or a business tycoon whose lost earnings could be considerable. But the corollary is that, once the threshold has been crossed, a claim in negligence can succeed against defendants whose fault was worse still. So if a defendant intentionally or maliciously harms someone, that also reveals his conduct to be unreasonable.[34]

1.039 Having said all this, the tort of negligence is as much about an objective duty of foresight as it is about a reasonable standard of conduct. There must be a relationship of proximity between the parties, which requires asking whether the plaintiff was someone whom the defendant should have had in mind as likely to be affected by his behaviour. And damages are only available for that harm which was reasonably foreseeable to result from the defendant's conduct.

3. The Places of Tort Law

1.040 We can consider the place of tort in law, geographically, and in time.

1.041 As for the place of tort in law, it sits conceptually at various points of intersection between: private and public law; the law of obligations and property; acts and omissions. It also overlaps with contract, criminal law, and equity. We shall take each in turn.

1.042 Tort is certainly part of private law; most litigation concerns horizontal actions between private citizens. But tort can also play a public law role. One example is the tort of misfeasance in public office, which enables a vertical action by a private citizen against a public officer. Another is the tort of wrongful imprisonment, which applies more usually to public officer defendants than to private citizen defendants. In cases such as these, the fact that the defendant is an officer acting upon public duty makes the tort worse, and so exemplary damages might be available. There are also further grey areas between private and public law. For example, a public nuisance can be sued upon by a private citizen, but only if she has suffered particular damage over and above the general inconvenience encountered by the public as a whole.

1.043 Tort is part of the law of obligations; it imposes personal duties on people, and the primary remedy for breach is often payment of a sum of money. But tort is also part of the law of property, for example: damage to property can be remedied through the tort of negligence; interference with land can be restrained through the torts of trespass or nuisance; and interference with goods can be actioned through the torts of conversion or detinue. It is worth emphasizing that tort law does have proprietary remedies: an injunction can preserve one's property; the plaintiff can seek an order for delivery up; and even where the court orders a money payment as an alternative to delivery up, until that payment is made the plaintiff enjoys protection against the defendant's insolvency because the subject property does not become part of the defendant's assets until it is paid for.[35]

[34] See too: Rogers, *Winfield & Jolowicz: Tort*, 18th ed (London: Sweet & Maxwell, 2010) 88.
[35] *Ex p Drake; In re Ware* (1877) 5 Ch D 866 (CA).

1.044 There is sometimes the impression that tort is concerned with actions and not omissions. This is an over-simplification. For example, once engaged in the activity of driving, a defendant has to meet a standard of reasonable care. When he crashes the car, he falls short of that standard, and it does not matter whether the crash was due to placing his foot on the accelerator or omitting to place it on the brake. Similarly, if a defendant is hired as a life guard at a swimming pool, then surely those in the pool relying on her assumed responsibility can expect her to act if someone gets into difficulty.

1.045 But there is more truth in the claim that tort law will rarely compel us into an activity in the first place, and this is where it makes some sense to say that tort is slow to impose liability for omissions. Thus, if a defendant is standing idly in the street, then as long as he is standing with reasonable care, he owes no duty to rescue a child from being run over. If this sounds callous, we should note that, even though the defendant is under no legal obligation to rescue, the moral obligation may be a strong one, and morality has a different system of punishments. If the defendant does act, then he must act with reasonable care, or tort will punish him in its own way. But the law has always been prepared to make wide allowances for a party acting on the spur of the moment in difficult circumstances.

1.046 The principal argument in favour of withholding liability for omissions is that forcing people to act is an unwarranted restriction on their freedom and autonomy. This is a weak argument.[36] For example, it ignores the freedom and autonomy of the child who is about to be run over; her rescue will safeguard her autonomy in very large measure, at the relatively minor expense of a temporary restriction of the autonomy of her rescuer. It also ignores the fact that tort law imposes duties upon us when we do act, and most of the time we cannot avoid acting. We must walk down the street, and share public transport, and earn money to support our families. Some of us must use cars. Rarely can we pick and choose the activities we engage in, but still tort law imposes duties upon us.

1.047 Tort overlaps with contract. For example, liability in negligence might arise following an 'assumption of responsibility', and that is also usually what a contract is. The plaintiff is then free to choose which cause of action to pursue.[37] The choice matters particularly where different remedies are available. If the plaintiff seeks damages, for example, in contract they are usually forward-looking, aiming to put the plaintiff into the position he expected to be in, whereas in tort they are usually backward-looking, aiming to put the plaintiff back into the position he was in previously.

1.048 Further, contract terms often look to exclude liability in tort. Such exclusions are regulated by the Control of Exemption Clauses Ordinance (Cap.71). And a contract between two parties can even impose tortious duties on a third party, such as the duty of non-interference found in the tort of inducing breach of contract. (Another way of viewing that tort is to say that it protects the intangible property of a contract.)

[36] For a persuasive rebuttal of the arguments against liability for omissions, see: Kortmann, *Altruism in Private Law* (Oxford: Oxford University Press, 2005) ch 3.
[37] *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL), where the choice of tort mattered to circumvent a limitation period.

6. Remoteness of Damage

(a) Introduction

2.168 **Definition.** A person's act may have any number of consequences, none of which would have occurred "but for" the particular conduct in question. Without some limit on a defendant's responsibility, liability would stretch endlessly forward. The principle of remoteness of damage, therefore, considers whether it is right to hold a defendant liable for all the consequences of his or her act and is essentially a value judgment. Remoteness of damage is less concerned with causation than with setting the boundaries within which a defendant will be held liable for damage caused by his or her established wrongdoing. The distinction between causation and remoteness has not always been clear and many of the older cases deal with remoteness of damage as an aspect of causation. In *Stapley v Gypsum Mines*,[335] Lord Reid, in dealing with a case where more than one cause had contributed to the plaintiff's death, said:

> "[O]ne must discriminate between those faults which must be discarded as being too remote and those which must not."

2.169 In posing the matter as such, Lord Reid was effectively treating the matter of remoteness as one of causation by asking was the cause "too remote" in the sense that it was too far removed in causative effect from the original wrongdoing? Such language stems from that fact that the test for remoteness of damage used to be one of "directness of consequence",[336] a test which was essentially one of causation. Strictly speaking, however, the principle of remoteness of damage imposes limitations on a defendant's liability for all the consequences of his admitted wrongdoing once causation has already been established.

2.170 In principle, the law does not impose liability ad infinitum, and a line must be drawn somewhere. One of the ways by which this is done is on the basis that the damage must not be too remote; however, remoteness of damage is merely one of the tools by which courts seek to limit liability. As Denning MR said in *Lamb v Camden London Borough Council*,[337]

> "[T]he truth is that all these three – duty, remoteness and causation – are devices by which the courts limit the range of liability for negligence or nuisance ... It is not every consequence of a wrongful act which is the subject of compensation. The law has to draw the line somewhere. Sometimes it is done by limiting the range of the persons to whom the duty is owed. Sometimes it is done by saying that there is a break in the chain of causation. At other times it is done by saying that the consequence is too remote to be a head of damage. All these devices are useful in their way. But ultimately it is a question of policy for the judges to decide."

2.171 Questions of remoteness of damage arise most frequently in fault based torts such as negligence and nuisance where the test of remoteness is one of foreseeability of damage.

---

[335] [1953] AC 663, 681.
[336] Derived from *In Re an Arbitration between Polemis and Furness, Withy & Co Ltd* [1921] 3 KB 560.
[337] [1981] 1 QB 625, 636E.

Should a defendant be held liable where he has undoubtedly behaved negligently but where the damage caused to the plaintiff is of a different kind or is more extensive or has occurred in a different manner from the damage which a reasonable man could have anticipated? When issues of fault are considered, to hold a defendant liable for all the consequences of his act, however unintended or however unforeseen is considered unfair. On the other hand, where the defendant has intended to injure the plaintiff, is it fair for the defendant to escape liability by arguing that the consequences were unforeseen or greater than intended? Thus, in considering whether the damage suffered is too remote, a determination of both the nature of the tort committed by the defendant and the scope of the defendant's duty must be undertaken. The difficulty then lies in determining where the line should be drawn between those acts for which a defendant should be held responsible and those acts for which he should not. After all, when dealing with questions of remoteness, the courts have to make a value judgment.[338]

(b) General principles of remoteness of damage

(i) *Test of directness of consequence*

2.172 This test laid down in *In Re Polemis and Furness, Withy & Co Ltd*,[339] in the context of a claim in negligence meant that a defendant was liable for all the consequences of his or her actions which were directly caused by the defendant's act, even those which were unforeseeable. The test of directness of consequence still applies to actions for deceit[340] and to actions for conversion where the defendant has knowingly converted the goods[341] so that a defendant is liable to make reparation for all damage directly flowing from the fraudulent inducement or conversion. This test was, however, rejected in the *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (Wagon Mound (No 1))*,[342] in relation to actions in negligence in favour of a test of reasonable foreseeability. It is only right that the more culpable the defendant, the greater should be the ambit of loss for which he can be held responsible and so for policy reasons, more extensive liability is imposed on intentional wrongdoers.

2.173 As to whether the test of directness of consequence applies where the defendant has acted deliberately towards the plaintiff, the law on intended consequences appears less settled in Hong Kong than that in the United Kingdom. In the United Kingdom, the position is that where the defendant has acted deliberately towards the plaintiff, the defendant's "intention to injure the plaintiff disposes of any question of remoteness."[343] In other words, a defendant who has intended to injure the plaintiff is liable for all the

---

[338] Per Lord Nicholls in *Kuwait Airways Corporation v Iraqi Airways Co (Nos. 4 and 5)* [2002] 2 AC 883, para 70.
[339] [1921] 3 KB 560.
[340] *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254; *Doyle v Olby (Ironmongers) Ltd.* [1969] 2 QB 158; *Downs v Chappell* [1997] 1 WLR 426. Note, however, that a plaintiff still has a duty to mitigate his/her loss. See also *Kee Suan Koh v Kay Lo Ip* (unrep., CACV 75/2000, [2000] HKEC 834) following *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158. The test of causation in deceit is also highly favourable to plaintiffs, see *Downs v Chappell* [1997] 1 WLR 426. Furthermore, damages for breach of s.3(1) of the Misrepresentation Ordinance (Cap.284) are measured on the same basis as those for the tort of deceit and include unforeseeable losses: see also *Long Year Development Ltd v Tse Fuk Man* [1991] 2 HKC 393.
[341] *Kuwait Airways Corporation v Iraqi Airways Co (Nos. 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883.
[342] [1961] AC 388.
[343] *Quinn v Leathem* [1901] AC 495, 537 (Lord Lindley).

being driven by its owner or his servant or agent.[232] Whereas there are situations in which such a presumption would be reasonable, namely a car involved in a "hit and run" accident, as a general approach it is submitted that this invites litigators to fall into the error of treating every road traffic accident case as one in which the driver is acting as the agent of the owner and suing both owner and driver as a matter of course rather than investigating the true circumstances.[233] A good illustration of this approach is to be seen in *Ip Shuk Hing v Yuen Yuk Wai and Yuen Yuk Lung*.[234] Deputy Judge McMahon (as he then was) held that to render a vehicle owner vicariously liable required some proof of the owner having some interest in the purpose for which the vehicle was being used. The Deputy Judge referred to the House of Lords'' decision in *Morgans v Launchbury*[235] when re-stating the principles applicable. The English Court of Appeal had endeavoured to broaden the scope of the motor vehicle owner's liability so as to make it virtually absolute but the House of Lords rejected this approach and re-affirmed the law as it had been previously. Nonetheless, the observations of some of the Law Lords with regard to a possible statutory change in the law are interesting in the light of the decision in the *Ritz-Carlton* case. The judgment of the trial judge at first instance in the *Ritz-Carlton*[236] case is redolent of the rigid attitude adopted prior to the decisions in *Bazley v Currie* and *Jacobi v Griffiths*,[237] though, remarkably, he considered it unnecessary to consider the law in detail. Interestingly enough, Mr. Justice Hunter in *Cheung Ping v American United General Insurance Ltd*[238] was remarkably prescient when he said:

> "There must, I think, be a strong social argument for saying that an owner who causes or permits his vehicle to be on the roadway in a condition which does not come up to the requirements of the Construction and Use Regulations, should be liable both civilly as well as criminally for the consequences".

3.107 The facts were that the owner of a lorry permitted his driver employee to take the vehicle home at the end of the week. On a Sunday, when not at work, the employee drove the vehicle without authorisation and was involved in an accident in which the plaintiff was injured. Hunter J held that "The plaintiff's damage resulted from the presence of the defendant's vehicle on the road in this [unroadworthy] condition". Then, invoking the speech of Lord Reid in *Home Office v Dorset Yacht*

[232] Not to be confused with the rebuttable presumption in *Ramburran v Gurucharran* [1970] 1 All ER 749: see below. *Rambarran* was applied in *Chong Ngan Seng v China Harbour Engineering Co Ltd* [2013] 2 HKLRD 223.

[233] *Chowdhary v Gillot* [1947] 2 All ER 541, where the owner was physically present in the car but had passed possession and control of it to the garage for repair, so that the garage was the bailee and the owner was no longer liable. Contrast this with *Nottingham v Aldridge* [1971] 2 QB 739 where a car was being used by an employee to drive himself and a fellow employee to work and this was with the authority of the employer who paid a mileage allowance, yet the employer was held not liable. See Atiyah, *op cit* 131–132. Applied in *Chong Ngan Seng v China Harbour Engineering Co. Ltd* [2013] 2 HKLRD 223.

[234] (Unrep., HCPI 216/1999, 11 August 2000) distinguished in *Chong Ngan Seng v China Harbour Engineering Co Ltd* [2013] 2 HKLRD 223 distinguished.

[235] [1973] AC 127. Applied *Chong Ngan Seng v China Harbour Engineering Co Ltd* [2013] 2 HKLRD 223.

[236] (2002) 5 HKCFAR 569.

[237] (1999) 174 DLR (4th) 71.

[238] [1984] HKLR 398.

Co Ltd,[239] he held that the driver/employee's presence on the road on the Sunday was reasonably foreseeable, found against the owner. Even closer to the facts of the *Ritz-Carlton* case is the decision in *Young Conqueror Co Ltd v Commercial Union Assurance Co Plc*.[240] A restaurant car-valet service was operated by a separate legal entity. While driving the car to park it on behalf of the owner, the valet picked up his girlfriend, by virtue of which it was alleged that he was then on an unauthorised "frolic of his own". Deputy Judge Gladys Li QC held that, the valet having set out on an authorised journey and then picking up his girlfriend, the burden lay on the restaurant to show that at the time of the collision, he was no longer driving in the course of his employment. In this she held that it failed, and she added that, having received the key of the vehicle, the restaurant then became bailee too and had failed to discharge the burden.[241]

Henceforth, the Court of Final Appeal's decision in *Ritz Carlton* must colour the **3.108** rationale in *Launchbury* and the test of whether or not the wrongful act of the servant is not so connected with the *authorised* act as to be a mode of doing it.[242] The confusion that may arise in the application of the *Launchbury* test is to use the *authorised act* as the criterion as distinct from *the work that the employee was employed to do*. Plainly, this latter test enlarges the scope of potential liability. Outside the employer–employee relationship, the agent and principal situation applicable to loan of a motor vehicle is carefully analysed by Fuad J (as he then was) in *Hui Kai Shun v Wai Kwok Chuen*[243] where the claimant was killed in a road traffic accident caused by the negligent driving of the second defendant who had taken possession of the motor car which was still registered to the first defendant. Payment had been deferred until the end of the month so that the second defendant could pay out of his wages. The second defendant denied that there was anything conditional in his possession of the car. The plaintiff relied on the Federal Court of Appeal of Malaysia's decision in *Wong It Yong v Lim Gaw Teong*[244] in which it was decided that where a driver was in possession of a vehicle while testing it out for two days before completing the deal, the driver was driving the car at least in part on behalf of the owner. Fuad J held that even though the owner "might well have had an 'interest or concern' in selling his car … ", that was insufficient to fix him with vicarious liability. It is submitted that were these facts to come before the court today, the result might very well be different.

Typical of a domestic circumstance is *Hewitt v Bonvin*[245] where the defendant lent his **3.109** car to his son for the son's personal use. It was held that because the father had no interest in the journey on which the son was driving it when the accident occurred,

[239] (1970) AC 1004, 1027. Applied *Yeung Kai Yuen v Cinerent Ltd* (unrep., DCPI 2514/2012, [2014] HKEC 633).

[240] [1992] 2 HKC 486.

[241] See also *So Wing Kwong v Cheng Chi Kwong* [1999] 3 HKLRD 689, another valet case in which the chain of liability stretched back from the valet, through to and including his employer and the restaurant. Applied *in Chong Ngan Seng v China Harbour Engineering Co Ltd* [2013] 2 HKLRD 223; CA.

[242] See also *Hung Kin Fai v Koo Kin Cheung* (unrep., HCA 12207/1983, [1985] HKLY 410) which would doubtless be decided differently post *Ritz-Carlton*.

[243] (unrep., HCA 4493/1978, 6 May 1981).

[244] [1969] 1 MLJ 79. Applied in *Hung Kin Fai, David v Koo Kin Chung* (unrep., HCA 12207/1985, [1985] HKLY 410).

[245] [1940] 1 KB 188.

probability is furnished by *Lam Fong v Hung Wan Construction Co Ltd*.[754] A heavy piece of concrete fell from a high floor to the podium of a building and caused the death of a worker. It was held that these facts indicated that it was more probable than not that the accident was caused by the defendant's negligence in the superintendence of the work or by the lack of implementation of adequate safety measures for the workers on the site. In *Chan Sau-Kuen v Woo Fan*,[755] the door of a car under the control of the defendant sprang open and injured the claimant, a passer-by. The Appellate Court held that the only probable inference from those facts was that the accident was caused by the failure of the defendant to take due care of the claimant. In *Pickford v ICI Plc*,[756] an employee suffered from a repetitive strain injury. Evidence was given that it was foreseeable that if an employee typed for excessively long hours, this might produce this kind of injury. Yet, the claimant's claim failed in the House of Lords because she was employed not just for typing but also for general secretarial work. Therefore the defendant's negligence could not be regarded as the probable cause of the claimant's injury.

4.213 There is one situation where the burden of proof reverses onto the defendant to prove that he was not the cause of the claimant's injury. Section 62(2)[757] of the Evidence Ordinance (Cap.8), provides, *inter alia*, that where in any civil proceeding a person has been convicted of an offence it shall be taken as proof that he has committed that offence unless the contrary is proved. The effect of s.62 is that where a person who has been convicted of an offence is sued in tort, the claimant does not have to prove that the defendant committed the wrong. In such cases, the duty is on the defendant to prove that he did not commit the wrong, which may be a daunting task given that a court has already pronounced him guilty. Thus, where the claimant sues the defendant (convicted of an offence) in negligence, but fails to give evidence as to how the injury was caused, the claimant would still succeed unless the defendant proves that there was no breach of duty on his part.[758] Lastly, it should be noted that where the defendant is acquitted in a criminal case, the claimant cannot rely on s.62.

[754] (Unrep., HCA 4942/1984, [1986] HKEC 122).

[755] [1975] HKLR 210 (AJ).

[756] [1998] 3 All ER 462.

[757] The relevant parts of s.62 are reproduced below: "(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in Hong Kong shall, subject to subsection (3), be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section. (Amended 37 of 1984, s.11). (2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in Hong Kong. (Amended 37 of 1984, s.11). (a) he shall be taken to have committed that offence, unless the contrary is proved; and (b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge on which the person in question was convicted, shall be admissible in evidence for that purpose". *Cf* s.11 of the Civil Evidence Act 1968 (UK). See also *Wong Tin Ming v To Chark Wah* [1993] 1 HKC 510 (the second defendant was convicted of an offence under the Summary Offences Ordinance (Cap.228), whereafter the claimant brought a civil action); *Wauchope v Mordecai* [1970] 1 WLR 317 (CA); *Wilsher v Essex Area Health Authority* [1988] AC 1074 (HL).

[758] *Chan Mei Yee v Ng Tat Cheung* (unrep., HCA4435/1990, [1992] HKEC 23).

Res ipsa loquitur. There are cases where it is impossible for the claimant to establish the defendant's negligence. The claimant cannot prove the defendant's negligence because he has no evidence in his possession to prove it, eg where the claimant's luggage in the defendant's possession was lost,[759] or where a vehicle mounts onto the pavement and rams into a lamppost hitting a wall,[760] or where an accident has been caused due to a latent defect in the braking system of the defendant's motor vehicle. To deal with such situations, the common law developed a rule of evidence called *res ipsa loquitur* (ie things speak for themselves). The best formulation of this rule is found in the words of Bokhary PJ in *Sanfield Building Contractors Ltd v Li Kai Cheong*:[761] **4.214**

> "The important thing to remember—and make clear—is that the expression [*res ipsa loquitur*] does not denote a doctrine but merely 'a mode of inferential reasoning' … This mode of inferred reasoning applies only to accidents of unknown cause.[762] But it matters not that the immediate cause of an accident (eg, brake failure or a burst tyre) is known. As long as the cause on which the issue on liability actually turns (eg, why the brakes failed or the tyre burst) is unknown, the accident is regarded as one of unknown cause. The *res ipsa loquitur* mode of inferential reasoning comes into play where an accident of unknown cause is one that would not normally happen without negligence on the part of the defendant in control of the object or activity which injured the claimant or damaged his property. In such a situation, the court is able to infer negligence on the defendant's part unless he offers an acceptable explanation consistent with his having taken reasonable care. The 'essence' of this was identified by Lord Radcliffe[763] … It is, his Lordship said, that 'an event which in the ordinary course of things is more likely than not to have been caused by negligence is by itself evidence of negligence'."

Res Ipsa loquitur thus is a process of inferential fact finding. It is a means of proving breach of duty and 'more commonly causation'.[764] However, negligence cannot be inferred where harm to another is the result of an involuntary act or act of God. Thus a driver who became unable to control a vehicle due to a disabling condition, a sudden heart attack and/or a loss of consciousness immediately before the accident, would not be liable for damage caused by loss of control of his vehicle if he was unaware of that condition. **4.215**

The inference of the defendant's negligence under *res ipsa loquitur* reasoning is derived where the following requirements are satisfied. **4.216**

[759] *Sally Thirkell and Trans World Airlines Corp* [1968] HKDCLR 91 (DC).

[760] See *Mok Ka Yin v Tsang Hing On* [2007] 2 HKLRD 858. In this case, however, the principle of *res ipsa loquitur* was not applied as the driver was not able to control the vehicle due to a disabling condition (of which he was not aware).

[761] [2003] 6 HKCFAR 207, [2003] 3 HKLRD 48, 51 (CFA). See also *Yu Yu Kai v Chan Chi Keung* [2009] 12 HKCFAR 705.

[762] *Lloyd v West Midland Gas Co* [1971] 1 WLR 749.

[763] *Barkway v South Wales Transport Co Ltd* [1950] AC 185.

[764] *Fleming's The Law of Torts* by Carolyn Sappideen and Prue Vines (10th ed, 2011) p360.

(3) The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.65(2)(b) of the [Race Relations Act 1976] from an evasive or equivocal reply to a questionnaire.[330]

(4) Though there will be some cases where, for example, the non-selection of the applicant for a post or for promotion is clearly not on racial grounds, a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the Tribunal will look to the employer for an explanation. If no explanation is then put forward, or if the Tribunal considers the explanation to be inadequate or unsatisfactory, it will be legitimate for the Tribunal to infer that the discrimination was on racial grounds. This is not a matter of law, but as May LJ put it in *Noone*, 'almost common sense'.

(5) It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the Tribunal should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a conclusion of the balance of probabilities, bearing in mind both the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case".[331]

5.184 **Remedies.** The remedies obtainable, apart from those obtainable under the Ordinances, are those which would otherwise be obtainable in the Court of First Instance.[332] Furthermore, the District Court has all such powers as are necessary or expedient for it to have in order to provide the remedies provided for under the legislation,[333] including the power to make declarations that the respondent has engaged in conduct, or committed an act, that is unlawful under the Ordinances and orders that the respondent shall not repeat or continue it, order that the respondent shall perform any reasonable act or course of conduct to redress any loss or damage suffered by the claimant, order the respondent to employ, re-employ or promote the claimant, order the respondent to pay damages to the claimant and make an order declaring any contract or agreement to be void in whole or in part either ab initio or from a date specified.[334]

5.185 **Order to perform reasonable act.** In *Ma Bik Yung v Ko Chuen*[335] the District Court had ordered the defendant to deliver to the claimant an apology in writing (through the

[330] The EOC has not yet issued such "questionnaires", pursuant to s.83 SDO, s.79 DDO; s.61 FSDO; and s.77 RDO.
[331] *Ibid.*, 518. Although this case dealt with direct race discrimination, by analogy, it also applies to direct discrimination on the given grounds in the SDO, DDO and FSDO. See also *Glasgow City Council v Zafar* [1998] 1 WLR 1659 (HL), where it was held that the guidance given by Neill LJ should in future be applied in discrimination cases of race or sex discrimination.
[332] See s.76(3) SDO; s.72(3) DDO; s.54(3) FSDO; and s.70(3) RDO.
[333] See s.76(4) SDO; s.72(4A) DDO; s.54(4) FSDO; and s.70(4) RDO.
[334] See s.76(3A) SDO; s.72(4) DDO; s.54(4) FSDO; and s.70(4) RDO.
[335] [1999] 1 HKC 714 (CFI).

parties' legal representatives) within 14 days. This was pursuant to s.72(4)(b) of the DDO, which gives the court power to order a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the claimant. The Court of Appeal held that an unwilling apology was not within the scope of s.72(4)(b), and that since the respondent was not at all repentant, and had always indicated otherwise, such apology was meaningless.

5.186 On further appeal to the Court of Final Appeal, it was held that there was power under s.72(4)(b) of the DDO to make an apology order against an unwilling defendant, but that such order should be made only in rare and exceptional cases. Furthermore, before making an apology order against an unwilling defendant, the Court of Final Appeal said that the court must satisfy itself that an insincere apology would, in fact, redress the plaintiff's loss and damage to some extent, and that it was a reasonable act for the defendant to perform in all the circumstances. In so finding, the Court of Final Appeal took into account the defendant's own right to freedom of thought or conscience guaranteed under art.32(1) of the Basic Law and Art 5 of the Hong Kong Bill of Rights, as well as the defendant's right to freedom of expression guaranteed under Art 27 of the Basic Law and Art 16 of the Bill of Rights. Although the Court of Final Appeal rejected the defendant's argument that these were absolute rights, it did accept that such rights were to be considered as part of the balancing exercise in each case. Of particular note was the Court of Final Appeal's comments as to the effect of an apology made at an early stage or prior to legal proceedings, and the effect of an apology made late in the day or not at all. In respect of the former, the court held that this should ordinarily mitigate the plaintiff's loss or damage. In respect of the latter, a late apology might still have the effect of redressing any loss or damage, but where no apology was ordered, this deficiency should be accounted for by a substantial increase in the quantum of damages.

5.187 **Damages.** Damages in proceedings brought under the three Ordinances include damages by way of compensation for any loss or damage suffered by reason of the respondent's conduct or act,[336] as well as punitive or exemplary damages.[337] In *Yuen Sha Sha v Tse Chi Pun*[338] the court awarded the plaintiff HK$50,000 damages for injury to her feelings (as well as ordered an apology against the defendant). In *Ma Bik Yung v Ko Chuen*[339] the District Court had ordered the defendant to pay to the plaintiff HK$15,000 for injury to feelings and HK$5,000 in punitive damages because of the oppressive and insulting circumstances of the taxi-driver's comments to her. On appeal, the Court of Appeal reduced the total sum of damages to HK$10,000, on the basis that the finding of unlawful disability discrimination could not be upheld, although the finding of unlawful disability harassment could. The Court of Final Appeal subsequently observed that damages of HK$20,000 in the first place had been on the low side.

[336] See s.76(3A)(e) SDO; s.72(4)(e) DDO; s.54(4)(e) FSDO; and s.70 (4)(e) RDO.
[337] See s.76(3A)(f) SDO; s.72(4)(f) DDO; s.54(4)(f) FSDO; and s.70 (4)(f) RDO.
[338] [1999] 2 HKLRD 28.
[339] (2006) 9 HKCFAR 888, [2002] 2 HKLRD 1

the basis that they had no legal proprietary interest. But, if the holder of the equitable interest also has possession of the goods, then he may be able to succeed on the basis of that possession, and similarly if A receives property on trust for, and also as agent for, B, B will be able to sue.[448]

7.086 **Mortgage.** Where goods have been mortgaged and the mortgagee holds the goods, a mortgagor may only bring an action in conversion or detinue where he has made the payment for the mortgage debt. The mortgagor's remedy may lie in redemption or making a summary application for the delivery of the goods and submitting a sum of money equal to the amount with a proper margin as security.[449] Where the mortgagor holds the goods up to the day fixed for payment, he may bring an action for conversion but he cannot sell the goods; if he does so the owner may bring an action against him or the buyer.

7.087 **Lien.** In certain cases where goods are entrusted to another to carry out particular services (for example, repairs or storage), the person in possession of those goods acquires a lien over the goods. He will thereby ordinarily be entitled to retain the goods until he is paid for the services.[450] But if title to the goods has passed to some third party (now the claimant), and the defendant who is holding the goods knows this, the defendant loses his right to retain the goods and must deliver them up to claimant.[451] The holder of a lien has a sufficient possessory interest to sue in conversion and his act is itself a conversion which ends the bailment and entitles the owner to sue him.[452]

7.088 **Licensee.** A licensee may sue in conversion. In *Northam v Bowden*[453] the claimant had a license to prospect certain land for tin and the defendant without permission, carted away some of the soil on this land. It was held that 'if the claimant had a right to the gravel and soil for the purpose of getting any mineral that could be found in it, he had such a possession of the whole as entitled him to maintain an action for its conversion against a wrongdoer'.[454]

7.089 **Pledge.** A pledgee who is by virtue of the pledge, in possession of the goods is entitled to bring an action of conversion against a tortfeasor until the time the debt for which the pledge forms a security has not been paid.[455] Where the pledge transfers the goods to another place without authority from the pledgor he may be liable if the goods are destroyed or lost.[456] The pledgor of the goods needs to tender the amount due under the pledge to the pledgee and needs to make the payment even were the pledgee claims himself to be the absolute owner of the goods; unless the pledgor tenders the amount due he does not get the immediate right of possession

[448] *International Factors v Rodriguez* [1979] Q.B. 351. See also *Nanyang Commercial Bank Trustee Ltd v John Ku. Tam & Ho [2011]* 3 HKLRD 156.
[449] *Bank of New South Wales v O'Connor* (1889) LR 14 App Cas 273, PC.
[450] See Murphy J, Witting C, *Street on Torts* (13th edn, Oxford University Press 2012) citing '*Bell, Modern Law of Personal Property* [1989] ch.6, 285.
[451] *Pendragon plc v Walon Ltd* [2005] EWHC 1082.
[452] *Mulliner v Florence* [1878] 3 QBD 484.
[453] [1855] 11 Exch 70.
[454] *Ibid.*, 73.
[455] *Martin v Reid* (1862) 11 CB NS 730.
[456] See *Lilley v Doubleday* (1880–81) LR 7 QBD 510.

of the goods.[457] If the pledgor makes a default the pledge may recover his debt by selling the goods. Further, a pledgee may even re-pledge the goods and this does not terminate the pledge and until the time the original pledgor tenders money he cannot sue the pledge. Thus, where the pledgee makes an unlawful sale this action does not determine the pledge and the pledgor cannot bring an action against the pledgee.[458] Similarly, an assignee of the pledgor cannot bring a claim in conversion against the pledge if the goods have been sold until he or she had tendered the amount owing.[459] In contrast to the right of a lienee, the pledgee has a higher priority and a much substantial right over the goods, because in case of default by the pledgor he can deal with the goods as the owner. A pledgee looses his property in the goods if he refuses a tender of the amount due to him and the pledgor may then bring an action against him where he can prove that he was ready to pay both at the time of the tender and even later.[460]

7.090 **Action by a buyer or a seller.** In the case of a sale of goods either the buyer or seller may sue a tortfeasor in conversion subject to the right of possession and property in the goods.[461] Where the property in goods has passed to the buyer[462] and he is entitled to delivery[463] he may bring an action against the seller or any third person who interferes with the goods. Where the goods have been sold and the buyer has both the right of possession and the property in the goods but the actual possession is with the seller as the agent for the buyer and if the seller now converts the goods, the buyer may bring an action against the seller.[464] A seller may also be liable where he collaborates in re-taking the goods from the buyer who already has the property in the goods and right to immediate possession.[465] But if the property has not passed to the buyer or where the seller retains possession of the goods although the property has passed, for instance he holds a lien for unpaid money,[466] it is the seller who may bring an action for wrongful interference.[467]

7.091 In *Bloxam v Sanders*[468] it was held that where goods were sold on credit, the buyer could ordinarily sue the seller in conversion if he wrongfully sold them to a third party, but that if a seller exercised his right of stoppage in transitu upon the buyer becoming

[457] *Yungmann v Briesemann* (1893) 67 LT 642, CA. See also *Pigot v Cubley* (1864) 15 CB NS 701 (wrongful conversion of two paintings pledged).
[458] *Donald v Suckling* (1865–66) LR 1 QB 585 (explaining *Johnson, Assignee of Cumming v Stear* (1863) 15 CB NS 330); *Halliday v Holgate* (1867–68) LR 3 Ex 299.
[459] *Halliday v Holgate* (1867–68) LR 3 Ex 299.
[460] *Yungmann v Briesemann* (1893) 67 LT 642, CA. See also *Pigot v Cubley* (1864) 15 CB NS 701 (wrongful conversion of two paintings pledged).
[461] *Bloxam v Sanders* (1825) 4 B & C 941; *Langton v Higgins* (1859) 4 Hurl & N 402. See also *Jarvis v Williams* [1955] 1 WLR 71, [1955] 1 All ER 108, CA.
[462] See Sale of Goods Ordinance (Cap.26), ss.18 and 19 for rules of transfer of property in the goods to the buyer.
[463] *Ibid.*, ss.53, 54 and 37. Also, a buyer may fail to prove that he has a right to delivery where he cannot produce the documents to the title, e.g. bills of lading: *Trucks and Spares v Maritime Agencies (Southampton)* [1951] 2 All ER 982, CA.
[464] *Chinery v Viall* (1860) 5 Hurl & N 288. The buyer may also sue the seller in such a case under the Sale of Goods Ordinance, s.14(1)(b).
[465] *Empresa Exportadora De Azucar v Industria Azucarera Nacional SA* [1983] 2 Lloyd's Rep 171, CA.
[466] Sale of Goods Ordinance (Cap.26) ss.40, 41, 42, 43, 46, and 47 (seller's remedies and rights).
[467] *Lord v Price* (1873–74) LR 9 Ex 54.
[468] [1825] 4 B & C 941.

actions where possible.[132] For instance, actual knowledge of mischievous propensity is not strictly required in an action for negligence.[133]

(a) Negligence

9.049 *Ordinary duty of care* In *Li Yuk Lan v Lau Kit Ling*[134] Cons V-P held that the "owner is liable … if there are particular circumstances which in themselves impose upon the owner a duty to take care". A person is liable for injury or damage[135] caused by his animal as a result of his failure to take reasonable care.[136] The owner is "not bound to guard against every conceivable eventuality but only against such eventualities as a reasonable man ought to foresee as being within the ordinary range of human experience".[137] What is reasonable is a question of fact in each case.[138] This may depend on the species of animal, the nature of the animal in question, whether the animal is in the country or town[139] and whether there are any special circumstances. For instance, it has been suggested that perhaps there should be a higher duty in relation to security dogs.[140]

9.050 *Generally not liable for tame animal doing something contrary to its nature unless special circumstances* Generally, nothing done by a tame animal that is contrary to its ordinary nature will establish liability, unless there are special circumstances.[141] In normal circumstances, a tame animal is not likely to cause harm and an act which is contrary to its nature cannot be regarded as being caused by the owner's negligence.[142] In addition, an animal is capable of spontaneous action and a reasonable person cannot foresee every mischievous act of a previously tame animal.[143]

9.051 Further, an owner is not liable for damage that "may be due to a spontaneous act of the animal for which the want of care gives the opportunity, but of which it is not the cause."[144] Where the act of negligence was leaving a pony, known to be restive, unattended on a highway, damage attributable to the restiveness will not be too remote, but damages not connected to the restiveness would be too remote.[145]

---

[132] For a useful illustration of the limitations of the different actions and the advantage of pleading different actions, see Lord Goddard's analysis in *Wormald v Cole* [1954] 1 QB 614 of *Cox v Burbidge* (1863) 13 CBNS 430.

[133] *Aldham v United Dairies (London) Ltd* [1940] 1 KB 507.

[134] [1989] 2 HKLR 128.

[135] For cases in which damages have been awarded for dog bites, see *Ho Lau Hing v Wu Ming Lok (t/a Sun Tak Wah Plastic Mfy)* (unrep., HC PI 464 / 1995, [1996] HKLY 665) and *Yanti v Chu Shiu Chuen* (unrep., HCPI 1176 / 2000, [2001] HKLRD (Yrbk) 419).

[136] *Fardon v Harcourt-Rivington* [1932] 146 LT 391. See also *Cheung Kwok Keung v Yip Man Hing Building Materials Co Ltd* (unrep., DCPI 2738/2009, [2012] HKEC 6).

[137] *Ibid.*

[138] *Aldham v United Dairies (London) Ltd* [1940] 1 KB 507.

[139] *Deen v Davies* [1935] 2 KB 282.

[140] *Obiter*, Pill LJ in *Gloster v Chief Constable of Greater Manchester Police* [2000] PIQR 114.

[141] See *Searle v Wallbank* [1947] AC 341, in particular Lord Du Parcq's *dictum* at 360; applied in *Li Yuk Lan v Lau Kit Ling* [1989] 2 HKLR 128.

[142] *Draper v Hodder* [1972] 2 Lloyd's Rep 93; *dicta* of Mortimer J in *Li Yuk Lan v Lau Kit Ling*.

[143] *Aldham v United Dairies (London) Ltd* [1940] 1 KB 507.

[144] *Ibid.*

[145] *Ibid.*

"Caused by" Likewise the dog is unlikely to be the cause of the accident if someone fell over backwards merely because a tame dog took a few steps towards them[146] or if someone jumped in front of an approaching car because an innocuous dog barked at them[147]. This is an excessive reaction rather than being caused by the animal. On the other hand injury or a heart attack resulting from being approached at speed by a large dog might be causative.[148] **9.052**

In cases where the damage is caused by a mischievous propensity of the animal, it is probably not necessary to prove knowledge of such propensity; although absence of knowledge of the propensity might render the damages too remote.[149] **9.053**

Children. "[P]articular" or "special" circumstances are more readily found by the Hong Kong courts where children are involved. In *Ching Ki Chun Ian v Li Yin Sze*[150] six boys aged around nine years old were at a play day at the defendant's premises. Five domestic helpers but no parents were present. The dog, a 2.5 feet tame mongrel, had been leashed in the corner of the living room. The boys were excited to see the dog and played with it and fed it dog biscuits over a prolonged period. One of the boys was bitten when he was left alone with it and he approached it. In holding the defendant liable, Eberwaney J acknowledged this was a "difficult case", as the dog was well behaved and tame prior to the incident; and emphasized that the Court of Appeal was not saying that young children playing with tame dogs must always be supervised. The defendant was liable as the lengthy period of continuous play by the lively young boys would have caused the dog to become stimulated and the proper inference was that the act of biting was not a spontaneous act that was wholly out of character but the result of the unsupervised play which excited the dog. It was incumbent on the defendant and her agents, the domestic helpers, to ensure there was periodic supervision. **9.054**

In *Amrol v Rivera*[151] the owner was held liable when she threw a ball for her golden retriever to retrieve into a crowded open area where children were playing, and there was a collision between the dog and a child. **9.055**

Allowing an animal liberty or the animal escaping. Generally, an owner will not be liable "without more"[152] or in the absence of "special circumstances"[153] merely because he has allowed his tame animal liberty or because of his negligence, it has escaped or there has been some failure of control; the escape by itself does not establish negligence. After all, in normal circumstances a tame animal is not likely to cause harm if it comes into contact with humans or animals.[154] Where the owner negligently allowed a horse, that was not likely to kick or bite when in the field, to escape and the horse then kicked a child, the owner was not held liable.[155] There **9.056**

---

[146] *Cheung Kwok Keung v Yip Man Hing Building Materials* (unrep., DCPI No 2738/2009, [2012] HKEC 6).

[147] *Chauhan v Paul* (English unrep., Court of Appeal, 19 Feb 1998)

[148] *Aldham v United Dairies (London) Ltd.*

[149] *Ibid.* This is also the view of *Charlesworth on Negligence*.

[150] [2011] 5 HKLRD 277.

[151] [2008] 4 HKLRD 110.

[152] *Cox v Burbidge* (1863) 13 CBNS 430.

[153] *Searle v Wallbank* [1947] AC 341.

[154] *Ibid.*; *Draper v Hodder* [1972] 2 Lloyd's Rep 93; Williams *The Law of Animals* (1939); *dicta* of Mortimer J in *Li Yuk Lan v Lau Kit Ling* [1989] 2 HKLR 128.

[155] *Cox v Burbidge*. See also *Lathale v Joyce & Sons* [1939] 3 All ER 854.

his liability for death or personal injury resulting from negligence, which is defined to include the common duty of care under the Occupier's Liability Ordinance.[190] By s.2(2) of CECO this prohibition only applies to "business liability", that is liability for breach of obligations or duties arising from things done or omitted to be done in the course of a business or from the occupation of premises used for business purposes of the occupier. This test of "business liability" refers to the purpose for which the occupier uses the premises and not the purpose of the visitor in entering it. Thus, *Ashdown v Samuel Williams & Sons Ltd*[191] would now be decided differently, as the defendants were business occupiers. This statutory prohibition is a significant inroad into the common law rules permitting exclusion or limitation of liability and s.3(1) of the Occupier's Liability Ordinance, especially since many cases brought in Hong Kong relying on provisions of the Ordinance are employment cases. Private and residential occupiers are excluded from s.7(1) prohibition. Section 7(3) provides that a person's agreement to or awareness of a contract term or notice purporting to exclude or restrict liability for negligence is not of itself to be taken as indicating his voluntary acceptance of any risk. As a result of this provision, the defence of *volenti non fit injuria* is considered preserved.

11.061 It is a question of fact whether there is a "business liability" and whether occupiers of places of worship, premises used by charities, schools, community halls, etc., will be subject to s.7(1) prohibition. It is suggested that, ultimately, it is a matter of degree, depending upon the dominant use of the premises and the principal activities undertaken therein. The limited provision of goods or services for money in a place of worship, for example, does not necessarily give rise to a business purpose.

11.062 *Educational and recreational purpose.* By a proviso to s.2(2), where a person enters for recreational or business purposes, the liability of an occupier of premises for loss or damage suffered by reason of the dangerous state of the premises is not a business liability, unless granting that person such access for the purposes concerned falls within the business purposes of the occupier.

11.063 **Damage to property.** Section 2(3)(b) provides that the rules enacted under the Ordinance in relation to an occupier and his visitor shall apply in the same way and to the same extent as common law principles had applied to an occupier and his invitees or licensees to regulate "the obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors". The Ordinance does not purport to create any additional duties if none existed in the common law and so does not protect the goods of a visitor on the premises from theft.[192] Nor does it seek to affect duties not

[190] Section 2(1).

[191] (1957) 1 QB 409.

[192] *Tinsley v Dudley* [1951] 2 KB 18. 31 (Jenkins LJ): "There is no warrant at all on the authorities, as far as I know, for holding that an invitor, where the invitation extends to the goods as well as the person of the invitee, thereby by implication of law assumes a liability to protect the invitee and his goods, not merely from physical dangers arising from defects in the premises, but from the risk of the goods being stolen by some third party. That implied liability, so far as I know, is one unknown to the law." See also the Law Reform Committee's Report (Cmnd 9305), para 56.

arising out of the occupation or control or premises, for example the duties of bailor and bailee.[193]

3. Trespassers

11.064 **Law relating to trespassers.** The Occupier's Liability Ordinance did not alter the common law rules governing the liability of occupiers for personal injury to trespassers and others who are not visitors. These rules continue to apply in Hong Kong, unlike in England where the Occupier's Liability Act 1984 was enacted. The common law rules in England before the 1984 Act were developed in three leading decisions, the last of which[194] has been followed in Hong Kong and represents the law here.

11.065 **Meaning of "trespasser".** A trespasser does not have the occupier's right or permission to enter and remain on the premises and "goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to".[195] Unlike the lawful visitor, he is an unknown and merely possible trespasser, and his presence and his movements are unpredictable.

(a) When does a lawful vistor become a trepasser?

11.066 In *Wong Wing Ho v Housing Authority*[196] a 12-year-old boy was playing basketball as a lawful visitor when his ball went over the fence into a closed court, which was fenced by a 6 m high wire mesh. Unfortunately, there was no telephone number provided to seek assistance and the building registration counter was unmanned. Half-an-hour later, the boy climbed over the fence into the court to retrieve his ball. Whilst returning to his own court, the plaintiff sustained injuries. It was held at first instance, that the plaintiff had entered the basketball court as a lawful visitor but became a trespasser when he climbed over the fence; the judge then proceeded to consider the duty owed to the plaintiff as a trespasser. However, on Appeal, it was held that the duty was owed to the plaintiff whilst he was still a lawful visitor. In a judgment given by Le Pichon JA at para 22:

> "On the facts of the present case, the Judge could not be criticised for his conclusion that the second defendant owed the plaintiff a duty of care in the form of exhibiting a notice giving a number to call for assistance. In my view, that duty was owed to the plaintiff qua visitor given that he was using the basketball court for a lawful purpose and the foreseeability of both the ball being knocked over the fence during such lawful user and the plaintiff wanting to retrieve it. The duty could not have been owed to him qua trespasser because the steps required to

[193] In *Fairline Shipping Corp v Adamson* [1975] QB 180 Lewis J held that the evidence was insufficient to establish the defendant was a bailee of the goods but the defendant nonetheless owed a duty of care to the plaintiff in respect of the storage of their goods in his premises, this duty being breached when the goods were negligently damaged. No mention was made to the 1957 Act or the rules therein.

[194] *British Railways Board v Herrington* [1972] AC 877.

[195] Per Lord Dunedin in *Robert Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358, 371.

[196] [2008] 1 HKLRD 352.

1. Introduction

13.001 In *Fletcher v Rylands*[1] the defendant engaged independent contractors to build a reservoir on his land, to supply water to his mill. In the course of work the contractors came upon some old shafts and passages on the defendant's land. The shafts appeared to be filled with earth, and no one suspected that they in fact extended to the mines of the plaintiff, a neighbour of the defendant. The contractors did not block them up, and when the reservoir was filled, the water from it burst through the old shafts and flooded the plaintiff's mines. The plaintiff sued the defendant. There was held to be no negligence on the part of the defendant.

13.002 The case came before the Court of Exchequer, which by a majority found for the defendant. The Court of Exchequer Chamber unanimously reversed this decision and held the defendant liable. Blackburn J delivered the judgment of the Court of Exchequer Chamber and set out what came to be known as the rule in *Rylands v Fletcher*:[2]

> "The question of law therefore arises. What is the obligation which the law casts on a person, who, like the defendants, lawfully brings on his land something, which though harmless while it remains there, will naturally do mischief if it escapes out his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours: but the question arises whether the duty which the law casts upon him under such circumstances is an absolute duty to keep it at his peril or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more […]
>
> We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape."

13.003 Liability under the rule is "strict", so that it is unnecessary to prove negligence in the defendant or his agents.

13.004 Blackburn J's judgment was affirmed by the House of Lords, where Lord Cairns[3] found liability on the basis that the defendant had made a "non-natural use" of his land. The effect is that the rule as expounded by Blackburn J applies to circumstances where the defendant had made a non-natural use of his land.

---

1 (1865–66) LR 1 Ex 265 (Court of Exchequer Chamber); *Rylands v Fletcer* (1868) LR 3 HL 330.
2 279–280.
3 338–340.

> sensitivity, involving very difficult decisions how to strike the balance between protecting the child from immediate feared harm and disrupting the relationship between the child and its parents. Decisions often have to be taken on the basis of inadequate and disputed facts. In my judgment in such a context it would require exceptionally clear statutory language to show a parliamentary intention that those responsible for carrying out these difficult functions should be liable in damages if, on subsequent investigation with the benefit of hindsight, it was shown that they had reached an erroneous conclusion and therefore failed to discharge their statutory duties."[176]

15.056 In *Cocks v Thanet District Council*,[177] it was held that no duty in private law arose until the housing authority had made a decision upon which the existence of the private law duty depended. Lord Bridge made a distinction between the decision-making functions and the executive functions of the housing authority and remarked that a private law duty would arise when "a decision has been reached by the housing authority which gives rise to the temporary, the limited or the full housing duty, rights and obligations are immediately created in the field of private law", and if the duty is established and breached, "it will give rise to a liability in damages". That approach was rejected by the House of Lords in *O'Rourke v Camden London Borough Council*,[178] on the ground that in *Cocks* there was no examination of the legislative intent indicating whether or not there was a private law duty "sounding in damages". Lord Hoffman said that the concept of a private law duty following a decision made by the authority to house the homeless would lead to the anomalous situation that a private action for damages will lie against a housing authority for recognising its duty to house the homeless but does so inadequately whereas no such action will lie against a perverse decision to refuse its duty.[179] In respect of the Housing Act 1985, Lord Hoffman said it was a social welfare scheme intended to confer benefits at the public expense on grounds of public policy and that the duty of the housing authority to provide accommodation depended on subjective judgment is indicative of a public law function to be enforceable only by way of judicial review.

15.057 In *Matteograssi SpA v The Airport Authority*,[180] the appellant's tender, which was the lowest amongst all others, for a contract to provide seating at Chek Lap Kok Airport was rejected. It brought judicial review proceedings against the authority seeking the relief of damages for which the only basis put forward was an action for breach of statutory duty under s.6 of the Airport Authority Ordinance (Cap.483), alleging that the authority had failed to consider the price factor contrary to their duty to act on "prudent commercial principles" and "economy" in "conducting its business" as required by that section. The Court of Appeal held that the authority's capacity to contract was a commercial function falling within the private law arena not amenable

[176] [1995] 2 AC 633, 731–732 and 747 (HL).
[177] [1983] 2 AC 286 (HL); see 11.40.
[178] [1998] AC 188 (HL).
[179] *Ibid.*, 196.
[180] [1998] 2 HKLRD 213.

to judicial review in the circumstances. In rejecting breach of duty under s.6 of the Ordinance as a basis for damages, Rogers JA said:

> "it is quite clear that s.6 could not be the basis upon which a claim based on a private right could be founded. As with any other body appointed with a public duty, economy is of course a factor to be taken into consideration, but as common sense as well as a proper construction of the statute dictates, it is not an overriding consideration. As such the statutory requirement for economy in the conduct of the Airport Authority's functions would, in my judgment, not be justiciable. It would be impossible for a court to weight and assess in the way the Airport Authority should all the relevant factors and matters relating to the conduct of the Airport Authority's functions."[181]

15.058 It appears that the reality is that actions against public authorities for breach of statutory duty under statutes establishing a regulatory system or a scheme of social welfare are unlikely to succeed, particularly where judgment and discretion have to be exercised. Factors operating against the finding of private liability include policy considerations, public element, alternative remedies and public law remedies. It has been suggested that where there is a breach of statutory duty in public law and the legislature is silent on the question of redress it will be assumed that judicial review is the only remedy and there is no room for enlarging the tort of breach of statutory duty.[182]

15.059 Thus any allegation of breach of statutory duty under social legislations such as, for instance, the Housing Ordinance (Cap.283), the Hospital Authority Ordinance (Cap.113) the Quarantine and Prevention of Disease Ordinance (Cap.141), and its subsidiary legislation, or in negligence, against the relevant authorities are likely to attract policy considerations.[183] No civil remedy is provided in any of those Ordinances and given their nature, it would appear that they fall squarely within the type described by Lord Browne-Wilkinson as "regulatory or welfare legislation".[184] It is suggested that it is highly unlikely that the courts will construe them as conferring a private law cause of action for breach of statutory duty on those affected individuals. The recent trend of authorities shows that the courts have been reluctant to impose liability on public authorities.[185]

[181] *Ibid.*, 36.
[182] Wade & Forsyth, *Administrative Law* (9th edn, 2004) at p 776; note that under O.53, r.7, RHC the courts are given power to award damages if satisfied that if the claim had been made in an action begun by the applicant at the time of making the judicial review application, damages could have been awarded.
[183] For a detailed discussion on potential liability in negligence, see Srivastava and Cullen, "SARS in the HKSAR: Some Important Legal Issues", *Hong Kong Lawyers* (July 2003); SARS Report, 2 Oct 2003; see also Davies, "Common Law Liability of Statutory Authorities: *Crimmins v Stevedoring Industry Finance Committee*" (2000) 8 *Torts LJ* 133; Sir Gerard Brennan, "Liability in Negligence of Public Authorities: The Divergent Views" (1990) 48 The Advocate 842; *Phelps v Hillingdon LBC* [2001] 2 AC 619 (HL), [2001] 117 LQR 25; see also *Clerk & Lindsell on Torts* (2000 edn), Ch 12.
[184] [1995] 2 AC 633, 731 (HL).
[185] See *Linky Chance Ltd v The Commissioner for Television and Entertainment Licensing* (unrep.,HCA 2127/2003, [2006] HKEC 2302): Amusement Game Centres Ordinance; *Lam Kang v Choy Hok Yin* (unrep., HCPI 557/2004, [2006] HKEC 607): Police General Orders made under s.46(1) of the Police Force Ordinance; *Lau Mei Wai v HKSAR* [2013] 1 HKLRD 1232: s.10 of Police Force Ordinance and Legal Aid Ordinance *Lam Yat Pun v Equal Opportunities Commission* (unrep., HCA 2404/2005, [2006] HKEC 431): Disability Discrimination Ordinance,

selling or letting for hire, or offering or exposing for sale or hire an article specifically designed or adapted for making infringing copies of a copyright work, with knowledge or reason to believe that it is to be used for making infringing copies;[150]

giving permission for a place of public entertainment to be used for an unauthorised public performance;[151]

supplying apparatus, or any substantial part of it, for the purpose of an unauthorised public performance;[152] or an occupier of premises giving permission for such apparatus to be brought onto the premises, with knowledge or reason to believe that the apparatus was likely to be used for copyright infringement;[153]

supplying a copy of a sound recording or film for infringement purposes, with knowledge or reason to believe that the copy was likely to be so used.[154]

17.036 **Parallel imports.** Parallel-imported copies of copyright works are genuine copies that are originally made with the authorisation of the copyright owner in the place of manufacture and destined for a market outside Hong Kong, but are subsequently imported into Hong Kong without the consent of the copyright owner or exclusive licensee in Hong Kong.

17.037 Such copies are infringing copies[155] but exemptions from civil liability have been introduced to allow the importing or possessing of parallel-imported copies of computer programs[156] and of other copyright works (except musical sound or visual recordings, television dramas or movies)[157] for use under specified circumstances (but not dealing in[158]). Criminal liability remains if the copies which are lawfully made elsewhere are imported into Hong Kong within 15 months from first publication.[159]

17.038 In relation to movies, television dramas, musical sound recordings and musical visual recordings, as the aforesaid exemption does not apply, there is civil as well as criminal liability to import or possess parallel-imported copies of such works if the copies are, or are intended to be, played or shown in public.[160] In relation to other categories of copyright works, if a parallel-imported copy is covered by the exemption and thus not

[150] Copyright Ordinance, s.32(1)(d). See, e.g. *Sony Computer Entertainment Inc v Lik Sang International Ltd* (unrep., HCA 3583/2002, [2003] HKEC 521).

[151] Copyright Ordinance, s.33(1). See also s.33(2), which provides that "place of public entertainment" includes premises which are occupied mainly for other purposes but are from time to time made available for hire for the purposes of public entertainment. As to permission, see *Performing Right Society Ltd v Ciryi Theatrical Syndicate Ltd* [1924] 1 KB 1, CA. There is no liability if the person who gave permission believed on reasonable grounds that the performance would not infringe copyright: Copyright Ordinance, s.33(1).

[152] Copyright Ordinance, s.34(2). As to the scope of the apparatus, see s.34(1).

[153] *Ibid.*, s.34(3).

[154] *Ibid.*, s.34(4).

[155] Copyright Ordinance, s.35(3).

[156] Copyright Ordinance, s.35A, inserted by virtue of the Copyright (Amendment) Ordinance 2003 (O.27 of 2003).

[157] Copyright Ordinance, s.35B, inserted by virtue of the Copyright (Amendment) Ordinance 2007 (O.15 of 2007).

[158] Section 35B(1) provides that the parallel-imported copy must not be imported or possessed with a view to its being dealt in by any person for the purpose of or in the course of any trade or business. "Deal in" is defined in Section 35B(6) to mean sell, let for hire, offer or expose for sale or hire, or distribute for profit or reward.

[159] Copyright Ordinance, s.35(4)(b). The period has been shortened from 18 months to 15 months by virtue of the Copyright (Amendment) Ordinance 2007.

[160] Copyright Ordinance, s.35B(2).

an infringing copy but is subsequently dealt in within 15 months from first publication, then besides civil liability, criminal liability returns as well.[161]

17.039 **Concept of copying.** A subsequent work may resemble an earlier work because (a) there was copying; (b) of sheer coincidence; (c) both works derived from the same source;[162] (d) the nature of the subject matter is such that the two works are bound to be identical or similar (e.g. tables of logarithms).[163] Only unauthorised copying of the whole or any substantial part of a copyright work,[164] either directly or indirectly,[165] constitutes an infringement. The concept of copying has two aspects. Firstly, the alleged infringement has to sufficiently resemble the copyright work and secondly, there has to be a causal connection between the two, meaning that the infringing work must be derived from the copyright work.[166]

17.040 Most of the time, copying involves a conscious effort on the part of the infringer to reproduce the whole or a substantial part of the original work.[167] However, absence of awareness of copying is not a defence.[168] Subconscious or inadvertent copying may occur if the alleged infringer is particularly familiar with the original work.[169] Also, although an author may not have seen an earlier work, if he is given such detailed instructions to produce a work and such instructions are given with a view to producing a reproduction of the earlier work, the subsequent work will turn out to be an infringing copy because the instructions afford a sufficient causal link between the similarities in the two works.[170]

17.041 The difficulty lies in deciding whether there has been copying of a substantial part of the work; emphasis being on the qualitative rather than quantitative aspect.[171] In comparing an original work and an alleged infringing copy, the court will judge whether

[161] Copyright Ordinance, s.35B(5).

[162] See, e.g. *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 276; *Harman Pictures NV v Osborne & Others* [1967] 1 WLR 723; *Ravenscroft v Herbert and New English Library Ltd* [1980] RPC 193; *Independent Television Publications v Time Out Ltd & Elliot* [1984] FSR 64. See also *Stoddard International Plc v William Lomas Carpets Ltd* [2001] FSR 44 (designer held to be inspired from an independent source).

[163] See, e.g. *Feist Publications Inc v Rural Telephone Service Co Inc* 499 US 340 (1991), where telephone directories were refused copyright protection as they were of such a nature that their selection and arrangement were bound to be identical or similar.

[164] Copyright Ordinance, s.22(3)(a). What must be copied is a substantial part of the expression, not the idea: *Bauman v Fussell* [1978] RPC 485, CA (photograph not infringed by a picture based on the same idea); *Antiquesportfolio.com Plc v Rodney Fitch & Co Ltd* [2001] ECDR 5 (photographs not infringed by logos made by tracing because the focusing and lighting did not carry through to the logos). *Cf Krisarts SA v Briarfine Ltd* [1977] FSR 577 (painting made after being shown another's paintings of the same scenes held an arguable case).

[165] Copyright Ordinance, s.22(3)(b). As to indirect copying, see, e.g. *King Features Syndicate Inc v O and M Kleeman Ltd* [1941] AC 417; *Navystar (Ngai Shing) Industrial Co Ltd v Fairing Industrial Ltd* [1994] 3 HKC 670.

[166] *Francis Day & Hunter v Bron* [1963] Ch 587CA; *Autospin (Oil Seals) Ltd v Beehive Spinning* [1995] RPC 683; *Jones v London Borough of Tower Hamlets* [2001] RPC 23.

[167] See, e.g. *LB (Plastics) Ltd v Swish Products* Ltd [1979] FSR 145; *Elanco Products Ltd v Mandops (Agrochemical Specialists) Ltd* [1979] FSR 46; *Solar Thomson Engineering Co Ltd v Barton* [1977] RPC 537.

[168] Knowledge is required only for secondary infringement, not for primary infringement.

[169] *Francis Day & Hunter Ltd v Bron* [1963] Ch 587, CA. See also *Jones v London Borough of Tower Hamlets* [2001] RPC 23.

[170] *Solar Thomson Engineering Co Ltd v Barton* [1977] RPC 537, CA. *Cf Stoddard International Plc v William Lomas Carpets Ltd* [2001] FSR 44 (instructions not sufficiently constraining to be regarded as directing copying).

[171] *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273, HL; *Biotrading & Financing OY v Biohit Ltd* [1998] FSR 109, CA; *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416; *Newspaper Licensing Agency Ltd v Marks & Spencer Plc* [2001] UKHL 38.

18.027 **Misrepresentation.** When a trader marks his goods or presents his services in a particular way or adopts a particular trading style, he is making a representation of some kind to his customers.[105] That representation becomes a misrepresentation if, because of another trader's reputation in the identifying features adopted, it connotes that other trader's goods or services in some way.[106] It is not enough to show that there has been confusion.[107] Before it is actionable, confusion has to be such that it is caused by a misrepresentation by the defendant that his goods or services are those of the plaintiff[108] or approved by the plaintiff.[109]

18.028 In *Kabushiki Kaisha Yakult Honsha v Yakudo Holdings Ltd*,[110] the plaintiffs, members of the Yalkult group of companies, brought both passing off and trade mark infringement actions against the defendants' use of the name "Yakudo" and similar bottle packaging on a lactobacillus drink similar to "Yakult". It was submitted in evidence that when translated into Japanese, "Yakudo" could be regarded as a "phonetic adulteration of Yakult".[111] It was held that the defendants' acts constituted a misrepresentation to the public. Apart from using "Yakudo" on their goods and websites, the defendants also adopted an email address embodying the letters "yakult". Although the plaintiffs encountered difficulties in collecting witness evidence, Lam J held that it was not fatal to their case.[112] Whilst, in each case the likelihood of confusion is a question of fact, the court has to reach its own conclusion. Quoting Laddie J,[113] whether there has been an infringement is more a matter of feel than science.[114] In the present case, the website and email address would be regarded as instruments of fraud in the passing off sense, and injunctive relief could be granted in a *quia timet* basis.[115]

18.029 In *Wyeth LLC v Wyeth (China) Ltd*,[116] the plaintiffs were part of the Wyeth group of companies, specialising in pharmaceutical products and infant merchandise. The defendant, incorporated in 2009 under the name "Wyeth (China) Ltd", was manufacturing and trading in baby nursery equipment and napkins. No reason was given by the defendant for choosing such a closely similar name. Even though the

[105] *AG Spalding & Bros v AW Gamage Ltd* (1915) 32 RPC 273, 284, *per* Lord Parker: "the basis of a passing-off action being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made. It may of course, have been made in express words, but cases of express misrepresentation of this sort are rare. The more common case is, where the representation is implied in the use or imitation of a mark, trade name, or get-up with which the goods of another are associated in the minds of the public, or of a particular class of the public".

[106] Such misrepresentation is actionable, be it intentional or not. See "Defendant's state of mind" below.

[107] *See Phones 4u Ltd v Phone4u.co.uk. Internet Ltd* [2007] RPC 5 and *Barnsley Brewery Co Ltd v RBNB* [1997] FSR 462, 467. See also *Marcus Publishing Plc v Hutton-Wild Communications Ltd* [1990] RPC 576; *HFC Bank Plc v Midland Bank Plc* [2000] FSR 176.

[108] *Marengo v Daily Sketch and Daily Graphic Ltd* [1992] FSR 1. Lord Greene's observations concerning mere confusion were referred to in *County Sound Plc v Ocean Sound Ltd* [1991] FSR 367. See also *Harrods Ltd v Harrodian School Ltd* [1996] RPC 697.

[109] See *Musical Fidelity Ltd v Vickers* [2003] FSR 50. The notion of misrepresentation is wide enough to include false endorsement. See "Character merchandising and false endorsement" below.

[110] [2004] 2 HKLRD 587.

[111] *Ibid*, at para 21.

[112] *Ibid*, at paras 89 and 90.

[113] *Wagamama Ltd v City Centre Restaurants Plc* [1995] FSR 713, 732.

[114] *Kabushiki Kaisha Yakult Honsha v Yakudo Holdings Ltd* [2004] 2 HKLRD 587 at para 96.

[115] *Ibid*, citing *British Telecommunications Plc v One in a Million Ltd* [1999] 1 WLR 903.

[116] (Unrep., HCA 7/2010, [2012] HKEC 523).

defendant subsequently changed its name to "P&W China Limited", the court held that this was tantamount to a confession of guilt. The defendants went on to grant authorisation to a Mainland company to be the general agent and chief operator of "WYETH" brand maternal and infant products within the Mainland. Thereafter, the Mainland company advertised itself by reference to the plaintiffs' Wyeth trade marks and used name cards and price lists bearing the Wyeth trade marks. It even had websites which were closely similar to that of the plaintiffs. The court held that "the supply of (or even the mere authorisation to use) instruments of deception which the defendant knows are going to be used for passing off (even abroad) is itself a form of passing off which is actionable and takes place when the supply or authorisation occurs".[117]

18.030 A false claim is not itself necessarily actionable. It is actionable only if it relates to the plaintiff's product or goodwill.[118] In *Cambridge University Press v University Tutorial Press*,[119] the defendant published a book, alleging that it was prescribed for an examination, but in fact it was the plaintiff's book that was prescribed. The plaintiff's action for passing off failed on the ground that any such representation by the defendant was only as to quality and there had been no passing off.[120] On the other hand, even if a claim is true, it can still amount to a misrepresentation in passing off if it carries with it a false representation and induces the belief that the defendant's goods or services are those of the plaintiff.[121]

18.031 **Defendant's state of mind.** Neither motive nor deceit is a necessary element of passing off.[122] On the other hand, mere imitation of the plaintiff's badge of recognition does not give rise to a cause of action if there is no probability of confusion.[123] Thus, a person who has unknowingly used another's badge of recognition in such a way that it is likely to confuse the purchasing public can be made liable even if he is innocent, though his innocence may have an implication on the damages recoverable.[124] In practice, once an intention to mislead is detected, it would not be difficult to infer that the desired result has in all probability been achieved.[125] Thus, the court is more than ready to grant an injunction to restrain a defendant who admits or is proved to have a deliberate intent to deceive.[126]

18.032 **Whose confusion is relevant.** The persons whose confusion is to be considered are the plaintiff's own customers or the ultimate consumers of the goods or services in

[117] *Kerry's Law of Trade Marks and Trade Names*, 15th ed, para 18-234.

[118] *Schulke & Mayr UK Ltd v Alkapharm UK Ltd* [1999] FSR 161.

[119] (1928) 45 RPC 335. See also *Ormond Engineering Co Ltd v Knopf* (1932) 49 RPC 634.

[120] *Cf. Combe International Ltd v Scholl (UK) Ltd* [1977] FSR 464.

[121] *John Brinsmead & Sons Ltd v Brinsmead* [1913] 1 Ch 492, 496–7.

[122] *AG Spalding & Bros v AW Gamage Ltd* (1915) 32 RPC 273; *Parker-Knoll Ltd v Knoll International Ltd (No. 2)* [1962] RPC 265.

[123] *Rox Industrial Co Ltd v Japan Stationery Co Ltd* [1966] HKLR 145; *Kjeldsen & Co v Hong Kong Peggy Foods Co Ltd* (unrep., HCA 165/1981). See also *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1995] 1 WLR 1564, 1569, where Jacob J said "there is no tort of copying".

[124] See "Remedies" below.

[125] *Slazenger & Sons v Feltham & Co* (1889) 6 RPC 531, 538. See also *Harrods Ltd v Harrodian School Ltd* [1996] RPC 697, 706.

[126] *Television Broadcasts Ltd v Home Guide Publication Co* [1982] HKLR 313.

must be important for the person in question to know, and in order to guide his conduct.[275] There would be no privilege if the communication could not influence his conduct. The privilege will depend on the nature of the communication, and on the relation in which the parties stand to one another. In *Chapman v Lord Ellesmere*[276] an inquiry was held by the stewards of the Jockey Club concerning the "doing" of a racehorse. The decision of the inquiry contained the statement that the plaintiff, the trainer of the horse, had been warned off, and this was published in the *Racing Calendar* as well as newspapers. The Court of Appeal held that the publication in the *Racing Calendar* was privileged as the stewards had a duty to communicate their decision to the racing public who had a corresponding interest in receiving it, and as it appeared that the *Racing Calendar* should be the means of the communication of such decisions. The publication to the news agencies was however not privileged as the public at large had not an "interest" in the publication, save only a sector of the public only.[277]

21.067 There must not only be an interest in the recipient but also an interest or duty in the maker of the statement to make the communication in question.[278] In *Pang Siu Yin v Tam Kei Wai Gary t/a Gary KW Tam & Co*[279] the plaintiff had been working in the defendant's firm of solicitors. When he left the employment, the defendant discovered a number of clients had received services from the plaintiff with the fees waived. The defendant, apart from seeking to recover the fees from the clients, also wrote them a letter suggesting that there had been collusion with the plaintiff against the firm's interest. The court ruled that the letter, though defamatory, had the protection of qualified privilege as both the sender and recipients of the letter had an interest in the matter. Protection was also found to be available in a case concerning statements concerning the competence and honesty of the chairman of a residential development in the course of maintenance works in the building, made by the person asked to do the works to the committee members.[280] In certain cases, there is a positive duty for one person to disclose what he is privy to, for example, in the case of an employee or agent who is bound to lay before his employer all the information which he possesses in relation to the matters put in his care or charge.[281] However, if the publication of the defamatory matter went

[275] See *Bromage v Prosser* (1825) 4 B & C 247. See also *Lo Ki Chung v Hong Kong Nam Hoi (Sha Tau District) Association Ltd* (unrep., HCA 39/2003, [2004] HKEC 868), Deputy Judge Poon found that the public that was subscribing and making donations to the defendant, a charitable organisation, as well as members of the public wishing to join as members of the defendant, had an interest in knowing the matters published.

[276] [1932] 2 KB 431; followed *Russell v Duke of Norfolk* [1949] 1 All ER 109; *Cf Cookson v Harewood* [1932] 2 KB 478; *Star Gems v Ford* [1980] CLY 1671 (publication of allegations of business malpractice).

[277] Considered in *Friend v Civil Aviation Authority (No. 1)* [1998] IRLR 253.

[278] *Watt v Longsdon* [1930] 1 KB 130, 147 (Scrutton LJ); and see *Phelps v Kemsley* (1942) 168 LT 18. *Beach v Freeson* [1972] 1 QB 14. In *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 the House of Lords acknowledged a reciprocity of duty and interest in media reports and that, subject to certain conditions, qualified privilege could be a defence to a newspaper publishing matters relating to politics which were of legitimate interest to the public generally.

[279] [1995] 3 HKC 482.

[280] *Ho Ping Kwong v Chan Cordelia* [1989] 2 HKC 415.

[281] *Cooke v Wildes* (1855) 5 El & Bl 328; *Lawless v The Anglo-Egyptian Cotton and Oil Co* (1868–69) LR 4 QB 262; *Moore v Canadian Pacific Steamship Co* [1945] 1 All ER 128.

beyond the parties interested in receiving it, then the protection offered under qualified privilege would be lost.[282] Reciprocity of duty and interest is essential.[283]

Confidential relationship. Privilege arising out of confidential relationship has been extended widely. In *Beatson v Skene*[284] the court said: **21.068**

> "[w]hen once a confidential relationship is established between persons with regard to an inquiry of a private nature, whatever takes place between them relevant to the same subject, though at a time and place different from those at which the confidential relationship began, may be entitled to protection as well as what passed at the original interview and it is a question for the jury whether any further conversation on the same subject, though apparently casual and voluntary, does not take place under the influence of the confidential relationship already established between them and is therefore entitled to the same protection."

Statement in answer to reasonable request for information. A trader is protected if he answers the question of another trader concerning the solvency of persons with whom the latter intends to deal.[285] However, a trade protection society or mercantile agency supplying credit information of traders for reward to subscribers is not protected by privilege.[286] A person is not necessarily protected simply because he was asked a question, and he should first be reasonably satisfied that the person asking the question has some interest or duty in the matter.[287] As opposed to answers given to questions asked, cases concerning volunteered communications were more difficult to determine. An example was *Coxhead v Richards*,[288] where the plaintiff was in command of a merchant vessel. The defendant received from the mate of that vessel, who was his friend, a letter imputing drunkenness and other grave charges against the plaintiff, and seeking advice. The defendant forwarded the letter to the owners of the vessel, who then terminated the employment of the plaintiff. The court was divided as to whether the communication was privileged. Whilst part of the court[289] held that information of a very important character had come into the defendant's possession, and that it was his duty to disclose it to those interested in it, the other part[290] denied privilege, on the ground that the defendant was an entire stranger to all the parties. In *Bennett v Deacon*,[291] the defendant had volunteered an imputation on the plaintiff's solvency to a person intending to give the latter credit. **21.069**

[282] *Li Tsze Sun v Ming Pao Newspaper Ltd* [1996] 2 HKC 515 (Mr Recorder E Chan).

[283] *Jameel v Times Newspapers Ltd* [2003] All ER (D) 104 (Nov); and *Bonnick v Morris* [2003] 1 AC 300. See also *Kearns v General Council of the Bar* [2003] 1 WLR 1357, where the chairman of the Bar Council sent letters to fellow members stating mistakenly that a person is not a solicitor.

[284] (1860) 5 Hurl & N 838, 855, 856. See also *Angel v H H Bushell & Co Ltd* [1968] 1 QB 813, 836.

[285] *Cf Davies v Snead* (1869–70) LR 5 QB 608, 611; *Robshaw v Smith* (1878) 38 LT 423, 424 (Grove J); *Waller v Loch* (1880–81) LR 7 QBD 619, 622.

[286] *Macintosh v Dun* [1908] AC 390. But see, per Scrutton LJ in *Watt v Longsdon* [1930] 1 KB 130, 148. *Macintosh v Dun* was applied by the Supreme Court of Alberta in *Gillett v Nissen Volkswagen Ltd* [1975] 3 WWR 520.

[287] *Force v Warren* (1864) 15 CBNS 806, 808 (Erle CJ); *Waller v Loch* (1880–81) LR 7 QBD 619, 621 (Jessel MR).

[288] (1846) 2 CB 569.

[289] Tindal CJ and Erle J (whose judgments were approved by Blackburn J in *Davies v Snead* (1869–70) LR 5 QB 608, 611).

[290] Coltman and Cresswell JJ.

[291] (1846) 2 CB 628; *Goslett v Garment* (1897) 13 TLR 391.

1. General

Focus of chapter. The focus of this chapter is the general law on the principles governing the types of loss, or heads of damages and method of assessment of such damages. Accordingly, rules of assessment or special considerations applicable to specific torts or types of injury are analysed in the chapters dealing with those torts. These include defamation and certain torts connected with injury to reputation, trespass to land, trespass to the person, misrepresentation, interference with economic interests and interference with rights to chattels. **26.001**

Purpose of damages: full restitution (principle of *restitutio in integrum*[2]). An award of damages is to serve as compensation for the losses, pecuniary and non-pecuniary, sustained by the plaintiff as a result of the tortious act of the defendant. Damages should be assessed to achieve *restitutio in integrum*. Litton V-P in *Chan Pui Ki v Leung On*, said that "the object of an award of damages is full restitution, compensating the victim for all the ill effects of the injury."[3] In doing so, he echoed Lord Blackburn's words, that the court should award "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."[4] **26.002**

Exceptions to principle of *restitutio in integrum*. While the principle of *restitutio in integrum* would be apt in its application to losses that can be calculated in reasonably precise terms of money, the same cannot be said of cases of personal injury, where damages are claimed for pain, suffering and the like, or in cases of defamation, where the court is asked to assess injury to reputation.[5] Compensation in these contexts has been described as providing the plaintiff some "place for his misfortunes"[6] and the proper award is one that is "fair, reasonable and just".[7] Nevertheless, the courts have strived towards achieving a certain degree of consistency in awards for non-pecuniary loss. Courts are permitted to consider and compare the circumstances of the case **26.003**

---

2 Restoration to original position.

3 [1996] 2 HKLR 401 at 584.

4 *Livingstone v Rawyards Coal Co* (1879–80) LR 5 App Cas 25 at 39. The principle was restated in *Admiralty Commissioners v Owners of the Steamship Valeria* [1922] 2 AC 242 at 248 (per Viscount Dunedin); *The Liesbosch* [1933] AC 449 at 463 (per Lord Wright); *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 at 463 (per Lord Scarman). The Hong Kong courts have approved and applied the principle: *Leung Tai Ah v Chan Tak Wan* [1968] HKLR 224; *Lee Woon Sun v Wong Kin Keung* [1976] HKLR 296; *Gordon Taylor Graham v P J Mansell* [1976] HKLR 176; *Tang Kwong Chiu v Lee Fuk Yue* [1988] HKLR 588; *Chan Pui Ki (an infant) v Leung On* [1995] 3 HKC 732.

5 *British Transport Commission v Gourley* [1956] AC 185 at 197 (per Earl Jowitt); *H West & Son Ltd v Shephard* [1964] AC 326 at 346 (per Lord Morris).

6 *Warren v King* [1964] 1 WLR 1 at 10 (per Harman LJ).

7 *Rowley v London and North Western Railway Co* (1872–73) LR 8 Ex 221 at 231; *Pickett v British Rail Engineering Ltd* [1980] AC 136 at 168 (per Lord Scarman); *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 at 187; *Heil v Rankin* [2001] QB 272; *Lau Che Ping v Hoi Kong Ironwares Godown Co Ltd* [1988] 2 HKLR 650 at 654, (per Cons ACJ). What is fair and reasonable for damages for non-pecuniary loss would depend on the social, economic and industrial conditions of the particular jurisdiction: *Chan Wai Tong v Li Ping Sum* [1985] AC 446. See also *Jag Singh v Toong Fong Omnibus Co Ltd* [1964] 1 WLR 1382 at 1385; *Selvanayagam v University of the West Indies* [1983] 1 WLR 585 at 590; *Ratnasingam v Kow Ah Dek* [1983] 1 WLR 1235 at 1237.

The court did not accept this as a good reason for the plaintiff's inactivity in seeking legal advice and refused to grant an extension.

29.105 The fact that the plaintiff did not appreciate his legal rights against the defendant may be taken into account by the court under s.30, although it is an irrelevant consideration for the purposes of computing time under s.27 based on the plaintiff's knowledge.[180]

29.106 Where the injured person died and when, because of s.27, he could no longer maintain an action and recover damages with respect to the injury, the court shall have regard in particular to the length of, and the reasons for, the delay on the part of the deceased.[181]

29.107 **(2) Cogency of evidence: s.30(3)(b).** This refers to the extent to which the delay has rendered the evidence less cogent than it would have been had the action been brought within the limitation period. The evidence may be less cogent because witnesses have died, or their memories have faded. Moreover, documentary evidence may have been lost or destroyed by the defendant,[182] though the effect of destruction of evidence may vary according to the nature of the case and whether the destruction is reasonable. Also, the workplace in question, being the subject matter of an industrial injury claim, may have closed down.[183] These are all relevant factors for the court to consider in determining whether or not to override the time limit under s.27.

29.108 The evidential burden is on the defendants to show that the evidence adduced by him is likely to be less cogent because of the delay.[184] A general allegation of impairment of memory is normally insufficient.[185] If there is no serious attempt by the defendant to outline his substantive defence, there will be a "paucity of material" to support any suggestion of evidential difficulty over any particular aspect that arises from dimmed recollection due to the delay.[186]

29.109 In *Brooks v J & P Coates (UK) Ltd*,[187] the limitation period was disapplied after a 12-year delay. This case concerned a system of work, which the court held was easier to recall than a sequence of events comprising a single incident. The court found that a clear picture could be presented for a fair trial even though the cogency of the defendant's evidence was impaired. In the same vein, the CFI in *Yam Yuen Lai v Board of Governors of the Prince Philip Dental Hospital* noted that:

> "[w]here the complaint of negligence is with respect to a system, and not dependant on the particular conduct of a particular person, and there is no suggestion of any dispute as to the existence or absence or nature of the system, then it must be that the delay will be less likely to affect the cogency of the evidence".[188]

[180] *Brooks v J & P Coates (UK) Ltd* [1984] ICR 158; *Halford v Brookes* [1991] 1 WLR 428; *Coad v Cornwall & Isles of Scilly Health Authority* [1997] 1 WLR 189.
[181] Limitation Ordinance s.30(4).
[182] *Hammond v West Lancashire Health Authority* [1998] Lloyd's Rep Med 146. The judge was entitled to discount the prejudice suffered by the defendant as a result of the destruction of X-rays forming part of the plaintiff's medical records after the defendant had been notified of the claim.
[183] *Stanley Price v United Engineering Steels Ltd* [1998] PIQR P407.
[184] *Mok Lai Fong v Ng Po Sui* [2011] 3 HKLRD 67, [65].
[185] *Ibid.*, [67].
[186] *Ibid.*, [69].
[187] [1984] ICR 158, 168.

29.110 **(3) Conduct of the defendant after the cause of action arose: s.30(3)(c).** This refers to the extent to which the defendant responded to the plaintiff's reasonable requests for information or inspection. It does not include the defendant's conduct that forms the basis of the claim.[189]

29.111 Although the defendant is not under any obligation to volunteer information, he must not obstruct the plaintiff from obtaining relevant information. Where a defendant deliberately protracted settlement negotiations in the hope of causing the time limit to expire, the court will take that into account. Such settlement negotiations may be an implied agreement to defer the service of a writ which has been issued. Accordingly there may exist an implied agreement not to plead limitation.[190] Where the defendant gave incorrect information to the plaintiff so as to prevent him from discovering the possibility of a claim, that could justify granting an extension.[191]

29.112 Under this section, the defendant's conduct may include that of his solicitors and insurers. This is because these persons are generally responsible for dealing with the plaintiff's requests for information.[192]

29.113 **(4) Duration of the plaintiff's disability arising after the accrual of the cause of action: s.30(3)(d).** The word "disability" should be given its ordinary meaning. It is not limited to purely physical disability.[193] It is also not restricted to cases where a person is legally disabled by virtue of being a minor or a person under the Mental Health Ordinance.[194]

29.114 Where the plaintiff's incapacity falls short of the standard required for "disability", such incapacity may still be considered by the court under the court's general discretion.[195]

29.115 The plaintiff's "disability" must arise *after* the date of accrual of the cause of action for the purpose of exercising the discretion under s.30. But any disability that arises prior to and subsists at the accrual of the cause of action may delay the running of time by virtue of s.22.

29.116 **(5) Conduct of the plaintiff: s.30(3)(e).** According to s.30(3)(e), the court will consider "the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages". The test is an objective one where the reasonableness of the plaintiff's action is considered.[196]

[188] (Unrep., HCPI218/2010, 11 July 2012), CFI, [53].
[189] *Hodgson v Imperial Tobacco Ltd (No. 3)* [1999] CLY 459.
[190] *Hare v Personal Representatives of Mohammed Yunis Malik* (1980) 124 SJ 328, CA.
[191] *Marston v British Railways Board* [1976] ICR 124.
[192] *Thompson v Brown* [1981] 1 WLR 744, 751H.
[193] *Thomas v Plaistow* [1997] PIQR P540.
[194] *Shek Chi Wai v Chai* (unrep., HCA 6295/1993, [1994] HKLY 797).
[195] *Yates v Thakeham Tiles Ltd* [1995] PIQR P135.
[196] *Mok Lai Fong v Ng Po Sui* [2011] 3 HKLRD 67, [80].