity for any such injunction but have no doubt of its need. That being so, I have to say that the names of the solicitors involved should not be published at the present stage because such publication would or might identify the area in which they practise and suggest, rightly or wrongly, the area in which the relevant local and area health authorities operate. If, of course, that situation changes, the court will be only too happy to authorise disclosure of that information¹.

Turning now to the substance of the appeal, I have, most regretfully, to start with one fundamental and inescapable fact. Baby C is dying and nothing that the court can do, nothing that the doctors can do and nothing known to medical science can alter that fact.

The problem of how to treat the terminally ill is as old as life itself. Doctors and nurses have to confront it frequently, but it is never easy. Parents and relatives have to confront it less often and that makes it all the more difficult for them. Judges are occasionally faced with it when terminally ill children are wards of court. It is an awesome responsibility only made easier for them than for parents to the extent that judges are able to approach it with greater detachment and less emotional involvement.

The present case is one of the saddest which can be imagined. Not only are we concerned with a very young baby, but one who became terminally ill before she was even born, a fact which only became apparent at a later date.

C was born prematurely on 23 December 1988. She is now 16 weeks old. At birth she was found to be afflicted with a much more serious condition than the usual type of hydrocephalus. There was not merely a blockage of cerebral spinal fluid within the brain, but as a result the brain structure itself was poorly formed. Her progress since then and further examinations have revealed how exceptionally she has been affected, and to that I will return.

But first I must explain how the court came to be involved. Some time before C was born and at a time when no one anticipated that she would be born handicapped, the

¹ Editor's note. Such an order was subsequently made: see *Re C (a minor) (wardship: medical treatment)* [1989] 2 All ER 791

social services were in possession of information which showed that the parents would have great difficulty in caring for her. This aspect was the subject of long and anxious consideration and it was decided that when she was born an application should be made to make her a ward of court. I must emphasise that this decision was quite unrelated to C's medical condition, which was neither known nor suspected at the time at which it was made. When C was born and it became apparent that she was brain damaged, the only change of plan was a decision to apply for a 14-day place of safety order under the Children and Young Persons Act 1969 to preserve the position until C could be made a ward of court. Once C had become a ward, which happened on 5 January 1989, two weeks after her birth, the court became charged with the obligation of making decisions in the interests of the welfare of C which would otherwise have been solely a matter for her parents.

One of the first decisions which the court had to make was whether or not to agree to the child being operated on to relieve pressure on the brain. This is often done in cases of hydrocephalus with good results, but alas in the case of C all that could be hoped for was that it would prevent her head becoming so enlarged that nursing would become impossible. The damage to her brain had been done before birth and was irreparable.

Those who, understandably, have been moved by the story of C, but who have no personal involvement, have publicly commented that this operation should have been performed. I am bound to say that I think it might have been better if they had first made sure of the facts. In fact, the registrar of the court readily consented to its being undertaken and it was. The actual order was dated 11 January 1989 and it required that C 'who is suffering from congenital hydrocephalus, receive such treatment, including surgical treatment, as is considered medically appropriate' to her condition. It was pursuant to this order that the doctors operated on C and inserted a shunt to relieve pressure on her brain.

At all times since her birth C has received the finest and most caring medical and nursing attention which this country has to offer. However, the time came when a decision had to be made on what further treatment should be provided. In a critical situation such as this such decisions should not be, and are not, taken without wide consultation. And so it came about that the local authority's medical and social services departments became involved. The essential problem was what treatment should be given in the best interests of C if, as sooner or later was inevitable, she suffered some infection or illness over and above the handicaps from which she was already suffering. In the middle of last month a social worker expressed the view that in such a situation the court would expect the doctors to embark on 'treatment appropriate to a non handicapped child'. The legal department of the local authority, on the other hand, expressed the view that C should 'receive such treatment as is appropriate to her condition'.

For my part, I have no doubt that the legal department was right and the social worker was wrong. You do not treat a blind child as if she was sighted, or one with a diseased heart as if she was wholly fit. But this difference of opinion created a problem for Dr W, the physician in charge of C, for his paediatric colleague, Dr S, and for the nursing staff. Sooner or later he or the local authority would have been bound to seek instructions from the court because, as Heilbron J said in *Re D (a minor) (wardship: sterilisation)* [1976] 1 All ER 326 at 335, [1976] Fam 185 at 196:

'... once a child is a ward of court, no important step in the life of that child, can be taken without the consent of the court ...'

In the circumstances, and quite rightly, the local authority decided to consult the court sooner rather than later. In previous correspondence, which was of course made available to the judge, Dr W had raised the question of what he should do if the time came when it proved impossible to feed C through a syringe, in itself a procedure fraught with difficulty. In such circumstances should he resort to the use of a nasal-gastric tube? If C vomited, should he set up an intravenous drip? If C developed a terminal respiratory

a infection, should she be given antibiotics? All these were legitimate and difficult questions, given the sad but fundamental truth that C was dying and the only question was how soon this would happen.

Faced with these problems, the judge invited the intervention of the Official Solicitor, who asked one of the nation's foremost paediatricians to examine C and to make recommendations. I do not name him, simply because it might serve to identify where C is being treated; I refer simply to 'the professor'. The professor reported as follows and b I read from his report:

'The records revealed that at birth she had a much more serious condition than the usual type of hydrocephalus. The detailed investigations which were done showed that there was not merely a blockage of cerebro-spinal fluid within the brain, but that the brain structure itself was poorly formed. Thus the operation that c was done to relieve the pressure within the brain was no more than a palliative procedure to prevent her head from becoming so excessive large that nursing would be impossible. The operation could not be expected to restore brain function. [C's] appearance is of a tiny baby. Although she is 16 weeks old, she is the size of a 4 week baby apart from her head, which is unusually large by way of being tall and thin—squashed because of sleeping on her side. She lies quiet until handled and then she d cries as if irritated. Her eyes move wildly in an uncoordinated way and she does not appear to see. (Her pupils do not respond to light so it is most unlikely that the mechanism for vision is present). She did not respond to very loud noises that I made, though the nurses said that she sometimes seems startled to their loud noises. However, my impression was that she did not hear, or had very poor hearing. She holds her limbs in a stiff flexed position. More detailed examination suggested that e she had generalised spasticity of all her limbs as a result of the brain damage. The only social response she makes is the irritable crying when handled, though sometimes she can be pacified by stroking her face. She does not smile and does not respond in any other way. The only certain evidence of her feeling or appreciating events is the report of her quietening when her face is stroked. Thus she does not have the developmental skills and abilities of a normal new born baby. It is f inconceivable that appreciable skills will develop, bearing in mind that there has been no progress during the past four months. She has severe brain damage. She is very thin and has not gained weight despite devoted nursing care at [the hospital]. She is receiving regular small doses of the sedative Chloral. If she does not receive that she cries "as if in pain", though the carers are unsure where the pain originates. I do not believe that there is any treatment which will alter the ultimate prognosis, g which appears to be hopeless. She has massive handicap as a result of a permanent brain lesion. Her handicap appears to be a mixture of severe mental handicap, blindness, probable deafness and spastic cerebral palsy of all four limbs. In addition, although given a normal amount of food, her body is not absorbing or using it in the normal way so that she is not growing. I do not believe that she can be said to be enjoying her life and I find it hard to know if she is experiencing very much, though h the reports of irritable crying suggest that certain things upset her. She is receiving outstandingly devoted care . . . which could not be replicated in many children's units, or in many homes. The high standard of care makes it difficult to forecast how long she will live . . . In the event of her acquiring a serious infection, or being unable to take feeds normally by mouth I do not think it would be correct to give antibiotics, to set up intravenous fusions or nasal-gastric feedings regimes. Such i action would be prolonging a life which has no future and which appears to be unhappy for her. However, the opinions of the local nurses and carers should be taken into account for they know her well, show great love to her, and have a feeling for her needs that an outsider cannot have. Thus if they believed she was in pain or would suffer less by a particular course of action, it would be correct to consider that course of action, always bearing in mind the balance between short-term gain and needless prolongation of suffering.'

It will be seen that the professor took the view that the goal should be to ease the suffering of C rather than to achieve a short prolongation of her life. But he did not rule out the giving of antibiotics, intravenous fusions or nasal-gastric feeding if this would achieve this result. Above all, he felt that, in reaching decisions as events unfolded, the opinions of the local nurses and carers should be given the greatest possible weight.

In giving the reasons for his decision Ward J said:

'That poor baby has now been nursed and attended by the hospitals with a degree of devotion to duty which deserves the very highest commendation, and I pay tribute to those who have had part in the care of this ward, and I give my thanks to those for so looking after my ward on my behalf. I have had the advantage of a report by an eminent professor of paediatrics, instructed by the Official Solicitor, whom I caused to become involved in this matter to represent the interests of the baby. The professor observes in his report that the outstandingly devoted care she has received could not be replicated in many children's units or in many children's homes, and it is important that that should receive its proper tribute and its proper commendation. Sadly, notwithstanding that devotion this child has not prospered. I have had the benefit of reading the report and hearing the evidence of Dr W, who is the consultant physician at the hospital, a physician of 21 years' experience, and I give him my thanks for the assistance he has given me. He reports to me that this baby has made virtually no progress since her birth.'

I omit some other matters and quote again from the judge's judgment, where he said: 'The damage which she has suffered is quite exceptionally severe.' Then he set out the evidence in support of that proposition and continued:

'The medical evidence satisfies me that the damage to the cortex of the brain is gross and abnormally severe. The cortex of the brain is that part of the brain which serves the higher functions; those functions of intellect which make human life distinguishable, perhaps, from other forms of life. That damage, moreover, is irreparable, and about that all the medical witnesses are wholly agreed. There is, therefore, no prospect of a happy life for this child, sadly; no prospect whatever. The prognosis, in the conclusion of [the professor], is that it is inconceivable that appreciable skills will ever develop, and that is, of course, confirmed by the total failure of progress in these few short weeks of her life. There is, in the united opinion of the medical experts, no treatment which will alter that prognosis, and the prognosis is therefore one of hopelessness. I am therefore dealing with a child massively handicapped by a mixture of severe or permanent brain lesions, blindness, probable deafness and generalised spastic cerebral palsy of all four limbs.'

The judge then referred to the decision of this court in *Re B (a minor) (wardship: medical treatment)* [1981] 1 WLR 1421. There the facts were very different. The child suffered from Down's Syndrome and would be very handicapped mentally and physically. Nevertheless, she could have a life expectancy of 20 to 30 years. She developed an intestinal blockage which would be fatal within a few days unless operated on, but could be cured by operation. There was a difference of medical opinion on whether, in all the circumstances, it was in B's best interests to operate. The parents, who were consulted, thought that it would not. At an earlier stage the judge had taken the view that the operation should be performed but later, when the difference of medical opinion emerged, the judge felt that he should accept the view of the parents. This court disagreed. It held that the judge's duty was to have regard solely to what was in the best interests of the child and that it was not for the court to decide that the child should not have the chance of the normal life span of a mongoloid child with the handicap, defects and life of such a child.

C does not have any such option. She is, as I have already said, dying, and there is no
a medical or surgical treatment which can alter this fact. The judge continued in his judgment, saying:

'But here I am quite satisfied that the damage is severe and irreparable. In so far
as I can assess the quality of life, which as a test in itself raises as many questions as it
can answer, I adjudge that any quality to life has already been denied to this child
b because it cannot flow from a brain incapable of even limited intellectual function.
Inasmuch as one judges, as I do, intellectual function to be a hallmark of our
humanity, her functioning on that level is negligible if it exists at all. Coupled with
her total physical handicap, the quality of her life will be demonstrably awful and
intolerable . . . Asking myself what capacity she has to interact mentally, socially,
physically, I answer none. This is her permanent condition.'

c It was shortly after this that the judge, in a brief passage in his judgment, failed to
express himself with his usual felicity. He said:

'Putting the interests of this child first and putting them foremost so that they
override all else, and in fulfilment of the awesome responsibility which Parliament
has entrusted on me, I direct that leave be given to the hospital authorities to treat
d the ward to die, to die with the greatest dignity and the least of pain, suffering and
distress.'

No judge giving an extempore judgment has not, at one time or another, realised that
he has not expressed himself as he intended. For this reason, and because the reasons for
a decision in one case are published and are rightly taken into account in deciding others,
e it has long been the practice for judges in appropriate cases to make small revisions in the
wording of their judgments when they receive a transcript from the shorthand writers.
So it was in this case. The judge revised the first sentence of that passage to read:

'I direct that leave be given to the hospital authorities to treat the ward in such a
way that she may end her life and die peacefully with the greatest dignity and the
least of pain, suffering and distress.'

f Unfortunately, the formal order also contained the misleading phrase 'treat the minor
to die'. Such orders are not seen by the judge unless he specifically asks to approve its
wording, and the judge was at first unaware of its phraseology. When it was drawn to
his attention, he at once exercised his powers under the slip rule to amend that part of
the order to read: 'the hospital authority be at liberty to allow her life to come to an end
peacefully and with dignity.'

g The Official Solicitor in appealing to this court does not take issue on this part of the
judge's order. Nor do the local authority or the mother, both of whom have been
represented. All concerned accept that the judge correctly directed himself that the first
and paramount consideration was the well-being, welfare and interests of C as required
by the decision of this court in *Re B (a minor) (wardship: medical treatment)* and by the
h House of Lords in a later and different case with the same name, *Re B (a minor) (wardship:
sterilisation)* [1987] 2 All ER 206 at 211, [1988] AC 199 at 202 per Lord Hailsham LC.

Counsel for the local authority nevertheless felt it his duty to direct our attention to a
decision of the British Columbia Supreme Court in *Re SD* [1983] 3 WWR 618, while
submitting that the facts were very different. In so doing he was fulfilling the
fundamental duty of members of the legal profession to assist the courts in the
j administration of justice, regardless of the views or interests of their client. He was
wholly right so to do. In the event, I am fully satisfied that it does nothing to cast doubts
on the correctness of his clients', and the judge's, view that the advice of the professor
should be accepted. It was another case in which a child suffered from hydrocephalus,
but the child concerned was very much older. The child had twice been operated on to
implant a shunt and the question was whether he should now undergo a third operation.

He was undoubtedly severely handicapped, but not as severely as some in his class at the hospital school. If a third operation were to be performed he would probably continue to live as he had done before and would do so for some years. The parents thought that there should be no operation and that he should be allowed to die at once. The higher court authorised the operation, saying it was too simplistic to say, as did the parents, that the child would be allowed to die in peace. There was a real possibility that, without the operation, the child would endure in a state of progressive disability and pain. That is a wholly different case.

The Official Solicitor in bringing this appeal had three objectives. The first was to question the propriety of an order expressed to be 'liberty to treat the minor to die'. As I hope I have made clear, neither Ward J nor anyone else would uphold such phraseology and he himself amended it. Second, the Official Solicitor wished to question that part of the order of the judge which appeared to provide that in no circumstances should certain treatment be undertaken. To that I will return in a moment. Third, the Official Solicitor wished to allay anxieties in some quarters that the hospital staff were treating C in a way designed to bring about her death. These anxieties, while no doubt sincerely felt, were wholly without foundation and, when expressed, were deeply wounding to the dedicated staff caring for C who, as the professor said, were providing C with devoted care which could not be replicated in many children's units.

Let me make it clear that, in my judgment, the Official Solicitor has been quite right to adopt this course. His first objective was achieved by the judge himself, but the Official Solicitor was not to know that this would occur. His third objective has, I hope, now been achieved. There remains only the second objective.

In para (4) of his order the judge ordered:

'The hospital authority do continue to treat the minor within the parameters of the opinion expressed by [the professor] in his report of 13.iv.1989 which report is not to be disclosed to any person other than the hospital authority.'

However, in para (3) he had ordered:

'... but it shall not be necessary either, (a) to prescribe and administer antibiotics to treat any serious infection which the minor might contract; or (b) to set up intravenous fusions or nasal gastric feeding regimes for the minor.'

These two parts of the order are inconsistent with one another because the professor did not wholly rule out these steps if the local nurses and carers took a different view when the question arose for decision. He merely said that he did not think that such measures were correct if the object was simply to prolong a life which had no future and appeared to be unhappy for C. I have no doubt that he would have considered revising his opinion, and indeed would have revised it, if the local nurses and carers had thought that such treatment would relieve C's suffering during such life as remained for her.

The second difficulty which arises out of this part of the order is the ban on any publication of the professor's advice. This was one of those comparatively rare cases of special difficulty and sensitivity in which the public interest requires that, subject to maintaining the privacy of those concerned, the court's decision and the reasons for it should be open to public scrutiny. The formal order itself will not be likely to be very informative, and in any event it would require considerable editing to remove any clues as to the identity of those concerned. What is required in such cases is that the judge should give judgment in open court, taking all appropriate measures to preserve the personal privacy of those concerned. However, such a judgment can set out all the relevant facts and the medical and other considerations of which the judge has taken account. Thus, in this judgment I have quoted extensively from the professor's advice without, I hope, giving any clue as to his identity or that of C, her parents or the authority involved.

No new principle is involved in this appeal. I would allow the appeal to the extent of deleting the whole of para (3) of the judge's order. I do so for two reasons. First, the inclusion of specific instructions as to treatment is potentially inconsistent with para (4), which adopts the professor's advice. Second, para (3) of the order as amended starts with these words:

'The hospital authority be at liberty to treat the minor to allow her life to come to an end peacefully and with dignity and, pursuant to such leave, it is directed that the hospital authority shall administer such treatment to the minor as might relieve her from pain, suffering and distress inter alia by sedation...'

Now, the specific references to treatment are, of course, amply covered by the professor's advice. But the opening words seem to me to have a potential for giving rise to misunderstanding and are, therefore, much better avoided and now deleted. To that extent I would allow the appeal.

UNIVERSITY OF HONG KONG
Bachelor of Laws: Supplementary Examination

LAW: LAW OF TORT I and II (LLAW1005/LLAW1006)

August 14, 2001

Time: 9:30 am to 1 pm
(including 30 mins. reading)

4 pages - 9 questions

ANSWER ANY FOUR (4) QUESTIONS

1. Ho and Man work on a construction site. They are scaffolders. They are employed by Tin. Tin is employed by the main contractor as the scaffolding subcontractor. Ho and Man signed contracts with Tin which describe their status as "subcontractors".

Tin instructed Ho and Man to install the scaffolding in a certain way. Ho thought he knew better and did it in a different, but quicker, way. In consequence, the scaffolding was not as well constructed, and part of the scaffolding fell onto Man, who was taking his tea break at the time. Man was killed.

Man's widow, who has been appointed administratrix of Man's estate, seeks your advice. **Advise Man's widow regarding available actions and claims on her own behalf and on behalf of the estate.** (For the purposes of this question do not advise regarding occupier's liability or breach of statutory duty. You can assume that Man's widow has already received such advice).

2. Allie Cheung, a student in the BA English Literature course at Kowloon University, was accused by her teacher of plagiarism in her term paper. Rather than face disciplinary proceedings, Allie quit the university (the plagiarism charge was never pursued and so was never proved). William, a lecturer, learned some of these facts and told a number of colleagues at lunch that "BA student Allie Cheng has recently been caught cheating". Unfortunately, there was a real Allie Cheng who was a BA student in History. William's colleagues believed the story referred to her. One of them dismissed Allie Cheng from her part time job as research assistant.

Meanwhile, another lecturer, Tom, posted a picture of Allie Cheung on the student notice board. The picture contained the caption "don't cheat or you too will pay the consequences".

Advise Allie Cheng in her action against William, and advise Allie Cheung in her action against Tom.

3 Ada was the owner of a restaurant. She wanted to increase the profitability of the restaurant so she decided to have it renovated. She planned to upgrade the menu, attract a rich clientele and increase the prices. She retained Bob, an architect/engineer, to advise on design and layout and to supervise the renovations according to a specific timetable. She explained to Bob that she hoped to increase her profit margin through these renovations. Bob in turn retained subcontractors to be responsible for the various aspects of the renovation. Among these was Charles, an electrician whose contract with Bob required him to rewire the building.

The work was completed within the timetable and the restaurant reopened. However, the design and layout of the restaurant that was recommended by Bob proved inappropriate, because it failed to fully utilize the floor space and achieve the desired seating capacity. According to Ada's estimate the design and layout error caused a 10% loss of usable table space.

One week after the restaurant's reopening, the restaurant suffered a power failure. This occurred because Charles had used faulty circuitry when rewiring the restaurant. The food in the large refrigerators went bad due to the lack of electrical refrigeration, which in turn caused a 2-day closure of the restaurant while the food was restocked. Ada had to replace the faulty circuitry and wiring at her own expense.

Ada wishes to sue Bob for damages arising from the improper design and layout, and Charles for damages arising from the installation of the faulty circuitry. **Advise Ada regarding the duty of care in these tort actions.**

4. One evening, Dana's grandmother, Mrs. Wong, suddenly suffered a stroke. Dana put Mrs. Wong into her car, and was anxious to rush her to the hospital for treatment. As she drove the car quickly through a steep, winding part of Clearwater Bay Road, Dana suddenly came upon an unlighted, parked vehicle owned by Edward. Edward was waiting for a friend who was robbing the 7eleven store nearby. Edward was to provide the getaway car. Due to her speed, and the fact that Edward's vehicle was unlighted, Dana had little time to avoid Edward's car, and panicked. She applied the brakes too late, and hit Edward's car, pinning him inside the car and causing him some personal injury. Dana and Mrs. Wong were not hurt in the collision. Thirty minutes later, 2 ambulances arrived to assist the victims and take them to hospital. The ambulance carrying Edward to the hospital was involved in a separate accident when a dog suddenly jumped in the path of the ambulance, causing the driver, through no fault of his own, to swerve and crash into a post. Edward suffered further severe injuries in this accident.

The second ambulance took Mrs. Wong to the hospital. She received treatment for her stroke, but sadly, suffered permanent brain damage. The evidence shows that if she had not been delayed by the collision on Clearwater Bay Road, she would have had a 50% chance of complete recovery.

Advise Edward and Mrs. Wong in their negligence actions against Dana.

5. Molly purchased some land near Yuen Long. Although the property included a 4-storey block of flats, all the tenants had moved out. Initially, Molly took little interest and allowed the property to deteriorate somewhat. At various places on the property there were signs saying: "Trespassers not welcome. Enter at your own risk".

Every day, Teri took a short cut over Molly's property on her way to the market. The property was fenced, but at one or two points the fencing had collapsed and passersby could walk through, and in fact regularly did so. One day when Teri was walking through Molly's property, she was injured by a loose piece of roofing that had been blown off the roof by the wind.

Valerie, aged 7, often played with her friends on Molly's property. She was badly injured while playing on an abandoned motor vehicle on the property.

In the meantime, Molly decided to repair the premises and use them as an office for one of her businesses. Bill, an employee of a roofing firm hired to install new roofing, was injured when he fell through a part of the roof that had become weak due to rotting from the weather.

Finally, the office space was ready. Sam, one of Molly's clients, entered and saw a sign that read: "the owner takes no responsibility for injuries to visitors". Sam did not see that the floor of the entranceway had just been washed with a mop. He slipped on the wet floor and was injured.

Advise Molly regarding her possible tort liability.

6. The Hong Kong Children's Product Safety Ordinance contains the following provisions:

" 5. No person shall manufacture, import or supply a children's product listed in the 1st Schedule unless the product complies in all respects with the specification established for that product in the 2nd Schedule.

31. A person who commits an offence under s.5 shall be liable on first conviction to a fine of \$100,000 and to imprisonment for 1 year, and on subsequent conviction to a fine of \$500,000 and to imprisonment for 2 years."

One day, Bobo was injured while "double-riding" her bicycle (her brother John was the passenger), when the back wheel fell off and the bicycle collapsed. The bicycle was manufactured by the X Company, and was a 1st Schedule product but did not meet the specifications in the 2nd Schedule.

Advise Bobo of her chances of succeeding in an action for damages for breach of statutory duty, identifying any additional information you feel may be needed to complete your advice.

7. Entertainment Inc. held a licence granted under the Outdoor Entertainment Sites Ordinance to operate a stadium in Happy Valley. On some Saturday nights, Entertainment Inc. held pop music concerts at the stadium. The concerts were sold out and very noisy, and normally concluded by 11 pm.

Norbert, who was a nearby resident, was an early sleeper. In fact he went to sleep every night at 7 pm. He was unable to sleep on those occasions when a concert was held at the stadium, due to the high level of noise.

Pierre owned a nearby restaurant. The vibrations from the high-density sound amplifiers used in the stadium were so great that the windowpanes in Pierre's restaurant would rattle. On a few occasions, the vibrations actually caused some windows to shatter, and on one such occasion Catherine, a waitress, was injured.

Before one of the concerts involving a famous local performer, the crowd queued up outside the stadium in large numbers. The stadium's doors were not opened until shortly before the start of the show. The huge crowd caused congestion in the streets, and prevented the flow of traffic. As a result John was delayed in getting to the hospital for much needed medical treatment, and suffered a worsening of his condition as a result.

Advise Norbert, Pierre, Catherine and John as to their rights in tort. (Do not advise in negligence. You can assume that the parties have already received any such relevant advice).

8. Negligence law arguably performs a number of functions within society and the legal system. **Identify one such function, and write an essay critically assessing that function.** Be sure to explain how tort law performs that function, and whether or not it does so effectively. Use case law examples where appropriate.

9. Fred and George were at a party and began to argue. Fred shouted at George: "If you say one more word, I will punch you in the face!" George, who was much larger, replied: "You little punk. I'm stronger than you." Later, when George wasn't looking, Fred tried to punch George but missed, and hit Hank injuring Hank's nose. John, the host of the party, then grabbed Fred, knocked him unconscious and locked him in the bedroom. John intended to call the police, but when he returned, he saw that all of his friends had left in disgust and that his flat was a mess from the fighting. This made John more angry at Fred and so he kept him in the bedroom and cleaned the flat before calling the police some hours later. When the police arrived, Fred was still unconscious.

Discuss the tort liability of the parties.

END OF PAPER

The University of Hong Kong

Bachelor of Laws: First Examination

LLAW1008
Legal System
(2001-2002)

17 December 2001

Time : 2:30 am - 5:00 am
(First 45 minutes reading time)

This paper consists of 9 pages and 5 questions. You have to answer TWO questions, Question 1 in Part A, which is COMPULSORY, and one question from Part B.

PART A (COMPULSORY QUESTION: 50%)

YOU MUST ANSWER THIS QUESTION.

1. Read the attached judgment of the District Court in *Incorporated Owners of Tropicana Gardens v Tropicana Gardens Management Ltd* [2001] 4 HKC 90 and answer the questions below. The main issue in this case is whether the Registrar of the Lands Tribunal has jurisdiction to handle taxation of a bill of costs in relation to proceedings before the Lands Tribunal. **Focus on this issue only.**

As you may recall, the general principle in civil litigation is that the losing party will have to pay the legal costs incurred by the successful party. The successful party will send its bill to the losing party for settlement. In case the parties cannot agree on the legal costs incurred, they can go to taxation. Taxation is a process whereby a party of the court proceedings (usually the losing party) asks the court to assess the reasonableness of the costs incurred by the winning party. Taxation is carried out by the Master of the court. (A Master is a judge who deals with only interlocutory applications. The head of the Master is the Registrar.) As you also know, the Lands Tribunal is at the same level as the District Court, and the Registrar of the Lands Tribunal is at the same level as a District Judge.

Now answer these questions. The percentage at the end of each question reflects the weight to be given to each question and may serve as an indicator of the time you may wish to spend on each of the questions:

- (1) On the question of jurisdiction, what did Judge Li decide in *Incorporated Owners of Honour Building v Lou Chui Sim*? (5%)
- (2) What is the ratio of the *Tropicana Gardens* case? (20%)

- (3) There are two previous decisions to the effect that the District Court is bound by its own previous decisions. How did Kwang AR deal with these two cases? (20%)
- (4) How could the decision of Kwang AR be reconciled with *Young v Bristol Aeroplane Co Ltd*? (20%)
- (5) Even if the decision of Judge Li is not binding on Kwang AR, it is still of persuasive authority, which means the court should not lightly depart from that previous authority unless there are good reasons to do so. Kwang AR refused to follow Judge Li's decision. What are the reasons of Kwang AR for doing so? (35%)

PART B (50%)

YOU CAN ANSWER ANY ONE QUESTION FROM THIS PART.

2. 'Civil litigation is in crisis. It has been so for some time.' (Mr Justice Litton, in M Wilkinson and J Burton (eds), *Reform of the Civil Process in Hong Kong*, 2000)

Discuss this statement critically with respect to:

- (1) **Legal cost, delay, and unrepresented litigants; and**
- (2) **What reforms you would suggest and the possible difficulties in implementing such reforms.**

3. The Sino-British Joint Declaration provides that 'the laws previously in force in Hong Kong will remain basically unchanged'.

Discuss, with reference to examples since the establishment of the Hong Kong Special Administrative Region in 1997, what has been changed in terms of the sources of law of the Hong Kong since the handover. What are the reasons for the changes, and do you think that the changes are compatible with the common law system?

4. In the recent Audit Report of the Director of Audit (Oct 2001), the Director of Audit severely criticized the Legal Aid Regulation which excluded financial resources of the parents in considering an application for legal aid from an infant (ie, persons below the age of 18 years). The Director of Audit referred to the following case:

'In this case the father of the infant was a wealthy person who owned companies with total assets worth over \$10 million. His personal bank accounts had millions in deposits. At first, the father hired a lawyer in private practice to conduct the litigation in the High Court for the infant. He was advised that the

infant could be eligible for legal aid.

In 1998, upon application legal aid was granted to the infant. In the means assessment the financial resources of the parents were not taken into account. The father was also not required to pay any contribution towards the legal costs.

In the event, the infant won the case. The Judge made no order as to costs. The Legal Aid Department (instead of the infant's father) incurred legal costs of some \$220,000.' (Para 4.29, Report No 37 of the Director of Audit).

The relevant legal aid regulation was reviewed in the Legal Aid Policy Review of 1997. It was concluded at that time that the way of assessing the financial eligibility of infant applicants (ie excluding financial resources of the parents) should be retained.

The Director of Audit criticized the rule as absurd and recommended that it be critically reviewed.

As a Legal Aid counsel you are asked to review the regulation in light of the criticism of the Director of Audit. What would you recommend? Explain your recommendation.

(You have a completely free hand in preparing your recommendation. You may defend the rule or recommend modifying or repealing the rule. However, you have to support your recommendation with reasons, and if you propose any modification of the regulation, you should discuss any possible drawbacks of the modification.)

5. Ugola was a former dependent territory of the United Kingdom. As in the case of many other former British dependent territories, the British Government introduced to Ugola the common law system. In 1951, Ugola became independent. The common law system was retained.

In the last 50 years, Ugola has had a thriving economy and has developed itself into one of the leading financial centres in the world. It has also become a world power in military forces, technology and fashion. Each year over 10 million tourists visit Ugola.

On 11 September 2001, without any warning, Tabin, a well known terrorist organization, planted a 5,000 lb bomb at the underground carpark of Ugola Stock Exchange. The explosion was so violent that the entire building as well as 3 adjacent buildings collapsed, killing over 5,000 people. The world was shocked. Public emotion in the country ran high. Investors were worried whether Ugola remained a safe place for investment. The President declared war against terrorism and ordered the arrest of Tabin, the head of Tabin, dead or alive.

The Secretary for Security proposed to introduce stringent measures to combat terrorism. A draft Anti-Terrorism Bill was prepared. The aim of the Bill was to attack the financial resources of the terrorists. Section 3 provides that the Secretary for Security may, upon

reasonable suspicion, freeze all the bank accounts of a suspected terrorist for a period of up to 3 years. Section 4 confers a power on the Secretary for Security, again upon reasonable suspicion, to confiscate any asset of a suspected terrorist for 3 years. Section 5 provides that any person (including the suspected terrorist, bankers or other people who have any dealings with the suspected terrorist) aggrieved by the exercise of power under sections 3 and 4 may apply for relief from the military court only. No other court shall have jurisdiction to entertain an application arising under this Bill. Section 6 sets up the military court, the judges of which shall be appointed by the President from amongst persons with 'experience of intelligence and anti-terrorism'. Section 7 confers a power on the Secretary for Security to arrest and detain, upon reasonable suspicion, any suspected terrorist for a maximum period of 12 months. Section 8 provides that the Act shall be deemed to come into force on 1 January 2001.

The draft Anti-Terrorism Bill was published for public consultation and received overwhelming support from the public and all political parties. The editorial of the leading newspaper said that 'it is time to be tough'. The leader of the Opposition Party said that these were the minimum measures that a responsible Government should introduce, and suggested that the law should have gone further. The families of the victims in the attack said that 'leniency to the terrorists is cruelty to the innocent victims'. It is most likely that the Bill would receive strong support from Parliament. Under the constitution, the draft Bill was sent to the Ministry of Justice for advice before it was introduced to Parliament.

As a senior member of the Ministry of Justice, you are asked to prepare an advice on the draft Bill, and in particular, on whether the Bill is consistent with the rule of law. If it is inconsistent with the rule of law, what improvements, modifications or alternatives would you suggest in light of the current situation in the country. You have to justify your advice and if appropriate, with reference to any decided cases.

***** End of Paper *****

INCORPORATED OWNERS OF TROPICANA GARDENS v
TROPICANA GARDENS MANAGEMENT LTD & ANOR

LANDS TRIBUNAL
BUILDING MANAGEMENT APPLICATION NO 374 OF 1998
ACTING REGISTRAR SIMON KWANG
20 JULY, 18 SEPTEMBER 2001

Headnote (Summary of facts only):

The respondents were ordered by the Lands Tribunal to pay the costs of the applicant in a building management application, such costs to be taxed if not agreed. The applicant lodged its bills of costs for taxation of its costs in the application. Formal taxation was adjourned to 20 July 2001. On 17 July 2001, a judge of the District Court held that taxation of Lands Tribunal costs should be handled in the Court of First Instance by a High Court taxing master and neither a District Judge nor a master of the District Court had jurisdiction to handle such taxation (the *Honour Building* case). The judge's decision was based on s 12 of the Lands Tribunal Ordinance (Cap 17) which empowered the Tribunal to order taxation of costs either according to the first schedule to the District Court Civil

Procedure (Costs) Rules (Cap 336A), which was repealed, or O 62 of the Rules of the High Court (Cap 4A). The parties were invited to make written submissions on whether the District Court or the Lands Tribunal had jurisdiction to tax the bills of costs for Lands Tribunal cases.

Judgment:

Acting Registrar Simon Kwang: *Background*

The applicant lodged its bills of costs on 3 March 2001 for taxation of its costs in the action herein pursuant to the orders of Deputy Judge Tong (sitting as Presiding Officer of the Tribunal) made on 4 October, 3 November and 29 November 2000 respectively whereby the first and second respondents were ordered to pay the applicant's costs to be taxed if not agreed. C

After 2 call-over hearings on 20 March and 10 April 2001 respectively, the formal taxation of the bill of costs was adjourned to be heard on 20 July 2001. Just three days before the scheduled taxation, on 17 July 2001, his Honour Judge Li (in his dual capacity of District Judge and Presiding Officer of the Lands Tribunal) handed down a judgment in another Lands Tribunal Case of *Incorporated Owners of Honour Building v Lou Chui Sim* (LDBM 266 & 373/1999, 17 July 2001, unreported) (the *Honour Building* case). While I shall deal with the said judgment in more detail in the latter part of this judgment, in gist, his Honour Judge Li held that taxation of Lands Tribunal costs should be handled in the Court of First Instance by a High Court taxing master and neither a District Judge nor a master of the District Court have jurisdiction to handle such taxation. D E F

In light of the judgment of the *Honour Building* case, at the taxation hearing on 20 July 2001, in my dual capacity as the Acting Registrar of the District Court and the Lands Tribunal, I invited both parties to make written submission on whether the District Court or the Lands Tribunal have jurisdiction to tax the bills of costs for Lands Tribunal cases and in particular on the following two issues: G

- (a) whether I am bound by the said decision of Judge Li in the *Honour Building* case; and H
- (b) the effect of s 7A of the Lands Tribunal Ordinance (Cap 17) on the jurisdiction of the Registrar of the Lands Tribunal to tax the subject bill of costs.

While the applicant's solicitors requested some more time to consider the issues, I directed that parties to file and serve written submission within 30 days and be at liberty to fix a hearing for the purpose of making oral submission (if necessary) after exchange of their respective written I

A submission. Both parties have also agreed that there be no order as to costs of the said hearing.

At the request of the applicant's solicitors, on 20 August 2001, I granted leave to them to file and serve their written submission out of time on or before 29 August 2001. The applicant's solicitors eventually filed their written submission on or about 29 August 2001. The applicant's solicitors in their written submission argued that the Registrar of the District Court and the Registrar of the Lands Tribunal have jurisdiction over the taxation of the Lands Tribunal bills and have all the powers and duties in the cause as in the case of a High Court taxing master. The applicant's solicitors further submitted that the decision of his Honour Judge Li in the *Honour Building* case is not a binding precedent that I must follow.

No separate written submission was filed by the respondent. Instead, on 31 August 2001, the respondent's solicitors wrote to the court confirming their agreement with the applicant's submission that a decision of the District Court shall not be binding on the District Court.

The Honour Building case

The case first came before Judge Li for an issue unrelated to the jurisdiction point but to deal with an application by the respondents to set aside an order of Master Chow of District Court dated 29 May 2001. In that case, the applicant lodged their bill of costs to the Lands Tribunal for taxation. The bill was provisionally taxed and a notice to the party commencing the proceedings for taxation was issued by the Tribunal to the applicant on 8 March 2001 notifying the applicant the outcome of the provisional taxation. On or about 9 May 2001, the District Court received a written request by the respondents for an appointment of taxation and a notice was issued on 11 May 2001 to the parties requesting them to attend a call over hearing for taxation on 29 May 2001. However, on 10 May 2001, the Lands Tribunal has issued an allocator for costs allowed by the Tribunal. On 29 May 2001, Master Chow found that the respondent's application for review of the taxation was out of time under O 62 r 33(2) and dismissed the respondent's application accordingly. Since that part of the judgment is not relevant to my decision in this case, I shall not set it out here in detail save that Judge Li finally decided to set aside the said order of Master Chow and exercised his discretion to allow the respondent's application for review out of time.

Judge Li then proceeded to deal with the taxation procedure of the Lands Tribunal. It is not clear from the judgment whether the parties, in particular the applicant's solicitors (the respondents appeared in person at the hearing), had made any submission on the issue. Judge Li referred to s 12 of the Lands Tribunal Ordinance which gives the Tribunal the power to award costs and O 62 of both the Rules of the High Court (RHC) and Rules of the District Court (RDC). Judge Li compared the difference in wordings of O 62 r 2 of the RHC and RDC and concluded that O 62 of RDC does not apply to non-District Court proceedings such as the proceedings in the tribunals.

In the judgment of his Honour Judge Li, he decided that:

13. According to Order 62 Rule 21 of RHC, after the Lands Tribunal has ordered taxation of costs, the bill of costs should be filed in the High Court, not in the Lands Tribunal or District Court, because the taxation procedure ought to be conducted in the High Court. In this respect, there was no legal basis for solicitors for the applicant to file their bill of costs in the Lands Tribunal; and it was not in order for officers of the Lands Tribunal or the District Court to proceed with taxation.

14. According to Order 62 Rule 1 of the Rules of the High Court, Cap. 4 taxing masters are judicial officers of High Court Registrar grade. In practice, because of the combined effect of Order 62 Rule 13 and Rule 21, after the Court of First Instance has received bill of costs for taxation, a Chief Judicial Clerk (not a taxing master) will undertake preliminary taxation and issue a notice of provisional taxation. If the parties do not raise issue over the certificate, the amount of costs indicated in the certificate will automatically become confirmed. In case of dispute, the bill of costs has to be passed to a High Court taxing master for formal taxation by appointment and representation and evidence from the parties have to be heard.

15. In summary, taxation of Lands Tribunal costs should, according to the law, be handled in the Court of First Instance by a High Court taxing master (or Chief Judicial Clerk). However, for the two instant cases, when the Respondents requested taxation, staff of the Lands Tribunal referred them to the District Court, and the Registrar, District Court (acting through subordinates) took over the cases and fixed appointment for taxation by a Master of the District Court (Master Chow). Such steps were taken without lawful authority. Neither Master Chow nor the Court to which he is attached has the authority to handled taxation of the two instant cases.

F
G

16. In matters of taxation of costs in Lands Tribunal cases, neither I nor other district judges have jurisdiction, not to mention a master of the District Court. Nonetheless, because Master Chow and the Registrar, District Court have made decisions on matters relating to costs in the two instant cases, causing the Respondents to ask a district judge to intervene, I have to adjudicate on the validity of the decisions of the master and the Registrar.

H

Judge Li while setting aside the order of Master Chow dated 29 May 2001, transferred the matters relating to the taxation of costs to the Court of First Instance.

I

A *Is the Honour Building case strictly binding?*

The long established common law rules of precedent (or commonly known as the doctrine of stare decisis) are that courts of all levels of the judicial hierarchy must loyally adhere to decisions of the courts above them. In the premises, the District Court should follow the decisions of the Court of Final Appeal, the Court of Appeal and the Court of First Instance. However, as appeared from the previous authorities of the District Court, it is doubtful whether the District Court is bound by its own previous first instance decisions. Neither did the applicant's solicitors refer me to any authority that a master sitting in chambers is bound to follow a decision of the judge in chambers of the same level.

B
C

Back in 1959, the Full Court decided in *Tsang Shiu Tim v Hang Fong* [1959] HKLR 308 that a District Judge, when exercising appellate jurisdiction under the provisions of the Landlord and Tenant Ordinance (Cap 225, 1953 Reprint), would be right, when considering the previous decisions, to follow the principles applicable in the Court of Appeal in England so that it could depart from its own previous decision according to the three exceptions as established in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. In my view, the principle of the said case would only apply to isolated incidents when a District Judge is exercising appellate jurisdiction and would clearly have no application in the present case.

D
E

In 1962, Judge Pickering held in *Ngan Che Sum v Mok Leung Choy* [1962] HKDCLR 149 that he was bound to follow a previous District Court decision (KDC A 829/1961, unreported) where the court there made a specific finding on the effect of a 'receipt' for construction money and the 'receipt' formed the subject matter of the 1962 action. Judge Pickering took the view that it was not open for him to rule that the previous finding was wrong and that should be the function of the Full Court. It appears that this decision was confined to its own facts and did not establish any general principle.

F

In the case of *Liu Chi Cheung v Tsang Wai Choi* [1958] HKDCLR 165, Judge Huggins (as he then was) after referring to English authorities concluded that the District Court was not bound by its own decisions in cases tried at first instance but he expressly reserved the question whether the District Court was bound by decisions in its appellate jurisdiction. Judge Huggins remarked:

G
H

It seems to me, therefore, that the so-called principle of judicial comity has been whittled down until it has, for all practical purposes, ceased to exist. A judge of first instance is not absolutely bound by a previous decision of the same court or of a court of co-ordinate jurisdiction and he must bring his own judgment to bear on the point in issue.

I

I am not aware of any recent reported judgment of the District Court which decides on the issue. I agree with the views of Judge Huggins and

conclude that the judgment of his Honour Judge Li in the *Honour Building* case is not absolutely binding on me which I must follow and at most, the case is of persuasive authority. A

Lands Tribunal Ordinance

Judge Li referred in his judgment s 12(2) of the Lands Tribunal Ordinance. For the sake of completeness, I set out in full the provisions of s 12: B

12. Costs

- (1) Subject to the provisions of the Ordinance giving the Tribunal jurisdiction in any matter, the Tribunal may award costs to and against any party to any proceedings and may order that those costs be taxed on the basis of any one of the Scales of Costs set out in the First Schedule to the District Court Civil Procedure (Costs) Rules (Cap. 336 sub. leg.) and the Schedules to Order 62 of the Rules of the High Court (Cap. 4 sub. leg.). C
- (2) Subject to any rules made by the Chief Justice under section 10(3), Order 62 of the Rules of the High Court (Cap. 4 sub. leg.) shall apply to the award, taxation and recovery of costs in the Tribunal. D

Under s 12(1), the Tribunal has the power to award costs and may order costs to be taxed according to the scale of costs under O 62 of the RHC or under the first schedule to the District Court Civil Procedure (Costs) Rules (Cap 336A). However, upon implementation of the RDC in September last year, the District Court Civil Procedure (Costs) Rules has been repealed so that for the time being, the costs of the Lands Tribunal cases will be taxed under the scales of costs of the schedule to O 62 of the RHC. The Landlord and Tenant (Consolidation) (Amendment) Bill 2001 proposes to restore to the previous position to allow the Presiding Officer to order costs to be taxed according to schedules to O 62 of RHC or RDC. E

Section 10(3) of the Lands Tribunal Ordinance empowers the Chief Justice after consultation with the President may make rules and in particular under sub-s (e) for the award, taxation and recovery of costs. Therefore, before the Lands Tribunal has its own rules for the taxation of costs in the Tribunal, s 12(2) provides that the Rules of High Court shall apply. So far, up to now, the Lands Tribunal do not have its own rules for taxation of costs. F

Section 12 was replaced to the present form in 1982 when at that time there was no taxing master in the District Court nor the Lands Tribunal. Further, the Registrars of both the District Court and the Lands Tribunal were not judicial officers. Not until September 2000 when the RDC was implemented, taxation of bill of costs of the District Court case save provisional taxations were by then handled by the taxing masters of the High Court. This may explain why under s 12(2) of the Lands Tribunal Ordinance, O 62 of the Rules of High Court shall apply to taxation of costs. G

A Judge Li in his judgment then referred to various provisions of the RHC and then concluded that because O 62 of the RHC applies to taxation of costs in the Lands Tribunal and O 62 r 1 of RHC defines taxing master as judicial officers of High Court Registrar grade, bill of costs of Lands Tribunal cases should be filed in the High Court Registry and the taxation should be handled in the Court of First Instance by a B High Court taxing master.

C I take a different view from Judge Li on the interpretation of s 12(2) of the Lands Tribunal Ordinance. Section 12(2) does not specify the venue for taxation of the bill of costs of the Lands Tribunal cases. Instead, it just provides that for the purpose of taxation, RHC shall apply. So it only specifies the procedure rather than the venue for the taxation. Further, it does not confer exclusive jurisdiction to the High Court taxing master to handle the taxation of Lands Tribunal costs.

D Without the benefit of legal submission by parties in the *Honour Building* case, Judge Li has overlooked the effect of s 7A of the Ordinance and the definition of 'registrar' under s 2. Since the implementation of the District Court (Amendment) Ordinance 2000, the Registrar and the Deputy Registrars of the District Court are judicial officers. Section 2 of the Lands Tribunal Ordinance was also amended so that the Registrar of the Lands Tribunal means the Registrar of the District Court so that the Registrar of the District Court will also look after the Registry and other business of the Lands Tribunal. Section 7A(2) of the Ordinance provides:

F In addition to the powers and duties conferred or imposed by or under this Ordinance or any other enactment, the registrar, any deputy registrar, assistant registrar, bailiff, clerk, interpreter and other officer attached to the Tribunal may exercise such powers and perform such duties, insofar as the same are applicable to the business of the Tribunal, as those respectively exercised or performed by the registrar, deputy registrar, assistant registrar, bailiff, clerk, interpreter or other officer attached to the High Court.

G Therefore, the Registrar of the Lands Tribunal when exercising his powers and duties conferred upon him under the Ordinance has the same powers of the Registrar of the High Court. Since the Registrar of the High Court can perform the function of a taxing master for taxation of bill of costs under O 62 of the RHC, it is my view that by virtue of s 7A(2) of the Lands Tribunal Ordinance, the Registrar of the Lands Tribunal can tax the bill of costs of the Lands Tribunal cases.

Order

I For the reasons as stated above, I conclude and find that the Registrar of the Lands Tribunal has the powers to tax bill of costs of the Lands Tribunal cases in accordance with the provisions of O 62 of the Rules of

the High Court. Accordingly, I make the following directions and order for the present action: A

- (1) the formal taxation of the applicant's bill of costs under the appointment to tax filed herein on 6 March 2001 be adjourned to a date to be fixed for arguments to be heard before the Registrar of the Lands Tribunal, three hours be reserved; B
- (2) there be no order as to costs of and incidental to the hearing on 20 July 2001 and arising out of this judgment.

Finally, I have the parties' consent to circulate this judgment.

Main Examinations for LLB Year I (May, 2002)			
	Name of Paper	Date of Exam.	Time
1	Law of Tort I & II (LLAW1005/ 1006)	13-May-02	9:30am-1:00pm
2	Law and Society II (LLAW1004)	21-May-02	9:30am-12:00noon
3	Law of Contract (LLAW1001/ 1002)	25-May-02	9:30am-1:00pm
4	The Legal System (LLAW1008)	1-Jun-02	9:30am-12:00noon
Supplementary Examinations for LLB Year I (August, 2002)			
1	Law of Contract (LLAW1001/ 1002)	1-Aug-02	9:30am-1:00pm
2	Law of Tort (LLAW1005/LLAW1006)	12-Aug-02	9:30am-1:00pm

UNIVERSITY OF HONG KONG
Bachelor of Laws

LAW: LAW OF TORT I AND II (LLAW 1005 AND 1006)

13 May 2002
5 pages, 10 questions

Time: 9:30am – 1:00pm
(including 30 minutes reading time)

Answer FOUR (4) Questions

1. It has been suggested by one commentator that although the primary concern of tort law is to protect personal safety, “the second most important concern is to provide protection of one’s interests in the possession and use of one’s home”.

Identify those tort actions that are principally concerned with the protection of possession and use of one’s home. With reference to relevant case law, critically assess how these tort actions provide that protection. Be sure to discuss the limitations that exist on that protection.

2. The publishers of the *Southern Weekly* newspaper seek your advice. They wish to sue the publishers of the *Orange Daily* newspaper for an article published in the *Orange Daily*. The statements in the article of which they complain are:

1. The *Southern Weekly* has become very pro-Falun Gong.
2. It has developed the habit of publishing articles praising the founder of Falun Gong, and blaming the Government in Beijing for its treatment of people who disturb the peace by carrying out Falun Gong demonstrations in Tiananmen Square.
3. This is a very unpatriotic stance.

The publishers of *Southern Weekly* say that they have in fact published two articles about Falun Gong over the last year. One of these said that the Founder of Falun Gong has obviously gathered a large following in many countries. The other said that the actions in arresting people demonstrating in Tiananmen Square was very “heavy-handed”.

The publishers of *Southern Weekly* complain that the real motive of the *Orange Daily* is to smear the *Southern Weekly* as being “anti-Beijing” and damage their circulation and advertising revenue.

With reference to relevant case law and statutory provisions, advise the publishers of *Southern Weekly* in their intended libel action against the publishers of *Orange Daily*.

3. John played rugby in an amateur rugby league. Rugby is a sport that permits heavy physical contact at high speed. Protective headgear is not required, but is optional in the amateur league in which John plays. In one match, Bill, a player on the opposing team, tackled John from behind. Bill tried to grab John's shoulders, a normal manoeuvre, but in fact grabbed John's neck. As a result John choked, lost his balance and struck his head against Bill's head, with some force. John lost consciousness. He was taken to the emergency ward of Queen Anne Hospital for treatment. He did not receive treatment for some 45 minutes, as a result of crowded conditions in the understaffed emergency ward. The delay worsened John's condition, in that the sustained pressure in his head aggravated a latent tumour, resulting in severe brain damage.

With reference to relevant case law, advise John regarding any negligence actions he may wish to bring against Bill and Queen Anne.

4. Tom, aged 26 and unmarried, was a ceramics craftsman. His work involved the installation of decorative tiles at lobby entrances of new tower blocks. Under his contract with Tower Contractors, on whose construction projects he had been working for six months, Tom was required to work eight hours per day, although the start and finish times were not indicated. Under the contract he was responsible for installing all of the tiles on the exterior of the building. Tower Contractors provides him with all of the tiles and other equipment necessary for the job. He was paid a basic rate of \$10,000 per month, as well as a bonus depending on the number of tiles installed. On average he was able to earn \$30,000 per month. In the contract he was designated as an independent contractor. On some days after his shift he did similar work for another construction company.

Tom was standing on scaffolding working on the third floor when suddenly the scaffolding collapsed. An investigation showed that the collapse occurred as a result of someone having deliberately tampered with the wheel locking mechanism on the scaffolding at street level. Tom was killed in the fall.

With reference to relevant case law and statutory provisions, advise Tom's mother Edith regarding her entitlement to employees' compensation.

5. "The action for breach of statutory duty in Hong Kong has only a limited role in the tort system, with little potential for providing a remedy for those injured or suffering damages as a result of a breach of a statutory provision."

Critically assess the statement, with specific reference to and analysis of case law. In doing so, be sure to explain how this tort action operates in the context of the tort system in Hong Kong, including its relation to other tort actions.

6 George, a former drug trafficker, known to the police, was walking home when he was suddenly grabbed from behind by Police Officer Chan. He tried to resist, but was pushed to the ground and then forced into a police van. Fortunately, he was not injured. Once in the police van, Chan questioned George about his recent activities. Chan was concerned about some drug trafficking that had been taking place at a nearby school, although he did not mention this to George. In fact, George was no longer involved in drug trafficking, having reformed himself some months earlier. Police Officer Wong, the driver of the van, then drove the van for more than one hour while Chan continued to question George. At one point, Chan, holding a police baton threateningly, told George that it would be best if he confessed to the drug trafficking at the school. This was the first that George learned of the reason for his questioning, and he insisted on his innocence. George was finally released from the van after a few hours.

Later, Chan telephoned George to say that if he did not confess, his family would “face the consequences”. As a consequence, George suffered illness, vomiting, and extreme nervous agitation for many months thereafter.

With reference to relevant case law and statutory provisions, advise George regarding tort actions that can be taken against the officers and the police department.

7. Y Contractors was a road construction company, involved in a project to widen a 300 meter curved portion of Victoria Road. This required the closing of one lane, leaving only one lane for traffic, controlled by two workers, Victor and Sam, stationed at opposite ends of the road construction. Victor and Sam communicated with each other by radio. One day Victor found that his personal CD player that he listened to during his tea break, was not functioning very well. He decided to swap batteries with the two-way radio that was used for road communications with Sam.

Later that day, Victor found that his radio was not able to receive Sam's messages very well. As a result of the poor reception he mistakenly understood Sam's message and allowed traffic to advance, when in fact Sam had asked Victor to stop his traffic. The result was that the traffic at both ends of the road construction simultaneously began to advance. A car driven by Andy collided with one driven by Zoe. Neither driver was negligent in causing the accident because the collision occurred at the curved portion of the road where oncoming traffic was hidden from view until the very last second. Andy, who was not wearing a seatbelt, suffered personal injuries in the accident, and his car was badly damaged. Zoe, a car thief who was driving a stolen vehicle, suffered personal injuries.

With reference to relevant case law, advise Andy and Zoe regarding the negligence actions they wish to bring.

8. The University of Kowloon sports ground consists of a group of sports fields with a number of different facilities, intended for the use of university members and their families. However, the gates were left open throughout the day and into the evening. There was no system in place to check the membership of entrants. As a result, members of the public would enter and use some of the facilities.

On one of the sports fields the university had recently installed a synthetic surface, which was easier and cheaper to maintain than natural grass, although known to be somewhat slippery when wet. It proved to be very slippery. Some members complained. The university installed a notice at the entrance to this field, which read: "slippery when wet". Mike, a member, was injured when he slipped while playing football in rainy weather in a university inter-hall league match. Investigation showed that the slipperiness was caused by excessive rain proofing substance applied by the contractors who had constructed the field for the university.

As a result of this injury, the university re-worded the notice to read: "caution: slippery when wet – use at your own risk". Brian, a non-member who played on the field with his friends on weekends, was injured when he slipped while playing rugby in rainy weather.

The university then posted a notice at the main gate that read: "these premises for use of university members only – unauthorized persons enter at their own risk". A new sports field was under construction. A trench was dug and left open. After a heavy rain it filled with water. Len a 6 year-old boy who lived nearby and who played on the field on many days with his friends, fell into the trench. He was pulled out some minutes later by a passerby, but suffered brain damage as a result of being under water for so long.

With reference to relevant case law and statutory provisions, advise the injured parties of the actions they may wish to bring.

9. "With only a few exceptions, the individualistic philosophy that underlies the common law is such that a person is not liable for the torts of another."

What exceptions can you identify? With respect to each of these, explain by reference to a case or cases the justification for the exception, and explain what the plaintiff must prove in order for that exception to operate.

10. Peter, who lives on Lamma Island where he operates his business, purchased a motorized boat. The boat had been recently certified as seaworthy by the Transport Department. One day, while transporting some clients from Lamma Island to Hong Kong, the boat suddenly began to take on large amounts of water. Peter lowered his life rafts and loaded his passengers onto the life rafts. The boat began to sink, leaving too little time to put all of the passengers on board rafts. One passenger, Steve, drowned. His girlfriend Janie, who accompanied Steve on the trip, and who was in one of the life rafts, did not see Steve drown but learned of it a few minutes later when Steve was nowhere to be seen. Afterwards, Janie was diagnosed as suffering from a post-traumatic psychiatric illness, requiring therapy and other treatment.

The boat was rescued and salvaged. An investigation has shown that the reason for the sudden sinking of the boat was a defect in the boat frame that was reasonably detectable on inspection by a boat engineer

With reference to relevant case law, advise the following parties in their negligence actions against the Transport Department:

- i) Peter, for the cost of repair of his boat, damage to his property on board the boat, and business lost because of the loss of use of his boat during repair; and**
- ii) Janie, for her psychiatric injuries.**

- END OF PAPER -

University of Hong Kong
Department of Law

LAW AND SOCIETY II (LLAW1004)
Examination 2001-02

Date: 21 May 2001

Time: 9.30 am – 12 noon (including 15 minutes reading time)

Instructions to candidates

1. Candidates are required to answer any three (3) questions.
2. All questions carry equal marks.

Questions

1. What do we learn from anthropological studies on the evolution of stateless societies into states? What do you think are the most significant factors that contribute to this evolution? Would you prefer to live in a stateless society or a state? Give your reasons.
2. It has been argued that the philosopher's answer to the questions (i) "who should be the ruler(s)" and (ii) "how should a state be ruled" are often influenced by a range of factors including the philosopher's view of the nature of man.

Compare the views of Plato and Aristotle concerning the above two questions. Show the extent to which their thinking were influenced by their views as to the nature of man. What other factors do you think influenced their thinking on these two questions?

3. "Both Hobbes and Locke were social contract theorists whose ideas became the foundation of as well as the catalyst for the development of the modern liberal

constitutional democratic state.”

Discuss this statement, particularly with reference to the following: What you understand by the term “social contract”? In what way did social contract theory contribute towards the development of the liberal constitutional democratic states in Western Europe and the United States ? Give one example showing how social contract theory might be relevant to the Hong Kong system of government.

4. What, in your view, is the significance of
- (a) the American Declaration of Independence; and
 - (b) the French Declaration of the Rights of Man and the Citizen

in the history and development of Western political and legal thought?

Please answer both (a) and (b).

5. Consider the political and social transformations of China during the last 100 years. Do you think these changes have prepared China for the development of a liberal constitutional democratic state? Give reasons for your answer.

*** *the end* ***

THE UNIVERSITY OF HONG KONG

Department of Law

Law of Contract Examination (LLAW1001 & LLAW1002)
2001-2002

Date: 25 May, 2002

Time: 9:30 a.m. to 1:00 p.m.
(Reading time: the first 30 minutes)

Instructions to Candidates:

1. The time for this examination is three hours and thirty minutes. This time period includes 30 minutes reading time.
2. You are required to answer any **three (3)** of the following five (5) questions.
3. All questions are of equal weight. Allocate your time accordingly.
4. This paper consists of 8 pages including this one.
5. Plagiarism will be penalized.

1. Alex and Bob have been good friends. They have gone to kindergarten, primary school and secondary school together. Now, they are roommates at an undergraduate residence at Kowloon University.

Bob's father has been laid off recently and Bob has been very depressed. To cheer him up, Alex proposed that they should pool their money and buy at least one Mark Six ticket every week. Bob could not think of anything else to do to help his family and agreed, although he was short on pocket money. The two of them went down the hall and signed a note solemnly in front of a class representative. The note read: 'We agree to contribute \$50 a week each to the purchase of Mark Six tickets. Winnings shall be shared 50-50.'

Since Bob was pre-occupied with his family's financial problems, Alex took charge of the project. He bought at least one ticket each week and always asked Bob to pay his share either before or after the purchase. After doing this for three months, Alex bought a winning ticket, winning \$6 million.

As soon as Bob heard the good news, he went to Alex with his share of the price of the ticket and asked for his share of the \$6 million. At first, Alex simply denied that Bob had any right to share the winnings. Then, he offered to pay Bob \$100,000 in exchange for his release of any claim to the winnings. He told Bob that if Bob refused, he (Alex) would simply go to Europe and disappear. Bob knew that Alex was an orphan without any relatives in Hong Kong and that he could disappear as threatened. Desperate for cash, knowing that he could not follow Alex around the world to sue him, Bob took the \$100,000 and signed the release.

Advise Bob.

2. Charles has been working hard in the past two years for fear of being fired. Despite the hard work, he received the Big Envelope (containing a dismissal letter) from his boss Ted. He was told to leave the company premises immediately.

Thinking that a rest away from Hong Kong would refresh his spirits and prepare him for job-hunting, he went to Sincere Travels. Having nowhere else to go, he spent one day at the office of Sincere Travels reading all their brochures before deciding on a three-day tour of Xanadu. He paid the full price of \$1,000 and was given a receipt with these printed words: '3-day Xanadu tour. For conditions ask for brochure.' He was told to show up at the bus depot one hour before the scheduled departure time. The tour guide would be there with their tickets and coupons.

Charles enjoyed the tour very much and he boarded the bus home in a more cheerful frame of mind. Unfortunately, the bus driver fell asleep at the wheel and drove off a cliff. Charles was severely injured and was first hospitalized for one month. Then he had to undergo intensive physiotherapy for six months. Meanwhile, he could not look for a new job. Slowly, he slipped into a depression and was unable to hold a job down even after he had recovered physically from the accident.

Two years later, when he had recovered sufficiently, he went to Sincere Travels to demand compensation. The clerk calmly pointed to the following clauses which appeared on the back of tickets and in all brochures issued by the company in the last three years:

1. Sincere Travels promises to pay \$100 and provide a free day-trip to Macau in compensation to anyone dissatisfied with any tour bought.
2. All claims for compensation must be made within six months after the last day of the tour.
3. The customer agrees his remedies against Sincere Travels arising out of this contract are limited to those provided under Clause 1.

For purposes of this question, you are to assume that Sincere Travels is liable for all parts of the tour. Advise Charles.

3. Alice, based in Hong Kong, has a smart telex machine which can store outgoing messages for transmission at pre-set times. This is a convenient device to reduce transmission charges by sending messages at designated discount periods, such as from midnight to 5 a.m. Hong Kong time.

On May 1, in a telephone conversation, Bill offered to sell to Alice his used Mercedes Benz. In the afternoon of May 3, Alice typed an acceptance to Bill at his Long Island (New York) home. Alice saved this message and set the time for transmission at 5 a.m. Hong Kong time. Promptly at 5 a.m. the telex was sent.

At Bill's end, the telex machine was out of paper. Fortunately, Bill's machine is also a smart machine. It can save incoming messages and the 'out-of-paper' signal triggered the saving function. However, while the message was being saved, contractors working in the basement blew a fuse and cut off all electricity supply. Electricity was soon restored, but Alice's message had been lost.

Bill arrived home at 7 p.m. (New York time) and saw the 'out-of-paper' light and the time indicator of his telex flashing. He refilled the paper tray and checked the 'New Message File'. There was a message from Charles offering to buy the same Mercedes. Bill immediately sent a telex to Alice revoking his own offer to sell and another telex to Charles accepting Charles' offer to buy. The telex to Alice arrived at Alice's house at 7:05 a.m. (Hong Kong time). The telex to Charles arrived at Charles' house at 7:10 a.m. (Hong Kong time).

At 7:30 p.m. (New York time) Bill's wife came home and told him that the flashing time-indicator meant that the electricity supply to the telex machine had been interrupted. She then checked the telex for a list of incoming and outgoing messages. They found Alice's telex number listed as an incoming telex at 5 p.m., but still could not find the actual message. Bill immediately sent another telex to Charles revoking his acceptance. This telex arrived at Charles' house at 7:35 a.m. (Hong Kong time).

Charles has a habit of jogging in the morning. That morning, he left his house as usual at 7:15 a.m. (Hong Kong time). As he was leaving, he could see that there was a message in the telex machine, but he did not bother to read it then. When he returned at 8:00 a.m. (Hong Kong time) he read both telexes from Bill.

Both Alice and Charles have claimed the car from Bill. Advise Bill.
(Assume the applicable law is Hong Kong law).

4. Harry is a very talented computer engineer. In February 2002 he received an offer to join a promising company in Shanghai at a remuneration package at least equal to what he was earning at Dick.com. Harry accepted the offer and handed in his resignation from Dick.com where he was employed on an indefinite contract terminable on reasonable notice.

Harry's resignation caused great anxiety to the senior management of Dick.com. The company was going through a rough period; the expected financial results for the year ending December 2001 were not good. If Harry left, his subordinates might leave with him and the price of Dick.com stock would plummet when all the bad news came out all at once. So, the company's managers thought it best if they were to persuade Harry to stay.

Dick, principal shareholder and CEO of Dick.com took Harry out to dinner at The Kowloon Club. Dick thanked Harry for his contribution to the company and shared with Harry his personal vision for the company's future. He also said that the company could not reward him and other employees until after the annual general meeting when media attention would be less intense. He promised on behalf of the company to raise Harry's salary by 30 percent as soon as possible after the annual general meeting in March. Taken in by the rosy picture painted by Dick, Harry withdrew his resignation and retracted his acceptance of employment with the Shanghai company.

Dick.com held the annual general meeting in March. Although the company had not achieved outstanding results for Year 2001, it was still profitable. Dick was able to charm the financial analysts with his answers about future prospects. As a result, the price of Dick.com stock remained stable.

In April, Dick.com issued letters of immediate dismissal to 900 employees. No reasons were given to the individual employees. Dick told the media that the company had to cut costs in order to remain competitive.

Harry was among the 900 dismissed. He was very angry and refused to accept his dismissal. He reported to work every day for the next three months and was turned away each day. Then one day he received an offer from a Californian company, so he stopped reporting to Dick.com and started to get ready to leave Hong Kong. A week later, Dick.com sent him a letter requiring him to report to duty again. Harry could not decide whether to go to California or return to Dick.com.

Advise Harry of his rights, obligations, liabilities and remedies vis-a-vis Dick and Dick.com if he ignores Dick.com's letter recalling him to duty. (You are not expected to display any knowledge of employment law.)

5. Charles came from a rich family. As his parents never had any time for him, his closest and best friends were his nanny and her son, John. John and Charles grew up together and being bigger and older, John always protected Charles from the bullies at school.

In 2002 Charles graduated from art school and John was laid off. After months of a fruitless search for a job, John went to Charles with a proposal. He wanted to set up a small restaurant. Although he has only had a few years of experience as a cleaner in a restaurant, he was confident of success. But he needed capital. Charles has never been able to say no to John. He responded to the request by offering to be a partner, even though he knew nothing about restaurants or business, finding both distasteful.

John quickly set up a company and applied to The Bank for a loan. He explained to the bank manager, Tom, that although the company was new and had no assets, one of its two shareholders, Charles, was a billionaire. Tom then required a personal guarantee from Charles as a condition for the loan. He gave John a package of documents and told him he and Charles should go to their lawyers to complete the documentation which should be returned by the lawyers directly to The Bank.

John set up an appointment with a newly qualified lawyer, Don. As Don did not have any experience in advising borrowers or guarantors, he merely chatted to John and Charles while they signed the documents in the places indicated to them by the legal clerk. After the signing, John reminded Don to deliver the documents to The Bank that afternoon. Don, however, said his only messenger was sick. John had to go to the restaurant to supervise the renovations. Charles, good-natured as ever, volunteered to deliver the documents.

Charles introduced himself to Tom as the director of the company and handed the package of documents over. Tom checked the documents one by one. They seemed to have been properly signed: the loan agreement, the guarantee by Charles and a certificate by Don confirming that advice had been given to Charles. Tom said, 'Everything seems fine. The loan can be disbursed within a week. Is that too late?' Charles promptly said, 'Don't ask me. I don't know anything. I trust John to take care of all my finances. Bye-bye.' Before Tom could ask any more questions, Charles had left.

Tom wrote a report on the above incident and sought advice from The Bank's Legal Department. You are the legal counsel in The Bank's Legal Department. Advise Tom.

- end -

The University of Hong Kong
Department of Law

Bachelor of Laws: First Examination (Supp)

Legal System (LLAW1008)
(2001-2002)

1 June 2002

Time : 9:30 am - 12:00 noon

(First 45 minutes reading time)

This paper consists of 8 pages and 5 questions. You have to answer TWO questions, Question 1 in Part A, which is COMPULSORY, and one question from Part B.

PART A (COMPULSORY QUESTION: 50%)

YOU MUST ANSWER THIS QUESTION.

1. Read the attached judgment of the Court of First Instance in *Commissioner of Inland Revenue v Indosuez WI Carr Securities Ltd* [2002] 1 HKC 359 and answer the questions below.
 - (1) What is the ratio of this case insofar as it concerns revenue law? (10%)
 - (2) What is the ratio of this case insofar as the law of precedent is concerned? (30%)
 - (3) Explain the reasoning of the court in relation to the law of precedent (20%)
 - (4) Do you think the decision of this case goes beyond *Young v Bristol Aeroplane Co Ltd*? If so, how? If not, how could it be reconciled with *Young v Bristol Aeroplane Co Ltd*? (40%)

PART B (50%)

YOU CAN ANSWER ANY ONE QUESTION FROM THIS PART.

2. Art 18 of the Basic Law states that the laws in force in the Hong Kong Special Administrative Region shall be the Basic Law, the laws previously in force in Hong Kong, and the laws enacted by the legislature of the HKSAR.

Critically analyse and discuss this Article, with reference to what laws have been preserved, what laws have been left out, why some laws were left out, and how the mechanism of deciding which laws should remain as the laws of the Hong Kong Special Administrative Region works. Is there any area which you think is incompatible with the previous common law system? You should refer to other articles of the Basic Law and decided cases in your analysis.

3. The Chief Justice's Working Party on Civil Justice Reform has pointed out that between 44% and 64% of all High Court Action cases involved at least one unrepresented litigant, and that the percentage of unrepresented parties was even higher in Constitutional and Administrative Law cases (para 147.1). **Discuss what problems have been caused to our civil justice system by the presence of a large number of unrepresented litigants and what improvements could be made to remove the strains on our legal system.**

4. In a special meeting of the Legislative Council Panel on Administration of Justice and Legal Services held on 25 April 2002, the Government agreed to review the following areas:
 - (1) Whether legal aid should be granted to employees in appeals brought by employers against judgments of the Labour Tribunal, when at present legal aid is not available for proceedings before the Labour Tribunal. Appeal against the decisions of Labour Tribunal lies to the Court of First Instance.

 - (2) Whether 'husband' and 'wife' should be treated as separate and independent entities for the purpose of assessment of means. At present, the resources of a spouse of a legal aid applicant are treated as the resources of the applicant in assessing the applicant's financial eligibility, except in domestic violence cases.

You are a lawyer at the Secretariat of the Legislative Council and are asked to provide LegCo members with a note setting out your recommendations with reasons on the above two issues.

5. Professor Hart wrote:

'What surely is most needed in order to make men clear sighted in confronting the official abuse of power is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.' (Hart, *The Concept of Law*, p 260)

Discuss whether this statement can be reconciled with the rule of law.

***** End of Paper *****

A COMMISSIONER OF INLAND REVENUE v INDOSUEZ WI CARR SECURITIES LTD

COURT OF FIRST INSTANCE
INLAND REVENUE APPEAL NOS 4 AND 5 OF 2001
DEPUTY JUDGE LONGLEY

B 17-20 DECEMBER 2001. 30 JANUARY 2002

Deputy Judge Longley: 1. This is an appeal by way of case stated from the decision of a Board of Review dated 28 August 2001 pursuant to s 69 of the Inland Revenue Ordinance (Cap 112).

E 2. At the hearing before the Board of Review (the 'Board') held on 4 and 5 January 2000, Indosuez WI Carr Securities Ltd (the 'taxpayer') had appealed against a determination of the Commissioner of Inland Revenue (the 'Commissioner') dated 2 July 1999 in respect of the taxpayer's additional profits tax assessments for the year of assessments 1992/1993 and 1993/1994 and the profits tax assessment for the year of assessment 1994/1995 (the 'assessments').

F 3. By notices of appeal against the Commissioner's determination dated 30 July 1999, the taxpayer had challenged the Commissioner's determination contending that the reduced additional assessable profits for each of the said three years of assessment, ie 1992/1993, 1993/1994 and 1994/1995 (the relevant years of assessment) were profits which neither arose in nor were derived from Hong Kong and were therefore outside the scope of the charge to profits tax imposed by s 14 of the Inland Revenue Ordinance.

G 4. The appeal before the Board therefore raised the question of source of profits.

H 5. The assessments were made in respect of 'commissions and brokerage' and 'interest' received by the taxpayer in the respective years and also in respect of placement fees (underwriting commission) received in 1994/1995. The assessor contended that the said sums were chargeable to profits tax under s 14(1) of the Inland Revenue Ordinance (IRO) on the basis that they were assessable profits arising in or deriving from Hong Kong from a trade or business carried on by the taxpayer in Hong Kong.

6. From the facts which the parties had agreed the Board of Review found inter alia the following facts proved: A

- (a) The taxpayer was incorporated as a private company in Hong Kong on 7 October 1986 and commenced to carry on business as a stockbroker in Hong Kong on 1 May 1987. B
- (b) The taxpayer is and was at the material time a member of an international stockbroking group. During the relevant years of assessment, the group maintained subsidiaries and offices at various places including New York, London, Singapore, Indonesia, Taiwan, Thailand and Japan. C
- (c) The ultimate holding company of the taxpayer at the time was Compagnie de Suez incorporated in France. C
- (d) The taxpayer's office in Hong Kong served as the centre or headquarters of the group for the Asia Pacific region.
- (e) At the material time, the taxpayer's offices in Hong Kong occupied five floors (although not the entire five floors) of One Exchange Square. D
- (f) It also incurred substantial expenses for salaries and allowances during each of the relevant years of assessment. By the end of 1995, there were over 200 staff working in the Hong Kong office.
- (g) The taxpayer derived income from brokerage commission both in respect of the Hong Kong market and overseas markets. Overseas markets would appear to cover stock markets in Thailand, Singapore, Indonesia, India, Korea and Taiwan. Brokerage commission generated from the Hong Kong market had always been offered for assessment. For the years of assessment 1987/1988-1991/1992, the assessor had accepted the taxpayer's claim that its profits or loss from its brokerage business in respect of overseas markets were offshore. E F
- (h) In 1993, the assessor commenced a review of the taxpayer's offshore claim. Pending the outcome of the review, the assessor issued to the taxpayer profits tax assessments for the years of assessment 1992/1993 and 1993/1994 in accordance with the taxpayer's returns for these two years. G
- (i) Subsequently the assessor issued to the taxpayer additional assessments on the basis inter alia that its profits derived from commissions arising from execution of transactions on overseas stock exchanges were profits arising in or derived from Hong Kong and were accordingly taxable by virtue of s 14 of the Inland Revenue Ordinance (Cap 112). H

7. At the hearing before the Board of Review, the Board was concerned not only with these profits from commission income, but also with certain interest income and corporate finance income of the taxpayer. The Board made certain findings in relation to interest income and corporate finance I

A income, but these findings are not the subject of the case stated before this court. This court is solely concerned with the taxpayer's profits from commission arising from the execution of orders placed on overseas stock exchanges.

B 8. Two witnesses were called by the taxpayer before the Board of Review Mr Jean-Luc Eymery, the Chief Financial Officer, and Mr Keith Craig, the Group Head of Sales. The Board accepted their evidence as to the primary facts and in para 8 of the case stated set out its findings on the basis of the evidence of these witnesses. I do not propose to set out those findings in full but shall refer to them in so far as they are relevant to the C issues before the court.

D 9 Initially during the hearing before the Board of Review, no distinction was drawn in respect of orders placed on overseas markets between orders placed in Hong Kong by Hong Kong customers and orders placed outside Hong Kong by overseas customers. Counsel for the taxpayers argued that all the commission profits in question were offshore whereas counsel for the Commissioner argued that the taxpayer had not proved its case. It was only during the course of the hearing that it appeared to the Board that a distinction might be drawn between the two

E 10 Ultimately the Board of Review did draw a distinction in its conclusions.

THE BOARD'S CONCLUSIONS

F *Overseas customers*

G 11. In so far as commission earned from the execution of orders in the overseas markets from clients outside Hong Kong is concerned, the Board came to the conclusion that the source of commission generated from overseas clients was substantially offshore and therefore not liable to taxation. It is significant that it did not do so on the basis that the execution of the orders on overseas markets was done by brokers acting as the agents of the taxpayer thereby making the acts of the brokers acts of the taxpayer performed overseas. Indeed it specifically found that it could not infer that the brokers were the taxpayer's agents and consequently it would not be right to regard the actual execution of the order at the markets as the acts of the taxpayer. The Board did so on the basis that the taxpayer engaged the overseas offices of its group as its agents to perform the tasks of liaising with clients, processing, handling and managing the orders and providing primary research material. As a result of so doing the Board found that the profits generated from overseas clients arose substantially from an offshore source.

Hong Kong customers

A

12. In so far as commission earned from the execution of orders in overseas markets for clients in Hong Kong is concerned, the Board came to the conclusion that the profits could be said to be derived from operations carried on both within and outside Hong Kong. The greater element, which derived from the operations within Hong Kong, was a result of the taxpayer's efforts in building up and maintaining the relationship with the clients, providing quality research and offering advice to the clients, providing an effective and reliable service to the clients and in projecting and maintaining an image of repute and reliability to the clients. Again the Board proceeded on the basis that the actual execution of the orders on the overseas markets was not the act of the taxpayer. If it had been permitted to do so the Board would have apportioned the profits derived from commission earned from Hong Kong clients to be 60% onshore and 40% offshore. It took the view however that it was bound by authority, which held that apportionment was not possible and that it had to look to the predominant source of the profit which was Hong Kong.

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13. There are five questions posed by the Board of Review in its case stated.

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18. Question 5 posed by the taxpayer is as follows:

E (5) Whether the Board of Review was correct in law in determining that it was not permitted by law to apportion the profits derived from commission earned from Hong Kong clients from the execution of orders in the overseas market, which the Board of Review would otherwise have done on the basis of 60% onshore and 40% offshore on the facts as found by the Board of Review.

Question 5

60. The fifth question of law for the opinion of the court relates to whether the Board of Review was correct in law in deciding that they were not permitted to apportion profits derived from commission from Hong Kong clients.

E

61. The Board of Review acknowledged that whether the law allowed or required apportionment when the profits arose in or are derived from more than one source both from Hong Kong and from an outside source, was not an easy question.

F

62. It concluded with reluctance that on the present state of the authorities and despite the opinion of the Judicial Committee of the Privy Council in *Commissioner of Inland Revenue v Hang Seng Bank Ltd* [1990] 1 AC 306 at 323, it was bound by the decisions of the Court of Appeal and could not make any apportionment.

G

63. The decisions of the Court of Appeal to which the Board was referring were *Commissioner of Inland Revenue v Hong Kong and Whampoa Dock Co Ltd* [1960] HKLR 166 and *Commissioner of Inland Revenue v Hang Seng Bank* [1989] 2 HKLR 236.

64. In *Commissioner of Inland Revenue v Whampoa Dock Co Ltd* (1960) 1 HKTC 85, Reece J (at p 115) took the view that since s 14 of the Ordinance made no provision for apportionment of profits arising in or derived from Hong Kong and those arising in or derived from elsewhere, the court could not make an apportionment. In circumstances where some profits arose in Hong Kong and some outside Hong Kong, the court adopted a test formulated by Dixon J in *Commissioner of Taxation (New South Wales) and Hillsdon Watts Ltd* (1936) 57 CLR 36, for situation

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I

- A where profits could not be dissected and separate parts attributed to different places, namely that the locality where the profits arose 'must be determined by considerations which fasten upon the acts more immediately responsible for the receipt of profits'. This was the test used by the court in *Commissioner of Inland Revenue v Hong Kong and Whampoa Dock Co Ltd* which led the court to the conclusion that the profits in that case did not arise in or derive from Hong Kong.

- B
C 65. When the Court of Appeal came to decide *Commissioner of Inland Revenue v Hang Seng Bank Ltd* [1989] 2 HKLR 236, it was again the absence of a statutory provision for the apportionment of profits which led the Court of Appeal to decide that apportionment was not possible. At p 243 Cons VP said:

- D The hypothetical answer foreshadows the next question, for Hong Kong legislation makes no provision for the geographical apportionment of profit. The Board of Review is required to ascribe to it only one location. In *Hong Kong and Whampoa Dock Co. Ltd.* at p. 193-4 Reece, J approved the suggestion of Dickson, J in *Commissioner of Taxation (N.S.W.) v Hillsdon Watts Ltd.* (1936) 57 CLR 36 that in the circumstance, ie where the profit is derived from more than one location, 'the locality where it arises must be determined by considerations which fasten upon the acts more immediately responsible for the receipt of the profit'. (There was much argument before us as to whether 'immediately' was intended to refer to time or space.) My Lord Clough will prefer a need to identify 'a dominant factor or factors'. It seems to me that both expressions contemplate the same underlying concept, which is equally to be found in Lord Atkin's use of the words 'in substance' in *Smidth v Greenwood*.

- E
F 66. The Court of Appeal decided that notwithstanding that this case was a multi-source cases (ie the profits derived partially from outside Hong Kong and partially from within) it was obliged to look at the 'dominant' source.

- G 67. When the case came before the Privy Council (*Commissioner of Inland Revenue v Hang Seng Bank* [1991] 1 AC 306) the Privy Council took the view that the Court of Appeal had erred in concluding that this was a multi-source case and found that the profits in question derived from a source outside Hong Kong. It is apparent from the report of argument in that case that the Privy Council had heard argument as to the

H possibility of apportionment. Although it was no longer necessary for their determination in the light of their finding that this was not a multi-source case (and therefore strictly obiter) Lord Bridge of Harwich (at p 323) delivering the unanimous opinion of the Privy Council said:

I There may, of course, be cases where the gross profits deriving from an individual transaction will have arisen in or derived from different places. Thus, for example, goods sold outside Hong Kong may have been subject to manufacturing and finishing processes which took place partly in Hong Kong

and partly overseas. In such a case the absence of a specific provision for apportionment in the Ordinance would not obviate the necessity to apportion the gross profit on sale as having arisen partly in Hong Kong and partly outside Hong Kong. But the present case was a straightforward one where, in their Lordships' judgment, the decision of the Board of Review was fully justified by the primary facts and betrayed no error of law.

68. The reasoning of the Privy Council was therefore that the absence of a specific statutory provision for apportionment did not preclude it.

69. Mr Smith has sought to argue that this court is free to follow the opinion of the Privy Council in this regard because he argues that the dicta in the judgment of the Court of Appeal in *Commissioner of Inland Revenue v Hong Kong and Whampoa Dock Co Ltd* and *Commissioner of Inland Revenue v Hang Seng Bank Ltd* were obiter in so far as they ruled that apportionment was not possible in that both were ultimately not multi-source cases.

70. In so far as the Court of Appeal's judgment in *Commissioner of Inland Revenue v Hang Seng Bank Ltd* is concerned, I accept Mr Smith's argument to be correct. There can be no doubt that if there had been no appeal from the decision of the Court of Appeal its ruling on apportionment would have been part of the ratio decidendi since the Court of Appeal had concluded that this was a case where profits were 'multi-source'. However once the Privy Council overturned the Court of Appeal's decision that the profits were multi-source and ruled that the profits were derived entirely from sources offshore, the pronouncements of the Court of Appeal regarding the question of apportionment were relegated to the status of obiter dicta.

71. I accept Miss Li's submissions however that the pronouncement of the Court of Appeal regarding apportionment in *Commissioner of Inland Revenue v Hong Kong and Whampoa Dock Co Ltd* were not obiter dicta. While Reece J (at p 114) did describe the profits arising outside Hong Kong as 'very small, infinitesimal perhaps' it is clear from a careful ruling of the judgment that he did regard it as a multi-source case.

72. Is this court therefore bound to follow the Court of Appeal in *Commissioner of Inland Revenue v Hong Kong and Whampoa Dock Co Ltd*? After very careful consideration, I am persuaded by the argument of Mr Smith, with whom Miss Li, for the Commissioner, does not take issue on this point, that I am free to depart from the ruling of the Court of Appeal in *Commissioner of Inland Revenue v Hong Kong and Whampoa Dock Co Ltd* in the light of the dicta of the Privy Council of *Commissioner of Inland Revenue v Hang Seng Bank Ltd* if I consider it appropriate to do so.

73. Both counsel as I understand them accept that the situation in this case falls within an exception to 'Stare Decisis', as explained in *Cross and Harris, Precedent in English Law* (4th Ed Ch IV). Miss Li would not

A this case in the category of 'implied overruling'. Mr Smith puts it in the category of cases where the ratio decidendi of the Court of Appeal in *Commissioner of Inland Revenue v Hong Kong and Whampoa Dock Co Ltd* has been 'undermined'. The learned authors put the principle in this way:

B A High Court judge of first instance confronted with a decision of the Court of Appeal which has not been expressly overruled by a later House of Lords' case may cease to be bound by it because the House of Lords considered that the Court of Appeal misinterpreted the authorities on which the impugned decision was based. The judge is then not obliged to follow the Court of Appeal, but he is not bound to dissent from their conclusion. The previous decision is undermined rather than directly overruled.

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74. The principle is exemplified by the decision of Hodson J in *Cackett v Cackett* [1950] P 253. There can be no doubt that the principle is not confined to a misinterpretation of authorities but extends to other misinterpretation of the law and indeed perhaps to any reasoning which led to the ratio decidendi of a case decided in a lower court if a superior court has decided that reasoning to be faulty. What the Privy Council did in *Commissioner of Inland Revenue v Hang Seng Bank Ltd* was impugn the reasoning which led the Court of Appeal to conclude that apportionment was not possible, ie because there was no statutory provision for it.

D
75. Accordingly, in my view, it was open to the Board of Review to apportion profits derived from commission earned from Hong Kong clients from the execution of orders in the overseas markets. In my view, it would be appropriate for them to do so.

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76. The court's answer to question 5 is 'no'.

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77. Accordingly, I remit this case to the Board of Review for it to reconsider its conclusion based upon my opinion that it has erred in law in the manner I have described:

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In so far as Hong Kong clients are concerned, the Board should apportion profits as they consider appropriate in the light of my opinion. A

78. In view of my ruling that the apportionment is permissible in law, I grant leave to the parties to have the matter restored in order to argue whether it is possible to amend the case stated or otherwise argue that the profits from the orders of overseas clients should be apportioned and whether it would be appropriate to do so. B

79. I make the following order nisi to costs unless either party applies to be heard on the question of costs: that the costs occasioned by and related to questions 1 and 3 be borne by the taxpayer; that the costs occasioned by and related to questions 2, 4 and 5 be paid by the Commissioner. C

THE UNIVERSITY OF HONG KONG
Department of Law
Bachelor of Laws (Supplementary) Examination

Law of Contract I/II (LLAW1001/LLAW1002)

Date: 1 August 2002 (Thursday)

Time: 9:30 am – 1:00 pm
(30 minutes reading time included)

Instructions to Candidates:

1. The time for this examination is 3 hours and 30 minutes. This time period includes 30 minutes reading time.
2. You are required to answer any **three (3)** of the following **five (5)** questions.
3. All questions are of equal weight. Allocate your time accordingly.
4. This paper consists of 7 pages, including this one.
5. **WARNING: PLAGIARISM will be PENALIZED.**

Question 1

Sam wanted to sell some of the restaurants in his chain of restaurants. On 1 May 2002, he placed an advertisement in the newspaper as follows:

Mongkok restaurant for sale at \$500,000.

Bosco was laid off from a well-paying managerial job and was looking for some occupation. He responded to the advertisement and had several meetings with Sam. During one of these meetings, Sam said that the restaurant had been profitable, but warned Bosco to make his own investigations. Bosco asked about Sam's plans for his other restaurants, but Sam refused to say anything. After investigation, Bosco and Sam signed a contract in June. The contract included these terms:

1. Bosco shall pay the price of \$500,000 as follows: \$300,000 on signing this contract and two instalments of \$100,000 each respectively on 1 September and 1 December.
2. Bosco acknowledges that he had relied on his own investigations in entering into this contract. Sam shall not be liable for any representations and warranties that might have been made in the course of negotiations.

Bosco paid the \$300,000 and took over the business. In the first month, he was able to make a small profit. In July, Sam closed many of his other restaurants. In August, Bosco noticed a perceptible decline in business. He thought it would be temporary and paid the September instalment. By November, Bosco knew the restaurant venture was a failure.

Bosco wants to rescind his contract with Sam on the grounds of misrepresentation since the restaurant was not profitable, partly due to the closure of Sam's other restaurants.

Advise Bosco.

Question 2

Edward is a lecturer at the University of Pokfulam. When he joined the University years ago, he signed a contract which included the following terms:

1. Employee shall be paid a monthly salary of \$30,000.
2. Employee shall be entitled to Housing Benefits as set out in the Staff Manual, as amended from time to time.
3. Salary increases shall be determined in accordance with the procedure set out in the Staff Manual, as amended from time to time.
4. Employee agrees to comply with the regulations set out in the Staff Manual, as amended from time to time.
5. Employer has the right to amend any part of the Staff Manual upon one month's notice.

In July 2002, the University informed Edward that his salary would be reduced by 1 percent effective October 2002. The University claimed that the contract properly interpreted included an implied term to reduce as well as to increase salary.

Edward has come to you for advice. You find that the Staff Manual refers to the unilateral adjustment of salary by the University after consulting the current Civil Servant pay-scale. In the past, the University has only increased the salary of its employees.

Advise Edward whether he has any claims against the University if it went ahead with the unilateral reduction.

Question 3

Apple wanted to sell her Porsche. Knowing that her friend Bill had always admired the car, she wrote him on Friday, 26 July asking whether he would be interested in buying it for \$500,000. The letter concluded: 'Please let me know by 2 August. A 10% deposit must accompany any acceptance.'

Bill was not in Hong Kong and he received the message in New York on Wednesday (New York time). He immediately wrote a letter accepting the offer. His letter concluded: 'As I do not have my cheque book with me, I will transfer the 10 percent deposit to you by telegraph. Please advise account number.' Bill posted the letter at 8.00 am, Thursday, on his way to work.

During the day, Bill heard a rumour that his rival Charles wanted to buy the Porsche as well. He immediately called his bank manager in Hong Kong and asked him to deliver a Manager's Cheque in the amount of \$50,000 to Apple on Friday (Hong Kong time). As Bill was a valuable customer, the manager did so and the cheque was delivered to Apple's office at 4 pm on Friday, 2 August. As the manager did not know what the transaction was about, he merely appended a note saying that the cheque was being delivered on the instructions of Bill. Apple was at a meeting and her secretary thought the cheque was in payment of a debt owed by Bill (Bill happened to owe Apple \$100,000 on another account). She credited it to Bill's account. Apple did not return to her office until 7:00 pm by which time the secretary had left.

Apple then went and had dinner with Charles. Thinking that Bill was not interested, she agreed to sell the Porsche to Charles.

When she finally got home that night, she received Bill's message that he had posted an acceptance letter and that the cheque would be delivered separately to her office that day.

Both Bill and Charles claim the car. Advise Apple.

Question 4

Alison had a flat and an unemployed nephew named Nick. Nick proposed to set up his own business and needed capital. Alison was willing to help by using the flat as security for a bank loan. Nick decided it would be simpler if the flat were sold, but he did not tell Alison.

Nick went about looking for a buyer. His friend's father, Tim, was looking for a flat for investment purposes. Nick and Tim quickly reached an agreement that Tim was to buy the flat for \$3 million and to let it back to Nick for \$10,000 a month. Tim thought Nick was the owner.

Nick went to Alison with two documents: a deed of gift of the flat from Alison to Nick; a tenancy agreement between Alison and Nick on the one side as joint tenants and Tim on the other side as landlord. Alison could not read very well and was in any event engrossed with the soap opera on TV. She asked Nick whether the documents related to the bank loan they had discussed. Nick said yes and Alison signed without reading.

Nick registered the deed of gift. As owner he sold the flat to Tim and rented it back as joint tenant; Tim did not object to the addition of Alison as a tenant. For the next 6 months, Nick paid the rent without Alison's knowledge. Then Nick's business failed and he could not keep up the payments. Tim threatened to evict Alison and Tim for non-payment of rent.

Advise Alison.

Question 5

Answer either A or B:

5A '[C]onsideration had to be not merely "something of value," but "something of value in the eye of the law." The law in certain cases refused to recognize the "value" of acts of promises which might be regarded as valuable by a layman. This refusal was based on many disparate policies; so that "promises without consideration" included many different kinds of transactions which, at first sight, had little in common. It is this fact which is the cause of the very great complexity of the doctrine: and which has also led to its occasional unwarranted extensions and hence to demands for reform of the law.'

Discuss. Do you agree with the above assessment of the doctrine of consideration? Can you give some examples to support or rebut the above assessment? Do you think the doctrine of consideration should be reformed? How?

5B Answer ALL parts of this Part B

(i) Tse owns an open air restaurant in Mongkok. A typhoon has recently destroyed all of the restaurant's tables and chairs. He wants to re-open the restaurant as quickly as possible, but his customers will not return unless they have some place to sit. He does not have the cash, and so he applies to the Kowloon Bank for a loan to be used to buy the tables and chairs. Kowloon Bank refuses to grant the loan unless Tse pays an unusually high interest rate. Tse accepts

Must he pay the interest?

(ii) Kwan borrowed from a moneylender the amount of \$50,000. He used this money to attend university in England. During Kwan's absence from Hong Kong, a friend of Kwan's called Pak paid the moneylender the sum of \$50,000 plus \$10,000 interest on Kwan's behalf. At the time it was made, Kwan did not know anything about this payment. However, upon his return to Hong Kong, Kwan promised to repay Pak \$60,000 plus \$3000 interest.

Does Kwan have any contractual obligation to pay the \$3000 interest?

(iii) Deborah owes Charlotte \$1000. On the due date Deborah met Charlotte over lunch and offered to pay \$500 if Charlotte would accept it in discharge of the debt of \$1000. As Deborah had been laid off, Charlotte agreed. Deborah handed over \$500. Charlotte signed a release. Deborah paid for lunch.

Charlotte had second thoughts and wished to claim the balance of \$500 from Deborah. Advise Charlotte.

-end-

UNIVERSITY OF HONG KONG
Bachelor of Laws: Supplementary Examination

LAW: LAW OF TORT (LLAW1005/LLAW1006)

12 August 2002
4 pages - 9 questions

Time: 9:30 - 1.00 pm
(including 30 min. reading time)

YOU **MUST** ANSWER FOUR (4) QUESTIONS
(DO NOT ANSWER MORE THAN FOUR)

1. "Recent judicial developments have cut a swath through the tort of nuisance and greatly curtailed its potential as a mechanism for the regulation of intrusive activities as between neighbouring land users".

Do you agree or disagree with this statement? Explain your answer with reference to the recent judicial developments referred to in the quotation. You may include in your discussion the related tort action of *Rylands v Fletcher*.

2. Answer both (a) **and** (b)

(a) Commenting on the criteria to determine whether or not a breach of statute gives rise to civil liability, Lord Denning said "You might as well toss a coin to decide it".

Discuss briefly, with reference to cases.

(b) Assuming that the court has determined that a breach of the statute does give rise to a cause of action for breach of statutory duty, **write a short essay outlining the advantages and disadvantages of suing in breach of statutory duty rather than in negligence. Be sure to make reference to cases in your answer.**

3. Andy was the manager of a restaurant. There was a toilet in the restaurant for use by staff and customers. In order to prevent others from entering the restaurant just to use the toilet, Andy posted a sign on the door, which read 'Customers Only May Enter Restaurant.'

The restaurant had recently installed an automatic door that would open when activated by a human presence. Andy noticed that the door developed a tendency to close rather suddenly, and made a mental note to have it repaired. However, Billy, the six year-old son of the neighbouring shopkeeper who played in the area, was intrigued by the door, and for fun he entered to activate the door. The door suddenly closed, causing him to be injured.

Andy then replaced the sign with one that read 'Caution! Faulty Door. Management Is Not Liable For Injuries'. The same day Sally, a nearby shopkeeper, whom Andy knew and who often used the restaurant toilet, was injured when the door suddenly closed on her.

Andy then closed for business temporarily, and arranged for the door to be fixed by Peter, an

electrician. While Peter was trying to fix the door, it suddenly closed and injured him.

Andy arranged for another contractor, referred to him by a friend, to fix the door. When it was finally fixed, the restaurant re-opened for business. Unfortunately, the door closed suddenly and injured a customer, Zoe.

Advise Andy of his possible tort liability.

4. AB Storage Co purchased a recently constructed one-storey warehouse building for its storage business in the New Territories. Prior to purchase, AB consulted CD Engineering regarding the suitability of the building, in particular the roof, for purposes of storage of a range of valuable property. CD certified the building as sound.

Soon after completion, the roof proved inadequate for the purpose, and during a typhoon, rain leakage occurred. The rainwater accumulated at floor level when the drainage system failed to clear the water, due to the accumulation of rubbish at the drainage sites. The property of AB's customers was badly damaged by the rainwater. The roof's leakage also affected the rest of the building, causing the walls to sag and crack. AB could no longer use the building for its intended purpose, and sold it for considerably less than the purchase price.

With reference to relevant case law:

a) Advise AB, who wishes to sue CD for the diminished value of the building (ie the loss on resale).

b) On the assumption that the action in a) is unsuccessful, advise AB, who wishes to sue EF Roofing Co, the specialist roofing subcontractors that installed the roof, for the diminished value of the building.

c) Advise the owners of the property stored in the warehouse, who wish to sue CD and EF for the damage to their property.

5. Carl was a labourer working for GH Construction Co. He was working at ground level on one of GH's construction sites, when he was hit by a large object that was blown from an upper storey of the building under construction. His body was crushed and he was bleeding profusely. His brother Tom, working on the same site, was not hurt by the object, and rushed to free Carl from the rubble. The ambulance attendants sent by the Queen B Hospital attempted to lift Carl, an extremely heavy man, onto a stretcher, but in doing so, dropped Carl onto the ground, and Carl's head hit a sharp metal object. Despite proper treatment at the hospital, Carl suffered permanent brain damage. Tom suffered from nervous shock as a result of these events.

With reference to relevant case law:

Advise Carl and Tom in their tort actions against GH, and advise Carl in his tort action against Queen B Hospital. [Do not advise on the Occupiers' Liability Ordinance or Employees' Compensation Ordinance. You may assume that any such relevant advice has been given.]

6 The Pearl Delta Television Station carries a programme in which the year's new films are reviewed by Acid Tong, well known for her biting comments on films and actors. The programme is transmitted live and many of the remarks seem to be unscripted. The programme concludes with the sentence "And the booby prize for the year's saddest actress goes to a very small star indeed. I won't say which of the films I have mentioned that she appeared in, but I expect you can guess. Made in Guangzhou she may be - but she is no Maggie Leung. The wrinkles are beginning to show, dear: maybe it is time you quit."

Stella Siu (whose first name, you will note, means "star" and whose family name sounds like "small") immediately believes that the "small star" is herself. She comes into your office the next day in floods of tears, saying that she was born in Guangzhou, and had appeared in one of the films mentioned earlier in Acid's programme. Maggie Leung, she explains, is a well-known actress who is so beautiful that she is never mentioned in the press without some expression such as "the beautiful" or "the stunning" attached to her name.

She says, "I want to sue Acid and the TV station. I want lots of damages and I want to stop them repeating the programme, which they have advertised they will do. That bitch Acid is just mad at me, because I recently married her ex-husband".

Incidentally - you can't help noticing that Stella, who has just turned 50, does have some wrinkles under her heavy makeup.

With reference to relevant case law and legislation, advise Stella.

7. Adrian held a hot-pot party at his house in the New Territories. During the party, some unfortunate events transpired.

One of the guests, Bob, apparently as a practical joke, suddenly withdrew the chair on which another guest, Tom, was about to sit. Tom fell to the floor, but was not hurt.

Tom got up and shook his fist threateningly in Bob's direction. Bob was not frightened, because he was much larger and stronger than Tom. When Bob showed no remorse and proceeded to ignore Tom, Tom threw his beer glass at Bob. The glass missed Bob and hit Jerry, who fell to the ground, injured and bleeding.

Tom withdrew to the roof terrace, where he soon fell asleep. Adrian then locked the door of the roof terrace, and cleared the guests out of the flat. These measures effectively prevented Tom from leaving, as it was a two-storey building. Adrian did this in order to arrest Tom. On the following day, Adrian returned with a police officer, Dan. Dan said nothing to Tom, and, despite Tom's offer to cooperate and go the police station willingly, Dan placed Tom in handcuffs and took him by police van to the police station. There, Tom was charged with a criminal offence for which he was eventually convicted.

Advise the parties with respect to tort actions they may bring, and available remedies.

8. Tim worked as a dismantler of scaffolding. He signed a contract with MCo, a construction company, which included the following terms:

- i) Tim (hereafter the 'contractor') shall report to work at sites designated by MCo (hereafter the 'Company'), as required by the Company, at 8am every Monday to Saturday.
- ii) The contractor shall remove scaffolding as instructed by the Company.
- iii) The contractor is free to take outside contracts on completion of tasks assigned by the Company, and on obtaining prior approval from the Company.
- iv) The contractor shall provide any required safety equipment.
- v) The contractor shall be paid monthly, at the rate of \$.05 per scaffolding pole removed, or \$300 per day, whichever sum is larger.
- vi) The contractor may take vacation only on giving notice and obtaining prior approval from the Company.

One Sunday afternoon, Tim returned to an MCo jobsite. He had been asked to report to the site by an MCo supervisor, in order to help interview some applicants for scaffolding jobs. Soon after entering the job site, there was a sudden explosion. Tim was hit by debris from the explosion, and was seriously injured. It was later reported in the newspaper that an unexploded bomb from WW2 was excavated by a machine on the building site, causing a large explosion and damage in the area. Tim, who had not been wearing his safety helmet at the time, suffered head and spinal damage resulting in paraplegia (permanent paralysis of the legs).

Advise Tim, who seeks your advice regarding the likelihood of success of a claim under the Employees' Compensation Ordinance. He was 40 years old at the time of the accident.

9. Wong worked as an unlicensed hawker. One day after work he invited his friend Chui to a pub, where they drank some beer together. Wong asked Chui for a ride home on the back of Chui's motorcycle. Chui agreed, but said: 'as I have been drinking beer, you must ride at your own risk'. Wong agreed. Unfortunately, Chui lost control of the vehicle while making a routine right hand turn. The vehicle overturned, and Wong was killed.

Wong was 40 years old at the time of the accident, and was earning \$20,000 per month from his business. He had recently purchased a small flat, on which he was making monthly payments. He had been living in the flat with his unemployed 30 year-old girlfriend, Mary, and her five year-old son Terry. Mary was three months pregnant at the time (the child was fathered by Wong). Wong is also survived by his 60 year-old mother, to whom he paid a monthly allowance.

Advise the claimants in the previous paragraph on the appropriate tort action that they may wish to bring against Chui, and the likelihood of success of that action. Then, assuming that the tort action is successful, advise the claimants as to the approximate damages (if any) that each can expect to obtain.

END OF PAPER

Main Examinations for LLB Year I (December, 2002)			
	Name of Paper	Date of Exam.	Time
I	Legal System (LLAW1008)	17-Dec-02	9 30am-12.00noon

**Examination Timetable
December 2002/January 2003**

<u>COURSE C</u>	<u>COURSE TITLE</u>	<u>EXAM D</u>	<u>REMARK</u>	<u>EXAM TIME STR</u>
LLAW1008	The legal system	17-Dec		9:30 am - 12:00 noon (30 min reading time included)
LLAW2001	Constitutional law	21-Dec		9:30 am - 11:30 am (15 min reading time included)
LLAW2003/ LLAW2004	Criminal law I/Criminal law II	18-Dec		2:30 pm - 6:00 pm (30 min reading time included)
LLAW2009	Introduction to PRC law	23-Dec		2:30 pm - 4:45 pm (15 min reading time included)
LLAW3010	Business associations	16-Dec		2:30 pm - 5:15 pm (20 min reading time included)
LLAW3028	International trade law I	19-Dec		9:30 am - 12:30 pm (30 min reading time included)
LLAW3030	Introduction to private international law	20-Dec		9:30 am - 12:30 pm
LLAW3041	People's Republic of China civil and commercial law	19-Dec		9:30 am - 12:00 noon (15 min reading time included)
LLAW3043	Principles of family law	18-Dec		9:30 am - 11:45 am (15 min reading time included)
LLAW3044	Public international law	17-Dec		2:30 pm - 5:00 pm
LLAW3065	Information technology law	23-Dec		9:30 am - 12:00 noon (15 min reading time included)
LLAW3072	Principles of Hong Kong taxation on income	18-Dec		2:30 pm - 5:00 pm (15 min reading time included)
LLAW6109	Public international law	17-Dec		2:30 pm - 5:00 pm
LLAW6128	International trade law I	19-Dec		9:30 am - 12:30 pm

The University of Hong Kong
Bachelor of Laws: First Examination
LLAW1008
Legal System
(2002-2003)

17 December 2002

Time : 9:30 pm - 12:00 noon
(First 30 minutes reading time)

This is an open book examination. The paper consists of 10 pages and 5 questions. You have to answer TWO questions, Question 1 in Part A, which is COMPULSORY, and one question from Part B.

PART A (COMPULSORY)

1. Tse belonged to an ethnic minority group at the south western part of China. He came from a poor family and had spent the whole of his life in a remote village in Yunnan until he met a “snake head” who promised to bring him to Hong Kong for a sum of RMB\$300. He sold everything he had and managed to raise RMB\$400. He was brought to Hong Kong illegally, and on arrival, the ‘snake head’ took away the remaining RMB\$100. Not being able to find any gainful employment and having no money with him, Tse broke into a house at Sai Kung with a view to stealing some food and money. He was discovered by a Filipino maid, and on making his way to escape, he badly injured the maid. He was caught and was subsequently charged with an offence of burglary and an offence of assault occasioning serious bodily harm, which, upon conviction, carried respectively a maximum sentence of 10 years’ imprisonment and life imprisonment.

You are a barrister who is assigned by the Director of Legal Aid to represent Tse at the trial before the Court of First Instance. In a conference before the trial, Tse indicated to you that he was prepared to plead guilty. However, he would like to have your advice as to whether he would be entitled to a reduction in sentence on the ground that he came from a different social and cultural environment and did not speak either English or Chinese (he could only speak the language of the ethnic minority and could not speak even Putonghua, thus making it more difficult to cope with prison life in Hong Kong) would be a mitigating factor. In your research, you have found two relevant cases from the Court of Appeal, namely *Attorney General v Rojas* [1994] 1 HKC 342 and *R v Rohrer* [2001] 3 HKC 371. [The relevant parts of these two cases are annexed.]

In light of these two cases, you are asked to advise Tse whether he would be entitled to any substantial reduction in sentencing because of his “foreignness”. Your advice should include the following:

1. The ratio in *Attorney General v Rojas*.
2. The ratio in *R v Rohrer*.
3. An explanation of how to apply these two cases to Tse. If you think that any one of these two cases should not be applied, you have to set out your reasons.
4. Whether the Court of First Instance is bound by these two cases? If so, would it affect your advice to Tse? If not, why not?

PART B (YOU HAVE TO ANSWER ONE QUESTION FROM THIS PART)

2. You are an assistant solicitor. Your supervising partner has given you a file and asked you to prepare a note of advice. The covering memo from your supervising partner reads:

“We act for Max Investment Corporation (“MIC”), a Chicago-based investment company. MIC is interested in investing in a project involving the development of a luxurious holiday resort with a chain of hotels near Disneyland in Lantau. The size of the investment is about US\$280 million. MIC is negotiating a joint venture agreement with Fun Fun Entertainment Ltd (“Fun Fun”), under which agreement Fun Fun will be responsible for raising finance up to US\$100 million, training of hotel personnel and promotion of the project in Asia-Pacific Region, particularly the Mainland. The draft agreement also provides that Fun Fun will undertake that the total number of visitors to the holiday resort in the first two years shall not be below 10 million.

Fun Fun Entertainment Ltd is a company incorporated in Hong Kong. A company search shows that 70% of its shareholding is owned by Guangdong Provincial Government and the remaining 30% by the People’s Liberation Army in Beijing, though the management consists mainly of Hong Kong Permanent Residents who have experience in hotel management and tourism. The proposed joint venture has recently been advertised in the official tourist magazine of Guangdong Tourism Board as a project of the Guangdong Provincial Government.

Under the draft joint venture agreement, the agreement is to be governed by the law of Hong Kong Special Administrative Region, and if there is any dispute, the dispute shall be adjudicated by the court of the Hong Kong Special Administrative Region. Given the size of the investment,

MIC is concerned whether the governing law and the judicial system in Hong Kong will provide sufficient protection for its investment if there is a dispute on the joint venture agreement. In particular, it is concerned how far the Chinese Government can interfere in the legal system of Hong Kong. The in-house legal team of MIC has drawn our attention to the interpretation of the Standing Committee of the National People's Congress over the right of abode matter and would like us to advise on the significance, if any, of the interpretation on the integrity of the Hong Kong legal system. It is also concerned whether PRC national law can apply to Hong Kong and whether there is any risk that its investment in Hong Kong may be affected by PRC national law.

Please prepare a draft advice and include any other issues that you think are of relevance to this advice.”

3. Jim was fired by his company as a result of a restructuring of his company. At the age of 40 and with secondary school education only, he has not been able to find any employment. He has a 7-year old child, and a mortgage repayment of \$20,000 per month. He is now living on his savings, and his wife, who is a secretary, is the main financial support of the family.

On 6 May 2002, Jim had an interview for a new job, but he was told at the end of the interview that he was not successful. Frustrated and in despair, he ended up at a pub at Lan Kwai Fong and was drunk by the time he returned home. He demanded to have sex with his wife Anna. Anna had a long day and was very tired. She was also angry that Jim was drunk and refused to have sex with him. Jim thought that it was an insult. He subdued Anna, and forced her to have sex with him. Anna struggled and screamed, but she was overpowered by Jim. She left home with the child the following morning and never returned to the matrimonial home again.

On 8 May 2002, Jim was arrested and charged with the offence of raping his wife. Rape is having sexual intercourse without consent. According to the common law at that time, marriage constituted consent to sexual intercourse. As a result, a husband could not have been guilty of raping his wife.

In October 2002, the Court of Final Appeal held in *Y v HKSAR* that the common law of consent by marriage is an archaic concept of the 19th century when women was considered to be the property of men. This kind of concept could no longer be acceptable in modern times. Consent is a factual issue which should be determined by evidence and not by the artificial notion of marriage. For the first time the husband in *Y v HKSAR* was convicted of marital rape.

The trial of Jim took place in December 2002. Advise Jim whether *Y v HKSAR* should be applicable to him in light of the current judicial view on the nature of common law.

4. Compare and contrast 3 aspects of the common law system and the civil law system. You should explain the rationale and the pros and cons of your chosen aspects of the two different systems.

5. In its recent Consultation Document on Proposals to Implement Article 23 of the Basic Law, the HKSAR Government proposed that:
 - (1) The Secretary for Security should be given a power to proscribe an organization, if she reasonably believes that this is necessary in the interests of national security or public safety or public order;
 - (2) This power may be exercised if the organisation is affiliated with a Mainland organization which has been proscribed in the Mainland by the Central Authorities, in accordance with national law on the ground that it endangers national security;
 - (3) Whether a Mainland organization endangers national security will be determined by the Central Authorities. Formal notification by the Central People's Government that a Mainland organization has been proscribed on national security grounds should be conclusive;
 - (4) An organization is to be defined as an organized effort by two or more people to achieving a common objective, irrespective of whether there is a formal organizational structure;
 - (5) The Secretary for Security has a further power to prohibit the operation of an organization that has a *connection* with a proscribed organization and to declare such an affiliated organization unlawful. Any person who manages or is an office-bearer of the unlawful organization commits an offence.
 - (6) 'Connection' is defined to include financial contribution, affiliation with a proscribed organization, determination of the policies by a proscribed organization or participation in the decision making process by a proscribed organization, or vice versa;
 - (7) The decision to proscribe and to declare an organization unlawful is subject to an appeal mechanism. An appeal on fact shall be determined by an independent tribunal, and an appeal on law shall be determined by the court.

Critics have pointed out that these proposals run contrary to the fundamental principle of the rule of law. Do you agree or disagree with this view, and why? What amendments would you propose to bring these proposals in line with the rule of law?

***** THE END *****

IN THE COURT OF APPEAL

1993, No.15
(Application for Review)

BETWEEN

ATTORNEY GENERAL

AND

PEDRO NEL ROJAS

Coram: Silke, V.-P., Macdougall, V.-P. and Bokhary, J.A.

Date of hearing: 16 June 1994

Date of judgment: 16 June 1994

J U D G M E N T

Silke, V.-P.:

This is the judgment of the court.

Pedro Nel Rojas appeared for trial before His Honour Judge Wesley Wong, sitting as a Deputy Judge of the High Court, upon an indictment containing two counts. The first was that of trafficking in a dangerous drug and its particulars alleged that he, on 25th February 1993, at Kai Tak Airport unlawfully trafficked in a dangerous drug, namely 2,353.75 grammes of a mixture containing 1,771.58 grammes of cocaine hydrochloride. The second count was that of using a false travel document and its particulars alleged that on the same day on his arrival at Kai Tak Airport, he used a false travel document namely a Venezuelan passport which was in the name of Dario.

On the first day of the trial he pleaded not guilty to the trafficking count but guilty to the false travel document count. There was then a gap and on the second day of the trial, the applicant entered a plea of guilty to the trafficking count. He was sentenced to a period of

7 years' imprisonment upon the trafficking count and 4 months' imprisonment in respect of the passport count, those sentences to run concurrently.

The Attorney General, having been given leave on 7th December 1993 to do so, now applies to this court under the provisions of section 81A of the Criminal Procedure Ordinance to ask this court to review the sentence upon the trafficking count - we are not concerned with the sentence upon the false document count - on the basis that that sentence is both inadequate and/or wrong in principle.

The basic facts were that the respondent arrived on 25th February at Kai Tai from Brazil. Customs officers suspected the passport he was carrying was false. The matter was referred to Immigration. This led to a search of the respondent's luggage. That luggage was found to have a false compartment and in that false compartment were 18 packets of dangerous drugs in the quantity set out in the particulars of the count. The photograph on the passport was found to be a substituted one and the respondent admitted that it did not belong to him.

As he said at that time, and repeated in mitigation, the respondent stated that he had been given these drugs in Brazil for the purpose of taking them to Japan. He was also supplied with the passport. He had been in financial difficulties and it was for this reason that he agreed to take these items to Japan.

[The Court then dealt with general sentencing approach and continued.]

The major aspect of mitigation here was the plea of guilty, admittedly made inside the door of the court. A further factor which a trial court is entitled to take into consideration also exists here in that the respondent will be isolated while in prison custody. He speaks no English nor any of the Chinese dialects and that would undoubtedly bear hard upon him. In **R. v. Shipra** [1988] 2 HKLR 493, the headnote reads:

"Where a person comes to Hong Kong in order to commit a crime, the fact that a term of imprisonment might bear more harshly on that person, compared with a local person, was not a material factor to be borne in mind by the courts in passing sentence."

Reference was made to that headnote in **R. v. Venatius Okoye**, Criminal Appeal No. 405 of 1990 where it was said at page 3:

"It was also suggested that because the applicant is a foreigner some discount should be given because he will not be able to receive visits from friends or relatives while he is in custody in Hong Kong. However we have now been referred to **R. v. Shipra**, Crim.App.No. 627 of 1987, which says that is not to be considered as a factor in mitigation and that ground has been abandoned."

In the light of passage which are contained in **Shipra**, the headnote may be considered as misleading for the court in **Shipra** stated it preferred the approach which had been taken

in **R. v. Garry La Verne Ohmert**, Criminal Appeal No. 213 of 1985 to that which was said by the court in **R. v. Kumar**, Criminal Appeal No. 179 of 1980. In **Ohmert** it was stated that:

"While it is quite right to say that anybody caught in somebody else's country and not speaking the local language will find prison a more disagreeable experience than would otherwise be the case that in general is not a circumstance which the court will take into account in mitigation to any substantial degree." (emphasis supplied)

In this case, the judge allowed a specific discount of one year for what we might term generally "the foreignness" of the respondent. We do not consider that a specific discount should be given for this aspect of mitigation but we do endorse the course adopted in *Shipra*, which was commended to judges when faced with problems of this kind in the future, that while it is a factor to be taken into consideration, it is not one which would affect sentence to any substantial degree. This is something to be considered in determining the totality of the sentence.

That have been said, what would have been the proper sentence here? Allowing for the factors of mitigation, that is the plea and considering the "foreigners", we consider that a sentence of 15 years would have been appropriate. We are conscious of the fact that the sentence imposed upon the respondent is being very substantially increased by this court in these Review proceedings and we therefore considered that there should be a further discount because of that. While we have indicated that 15 years would have been the appropriate sentence in this case, the sentence we shall impose is one of 14 years' imprisonment.

The Attorney General's application is granted as indicated.

(William Silke)	(Neil Macdougall)	(K. Bokhary)
Vice President	Vice President	Justice of Appeal

Representation:

D.G.Saw, Esq. for Crown/Applicant
Kevin Chan, Esq. (D.L.A.) for Respondent

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CRIMINAL APPEAL NO. 114 OF 2001
(ON APPEAL FROM DCCC NO. 163 OF 2000)

BETWEEN

THE HONG KONG SPECIAL ADMINISTRATIVE REGION

AND

FELIX ROHRER

Coram: Mayo V-P, Keith JA and Woo JA in Court
Date of Hearing: 21 August 2001
Date of Judgment: 21 August 2001

J U D G M E N T

Keith JA (giving the judgment of the Court):

Introduction

1. The Applicant pleaded guilty in the District Court to a total of ten charges involving counterfeit travel documents and counterfeit travellers' cheques. On 16 March, he was sentenced by Judge Wong to terms of imprisonment totalling 4 years and 4 months. He now applies for leave to appeal against his sentence.

The facts

2. The Applicant is a Swiss national who was 27 years old at the date of his arrest. He arrived in Hong Kong on 21 December 2000. The passport which he presented at immigration control was a counterfeit German passport in a fictitious name. On the following day, he visited five foreign exchange outlets in Tsim Sha Tsui to cash 50 travellers' cheques which had purportedly been issued to Ralf Anderson. The Applicant had a counterfeit Danish passport in the name of Ralf Anderson which he used for the purposes of identification. Each of the travellers' cheques was for US\$100.00.

3. The Applicant cashed 33 of the travellers' cheques obtaining a total of HK\$24,893.00 at three of the outlets. He left the fourth outlet when he was asked for receipts for the purchase of the 13 travellers' cheques which he tried to cash there. He was caught at the fifth outlet when the member of staff to whom the remaining 4 travellers' cheques were presented became suspicious and called the police. Another 11 US\$100.00 counterfeit travellers' cheques in the name of Ralf Anderson were found either on him or in the room he had rented the previous day.

4. The Applicant admitted these facts when he was subsequently interviewed by the police. He told them that he had lost his Swiss passport in Thailand and had run out of money. He had been approached in a bar by a Pakistani who had persuaded him to cash counterfeit travellers' cheques in Hong Kong. He was to hand over the cash he obtained to the Pakistani's associates in Hong Kong, and in return he was to be paid 10% of the proceeds when he returned to Thailand. He had been provided by the Pakistani with the counterfeit German passport.

5. He told the police that on his arrival in Hong Kong he had been taken to a building in Tsim Sha Tsui where he had rented a room. He had then been contacted by Pakistani associates of the man he had met in Thailand who had given him the 61 travellers' cheques and the counterfeit Danish passport, and who had taken him to each of the foreign exchange outlets to cash them. He had not been given all 61 travellers' cheques together in case he was caught. He had only been given those travellers' cheques which he was to cash there and then. After cashing the cheques, he had given the cash to the Pakistanis who had taken him to the outlets and who had watched him throughout. There was nothing to contradict what the Applicant had told the police.

6. On these facts, the Applicant faced two charges of using forged travel documents relating to the counterfeit passports. He faced five charges of using false instruments relating to the 50 counterfeit travellers' cheques which he had tried to cash. He faced three charges of possessing false instruments relating to the 11 counterfeit travellers' cheques found on him and in his room which he had not yet had a chance to cash.

[The Court then dealt with the approach of the trial judge and concluded that the sentence was manifestly excessive. It then continued:]

14. The additional feature of the case is this. When sentencing the Applicant, the judge said:

"A foreigner committing crimes in Hong Kong [should] not expect leniency because of the language problem and their hardship, if any, of being detained in a foreign jail. Hardship, if any, is self-induced and you do not deserve any sympathy."

There is a divergence of opinion as to whether that view is correct. Unfortunately, the Court of Appeal has not spoken with one voice over the years. Their different pronouncements on the topic have been gathered together in Cross & Cheung, "Sentencing in Hong Kong", 3rd ed., pp. 302-303. For our part, we recognise that an offender has only himself to blame if he finds himself in prison in a foreign land. He is the author of his own misfortune. But the fact remains that a foreigner in a prison in Hong Kong may well find prison a harsher regime to endure than a prisoner who has lived in Hong Kong. Depending on his nationality, he might find himself isolated linguistically and culturally, having to face an unfamiliar diet, and deprived of the opportunity of visits from his family and friends. The fact that prison could for these reasons be a harsher regime for a prisoner to endure is a factor which can, in an appropriate case, justify some reduction in the length of any sentence of imprisonment imposed. We think that that applies to a German-speaking Swiss national, who has never been to Hong Kong before, serving a sentence of imprisonment in Hong Kong. In all the circumstances, we propose to reduce the Applicant's overall sentence by another 3 months.

Conclusion

15. For these reasons, we grant the Applicant leave to appeal against his sentence. We order that the sentences of 3 years' and 4 months' imprisonment imposed on the eight charges relating to the counterfeit travellers' cheques (charges 2, 3, 4, 5, 6, 7, 10 and 11) be set aside, and we order that there be substituted for them sentences of 2 years' and 9 months' imprisonment on each of those charges, to be served concurrently with each other and concurrently with the sentences of 12 months' imprisonment imposed on the two charges relating to the counterfeit travel documents (charges 1 and 8). The Applicant is accordingly sentenced to 2 years' and 9 months' imprisonment in all.

(Simon Mayo)	(Brian Keith)	(K. H. Woo)
Vice-President	Justice of Appeal	Justice of Appeal

Representation:

Ms Munira Moosdeen, instructed by the Director of Legal Aid, for the Applicant.
Mr Paul Madigan, of the Department of Justice, for the Respondent.

Main Examinations for LLB Year I (April/May/June 2003)			
	Name of Paper	Date of Exam.	Time
1	Law and Society (LLAW1004)	17-May-03	9:30am-11:45pm
2	Tort I and II (LLAW1005 & 1006)	20-May-03	9:30am-1pm
3	Law of Contract I & II (LLAW1001/ 1002)	24-May-03	9:30am-1:00pm
4	Legal System (LLAW1008) Supplementary	2-Jun-03	9:30am-12:00noon

Examination Timetable April/May/June 2003

COURSE_CO	COURSE_TITLE	EXAM_DAT	EXAM_TIME_STR	REMARKS
LLAW1001/ LLAW1002	Law of contract I & II	24-May	9:30 am - 1:00 pm (30 minutes reading time included)	
LLAW1004	Law and society	17-May	9:30 am - 11:45 am (15 minutes reading time included)	
LLAW1005/ LLAW1006	Law of tort I & II	20-May	9:30 am - 1:00 pm (30 minutes reading time included)	
LLAW1008	The legal system	2-Jun	9:30 am - 12:00 noon (30 minutes reading time included)	
LLAW2002	Administrative law	31-May	9:30 am - 12:45 pm (30 minutes reading time included)	
LLAW2003/ LLAW2004	Criminal law I & II	2-Jun	9:30 am - 1:00 pm (30 minutes reading time included)	To be available from Lecturer (Away from Hong Kong)
LLAW2005/ LLAW2006	Property law I & II	28-May	9:30 am - 12:00 noon (10 minutes reading time included)	Restricted
LLAW2007/ LLAW2008	Equity and introduction to trusts I & II	23-May	9:30 am - 1:00 pm (30 minutes reading time included)	
LLAW2009	Introduction to PRC law	5-Jun	9:30 am - 11:45 am (15 minutes reading time included)	
LLAW3001	Introduction to legal theory	19-May	9:30 am - 12:45 pm (15 minutes reading time included)	
LLAW3007	Alternative dispute resolution	21-May	2:00 pm - 4:30 pm (15 minutes reading time included)	
LLAW3009	Banking law	21-May	9:30 am - 12:00 noon	
LLAW3010	Business associations	2-Jun	9:30 am - 12:15 pm (30 minutes reading time included)	
LLAW3015	Company law	24-May	2:00 pm - 4.30 pm (30 minutes reading time included)	
LLAW3021	Fundamentals of evidence and trial procedure	22-May	2:00 pm - 5:30 pm (30 minutes reading time included)	
LLAW3023	Insolvency law	27-May	2:00 pm - 4:45 pm (15 reading time included)	The examination has been cancelled
LLAW3029	International trade law II	26-May	9 30 am -12:30 pm (30 minutes reading time included)	
LLAW3030	Introduction to private international law	3-Jun	9:30 am - 12:30 pm (30 minutes reading time)	

LLAW3033	Issues in intellectual property law	29-May 9:30 am - 12:30 pm (30 minutes reading time included)	
LLAW3065	Information technology law	5-Jun 9:30 am - 12:00 noon (15 minutes reading time included)	
LLAW6024	Banking law	21-May 9:30 am - 12:00 noon	
LLAW6128	International trade law I	3-Jun 9:30 am - 12:30 pm (30 minutes reading time included)	
LLAW6129	International trade law II	26-May 9:30 am - 12:30 pm (30 minutes reading time included)	
LLAW6135	Alternative dispute resolution	21-May 2:00 pm - 4:30 pm (15 minutes reading time included)	
PCLL1003	Landlord & tenant	15-May 9:30 am - 11:30 am	Restricted
PCLL2001	Civil and criminal litigation examination	19-May 2:00 pm - 5:00 pm	
PCLL2002	Civil and criminal litigation (Opinion writing)	21-May 9:30 am - 12:30 pm	
PCLL2003	Civil and criminal litigation (Drafting)	23-May 2:00 pm - 5:30 pm	
PCLL3002	Commercial law & practice graded assignment 2 (Letter writing)	13-May 9:30 am - 12:30 pm	Restricted
PCLL3003	Commercial law & practice examination	12-May 9:30 am - 12:30 pm	Restricted

University of Hong Kong
Department of Law

LAW AND SOCIETY II (LLAW1004)
Examination (2002-03)

Date: 17 May 2003

Time: 9.30 a.m. – 11.45 a.m. (including 15 min reading time)

Instructions to candidates

1. This examination paper consists of five (5) questions.
2. Candidates are required to answer any three (3) questions.

Questions

1. How did some originally stateless societies evolve into states, while other primitive societies remained stateless until they were discovered by anthropologists in modern times? Would you like to live in a stateless society yourself?
2. Compare and contrast the political thought of any two of the following thinkers, and explain whether you agree with their ideas.
 - (a) Plato;
 - (b) Aristotle;
 - (c) Machiavelli;
 - (d) Hobbes;
 - (e) Locke;
 - (f) Rousseau;
 - (g) Marx;
 - (h) Lenin.
3. “The development of the modern liberal constitutional state in the West would not have been possible without

the foundations laid in earlier (pre-modern) periods of Western civilization.” Discuss.

4. With reference to the case of contemporary China, explain the relationship between legal development and economic development.
5. “The concept of human rights is a product of Western civilization and is inconsistent with Chinese culture.” Discuss.

*** the end ***

May Examinations 2003
Tort I and II (LLAW 1005 & 1006)

DATE: May 20 2003

TIME: 9.30 a.m. – 1 p.m.

LENGTH: 3 hours plus 30 minutes reading time in which no answer may be begun but you may make notes on the question paper.

ANSWER FOUR QUESTIONS

STRUCTURE OF THE PAPER: there are ELEVEN questions in the paper of which ONE (question 11) offers a choice between two topics. There is a line across the page after each question. There are EIGHT PAGES in this paper.

1. There is an outbreak in Hong Kong of Hepatitis A which is traced to increased pollution from sewage in Deep Bay, the main oyster growing area in Hong Kong.

[Note: Hepatitis A (甲型肝炎病毒) is a disease of the liver. It is spread through food and water contamination, especially through infected seafood. In HK about 20-30% of local oysters are infected with the virus. In any one year, there are a few hundred cases. The last major Hepatitis A outbreak was in 1992. For the purposes of questions 1 and 2 assume there is a major new outbreak.]

The Government wishes to know whether it might be sued successfully in tort by individuals infected as a result of this outbreak. It points to the following two pieces of legislation:

- (a) The Public Health and Municipal Services Ordinance s. 3 which provides:

The Authority shall be responsible for causing the construction, repair and maintenance of all public sewers, drains or drainage works, and may alter or disconnect the connection therewith of any private sewer, drain or drainage works.

The Authority for this purpose is the Drainage Services Department, which admits that it failed to ensure that a public sewer in the vicinity of Deep Bay was kept in good repair. The Ordinance specifies no sort of liability or penalty for such a failure.

- (b) The Public Health and Municipal Services Ordinance, which provides powers for the Food and Environmental Hygiene Department to inspect food.

The Department admits that it has been so preoccupied recently with other health crises that it failed to carry out its usual inspections for Hepatitis A in oysters even though it was aware that there was an enhanced risk.

Please advise the Government.

2. In the middle of a Hepatitis A epidemic caused by contaminated oysters, Albert contracts the disease. [For some information on Hepatitis A see q. 1]. Albert does not realize what is wrong with him. He is aware that he is ill, but is terrified to stop work because he is afraid that in the current economic climate he will be dismissed. Unfortunately he is a chef, in a not very distinguished small restaurant called the Clean Café. His boss, Billy, suspects that Albert is ill but does not know where he will find someone else to whom he would have to pay so little if he lays Albert off or asks him to take sick leave. If he had looked at Albert he would have seen that the whites of Albert's eyes were yellow – a sign of the jaundice caused by Hepatitis A.

Albert becomes more ill than if he had taken time off work. And he has contaminated with Hepatitis A the food that he is cooking. He has become so tired as a result of his illness that he has failed to observe normal hygiene standards. Also, the kitchen in the restaurant is not equipped with very good hand-washing facilities.

A regular customer, Charlie, develops Hepatitis A. But Charlie is an oyster enthusiast and may have contracted the Hepatitis from some other source. On average he eats once a week at the Clean Cafe and once a week at an oyster bar elsewhere in Hong Kong.

As the result of contact with items touched by Albert, his fellow worker, Dolly, is also infected,. A doctor says that this ought not to have happened if Dolly had observed proper hygiene herself. In fact, Dolly has sometimes complained to Billy about the inadequate facilities.

Discuss the likelihood of Charlie and Dolly recovering damages in negligence from Billy and Albert.

3. As a result of a malfunction in the equipment of a Trans-Pacific Airlines (TPA) plane that had recently taken off from Chek Lap Kok airport, the plane flew straight into the side of a well-known Hong Kong building. Initially, people assumed it was a terrorist attack., though some time later it was discovered to have resulted from the negligence of TPA staff.

Crowds stood and watched as the building burned and television crews rushed to the scene. Tragically, among the crowd was Andrew whose partner (Brian) in a gay relationship worked in the burning building. Brian was trapped in the building and rather than burn to death flung himself out of the 10th floor window and landed close to Andrew, dying instantly. Andrew told Brian's mother about the accident and she rushed to the hospital where he had been taken, arriving only about one hour after he died. She was refused permission to see his body because it was so badly mutilated by the fall.

Meanwhile a television company (Hong Kong Independent Television or HKITV) was filming at the scene of the disaster. It showed live footage, including a shot that showed, very clearly and in great detail, Brian's fall.

Among the viewers was Brian's former girl friend, Debbie, who had lived with him for 6 years, until only 6 months before these events, and was still in love with him, and their 5 year old daughter, Carrie. HKITV say they are very sorry. They insist they have not violated any broadcasting standard (There is no provision in the Hong Kong Standards for Television Companies which deals with the questions of having regard to the feelings of relatives and viewers when including pictures of dead or seriously wounded people.). They also argue that this was a big event (especially since while they were filming they thought it was a terrorist attack) and they thought it was in the public interest to show it in detail.

Andrew, Brian's mother, Debbie and Carrie all suffer nervous shock. Advise them on their chances of bringing actions in negligence for the nervous shock against TPA and HKITV.

-
4. Lilly and Sally are invited to a 'rave' or dance party held near a flying club where Lilly has been receiving flying lessons. Since January 2003 a licence is required for a dance party of this type, but no licence has been obtained. Lilly and Sally realise that there is some problem as they have been told not to tell anyone where they are going. While there Sally takes some drugs; the drugs are completely illegal. They both become 'liberated' by the music and the general atmosphere from the usual restraints of their upbringing and feel unusually bold. They wander on to the club runway and find a small plane, which belongs to Bob who is also the organiser of the party. Bob has left the plane ready to take off if there is a police raid. Sally says 'Show me how well you are learning to fly'. They get in and try to take off. Sally is too intoxicated to be able to fasten the seat belt. In fact Lilly fails to take off at all; the plane skids off the runway and bumps along the grass until it hits Bob's car.

Sally is thrown out; if she had been wearing a belt she would probably have been injured but less seriously. Lilly is injured. The plane is seriously damaged. The car is also damaged. When the story comes out, Bob is reprimanded by the club and the police for leaving the plane ready for take-off and unsupervised. This is a breach of a club regulation which is intended precisely to avoid the risk of some inexperienced person taking it and injuring themselves and others.

Discuss the rights and liabilities of the various parties in tort.

5. James is an expert scaffolder. He works for the Super Construction Co. According to his written contract he is an 'independent contractor'. He works as a scaffolder only for Super but he is free to do other work of a different kind for other people when not erecting or taking down scaffolding for Super. He is paid according to the size of the job, according to the number of poles involved rather than the number of hours he works, and is paid when the scaffolding for a project has been completely erected, or removed. He is so skilled that no-one else can tell him how to do his job, though naturally he is told when and where to erect scaffolding for Super. He takes holidays when he chooses provided there is no scaffolding work to do for Super. In fact in most months he spends 70% of his time working for Super.

He sometimes brings a helper to the site; this is not formally agreed between him and Super, but the company have never objected.

One day, when he was going to take down some scaffolding, he brought a 16 year old helper, Mac, to the site. This was the first time he had brought anyone so young. Mac had never done this work before. While Mac was working he went on the roof of the building. In fact the roof was not very safe, as an experienced worker would have realised. James did not notice what Mac was doing, or he would have warned him and told him that he should not go on the roof at all. It was unnecessary to go on the roof if the scaffolding work was done properly. Super Construction had placed a handwritten notice at the edge of the roof saying "take care".

Mac fell through the roof and was seriously injured.

Advise Mac about his chances of succeeding in a tort action against Super. Do not discuss the Employees' Compensation Ordinance.

6. Mary is a tort lecturer at the University of Kowloon. Around midnight one night, Jenny, a law student at the University of Kowloon, sees that Mary's light is on in her

office. Jenny is very angry with Mary because of a poor grade that Jenny had received for her essay on the topic of 'deliberate torts against the person'. Jenny decides that she is going to punish Mary. She knows that Mary is unable to use the stairs because of a bad leg. Jenny creeps down to the lower ground floor of the building and into the control room for the lifts. She waits until the lifts have remained at the same floor for some time, reckoning this means that there is no-one in any of the lifts. She turns off the power to the lifts. Unfortunately Mary had just stepped into the lift on the 4th floor where her office was and had pressed the 'close' button 3 seconds before Jenny turned off the power. The door had just closed. Mary is trapped in the lift with the door closed, the lights off and the telephone system not working.

Tom, another lecturer, is also working late. He uses a wheelchair. When he goes to the lift, 30 minutes after Mary was shut in, he finds the lifts are not working. Though he can move around the large floor where his office is situated he cannot move from the floor. He is able to telephone the university emergency number and the staff come in 20 minutes. They restart the power to the lifts and release Mary, and Tom is able to go home.

Tom is unhurt by the experience, but Mary is very upset by her confinement, which lasted about one hour.

Jenny suffers great remorse and confesses her responsibility. Discuss her liability in tort to Mary and Tom.

7. Anne comes to your office in great distress with the following story:

The man she called her 'husband', Bob, was killed in an accident at work recently at the age of 41. There is no question that the employer was liable in negligence for this. In fact Anne and Bob had never been formally married but had lived together for 10 years. After the accident Bob was in hospital and in great pain for 2 months, but he eventually died.

To add to Anne's distress, she has just discovered that Bob had had an affair with another woman, Carol. The affair had ended several years before, but there was a child of the affair, David. Anne herself has no children.

The reason Anne found out about Carol and David was that Bob left a will in which he divided his estate equally between Anne, Carol and David.

Anne says that she is in need of money quickly. She wants to know how she can get this, and in principle how it will be calculated. She also wants to know whether she has to share anything she gets with Carol and David. She is very concerned because, as she says, “I do not begrudge Carol and David a reasonable amount, but I was really counting on Bob’s savings when I got old. I have discovered that Bob used to send Carol some money every month – but he still managed to save about one-third of his salary.”

Advise Anne on all the types of claim that may arise and how any money will be allocated. Note: Anne comes within the definition of “Members of the family” under the Employees’ Compensation Ordinance.

-
8. Oliver is a newly qualified soil engineer. He is working for a consultancy firm that is asked by the Government to prepare a report on the appropriate treatment for some slopes for which the Government is responsible.

Oliver prepares the report, which he knows is to be presented to the Government. He does his best, but this is an area of work which he knows little about. He had his training in the Mid-western United States, which does not have the sorts of problems with slopes, nor the sorts of weather conditions, that Hong Kong experiences. His analysis of the situation would have been perfectly adequate for the US but did not really tackle some of the Hong Kong issues. The only guidance he received from the firm was a reference to the website of the Geotechnical Department of the Hong Kong Government. Oliver looked at that website, but failed to notice an important new circular – posted only one week before he wrote his report – which set standards for the particular type of report Oliver was writing.

The Hong Kong Government accepted the report. They also showed it to the contractor who was to build a housing development near one of the slopes, and he also accepted it. The main point made by Oliver was that there was no necessity to carry out special strengthening measure for certain slopes.

Unfortunately, while the development was being constructed, there was an unusually heavy rainstorm and a slope collapsed. A piece of earth-moving equipment belonging to the contractor fell, and was buried under the earth of the slope. The consequences of this event were:

- (a) The work was much delayed so the contractor lost money.

(b) The earthmoving equipment was dug out from under the earth and was quite undamaged. The construction company had been going to use it on another site, but were prevented from doing so while it was buried in the soil, and had to spend money hiring a replacement.

(c) The Government had to pay for some slope support work. This would have been much cheaper if it had been done before the construction work started.

Assume that if Oliver had known more, or if he had read the Geotechnical Department circular, he would have written his report rather differently and these events would not have occurred.

Advise Oliver on whether he is liable in tort.

9. Mr Tang suffers from a disease which affects his breathing. He and his wife buy a house in the Western New Territories in order to get as much fresh air as possible. There is no industrial development around, and little housing. His breathing problems improve.

But the pressure on land changes things. Some houses are built, which is not a problem at first. Then the following developments occur:

- (a) A rubbish incinerator is built by Ecolleen Ltd. Fumes from the incinerator blow towards their house. Mr Tang's new neighbours seem to find no problem with the incinerator, which is 'state of the art' emitting as little air pollution as possible. But Mr Tang's breathing problems return.
- (b) Then shops begin to be built and facilities provided for the growing population. Their quiet area is now noisy. One bar, which is leased by Joe from the owner, Simon, stays open until 1 am most nights and some of the patrons are very noisy when drunk.
- (c) A new tall building built by New Territories Land Co. (NTLC) cuts out the Tangs' view of calm green hillsides, and also makes it impossible for Mr Tang's existing mobile phone to work. This last problem angers all the other neighbours as well, but they are told that a new system will take about 3 months to set up and meanwhile they will not be able to use mobile phones! This building construction had the permission of the Town Planning Board

The Tangs want to know whether they can sue Ecolleen, Joe, Simon, and NTLC.

10. During the run-up to the LegCo elections some of the candidates are engaged in rather bitter exchanges with each other. In one constituency three of the candidates are: Jenny, Lucy and Kevin.

Jenny publishes a pamphlet, which is distributed to every household in the constituency, although only about half of the households have registered voters. In it she accuses Lucy of having been convicted of an offence of dishonesty, and Kevin of cheating on his wife, by having an affair with another woman. Lucy was in fact convicted of travelling on the MTR without a ticket with intent to avoid payment 15 years ago when she was only 18. Kevin is not married.

Kevin responds by writing an article in the Daily Rag newspaper, which is read by people all over Hong Kong. He says “Jenny has a tendency to make unfounded allegations, as this occurrence shows. She is somebody who is not fit to represent a mature electorate. And I have little doubt that she will now sue me for libel as she is prone to make use of the libel laws to shut up anyone who disagrees with her”. Kevin is very angry when he writes this; he is also feeling very spiteful towards Jenny, whom he has never liked and is determined to embarrass her so much that she will withdraw from the election.

Jenny does sue Kevin. In fact this is the third time that Jenny has brought a libel action against a political opponent.

Kevin and Lucy sue Jenny.

Discuss the chances of success of these actions.

11. Answer ONE of the following questions

(a) Is the law of tort relevant to the ordinary Hong Kong person? Discuss this issue with regard to substantive rules, precedents and purposes of the law. Do not discuss questions of procedure and cost of litigation. OR

(b) “The common law of tort requires the judges constantly to draw lines, between situations in which there is liability and those where there is not. They try to draw these lines in logical places, but this is very often impossible. Sometimes they simply replace one illogical line with another. Certainly they cannot please everybody.”

Discuss, drawing concrete examples from at least 2 torts.

END OF EXAMINATION PAPER

THE UNIVERSITY OF HONG KONG
DEPARTMENT OF LAW

BACHELOR OF LAWS EXAMINATION 2002/2003

Law of Contract I & II (12 Credits)

(LLAW1001 and LLAW 1002)

Date: May 24th, 2003.

Time: 9.30 to 1.00 p m (reading time of 30 minutes included).

Instructions to Candidates

1. The time for this examination is 3 hours and 30 minutes. The first 30 minutes is reading time.
2. This Examination consists of **nine pages** including this one.
3. All questions carry equal marks. Where a question has two sections, the mark for each section is shown in bracket next to that part. You must therefore allocate your time accordingly.
4. There are **SIX** questions in all. You must answer **THREE** questions **ONLY**.
5. This is a 100% open-book examination. Candidates may bring any material into the examination room.
6. Any form of plagiarism will be dealt with in accordance with existing University regulations.

1. “An equitable jurisdiction to grant rescission on terms where a common fundamental mistake has induced a contract gives greater flexibility than a doctrine of common law which holds the contract void in such circumstances.” Lord Phillips MR in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*. [2002] 4 All E R 789.

Do you agree with the above dictum? Support your answer with relevant case law. Do you think *Great Peace* should be followed in Hong Kong?

2. “Remedies for breach of contract (including the right of the innocent party to terminate the contract) are dominated by the concern to ensure that the remedy is proportionate to the seriousness of the breach rather than a desire to implement the intention of the contracting parties”.

Discuss.

3. Luke Skyler owns and operates a small business, Mediquip, which sells medical supplies over the Internet. Luke's website, www.mediquip.com.hk, is registered and located on a server in Hong Kong. Of the many items Luke sells online, are fluorescent yellow latex hand gloves.

Ann Ng runs a small pharmacy in Kennedy Town. Recently, she has been thinking about introducing some new items for sale in her store. While surfing the Internet one night, she came across Luke's website, www.mediquip.com.hk. Ann browsed the website and noticed the advertisement:

"Mediquip offers one of a kind quality fluorescent yellow latex hand gloves. Looking for exclusive dealer in Hong Kong to carry product. Contact us at luke@mediquip.com.hk."

On 3rd January, 2003, Ann emails Luke to make further inquiries about the possibility of becoming an exclusive dealer of the latex gloves. She types:

"Hi, I run a small pharmacy in Kennedy Town. I may be interested in becoming the exclusive dealer in Hong Kong for your latex gloves. Could you please provide more details to me at this email address: ann@sohu.com.hk."

*Regards,
Ann Ng"*

On 5th January, 2003, Luke returns Ann's email:

"Ann, we are indeed looking for an exclusive dealer in Hong Kong. Let us know if the following terms and conditions are suitable to you and we will consider the contract concluded:

- 1. Unique, high quality fluorescent yellow latex hand gloves. 100 per box. \$20 per box.*
- 2. Ann Ng to be the exclusive dealer of fluorescent yellow latex gloves in Hong Kong effective 15th January, 2003 until 15th January, 2004.*
- 3. Upon receipt of order, Ann Ng will pay Mediquip the required amount within one week of delivery of product.*

Please accept and return your response by 10th January, 2003

*Luke Skyler
Mediquip*

On 6th January, 2003, Ann read the email, printed it out, signed it, and mailed it to Luke Sklyer that same day. She then replied via email:

“The terms sound good but I wish to lengthen the one week payment upon delivery of product to two weeks.

Sincerely,

Ann Ng.”

On 7th January, Luke Sklyer received Ann’s package in the mail. He did not, however, read Ann’s email to him until 11th January, 2003, and he did not respond to her email.

On 20th January, 2003, Ann placed an order for 3 boxes of latex gloves. Mediquip delivered the product on 22nd January, 2003. Ann paid \$60 four days later on 26th January, 2003.

On 1st April, 2003, Ann placed an order for 100 boxes of the latex gloves as they were in great demand with the threat of the SARS pneumonia in Hong Kong. The latex gloves were delivered on 2nd April, 2003. Ann paid the amount owed, \$2000, on 12th April, 2003.

On 15th April, 2003, Luke Sklyer emailed Ann to inform her that Mediquip was terminating the contract due to late payment under the contract. That same day, Luke discontinued the production of the fluorescent yellow gloves, producing instead, fluorescent pink gloves. He began to take orders on 16th April, 2003 from various pharmacies in Hong Kong for the fluorescent pink latex gloves, for the price of \$100 per box of 10.

Ann Ng comes to see you. She wishes to know whether she:

- (a) can force Luke Sklyer of Mediquip to continue to sell her the original yellow gloves at the original price (\$20 for a box of 100). (75%)
- (b) can force Luke to discontinue the sale of pink latex gloves to other clients. (25%)

Advise Ann Ng.

4. Mrs. Henri has just moved to Hong Kong from France. She speaks some English but does not read English very well. She rented a flat that needed painting. One day she found an advertising flyer in her mailbox, which stated:

“Discount Package: You provide the paint, I provide expert painting. \$2,000 per room. Call Siu Wai at 2859-2965. For additional terms, see brochure”.

Mrs. Henri called and made an appointment for Siu Wai to paint 4 rooms. On the agreed date, Siu Wai arrived with her ladder and brushes. She also brought several copies of her brochure, which she gave to Mrs. Henri. When Mrs. Henri asked what the brochures were for, Siu Wai said: “These contain all my usual terms and conditions. I am giving you some extras in case you have any friends who need painting”. Mrs. Henri put the brochures on her glass coffee table. She then covered the table with a blanket (because it is a very expensive table and she did not want any paint to fall on it). Siu Wai removed the ceiling fan in each room so that she could paint the ceilings more quickly. (Otherwise she would have had to cover up each fan and paint very slowly around it.) When she finished painting, she asked Mrs. Henri for payment. Mrs. Henri noticed that the 4 ceiling fans were on the floor and asked Siu Wai to reattach them. At first Siu Wai refused, as she was in a hurry. However, when Mrs. Henri insisted, Siu Wai set up her ladder and reattached the 4 fans. This required about 30 minutes of work. Siu Wai then hurried away, saying that she would send Mrs. Henri a bill.

Three days later, Mrs. Henri received a bill from Siu Wai. She was surprised to find that the bill was for \$9,000. The bill stated that she was being charged \$8,000 for painting 4 rooms and \$1,000 for reattaching the 4 ceiling fans. Later that day, one of the ceiling fans fell on top of Mrs. Henri’s glass coffee table and cracked it. While cleaning up the mess, Mrs. Henri noticed Siu Wai’s brochures, right in the middle of the cracked table.

Mrs. Henri has come to you for legal advice and she has brought one of Siu Wai’s brochures. Most of the brochure is filled with photographs of Siu Wai painting. However, on the back page, in small but readable print, it states (in both English and Chinese):

Terms and Conditions

- (1) Painting services provided at \$2,000 per room. Customers will be charged \$2,000 per hour for any additional services.

- (2) Customers will be compensated (up to a maximum of \$500) for property damage caused by the painting, providing that customers notify Siu Wai of any damage within 24 hours.
- (3) Siu Wai accepts no liability beyond that stated in paragraph (2) and advises Customers to obtain their own insurance for valuable items.

Advise Mrs. Henri.

5. Hotrod is a famous pop singer. He has produced a long list of records over the past three years and signed several recording contracts in Asia, Europe and the United States of America. On 1st January, 2003 he was hired by Select Records to perform at an 'all-night' concert at the Hong Kong Coliseum on 2nd April, 2003. Hotrod was to receive \$250,000 for that single performance. Select Records were able to sell all tickets to the concert and prepaid \$50,000 to Hotrod. Select Records then incurred expenses related to the concert amounting to \$100,000. The expenses included the cost of the Hall, the hiring of security guards for the night and the running of a series of advertisements in local papers and television channels. On 1st March, 2003 Hotrod informed Select Records that he was going to England for a recording session and might not be back in time for the Hong Kong performance. In fact, Hotrod did not go to England but fell ill on 27 March and as a result was unable to perform in Hong Kong on 2nd April, 2003. Customers are now demanding a complete refund of their ticket prices from Select Records.

(a) Advise Select Records. (75%)

(b) How, if at all, would your answer differ if Hotrod had performed at the Coliseum as agreed but collapsed into a coma during the last hour of the show. The doctor at QMH found that Hotrod had collapsed due to over consumption of alcohol. (25%)

You must ignore any claims that could be made under tort law.

6. Antonio Liu is a successful fashion designer and managing director of Antonio Concepts, a public company. He lives in the Mid-Levels with his partner, Petrus Paparazi (PP). PP is a successful television personality who is highly regarded and widely known for his satirical commentaries on important social issues and events. Antonio Liu and PP met for the first time in 1990 when they were both studying at a University in England. They began living together in 1997. In 1998 PP decided to set up his own company known as PP Enterprise specializing in children's sports wear and toys. He obtained a loan of \$10 million from Big Bucks Bank (BBB), with a guarantee from Antonio Concepts. Within a few months PP Enterprises became a great success and was able to pay back the bank loan after two years.

Unfortunately for Antonio Liu, business at Antonio Concepts was sluggish and by the end of 2001 he decided to close down and start another business. Antonio Liu approached BBB for a \$20 million loan saying he wanted to start a salvage company, buying cheap and selling dear. When Joyce Ma, the BBB branch manager, asked him for a guarantor, he replied that he would ask his partner Petrus to act as the guarantor. Antonio Liu was given a pile of documents to be signed and was further asked to ensure that Petrus obtained independent legal advice.

During the next two weeks Petrus was very busy recording various interviews for his Television station and did not have time to read the papers. In the morning before his flight to Bangkok, to interview the Rolling Stones, Antonio gently reminded him of the pending documents and how urgently he needed the money to get started. Petrus apologized and immediately signed all the papers. He also phoned up Katrina, the BBB's lawyer, who was also acting for Antonio, and told her he fully understood the meaning and legal implications of the documents he had signed. He also requested Katrina to confirm this to the BBB.

The next day Antonio Liu submitted the documents to BBB including the lawyer's certificate. Ms Chung, an officer of the BBB, looked at them and found them to be in order and approved the loan. A week later, Antonio Liu withdrew all the money and disappeared. No one has heard of him since. BBB has become aware of Antonio's disappearance and has asked Petrus to pay up the \$ 20 million loan as soon as possible.

(a) Advise Petrus. (75%)

(b) Discuss the significance of the concept of “manifest disadvantage” in cases of undue influence, before and after the House of Lord’s decision in *Royal Bank of Scotland Plc v Etridge (No 2)* [2002] 2 AC 773 (HL). (25%)

THE END

The University of Hong Kong
Bachelor of Laws: Supp Examination
Legal System (LLAW1008)
(2002-2003)

2 June 2003

Time : 9:30 a.m - 12:00 noon
(First 30 minutes reading time)

This is an open book examination. The paper consists of 2 parts. Part A consists of one COMPULSORY question which you must answer. Part B consists of 4 questions, out of which you must answer one question. The compulsory question in Part A counts for 60% of the final mark of this paper.

PART A (COMPULSORY)

1. Paul is a clinical psychologist working at the Counselling Service Unit of the University of Hong Kong. His job is to provide counselling services to students and staff of the University. This would involve talking to his patients, analysing their problems and helping them to find a solution. All patients who wish to see Paul have to make a prior appointment at the Reception Counter of the Counselling Service Unit. Apart from meeting students at his office, Paul also joins students' activities and sometimes has lunch with students at students' canteens or restaurants near the University. It is stipulated in the internal rules of the Counselling Unit that a counsellor shall not have dinner with a patient alone. His office hours are between 9:00 am and 6:30 pm.

On 1 May 2002, Paul was about to leave his office at about 7 pm when Mary, a student, appeared at his office and wanted to see him. Paul told Mary that he was about to leave and asked Mary to make an appointment the following day. Mary looked very depressed and was in an unstable emotional state. Paul decided that it would be better to talk to her. They sat on the doorstep to the entrance of the Counselling Unit. Mary told him that her mother had passed away two weeks ago, that she had just broken up with her boyfriend, that the examination was near and she had not done any revision at all and that she was extremely worried. She also gradually unfolded her unhappy childhood and how she was sexually abused by her step-father 10 years ago. They talked for about 3 hours, and at around 10 pm, Mary seemed to have calmed down a lot. Paul, however, was still worried about Mary. Both were hungry, but all restaurants on campus had closed by then Paul offered to take Mary for a light meal and then took her back to her student

hostel. He knew that there was a small restaurant on Robinson Road which had parking facilities and suggested driving there.

As Paul drove outside the main campus, he carelessly knocked down George, a law student. George is now suing Paul for negligence and the University for vicarious liability [that is, liability on the part of an employer for the negligent act committed by his employee in the course of employment].

Question

Advise the University whether the University is liable for the negligent act of Paul. You can assume that Paul is negligent. The negligence suit will be heard before the Court of First Instance. In your research you have come across a recent decision of the Court of Appeal in *Tse Ngan Heung v Ritz-Carlton Ltd* [2002] 3 HKLRD 311. Your advice should include the following:

1. The ratio in *Tse Ngan Heung v Ritz-Carlton Ltd*.
2. In *Lister v Hesley Hall Ltd* [2002] 2 WLR 1311, the House of Lords held that the owners and managers of a school were vicariously liable for the tortious act of sexual abuse against the students by the warden of a boarding house of that school. How did the Court of Appeal deal with the *Lister* case in *Tse Ngan Heung*?
3. An explanation of how to apply *Tse Ngan Heung* to this case. Are you happy with the results? Why?
4. The decision of the Court of Appeal in *Tse Ngan Heung* is binding on the Court of First Instance, but is there any way you can get round the *Tse* case? If not, what will be your advice to the University?
5. Any observation on the common law system arising from this hypothetical case.

[Note: The decision of the Court of Appeal in *Tse Ngan Heung* was overruled by the Court of Final Appeal in *The Ming An Insurance Company (HK) Ltd v The Ritz Carlton Limited*, FACV No 4 of 2002. We are, however, not concerned with the substantive law in this present case and you can assume that the Court of Final Appeal decision does not exist for the purpose of this question.]

PART B (YOU HAVE TO ANSWER ONE QUESTION FROM THIS PART)

2. Sir Anthony Mason of the Court of Final Appeal recently recommended in a report that legislation should be enacted to protect the salary of judges against reduction by the HKSAR Government. Do you agree with this recommendation? Explain your answer.

3. If the Legislature enacted a Negligence Ordinance introducing the tort of negligence, it would not have affected the rights and liabilities of any person that were incurred before the enactment of the law. However, the House of Lords decided in *Donoghue v Stevenson* to introduce this far-reaching concept through the common law, which operated retrospectively. How could this be fair to the manufacturer in *Donoghue v Stevenson* and any other people who were exposed to liabilities arising from incidents before the judgment of the House of Lords? Discuss this question in light of the decision of *Kleinwort Benson Ltd v Lincoln City Council* [1998] 3 WLR 1095 and any other judicial decisions as you think appropriate.
4. Compare and contrast the adversarial system under the common law and the inquisitorial system under the civil law. What are their strengths and weaknesses? In further development of the PRC legal system, which trial system would be more suitable to the Mainland, and why?
5. The rule of law embraces a bias in favour of individual rights. Explain how fundamental rights are protected under the common law system.

***** THE END *****

CACV 353/2001

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO. 353 OF 2001

TSE NGAN HEUNG
AND
RITZ-CARLTON LTD

Coram: Rogers VP, Woo and Le Pichon JJA
Date of Hearing: 16 November 2001
Date of Judgment: 23 November 2001

J U D G M E N T

Hon Rogers VP:

1. This is an appeal from a judgment of Seagroatt J given on 18 January 2001. The point at issue on this appeal is whether the 1st defendant is vicariously liable for the negligent driving of the 2nd defendant, Lo Sin Tak. As explained in the judgment below, the dispute is, in effect, a dispute between two insurance companies as to which will ultimately bear the damages which will be awarded.
2. The plaintiffs in the cases are two persons who were pedestrians in the evening of 9 March 1998 in the vicinity of Queensway. They were struck by a car driven by the 2nd defendant. Their injuries were serious. It is not disputed that the 2nd defendant was wholly responsible for the damage. The point taken on this appeal is that the judge wrongly came to the conclusion that the 1st defendant was not vicariously liable for the negligent driving of the 2nd defendant. It is said that since the date of the hearing there has been a

fundamental change in the law relating to vicarious liability of employers for the negligence of their employees.

The facts relating to this case

3. There was no real challenge to the findings of fact by the judge. Counsel for the appellant sought to encapsulate the facts in a way that in some respects glossed over the findings. In other respects the citations of the evidence which counsel gave did not appear to support the way the propositions were put forward.

4. The 2nd defendant was employed by the 1st defendant as a doorman. As such he would also have to act as a car jockey. As part of his duties, he would have to move cars parked in the hotel forecourt both when hotel guests required their cars to be parked and also if parked cars constituted an obstruction. The 2nd defendant was under the supervision of the baggage master of the hotel. On the night in question that was Mr Wilson Leung Tat-kei.

5. The hotel provided limousine services for its guests by having on permanent hire cars from Parklane Limousines Services Limited. Only one driver would be assigned to and responsible for driving a particular car. The drivers worked in shifts. When the driver went off duty he would park his car in the hotel forecourt and leave it there. The drivers would leave their keys with the hotel, normally apparently with the hotel reception, so that, if necessary, the car could be moved whilst the driver was not on duty. Nobody other than the assigned driver would drive a Parklane car. Hence, although a car jockey might have to move a car if it was an obstruction or, possibly, if more space was needed, none of the hotel staff would use the car either for hotel purposes or for their own purposes. Moreover, the Parklane drivers were not under the control or direction of the hotel staff.

6. The hotel staff also worked in shifts. Whilst on duty they might, if time were available, be allowed to make use of the staff canteen. The evidence before the judge showed that this arrangement had drawbacks. Generally speaking, the food was not considered particularly appetising and the canteen closed early in the evening. After the canteen had closed regular meals could not be obtained. As can be imagined, staff would often wish to supplement their food with food obtained outside.

7. Mr Leung gave evidence, which the judge accepted, as to how this could be done. If time were available, staff, such as bellboys, were given permission to leave the premises to obtain food. This would then be brought back and, apparently, shared amongst the staff. The staff leaving the premises might collect the food when they were out of the hotel on an errand or other hotel business. If one of the Parklane drivers was prepared to take one of the hotel staff to fetch food, that could be permitted. Otherwise the hotel staff would only be permitted to go by taxi to fetch food. On no occasion would a bellboy, or anybody else, be permitted to go in a car belonging to a hotel guest being

driven by a car jockey to fetch food. Nor would a car jockey be permitted to drive a Parklane car to fetch food, whether with another hotel employee or not.

The night in question

8. Mr Chung Tung Shing was the driver of Mercedes-Benz FF2282. He finished work at about 7 p.m.. He parked his car in the No. 1 space outside the hotel. In that space the car did not cause any obstruction. He gave the car keys to the 2nd defendant. He saw the 2nd defendant put the keys in the drawer of the valet parking counter, as usual. At some time between 7 p.m. and 9 p.m. the car had been moved to parking space No. 4. There was no apparent need to move the car from parking space No. 4 and it was not causing an obstruction. Nevertheless the security video shows that it was moved again. The 2nd defendant drove the car a few feet from its parked position. The car stopped for a few seconds, somebody, who the judge identified as Kwok Sze Lun, a bellboy, got in and the car drove off. It was a wet evening. The car was driven recklessly. The 2nd defendant lost control and the plaintiffs were severely injured. Mr Wilson Leung's evidence was that he had not given permission either to the 2nd defendant to take the car or to Mr Kwok to leave the premises. The judge specifically stated in his judgment that he was satisfied that Mr Leung had told the truth in his evidence. The judge had himself questioned Mr Leung and observed him closely.

The appeal

9. In a late amendment to the Notice of Appeal, the appellant had sought to raise a point as to the use which had been made of the witness statements of the 2nd defendant who had not given evidence. On the opening of the appeal, counsel for the appellant indicated that the new point was not to be pursued after all.

10. The point argued on the appeal was that the law as to vicarious liability had been fundamentally changed as a result of the decision of the House of Lords in *Lister and others v Hesley Hall Ltd* [2001] 2 WLR 1311. It was said that the judge had applied the old law and that if the law as expounded in the Lister case were applied, the hotel would be held vicariously liable for the negligent driving of the 2nd defendant.

The Lister case

11. The Lister case concerned the liability of the owners and managers of a school for sexual abuse committed by the warden of a boarding house of that school. The warden had clearly committed acts which were not merely tortious but criminal and well contrary to the instructions and intention of the owners and managers of the school. Nevertheless, the question which the House of Lords had to determine was whether Hesley Hall Ltd was vicariously responsible for those acts committed by the warden.

12. Their Lordships took as the starting point the exposition of the law of vicarious liability in *Salmond, Law of Torts* 1st Edition 1907, as repeated in *Salmond and Heuston on the Law of Torts*, 21st Edition. The statement which was described as being the classic statement of the concept was:

"A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master."

The text also contains the following:

"But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes - although improper modes - of doing them."

13. The speeches in the House analysed many of the cases on vicarious liability. In particular *Lloyd v Grace, Smith & Co* [1912] AC 716 and *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716. Lord Steyn pointed out at page 1319 that the Salmond formulation was crucially dependent on identifying what specific act the employee was engaged upon. In this respect he derived considerable help from the quotation from Diplock LJ's judgment in *Ilkiw v Samuels* [1963] 1 WLR 991 at 1004 which was cited by Scarman LJ in *Rose v Plenty* [1976] 1 WLR 141 at 147-148.

14. The same passage from Diplock LJ's judgment in *Ilkiw v Samuels* was also cited by Lord Clyde at page 1327. He did so in the context of saying that in considering the scope of the employment a broad approach should be adopted.

15. Lord Hobhouse at page 1332 spoke in terms of employers being liable for an employee's tortious act or omission because the employer had entrusted the performance of the employers' duty to the particular employee. He concluded at page 1334A-B after a review of the cases saying:

"All these cases illustrate the general proposition that, where the defendant has assumed a relationship to the plaintiff which carries with it a specific duty towards the plaintiff, the defendant is vicariously liable in tort if his servant, to whom the performance of that duty has been entrusted, breaches that duty."

Lord Millett, again, also referred to the judgment of Diplock LJ. He pointed out, as did the other judges, that the mere fact that the employment gave an opportunity to the servant to commit a wrong was not enough to make the employer liable. He, too, also considered the importance of analysing the task upon which the employee was engaged at the time the tort was committed and the duties which he was engaged to perform broadly defined. He pointed out that an employer would normally be liable if

the risk was one which experience had shown was inherent to the nature of the business being conducted.

16. When their Lordships referred to the requirement that attention had to be concentrated upon the closeness of the connection between the act of the employee and the duties for which he was engaged, it was in the context of a proper analysis of the two.

The judgment below

17. When dealing with the question of law of vicarious liability the judge below referred to the line of cases from *Canadian Pacific Railway Co v Lockhart* [1942] AC 591 and *Harvey v O'Dell* [1958] 2 QB 78 and in particular of the approach of the judicial committee of the Privy Council which was cited by McNair J in the latter case:

"... if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it."

18. This was, again, taken from *Salmond on Torts*. This time the 9th Edition. The passage cited follows the passages referred in paragraph 12 above.

19. I can see no grounds for criticising the judge in this approach. In considering, as he clearly did, the connection between the unauthorised and wrongful act and the scope of the 2nd defendant's employment, the judge clearly performed precisely the task which the House of Lords considered he should.

20. The 2nd defendant was not employed to drive Parklane cars. He would only be authorised to move them in special circumstances. Either he would be instructed by Mr Wilson Leung to do so or it would be a matter of necessity because the Parklane car would have been causing an obstruction. On the relevant occasion he had not been told to move the car. There was no cause for him to move the car as it was not causing an obstruction. The only explanation for his driving the car was that he had obtained the keys from the valet parking desk. He had not been authorised to drive the car. He took a bellboy out to buy some food on a wet night. As such, his employment gave him the opportunity to obtain the keys and make use of the car for his own private purposes. The use of the car to drive a bellboy to buy food was equally outside the acts which he had been employed to do, as if he took the car for a joy-ride to the New Territories. In my view, this appeal should be dismissed with costs.

Prompt and due attention to the proper preposition of skeleton arguments

21. Before concluding I should state that although skeleton arguments were filed well prior to the hearing, the day before the hearing there was produced a document entitled

"Notes of appellant's legal argument". When it came to the oral argument it became quite clear that this document was essentially a substitution for the earlier skeleton argument. As it turned out, the manner in which the facts had been set out on pages 7 and 8 of these Notes was disputed. It was not until the mid-morning adjournment that hand written notes as to what were said to be the relevant portions of the transcript were available.

22. This manner of producing skeleton arguments is of no assistance in reaching a proper and speedy resolution of the dispute. Appeals are conducted on the basis that the court's and the parties' attention is drawn to the relevant points prior to the hearing. In that way, attention can be given to those points so that the argument can become focused. Late substitution of skeleton arguments is simply counter-productive.

Hon Woo JA:

23. I agree with the Vice-President.

24. The only close connection between the negligent driving of the 2nd defendant and his employment by the hotel that Mr Griffiths SC, for the appellant, was able to point out are that the 2nd defendant had the opportunity to drive the Parklane car on the night in question and that he, with Kwok Sze Lun, was obtaining food for themselves and their colleagues, which Mr Griffiths described as being for the benefit and purposes of the hotel.

25. The important evidence accepted by the trial judge is that the 2nd defendant was never authorised or permitted to get food for the hotel staff by driving any of the Parklane cars. Though the 2nd defendant was authorised to drive the Parklane cars only when they caused obstruction in the hotel forecourt, and that was for the business and benefit of the hotel, in my view, there was insufficiently close connection between the 2nd defendant's employment and his driving the Parklane car at the material time, causing the accident. He was employed and certainly authorised to drive the Parklane cars to avoid obstruction, and apart from that limited purpose, he was not allowed to drive those cars at all. He might be permitted to go outside the hotel to buy food, but that was not a duty within his employment. At the material time, he was not driving for the hotel's business or purposes or performing any part of his duties towards the hotel or towards the hotel guests that the hotel had entrusted upon him to perform. It would stretch the law of vicarious liability as expounded in *Lister v Hestley Hall* to an unacceptable extent to say that the 2nd defendant's driving of the Parklane car to get food, which was expressly not allowed, as being within the general scope of his employment, however broadly one views that scope. In the circumstances, I am also of the view that the appeal must be dismissed.

Hon Le Pichon JA:

26. I agree with both judgments.

(Anthony Rogers)
Vice-President

(K H Woo)
Justice of Appeal

(Doreen Le Pichon)
Justice of Appeal

Representation:

Mr John Bleach, SC and Mr Mohan Bharwaney, instructed by Messrs Fairbairn Catley Low & Kong, for the 1st Defendant/Respondent

Mr John Griffiths, SC and Ms Liza Jane Cruden, instructed by Messrs Ip Kwan & Co., for the 3rd Defendant/Appellant

Supplementary Examinations for LLB Year I (August, 2003)			
	Name of Paper	Date of Exam.	Time
1	Law of Contract I & II (LLAW1001/LLAW1002)	8-Aug-03	9:30am-1:00pm
2	Law Of Tort I & II (LLAW1005/LLAW1006)	12-Aug-03	9:30am-1:00pm
3	Law And Society II (LLAW1004)	15-Aug-03	9:30am-11:45am

Supplementary Examination Timetables for August 2003

COURSE CODE	COURSE TITLE	EXAM DATE	EXAM TIME	REMARKS
LLAW1001/LLAW1002	Law of contract I/II	8-Aug	9:30 am - 1:00 pm (30 minutes reating time included)	
LLAW1004	Law and society II	15-Aug	9:30 am - 11:45 am (15 minutes reading time included)	
LLAW1005/LLAW1006	Law of tort I/II	12-Aug	9:30 am - 1:00 pm (30 minutes reating time included)	
LLAW2002	Administrative law	12-Aug	9:30 am - 12:45pm (30 minutes reating time included)	
LLAW2005/LLAW2006	Property law I/II	15-Aug	9:30 am - 12:00 noon (10 minutes reading time included)	Restricted
LLAW2007/LLA2008	Equity and introduction to trusts I/II	6-Aug	9:30 am - 1:00 pm (30 minutes reating time included)	
LLAW3001	Introduction to legal theory	6-Aug	9:30 am - 12:45pm (15 minutes reading time included)	
LLAW3021	Fundamentals of evidence and trial procedure	15-Aug	9:30 am - 1 00 pm (30 minutes reating time included)	
PCLL1001	Conveyancing graded assignment	16-Aug	9:30 am - 1:30 pm	
PCLL1002	Conveyancing & Probate examination	15-Aug	9:30 am - 1.00 pm	
PCLL1003	Landlord & tenant examination	18-Aug	9:30 am - 11:30 am	Restricted
PCLL2001	Civil and criminal litigation examination	11-Aug	9:30 am - 12:30 pm	
PCLL2002	Civil and criminal litigation (Opinion writing)	9-Aug	9 30 am - 12:30 pm	
PCLL2003	Civil and criminal litigation (Drafting)	13-Aug	9:30 am - 1:00 pm	

PCLL3001	Commercial law & practice graded assignment 1 (Drafting)	22-Aug 9:30 am - 12:30 pm	Restricted
PCLL3002	Commercial law & practice graded assignment 2 (Letter writing)	21-Aug 9:30 am - 12:30 pm	Restricted
PCLL3003	Commercial law & practice examination	20-Aug 9.30 am - 12:30 pm	Restricted
PCLL7004	Revenue law	7-Aug 9:30 am - 1:00 pm	Restricted
PCLL7006	Professional practice	25-Aug 9:30 am - 12:00 noon	Restricted
PCLL7007	Accounts and financial management	26-Aug 9:30 am - 11:45 am	

THE UNIVERSITY OF HONG KONG
DEPARTMENT OF LAW

BACHELOR OF LAWS SUPPLEMENTARY EXAMINATION
2002/2003

Law of Contract I & II (12 Credits)

(LLAW1001 and LLAW 1002)

Date: August 8, 2003.

Time: 9:30 am – 1:00 pm (reading time of 30 minutes included).

Instructions to Candidates

1. The time for this examination is 3 hours and 30 minutes. The first 30 minutes is reading time.
2. This Examination consists of **6 pages** including this one.
3. All questions carry equal marks. You must therefore allocate your time accordingly.
4. There are **SIX** questions in all. You must select and answer **THREE** questions **ONLY**. No credit will be given for answers to additional questions.
5. This is a 100% open-book examination. Candidates may bring any written materials into the examination room.
6. Any form of plagiarism will be dealt with in accordance with existing University regulations.

Question 1

“The law of contract seeks to establish ‘a level playing field’ by discouraging the use of unfair means by one party in bringing about an agreement”

Basing your answer on decided cases, comment on the methods by which the law achieves such protection and the limitations, if any, of such methods.

Question 2

Consider the following quotation and write an essay that states whether you agree or disagree with the quotation and why. You should justify your reasons by using examples from decided cases.

“The doctrine of consideration is a fiction, lacks coherence, and serves no useful purpose in the modern law of contract. It would be advantageous to abolish the requirement of consideration and rely more upon the doctrine of intention to create legal relations to determine the enforceability of an agreement.”

Question 3

Mr. Li wanted to redecorate his flat and invited decorators to give an estimate of the cost. On April 1, Mrs. Wong (an experienced decorator) came to see Mr. Li. After measuring and showing him samples, she returned to her office and did some calculations. That afternoon she sent Mr. Li an email that listed the work he wanted done, specified the materials that would be used, and stated:

“I offer to redecorate your flat, including all labour and materials listed above, for \$100,000. To accept this offer, give me a cheque for 10% of the price. When I receive your check I will start ordering the materials.”

Mr. Li thought this was an excellent deal and immediately emailed Mrs. Wong: “I accept your offer and will mail you the cheque.” He put the cheque for \$10,000 in the postal box at 9:00 a.m. on April 2.

At 10:00 a.m. on April 2, Jim Tang (a new decorator) came to see Mr. Li. Hoping to get an even better price, Mr. Li showed Jim the email he had received from Mrs. Wong. Jim boasted: “I bet that I can do the same job for

only \$80,000.” Mr. Wong responded: “I accept! But I want a written contract that lists all the same work and materials that Mrs. Wong listed.” Jim returned to his office to prepare a written contract. He then discovered that the materials were more expensive than he thought and he immediately emailed Mr. Li the following message: “I have to charge you \$90,000. I will assume that you agree to that price unless I hear otherwise from you by tomorrow.” Mr. Li noticed an email from Jim in his computer’s in-box that afternoon but did not read it because he had so many other emails to read.

On the evening of April 2, Mr. Li telephoned Mrs. Wong and said: “Please tear up my cheque when you receive it as I am using a different decorator”. Mrs. Wong (who had not yet received the cheque) was furious and threatened to sue for breach of contract.

On April 4, Jim brought Mr. Li a written contract that specified the same work and materials as Mrs. Wong’s email and a total price of \$90,000. Mr. Li claimed that they had already agreed on \$80,000 but Jim insisted that the agreed price was \$90,000, pointing to a copy of the email he had sent Mr. Li on April 2.

Advise Mr. Li. He wants to know: (1) if a contract has been formed between himself and Mrs Wong; and (2) if a contract has been formed between himself and Jim and if so, at what price.

Question 4

Mr. Chan operates his own business, known as “Chan Auto Repair Company”. Mr. Chan is often asked to tow cars that break down. This is tricky work and accidents can happen. He has recently become concerned about possible lawsuits and wants to protect himself from liability. Therefore, last month, he had the following notice painted on the back and both sides of his tow truck:

“All towing is done at the customer’s own risk. Chan Auto Repair Company accepts no liability for any damage, injury, or consequential loss, howsoever caused, while a car or truck is being towed.”

Originally Mr. Chan planned to print the notice in both Chinese and English. However, because of the limited space on his truck, the notice would be rather small if printed in both languages. Since most of his customers speak English, Mr. Chan decided to print the notice only in English, in the largest print that would fit on the back and sides of the tow truck.

Susan Ng drives an expensive but temperamental sports car, which often breaks down. One rainy night, Susan drove to the airport to collect her mother, who was visiting her from Beijing. (Susan's mother is elderly and speaks only Mandarin, so Susan did not want her to take public transport.). Unfortunately, on their way home, Susan's car broke down as she was driving up a steep hill. Susan used her mobile phone to call Chan Auto Repair Company, as Mr. Chan had given her good service on three previous occasions.

Mr. Chan arrived promptly and determined that Susan's car needed to be towed to his garage to be repaired. He offered to tow her car and to give Susan and her mother a ride home, which Susan happily accepted. It was rather miserable standing in the heavy rain so Mr. Chan attached Susan's car to his tow truck as quickly as possible. Because he was working so fast, he failed to notice that the clip on the towing gear was not shut tight. The clip suddenly slipped open and the car fell and rolled backwards down the hill, directly over Susan's mother's foot (breaking three toes). The car then rolled through the railing and into a ditch, far below the highway. The accident caused \$50,000 worth of damage to Susan's fancy sports car.

Susan and her mother have demanded compensation but Mr. Chan refuses to pay for anything, insisting that he is protected from liability by the notice.

Advise Susan and her mother.

Question 5

After his retirement in 2002, Peter Mok received a bonus of 2 million dollars. He was still trying to figure out how to spend his retirement years when he found the following advertisement in the local paper:

"Spend your retirement years in absolute luxury. A brandy new development at Cape Cantata consisting of serviced apartment and studios-- all with balconies—all constructed in Victorian style to cater for all your retirement needs. Completion date, Sept 2002. For further details please contact John Chan at 'cchan@cantatadev.co.uk'"

Peter became very interested. He wanted a home with his wife Josephine on the beach where he could retire while remaining physically active and fit. Peter spent the next two days holding discussions with John about the sporting facilities at Cape Cantata. He was given detailed information and glossy brochures showing the location, the surrounding facilities, the size of the flat and the nature of the out-door activities. Peter intended to become a member

of the Cape Cantata Sports Club which offered him the chance to play golf, tennis, regular swimming and deep-sea diving. According to John Chan, an experienced property developer, Cape Cantata would be a most ideal retirement spot with five-star facilities.

John Mok offered to take Peter to see for himself the wonders of Cape Cantata but Peter declined saying he would take him on his word. At that point Peter paid a deposit of \$1 million, signed the sale and purchase agreement and left. The written contract indicated the size of the flat and other specifications but made no mention of the sporting and other facilities.

Peter spent much of the time preparing to move into his new home. He bought a variety of sporting equipment for himself and his wife at a cost of \$ 250,000 and ordered a motorised luxury boat at \$0.5 million. Two weeks before the completion date Peter and his wife Josephine decided to visit Cape Cantata arriving there in the evening. They spent a night at the White Sands Hotel and the next morning they were amazed to find that although the flats had been built in accordance with the original specifications, there was no sea anywhere in the neighbourhood and no sporting facilities either. On further inquiry Peter was told by a local property agency that although sporting facilities were originally in the plan, planning permission for such facilities had been denied to the Cape Cantata developer. Peter returned to Hong Kong feeling cheated and disappointed. He could not sleep for weeks and only after taking sleeping pills. He thought his retirement plans had been totally ruined and his money lost.

Now Peter wishes to claim back his \$1 million with interest. He also wants compensation for the cost of his sporting equipment, the cost of the motorized boat and damages for disappointment. Advise Peter

Question 6

Martin Yeung has planned well for his wedding party. The wedding ceremony will be held on Saturday, 30 August 2003, at the Lady of Lourdes Church and the party, that evening at the Metropolis Hotel, one of Hong Kong's leading hotels. Martin has booked the banquet hall in the Metropolis with a sitting capacity of 250 guests, and 5 suites for his out of town guests. Martin has agreed to pay \$10,000 for the hall, \$125,000 for the guest dinner, and \$15,000 for the 5 suites. Under the terms of agreement with the hotel, Martin is to pay \$ 25,000 on signing the agreement, \$50,000 on 25 June, and the balance on 30 August. Martin signed the contract and made the initial payment of \$25,000.

On 9 August, Martin was out shopping with his sister Clara when he decided to stop for tea at the Mandarin Café. In the same Café was Stella, his intended bride, with three men having coffee and cakes. Martin and his sister joined them and in the course of the conversation Stella revealed to Martin that she was holding a farewell tea party for her former boyfriend as she would have no further contact with him after the wedding. Martin, who was totally unaware of Stella's previous relationship, became very angry. He immediately left the Café without saying a word. He kept saying to himself as he walked towards his car, "the wedding is off, the wedding is off". When he phoned up the Metropolis Hotel that evening to cancel the wedding party he was firmly told that the hotel was not prepared to cancel the party as it was experiencing a serious shortage of patrons.

Martin wants to know whether he would be legally liable to the hotel if he decides to cancel the wedding party despite the hotel's refusal.

THE END

UNIVERSITY OF HONG KONG

Faculty of Law

AUGUST EXAMINATION PERIOD 2003

LAW OF TORT I and II (LLAW1005/LLAW1006)

DATE: August 12, 2003

TIME: 9:30 am – 1:00 pm
(30 minutes reading time included)

LENGTH: 3 hours plus 30 minutes reading time during which no answer may be begun but you may make notes on the question paper

ANSWER ANY FOUR QUESTIONS

STRUCTURE OF THE PAPER: There are 9 questions in the paper There is a line across the page after each question. The words “END OF THE PAPER” appear after the last question. There are 5 PAGES in this paper

-
-
1. Andrew’s wife Belle is pregnant. The arrangement made with the hospital is that when the baby begins to be born (when Belle goes into labour), Andrew will phone for the ambulance. But at 2 am one night Belle’s labour begins – a few weeks early. Belle panics. She says “you must take me to hospital NOW”. He tries to persuade her to wait for the ambulance but she becomes hysterical so Andrew agrees.

Andrew is very nervous, his car is rather old, and the weather is unpleasant – it is raining hard. The engine stops when the car goes through a pool of water, and Andrew is too nervous to do the right thing to re-start it. It is stranded in the middle of the road, and another car comes along, driven by Charlotte, with her friend Doris. Doris has been taking the drug ‘ecstasy’. It is a serious offence to take this drug. The drug makes Doris very reckless, and she has been urging Charlotte to drive faster and faster. Charlotte did not take any drug, but she is driving without any insurance as she knows (which is also a criminal offence).

Charlotte’s car runs into Andrew’s car.

Andrew is unhurt, but Belle, Charlotte and Doris are all injured. They all sue Andrew. Advise him.

-
2. Hattie is a patient in the Prince of Scotland Hospital. By mistake the doctor who is treating her writes down the wrong dose of the medicine. The nurse, Judy, is very newly qualified, and, although she is surprised at the dose prescribed believes that the doctor must be right – or at least she is too shy to ask for confirmation. The impact of the wrong dosage on Hattie is serious. It causes paralysis to her left side which gives her a strange appearance.

Hattie's brother, Kevin, whom she has not seen for 10 years because he has emigrated to Canada and has not been in touch with the family, unexpectedly comes to Hong Kong and when told that Hattie is in hospital comes straight to see her arriving about 3 hours after the medicine took its unfortunate effect. He is totally shocked to see his sister looking so strange and ill and he suffers nervous shock and illness.

Hattie lives with her mother, Lily, who does not see her for a few days and when she does so has been warned about her strange appearance. The paralysis means that Hattie has to be given 24 hour nursing and the family cannot afford professional help. So Hattie's mother has to nurse her. After about 3 years of constantly looking after Hattie the mother develops a nervous illness as a consequence of the mental strain of watching her daughter suffer.

Advise Hattie, Kevin and Lily about their chances of recovering damages. You may assume that the doctor was negligent – but that he was not employed by the hospital and has disappeared so cannot himself be sued.

-
3. A recent report discussed the safety record of roller-coasters and other forms of funfair ride. You are approached by the management of Motion Park – a big theme park with funfair. They want you to advise them as to whether there is any possibility of their being liability in tort if any of the following situations (which are described as having occurred somewhere in the report) should happen at their Park. The examples given have little detail, and you should explain the circumstances in which such an accident might give rise to liability (if you think it could ever do so):

- (i) A child aged 6 died because she choked on a sweet while on a roller-coaster; the minimum age limit for the particular ride was 10
- (ii) During the operation of a 'big wheel' ride, it was normal for each car to stop for a minute when at the top so that the people inside could look at the view. One rider, an elderly woman, did not realise that this was normal and thought that there was a fault in the machinery, and was so frightened she had a heart attack
- (iii) in a totally unexplained way a piece of metal came away from a ride and caused serious cuts to one of the riders.

-
4. There is an area of Hong Kong set aside by the Town Planning Board for 'hazardous industries'. Near the area is a housing estate. The whole area is rather noisy and smells are not uncommon. The Town Planning Board designates an area very close to the housing estate – previously used for commercial purposes - as an extension to the extra-hazardous industries area. The result of this is that the noise of lorries etc increases further, and smells get worse.

In the housing estate live many families including the Chan family. Their flat was given to Mrs Chan by her mother as a wedding present, and it is registered in Mrs Chan's name. In the flat live Mrs Chan and her husband, Mrs Chan's mother and 2 children under 5. One of the children suffers from serious breathing problems.

The Chan's complain that since the change of use of the neighbouring area (from commercial to hazardous industry) they have noticed the following consequences: the sick child is much worse though the other child is fine. Mrs Chan's mother cannot

sleep at night – she has has gone to bed at 9 pm all her life and now finds that the area is too noisy for her to sleep before 12. Mrs Chan feels no effect of the change in noise levels, partly because she is a bit deaf. But her husband finds that the noise and the smells are becoming intolerable.

The Chans complain “We know the area was bad before but even by those standards it is worse. We are seriously thinking of selling the flat and moving but the same noise and smells mean that it is almost impossible for us to sell the flat so we feel trapped there. And the sick child cannot do her school work properly and we are having to pay medical fees constantly. And the family is constantly quarreling because everyone is so unhappy”.

Advise the Chans on possible liability to them in nuisance on the part of the largest business, which is responsible for most of the noise and smell and has moved into the area since the decision of the Town Planning Board..

5. James is writing a Ph.D. in the Department of Political Economy at the University of Kowloon; its title is “A Mickey Mouse Approach to Mickey Mouse” and it is about the Disneyland project on Lantau Island. His final thesis is read by his supervisor and by 2 examiners only. But one of the examiners is a friend of some people mentioned in the thesis and tells them about it – thinking they will find it funny, but they are very angry and threaten to sue James and the examiner, Peter, in defamation. Among the statements they are complaining of are:
- (i) “The proposal was thought up by the foolish X” (X was named and was a senior member of the civil service at the time of Disneyland was thought up).
 - (ii) “It was financed by the Hong Kong Government and a major contract given to a company owned by the brother of a Policy Secretary”
 - (iii) “It was opposed by the Greening Hong Kong Movement – a collection of romantic, ignorant so-called environmental experts and people with nothing better to do with their time than cause trouble for the government”.

The following are thinking of suing:

- (a) X
- (b) The Financial Secretary - who says the statement about a Policy Secretary referred to him.
- (c) All the 10 members of the Greening Hong Kong Movement executive and all the 1000 ordinary members. One of the executive members is a professor of environmental law at the University of Hong Kong and is particularly angry. An ordinary member is a well-known regular demonstrator against government policies.

Other information that might be relevant:

One of the contracts was given to a company in which the brother of the Financial Secretary has a 40% share-holding.

The name of the Financial Secretary is totally different from that of his brother and only members of the actual family know they are related.

James used to be a member of the Greening Hong Kong Movement but was asked to leave when he developed a habit of quarrelling with members during meetings.

Discuss the likelihood of actions for defamation succeeding.

6. Ben has been offered employment as a glazier (glass installer) by a big construction company. The contract - which he is studying - says that he would be described as "independent contractor". He would be required to work for at least 30 hours a week for the company. The company does not mind if he works for someone else after this time provided there is no work for the company itself. He would be paid a fixed amount but if he worked more than 40 hours a week would be paid extra which would be related to the square footage of glass installed. He must do the work himself, but the company has said informally that he would be at liberty to bring someone on site to help him – and would have to pay that person himself. He would be entitled to 3 weeks leave but without pay each year. The company would supply the equipment and tools.

Ben wants you to explain what the implications are of being an independent contractor (discuss implications in the law of tort and employees' compensation). Also you should advise him whether on the facts as you have them he would actually be treated by the courts as an independent contractor.

7. Answer BOTH (a) AND (b). Part (a) accounts for 70% of the marks for the question:
- (a) Explain the concept of 'remoteness' in the law of tort; illustrate your answer by concrete examples and cases
 - (b) John was involved in an accident through no-one's fault. When he went to the hospital he was seen by a doctor who failed (negligently) to realise all the possible causes of the pain. He sent John away with painkillers. If the doctor had realised the true cause of the pain there was a 50% chance that the cause could have been cured. Now John is likely to live with this pain for the rest of his life. Can he claim compensation from the doctor?
-

8. Jessie has broken up with her boyfriend, Tony. He is very angry and jealous. On a number of occasions he has phoned her on her mobile phone. Once he said, "one of these days I shall scar that beautiful face of yours". And on another occasion he said "If you don't come back to me today, I am going to rape you". Jessie says that she knows that Tony works overseas a lot so she never quite knows whether these calls come from Singapore, or Canada, or from just round the corner from where she is. This makes them even more alarming.

Recently he has become bolder. She tried to leave her flat one day but found him standing right outside the door so she could not get out without pushing him aside. He said nothing and remained absolutely still. She went indoors and stayed there for an hour until Tony left.

On another occasion she was sitting outside a restaurant with friends when Tony came up behind her and kissed her on the cheek – very gently – and whispered "I love you". He then went away. The friends said "How romantic – he must really love you".

And once he left a cloth outside her flat. When she picked it up she found her hand got covered in what she thought was blood. A piece of paper fluttered to the ground – on it there was the message “My heart’s blood – my heart is bleeding for you. Tony”. Jessie was disgusted and felt ill for the rest of the day. In fact, as she later realised, it was tomato sauce.

Advise Jessie as to whether she can bring any action in tort against Tony.

9. Molly leases a restaurant in a shopping centre. By informal arrangement with the owner of the shopping centre (ShopCo), Molly also has some tables set outside her restaurant. The area where these outside tables are is swept every night and during the day once every 4 hours by the independent cleaning company (Kleenit) employed by the owners. One day a person who is eating at the restaurant drops some oily food just inside the area which Molly uses for her tables. She notices it and because she is very busy (and because she realises that the next round of cleaning should take place in 15 minutes time) she just places a plastic sign which says “Take care” over the spilled oil. An employee of ShopCo sees the sign, and, thinking it looks very untidy, takes it away.

25 minutes later the cleaning company has still not come by (in fact that day they completely omit one cleaning session). Molly is aware of this but has been too busy to check on the oil spill. A child (Peggy) comes running by and takes a short-cut through the restaurant area and steps into the oil. Peggy falls over and knocks over a table and a bowl of hot soup spills over another child, Johnny, who is having lunch at the table with his mother.

Advise whether he can bring any action in tort against Molly or ShopCo.

END OF THE PAPER

University of Hong Kong
Department of Law

LAW AND SOCIETY II (LLAW1004)
Examination (Supplementary) (2002-03)

Date: 15 August 2003

Time: 9.30 a.m. – 11.45 a.m. (including 15 minutes reading time)

Instructions to candidates

1. This examination paper consists of five (5) questions.
2. Candidates are required to answer any three (3) questions. All questions carry equal marks.

Questions

1. "The conversion of egalitarian band and village peoples into peasants who pay rent and taxes transformed every aspect of human existence. With it arose the distinction between rich and poor and rulers and ruled. This transformation was not the result of any sudden conspiracy of the strong against the weak, nor of any sudden collapse of the charitable components of human nature. It resulted from recurrent evolutionary processes that led to parallel lines of development in several different parts of the globe." Discuss.
2. Construct a debate between:
 - (a) Plato and Aristotle; or
 - (b) Hobbes and Locke.
3. Compare and contrast the political systems of
 - (a) feudalism;
 - (b) absolutism; and
 - (c) liberalism.[Please answer all of (a), (b) and (c).]
4. "Economic development is impossible without the Rule of Law." Discuss.
5. Did the concept of human rights exist in the Confucian legal culture of traditional China? What do you think are the future prospects of human rights in China?

[the end]

Main Examinations for LLB Year I (December 2003)			
	Name of Paper	Date of Exam.	Time
1	Legal System (LLAW1008)	16-Dec-03	9 30am-12 00 noon

Examination Timetable 1st Semester 2003-2004 December 2003/January 2004

COURSE_CODE	COURSE_TITLE	EXAM_DATE	EXAM_TIME_STR	REMARKS
LLAW1008	The legal system	16-Dec	9:30 am - 12:00 noon (30 minutes reading time included)	
LLAW2001	Constitutional law	17-Dec	9:30 am - 11:30 am (15 minutes reading time included)	
LLAW2003	Criminal law I	19-Dec	9:30 am - 12:15 pm (45 minutes reading time included)	
LLAW2009	Introduction to PRC law	23-Dec	9:30 am - 11:45 am (15 minutes reading time included)	
LLAW3010	Business associations	15-Dec	2:30 pm - 5:15 pm (20 minutes reading time included)	
LLAW3028	International trade law I	18-Dec	9:30 am - 12:30 pm (30 minutes reading time included)	
LLAW3030 ^h	Introduction to private international law	19-Dec	9:30 am - 12:30 pm (30 minutes reading time included)	
LLAW3043	Principles of family law	17-Dec	2:30 pm - 4:45 pm (15 minutes reading time included)	
LLAW3044	Public international law	16-Dec	6:30 pm - 9:00 pm	
LLAW3065	Information technology law	22-Dec	9:30 am - 12:00 noon (15 minutes reading time included)	
LLAW3081	Commercial law in Mainland China	17-Dec	9:30 am - 12:00 noon (20 minutes reading time included)	
LLAW6109	Public international law	16-Dec	6:30 pm - 9:00 pm	
LLAW6128	International trade law I	18-Dec	9:30 am - 12:30 pm (30 minutes reading time included)	
PCLL1001	Conveyancing graded assignment	8-Dec	2:30 pm - 6:30 pm	
PCLL1002	Conveyancing and probate examination	11-Dec	9:30 am - 1:00 pm	
PCLL3001	Commercial law & practice graded assignment 1 (Drafting)	17-Dec	2:30 pm - 5:30 pm	Restricted
PCLL3004	Commercial law and practice exam 1 (Knowledge)	15-Dec	9:30 am - 11:30 am	Restricted
PCLL6001	Professional practice exam 1	20-Dec	9:30 am - 11:15 am (15 minutes reading time included)	Restricted
PCLL7007	Accounts and financial management	23-Dec	2:30 pm - 4:30 pm	

The University of Hong Kong
Bachelor of Laws: First Examination
LLAW1008
Legal System
(2003-2004)

16 December 2003

Time: 9:30 pm - 12:00 noon
(First 30 minutes reading time)

This is an open book examination. The paper consists of 5 questions and 11 pages (including the case). You have to answer TWO questions: Question 1 in Part A, which is COMPULSORY, and one question from Part B.

YOU MUST PASS PART A IN ORDER TO PASS THIS PAPER.

PART A (COMPULSORY)

1. Professor Dumbledore is a leading academic specialising in tax law at the University of Hong Kong. In the tax year of 2002-03, Professor Dumbledore claimed a deduction of \$100,000 for books and journals from his taxable income. He argued that the expenditure was necessary for generating his income, as he has to regularly update himself for law teaching. The Director of Inland Revenue disallowed the claim on the ground that the expenditure was for his own benefit and that he could have access to these books and journals in the Law Library. On appeal, the Inland Revenue Board of Review held:
 - (i) The Full Court held in *IRC v John* [1968] HKLR 123 that expenditure on books and journals were not deductible items for the purpose of income tax.
 - (ii) *IRC v John* was approved by the Court of Appeal in *IRC v Merry* [1992] HKLR 345, the issue of which was whether attendance at overseas conferences was deductible expenditure. In disallowing the claimed deduction, the Court of Appeal stated:

“Attendance at overseas conferences was mainly for the personal benefit of Professor Merry. While we had no doubt that it was a laudable activity, its nature was the same as expenditure on books

and journals to update oneself, which, as held in *IRC v John*, was not deductible item.”

- (iii) In *IRC v Harry* [1994] HKLR 567, where a secondary school teacher claimed for deduction for purchasing reference books, the Court of Appeal, referring to *IRC v John* and *IRC v Merry*, disallowed the claim on the ground that these reference books were purchased for the self education of the teacher and not necessary for generating his income. On further appeal, the Privy Council allowed the appeal on the ground that the reference books were indeed purchased by the teacher as the career master of the secondary school and were therefore expenditure incurred in the discharge of his duty” [1995] AC 456. In its judgment, the Privy Council stated:

“Given the decision we have reached, it is unnecessary to decide whether expenditure on books could be a deductible item for the purpose of income tax. Given that education is a life-long process, we would have thought that expenditure by a teacher or an academic on books to update himself so that he can become a more effective teacher or academic is something which the law should encourage, and for that purpose it should be regarded as expenditure necessarily incurred for generating income and be deductible from income tax. However, as we note above, it is not necessary for us to decide this question.”

- (iv) In *IRC v Malfroy* [1996] 2 AC 444, where an academic from the University of Leeds claimed for deduction for purchase of books and journals, the House of Lords decided not to follow the Privy Council decision in *IRC v Harry*. It held that the Privy Council decision was not binding on the House of Lords, and that the Privy Council had confused beneficial activity from activity necessary to generate income.
- (v) The dictum of the Privy Council in *IRC v Harry* was followed by the Australian High Court in *R v Snape* (1997) 123 ALR 456 and by the New Zealand Court of Appeal in *IRC v Ron* [1999] 2 NZLR 333.
- (vi) In 2001, the Privy Council, in an appeal from Trinidad, held that expenditure on books and journals was a deductible item. It confirmed its view expressed in *IRC v Harry*. Lord Weasley, who was also a judge in *IRC v Malfroy*, stated:

“Having reviewed all the authorities and the modern trend of development in the common law world, I am convinced that our decision in *IRC v Malfroy* should no longer be followed. It is an unduly restrictive decision which does not stand well with modern trend of encouraging life-long education.”

- (vii) Lord Gryffindor, who was also a judge in *IRC v Malfroy*, concurred. Sir Neeves, who did not decide *IRC v Malfroy*, delivered the only dissenting judgment. Sir Neeves said:

“I was disturbed that we could lightly depart from a well-reasoned judgment in *IRC v Malfroy* delivered only 5 years ago merely because there was a change in composition of the court. Certainty of the law will now go out of the window. I do not see any reason to depart from *IRC v Malfroy*. It is a strength of the common law that it comes from the same source but it can blossom in different directions in different parts of the common law world. As far as English law is concerned, I am convinced that *IRC v Malfroy* remains good law. I should add that we are sitting as the court of final appeal of Trinidad and not an appeal court from the House of Lords. We simply have no jurisdiction to cast doubt on what English law is, and the majority judgment of this Board should be considered in this light.”

- (viii) In light of these authorities, the Board of Review considered itself bound by the decision of the Full Court in *IRC v John*, the Court of Appeal decisions in *IRC v Merry* and *IRC v Harry*. The Privy Council decision in *IRC v Harry* was not directly on point, and this line of authorities was further affirmed by the House of Lords in *IRC v Malfroy*, which was binding on Hong Kong courts. Accordingly, the claim of Professor Dumbledore for deduction of expenditure for books and journals from his income tax was disallowed.

Professor Dumbledore decided to appeal against the decision of the Board of Review to the Court of Appeal. **You are asked to prepare an argument in support of his appeal. In your argument you should also highlight the weaknesses of the argument and your possible reply.** (You can assume that there is no relevant statutory provision and the issue is to be determined solely by the common law.)

PART B (YOU HAVE TO ANSWER ONE QUESTION FROM THIS PART)

2. Read the attached case of *Hospital Authority v C* [2003] 1 HKLRD 507 (attached).
- (1) Prepare the holdings of the case (it is not necessary to prepare a summary of facts).

- (2) Explain on what basis the court decides that it has jurisdiction to authorize medical intervention;
- (3) Explain the right, if any, of an unborn foetus and his father;
- (4) Set out the ratio of this case and explain why you have chosen to formulate the ratio this way;
- (5) Comment on whether the result would be the same if the father was also worried that the child may be born handicapped (and the medical opinion is that there is a 50% chance that the child would be born handicapped) and the father would have difficulty in taking care of a handicapped child. Explain your decision in light of the case law referred to in this judgment.

3. Mike is a senior partner of a solicitors firm. He has been in practice for over 30 years and specialises in commercial work. Apart from one appearance in a short trial at the District Court when he was a newly qualified solicitor, he has never appeared in court in the last 30 years.

Apart from legal practice, Mike is also very active in the business field. In 1996, he purchased over 20 properties in Hong Kong at the height of the property market, and speculated heavily in the securities and bond market in late 1997. As a result of the Asian financial crisis, he was heavily in debt and by January 2000, he owed various banks a total amount of \$96 million.

In order to repay his debt, Mike, together with his brother Steve, created a series of false transactions through 6 different companies they controlled, and bribed Low, a long term business friend who was in charge of the loan department of Kowloon Bank, to get the Bank to lend him \$100 million, which was secured by various fictitious stock in trade created by Mike.

In May 2000, the questionable loan to Mike was discovered by the internal auditing team of Kowloon Bank. The Independent Commission Against Corruption (ICAC) was brought in to investigate the matter discreetly.

In July 2000, a further market crash in the stock market destroyed the last hope of Mike to salvage his business. Various creditors, including Kowloon Bank, petitioned for his bankruptcy. In September 2000, the court made a bankruptcy order against Mike.

In October 2000, the ICAC arrested Mike, Steve and Low and charged them with 56 counts of false accounting, issuing forged documents, bribery and conspiracy to defraud. The maximum sentence of these offences ranged from 7 years' to life imprisonment. Shortly after his arrest, Low fled to New Zealand. He was subsequently arrested in New Zealand and extradited to Hong Kong in March 2001. As a result of an agreement with the prosecution, Low was given immunity and became a key prosecution witness against Mike and Steve.

Mike applied for legal aid in March 2001. Although Mike was bankrupt by then, the Director of Legal Aid remained suspicious of Mike's financial circumstances, and asked for details of Mike's financial position. Mike was reluctant to disclose all of his financial documents, as some of these documents would be damaging evidence against him in the criminal trial and he was worried that the Director of Legal Aid would pass these documents to the prosecution. In the absence of full and frank disclosure, the Director of Legal Aid refused to grant legal aid.

The criminal trial against Mike began in May 2002. One week before the trial, Steve committed suicide. Before he committed suicide, Steve transmitted \$1 million to Mike's bank account in Switzerland as "the last thing he can give to his closest and only relative on earth." Mike was very close to Steve and was heavily disturbed by the death of his brother.

On the first day of the trial, the trial judge was concerned that, given the complexity of the trial, Mike might not have a fair trial if he was not legally represented. Although Mike was a solicitor, the court noted that he had very little trial experience. The case was adjourned to allow the Director of Legal Aid to reconsider granting Mike legal aid.

The Director then found out about the \$1 million transmitted to Mike by Steve before Steve committed suicide. As a result, the Director agreed to grant legal aid only on condition that Mike would pay a contribution of \$0.5 million. When Mike was informed of the decision of the Director, he instructed his bank in Switzerland to transfer the \$1 million to Steve's mistress in Taiwan "as the only thing he could repay his dearest brother". Mike then informed the Director that he had no financial resources to pay the contribution. The Director refused to change his order and hence Mike was not represented in the trial. The trial judge was provided with full details and having considered *R v Wu Wai-fung* [2003] HKEC 1137 he did not consider it appropriate to order legal aid for Mike without contribution.

The trial of Mike lasted for 8 months. Given the widespread publicity about this case, the prosecution was represented by the Director of Public Prosecution himself, who was a senior counsel, leading 3 other Government counsel. A total of 150 prosecution witnesses were called. Low gave very damaging evidence against Mike, and the judge had warned the jury that the evidence of Low should be treated with caution, as Low would have a natural tendency to put all the blame on Mike and to minimize his own part in the criminal activities. Mike experienced considerable difficulties in the first two months of the complicated trial. However, he picked up reasonably well and by the 5th month of the trial, he became a reasonably seasoned trial lawyer. Mike was eventually found guilty of all 56 offences and was sentenced to a total of 30 years of imprisonment. He was aged 60 at the time of the sentence and it is quite likely that he would have to spend the rest of his life in prison.

Mike has appealed against his conviction on the ground that he was denied a fair trial because the Director of Legal Aid refused to grant him legal aid free of contribution and the trial judge has failed to order legal aid for him without contribution.

Advise Mike of his chances of success in light of the decision of *R v Wu Wai-fung*. *[In a legal advice you should provide your client with your independent and impartial assessment of the merits of the case, pointing out both the strengths and the weaknesses of your client's case, and making an assessment of how the court would likely decide the case.]*

4. “Whereas the ‘mosaic’ of the common law is kept in a constant state of adaptation and repair, the doctrine of precedent, the ‘cement of legal principle’, provides the necessary stability.” **Discuss this statement in light of the nature of the common law and how common law reconciles retrospective operation with fairness to the litigating parties.**

5. The Secretary of Justice was invited to give a speech at Tsinghua University on the characteristics of the common law system and how it compares with the civil law system. **You are asked to draft the speech, highlighting 3 areas of contrast between the civil law and the common law, and the strengths and weaknesses of the common law system.**

***** END OF PAPER *****

A	Hospital Authority	Applicant
	and	
	C	Respondent

B

(Court of First Instance)
(Miscellaneous Proceedings No 479 of 2003)

F W suffered irreversible brain damage and went into a deep coma. W was pregnant at the time and her husband, H, stated that W would have wished to remain on a life support system until the foetus became viable and a healthy child could be born. The Hospital Authority (the HA) took this into account and maintained W on a life support system.

G When the pregnancy reached 32 weeks, the HA felt that a caesarean section was now fully viable; and because W's condition was growing increasingly unstable, any delay in performing the operation would endanger the child. The HA therefore sought a declaration to authorise doctors to perform an emergency caesarean. However, H, on the basis of spiritual advice, objected to an operation being performed immediately. H felt that to ensure the health of W and the baby, the operation should be delayed by 10–14 days.

[The next page is 512]

16. However, the husband, who impressed me as a man of considerable dignity and fortitude, strongly opposed what he believed to be a premature delivery. As I have earlier said, the husband had been told by his spiritual guide that further time was needed to marshal spiritual healing powers and it was therefore essential that the birth be delayed at least until 10 February 2003. Just as the doctors sought the earliest possible delivery for the welfare of the child, the husband was convinced that only a further delay would ensure that same welfare for both mother and child.

The jurisdiction of the court and the principles on which it should be exercised

17. In tragic circumstances of this kind, with the mother so severely brain damaged and the life of an unborn child at stake, it is perhaps natural to go directly to the interests of that unborn child in the belief that those interests must decide the issue. But that is not the common law. Not is it the law of statute. The law, as I understand it, is that a foetus, up to the moment of birth, does not have any separate interests capable of being taken into account by a court considering an application to perform a caesarean section on a pregnant woman carrying the foetus. In short, a court does not have jurisdiction to declare medical intervention lawful *solely* to protect the interests of an unborn child.

18. What the court must look to are, first, the wishes of the mother and, if the mother is incapable of making any such wish, then, and only then, to the mother's best interests. In *Rc MB (Caesarean Section)* (1997) 38 BMLR 175 at p.193, Butler-Sloss LJ, giving the judgment of the Court of Appeal, said the following:

The law is, in our judgment, clear that a competent woman who has the capacity to decide may, for religious reasons, other reasons, or for no reasons at all, choose not to have medical intervention, even though, as we have already stated, the consequence may be the death or serious handicap of the child she bears or her own death ... The foetus, up to the moment of birth, does not have any separate interests capable of being taken into account when a court has to consider an application for a declaration in respect of a caesarian section operation. The court does not have the jurisdiction to declare that such medical intervention is lawful to protect the interests of the unborn child even at the point of birth.

19. But this does not mean that a foetus is to be treated as simply an integral part of the mother, as integral to her as any other organ of her body: a kidney or limb. In *Re A-G's Reference (No 3 of 1994)* [1998] AC 245 at p.255, Lord Mustill accepted that the foetus is a unique organism, albeit living symbiotically:

A There was, of course, an intimate bond between the foetus and the mother, created by the total dependence of the foetus on the protective physical environment furnished by the mother, and on the supply by the mother through the physical linkage between them of the nutrients, oxygen and other substances essential to foetal life and development. The emotional bond between the mother and her unborn child was also of a very special kind. But the relationship was one of bond, not of identity. The mother and the foetus were two distinct organisms living symbiotically, not a single organism with two aspects. The mother's leg was part of the mother; the foetus was not ... I would, therefore, reject the reasoning which assumes that since (in the eyes of English law) the foetus does not have the attributes which make it a "person" it must be an adjunct of the mother. Eschewing all religious and political debate I would say that the foetus is neither. It is a unique organism. To apply to such an organism the principles of a law evolved in relation to autonomous beings is bound to mislead.

20. That recognition, of course, makes the moral dilemma greater. It is a dilemma which has taxed a number of courts in the common law world. In the Canadian decision of *Winnipeg Child and Family Services (Northwest Area) v G* [1997] 3 BHRC 611, in a dissenting judgment, Major J was forced to state that:

... where the harm is so great and the temporary remedy so slight, the law is compelled to act ... Someone must speak for those who cannot speak for themselves.

21. Judge LJ, in the Court of Appeal judgment in *St George's Healthcare NHS Trust v S* [1998] 3 WLR 936 at p.953, recognised that when human life is at stake the pressure to provide an affirmative answer authorising unwanted medical intervention is very powerful. But he recognised that the fundamental principle that has prevailed and must continue to prevail (unless the legislature otherwise directs) is that of the mother's right to self-determination. He said:

In our judgment, while pregnancy increases the personal responsibilities of a woman it does not diminish her entitlement to decide whether or not to undergo medical treatment ... She is entitled not to be forced to submit to an invasion of her body against her will, whether her own life or that of her unborn child depends on it. Her right is not reduced or diminished merely because her decision to exercise it may appear morally repugnant.

22. In my judgment, in respect of a competent woman, this is at present the law in Hong Kong. But what if the woman — as in the present case — is not competent? What if she is incapable of giving

or withholding consent because she has no capacity to do so? In such a case, the woman may lawfully be treated by a doctor provided, in accordance with the doctor's clinical judgment, it is considered to be in the patient's best interests. That this is so in common law has been established by a number of high authorities. For example, in *F v West Berkshire Health Authority* (1989) 4 BMLR 1, a 1989 decision of the House of Lords, the headnote reads (in part):

The court did have jurisdiction [an inherent jurisdiction] ... to make a declaration that the proposed operation was lawful on the ground that in the circumstances it was in the best interests of the patient, and although (Lord Griffiths dissenting) such a declaration was not necessary to establish the lawfulness of the operation, because a doctor could lawfully operate on such a patient if it was in her best interests, in practice the court's jurisdiction should be invoked whenever it was proposed to perform such an operation, since a declaration would establish by judicial process whether the proposed operation was in the best interests of the patient and therefore lawful. In determining whether the proposed operation was in the best interests of the patient the court should apply the established test of what would be accepted as appropriate treatment at the time by a reasonable body of medical opinion skilled in that particular form of treatment.

23. The Mental Health Ordinance (Cap.136) also recognises the lawfulness of treatment taken in the best interests of a patient who is incapable of giving or withholding consent. Section 59ZF of the Ordinance states:

(1) Treatment by a registered medical practitioner or registered dentist may be carried out in respect of a mentally incapacitated person to whom this Part applies without consent ... if that registered medical practitioner or registered dentist intending to carry out or supervise the treatment *considers that as a matter of urgency that treatment is necessary and is in the best interests of the mentally incapacitated person.*

(2) Subject to sub-s.(3), treatment by a registered medical practitioner or registered dentist may be carried out in respect of a mentally incapacitated person to whom this Part applies without consent under s.59ZD(1) if:

(a) after all reasonably practicable steps have been taken by that practitioner or that dentist to ascertain whether or not a guardian has been appointed under Pt.IIIA or IVB responsible for that person, there is, or appears to be, no guardian so appointed; or

A (b) the guardian appointed under Pt.IIIA or IVB has not been conferred the power to consent in a guardianship order under ss.44B(1)(d) or 59R(3)(d).

B (3) Where a registered medical practitioner or registered dentist intending to carry out or supervise the treatment under sub-s.(2) considers that that treatment is necessary and is in the best interests of the mentally incapacitated person, then he may carry out that treatment without the consent of the mentally incapacitated person or that persons' guardian (if any) accordingly. (Emphasis added.)

C 24. The "best interests" of a mentally incapacitated patient are defined in s.59ZA of the Ordinance as the carrying out of treatment in order to:

D (a) save the life of the mentally incapacitated person;

E (b) prevent damage or deterioration to the physical or mental health and well-being of that person; or

F (c) bring about an improvement in the physical or mental health and well-being of that person.

G 25. The term "well-being" used in the definition is a broad, inclusive term and, in my judgment, concurs with the meaning given in the common law to the "best interests" of a patient. In common law, the best interests of a patient are not limited solely to best medical interests: see *Re MB (Caesarean Section)* (1997) 38 BMLR 175 at p.188. Nor are best interests limited solely to what is necessary: see *F v West Berkshire Health Authority* (1989) 4 BMLR 1 at p.26. In considering the scope of best interests, the two authorities to which I have just referred have concluded that they are to be determined on similar principles to the welfare of a child since the doctors and the court are concerned with a patient unable to make the necessary decisions for himself or herself.

H 26. In seeking the best interests of a patient, Lord Goff in *F v West Berkshire Health Authority* (1989) 4 BMLR 1 at p.27, commented that the doctors must act in accordance with a responsible and competent body of professional opinion. But, in emphasising the broader nature of "best interests", Lord Goff went on to say:

I No doubt, in practice, a decision may involve others besides the doctor. It must surely be good practice to consult relatives and others who are concerned with the care of the patient. Sometimes, of course, consultation with a specialist or specialists will be required, and in others, especially where the decision involves more than a purely medical opinion, an inter-disciplinary team will in practice participate in the decision.

27. In the present case, in looking to the best interests of Madam C, the doctors wisely consulted with the husband and it is apparent that they paid as much heed to his views as their professional wisdom would allow. But that is not to say that the husband had any legal authority to dictate what should or should not happen to his wife or the unborn child.

28. In *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276, a case in which a husband made an unsuccessful attempt to obtain an injunction in the High Court to restrain the carrying out of an abortion on his wife, Sir George Baker P said:

The first question is whether this plaintiff has a right at all. The foetus cannot, in English law, in my view, have a right of its own at least until it is born and has a separate existence from its mother. That permeates the whole of the civil law of this country (I accept the criminal law, which is now irrelevant), and is, indeed, the basis of the decisions in those countries where law is founded on the common law, that is to say, in America, Canada, Australia, and, I have no doubt, in others.

29. In *Re T (Adult: Refusal of Treatment)* [1992] 3 WLR 782 at p.787, Lord Donaldson MR spoke plainly of the lack of legal rights vested in next of kin, very often the husband:

There seems to be a view in the medical profession that in such emergency circumstances the next of kin should be asked to consent on behalf of the patient and that, if possible, treatment should be postponed until that consent has been obtained. This is a misconception because the next of kin has no legal right either to consent or to refuse consent.

However, he went on to make the practical observation:

This is not to say that it is an undesirable practice if the interests of the patient will not be adversely affected by any consequential delay. I say this because contact with the next of kin may reveal that the patient has made an anticipatory choice which, if clearly established and applicable in the circumstances — two major “ifs” — would bind the practitioner. Consultation with the next of kin has a further advantage in that it may reveal information as to the personal circumstances of the patient and as to the choice which the patient might have made, if he or she had been in a position to make it.

The reasons for my decision

30. In the present case, it was not in any way disputed that Madam C, having sustained severe cerebral damage and being in a deep coma,

A was incapable in any way of either giving or withholding her consent to the caesarean operation. That being the case, it was necessary to look to the best interests of Madam C. Those best interests were not limited simply to what was necessary to keep her clinically alive but embraced a broader range of factors, especially what she herself would have wished.

B 31. In or about September 2002, the husband had said that his wife would have wished to be kept on life support so that her child may be born healthy. That indeed, over the following weeks, had been the driving motive for the undoubted skill and care exercised by the medical team. Manifestly, in my view, in the circumstances it was in the best interests of the patient that an operation take place to try and ensure that a healthy child was born.

C 32. Aside from all other imperatives, not to have acted risked the death of the child and a foetus without life lying in the womb of the mother could not, by any reckoning, be considered to be in her interests.

D 33. I granted a declaration not because the mother and foetus were one and what was for the benefit of the foetus had to be for the benefit of the mother. I granted the declaration because they were not one, because the foetus was a unique organism having the potential for a full and independent life, because, on the evidence available, the mother's wish, if she had been able to express it, would have been to deliver into the world a healthy child and, in all the circumstances, that clearly was in her best interests.

E 34. In *Re MB (Caesarean Section)* (1997) 38 BMLR 175 at p.188, Butler-Gloss LJ, a jurist of the highest repute in these difficult matters, adopted similar reasoning:

G It is clear on the evidence that the mother and the father wanted this child to be born alive ... It must be in the best interests of a woman carrying a full-term child, whom she wants to be born alive and healthy, that such a result should if possible be achieved

H 35. As for the husband, while I took full note of his deeply held beliefs and while I sympathised with the anguish he was experiencing, it had to be accepted that he had no legal right to object and to have that objection upheld.

I 36. The body of medical opinion that was placed before me, opinion which I accepted as being entirely reasonable, was to the effect that it was critically important that a caesarean section take place without delay.

J 37. If there had been more time, ideally, I would have wished to hear from a guardian *ad litem* or guardian appointed under the Mental Health Ordinance (Cap.136) to speak for the interests of the wife. The Official Solicitor may fulfil that role. But time, in my view, did not allow for further delay. I therefore granted the declaration that had been sought.

38. I close by saying that I made the declaration in the exercise of the court's inherent jurisdiction in matters of this kind. Section 59ZG of the Mental Health Ordinance (Cap.136) makes provision for similar applications but, without in any way determining the matter, I was concerned as to whether, in the absence of the appointment of a guardian under the Ordinance, that section conferred jurisdiction upon me to authorise the particular treatment that was sought.

Main Examinations for LLB Year I (May 2004)			
	Name of Paper	Date of Exam.	Time
1	Tort I and II (LLAW1005 & 1006)	11-May-04	9:30am-1:00pm
2	Law of Contract I & II (LLAW1001/ 1002)	15-May-04	9:30am-1:00pm
3	Law and Society (LLAW1004)	18-May-04	9:30am-11:45am

Examination Timetables for Law Papers 2nd Semester 2003-2004

COURSE_CODE	COURSE_TITLE	EXAM_D	EXAM_TIME_STR	REMARKS
LLAW1001/LLAW1002	Law of contract I/II	15-May	9:30 am -1:00 pm (30 minutes reading time included)	
LLAW1004	Law and society II	18-May	9:30 am -11:45 am (15 minutes reading time included)	
LLAW1005/LLAW1006	Law of tort I/II	11-May	9:30 am -1:00 pm (30 minutes reading time included)	
LLAW2002	Administrative law	17-May	9:30 am -12:45 pm (30 minutes reading time included)	
LLAW2003	Criminal law I	3-Jun	9:30 am -12:15 pm (45 minutes reading time included)	
LLAW2004	Criminal law II	11-May	2:30 pm - 5:00 pm (30 minutes reading time included)	
LLAW2005/LLAW2006	Property law I/II	19-May	2:30 pm - 5:00 pm (10 minutes reading time included)	Restricted
LLAW2007/LLAW2008	Equity and introduction to trusts I/II	14-May	2:30 pm - 6:00 pm (30 minutes reading time included)	
LLAW2009	Introduction to PRC law	1-Jun	9:30 am - 11:45 am (15 minutes reading time included)	
LLAW3001	Introduction to legal theory	10-May	9:30 am - 12:45 pm (15 minutes reading time included)	
LLAW3009	Banking law	14-May	2:30 pm - 5:00 pm	
LLAW3010	Business associations	2-Jun	9:30 am -12:15 pm (20 minutes reading time)	
LLAW3013	Commercial law I	27-May	9:30 am - 12:00 noon (20 minutes reading time included)	
LLAW3015	Company law	15-May	2:30 pm - 5:00 pm (30 minutes reading time included)	
LLAW3021	Fundamentals of evidence and trial procedure	13-May	9:30 am - 1:00 pm (30 minutes reading time included)	
LLAW3028	International trade law I	4-Jun	9:30 am - 12:30 pm (30 minutes reading time included)	
LLAW3033	Issues in intellectual property law	20-May	9:30 am - 12:30 pm (30 minutes reading time included)	
LLAW3040	Medico-legal issues	18-May	9:30 am - 11:45 am (15 minutes reading time included)	

LLAW3041	People's Republic of China civil and commercial law	12-May 2:30 pm - 5:00 pm (15 minutes reading time included)	
LLAW3042	Planning and environmental law	21-May 2:30 pm - 5:45 pm (15 minutes reading time included)	
LLAW3072	Principles of Hong Kong taxation on income	18-May 2:30 pm - 5:00 pm (15 minutes reading time included)	
LLAW6024	Banking law	14-May 2:30 pm - 5:00 pm	
LLAW6048	PRC Security and insolvency law	11-May 2:30 pm - 5:00 pm (20 minutes reading time included)	
PCLL1003	Landlord & tenant	20-May 2:30 pm - 4:30 pm	Restricted
PCLL2002	Civil and criminal procedure (Opinion writing)	27-May 2:30 pm - 5:30 pm	
PCLL2003	Civil and criminal procedure (Drafting)	29-May 9:30 am - 1:00 pm	
PCLL2004	Civil procedure (Knowledge & fact analysis)	25-May 2:30 pm - 5:00 pm	
PCLL2005	Criminal procedure (Knowledge & fact analysis)	22-May 2:30 pm - 5:00 pm	
PCLL3002	Commercial law & practice graded assignment 2 (Letter writing)	18-May 2:30 pm - 5:30 pm	Restricted
PCLL3005	Commercial law & practice exam 2 (Knowledge)	17-May 2:30 pm - 4:30 pm	Restricted
PCLL6002	Professional practice exam 2	14-May 9:30 am - 12:30 pm	

UNIVERSITY OF HONG KONG
Bachelor of Laws

LAW: LAW OF TORT I AND II (LLAW 1005 AND 1006)

11 May 2004
5 pages, 10 questions

Time: 9:30am – 1:00pm
(including 30 minutes reading time)

Answer FOUR (4) Questions

1. Buildco Ltd, the contractor in charge of the construction of a new warehouse and storage facility, sub-contracted the painting of the ceiling to Improvements Ltd. Chow, an experienced painter employed by Improvements Ltd, was assigned to the task. To reach the ceiling, Improvements Ltd provided a mobile platform. The platform did not contain a ladder, but consisted of a series of diagonal crosspieces, each crosspiece .5 metres above the other. Chow climbed the platform by stepping on the crosspieces. While doing so, he slipped and fell to the ground, suffering serious injuries. Chow, who was wearing rubber slippers, said he slipped because he is a short man and the crosspieces were too far apart.

Regulation 38C of the Construction Sites (Safety) Regulations provides:

“Where work cannot be safely done on or from the ground or from part of a permanent structure, the contractor responsible for the construction site concerned shall provide, and ensure the use of, a scaffold, ladder or other means of support, all of which shall be safe for the purpose, having regard to the work to be done.”

With reference to relevant case law, advise Chow regarding the possible tort actions that might be available. [Do not include a discussion of the Employees’ Compensation Ordinance liability – you can assume that such advice has already been given]

2. Polly was not a customer of Denny’s Cafe, but was shopping nearby. Polly often used Denny’s Café’s toilet when she was shopping in the area, ignoring the sign posted outside which read “For customers’ use only – others use at your own risk”. Polly was also aware of a notice permanently posted inside the toilet which read: “Caution - wet floor”.

When Polly entered the toilet, she noticed Nathalie, the toilet assistant, sitting in the corner on a stool. Nathalie was employed by Management Ltd, to whom Denny’s Café had contracted the cleaning of the toilet once a day. A few minutes after entering a cubicle, Polly came out to ask Nathalie for some toilet paper. Polly stepped forward towards Nathalie and only then noticed that Nathalie was cleaning the floor, which was now completely soaked with soap and water. At that moment Polly slipped and fell to the ground, sustaining an injury to her left ankle.

With reference to relevant case law and legislation, advise Polly regarding any tort actions she may have.

3. Theo, aged 41, unmarried but living with his girlfriend Jane, is a scaffolding worker. His work involves the dismantling of bamboo scaffolding after the completion of small building projects. Under his contract with Tower Contractors, on whose construction projects he has been working for six months, Theo is required to work eight hours per day. Tower Contractors does not provide him with any equipment, in view of the simple nature of the work. Theo is paid according to the number of pieces dismantled. On average he is able to earn \$20,000 per month. In the contract he is designated as an independent contractor. On some days after his shift he does similar work for another construction company.

Theo was standing on the scaffolding when the cable which secured his safety harness malfunctioned. An investigation showed that the malfunction occurred as a result of a co-worker having deliberately tampered with the safety harness, whether as a joke or a malicious act is unknown. Theo was killed in the fall.

With reference to relevant case law and statutory provisions, advise Jane regarding her entitlement under the Employees' Compensation Ordinance, and the assessment of any compensation to be awarded.

4. "Given its technicalities, and the restrictions on its availability and the permitted remedies, the tort action in nuisance has lost most of its utility, to the point where it should be abolished."

Critically discuss this statement with reference to and discussion of relevant case law.

5. "That a tort of breach of statutory duty exists in Hong Kong is purely a historical oddity. There is nothing that the common law of breach of statutory duty contributes to Hong Kong law which cannot be achieved through recourse to the modern law relating to the tort of negligence".

Critically discuss this statement with reference to and discussion of relevant case law.

6. "With only a few exceptions, the individualistic philosophy that underlies the common law is such that a person is not liable for the torts of another."

Identify the main exceptions (up to four is sufficient). With respect to each of these, explain by reference to and discussion of a case or cases the nature of the exception, the justification for the exception, and what the plaintiff must prove in order for that exception to operate.

7. George was hiking in a remote part of the New Territories, when he became lost. He spent the night wandering aimlessly, trying to stay warm. The next morning, he came upon some hikers, Janice and Ada, and he quickly approached them for water and to ask directions. Janice and Ada were frightened, and stepped back. George was able to reassure them of his intentions and his situation. Janice and Ada then explained to George how to walk back to the main road, and gave him some water and fruit. At that moment, Bill, an undercover police officer assigned to hiking trails to catch illegal immigrants, was nearby and tackled George from behind and pushed him to the ground. George was too weak to resist. Bill asked to see his ID card, and questioned him as to his activities. George could not produce his ID card, having lost it during his overnight wanderings.

One hour later, after a telephone call to his supervising officer, Bill was instructed to release George. The police supervisor had been able to verify George's identity through a computer verification and telephone call to George's employer.

Later that day, Bill telephoned George to say that if he did not confess to an attempted robbery of the hikers, his family would "face the consequences". George was frightened, subsequently suffered illness, vomiting, and extreme nervous agitation for some time thereafter.

With reference to relevant case law and statutory provisions, advise George regarding actions that can be taken against Bill and the police department.

8. Matt, a businessman, was interested in purchasing a small residential building for investment and rentals. He came across the website of Jane's Commercial Realty, which advertised itself as "the best in the business, advising Hong Kong investors for more than 25 years". One of the buildings advertised was a small, 10 year old, three storey residential building owned by Ella. The advertisement on the website of Jane's Commercial Realty said that the building was a "solid, risk-proof investment for the careful investor". Before purchase and sale, Matt requested professional survey documents certifying the building as sound, and these were provided by Ella. They were prepared by Timothy, a professional surveyor appointed by Ella. In fact, the building foundations were defective.

Seven years after purchase, it became apparent that the foundations were sinking, very slightly, but enough to cause some of Matt's tenants to complain that the floor was uneven. Some of them moved out, leaving Matt with lower rents and less than full occupancy rates. The value of the building declined to a level below the purchase price. Worse, the foundation collapse caused damage to some water pipes in the basement, causing flooding, and damage to other parts of the building, including a storage room where Matt stored some of his own personal property.

With reference to relevant case law, advise Matt regarding any tort actions he may have.

9. It was 1 a.m. when Ben, an ambulance driver, was driving an ambulance back to the hospital after picking up a patient. The patient, Tom, was an elderly man who had reported heart pains, and had called the emergency department of Ben's hospital for help. As Ben approached a major intersection at normal speed the light changed from green to yellow. In the split second available for decision Ben decided to accelerate rather than slow down and stop. He was sure there would be little or no traffic at that hour, and he didn't want to waste time at an empty intersection waiting for the light to change back to green. By the time he entered the intersection the light was already red. At the same time, a vehicle driven by Mark entered the intersection from the intersecting street. Mark entered on the green signal, but he accelerated quickly because he was anxious to return home to avoid being stopped by the police (although an experienced driver, Mark's licence had recently been suspended because of his numerous traffic offences). Ben tried his best to swerve to avoid Mark, but due to their respective speeds, Ben could not avoid Mark, and crashed into Mark's vehicle.

Mark was killed in the crash. In the meantime, Tom suffered a complete heart failure and died. Tom's family alleges that if there had been no accident and no delay in reaching the hospital, Tom would have survived.

At the date of the accident Mark was unmarried but living with his girlfriend Jane. Tom was a widower who left behind three self-supporting adult children.

With reference to relevant case law and legislation, advise Jane and advise Tom's family in their tort actions against Ben, including the types of damages and method of assessment of the damages they can expect to receive.

10. Professor Wong is the Dean of the Medical Faculty at the University of Kowloon. He recently published an article on Hong Kong's SARS epidemic, which included the following statement about the Government-appointed Hospital Authority (of which there are seven members):

"According to the Hospital Authority, in order to avoid alarming the public, it decided not to publicly disclose the extent and nature of the epidemic until three weeks after learning of the first cases. However, the crisis could have been averted but for the concern of the Hospital Authority to cover up the problem and avoid adverse publicity. Members of the Hospital Authority seemed more concerned about keeping their jobs than their duty to the public."

On another occasion, Professor Wong made some adverse comments about members of the University of Kowloon's competitor faculty, the Faculty of Medicine at the University of East Hong Kong. These comments were not included in the article. In a meeting of some of the Chief Doctors of Hong Kong's leading hospitals, Professor Wong questioned the competence of the Dean of the Medical Faculty at the University of East Hong Kong's Hospital, Thomas Leung (with whom Professor Wong was in competition for the position of

Secretary for Health and Welfare in the HKSAR Government). At the meeting Professor Wong said that “Dr Leung has taken to alcohol as a way of coping with pressure”.

And in yet another incident, in a television interview Professor Wong made the following statement about Dr Anne Chan of the University of East Hong Kong’s Hospital:

“The number of SARS cases as reflected in the records kept by Dr Anne Chan is suspiciously low, given the large number of patients that died in the hospital during the relevant period.”

Advise Wong in respect of his possible liability in the tort of defamation, including the defences that may be open to him.

- END OF PAPER -

THE UNIVERSITY OF HONG KONG
DEPARTMENT OF LAW

BACHELOR OF LAWS EXAMINATION 2003/2004

Law of Contract I & II (12 Credits)

(LLAW1001 and LLAW 1002)

Date: May 15th, 2004.

Time: 9.30 to 1.00 p m (reading time of 30 minutes included).

Instructions to Candidates

1. The time for this examination is 3 hours and 30 minutes. The first 30 minutes is reading time.
2. This Examination consists of **seven pages** including this one.
3. All questions carry equal marks. You must therefore allocate your time accordingly.
4. There are **SIX** questions in all. You must answer **THREE** questions **ONLY**.
5. This is a 100% open-book examination. Candidates may bring any material into the examination room.
6. Any form of plagiarism will be dealt with in accordance with existing University regulations.

1. Critically evaluate the English Court of Appeal's decision in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] 4 All E R 789 and consider its relationship with *Bell v Lever Brothers*.

Do you think *Great Peace* should be followed in Hong Kong? Give your reasons.

2. Susan Lee is a model and a budding actress who has had some limited roles in local plays. She is planning to audition, on 1 August 2004, for the lead role in a new musical. Although Susan has a nice singing voice, she has never had any formal training and she is terrified that she will not do well at the audition.

Anna Wong is a trained singer and completed, in May 2004, an honours degree in music at HKU. On 20 May 2004, Anna posted the following notice in the lobby of her apartment building:

“Special Offer from 1 June-1 August 2004: Singing lessons with Anna Wong, at \$200 per hour. Phone me at 2558-9999 if you are interested.”

Upon seeing the advertisement, Susan left the following voicemail for Anna on 20 May:

Message 1: Hi, my name is Susan Lee. I saw your advertisement in our building. Sounds great. I accept! I need lots of singing lessons. I will take lessons with you for 4 hours every afternoon, for the next two months. I am willing to pay \$200 per hour. However, would you consider giving me a discount since I am giving you so much business? My number is 6778-9073. Thanks.

Later that same day, Anna listened to her voicemail and returned the call leaving the following message on Susan's voicemail:

Message 2: Hi Susan. Got your message and I agree. I have signed a formal contract and will put it in your postbox. Please make sure that you sign and place it in my postbox in the building by 25 May.

Anna then put a sheet of paper into Susan's postbox in the lobby of her building. The paper read as follows:

1. Anna Wong agrees to give singing lessons to Susan Lee, every weekday (Monday-Friday), from 1:00 p.m.-5:00 p.m., 1 June to 31 July 2004.
2. Susan Lee agrees to pay Anna Wong \$200 per hour, payment due at the end of each lesson.
3. Place in my postbox in building by 25 May. If I do not hear from you by then I will assume that you have changed your mind.

Anna signed and dated the paper and left a space for Susan to sign and date it.

Susan was in Macau and did not listen to her voicemail until May 23. On May 25, Susan left the following voicemail with Anna:

Message 3: Hi, this is Susan. I am in Macau now but should be back tomorrow. Anyway, we have a deal and you can assume that I will sign your document when I get back.

Anna checked her postbox at 11:59 p.m. on May 25 but it was empty. The next morning, Anna was contacted by HKU to see if she was available to teach a summer course in music. Anna said that she was very interested. HKU faxed Anna the contract an hour later which Anna signed and returned by fax at 3:00 p.m.

At 5:00 p.m. that same day, Anna listened to her voicemail. She then left the following voicemail for Susan at 5:30 p.m.:

Message 4: Hi Susan. This is Anna. Since you did not respond in time I am revoking my offer.

Susan returned from Macau at 6:00 p.m. on 26 May and immediately took the written document drafted by Anna from her postbox, signed it and put it into Anna's postbox. Later that night at 9:00 p.m Susan checked her voicemail and immediately phoned Anna to insist that she must give her 4 hours of singing lessons per day starting 1 June. Anna is no longer interested in giving any singing lessons to Susan.

Advise Anna.

3. George decided to start up a business running a restaurant and bar called "Help Yourself". Pokfulam Bank (the "Bank") lent him the money to do so. George had to repay the money in monthly installments over five years. The restaurant soon got into financial difficulty as soon afterwards another similar business opened nearby and took away most of George's customers.

George went back to the Bank and explained that he could not make the repayments according to the original repayment schedule. He told the Bank that he was in grave danger of having to close down the business. The Bank agreed to restructure the loan. They gave George a period of nine months during which he need make no repayments and could then make the rest of the repayments over seven years with no extra interest to pay.

Three months later a well known socialite contacted George and said he would like to have exclusive use of *Help Yourself* on a particular night to celebrate his girlfriend's birthday. George thought this would give his business a big boost. He told his staff that if they did their job well on that night and the event was a success he would pay each of them an additional \$1,000 in salary for that night. George also asked his daughter Heather to help out on the night.

The evening was a great success and George was so pleased he promised to pay Heather \$2,000 for her efforts. The publicity resulted in a great increase in business and *Help Yourself* is now, six months after the loan was taken out, full almost every night of the week.

The bank is now demanding that George reverts to repaying the loan under its original terms. This would mean that from next month George would have to make monthly repayments over five years and must repay the Bank in one lump sum the last six monthly installments that were due. George does not wish to do so as he intends to open another restaurant and bar very soon and wishes to invest as much of his own capital as he can.

Relations between George and his staff have worsened. His daughter Heather is not speaking to him after a major argument. He no longer wishes to pay the staff the \$1,000 bonus nor does he want to pay Heather the \$2,000.

Advise George.

4. Len is the owner of a small business and decides to computerize his accounting system. He is visited by a salesman from Cyber Ltd who advises him to buy an *Accountcom 400*, a new type of computer. Len inquires about the sales service and is told that Cyber Ltd has a team of engineers on call 24 hours a day.

Len immediately agrees to buy an *Accountcom 400*, with 150 megabytes of memory for \$30,000 and signs a contract for the supply of this machine. The contract states at Clause 3:

“We guarantee to deal with any problem with your *Accountcom 400* within 24 hours of notification”.

The computer breaks down several times during the following three months and there are also delays of up to three days in getting it repaired. Len then discovers that *Accountcom 400* has only 60 megabytes of memory – explaining its inability to handle his accounts. Len also discovers that Cyber Ltd employs only one service engineer.

Len sues Cyber Ltd for misrepresentation, breach of Clause 3 of the contract and breach of the implied terms under s 15 (description) and s16 (2) (satisfactory quality) of the Sale of Goods Ordinance. He is claiming damages of \$50,000.

Cyber Ltd does not dispute liability or the assessment of Len’s damages but relies on the following clauses in the contract which Len signed:

“4. This document contains all the terms of the agreement other than those implied under the Sale of Goods Ordinance and no liability is accepted for any pre-contractual statements.

5. Liability for breach of any term of this agreement or any implied term is limited to the purchase price of the computer.

6. Any claim for breach of contract must be notified to Cyber Ltd within 14 days of delivery of the computer”.

Advise Len.

5. Peter Wong has been a tour guide operator for the last 5 years. In 2003 he visited Madam Wong, his grandmother, and informed her he had finally decided to marry his long time girlfriend Carmen. Madam Wong was very delighted. She offered to pay him \$20,000 as her contribution towards his wedding expenses. In fact, Madam Wong had asked Peter, on previous occasions, to get married so that she could see her great-grand children before she lost her eyesight completely. In response to Madam Wong's offer Peter suggested that instead of parting with her cash savings, it would be best for both of them if she could guarantee a loan of \$ 2 million for him and he would invest some of that money in his business. Madam Wong replied that she would do whatever Peter asked as long as he married Carmen as soon as possible.

The next day Peter approached his old classmate, James Mak, the branch manager of Kowloon Commercial Bank (KCB) for a loan of \$20 million. He told James that Madam Wong, his grandmother, had agreed to secure the loan using her house valued at \$25 million. James pulled out a set of documents from his drawer and said to Peter: "you know our procedure, take these to the old lady and make sure she gets independent legal advice". That evening, Peter went to Madam Wong's house, accompanied by his solicitor, David Chan, another old classmate. When they were having tea Peter asked Madam Wong to sign the papers. At that point David asked Madam Wong if she understood the meaning and consequences of what she was about to sign. Then Madam Wong, replied: "My eyesight is failing and I cannot read; I trust my grand child and if you also trust him, everything will be fine." As David did not want to argue with Madam Wong, he indicated to her where to sign. He then signed the Solicitor's certificate and handed it back to Peter.

Peter took the papers to KCB for processing and after one week the loan was ready. The following month Peter withdrew all the \$20 million; quickly got married to Carmen and the couple emigrated to Argentina. Now KCB wants its money back and is planning to sell Madam Wong's house.

Advise Madam Wong.

6. Daniel Chan is a successful businessman. As he approached retirement, he began to prepare for a life of luxury. In March 2003, Daniel purchased an old townhouse at the Peak for \$150 million which he intended to demolish so that he could build the luxury home of his dreams. In May 2003 Daniel contracted with Mandarin Properties (MP) to construct his dream house for an agreed price of \$60 million. It was agreed that the whole sum would be paid on completion of the building. The date of completion was the end of November 2003. Patrick emphasized to MP that he wanted to hold his retirement party on 25 December, 2003 in his new home.

Construction work began immediately and by early September 2003, about half of the work had been completed and MP was confident the deadline would be met. Some time in October 2003, Daniel visited the site and while looking around he noticed that the architect's design had not been followed. The location of the living room had been changed so that it now faced the mountain side instead of Victoria Harbour. Daniel was furious. He angrily told MP to stop construction immediately and remove the unfinished building from his site. MP was surprised at Daniel's reaction and thought Daniel was being fussy. Instead of stopping construction MP increased the pace.

The next day Daniel left for a business trip to London. On his return, on 20 November 2003, Daniel found a brown envelope at his office containing the keys for his new house, a \$60 million bill, and a building surveyor's report. The report showed that Daniel's new house had increased in value by 10% based on its original estimated value. However, Daniel insists that MP has breached the contract and is not entitled to any payment.

Advise Daniel.

THE END

University of Hong Kong
Department of Law

LAW AND SOCIETY II (LLAW1004)
Examination (2003-04)

Date: 18 May 2004

Time: 9.30 am – 11.45 am (including 15 min reading time)

Instructions to candidates

1. This examination paper consists of five (5) questions.
2. Candidates are required to answer any three (3) questions.

Questions

1. “The transformation of stateless societies into states was an important step forward representing progress in human history.” Discuss.
2. Assess the significance in the history of Western political thought of any two of the following thinkers:
 - (a) Plato;
 - (b) Aristotle;
 - (c) Machiavelli;
 - (d) Hobbes;
 - (e) Locke;
 - (f) Rousseau;
 - (g) Marx.
3. Answer EITHER (a) OR (b).
 - (a) Why did the modern liberal constitutional state first develop in Europe rather than in other civilizations?

- (b) How did the liberal constitutional state come into existence in Britain and in America?
4. What is the relationship between law and economic development? Illustrate your answer with reference to the case of contemporary China
 5. "It is difficult for the modern concept of human rights to take root in Chinese culture." Discuss.

*** the end ***

Supplementary Examinations for LLB Year I (August 2004)

	Name of Paper	Date of Exam.	Time
1	Law and Society (LLAW1004)	5-Aug-04	9:30am-11:45am
2	Law of Contract I & II (LLAW1001/ 1002)	10-Aug-04	9:30am-1:00pm
3	Law of Tort I And II (LLAW1005 & LLAW1006)	13-Aug-04	9:30am-1:00pm

Supplementary Examination Timetable for Law Papers July/August 2004

COURSE CODE	COURSE TITLE	EXAM DAT	EXAM TIME	REMARKS
LLAW1001/LLAW1002	Law and contract I/II	10-Aug	9:30 am - 1:00 pm (30 minutes reading time included)	
LLAW1004	Law and society II	5-Aug	9:30 am - 11:45 am (15 minutes reading time included)	
LLAW1005/LLAW1006	Law of tort I/II	13-Aug	9:30 am - 1:00 pm (30 minutes reading time included)	
LLAW2002	Administrative law	9-Aug	9:30 - 12:45 pm (30 minutes reading time included)	
LLAW2004	Criminal law II	6-Aug	9:30 am - 12:00 noon (30 minutes reading time included)	
LLAW2005/LLAW2006	Property law I/II	12-Aug	9:30 am - 12:00 noon (10 minutes reading time included)	Restricted
LLAW2007/LLAW2008	Equity and introduction to trusts I/II	3-Aug	9:30 am - 1:00 pm (30 minutes reading time included)	
LLAW2009	Introduction to PRC law	9-Aug	9:30 am - 11:45 am (15 minutes reading time included)	
LLAW3001	Introduction to legal theory	29-Jul	9:30 am - 12:45 pm (15 minutes reading time included)	
LLAW3009	Banking law	2-Aug	2:30 pm - 5:00 pm	
LLAW3013	Commercial law I	12-Aug	9:30 am - 12:00 noon (20 minutes reading time included)	Examination has been cancelled. The only one candidate informed that he will not take the examination. No question paper.
LLAW3021	Fundamentals of evidence and trial procedure	6-Aug	9:30 am - 1:00 pm (30 minutes reading time included)	
LLAW3033	Issues in intellectual property law	10-Aug	9:30 am - 12:30 pm (30 minutes reading time included)	
LLAW6024	Banking law	2-Aug	2:30 pm - 5:00 pm	
LLAW6064	Ethnicity, human rights and democracy	13-Aug	9:30 am - 12:45 pm (15 minutes reading time included)	
LLAW6075	National protection of human right	9-Aug	9:30 am - 12:45 pm (15 minutes reading time included)	
PCLL1001	Conveyancing graded assignment	14-Aug	9:30 am - 1:30 pm	
PCLL1002	Conveyancing & probate examination	13-Aug	9:30 am - 1:00 pm	

PCLL1003	Landlord & tenant examination	23-Aug 9:30 am - 11:30 am	Restricted
PCLL2002	Civil and criminal procedure (Opinion writing)	7-Aug 9:30 am - 12:30 pm	
PCLL2003	Civil and criminal procedure (Drafting)	11-Aug 9:30 am - 1:00 pm	
PCLL2004	Civil procedure (Knowledge & fact analysis)	9-Aug 9:30 am - 12:00 noon	
PCLL2005	Criminal procedure (Knowledge & fact analysis)	5-Aug 9:30 am - 12:00 noon	
PCLL3001	Commercial law & practice graded assignment 1 (Drafting)	20-Aug 9:30 am - 11:30 am	Restricted
PCLL3002	Commercial law & practice graded assignment 2 (Letter writing)	18-Aug 9:30 am - 12:30 pm	Restricted
PCLL3004/PCLL3005	Commercial law & practice Exam	16-Aug 9:30 am - 1:30 pm	Restricted
PCLL6001/PCLL6002	Professional practice	25-Aug 9:30 am - 12:30 pm	
PCLL6002	Litigation issue	25-Aug 9:30 am - 12:30 pm	

University of Hong Kong
Department of Law

LAW AND SOCIETY II (LLAW1004)
Examination (2003-04) (Supplementary)

Date: 5 August 2004

Time: 9.30 am – 11.45 am (including 15 min reading time)

Instructions to candidates

1. This examination paper consists of five (5) questions.
2. Candidates are required to answer any three (3) questions.

Questions

1. What is the difference between a “stateless society” and a society organized in the form of a “state”? Under what circumstances is it likely for a stateless society to evolve into a state?
2. Compare and contrast the political thought of any pair of thinkers mentioned below:
 - (a) Plato and Aristotle; or
 - (b) Hobbes and Locke.
3. Explain the difference between the political systems known as (a) “the polity of estates”; (b) absolutism; and (c) liberal constitutionalism.
4. What is Max Weber’s theory of the relationship between law and economic development? Do you agree with the theory?
5. “The modern idea of human rights is incompatible with

traditional Chinese values.” Discuss.

*** the end ***

THE UNIVERSITY OF HONG KONG
DEPARTMENT OF LAW

SUPPLEMENTARY EXAMINATION FOR THE
BACHELOR OF LAWS 2003/2004

Law of Contract I & II (12 Credits)

(LLAW1001 and LLAW 1002)

Date: 10th August, 2004.

Time: 9.30 to 1.00 pm (reading time of 30 minutes included).

Instructions to Candidates

1. The time for this examination is 3 hours and 30 minutes. The first 30 minutes is reading time.
2. This Examination consists of **eight pages** including this one.
3. All questions carry equal marks. You must therefore allocate your time accordingly.
4. There are **SIX** questions in all. You must answer **THREE** questions **ONLY**.
5. This is a 100% open-book examination. Candidates may bring any material into the examination room.
6. Any form of plagiarism will be dealt with in accordance with existing University regulations.

1. "I have always thought that a promise to perform an existing duty, or the performance of it, should be regarded as good consideration, because it is a benefit to the person to whom it is given." Lord Denning in *Ward v Byham* [1956] 2 All E R 318.

Discuss Lord Denning's dictum above and the way it has been applied in subsequent decisions. What are the limits and doctrinal difficulties of applying Lord Denning's dictum?

2. On March 1, 2004, Mr. Wong mailed the following letter to 50 addresses in Hong Kong:

“Special repair package for my loyal customers: For a special price of \$4,000, paid in advance, I will check and repair up to 4 air-conditioners in your flat, at a mutually agreeable date in April. No extra labour charges. I will only charge you additional money if I need to order parts. To accept, complete the enclosed form and return it to me by March 13, together with a cheque for \$4,000. After that date, prices go up! If you have any questions, fax me at 2222-8888.”

Susan received the letter and thought it was a very good deal. On March 10, Susan filled out the form and added the following words: “I accept your offer. As I will be away from Hong Kong most of April, would you mind coming in the first week of May instead? I will assume that this is alright with you unless I hear otherwise from you by tomorrow”. Susan faxed this form to 2222-8888.

Mr. Wong’s daughter saw the fax come in on her father’s fax machine on March 10. She placed it on the dining table so that her father would see it when he returned home. Unfortunately, she then spilled juice all over the table and the fax was soaked. In the course of cleaning up the mess, she accidentally tossed the sticky wet fax into the bin. As a result, Mr. Wong never saw the fax and his daughter never mentioned it to him.

Having heard nothing from Mr. Wong, on Friday March 12, Susan put the original of the form that she faxed to Mr. Wong in an envelop, together with a cheque for \$4,000, and mailed it at 4:00 p.m. The letter was delivered to Mr. Wong’s flat on Monday, March 15.

On March 15, Mr. Wong telephoned Susan and left the following message on her message machine: “I am returning your cheque because it came too late. Also, the special repair package is not

available in May, only in April. May is a very busy month and I never offer special discounts during that month.”

After playing this message, Susan telephoned Mr. Wong and told him that she still wanted the special repair package and was willing to have him come in April. However, Mr. Wong refused, saying that she had not accepted in time. Mr. Wong said that he would be happy to service her air-conditioners at his normal price of \$2,000 per air conditioner. Susan is furious and thinks that she is entitled to have the discounted package.

Advise Susan.

3(a) Terry rented a residential flat on Lamma Island from Lorna at a monthly rental of \$10,000. When the lease was about to expire, Terry asked Lorna to renew the lease for another two years. Lorna replied that she would renew the lease as long as Terry was willing to pay a monthly rent of \$15,000. Although Terry thought \$15,000 was rather high he agreed nevertheless because he believed Lorna had the right to raise the rent and moreover, he also wanted to stay in the flat because it was close to his place of work.

Both parties signed the new lease which stated that the rent payable was \$15,000 per month starting the next day. The lease also required Terry to pay \$30,000 deposit to Lorna. At the signing of the new lease, Terry paid the said deposit to Lorna. One week later Terry found out from a friend, a solicitor specializing in the law of landlord and tenant, that the flat that Terry had rented was subject to rent control and that the maximum rent payable for that flat was \$13,000 per month. [50%].

Advise Terry as to his contractual rights and liabilities.

3(b) Two weeks after the renewal of the lease, Hong Kong was struck by typhoon Nina! The storm was particularly strong over Lamma Island, bringing with it extremely heavy rain. The building in which Lorna's flat was located was completely destroyed by a landslip. Terry was only able to survive by fleeing the building just minutes before the landslip occurred.

How would the above event affect your original advice to Terry?
[50%]

4. Brian agreed to build a small house in the New Territories for Oscar for \$1.2 million. Construction was due to take three months to complete. When the work was about three-quarters done, Brian told Oscar that due to a dramatic increase in the cost of materials he had already spent the entire \$1.2 million. Brian told Oscar that he could probably finish the job if Oscar paid an additional \$100,000. Oscar agreed to do this because the lease on of his flat was due to expire in one month and he urgently needed a place to live in.

The next day Oscar went to the airport to welcome his cousin Derek who was visiting him for a holiday. Derek was a master builder and the owner of a thriving construction business in Canada. Although he had emigrated to Canada one year before he still had a permanent Hong Kong identity card which entitled him to work in Hong Kong. Derek was to stay in Oscar's flat for one month. When Derek arrived in Hong Kong, Oscar told Derek about the construction of his house in the New Territories. The next day they visited the building site. Whilst there Derek offered to complete the construction himself as he felt he could do a much better job than Brian and in much less time.

Oscar was delighted with this offer from Derek as he was not entirely happy with the work done by Brian. The next day Oscar informed Brian that he would not pay him the additional \$100,000 and that Derek would complete the work instead.

The construction work was completed by Derek in two weeks and Oscar was so pleased with it that he promised to pay Derek \$50,000 for his efforts. That night Derek and Oscar went to a nightclub to celebrate. Unfortunately, they got drunk, quarreled and fought each other in the nightclub. Oscar has now changed his mind and does not wish to pay the \$50,000 to Derek.

Advise Oscar.

5. The Wampoa University (WU) has become very famous since the recruitment of Prof Hercules and four of his assistants ten years ago. WU has attracted hundreds of talented students from several countries who pay high fees for the chance to study under Hercules. Prof Hercules is a nuclear scientist and a winner of a Nobel Prize in physics. In order to attract many bright students Prof Hercules has a website describing his work and academic achievements and stating that Prof Hercules and his four assistants are entirely responsible for the postgraduate studies programme in nuclear physics at WU.

In June 2003 Professor Hercules informed WU that he intended to retire on 31 December, 2004 and return to his native country of Greece. The Vice-Chancellor of WU was shocked by this news. He tried hard to persuade Hercules to stay but all that Hercules could offer was to allow his four assistants to stay on till July 2005 in order to wind up the unfinished research projects. Before his retirement Hercules traveled again in July 2003 to many countries, as was now customary, telling prospective students about his work and inviting them to apply to study at WU. It was during his last promotional tour that Adam Smith, an American physics major decided to apply to UW. Adam Smith had been offered \$2 million as postgraduate scholarship by Harvard University but he rejected this offer. He did not want to lose the opportunity to study at WU under the supervision of Prof Hercules.

Last month Adam Smith arrived in Hong Kong. He rented a flat, paid up his tuition fees to WU, and enrolled in a Cantonese class in Central. Two days ago while reading the SCMP he was dismayed to learn that Prof Hercules was to retire from WU along with his four assistants. Now Adam Smith wishes to claim back his tuition fees, his \$20,000 deposit on the flat, his \$10,000 down payment for his Cantonese classes, his airfares, compensation for the lost place at Harvard, and the lost scholarship of US\$ 500,000.

Advise Adam Smith.

6. Peter Chan owns several entertainment businesses in South East Asia. In June 2003 he contracted to bring the famous Ricky Ma to Hong Kong. Peter Chan, who wanted to maximize his profits from this show, hired some expensive recording equipment from Hong Kong Records, costing him \$1.5 million. He planned to manufacture CDs from the recording. He also contracted with Star TV and was paid \$2 million to allow Star TV broadcast this event. Mary who had recently broken up with her boyfriend and was very depressed, bought five front tickets for the Ricky Ma performance. She and her four sisters looked forward so much to this show. They practised daily at home for a whole week, especially on how to shake their bodies following one of the signature tune of Ricky Ma called "Margarita Shek O' Bamba".

On the night of the show, Ricky Ma phoned up from his hotel, saying he was not feeling too well and suspected jetlag might be the cause. He asked Peter Chan to cancel the show. Peter Chan was terrified. He went to Ricky's hotel intending to beg him to come and perform but Ricky was out. Peter Chan was forced to cancel the Rick Ma show.

But the cancellation was a great disaster for Peter Chan. Besides having to refund the cost of the tickets, payment for hiring the recording equipment and the hall, Peter is also being sued by Star TV for refund of their fees and loss of profits. He is also being sued by Mary and her four sisters for mental distress caused by the cancellation of the show. The five sisters are also claiming compensation for the time they spent practising the dance, the cost of their new dresses, which they bought specifically for the event, and their taxi fares. Peter Chan has been unable to sleep for days now and the doctor thinks his condition is a result of stress caused by the cancellation of the Ricky Ma show.

You have been hired by Peter Chan to determine what damages can be recovered from Ricky Ma. Advise Peter Chan.

UNIVERSITY OF HONG KONG
Bachelor of Laws Supplementary Examination

LAW: LAW OF TORT I AND II (LLAW 1005 AND 1006)

13 August 2004
4 pages, 10 questions

Time: 9:30am – 1:00pm
(including 30 minutes reading time)

Answer FOUR (4) Questions

1. Raymond drives a bus for the HK Motor Bus Company. While trying to turn a corner at a busy intersection, Raymond saw a dog suddenly run into the path of his bus. With little time to react, Raymond swerved to avoid the dog, and lost control of the bus. He crashed into the Kowloon Hotel, causing extensive damage to the lobby and ground floor structure.

The damaged part of the hotel was immediately boarded up, pending repair in the weeks to come. However, later, on the evening of the accident, some thieves entered the lobby of the hotel through the hole created by the crash, and stole some of the Kowloon Hotel's artwork hanging in the lobby of the hotel.

The damage to the structure of the hotel required two weeks to repair, during which time the hotel was unable to do any business.

The repair work to the lobby was so extensive that the shops in the hotel shopping arcade, including Jade's Jewellery shop, had to be closed for two weeks.

Advise the Kowloon Hotel and Jade's Jewellery Shop regarding their claims in negligence for the various damages suffered.

2. Jim is a 30 year-old employee of Y Company, earning \$30,000 per month. He is unmarried but lives with his fiancée Mary, and Mary's infant child Sandy by a previous marriage. Jim works as a scaffolding worker on one of Y Company's high-rise construction sites. On the day in question, Jim was not wearing a safety harness, although he had been provided with one, and was instructed by Y Company to wear it all times when working on scaffolding. He was struck on the head by a falling object, lost his balance, fell from the scaffolding, and was killed.

The Construction Sites (Safety) Ordinance Regulations require that employers shall ensure that every worker on a high-rise construction site shall wear a safety helmet.

An investigation of the accident showed that the object that struck Jim was a tool that had been dropped by Tim, a specialist masonry craftsman who had been working for three months on the high-rise building. He was working two floors above Jim, and was applying the plaster finishing around the windows that were recently installed in the

building. Tim used his own tools for this job. He had been playing a joke on another worker at the time that he dropped the tool.

With reference to relevant case authority, advise Mary and Sandy as to any tort actions that can be brought against Y Company, and the likelihood of success. Mary and Sandy would also like to know what compensation might be payable, and how it will be calculated.

[Note: do not give advice regarding a claim under the Employees' Compensation Ordinance or an action under the Occupiers' Liability Ordinance. You may assume that Mary has already received independent legal advice on these claims].

3. Consider the cases of *Baker v Willoughby*, and *Jobling v Associated Dairies Ltd*. **Explain the principles relied on by the courts in these cases. Do these cases contradict each other, or can they be reconciled?**

4. John was admitted to the psychiatric ward of Princess Mary Hospital, having been brought in by the police, who had found him wandering in the street in an evidently mentally disturbed state. The police reported to the staff at the hospital that they suspected John was under the influence of drugs, and indeed John was under the influence of a newly popular drug called euphoria when he was admitted to the psychiatric ward. While he was waiting to see a doctor, accompanied only by an inexperienced and small nurse, John suddenly leapt out of his chair, pushed aside the frail nurse who tried to stop him, and threw himself through a small window. He fell 20 floors, smashing to the ground at the feet of his own sister Hilda, who was on her way to the hospital to see him.

John died in the fall. The hospital has now received a letter from the family solicitor seeking compensation on behalf of John's family for his death. The letter also asks for damages on behalf of Hilda, in negligence for psychiatric injuries which she suffered as a result of John's fall. The hospital authorities insist that almost all the windows in the hospital are made of unbreakable glass, and that they had just approved a plan to install bars in the windows in the coming year.

With reference to relevant case authority, advise the Queen Mary Hospital regarding its possible liability in tort.

5. Steve, a former professional boxer, operated a small fish ball stall. Late one night he heard someone shout "Help! Thief! Help!" Steve stepped outside to look, and saw Henry approaching him on the run carrying an expensive camera. About 20 metres behind Henry was James, who was chasing Henry. As Henry turned into a dead-end alley, Steve, still well ahead of James, joined in the chase. Just as Henry slowed down at the end of the alley, Steve caught Henry and brought him to the ground with a tackle. Henry attempted to struggle free, but Steve pulled him to his feet with ease and threw him against a fence with such force that the camera fell from his hands and rolled away down the alley. Breathless and badly shaken, Henry was finally able to scream at Steve "I'm not the thief, you idiot, the thief was chasing me! That is my camera!" When Steve turned around he saw that James, who had now picked up the dislodged camera, had disappeared. Steve now realized that James, not Henry, was the thief.

Have any torts been committed? Are any defences available? Refer to relevant cases or legislation in your answer.

6. Explain the concepts of misfeasance and nonfeasance. The early common law furnished redress only for injury resulting from misfeasance. **Is this true of the current common law? Discuss, with reference to examples and developments in the case law.**

7. "An employer is not liable for a wrongful act done by his servant unless it is done in the course of the servant's employment."

Explain, in the light of decided cases, the meaning of "servant" and "course of the servant's employment". Be sure to take into account recent judicial decisions.

8. Alice is a wealthy widow who owns some land in Shatin on which a row of single unit dwellings was built many years ago. Since her husband's death three years ago, Alice has not paid much attention to the property. All of her tenants have moved out, and the houses stand empty. At various places on the boundary of the land are signs saying: "Trespassers will be prosecuted. Enter at your own risk."

Every working day, Betty takes a short cut to work over Alice's land. The land is fenced, but at one or two points the fencing has collapsed and passersby can walk through. One day when Betty is walking between two of the houses on Alice's land, a brick falls off one of the houses, and Betty is seriously injured.

Candy, aged 6, often plays with her little friends on Alice's property. She is badly injured when she trips and falls over a piece of timber lying concealed in long grass near the houses.

Subsequently, Alice decided to repair the premises and prepare them for letting to tenants. Kevin, an employee of the roofing firm hired to install new roofing, is injured when he falls through a part of the roof which had become weak due to rotting timber.

Finally, Alice decides to re-let all of the flats and opens one of the flats for public viewing as a “show flat”. At the entrance is a sign that reads “Slippery when wet”. Wilson does not notice that the floor has recently been cleaned with a mop. Wilson slips on the wet floor, and is seriously injured.

With reference to relevant case law and legislation, advise Alice respecting her possible liability as occupier of the premises.

9. Answer both (a) and (b)

- (a) With reference to relevant case law, explain the concept of malice in the context of the defamation defences of fair comment and qualified privilege.

and

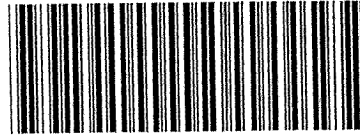
- (b) With reference to relevant case law, what constitutes “defamatory meaning” in the law of defamation?

10. “Nuisance is no longer a tort of strict liability. Tort would be improved if nuisance were abolished. Such claims can just as readily be taken up through the tort of negligence”.

Do you agree or disagree? Explain your answer, with reference to relevant case examples.

End of Paper

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University of Hong Kong.
Faculty of Law.
Examination papers : Bachelor
of Laws : first examination.
Hong Kong : Faculty of Law,
University of Hong Kong, 1971-

