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## Principles of Common Law

4 January 2017

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**Duration:** 120 minutes

- Please check both at receipt as well as at submission of the exam the number of question sheets. The examination contains 1 page and four (‘4’) questions.

**Notes on marking**

- When marking the exam each question is weighted separately. Points are distributed to the individual questions as follows:

Question 1	20 %
Question 2	25 %
Question 3	30 %
Question 4	25 %

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Total	100 %
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**We wish you success!**

## Exam questions

1. **(20%)** Discuss some of the main differences between the common law and civil law (as discussed in lecture and the readings). For each difference, discuss the merits and faults of both legal systems and suggest ways to improve each.
2. **(25%)** Comment on the doctrine of consideration in contract law. Describe what it is and discuss in your view what its advantages and disadvantages are, and what in your opinion could be done to improve this legal doctrine. If you feel it does not need improvement explain why.
3. **(30%)** Michael was 27 years old and had come under the influence of a group of friends who had previously been involved in criminal activity. Michael lived at home with his parents. Michael's group of friends had discussed with him the possibility of robbing a bank and had proposed to him that he and another member of the group rob Bank A the following night. Michael and the other members of the group agreed that Michael and his accomplice would rob the bank. The day before the night of the planned robbery, Michael began to have doubts about whether he should rob the bank. He told his accomplice that he did not want to go through with it. His accomplice contacted the other members of the group and they all told Michael that if he did not rob the bank that they would kidnap his parents. Michael then decided to go through with it. Just before the robbery began, the police arrived and arrested Michael and his accomplice who were taken into custody.

Comment on what crimes Michael can be charged with at common law and any other applicable criminal law statutes discussed in lecture. Are there any defences that Michael can assert against these charges?

4. **(25%)** Describe what the common law of negligence is. What are its main elements and some of the defences? How is it different from the intentional torts? What type of damages is available? In your view, what could be done to clarify or improve the law of negligence?

<b>Question 1</b> Discuss some of the main differences between the common law and civil law (as discussed in lecture and the readings). For each difference, discuss the merits and faults of both legal systems and suggest ways to improve each.	Points 20%
Common law (CL) – judge-made law through resolving cases in which judges apply existing legal principles to facts of the case. Judges are legally bound to respect the decisions of previous judges in applying and resolving the facts of a particular case – <i>stare decisis</i> . This is binding precedent.	2
CL judges are ‘umpires’ – play more of a passive role in fact-finding and formulating arguments for the parties, as attorneys for respective parties are supposed to present the arguments and evidence in support of their client’s position.	2
Cite discussion of the judicial process from the readings – Frankfurter, Brandeis	+2
Parliament can intervene to change the common law by adopting statutes	1
Example of Magna Carta (1215) imposing duties on the Crown to require that all criminal trials with prison sentences be decided factually based on a decision of jury of peers. Trial by jury.	0.5
Citing the historical origins of common law in medieval Europe to show how CL reflects the customs, manners and habits of European people. They could cite the Holmes readings as support but not necessary	+1
Cite example of trust law developing as a flexible response to societal problems 13-15 <sup>th</sup> centuries such as male family wanting to leave property for benefit of family by leaving trustee management of property to a male trustee.	+1
Civil law attempts to apply principles from Roman law <i>ius civilis</i> (Justinian) that have been developed into more specific rules for modern civil code. Civil law goal to write rules for every conceivable situation. Purposive approach to interpretation.	2
Civil law appears to be more comprehensive in coverage than CL. But CL is accompanied by statutes filling gaps at CL.	0.5
Additional elaboration of characteristics of civil law. Principles of Roman civil law have been accepted and applied in modern civil codes adopted in Europe in 19 <sup>th</sup> century (France & Germany). More developed legal concepts and principles than the common law which was based on judges interpreting principles and applying them to practical every day disputes.	2
But Holmes reading notes that CL also had origins in Roman law and early medieval continental European (i.e., Germanic tribes) law and customs.	+1
<u>Merits and faults</u>	
<i>Common Law:</i> Flexibility of applying existing legal principles to facts of a case. Most cases have different sets of facts. Therefore, good lawyers are able to distinguish the facts of each case and to show why possibly the same legal principle – or another one - should be applied differently to a case with a different set of facts.	1
However the flexibility of interpreting existing legal principles can create legal uncertainty and can be criticised as giving judges too much power.	1
cite the historic dispute between Lord Coke and the King’s (Charles I’s) Chancellors over whether Judges could veto a Parliamentary statute as violating fundamental principles of common law (such as trial by jury).	+1
<i>Civil Law:</i> Civil law increased legal certainty because based on providing an answer to every dispute based on the will of the legislature/government. If there is a gap in the law, the judges do not have as much flexibility as CL in applying existing principles in creative ways. Civil law rules are often prescriptively applied with little room for creative application.	2
Also, civil law allows judicial magistrates to conduct investigations of crimes and to decide to charge defendant. Criticised on grounds of separation of powers. But civil law magistrates have power to appoint experts and assess evidence and request additional evidence from parties. In contrast to passive approach by CL judges.	2

CL criticised for allowing judges to make the law where the legislature has not acted. But judges respond that they are Not making law but using legal techniques of interpretation and analysis to find out what the law is.	2
CL has strict doctrines – punishment by death for serious CL offences, which must be strictly adhered to by judges ( <i>ie.</i> , <i>stare decisis</i> ) despite modern societal practices that reject extreme punishment ( <i>ie.</i> , death penalty) So CL has had to be modify by legislative statute, including human rights statutes to implement evolving norms for fundamental rights.	2
<b>Total</b>	<b>20</b>

<b>Question 2</b>	25%
Comment on the doctrine of <u>consideration</u> in contract law. Describe what it is and discuss in your view what its advantages and disadvantages are, and what in your opinion could be done to improve this legal doctrine. If you feel it does not need improvement explain why.	
Contract law formed by private rights and obligations created through consent of the parties with some public law prohibitions applicable. No valid contracts arising from of illegal activity	1
Inducement to enter the contract	1
For contract law to be legally enforceable, the formation of contract (exchange of promises or an exchange of promise for property/money) there must be consideration. An important principle of common law.	1
Benefit or detriment to both parties	1
A promise with no consideration is not enforceable	1
Contract based on past consideration or consideration to third party not enforceable	1
Formation of contract must conform with consideration requirement. Promise for some other of value.	1
Gifts are not enforceable in common law	1
Comparison with civil law	+1
Discuss the legal theory behind consideration – consent-based theory, meeting of the minds	2
Consideration can be of potentially of very-low value (ie., a peppercorn will do)	1
Exchange of consideration must be simultaneous	1
<u>Discuss</u> that consideration to be valid has to be simultaneous with exchanged for promise and can be potentially of very-low value	2
<b>Critique</b>	
Fairness of not enforcing contracts without consideration. Should past consideration count – why or why not?	2
Estoppel + definition	1
Modern technology and electronic commerce make the consideration requirement obsolete. Discuss impact on consumer who buy online and applicable consumer statutes that might protect consumers for electronic as well as in person transactions.	2
Readings discussing common law doctrine of consideration	+1
How statute potentially changes its application	1
What about illegal consideration – illegal acts, doctrine of frustration of purpose; how does this affect enforcement of contracts and the consideration requirement.	1
Advantages and disadvantages (at least 2)	2
What can be done to improve?	2
<b>Total</b>	<b>25</b>

<p><b>Question 3</b></p> <p>Michael was 27 years old and had come under the influence of a group of friends who had previously been involved in criminal activity. Michael lived at home with his parents. Michael's group of friends had discussed with him the possibility of robbing a bank and had proposed to him that he and another member of the group rob Bank A the following night. Michael and the other members of the group agreed that Michael and his accomplice would rob the bank. The day before the night of the planned robbery, Michael began to have doubts about whether he should rob the bank. He told his accomplice that he did not want to go through with it. His accomplice contacted the other members of the group and they all told Michael that if he did not rob the bank that they would kidnap his parents. Michael then decided to go through with it. Just before the robbery began, the police arrived and arrested Michael and his accomplice who were taken into custody</p> <p>Comment on what crimes Michael can be charged with at common law and any other applicable criminal law statutes discussed in lecture. Are there any defences that Michael can assert against these charges?</p>	30%
<p>Attempted crime v actual commission. Attempt is a criminal offence.</p> <p>To prove attempt must show <i>actus reus</i> (requires conduct) and <i>mens rea</i> (requires fault).</p>	3
<p>Also, conspiracy to commit a crime. Requires agreement between the defendant and at least one of other person to engage in conduct that is a criminal offence. A so-called <i>inchoate</i> offence.. Requires <i>Actus reus and mens rea</i>.</p>	3
<p>Six commonly used kinds of fault: intention, knowledge, belief, recklessness, negligence, dishonesty (past/present/future)</p> <p><i>Actus reus and mens rea</i> must occur <u>simultaneously</u> for the offence.</p> <ul style="list-style-type: none"> <li>• Intention as 'decision': Where X has settled on bringing a possibility about, this is intent.</li> <li>• Intention-in-action: Engaging in an action in the belief that by so doing, that action, or some consequence, may come about.</li> </ul>	6*
<p>Analysis of question facts</p> <p>By coming under influence of the group raises questions about Michael's <i>mens rea</i>. To commit a crime at CL a requirement that the defendant has acted with mental culpability – <i>mens rea</i> – and intentionally committed an act which is defined at CL or by statute as a criminal offence. But Michael was told that his parents would be killed if he did not participate in crime.</p> <p>The problem with all of these principles, whether derived from case law or statute law, is that in the end the jury has to decide whether the defendant had the required intention (as he will deny it), whether he was capable of having the required intention (reasonable man different for all of us). Reasonable person applied to show what a reasonable person would have done under circumstances.</p>	4*
<p>Defences. Lacks mens rea. Duress. Discuss elements and whether it can be used by Michael as a defence. Why can duress be accepted or not used as defence? Would defence of duress hold up? Voluntarily joining gang: open to such threats?</p>	3*
<p>Diminished responsibility. Can it be used as defence? Elements of diminished responsibility. Can it be used as defence for the crime Michael may have committed?</p>	3*
<p>Inchoate offence. Offence not carried out so no conduct to be complained about. Was the conduct enough to satisfy elements of attempt to commit a crime?</p>	3*
<p><b>Total</b></p>	<b>30</b>

\* Very in-depth analysis is necessary to reach these points. Naming never sufficient

<b>Question 4</b> Describe what the common law of <u>negligence</u> is. What are its main elements and some of the defences? How is it different from the intentional torts? What type of damages is available? In your view, what could be done to clarify or improve the law of negligence?	25%
Historical development of intentional torts how negligence action derived and evolved from intentional tort of trespass.	2
Case Donoghue vs. Stevenson + discussion/analysis	1
Case of Thorns – example of property owner’s tree limb growing over the property of neighbour and neighbour’s removal of limb accidentally damaged neighbour’s property. Judge had to use creative interpretation to expand intentional tort of trespass to include accidental damage of property falling	+1
Modern distinction between intentional torts (assault or battery) and conduct when harm is not intended but because societal norms define a reasonable person to be someone who would take reasonable or cautionary behaviour.	2
Elaboration based on slides or readings	1
Discuss the main elements of negligence:	
Standard of care defined by societal norms (not by agreement as in contract), duty of care owed to someone whom it was reasonably foreseeable that they might suffer damages if duty of care breached.	3
To show foreseeability must apply either ‘but for’ or ‘proximate cause’ tests. That the plaintiff/individual whose rights were infringed suffered damages.	1
Foreseeability test – ‘but for’ test and ‘proximate’ cause – a chain of events to show that breach of duty of care caused injury	2
General. summary of types of damages – actual (physical to body or property), emotional (pain & suffering) damages, and in exceptional cases exemplary or punitive damages	3
Calculation of damages factual issue. Determining negligence based on balance of probabilities (more than 50% that he/she was negligent based on legal elements of negligence being fulfilled).	1
Defences. Defendant did not breach standard or duty of care even though a person suffered losses/damages. Ex turpi causa and volenti not fit injuria + discussion (not just citation)	2
Break the chain of causation – novus actus interveniens + discussion	1
If duty of care defined broadly for certain activity (ie., medical negligence) then difficult for person to recover losses.	1
Evidence must be shown on balance probabilities (more likely than not) that defendant should have known the standard of care	1
Student’s own analysis, comments, improvement, opinions Based on readings or previous legal education	3
For example, comparative negligence of claimant party could nullify action at common law, but claims based on comparative negligence allowed by statute today. Claimant must show loss or damages of some type for negligence claim to be brought to trial.	1
<b>Total</b>	<b>25</b>
<b>Total</b>	<b>100</b>