CHAPTER 1

Tortious Liability in General

INTRODUCTION

1.01 Within a relatively short history, the Hong Kong Special Administrative Region ('Hong Kong') has been transformed from a wilderness of barren rocks into one of the leading international centres of business, finance and industry in Asia, and, indeed, the whole world. Over seven million people[1] inhabit an area of just 426 square miles. Nevertheless, it is one of the busiest cities where there exist numerous engineering works, industries and businesses, requiring the constant movement of people, machinery and materials by land, sea and air. Hong Kong has the second tallest building in the Peoples Republic of China and the fifth tallest in the world. The turnover of money in Hong Kong's stock exchange is over billions of dollars each day. As in other developed countries, complex engineering projects undertaken in Hong Kong multiply the opportunity for injury. Hong Kong is as accident prone as any other commercial and industrial city in the world. Buildings collapse, trains derail, motor vehicle accidents occur every day, fake and defective products are freely circulated. People suffer huge financial losses and serious physical injuries at the hands of criminals and fraudsters as well as through negligent professional advice, conduct and activities.

1.02 One has only to look at any of the Hong Kong daily newspapers to gain an idea of the magnitude of the problem. Here are some samples: 'HKU apologises after 254 dental patients put at HIV, hepatitis risk'[2]; 'Beauty industry can't self-regulate; new laws

1 As calculated by the Census and Statistic Department, Hong Kong Special Administrative Region in 2011. Statistic available at [www.census2011.gov.hk/pdf/graphic-guide.pdf] Accessed 15 October 2012.

2 P Siu, *South China Morning Post*, Health Section, Monday, 5 November 2012 12:00am [http://www.scmp.com/news/hong-kong/article/1075166/hku-apologises-after-254-dental-patients-put-risk] Accessed 10 November 2012.

needed'[3]; '38 die in Hong Kong ferry disaster'; 'Three dead as speeding minibus rams truck'[4]; 'Worker impaled in deadly accident at highway site'[5]; 'Flashing signs and billboards bring misery to many residents'[6]; 'Investor's minibond lawsuit a first for consumer action fund'[7]; 'Guidelines ignored on checking tree that killed girl'[8].

1.03 It can be seen that with a city that is prone to accidents, redress is often sought. In Hong Kong one of the sources of law for redress is the law of tort and the source and the foundation of the law of tort in Hong Kong are to be found mainly in English law, both statutory and common law. After the 1997 handover, English law still retains its persuasive effect in Hong Kong courts. The law of tort as a separate branch of civil liability is of comparatively recent origin; the first English textbook on the subject, which was by Addison, was published as late as 1860.[9] Yet, it is one of the most rapidly growing subjects.

1.04 In this chapter, we shall first look at the meaning and the scope of the law of tort. Second, we shall distinguish tort from other forms of liability. Third, we shall examine the origin and development of the law of tort, together with the forms of action and refer to the basic principles of the law of tort as applied in Hong Kong.

MEANING AND SCOPE OF TORT

1.05 A tort is a civil wrong, the essential hallmark of which is an action for damages.[10] It is distinguishable from crimes (where the main object is to punish the wrongdoer). A right to damages, however, does not necessarily make a civil wrong a tort. Thus, a breach of contract may entitle the injured party to sue for damages, but may

3 *South China Morning Post*, Insight & Opinion Section, SCMP Editorial, Sunday, 21 October 2012 12:00am, [http://www.scmp.com/comment/insight-opinion/article/1065865/beauty-industry-cant-self-regulate-new-laws-needed] Accessed 10 November 2012.

4 *South China Morning Post*, FT News & Education Section, 26 July 2009, p 1.

5 *South China Morning Post*, FT News & Education Section, 8 April 2011, p 3.

6 *South China Morning Post*, FT News & Education Section, 16 March 2011, p 12.

7 *South China Morning Post*, FT News & Education Section, 25 September 2009, p 3.

8 *South China Morning Post*, FT News & Education Section, 25 March 2009, p 4.

9 Addison's *Treatise on Contracts* was published earlier in 1847.

10 See Salmond and Heuston, *The Law of Torts* (21st edn, 1996) pp 10–13; *Salmond on Jurisprudence* (8th edn, 1930) pp 486–90; Fleming, *The Law of Torts* (10th edn, 2011) pp 3–4.

not give rise to an action in tort. Likewise, breaches of trust are governed by different principles.[11]

1.06 The word 'tort' is derived from the Latin word *tortus*, meaning twisted or crooked. In English law, it came to mean wrongful conduct which rendered the defendant liable in damages.

1.07 The law of tort plays an effective role in Hong Kong by providing remedies for the conduct of others that endanger our lives and interfere with our safety, liberty, property and possessions. Thus, if you issue threats of physical violence, or beat a person, or restrain a person's movements, or lower his reputation in the eyes of right thinking people, or make unwelcome sexual advances or request for unwelcome sexual favours or engage in conduct of a sexual nature or create a sexually hostile work environment, or run over a person walking on the street, or collide with another vehicle, or erect a factory which emits excessive noxious smoke or fumes or discharges noxious effluents, or interfere with the enjoyment of land by another person, or enter upon his land without his consent, or take his chattels, you may be liable to compensate the injured party.[12] A person, however, is not only liable for causing physical damage to the person or property of another person; he may also be liable for inflicting economic loss by his negligent advice, and even liable for acts or omissions of others who act as his agents or servants.

1.08 The law of tort is based on the simple principle that in a civilised society, people must be able to live on the assumption that others will respect their person, property and possessions; and if others fail to do so, they will pay for the unwarranted interference, aggression, or failure to observe norms of expected behaviour. The idea of payment of compensation for loss or injury resulting from any wrongful conduct is not entirely new. As far back as the seventh century AD, the laws of King Ethelbert (601–604) prescribed payment of blood money for various kinds of wrong.[13]

11 The idea that the wrongdoer must pay for his wrong was also accepted by Roman law. Obligations arising from what we now call tort in English law were termed *obligationes ex delicto*, meaning duty to pay compensation to the victim. The basis of Roman law and Anglo-Saxon law is similar, though Anglo-Saxon law grew out of custom and Roman law was entirely a creature of statute.

12 The listed actions may expand with new developments in tort or legislation. As an example, stalking is being considered by the Law Reform Commission of Hong Kong (HKLRC). See HKLRC report on Stalking http://www.hkreform.gov.hk/en/publications/rstalk.htm (Accessed 26 November 2012)

13 D Roebuck, *The Background of the Common Law* (2nd edn, 1991) pp 14–15.

Pollock and Maitland state that early jurisprudence consisted of knowledge of pre-appointed prices, 'every kind of blow or wound given to every kind of person had its price'.[14] Tort law determines the circumstances in which a person would be liable to compensate others for their wrongdoings. Tort duties are often extended to take account of social values and technological advances. The idea of offering greater protection to women has resulted in creating the tort of sexual harassment. The development of Internet technology has expanded the scope of intentional torts. For example, courts are awarding damages for trespass to chattels and defamation on the Internet and in cyberspace. The movement for the protection of the environment has expanded the scope of negligence and strict liability. The role of tort law today is to balance the following demands of society — the desire to compensate the injured; to deter the wrongdoer; to encourage useful developments and activities in the fields of science and technology; and to give recognition to changing social mores and practices.

1.09 There are three types of tortious liability: liability for intentional wrongs, liability for unintentional wrongs, and strict liability. The liability in the first two categories presupposes fault. Although the liability in the third category arises independently of any fault, it is based on the theory that a person must pay for his interference with the legitimate expectations of another in respect of the enjoyment of his person or property.[15] On the other hand, payment by the wrongdoer in most cases is only a fiction, for the payment is made by insurance.

1.10 There are many and various interests protected within a complex system known as tort law.

Tort and insurance

1.11 The current law of tort system relies heavily on insurance. This is because many damages are paid out by insurance companies instead of the actual wrongdoer. The relationship between the insurance company and the wrongdoer is one of contract and has no concern in tort law or in adjudicating cases by the court in determining the amount of damages. However, it is suggested

14 F Pollock and FW Maitland, *The History of English Law Before the Time of Edward I* (2nd edn, 1959) p 451.

15 See R Pound, *Introduction to the Philosophy of Law* (Yale University Press, 1982) p 105.

that, without a properly functioning insurance system, the tort law system would not be able to run effectively, as the possibility of paying out a large amount of damages by the wrongdoer is small, and the claimant would therefore always go uncompensated. Given the large cost of court and lawyer's fees, combined with the chance of uncompensation, tort cases would not arrive at the court room.

1.12 Since damages are paid by the insurance companies, insurance companies exert considerable influence in certain tort areas.[16] Such influence can occur in the form of insurance companies taking over the wrongdoer's place (due to the terms of the policy and right of subrogation) and actually deciding which case goes to court (and may become precedent) and which do not. Further, if legislative changes are contemplated, legislatures may take into consideration insurance policies, as such insurance policies may even affect judicial decisions.[17]

1.13 But protection is incomplete. For some wrongs, there is no remedy. Thus, where the defendant inflicts a substantial financial loss to the plaintiff in the course of a legal (albeit unethical) trade competition, the latter has no remedy. Salmond and Heuston state that the law of tort consists of a body of rules establishing specific injuries; the plaintiff can only sue if he has suffered a recognised injury.[18] This view also seems to have been taken by the House of Lords as far back as 1689 in *Barnardiston v Soame*.[19] Lord Denning summarised the English position thus:

> It has been said by high authority that it is an actionable wrong for any man intentionally to injure another without just cause or excuse. But I do not think that this wide proposition has yet been accepted into our law.

Tort and crime

1.14 The idea of taking revenge and inflicting deterrent punishment underlies the development of the laws of tort and crime.[20] Early English law did not distinguish between criminal and tortious acts. The roots of tort can be found in criminal procedure. In fact,

16 J Cooke, *Law of Tort* (9th edn, Person Longman, 2009) pp 7–8.

17 *Barker v Corus UK Ltd* [2006] 3 All ER 785.

18 Salmond and Heuston, *The Law of Torts* (21st edn, 1996) pp 8–9.

19 6 State Trials 1063. Pollock, however, argued that *prima facie* all harm was actionable. See F Pollock, *The Law of Torts* (13th edn, 1929).

20 See Holdsworth ii, pp 43–54.

the writ of trespass so commonly used to support a tort action, was derived from a criminal type of proceeding.[21] Even today, the facts of many cases may disclose both a crime and a tort. Thus, when a person steals another person's goods, he may be prosecuted for committing a theft, and he may be sued in civil tort for trespass to chattels and/or conversion. Again, both assault and battery are torts but they may also give rise to criminal prosecution. However, despite their common origin and some overlapping situations, tort and crime differ in several essential respects. First, generally, criminal actions are brought by the Secretary of Justice in the name of the Hong Kong Special Administrative Region, whereas a tort victim himself takes legal action. Second, civil (including tort) cases are conducted differently from criminal cases. In the case of civil trials, the court makes a decision on the 'balance of probabilities', whereas in criminal cases the prosecution must establish the case 'beyond all reasonable doubt'.

1.15 The objective of criminal law is to punish the wrongdoer in order to protect society as a whole. Imprisonment, non-custodial sentences and pecuniary fines are among the most important types of punishment. The essential characteristic of a tort action is not to seek punishment of the wrongdoer (even though sometimes punishment is an underlying reason) but to claim monetary compensation for the victim. On the other hand, a criminal court in some cases may order an offender to pay monetary compensation to the injured party[22] and a civil court may award exemplary

21 See infra at paras 1.28-1.31.

22 Section 73 of the Criminal Procedure Ordinance (Cap 221) provides:

'(1) Where a person is convicted of an offence, the court may, in addition to passing such sentence as may otherwise by law be passed or making an order under section 107(1), order the person so convicted to pay to any aggrieved person such compensation for—

(a) personal injury;

(b) loss of or damage to property; or

(c) both such injury and loss or damage,

as it thinks reasonable.

(2) The amount ordered as compensation under subsection (1) shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted.'

Section 98 of the Magistrates Ordinance (Cap 227) provides that a magistrate may in addition to any other punishment, order an offender to pay to any aggrieved person compensation not exceeding $10,000. See Ashworth, 'Punishment and Compensation' (1986) 6 QJL 586, where the distinction between crime and compensation has been examined from a theoretical standpoint.

damages in exceptional cases to punish the wrongdoer.[23] Such damages are, for example, awarded in actions founded on sexual harassment and defamation. The most striking feature of modern tort law, however, is its attempt to allocate losses.[24]

Tort and contract

1.16 Tort and contract share a common procedural origin. The classification of different civil obligations into categories such as tort and contract appeared relatively late. The idea that executory promises are enforceable was derived from the tortious notion of deceit. The strict doctrine of privity of contract was largely derived from the origin and development of the modern tort of negligence.

1.17 The same facts may give rise to alternative liability in both contract and tort, although the plaintiff cannot be allowed to recover twice.[25] The most common example is where a person employs a surgeon who negligently performs an operation. The surgeon may be sued for failure to perform his contractual obligation or he may be sued in tort for negligence. *Esso Petroleum Co Ltd v Mardon*[26] furnishes another excellent example. A tenant took out a lease on a petrol station from Esso company. He was induced to enter into a contract because of a negligent forecast by an Esso company's salesman as to future sales. Since the statement made by the salesman constituted a collateral contract, the tenant might sue Esso company for breach of contract or under the tort of negligence for making a negligent statement.[27] Thus mere presence of contractual duty does not preclude an action in negligence.

1.18 There are four essential differences between contract and tort, namely:

(1) Contractual obligations come into existence when two parties assume such obligations; whereas tortious liability

23 See *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL; Fridman, 'Punitive Damages in Tort', 48 Can B Rev (1970) 373; Stoll, 'Penal Purposes in the Law of Tort' (1970) 18 Am J Comp L 3.

24 See Fleming, *The Law of Torts* (10th edn, 2011) pp 11–12.

25 Note the distinction between the actions giving rise to a criminal action and tort as against contract and tort. The first would allow the victim to claim in tort even if the government has prosecuted the wrongdoer under criminal law.

26 [1976] QB 801, [1976] 2 All ER 5, CA (Eng).

27 *Henderson v Merrett Syndicate Ltd* [1995] 2 AC 145, [1994] 3 All ER 506, HL. Cf *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, [1985] 2 All ER 947, PC.

CHAPTER 11

Detinue

INTRODUCTION

11.01 The action of detinue as a distinct and different tort no longer exists in England, having been abolished by section 2 of the Torts (Interference with Goods) Act 1977, which Hong Kong has not followed. In Hong Kong, the common law position has not been changed, and remedies for wrongful detention of a chattel are still granted under this tort.[1]

11.02 The tort of detinue is of much greater antiquity than the tort of conversion.[2] With the emergence of the latter, detinue faded into insignificance. Although in most cases of unlawful detention of chattels where detinue lies, conversion will also lie, detinue is the only tort which enables a plaintiff to demand a proprietary remedy, that is, to demand a specific restitution of the chattel itself. Moreover, at common law, a bailee who wrongfully loses the chattel due to his carelessness or where the chattel is lost or destroyed while in his possession, the bailor cannot sue in conversion. His only tort remedy is in detinue.[3]

ACTS CONSTITUTING DETINUE

11.03 Detinue means intentional detention by the defendant, without lawful justification, of a chattel after the plaintiff has demanded its return, the plaintiff having a right to immediate possession of the chattel. A simple example of detinue would be where a student or teacher refuses or fails to return an overdue book to the library after receiving a recall notice.

1 In *Fook Woo Cars Co Ltd v Companion Building Material (Holdings Ltd)* [1987] HKEC 66, SC, the plaintiff brought alternative actions in detinue and conversion.

2 See Prosser, 'The Nature of Conversion' (1957) 42 Corn LQ 168.

3 Section 2(2) of the Torts (Interference with Goods) Act 1977 (UK) declares that in such cases, the bailor's remedy is to sue in conversion.

Demand

11.04 Merely holding another's goods does not constitute detinue. Detinue is only committed when a proper demand for the return of the chattel is made by the plaintiff to the defendant but the defendant refuses or is unable to deliver up the chattel. The demand (to be a proper demand) must be specific[4] and not general and in written form.[5] Where the plaintiff informs the defendant that he will come and collect his chattel from the defendant's place on a certain date, this amounts to a proper demand for the purposes of detinue.[6] In certain exceptional situations, a proper demand may be assumed if it is clear that the demand, if made, would in any event have been refused by the defendant, for example, where the defendant acquired possession of the chattel by claiming that the chattel was his despite the plaintiff's protest.[7]

11.05 A demand is not a proper demand if it does not specify the place and the person to whom the chattel must be returned.

11.06 In *Lloyd v Osborne*,[8] the plaintiff's solicitor wrote a letter of demand to the defendant in the following terms: 'Dear Sir, – I am instructed by Mrs Catherine Lloyd, of Jugoing, to demand that you will at once deliver to her or her agent all sheep branded F or FG (tar brand) which you unlawfully withhold from her .' The defendant did not give any reply to this letter. It was held that the demand was insufficient in that it did not specify where the sheep were to be delivered and to whom. Even if the notice of demand designates a particular place for delivery, the demand may still not be sufficient in law unless there is a contractual obligation on the part of the defendant to make delivery at that place,[9] as would be the case where a borrower of library books is served with a notice to return them to the library. Naming more than one place for delivery and giving the defendant an option to deliver at any one of them is also not a proper demand in the absence of any

4 Note in *Advance Equipment Services (Hong Kong) Ltd v Tonge (Hong Kong) Ltd* [2009] HKEC 110, it was held that when a plaintiff made a general demand for a batch of goods which the plaintiff did not have title to, but in the same demand, specifically demanded for goods to which he was entitled to, the demand was valid.
5 *Lloyd v Osborne* (1899) 20 LR (NSW) 190.
6 *Coley & Ors v Rogers* (1938) St R Qd 25.
7 *Brown v Mackenzie* (1871) 10 SCR (NSW) 302.
8 (1899) 20 LR (NSW) 190.
9 See *Capital Finance Co Ltd v Bray* [1964] 1 All ER 603, [1964] 1 WLR 323.

contractual obligation. As without any contractual obligation, a proper demand must be on that is unconditional and specific.

11.07 In *Capital Finance Co Ltd v Bray*,[10] the plaintiff asked the defendant to deliver up the chattel in question at Edinburgh, Waterloo Place in London or Stone Buildings, Lincoln's Inn. Since there was no contract between the parties imposing that obligation on the defendant, the Court of Appeal held that the demand was insufficient. In *Chow Shun Yung v Weh Pih Stella*,[11] the court held that because the defendant had no contractual obligations to deliver the goods from China to Hong Kong, the demand was not valid in law, as such, the plaintiff's action in detinue failed.

11.08 The reason for insisting on prior demand for the liability of detinue is to ensure that one who came into possession of the plaintiff's goods innocently be first informed of the defect in his title and given the opportunity to deliver up the chattel to the plaintiff.[12]

Refusal

11.09 Even if the demand for the return of the chattel is proper and sufficient, there is no detinue unless the defendant improperly refuses to deliver up the chattel or unjustifiably takes more than reasonable time to return the chattels. What constitutes an improper refusal or failure to return within a reasonable time is a question of fact. In *Tsun Fat Finance Co Ltd v Commissioner of Police*,[13] the defendant lawfully seized 50 packets of diamonds under a search warrant from the plaintiff for investigation. Subsequently, the Department of Justice advised the defendant to return the diamonds to the plaintiff and the plaintiff also demanded their return. This was not done. The court held that in the circumstances, the plaintiff was entitled to a right of immediate possession of the diamonds at the close of the criminal case and any detention of diamonds beyond a reasonable time after the closing of the prosecution's case was inconsistent with the plaintiff's such right of immediate possession of the diamonds.

11.10 It must be noted that a mere refusal to deliver the chattels to a given place by the defendant would not give rise to the action of detinue if the defendant does not owe a contractual duty to adhere

10 [1964] 1 All ER 603, [1964] 1 WLR 323.
11 [2007] HKCLRT 72.
12 John G Fleming, *The Law of Torts* (10th edn, 2011) p 71.
13 [2002] 3 HKC 232, CFI.

to the delivery instructions of the plaintiff and the defendant does not prevent the plaintiff from collecting the chattels which are in the possession of the defendant.

11.11 Refusal may be expressed or implied. Where the defendant tells the plaintiff, in response to the plaintiff's letter of demand, that he will not permit him to remove the chattel, this is a clear refusal amounting to detinue. So long as the refusal is made, the reason for it is immaterial. A railway depot refusing to deliver up the plaintiff's chattel cannot escape liability because its refusal was made from fear of retaliatory action by trade unions.[14]

11.12 Refusal would be implied where the defendant made no response whatsoever within a reasonable time. Further, where a chattel has been entrusted by a bailor to the bailee and is lost or destroyed, whether by any intentional, reckless or negligent conduct of the latter and as a consequence he cannot return the chattel, he is liable. His failure to return the chattel would be tantamount to a refusal to comply with the bailor's demand.

11.13 In *Houghland v RR Low (Luxury) Coaches Ltd*,[15] the plaintiff was a passenger on the defendants' bus. She deposited her suitcase with the driver and it was lost. The court held that she would succeed unless the defendants could show that what happened was not due to any fault on their part.

11.14 Moreover, a refusal to return with justification does not give rise to detinue. Thus, for example, where the plaintiff alleges that the defendant took away some chattels belonging to him but is unable to produce satisfactory evidence of a right to immediate possession over the chattel, he has no cause of action in conversion.[16] However, a mere failure to reply to a proper demand cannot, in all circumstances, be construed as a refusal, for example, the defendant may need time to consider the matter. This can be the case particularly where the chattel has come into the defendant's hand from a third party[17] or where the chattel is in the possession of a third party. In either case, however, if the defendant fails to make it clear that he admits the plaintiff's title to the chattel and

14 *Howard Perry v British Railways Board* [1980] 2 All ER 579, [1980] 1 WLR 1375.
15 [1962] 1 QB 694, [1962] 2 All ER 159, [1962] 2 WLR 1015.
16 See *Fu Lok Man (T/A Lokie Leatherware Manufacturing Co) v Chief Bailiff of the High Court* [1999] 2 HKLRD 835, CFI.
17 *Nelson & Anor v Nelson* (1923) St R Qd 37.

it is at the plaintiff's disposal, he may render himself liable in detinue.[18]

PLAINTIFF'S INTEREST

11.15 Detinue, like conversion, is a wrong against possession or an immediate right to possession. In *Meiko Trans Co Ltd & Anor v Chan Kwan Yin & Anor*,[19] the court held that the plaintiffs acting as bailees (not owners of the goods) have the immediate right of possession of the vehicle (chattels in question) and were entitled to sue in detinue. The underlying idea is that where the defendant has interfered with the plaintiff's chattel, the latter must be given his chattel back within a reasonable time and after a proper demand has been made to restore him into possession. However, this remedy is also available even though the goods have been lost or destroyed provided the plaintiff can prove that the defendant had in his possession the chattel at some time or another, not necessarily at the time of institution of the action.[20] Accordingly, if the defendant did not have possession of the chattel at any time, there would be no detinue.

SUBJECT MATTER OF DETINUE

11.16 The subject matter of detinue (as in the case of conversion) is any chattel, tangible or intangible. For a detailed discussion of this topic see Chapter 10[21].

REMEDIES

11.17 In an action in detinue, the court may make an order asking the defendant to pay the value of the chattel or, in appropriate cases, return of the chattel and damages for its retention. In *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd*,[22] Diplock LJ said that the plaintiff in an action in detinue today may seek judgment in one of three different forms:

18 *Metals and Ropes Co Ltd v Tattersall* [1966] 3 All ER 401, [1966] 1 WLR 1500.
19 HCA 1024/2011, [2012] HKEC 786.
20 *Houghland v RR Low (Luxury) Coaches Ltd* [1962] 1 QB 694.
21 See Chap 10 paras [10.46]–[10.50].
22 [1963] 2 All ER 314, [1963] 1 WLR 644, CA (Eng).

(1) for the value of the chattel as assessed and damages for its detention;
(2) for return of the chattel or recovery of its value as assessed and damages for its detention; or
(3) for return of the chattel and damages for its detention.

11.18 A judgment in the first form will be appropriate where the tort of detinue is committed with respect to an ordinary article in commerce, for the court will not normally order specific restitution of the chattel when damages will be an adequate remedy.[23] Sometimes a person may only claim damages for the detention of his chattel. In *Toivanen Taina v Osman Aziza*,[24] the defendant refused the plaintiff to have access to her personal clothing. The plaintiff therefore had to buy items of clothing worth HK$15,434. The court said that she was entitled to this sum as damages.

11.19 Where a judgment is given in the first form, the value of the chattel is ordinarily assessed as at the date of judgment. It will therefore be advantageous for the plaintiff to sue in detinue rather than in conversion if the market value of the chattel has gone up since the date of the wrong.[25] Where the plaintiff seeks judgment for the return of a chattel with special value such as a vintage motor car or its value, the judgment in the second form will be the most appropriate.[26] Pearson LJ, in *General and Finance Facilities Ltd*, stated that judgment in the second form should specify separate amounts for the assessed value of the chattel and for the damages for its detention so that if the chattel could not be recovered, the plaintiff might recover its value by levying execution on the defendant's property. Where the plaintiff seeks judgment for the specific restitution of the chattel, he must pray for judgment in the third form. This remedy may be obtained by the plaintiff by a writ of delivery, attachment or sequestration.[27] The remedy being discretionary, the court may refuse to grant it in the case of an ordinary article in commerce.[28]

23 *Whiteley Ltd v Hilt* [1918] 2 KB 808.
24 [1995] HKLY 518, HC.
25 *Rosenthal v Alderton & Sons Ltd* [1946] KB 374. Semble, market value of used clothes would be the replacement value. See *Toivanen Taina v Osman Aziza* [1995] HKLY 518, HC.
26 In *Juhlinn-Dannfelt v Crash Repairs Pty Ltd* [1969] QWN 1, the Supreme Court of Queensland considered that where the plaintiff sought to recover a vintage Horch motor car, the judgment should be in form (2).
27 *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 2 All ER 314, [1963] 1 WLR 644, CA (Eng).
28 See *Howard Perry & Co v British Railways Board* [1980] 2 All ER 579, [1980] 1 WLR 1375.

DEFENCES

Jus tertii

11.20 The plaintiff has no right to sue in detinue if a third party has the right to immediate possession. Accordingly, the defendant can set up the defence of *jus tertii*[29] provided he defends his possession of the chattel under the authority of the *tertius* (third person) from whom he himself obtained the property in the chattel.[30]

Defendant acquiring chattel under an illegal contract

11.21 Where the defendant has got possession of the plaintiff's chattel pursuant to a contract which is illegal, the plaintiff cannot sue the defendant by reliance on such illegal contract for the rule is: *ex turpi causa non oritur actio* (no cause of action arises out of an illegal cause or transaction). Thus, in *Thomas Brown & Sons Ltd v Fazel Deen*,[31] where the plaintiff deposited certain gold bars with the defendant in contravention of the law which made their transaction illegal and the defendant lost the gold bars, it was held that the plaintiff could not recover.

Defendant bought chattel in market overt

11.22 A bona fide purchaser in a shop or a market of a chattel for value acquires a good title to it even though the seller himself did not have good title to sell it since in such a situation the purchaser becomes owner of the chattel and the plaintiff has no right to immediate possession, and he cannot therefore bring an action in detinue against the purchaser.[32]

ADVANTAGES AND DISADVANTAGES

11.23 Although, normally, the same situation gives rise to both detinue and conversion, there are some advantages in suing in detinue

29 See also the discussion of this topic in the previous ch 10 'Conversion' in para 10.43.
30 *Horne v Richardson* (1969) 64 QJPR 47.
31 (1962) 108 CLR 391. See also *Singh v Ali* [1960] AC 167, [1960] 1 All ER 269, [1960] 2 WLR 180, PC; *Thackwell v Barclays Bank* [1986] 1 All ER 676.
32 Such bona fide purchaser's title is also protected by the Sale of Goods Ordinance (Cap 26) s 24.

CHAPTER 22

Nuisance

INTRODUCTION

22.01 The word 'nuisance' is derived from the French word 'nuire', meaning 'to hurt'. In ordinary parlance, it refers to things, acts or forms of conduct which are noxious or offensive.

22.02 In law, it refers to unauthorised acts of indirect interference which materially impair the use and enjoyment by another person of his property or which prejudicially affect his comfort and convenience.[1] In whatever context the word is used, it essentially carries the basic notion of unlawful hurt or harm. In many ancient communities, ownership of land symbolised not only material wealth but also social status. The law was, therefore, designed primarily to protect landowners from unauthorised acts of interference in the use and enjoyment of their land. In the United Kingdom, the common law dealt with all acts of direct interference with the possession of land under the writ of trespass and subsumed all acts of indirect interference with the use and enjoyment of land under the writ of action on the case. Nuisance as an actionable wrong appeared for the first time in the fourteenth century under the name 'assize of nuisance', which was available only to freeholders.[2] It, however, developed into its present form from the action on the case in nuisance. Today, it belongs to the class of torts known as torts of strict liability as distinguished from intentional and negligent torts.[3]

1 Three distinct uses of the word 'nuisance' can be seen from the legal literature—it is sometimes used to refer to the conduct of the defendant, sometimes to the result of that conduct, and sometimes to such results of that conduct as are actionable. See *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634, HL.

2 For the origin and development of this tort, see Holdsworth, *A History of English Law*, Vol III, pp 154–156; Vol VII, pp 279–323, 324, 325, 329, 330, 334, 344.

3 See also *Wringe v Cohen* [1940] 1 KB 229, [1939] 4 All ER 241, CA (Eng).

CATEGORIES OF NUISANCE

22.03 Nuisance may be classified into three broad categories, namely, private nuisance, public nuisance and statutory nuisance. As we shall see later, there are distinct differences between these categories but the same situation may give rise to two or all three of them.

PRIVATE NUISANCE

Elements

22.04 Private nuisance consists of continuous, unreasonable and indirect interference with the use or enjoyment of land or of some right over or in connection with it. A popular judicial definition of private nuisance is found in the following terms in the case of *Cunard v Antifyre*:[4]

> Private nuisances, at least in the vast majority of cases, are interferences for a substantial length of time by owners or occupiers of property with the use or enjoyment of neighbouring property.[5]

22.05 And as further stated by the Court of Final Appeal in *Leung Tsang Hung v Incorporated Owners of Kwok Wing House*:[6]

> Private nuisance is a tort protecting property rights. It is concerned with the activities of the owner or occupier of property within the boundaries of his own land which may harm the interests of the owner or occupier of other land.

Continuous interference

22.06 The kind of act or conduct which may be construed as constituting an interference may take any form from a very broad spectrum of human activities.[7] Thus, it embraces interferences with the use and

4 [1933] 1 KB 551 at 556–557. See also *Southport Corp v Esso Petroleum Co Ltd* [1956] AC 218 at 224, [1955] 3 All ER 864 and *Leung Tsang Hung v Incorporated Owners of Kwok Wing House* (2007) 10 HKCFAR 480 at 491.

5 It has been a well known principle of law from ancient times that owners of land should enjoy their land in such manner as would not injure their neighbours. This is expressed in Roman Law as '*Sic utere tuo ut alienum non laedas*'.

6 (2007) 10 HKCFAR 480 at 509.

7 'The forms which nuisance may take are *protean*. Certain classifications are possible, but many reported cases are no more than illustrations of particular matters of fact which have been held to be nuisances': see *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903, [1940] 3 All ER 349, HL per Lord Wright.

enjoyment of land by water,[8] fire, smoke, smell, fumes, gas, noise, heat, electricity, vibrations, disease and any other incursions into another person's property. The common feature that characterises these activities is the interest invaded — use and enjoyment of land. For an interference to amount to a nuisance, it must be continuous. There is, however, no set period of time over which the activities must be carried on to amount to a private nuisance. Much depends on the neighbourhood and other surrounding circumstances. As a general rule, temporary interferences do not give rise to a cause of action except where the temporary activity relates to a very substantial state of affairs amounting to a nuisance.

22.07 The case of *De Keysers Royal Hotel Ltd v Spicer Bros Ltd*[9] provides a good illustration where the general rule does not apply, but the exception does. In that case, the defendant company was carrying on noisy pile driving operations in the night as part of a temporary building works programme. The court held that those operations constituted a private nuisance.[10]

22.08 Although a single act cannot normally constitute a private nuisance, it may give rise to a public nuisance. What is required to ground an action is that the defendant allowed a state of affairs to develop into a state of affairs which threatened damages to the plaintiff's property.[11] As Jenkins LJ put it in *Bolton v Stone*,[12] 'the gist of such a nuisance is the causing or permitting of a state of affairs from which damage is likely to result'. In *Sedleigh-Denfield v O'Callaghan*,[13] the defendants had allowed a culvert on their land to remain blocked. As a result, the adjoining land of the plaintiffs was flooded. Lord Atkin found that the defendants had created a state of affairs from which flooding might reasonably be expected to result. He held the defendants liable.[14]

22.09 Exceptionally, a single act may in fact be the culmination of a state of affairs which has been going on for some time. In *British*

8 See *Leung Wai Kee v Tam Yuet Sheung* [2012] HKEC 959; *Wong Pui Ping v Au Wai Ki Jackey* [2012] HKEC 532; and *Lam Eguchi Mayunu v Fast Well Enterprise (HK) Ltd* [2010] HKEC 485.

9 (1914) 30 TLR 257.

10 See also *Matania v National Provincial Bank Ltd* [1936] 2 All ER 633 where temporary noise and dust caused by the making of alterations to a building were held to constitute a private nuisance.

11 See *Spicer v Smee* [1946] 1 All ER 489 at p 493 per Atkinson J.

12 [1949] 2 All ER 851 at 855–856.

13 [1940] AC 880, [1940] 3 All ER 349, HL.

14 See also *Midwood & Co Ltd v Manchester Corp* [1905] 2 KB 597.

Celanese v Hunt (Capacitators) Ltd,[15] the defendant had stored foil on his land. It blew off the land and damaged an electric substation causing an interruption of power supply to a small industrial estate. The same problem had arisen before due to the manner in which the foil had been stored. The court held that in the circumstances, what had occurred amounted to a private nuisance. Even a single act may give rise to a private nuisance if it creates a continuing state of affairs.[16]

Substantial interference

22.10 The interference relied on must be substantial. The test of what constitutes a substantial interference has been laid down by Bruce-Knight VC in *Walter v Selfe*,[17] in the following words:

> Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?

22.11 Life in society renders it necessary for everyone to tolerate a minimum degree of interference. The courts in deciding what is the permissible limit in inconvenience and annoyance between neighbours and in deciding whether an interference can amount to an actionable nuisance have to strike a balance between the right of the defendant to use his property for his own lawful enjoyment and the right of the plaintiff to the undisturbed enjoyment of his property. No precise or universal formula is possible but a useful test is what is reasonable according to ordinary usages of people living in Hong Kong.[18] Thus, not every trivial interference can constitute a nuisance. On the other hand, the loss of one night's sleep through excessive noise may not be a trivial matter.[19] Nor is injury to health a necessary ingredient to be proved nor need the defendant's activities have an impact on the plaintiff's senses which smells, sights, sounds and fumes have. Thus, it would be a

15 [1969] 2 All ER 1252, [1969] 1 WLR 959.
16 See *SCM v Whittal & Son Ltd* [1970] 2 All ER 417, [1970] 1 WLR 1017.
17 (1851) 4 De G & Sm 315 at 322. Followed in *Capital Prosperous Ltd & Anor v Sheen Cho Kwong* [1999] 1 HKLRD 633 at 639, CFI.
18 See *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, [1940] 3 All ER 349, HL; followed in *Capital Prosperous Ltd & Anor v Sheen Cho Kwong* [1999] 1 HKLRD 633 at 639, CFI.
19 *Andreae v Selfridge & Co Ltd* [1938] Ch 1, [1937] 3 All ER 255.

nuisance to use the adjoining premises for prostitution or as a sex shop.[20] Even persistent telephone calls of an objectionable nature[21] or burning incense in the common area of a multi-storey residental building[22] may constitute a nuisance.

Unreasonableness of interference

A necessary element

22.12 The primary role of the law of nuisance is to resolve conflicts of interests between neighbouring landowners and this it does by adjusting their rights and privileges. As Lord Wright put it:

> A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society.[23]

22.13 What is necessary to strike the desired balance between the two contending sets of interests is a measure of give and take, live and let live.[24] It is, therefore, not sufficient for the plaintiff merely to show that the defendant committed a substantial interference with his land resulting in damage. He must also establish that the interference was unreasonable for the unlawfulness of the defendant's conduct lies in its unreasonableness. In determining the unreasonableness or otherwise of the defendant's interference, the courts take all relevant factors into account, but will ultimately decide the matter by falling back on the general feel of the case on an overall evaluation.[25] In *Capital Prosperous Ltd & Anor v Sheen Cho Kwong*,[26] the court held that it was not unreasonable

20 *Laws v Florinplace Ltd* [1981] 1 All ER 659.
21 See *Khorasandjian v Bush* (1993) 137 Sol Jo LB 88.
22 [2011] HKEC 736.
23 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903, [1940] 3 All ER 349, HL. See also *Realty Harvest Ltd & Ors v Gold Margin Development Ltd & Anor* (unreported; HCA 11197/1998), CFI; [2001] 1 HKLRD 506, CA.
24 See *Kennaway v Thompson* [1980] EWCA Civ 1, [1981] QB 88, [1980] 3 All ER 329 at 333. See also *Cavey v Ledbitter* (1863) 13 CBNS 470 where Erle CJ explained the rationale behind the requirement of reasonableness on one's part in the use and enjoyment of his land. He said: 'It seems to me that the affairs of life in a dense neighbourhood cannot be carried on without mutual sacrifices of comfort; and that, in all actions for discomfort, the law must regard the principle of mutual adjustment.'
25 *Bulmer Ltd & Anor v ACL Electronics (HK) Ltd* [1991] 2 HKC 544, HC.
26 [1999] 1 HKLRD 633, CFI.

for the average Hong Kong person to take a pump-assisted shower between 11pm and midnight. Deputy Judge Muttrie (as she then was) said that it was common knowledge that Hong Kong people stayed up late at night. Anything up to midnight could not be regarded as out of the ordinary. The fact that one liked to go to bed early made no difference. On the other hand, it would be unreasonable for the defendant to obstruct the free flow of water for self-protection without caring that it would inevitably cause damage to the defendant's property.[27]

Defendant's conduct

22.14 In deciding whether a particular act or course of conduct constitutes a nuisance, the courts take into account the object of the defendant's activity. Consequently, if harm to the plaintiff is only an incidental result, such harm may be immaterial. If, on the other hand, the defendant's primary aim is to injure the plaintiff, a court will have no difficulty in coming to a finding against the defendant. Malice in the defendant's behaviour may preclude any inference of reasonableness and render it unlawful.

22.15 In *Christie v Davey*,[28] the plaintiff had been giving music lessons and conducting musical evenings in his semi-detached house. The defendant who resented the plaintiff's activities banged on the party's walls, shouted, blew whistles and beat trays with the intention of annoying the plaintiff and spoiling the music lessons. The court held that the defendant's conduct was motivated by malice and found in favour of the plaintiff.

22.16 In *Hollywood Silver Fox Farm v Emmett*,[29] the defendant deliberately fired guns close to the plaintiff's boundary with the intention of interfering with the breeding habits of the animals which became frightened and devoured their young. The court held the defendant liable. His conduct on his own land would probably have been found to be innocent but for his malice.

22.17 On the other hand, in *Bradford Corp v Pickles*,[30] the defendant had deliberately diverted percolating water from the plaintiff's

27 *Chan Kwok On Peter & Anor v Thomas & Ors* [1984] HKC 455, HC. See the discussion of the case, infra. See also *Neill v London North Western Railway* Co LR 10 Eq 4.
28 [1893] 1 Ch 316.
29 [1936] 2 KB 468.
30 [1895] AC 587.

land with the intention of forcing the plaintiff to buy his land at an inflated price. The court found the defendant's conduct unexceptionable because no one had a right to an uninterrupted supply of underground water. It appeared that the defendant's conduct had no malice because he was only trying to promote his own legitimate interests.

22.18 However, in the case of *Chan Kwok On Peter & Anor v Thomas & Ors*,[31] the defendant had placed a grill in a common drainage channel between his land and that of the plaintiff in order to prevent rubbish from coming through to his land. The blockade of the drainage channel resulted in the plaintiff's land being flooded. The court found the defendant liable, taking the view that when the defendant placed the grill in the channel, he knew that the result would be an accumulation of rubbish which would flood the plaintiff's land. The fact that the defendant had only acted with the intention of saving his own premises from invasion by the rubbish that came along the channel does not seem to have weighed in the mind of the court.

22.19 These cases raise an interesting question. If the tort of nuisance is one of strict liability as it is said to be, how can any particular state of mind such as malice be relevant? Does it not take the tort closer to intentional or negligent torts? The answer seems to be that such a state of mind is relevant for the determination of the reasonableness of the defendant's conduct. Note, however, that conduct tainted by malice has no socially valuable purpose and may, therefore, be regarded as being unreasonable.

22.20 There is another category of cases which raises a similar question. This is where naturally occurring hazards on one's land create an interference with the neighbour's land. In *Leakey v National Trust for Places of Historic Interest or Natural Beauty*,[32] there was a large mound of earth on the defendant's land which was being gradually eroded by natural processes and deposited on the plaintiff's land. The English Court of Appeal held that natural encroachments of that kind could amount to nuisance in some circumstances and that landowners had a duty to take reasonable steps to prevent encroachments into adjoining lands. Is the duty not, as in the case of negligence, based on the neighbour principle? The main feature that distinguishes nuisance from negligence is the courts' approach which is subjective and not objective as in negligence.

31 [1984] HKC 455, HC.
32 [1980] QB 485, [1980] 1 All ER 17, CA (Eng).

CHAPTER 34

Limitation of Actions

INTRODUCTION

34.1 The common law does not provide for any limitation period for tort actions. Enacted in 1965, the Hong Kong Limitation Ordinance (Cap 347) ('LO'), governs, *inter alia*, limitation of tort actions. It provides for the time period during which it is lawful for a claimant to bring an action against a defendant beyond which the action becomes time barred.

34.2 The phrase 'limitation of actions' refers to time limitations for the institution of a legal action in the court by a claimant. In other words, where the claimant brings his action after the expiration of the limitation period, either three years or six years based on the nature of tort committed, that is, whether an actionable tort or a tort which requires proof of damage, the courts will, on the defendant's pleadings, declare the action as statute-barred and not proceed with the merits of the claimant's claim.[1]

ACCRUAL OF CAUSE OF ACTION

34.3 Procedurally, a writ will be issued after the accrual of the cause of action.[2] A cause of action accrues to the claimant in the case

1 The Limitation Ordinance (Cap 347) ('LO') is largely modeled on the United Kingdom Limitation Act 1939. The most recent amendment introduced into the Hong Kong Ordinance, is modelled on the United Kingdom Latent Damage Act 1986. The first limitation statute in England, the Limitation Act, was enacted in the United Kingdom as early as in 1623. The Limitation Act 1623 was followed by the Limitation Act 1939, which provided a standard period of six years for all actions founded on tort. Further, the law on limitation was consolidated by the Limitation Act 1980. Some further amendments were introduced into the 1980 Act, the most important being the Latent Damage Act 1986. See *Report of the Committee on Limitation of Actions in Cases of Personal Injury* (Cmnd 1829, 1962) paras 16, 17 (UK).

2 A cause of action accrues when the damage occurs or when the plaintiff has knowledge of the damage: see *Bank of East Asia Ltd v Tsien Wui Marble Factory Ltd*

of torts actionable *per se*, such as trespass to the person or land, normally at the date of the wrong; whereas in the case of torts actionable only on proof of damage, such as negligence, a cause of action accrues when the damage occurs or when the claimant has the knowledge of the damage.[3] Accrual of cause of action refers to the time when the claimant gains a right to sue the defendant. Under the LO it means that a claimant has a limited period of time to bring his action to the court when suing for different torts as mentioned above. Section 4(1)(a) provides a six year limitation for actions founded on simple contract or on tort. This implies that a claimant could bring an action for tort within six years from the date of accrual of cause of action for all torts except for those mentioned under section 27(3).

NECESSITY FOR STATUTORY RESTRICTION

34.4 The reason that the law provides for a limitation period and a certain time during which a cause of action can be brought is justified on the basis that a person may after a given time feel certain that the incident that led to a tort against the claimant has been finally put to rest. One could say that in every legal system it is a normal rule that one who sleeps over his rights ought not be allowed to enforce them. 'The rationale for limitation periods is two-fold, encouraging the claimant to proceed without undue delay and in providing finality so that he is vindicated as against the defendant and secondly to protect the defendant from stale claims in order that he feels confident in the machinery of the legal procedure established by law that after a certain period potential claims against him would be closed and he can arrange his affairs accordingly.'[4]

& Ors [2000] 1 HKLRD 268, CFA. Note the discussion concerning accrual of cause of action in respect of latent property damage. However, there is no requirement to have the writ served within that period. It is also worth noting that after issuance of the writ, the claimant can take some further time to serve it. This period can be further extended in exceptional cases, for example, if the claimant, having taken necessary steps, was unable to serve the writ.

3 Section 4(1) of the LO.

4 See *Report of the Committee on Limitation of Actions in Cases of Personal Injury* (Cmnd 1829, 1962) para 17; *Birkett v James* [1978] AC 297 at 331, [1977] 2 All ER 801, [1977] 3 WLR 38; *Ng Ngan Chiu v Paramount Printing Co Ltd and Shell HK Ltd (Third Party)* [1998] 2 HKLRD 557, CFI. An application to join a third party after the expiry of the limitation period by the plaintiff would not be tantamount to making a stale claim if the third party had been actively preparing himself for a defence to a

The purpose of statutes of limitation, as explained in *Adnam v Earl of Sandwich*,[5] is as follows:

> The legitimate object of all Statutes of Limitation is no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principle that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for so long a time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties …

34.5 Moreover, as put succinctly by Justice Chan PJ in *Kensland Realty Ltd v Tai Tung Chong*:[6]

> The purpose of having limitation provisions is to ensure on the one hand, that a defendant is not unduly vexed by stale claims to his disadvantage particularly when the relevant evidence has been lost and the memory of the witnesses has failed; and on the other hand, that a plaintiff is not unfairly prejudiced by a lack of knowledge of the relevant facts required to bring a claim until after it is time barred …[7]

34.6 Moreover, an action after the passage of a certain time would be very difficult to maintain; human memory has limitations, witnesses could disappear, evidence could be lost, and where no action is brought for a period of time, it would be inequitable and unreasonable to put the defendant to the task of defending a law suit.[8] Taking into account these and other considerations, legislation has intervened to impose varying time limits for tort

third party claim: see *Ng Ngan Chiu v Paramount Printing Co Ltd and Shell HK Ltd (Third Party)* [1998] 2 HKLRD 557, CFI.

5 (1877) 2 QBD 485.

6 (2008) 11 HKCFAR , where the claimant sued his former solicitor for providing him negligent advice with respect to buying and selling off his property due to which the former allegedly incurred a loss and sold his property at a lesser value in 2001. The advice by the solicitor was provided in 1997. The claimant brought an action against his former solicitor in 2004, as negligence claims have a time limit of six years, the claim was held to be time barred by the Court of Final Appeal. The court held that the primary limitation period of six years had expired because the cause action accrued in September 1997 when the claimant acted on the advice of the former solicitor in not selling his property and being sued by the purchaser for breach of contract.

7 Cf *Ng Ngan Chiu v Paramount Printing Co Ltd and Shell HK Ltd (Third Party)* [1998] 2 HKLRD 557, CFI. In this case, an application to join a third party after the expiry of the limitation period by the plaintiff was held not to be tantamount to making a stale claim if the third party had been actively preparing himself for a defence to a third party claim.

8 See *Birkett* v *James* [1978] AC 297, [1977] 2 All ER 801, [1977] 3 WLR 38.

actions and, at the same time, relaxing these time limits in the interest of justice and fairness.[9]

LIMITATION PERIODS

In general

34.7 The LO does not apply where any other legislation prescribes the limitation periods.[10]

34.8 As stated above, the basic limitation periods for actions founded on tort is either six years or three years. This period can be extended in exceptional cases. In respect of personal injuries and death caused by the defendant's negligence, the courts have power to dis-apply the limitation period altogether.[11] In cases where the claimant suffers from disability (for example, he is a minor), the limitation period can be extended until the disability ceases. The limitation period can also be extended in the case of latent damage to property, but the legislation has imposed an absolute time limit after which the claimant cannot sue notwithstanding that he had had no knowledge of the damage before its expiry.

Property damage, economic loss, defamation and trespass

34.9 The limitation period for property damage, economic damage, defamation and trespass to the person (assault, battery and false imprisonment)[12], chattels or land is six years. As mentioned above, section 4(1) of the LO provides, *inter alia*, that actions founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. Thus, where the defendant commits a trespass against the claimant or makes a false statement to defame the claimant, the period of limitation begins from the time the trespass was committed or the statement was made. However, section 4 does not cover claims in negligence, nuisance or for breach of duty in respect of personal injuries or death.

9 See s 30 of the LO.

10 See eg the Carriage by Air Ordinance (Cap 500) ss 7 and 17.

11 Personal injuries 'include any disease and any impairment of a person's physical or mental condition, and 'injury' shall be construed accordingly': see the LO s 2.

12 See *Stubbings v Webb* [1993] AC 498, [1993] 1 All ER 322, HL and *Chan Chung Lop v Chan Yun Sun* [1999] 3 HKLRD 442, CFI. Cf *Letang v Cooper* [1965] 1 QB 232, [1964] 2 All ER 929, [1964] 3 WLR 573.

Conversions and detinue

34.10 The LO also sets out the limitation period for wrongful interference with goods. Section 5 of the LO provides that:

> (1) Where any cause of action in respect of the conversion or wrongful detention of a chattel has accrued to any person and, before he recovers possession of the chattel, a further conversion or wrongful detention takes place, no action shall be brought in respect of the further conversion or detention after the expiration of 6 years from the accrual of the cause of action in respect of the original conversion or detention.
>
> (2) Where any such cause of action has accrued to any person and the period prescribed for bringing that action and for bringing any action in respect of such a further conversion or wrongful detention as aforesaid has expired and he has not during that period recovered possession of the chattel, the title of that person to the chattel shall be extinguished.

34.11 It is important to note that the period of limitation is six years from the date of original conversion notwithstanding any further acts of conversion in relation to the same chattel, and that if the owner of the chattel has failed to acquire possession within six years of the original conversion, his right to sue for the title of the chattel will be extinguished.[13] In detinue, the time begins to run from the time when a proper demand for the return of the chattel is made.

Negligence, nuisance and breach of duty in respect of personal injuries

34.12 As stated above, the six-year rule set out in section 4 of the LO does not apply where a person brings an action in negligence, nuisance or for breach of duty in respect of personal injuries. For such cases, section 27 of the LO prescribes the basic limitation period of three years, which can be extended by the courts in circumstances delineated by section 30. Negligence and nuisance here should be understood in the sense which these topics have been discussed elsewhere in this book. Breach of duty includes breach of statutory duties in negligence, for example, duties imposed by the Occupiers Liability Ordinance. It cannot be construed to include a deliberate assault or battery for which the basic six-year limitation period applies.[14] There are two alternative ways of computing the

13 See s 5(1) and 5(2).

14 *Chan Chung Lop v Chan Yun Sun* [1999] 3 HKLRD 442, CFI.

period of limitation for personal injuries caused by negligence. The first is the straightforward one where the claimant knows of the damage at the moment it occurs. In that case the limitation period is three years and computed from the date on which the damage occurred.[15] The second situation is where the claimant does not have the knowledge of the damage at the time it occurs and he does not discover for years that his condition was related to a tort committed by the defendant, that is, latent damage. In this case, the limitation period of three years does not begin to run until the claimant has the knowledge of the damage.[16] A claimant can bring an action where he or she discovers his injury later and the start date for bringing an action then lies under s 27(4)(b). In *Cheng Man Chi v Tam Kai Tai*,[17] the claimant did not acquire knowledge of her osteotomy (bone surgery in 2001) until told by another dentist four years after her previous surgery in 2005. The claimant commenced an action for her injury against the negligent dentist under section 27(4)(b) in 2005 which the court held to be within time limitation.

34.13 As regards a person's knowledge, section 27(8) of the LO states that:

> ... a person's knowledge includes knowledge which he might reasonably have been expected to acquire–
>
> (a) from facts observable or ascertainable by him; or
>
> (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek,
>
> but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

34.14 Section 27(8) explains that 'knowledge' which is required can be either actual or constructive.[18] It provides that 'a person's knowledge includes knowledge which he might reasonably have been expected to acquire from facts observable or ascertainable by him or from facts ascertainable by him with the help of medical or other appropriate expert advice which is reasonable for him

15 See *Stubbings v Webb* [1993] AC 498, [1993] 1 All ER 322, HL; *Chan Chung Lop v Chan Yun Sun* [1999] 3 HKLRD 442, CFI.

16 See *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, [1963] 1 All ER 341; *Thompson v Smith Shiprepairers (North Shields) Ltd* [1984] QB 405, [1984] 1 All ER 881; *Brooks v J and P Coates (UK) Ltd* [1984] 1 All ER 702.

17 [2009] HKEC 205.

18 See *Pang Kwok Lam v Schneider Electric Asia Pacific Ltd* [2011] HKEC 33.

to seek but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and where appropriate, to act on) that advice'.[19] Further, the claimant will not be prejudiced where he seeks an expert's advice but that expert fails to discover or ascertain relevant facts.[20] The position will be otherwise if, on wrong legal advice, he fails to institute the action in time, for the LO only speaks of knowledge of fact and not of law.[21] In other words, the claimant is deemed to know the law.[22]

34.15 The date of 'knowledge' for the purpose of ascertaining when limitation begins to run means the date on which the claimant first had knowledge of the matters set out in section 27(6) of the LO:

(1) that the injury in question was significant;

(2) that that injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;

(3) the identity of the defendant; and

(4) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

34.16 An injury is 'significant' where the claimant would reasonably have considered it sufficiently serious to justify his instituting proceedings.[23] In *Wong Shui King v Dr Wu Hin Ting & Ors*,[24] the claimant, a housewife was involved in a traffic accident on 24 April 1994, and instituted legal proceedings on 7 April 1997 against the first defendant (Dr Wu), the second defendant (the bus driver) and the third defendant (the bus company). The case against the first defendant was for negligent medical treatment on the claimant's hip between August 1992 until February 1993, which

19 *Lau Kam Nui v Sau Kee Co Ltd* [2002] HKEC 256, DC. Cf *Kensland Realty v Tai Tong & Chong* (2008) 11 HKCFAR 237.

20 *Marston v British Railways Board* [1976] ICR 124.

21 If the solicitor's advice is wrong on the facts, as distinct from the law, time does not start to run. However, see *Kensland Realty v Tai Tong & Chong* (2008) 11 HKCFAR 237.

22 See *Sunwar Bhimraj Sunwar v Le Cheong Engineering Co & Anor* [2002] 1 HKLRD A20, CFI; cf *Lau Kam Nui* v *Sau Kee Co Ltd* [2002] HKEC 256, DC.

23 See s 27(7) of the LO. See also *Wong Shui King* v *Dr Wu Hin Ting & Ors* [2000] HKEC 121, CFI.

24 [2000] HKEC 121, CFI.