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liability, occupier's liability, nuisance, *Rylands v. Fletcher*[24] liability, economic torts, reputation, product liability, trespass, etc.

24. (1868) LR 3 HL 330.

Part I. Liability for One"s Own Acts

Chapter 1. General Principles

§1. Unlawfulness and Fault: The Standard of Care and Its Breach

26. Courts determine whether a duty of care has been breached by the defendant by applying the objective 'reasonable person test'. The 'reasonable person' is hypothetical, created by the judiciary. The test tries to determine whether, in similar circumstances, the defendant's acts fall below a reasonable person's prudence. In other words, it is assessed whether the defendant has fallen below a certain standard of behaviour that is acceptable in the conduct of human affairs, given the considerations that ordinarily regulate society. In *Vaughan v. Menlove,*[25] the court stated that, to assess whether the defendant's conduct was honest and bona fide, it must ask itself 'whether the individual *'proceed[ed] with such reasonable caution as a prudent man would have exercised under such circumstances'*. Hence, this test provides courts with the discretion to assess the defendant's conduct from the 'reasonableness' perspective, which is adjustable depending on the type of circumstances and defendants involved, based on their experiences and skills. Therefore, reasonableness is based on particular circumstances instead of being a specific duty. In *N v. Agrawal,*[26] the plaintiff complained to the police after she was raped and buggered by a third party. The defendant medical practitioner, an accredited Rape and Child Abuse Forensic Medical Examiner, examined and submitted her findings in a witness statement. The defendant was told she would not be needed at the time but that she would be contacted in the following week, so she went on her holidays. The judge was unwilling to adjourn until her return, so the plaintiff lost her case, and sued the defendant for exacerbating her PTSD symptoms. The defendant was not held liable. Stuart-Smith LJ stated: '*If a duty of care exists at all it is a duty to take reasonable care to prevent the plaintiff from suffering injury, loss or damage of the type in question, in this case psychiatric injury. A failure to attend to give evidence could be a breach of such duty; but it is not the duty itself.*'[27]

27. As shown above, the degree of care is formulated by considering: (1) specific situations, such as those involving emergency, professional skills, etc., or (2) setting

25. (1837) 132 ER 490 (CP).
26. [1999] PNLR 939.
27. [1999] PNLR 939, 943.

the standard of care according to foreseeability of harm or magnitude of the risk, which includes the social utility of the defendant's activity and the cost of taking precautions, etc. The objective test looks at the type of activity undertaken, not the tendencies of the particular defendant. Thus, the same standard will be expected of professionals in a particular post. Lack of experience is irrelevant because, once qualified, society believes that the person is able to complete the job, and also because it is hard to determine when a professional can be considered experienced. An example would be *Nettleship v. Weston*,[28] where a learner driver was denied a lower standard of care than an average driver. The big question here is to find out how a reasonable person with a particular skill would act under certain circumstances. As per Mustill LJ in *Wilsher*, a junior doctor undertaking specialist work cannot claim a lower standard of duty due to his status as a beginner with less experience. The standard should not just be that of an average, competent, and well-informed inexperienced person, but that of a person who is part of a highly specialized service unit.[29] Similarly, an inexperienced golfer may not escape liability for injuring his caddie by claiming he must be held at a lower standard of duty for inconsistent play or failure to take appropriate precautions.[30]

28. In *Glasgow Corp v. Muir*,[31] the appellant's manageress allowed a picnic party to be hosted in their tearoom. Two men on the premises spilled hot tea from an urn, which scalded children. A case was brought on the children's behalf, contending that the appellant's manageress had been negligent in allowing the urn to be carried around on the premises. The children succeeded at trial, but the House of Lords reversed the decision. They held that liability should be limited to consequences of acts that a reasonable person would have considered. The appellant's manageress had no reason to anticipate that such an event would occur. Thus, she is not obliged to take precautions against the occurrence of such an event. An important note about the 'reasonable person' test is that courts are only concerned with how the reasonable person would have acted in the circumstances. Lord Macmillan stated:

> The standard of foresight of the reasonable man is in one sense an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions; others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from overconfidence.[32]

29. As discussed above, it is clear that the standard of care required under the reasonable person test is what constitutes reasonable conduct for the defendant under the circumstances, not about the relationship between the parties. The nature of the relationship falls under duty of care, not standard. To find out whether there is a breach of duty; one must determine whether the defendant has fallen below the standard of care expected of the reasonable person under the circumstances. Hence, the objective standard of a reasonable person may not always reflect 'average' behaviour, as that

28. [1971] 2QB 691 (CA).
29. *Wilsher v. Essex Area Health Authority* [1987] QB 730 (CA) (Lord Mustill).
30. *Chau Fung Yee v. Lee Chi Ming* [2000] 2 HKLRD 690, 694–696 (CFI) (Seagroatt J).
31. [1943] 2 AC 448.
32. *Glasgow Corp v. Muir* [1943] 2 AC 448, 459.

will be determined on a case-by-case basis. In certain cases, influenced by policy reasons, meeting an 'average' standard may not be enough to avoid breach of duty. This is most evident in traffic accident cases, where a higher standard may be imposed since most defendants are insured and imposing similar standards on all drivers, irrespective of their experience, is more reasonable.[33]

I. The Common Standard of Care in Special Situations

30. The objectivity of the expected standard of care helps courts focus on types of activity without having to create a subjective standard for the particular defendant involved. The test looks at the degree of skill appropriate to an activity rather than considering the defendant's experience. The legitimate expectations of the plaintiff are given priority to make sure that the public is protected. This test also allows the standard of a reasonable person to be compared to the defendant's characteristics (e.g., experience, age or maturity).[34] However, applying this test to the elderly and infirm may be problematic. On the surface, it seems that the law is prepared to give special consideration to elderly plaintiffs suffering injuries, and not elderly defendants causing injuries. An elderly driver enjoys no free passes, as the public expects a common minimum safe standard from all drivers. In *Roberts v. Ramsbottom*,[35] Neill J regarded the age of the defendant irrelevant and stated: '*The driver will be able to escape liability if his actions at the relevant time were wholly beyond his control. The most obvious case is sudden unconsciousness. But if he retained some control, albeit imperfect control, and his driving, judged objectively, was below the required standard, he remains liable. His position is the same as a driver who is old or infirm.*'[36]

31. Furthermore, if compulsory insurance is in effect, there is no reason for free passes. In *Nettleship v. Weston*,[37] the plaintiff acted as a driving instructor for the defendant. The defendant panicked, causing the plaintiff to be injured in an accident. The Court of Appeal held that if inexperience is no defence in criminal law, there is no reason to lower the degree or standard for learner drivers under civil law.

32. For people with physical or mental incapacities, they must conform to the standard of an average person with the same disability taken into account. They are required to take greater precautions, as they should recognize the limitations caused by their conditions. For example, if a car driver with poor eyesight, who has not done anything to rectify it, causes an accident, he puts others in danger by carelessly choosing to drive in the first place. Where the defendant's incapacity was caused by factors totally beyond their control, like a stroke or heart attack, causing the defendant to lose the mental capacity to control his actions, the court may apply a lower standard due to the exceptional circumstances of the case.[38] However, if the defendant is aware of his medical condition, he will be held liable. For example, in *Lin Chun Yuen & Anor*

33. Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap 272).
34. *McHale v. Watson* [1996] 115 CLR 866.
35. [1980] 1 WLR 823.
36. [1980] 1 WLR 823, 833.
37. [1971] 2 QB 691.
38. *Mok Ka Yin v. Tsang Hing On* [2007] 2 HKLRD 858, [2007] HKCU 1006.

v. Kwong Kam Chuen & Anor,[39] the defendant was a public light bus driver who killed a woman after having lost control of the bus. He claimed that he was in a state of automatism induced by a disease, and he had failed to take medication for it on the day of the accident. The court held the defendant liable as they took a risk by not taking medication, finding that the accident was a direct result of his negligence, and not a medical condition he was unaware of.

33. The objective standard of care will differ in special situations (e.g., emergency situations, sports, children, and professionally skilled persons). The defendant's liability while responding to emergencies is determined by whether his conduct can be viewed as being what a reasonable person's conduct would be under the same circumstances. In *Parkinson v. Liverpool Corporation*,[40] the defendant driver was not held liable when a passenger was thrown out of the bus due to his sudden braking to avoid a dog that suddenly appeared on the road. Similarly, in *Sze Ha Kam Carly v. Chum Chi On*,[41] the defendant hit the brakes sharply to avoid collision with another vehicle, but he lost control and hit a road divider. He was not held to have been negligent, as he was merely responding to an emergency situation that was not of his making. The judge believed that to find the defendant liable for not foreseeing and taking precautions for the cutting in would be too harsh. He accepted the defendant's evidence of there being no vehicle in front of him, and that the increase of speed by the other vehicle did not mean an indication to overtake. Under the Road Users' Code 1997 and Road Traffic (Traffic Control) Regulations (Cap 374 sub Leg G), drivers must stop at pedestrian crossings. If the circumstances of the situation force a driver to hit a pedestrian crossing at an inappropriate time, their actions will be judged from the standpoint of a reasonable person.

34. Participation in sports is somewhat similar to emergency situations, as the competitors may have to act in the spur of the moment. In sports injuries cases, the defendant is not liable for mere errors of judgment that cause injury or damage to others, as there is an implicit agreement that some scuffle will occur once someone agrees to participate in a sports game. Liability is determined by how a reasonable person would have acted in similar circumstances. Despite the implicit agreement, all participants have a duty towards each other to take all reasonable care. In *Chau Fung Yee v. Lee Chi Ming*,[42] an inexperienced golfer hit his caddie in the mouth and teeth with a ball. The defendant golfer was found negligent, since he took no precautions in light of his erratic play. The plaintiff caddie was also held contributory negligent for her own injuries, since she was aware of the defendant's inexperience. Different standards apply to accidents between fellow competitors and in spectator-competitor accidents. For example, in *Vowles v. Evans*,[43] a rugby referee (the defendant) was held liable for allowing a game to continue after the injury of the plaintiff player. However, the court emphasized that the standard for referees should be at a higher threshold for exposing participants to the risk of injury.

39. [2002] HKEC 1472.
40. [1950] 1 All ER 367.
41. HKCU [2010].
42. [2000] 2 HKLRD 690 (CFI).
43. [2003] 1 WLR 1607.

35. A child is held at a lower standard of care than an adult. A child merely has to conform to the standard of an ordinary child of his age and maturity. In *Mullin v. Richards*,[44] 15-year-old girls were playing 'fencing' with plastic rulers in class. The plastic ruler hit the plaintiff in her eye when it snapped, and caused her to go blind. The court held the defendant to be not liable, as children and teenagers commonly played the game, so the risk of injury was not foreseeable. Hutchinson LJ stated:

> Taking the view therefore that the learned judge… on his findings of fact that there was negligence on the part of both these young ladies—was wrong in his view and there was no evidence on which he could come to it, I would allow the appeal and direct that judgment be entered for the first defendant. I have to say that I appreciate that this result will be disappointing to the plaintiff for whom one can have nothing but sympathy, because she has suffered a grave injury through no fault of her own. But unfortunately she has failed to establish in my view that anyone was legally responsible for that injury and, accordingly, her claim should have failed.[45]

36. In *McHale v. Watson*,[46] a 12-year-old boy threw sharp metal at a post near where a 9-year-old girl was standing, and caused her eye an injury. The court dismissed the case, finding no breach of duty, as the conduct must be judged by the foresight and judgment of an ordinary boy of the same age. Generally, the court will consider the child's mental ability, background and maturity for the purposes of determining liability.

37. The standard of care for professionals is determined by what is normally done by reasonable, prudent professionals in that industry. For imposing liability on a defendant who possesses special skills (e.g., doctor, lawyer), the court will determine whether the person measured up to the standard of proficiency expected of him as a professional. This standard is higher than it is for a reasonable person with no such skill. However, the professional does not have to guarantee a particular result. For example, a solicitor cannot guarantee that his client will win a case. In *Bolam v. Friern Hospital Management Committee*,[47] the defendant gave E.C.T. to the plaintiff without applying any form of manual restraint, in accordance with his normal practice. The plaintiff tried to claim damages for the defendant's negligence in failing to administer any relaxant drug, and failing to warn him of the risks involved in treatment. The defendant was not held liable as he conformed to the custom of a responsible professional body. Ultimately, this case confirmed two principles, known as the *Bolam* test: (1) where the defendant has special skills, they are to be judged by the standard of a reasonable person who possesses such skills; (2) the professional defendant will not be held liable if it is shown that his conduct was regarded as proper by a responsible body in their profession.

38. In *Sidaway v. Board of Governors of the Bethlem Royal Hospital*,[48] the issue was whether a doctor had the duty to inform a patient of every single risk before an operation. Rejecting the plaintiff's claim, the court held that consent did not mean that

44. [1998] 1 WLR 1304.
45. [1998] 1 WLR 1304, 927.
46. (1965) 111 CLR 384.
47. [1957] 2 All ER 118.
48. [1985] AC 871 (HL).

an explanation of remote side effects was needed. Lord Scarman dissented, stating that the *Bolam* test should not apply to informed consent cases, and that it should be the doctor's duty to inform his patients of the inherent and material risks of the proposed treatment.

39. In a key turn of events, on 11 March 2015, the UK Supreme Court in *Montgomery v. Lanarkshire Health Board*[49] partly overturned the *Bolam* test regarding the doctor's liability in informed consent cases. Montgomery (the appellant) gave birth to a severely disabled child, and attributed the injuries to the negligence of a doctor working under the respondent company. The grounds on which she claimed negligence are: (1) she was not given any advice regarding the risk of shoulder dystocia before vaginal birth; and (2) the doctor failed to perform a C-section when cardio abnormalities were detected during labour. Instead of leaving it to medical professionals to determine what should be disclosed to patients, the Supreme Court held that the approach should be taken from a patient's perspective, since it takes personal autonomy and human rights into account. This decision was also in light of the fact that Montgomery studied molecular biology, and also had family members that were medical practitioners, so she was highly informed when it came to human body-related topics. Although Hong Kong tends to follow UK common law, the impact of this decision on future similar cases has yet to be seen.

40. There are problems with the *Bolam* test, such as how professionals can put themselves above the law and not be answerable to the plaintiff, as long as their behaviour is approved by a body of professionals, even if it is an unusual situation. The *Bolam* test was limited by *Bolitho v. Hackney Health Authority*.[50] This case concerned the cardiac arrest and death of a child with breathing difficulties. The defendants accepted that their doctor should have attended to the plaintiff, or arranged an appropriate person to do so. The court also had to consider whether the doctor should have intubated the child when they could have saved him. The doctor claimed that neither she nor any other doctor would have intubated the child. Lord Brown-Wilkinson dismissed the appeal on the grounds that the doctor was not negligent for doing what was accepted by an expert responsible body of medical opinion. However, it was also held that the court must be satisfied that the opinion has a logical basis. Judges have the discretion to reject logically indefensible opinions of expert bodies.

II. Factors Used by Courts to Assess Standard of Care (Risks and Benefits)

41. Depending on the circumstances, the court considers different factors in assessing the standard of care required by the defendant. The defendant should have foreseen the harm, and appreciate the magnitude of the risk (i.e., probability of the injury occurring, and knowledge of the severity). The social utility of the defendant's activities, the cost of taking precautions, and failure to conform to common practice would also be considered.

49. [2015] UKSC 11.
50. (1998) AC 232 (HL).

42. The standard of care expected from a defendant is such that if the harm that the plaintiff suffers is not foreseeable by a reasonable person, then the defendant will not be liable. Precautions against harm are only required for harm that is reasonably foreseeable, with reference to the knowledge that the defendant should have at the relevant time. In *Bolton v. Stone*,[51] the defendant's cricket ball managed to hit the plaintiff after going over a 17-feet-high fence that was 78 yards away from the defendant, and the fence was 100 yards away from where the plaintiff was standing. Evidence shows that balls had only strayed over the fence five or six times in the past thirty years, so it was rare for the ball to stray to begin with, let alone hit a stranger. The plaintiff lost the case, since the possibility of such an accident was not foreseeable. An important point was that, in the five or six times a ball had strayed, it had not hit anyone. The House of Lords also stated that the cricket club was not negligent in doing nothing about the risk of someone being injured by a flyaway cricket ball, because the cricket club would have to stop playing at that ground entirely to completely avoid such injuries from occurring again, when it was merely carrying out a lawful and socially useful activity. The situation in *Bolton* can be contrasted with that in *Miller v. Jackson*,[52] as the cricket balls in the latter case strayed from the grounds on eight or nine occasions per season. As the risk of harm was much higher, the cricket club was found negligent for not taking preventative actions to reduce the risk as much as reasonably possible.

43. If the magnitude of any risk reaches threatening levels, the court will consider the likelihood of harm. A reasonable man is not usually expected to take precautions against an event that only has a miniscule chance of occurring. A merely theoretical chance of an accident occurring will not be enough to prove a breach of duty of care by the defendant. In the case of *Overseas Tankship (U.K.) Ltd v. The Miller Steamship Co and Anor (The Wagon Mound No. 2)*,[53] neighbouring ships were burned due to the ignition of furnace oil negligently leaked into Sydney harbour from a vessel owned by the defendant. Had the defendants breached their duty of care by not preventing the fire? It was held by the Privy Council that the risk of was foreseeable, though small. With respect to the vessel's chief engineer, Lord Reid stated that, '*The only question is whether a reasonable man, having the knowledge and experience to be expected of the chief engineer of the Wagon Mound would have known that there was a real risk of the oil on the water catching fire in some way: if it did, serious damage to ships or other property was not only foreseeable but very likely.*' If a real risk of harm would be perceived by a reasonable person in the defendant's position, they have a duty to take steps to prevent it.[54] In the case of *Haley v. London Electricity Board*,[55] the defendants were liable for an accident in which a blind person fell into a hole that the defendants had dug. The risk was not so small that it could be ignored. Precautions should have been taken, bearing in mind the blind people residing in the area.

44. Regarding the magnitude of risk, the seriousness of injury is also considered by courts when setting a standard of care, and balancing the risks and rewards involved.

51. [1951] AC 850.
52. [1977] 3 All ER 338 (CA).
53. [1967] 1 AC 617 (PC).
54. *Mourton v. Poulter* [1930] 2 KB 183.
55. [1965] AC 778 (HL).

Even if the risk of harm is small, where the gravity of the injuries that could occur is great, then a reasonable man would be expected to take precautions. An example would be *Paris v. Stepney Borough Council,*[56] when the plaintiff was already blind in his left eye, and his good right eye was blinded by a metal chip striking it while working for the defendants. The defendants were found negligent in omitting to supply him with protective goggles, as the injuries that he could have, and did, sustain were serious. If there is a danger to life and personal safety, then the defendant is to be held as owing a higher degree of care.[57]

45. The purpose and social utility of the situation in which the accident occurs is also assessed. For example, in *Daborn v. Bath Tramways Motor Co Ltd,*[58] the plaintiff was injured in an accident with an ambulance during the Second World War. The ambulance had a sign saying 'left-hand drive no signal'. The accident occurred after the defendant attempted to turn after using a hand signal, which was not seen by the plaintiff. It was held that the defendant's conduct was reasonable in that time of national emergency and had social utility, and the defendant was not liable. This can be contrasted with *Overseas Tankship (UK) Ltd v. Miller Steamship Pty Ltd (The Wagon Mound (No. 2)),*[59] where the defendant's activity was not justified. Lord Reid stated:[60]

> In the present case there was no justification whatever for discharging the oil into Sydney Harbour. Not only was it an offence to do so, but it involved considerable loss financially. If the ship's engineer had thought about the matter, there could have been no question of balancing the advantages and disadvantages. From every point of view it was both his duty and his interest to stop the discharge immediately.

46. In *Tomlinson v. Congleton Borough Council,*[61] the plaintiff visited an artificial lake within a country park under the defendant's jurisdiction. The plaintiff struck his head hard on the sandy bottom from a poorly executed dive, which broke his neck at the fifth vertebrae. This case raised issues regarding social utility on top of the ''Occupiers' Liability Act 1957/1984. Lord Hoffmann considered the enjoyment against the consequences of risk, and concluded that the defendant did not have to take further steps to prevent swimming in the lake. Lord Hobhouse of Woodborough stated: *'The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen. Of course there is some risk of accidents arising out of the joie de vivre of the young, but that is no reason for imposing a grey and dull safety regime on everyone.'*[62] *Glasgow Corporation v. Taylor*[63] was considered, where Lord Shaw of Dunfermline stated: *'Grounds thrown open by a municipality to the public may contain objects of natural beauty, say precipitous cliffs or the banks of streams, the dangers of the resort to which are plain.'* Thus, it is evident that the court considers the risks and rewards of social utility at

56. [1951] 1 All ER 42 (HL).
57. *Luen Hing Fat Coating & Finishing Factory Ltd v. Wan Chuen Ming* 61 (2011) 14 HKCFAR 14.
58. [1946] 2 All ER 333.
59. [1967] 1 AC 617.
60. [1967] 1 AC 617, 643.
61. [2003] UKHL 47.
62. [2003] UKHL 47, 81.
63. [1922] 1 AC 44, 61.

leisure places that may have physical features capable of causing injury to careless persons or children alongside the protective measures already taken by the defendant. Obviously, it may not be possible to protect against all injuries, so the defendant will not be liable for not taking measures that a reasonable person would consider unnecessary. In *Hastie v. Magistrates of Edinburgh,*[64] Lord President stated that there are certain risks which the law, in accordance with common sense, does not protect people from, as they are *'just one of the results of the world as we find it'.*[65]

47. The failure to take precautions requiring a lot of resources to prevent accidents would not make the defendant liable (e.g., constructing expensive walkways). However, if the cost is not high, or the correction is necessary, the defendant would be held liable. The damp floors of a factory led to the electrocution of a worker in *Wong Tak-hing v. Tai Sang Industrial Co Ltd,*[66] and it was established that this was a common risk in factories. The defendants were held liable for not taking reasonable steps to keep the floors dry and safe for use. Similarly, in *Knight v. Home Office,*[67] the plaintiff's husband had suicidal tendencies, and tried to act on them one day in the prison hospital, and an officer working for the defendant ended up injuring the husband while trying to stop him from hurting himself. The defendant was not held liable as prisons did not have enough resources at their disposal to build a hospital wing specifically for mentally unstable people like him. A prison's duty of care is different from a mental hospital's, and it is held at a lower standard since it only has to ensure certain things, e.g., that no one escapes. The defendant was not liable this time, since it was the first time such an incident had occurred. However, generally, the risk and frequency of accidents should make the defendant more vigilant to avoid them in order to avoid being found liable for negligence (e.g., petrol stations contain flammable items, so precautions should be taken to ensure no items capable of igniting them are brought onto the premises).

48. In terms of the failure to conform to common practice, the defendant is held liable only if he fails to take reasonable precautions as taken by other fellow professionals, or if the defendant does not conform to the standards of practice expected. For example, the solicitors in *Li Fook Chu v. HH & Co*[68] were found negligent for not warning their clients that their claim for the recovery of a loan was time-barred. This was a failure to conform to the standards of the solicitor's profession.[69] Conformity to codes or statutes is within the community's reasonable expectations from professionals. However, in some exceptional cases, adherence to common practice may expose the plaintiff to unreasonable risks, which the defendant could be still liable for.[70] This is in accordance with *Bolitho v. Hackney Health Authority,*[71] where it was held that the court is entitled to hold professional opinion to be unreasonable if it has no 'logical basis'. With the development of third-party insurance, the community's expectations have expanded

64. [1907] SC 1102.
65. [1907] SC 1102, 1106.
66. [1975] HKLR 375.
67. [1990] 3 All ER 237.
68. [2006] 3 HKC 433.
69. (Vol. I, Rule 2.03).
70. *Lloyd's Bank Ltd v. Savory & Co* [1933] AC 201.
71. [1998] AC 232 (HL).

to expect liability to be imposed on all defendants, including drivers of all ages or experiences. This is because the defendants are insured; imposing similar standards on all drivers is reasonable.[72] Therefore, in motor accident cases, discussion is on whom the risk should fall on, as opposed to fault. The rise in public expectations has given rise to ingenious methods to improve safety standards.

III. Res Ipsa Loquitur (Rule of Evidence)

49. The burden of proof rests on the plaintiff to show that the defendant has more likely than not been careless on the balance of probabilities (e.g., falling objects cases). For the proof of carelessness, the plaintiff can rely on the Evidence Ordinance (Cap 8), which allows for criminal convictions to serve as admissible evidence in civil proceedings. Under section 62, it states:

(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.

50. If it is virtually impossible for the plaintiff to prove the exact cause of their injury, or the defendant's negligence, due to lack of substantial evidence, he can invoke the principle of res ipsa loquitur. It means 'the thing speaks for itself', so it relies on the fact of the accident occurring to suggest the defendant's negligence.[73] The court tries to determine a reasonable evidential inference to see whether to hold the defendant liable.[74] Ribeiro PJ in *Yu Yu Kai v. Chan Chi Keung*[75] clarified the meaning of res ipsa loquitur:

43. Whether one uses the label res ipsa loquitur or one speaks (as Hobhouse LJ would have preferred) of establishing a prima facie case, one is concerned with a rule regarding the proper approach to the evidence. It is an approach whereby, in cases where the plaintiff is unable to say exactly how his injury was caused but, consonant with his duty of care, one may expect the defendant to know, one asks whether the evidence has raised a prima facie case against the defendant and if it has, whether the defendant has, at the end of the day, dispelled that prima facie case by providing a

72. Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap 272).
73. *Pickford v. Imperial Chemical Industries plc* [1998] ICR 673.
74. *Ho Ka Yin v. Express Security Ltd* [2011] HKCU 1398.
75. (2009) 12 HKCFAR 705.

plausible explanation for the plaintiff's injury which is consistent with the absence of negligence on his part.[76]

51. The res ipsa loquitur principle originated from *Scott v. London and St Katherine Docks,*[77] and is applied in very few cases. To prove the case with res ipsa loquitur, the court must prove from case facts whether: (i) the harm could have occurred without negligence; (ii) the defendant had control over the cause of harm; and (iii) the cause of harm was unknown to the plaintiff. If these conditions are satisfied on the balance of probabilities, the defendant would be held negligent. In *Ho Ka Yin v. Express Security Ltd,*[78] the plaintiff fell off her wheelchair twice while using the defendant's lift. For the first accident, the defendant was held liable upon the application of res ipsa loquitur. McWalters J stated:

In my view the conditions precedent to the operation of the rule are present in this case. First, the plaintiff is unable to say exactly how her injury was caused. Secondly, consonant with his duty of care, one may expect the defendant to know. Thirdly, the evidence has raised a prima facie case against the defendant. I say this because the evidence is that the accident happened when the plaintiff's wheelchair encountered an obstruction when the plaintiff, in compliance with the instructions of the defendant's staff who were supervising her, propelled the wheelchair to exit the lift platform … .

52. In *Chung Man Yau and Anor v. Sihon Co Ltd,*[79] the plaintiffs were injured after falling from a great height off a balcony. The court held that their injuries were evidence of the defendant's negligence; the defendant was the occupier of the building. Applying res ipsa loquitur it was held that such an accident could not have occurred without the defendant's negligence. In *Gee v. Metropolitan Railway Co,*[80] the plaintiff fell off a train when a door suddenly opened. Since the door was under the supervision and control of the defendant's company, the court inferred the evidence of the defendant's negligence from it and held the defendant liable. In the CFA case of *Sanfield Building Contracts Ltd v. Li Kai Cheong,*[81] the plaintiff was injured after falling from scaffolding provided by a subcontractor; the principal contractor, the appellant, was also found liable. The accident could not have happened, in the absence of contrary proof, if the appellant had taken reasonable care. Justice Bokhary's discussion on the doctrine of res ipsa loquitur covered Hong Kong and UK authorities, and described the doctrine as a *'mode of inferential reasoning'* applying *'to accidents of unknown cause'*.[82] Res ipsa loquitur does not apply if the cause of the accident is discovered after investigation (e.g., equipment issues, tyres bursting).[83]

76. (2009) 12 HKCFAR 705, 720, para. 43.
77. [1865] 3 Hurl. & C 596.
78. [2011] 4 HKRLD 395.
79. [1996] HKLY 668.
80. [1873] LR 8QB 161.
81. (FACV No. 16 of 2002, 12 Jun. 2003); (2003) 6 HKCFAR 207.
82. (FACV No. 16 of 2002, 12 Jun. 2003), para. 3.
83. *Barkway v. S. Wales Transport Co.* [1950] AC 185.

§2. The Concept of Fault

53. The concept of fault is closely connected to the tort of negligence. Although it is fair to say that all torts involve some sort of wrongdoing, this is distinct from the concept of fault for the purposes of the tort of negligence. It was in the nineteenth century that the law of tort was significantly altered in order to provide compensation to victims during the industrial revolution by expanding the ambit of the tort of negligence. During the time of the King's Courts in England, although remedies were available for victims suffering harm as a result of certain forms of careless conduct, the tort known today as negligence, or the general idea of a duty of care, had not yet come into existence. While attempts had been made towards establishing general liability in negligence, these efforts were hampered because the law of contract overlapped with the general duty of care.[84] It was not until the case of *Donoghue v. Stevenson* that the general duty of care was finally separated from the scope of contract.[85]

54. Liability in negligence can arise from careless acts or omissions causing damage. It must, however, be shown that the defendant owed a duty of care to the plaintiff; that the defendant breached the duty of care (such as by failing to act reasonably within the circumstances and in relation to their position with respect to the plaintiff); and that breach caused damage to the plaintiff. Causation must be established between the defendant's breach and the harm to person or property suffered by the plaintiff.

55. The tort of negligence applies to many aspects of societal dealings and sets standards as to how a reasonable person is expected to socially interact with others[86] and, where reasonable care has not been taken,[87] a person is held liable. The acts or omissions[88] giving rise to tortious liability depend[89] on the existence of a duty of care, its breach and the causation of the claimant's injury.[90]

§3. The Duty of Care

I. Identifying a General Duty: 'The Neighbour Principle and the Caparo Test'

56. There are, as aforementioned, many categories within the law of tort and under the tort of negligence; a plaintiff must ascertain which category of liability their claim lies within. In order to establish whether a duty of care was owed and breached, the plaintiff should look at their relationship with the alleged tortfeasor and at which

84. *Williams v. Holland* [1833] 10 Bing 112.
85. *Donoghue v. Stevenson* [1932] AC 562.
86. *Grant v. Australian Knitting Mills Ltd* [1936] AC 85, 103 (PC), (Lord Wright).
87. *Vaughan v. Taff Vale Rly Co* (1860) 5 H & N 679, 688 (Willes J).
88. *Blyth v. Birmingham Waterworks Co* (1856) 11 Exch 781, (1856) 156 ER 1047, 784 (Alderson B).
89. *Fardon v. Harcourt-Rivington* [1932] All ER Rep 81, (1932) 146 LT 391, 392 (HL) (Lord Dunedin).
90. *Lochgelly Iron and Coal Co Ltd v. M'Mullan* [1934] AC 1, 25 (HL) (Lord Wright).

interests of theirs were harmed and what damage they suffered, be it physical, economic, psychiatric or otherwise. In *Donoghue v. Stevenson,*[91] the landmark case in which a third party to a contract for the purchase of a bottle of ginger beer suffered ill effects after discovering a decomposing snail inside the bottle partway through partaking of it, we see the roots of the modern conception of the tort of negligence. Lord Atkin's famous adaptation of the Biblical concept of loving one's neighbour into a limited legal duty applies, taken at its widest, to situations in which the defendant would be able to reasonably foresee that their acts or omissions could cause harm to others. Lord Atkin defined the neighbour principle in the following words:

> That rule that you are to love your neighbour becomes, in law, you must not injure your neighbour, and the lawyer's question, "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[92]

57. In his formulation, Lord Atkin stated two requirements for establishing the existence of a duty of care: foreseeability and proximity. In his own words:

> Proximity in this sense is not confined to mere physical proximity but extends to close and direct relations between the parties. In this case the scope of the notional duty owed by a manufacturer to a consumer was defined by the requirement that injury to the consumer be foreseeable and that there be proximity in the sense that the product was intended to reach the ultimate consumer in the form in which it left the manufacturer, with no reasonable possibility of intermediate examination.[93]

58. Reasonable foreseeability is determined by the knowledge that a person in the defendant's shoes would ordinarily be expected to have, whilst proximity depends on the broader relationship between the parties to tortious claim[94] and consists of various forms of closeness, including physical, circumstantial, causal or assumed.[95] For instance, in the case of *Donoghue*, the manufacturer owed a duty of care to the plaintiff because the former intended his product to reach the ultimate consumer, which included the plaintiff (Mrs Donoghue). The significance of this case is that it separated the law of negligence from the law of contract and it was no longer necessary to establish the privity of contract before bringing a claim in negligence.[96] It is also important to note that, although there is no exhaustive list as to the categories of

91. *Donoghue v. Stevenson* [1932] AC 562.
92. *Donoghue v. Stevenson* [1932] AC 562 para. 580.
93. *Donoghue v. Stevenson* [1932] AC 562, 580 (HL) (Lord Atkin).
94. *James Mc Naughton Papers Group Ltd v. Hicks Anderson & Co* [1991] 2 QB 113, 126, [1991] 1 All ER 134, 145 (CA) (Eng) (Neill LJ).
95. *Sutherland Shire Council v. Heyman* (1985) 60 ALR 1, 55–56 (Aust HC) (Deane J).
96. *Lee Cooper Ltd v. C. H. Jeakins & Sons Ltd.* [1967] 2 QB 1 cited in *Corsina (Far East) Ltd v. Taipen Yusen Wharf & Godown Co. Ltd.* [1976] HKCU 45.

Chapter 2. Specific Cases of Liability

§1. Liability of Professionals

122. Professional liability is discussed under former subheadings relating to standard of care and pure economic loss. The general principles of negligence are used to determine the standards of professional conduct in different areas, such as the expectations from those who work in the medical, legal, engineering, tax advising, banking, and accounting fields. If the courts have to consider whether the professional's conduct has breached the standard of care, they see if the professional was acting in accordance with the common practice of the relevant professional body. The court applies the *Bolam v. Friern Hospital Management Committee*[232] and *Bolitho v. City and Hackney HA*[233] cases to determine the liability of the professional. It is difficult to prove causation in medical negligence cases as there may be multiple causes to the plaintiff's injury and subject specific texts should be referred to.

123. In general, professionals owe a higher standard of care, though they do not need to achieve a certain result. They are not judged at the same standard as inexperienced persons. For example, in *Wells v. Cooper,*[234] a householder fixing a door only needed to meet the standard of reasonable amateur carpenters but not professionals. In *Susan Field v. Barber Asia,*[235] the defendant, the plaintiff's independent financial adviser, was liable for negligence for their financial advice. The plaintiff was not experienced and had expressed her wish to invest conservatively. The court considered the inexperience of the plaintiff and her will to invest prudently, and held that the investment adviser breached his duty.

124. Likewise, in *Midland Bank Trust Co Ltd v. Hett Stubbs & Kemp,*[236] the client was awarded damages for the solicitor's negligence in not registering the option to buy, causing the plaintiff economic loss by not being able to buy the land. Similarly, in *White v. Jones,*[237] a solicitor negligently failed to amend the plaintiff's will and therefore he was liable for the economic loss sustained by the plaintiff due to his negligence. These two cases are compared here to illustrate the special relationship that occurs with the plaintiff when the defendant is a professional, and the *Hedley Byrne*[238] principle imposes responsibility on the defendant for his professional conduct. In these cases, they did not only consider 'statements' but also professional services, which shows that courts can adopt a more flexible approach to the *Hedley Byrne* principle.

232. *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118.
233. [1998] AC 232 (HL).
234. [1958] 2 QB 265.
235. [2003] HKCU 712; Also *see* Jose Antonio Maurellet & Adrian Lai, '*The Minibond Saga: Caveat Emptor or Financial Adviser Beware?*', Hong Kong Law. (2008 December).
236. [1979] Ch 384, [1978] 3 All ER 571, [1978] 3 WLR 167.
237. [1995] 2 AC 207.
238. [1964] AC 465.

§2. Liability of Public Authorities

125. In Hong Kong, similar to the UK, public services tortious liability is governed by general common law rules. Hence, were a public official negligently acts or omits performance of his duty resulting in an injury to the plaintiff, in addition to recourse in public law, he may be able to pursue private law actions in tort for: (1) the breach of statutory duty simpliciter (i.e., irrespective of carelessness); or (2) the careless performance of a statutory duty in the absence of any other common law right of action; or (3) the breach of common law duty of care arising either from the imposition of the statutory duty or from the performance of it; or (4) misfeasance in public office (i.e., the failure to exercise, or the exercise of, statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct is unlawful).[239]

126. However, in misfeasance in public office cases, public policy plays a significant role when determining the duty of care owed by a public authority, such as a government department or public health department, in situations of economic loss, omission, psychiatric illness,[240] and unintended births, etc. This has been discussed in detail in this text under the topics of omission, psychiatric illness, economic loss and unintended children. The court has to be mindful of the far-reaching consequences of holding a public authority liable and how it may affect the allocation of government funds and dictate how public money should be spent. It will also affect insurance costs. For example, in omission situations, if a court' imposes a duty of care onto a public authority for wrongful life[241] or for omission[242] it will lead to interference with the budgeting of the public authority and cause loss of public money.[243] Hence, in determining the liability for negligence of a public authority, the court takes into consideration that public authorities mainly operate under statute and that it may not be appropriate to impose a common law duty of care on them if the legislature did not intend it.

§3. Abuse of Rights

127. The doctrine of abuse of rights is found in civil law traditions, such as in Swiss, German and French law, and is a legal principle which prevents injury caused by the malicious exercise of legal rights or abuse of legal procedure giving rise to liability. In the common law tradition there is no similar principle. However, all of common law is based on the rule of law, justice, fairness and equity; as such, the abuse of rights will incur liability.

128. Generally, in tort law, the abuse of rights by parties, whether negligent or intentional, will incur liability. For example, a police officer who oversteps in the

239. Michael Ramsden & Dr Hsiao-Pen Chang, '*Misfeasance in Public Office*', in *Tort Law & Practice in Hong Kong* (Justice Kemal Bokhary, N. Sarony & D.K. Srivastava eds, 3rd edn., Sweet & Maxwell, 2014), Chapter 32, 32.001.
240. *Alcock v. Chief Constable of the South Yorkshire Police* [1991] UKHL 5, [1991] 4 All ER 907.
241. *Mckay v. Essex Area Health Authority* [1982] 2 QB 116.
242. *Hill v. Chief Constable of West Yorkshire* [1988] 2 All ER 238 (HL).
243. *Stovin v. Wise* [1996] AC 923 (HL).

performance of his duties can be held liable for assault/battery/false imprisonment for the use of unnecessary force.[244]

129. Specifically, under the tort of malicious prosecution, which aims at protecting citizens from abusive uses of the criminal justice system, civil liability is imposed for the abuse of criminal investigation and prosecution systems.[245] This tort is difficult to prove since a prosecutor has a special immunity and liability is limited to cases where the prosecution is brought without reasonable and probable cause or fabrication of the evidence. This tort does not extend to wrongful disciplinary proceedings.[246]

§4. Injury to Reputation and Privacy

I. General

130. The tort of defamation is committed when the defendant makes a false statement that is either libellous or slanderous, injuring the plaintiff's reputation. This tort applies when a person's reputation is lowered in the eyes of right thinking people in society by published or spoken words. Strict liability is imposed on the defendant when his defamatory statement attacks the moral character of the plaintiff, like the defendant holding plaintiff as the object of ridicule of a serious nature and communicating it to the third party, making false allegations that plaintiff was incompetent, lacking in a certain ability, or producing goods or work of an inferior quality. The limitation period on civil actions in Hong Kong is either three or six years. For defamation, it is six years from the date when the cause occurred, and it may be extended in exceptional circumstances.[247]

131. Hong Kong's Defamation Ordinance 1986 was first enacted in 1887 and it is mostly derived from the Defamation Act 1952 (UK). The Ordinance contains twenty-nine sections and a schedule. This ordinance interprets '*words*' as '*including pictures, visual images, gestures and other methods of signifying meaning*'. For the tort of defamation, the court needs to strike a balance between the right to free expression and people's reputations. As such, it is important that freedom of expression cannot be abused as an excuse to harm others' reputations. Hence, there are provisions about the extent of the right and the scope in which the Defamation Ordinance can be applied, and the detailed provision was laid down in the Bill of Rights Ordinance: '*Everyone shall have the right to hold opinions without interference…Everyone shall have the right to freedom of expression…The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities…subject to certain restrictions…for respect of the rights or reputations of others; or for the protection of national security or of public order (order public), or of public health or morals.*'[248] Therefore, legislation is used to try to maintain a balance between freedom of expression

244. *R v. Governor of Brockhill Prison, ex parte Evans (No. 2)* [2001] 2 AC 19.
245. *Kowloon Dairy Ltd v. Ku Yuk Shing* [1968] HKDCLR 57.
246. *Gregory v. Portsmouth City Council* [2000] 1 AC 419.
247. Limitation Ordinance (Cap 347) s. 4(1).
248. Cap 383 s. 16.

and protection of reputation. Article 27 of the Basic Law provides Hong Kong citizens with the freedom of speech, press, publication, association, assembly, procession, demonstration, joining or forming trade unions and also going on strike. The Basic Law also provides foundations for the enactment of Bill of Rights Ordinance.[249] Article 39 of the Basic Law states: '*The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.*' In Hong Kong, no provision is specifically made for invasion of privacy, although the Personal Data (Privacy) Ordinance (Cap 486) could provide some protection.

132. In the most serious criminal cases and some particular civil cases, like defamation, jury trials are allowed. In *Chiang Lily v. Secretary for Justice,*[250] it is stated that *'there is no right to trial by jury in Hong Kong'*. It is up to the plaintiff to decide which court to bring his action to. If he commences the claim in District Court, he could claim no more than HKD 1 million. Jury trials in defamation cases take place in the Court of First Instance of the High Court and the court allows such kinds of trials on a discretionary basis. Under the High Court Ordinance,[251] the parties in a defamation case can seek a jury trial, but it is left to the court's discretion to allow such an application, after considering whether such a request would prolong the examination of documents or accounts or any scientific or other investigation. The judge decides whether the alleged words are capable of being defamatory in the eyes of a reasonable or right thinking person before putting them in front of the jury.

133. The ordinary meaning of defamation is making slanderous or libellous statements to harm the plaintiff's reputation, character or good name. The tort of defamation aims to protect the claimant's reputation from being harmed by false statements (both written and spoken). Libel is where the defamatory statement is made and recorded permanently, such as in pictures, statues & waxworks. This tort is actionable per se and the plaintiff only needs to show that the statement is defamatory and false, and then burden shifts to the defendant. In *Youssoupoff v. Metro-Goldwyn Pictures,*[252] a film was produced about the sexual relations and murder of Rasputin, showing the allegedly false statements through the scenes and recorded speech in the film. The plaintiff (Princess Irina Alexandrovna of Russia) contended that any reasonable man would link the female character having sexual relationships with Rasputin in the film with the plaintiff. Hence, the publication would amount to defamation. In this case, it was held that the scenes in the film affected third parties' perception of the plaintiff's moral character and therefore an action in libel was founded.

134. Slander includes statements, like spoken words, gestures and mimicry, which are transitory or temporary. Generally, the plaintiff needs to prove s/he had suffered special damages in a slander case. In *Allsop v. Allsop,*[253] the plaintiff failed to prove the causation between his illness and the slanderous statement, and hence the

249. Cap 383 s. 16.
250. [2010] HKCU 698 (unreported, FAMC 64/2009, FAMC 65/2009, 26 Mar. 2010) (CFA).
251. Cap 4 s. 33A.
252. [1934] 50 TLR 581.
253. [1865] 5 H & N 534.

court held it was too remote to claim such damage. The court found that the distinction between libel and slander was that the former is actionable per se.

135. There are four situations where slanders can be actionable per se: first, if the statement is accusing the plaintiff of committing a criminal offence for which they could be sentenced to imprisonment; second, if the statement is related to a sexually transmitted disease; third, if it affects official, professional or business reputation (section 23 the Defamation Ordinance 1986);[254] and fourth, if the statement is related to the unchastity of a female.[255] In the case of *Lee Ting and Another v. Wei Sau-Hung,*[256] the plaintiffs were husband and wife. They sued the defendant for slander after he made a false statement about the wife having adulterous relationships with others in the village where defendant and plaintiffs were living. The plaintiffs claimed that they were being ridiculed by others in the village and suffered from stress and agony after such accusations, though they did not plea particular damages; they claimed for general damages and an injunction. However, the court awarded damages notwithstanding the absence of special damages. The court based its decision on section 21 (words imputing unchastity to woman or girl per se actionable) of the Defamation Ordinance.

II. Who Can and Cannot Sue for Defamation

136. Anyone, including authors, publishers, corporations or even non-business entity, can be potentially liable if they are involved in producing a defamatory statement. An employer can be liable under vicarious liability[257] for their agent's defamation during the course of employment if the agent was authorized to speak for the employer.[258] Corporations could be sued. The House of Lords case of *Jameel v. Wall Street Journal Europe SPRL (No.3)*[259] is useful in this connection. The first plaintiff, who was a wealthy Arab businessman, and the second plaintiff, a company in Saudi Arabia, sued the defendant for libel for publishing an article accusing the plaintiffs of being linked to terrorism, and the court awarded damages to both plaintiffs. The defendants, in their appeal, brought up a few issues, two of which are relevant in our present context: firstly, whether a company can sue under this tort; and, secondly, whether the *Reynolds* privilege can be used.[260] Lord Bingham, in response to these issues, commented (at paragraph 26): '*...the good name of a company, as that of an individual, is a thing of value. A damaging libel may lower its standing in the eyes of the public and even its own staff, make people less ready to deal with it, less willing or less proud to work for it. If this were not so, corporations would not go to the lengths they do to protect and burnish their corporate images.*'

254. *Tsang Hon Chu v. Wong Kwok Leung* [2005] DCCJ 3917 of 2003); In *Au Yee Ming Ivan v. Ng Fei Tip* (District Court, DCCJ 4595/2008).
255. Defamation Ordinance 1986 (Cap 21) s. 21.
256. [1977] HKDCLR 17.
257. *Riddick v. Thames Board Mills* [1977] QB 881.
258. Please refer to vicarious liability (Part II, Chapter 1) for updates.
259. [2007] 1 AC 359 (HL).
260. For the comments as to Lords views on the *Reynolds* Privilege *see* para. 164, below.

137. The general rule for a class action is that libel or defamation against a class would not lead to liability to particular individuals in that class. In the case of *Knupffer v. London Express Newspaper Ltd,*[261] an article was published by the defendant's newspaper about the Young Russian Party being unpatriotic and being willing to work under the rule of Hitler to advance fascism in Russia. The plaintiff was the head of the political party and, though the party was international, the party members were not easily identified and a right-thinking person would recognize that the statement was referring to plaintiff. Lord Atkin stated: '*The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement.*' The proper test would be whether a reasonable person would automatically recognize that the defamatory statement is referring to plaintiff; if not, the action would fail. There are two exceptions: first, if the statement is referring to a specific class of people but there is something in words or circumstances that could direct the statement to the particular plaintiff,[262] and, secondly, if the class referred to is small in number and the statement referred to each member, then such statements may still attract liability.

138. Governments cannot use the tort of defamation as it would go against the democratic process and freedom of speech, but an individual government official or councillor can sue if they are personally defamed. In *Derbyshire County Council v. Times Newspaper Ltd,*[263] the court held that the government cannot sue for defamation and this rule has already been accepted to confine the Hong Kong government. In *Derbyshire*, the plaintiff attempted to sue the defendant for its article accusing the council of mismanaging pension funds. The council argued as a corporate entity but was rejected, as the court saw that there was no 'pressing social need'. The court would rule differently if an individual councillor brought a suit for being defamed by malicious statements. On the other hand, universities can sue in defamation. In *Hong Kong Polytechnic University & Others v. Next Magazine Publishing Ltd & Another,*[264] the plaintiff sued the magazine publisher for defamation. The judge at the Court of First Instance held that the university, as a governmental body, could not sue in defamation from the *Derbyshire* ruling. The Court of Appeal later reversed the decision and held that the university was not a governmental body as it was not part of the bodies of government, nor was it democratically elected. It would be of public interest to protect the university's reputation.

139. Political parties and public bodies cannot sue in relation to their governmental functions or public offices, so as to balance freedom of speech in a democratic society. In *Tilbrook v. Parr*[265] the plaintiff, as chairman of a political party, sued the defendant, an author of blog, for accusing a party, the English Democrats, of being racist, but the court held that such words did not clearly refer to the plaintiff. Likewise, in *Goldsmith*

261. [1944] AC 116 (HL).
262. *Charles Sin Cho Chiu v. Tin Tin Publication Development Ltd & Another* (HCA 6662 of 1997) p. 1197.
263. [1993] AC 534 (HL).
264. [1997] 1 HKLRD 514, (1997) HKPLR 286, CA.
265. [2012] EWHC 1946.

v. Bhoyrul,[266] it was affirmed by Justice Buckley that democratically elected bodies, especially government bodies, shall not be allowed to prohibit public criticism.

III. Elements of General Liability in Defamation

140. The claimant must prove three things: (1) the nature of statement was defamatory; (2) the statement was referring to the claimant; and (3) it was published or communicated to a third party.

A. Statement was Defamatory

141. To consider whether the plaintiff's reputation was harmed by the defendant's statement, an objective test of how a 'right-thinking person' would understand the defamatory statement is used. This test is to see if such a statement would 'lower the reputation of the claimant'[267] and whether such a statement discredits them. The statement would cause the plaintiff to be regarded with hatred, contempt, ridicule, fear or disesteem, and would generally be regarded as lowering the plaintiff's reputation in the eyes of right-thinking people. In *Byrne v. Deane,*[268] police went to a club to raid and seize an illegal fruit machine. A notice was later posted saying, 'but he who gave the game away may he burn in hell and rue the day'. The plaintiff pleaded that the notice was referring to him and the court held that being a police informant could not be a negative statement and that any right-thinking person would act similarly and inform police about the occurrence of any illegal operations.

142. The court considers the publication as a whole in defamation cases and that is shown in *Charleston v. News Group Newspapers Ltd.*[269] The courts, while considering whether the publication of photographs was defamatory, also considered factors such as the viewing of the photos with or without the headlines. The defendant was accused of superimposing the plaintiff's face onto naked bodies in pornographic poses. In their defence, the defendant stated that the headlines clearly showed that the photo was superimposed, and hence the court did not hold the defendant liable. The test for libel is whether the ordinary person, after considering the entire defamatory material, would find them defamatory to the plaintiff and, in this case, the court saw that an ordinary person could not find that the plaintiff could be linked to participating in such acts. However, Lord Nicholls warned the newspaper that they are 'playing with fire' and had the text been printed a little further down the article or even on other page, the court would have taken a different view.[270] In *Li Yau-Wai v. Genesis Films Ltd,*[271] the plaintiff was ridiculed by his friends after his photo was shown in a comedy scene of a film. In *Au Yee Ming Ivan v. Ng Fei Tip,*[272] the defendant, as the principal

266. [1998] QB 459.
267. *See Sim v. Stretch* [1936] 2 All ER 1237.
268. [1937] 1 KB 818 (CA).
269. [1995] 2 AC 65 (HL).
270. [1995] 2 AC 65 (HL), 74.
271. [1987] HKLR 711.
272. [2013] HKCU 1079.

of the college, made a statement on the plaintiff's integrity to the Education and Manpower Bureau which was held to be defamatory.

143. In exceptional circumstances, such as where an actor was described as 'hideously ugly', commentators may also be liable for defamation. In *Berkoff v. Burchill,*[273] the defendant published two film reviews in a Sunday newspaper, commenting on the plaintiff's appearance as being ugly and exposing him to ridicule. The defendant appealed, arguing that the statement was not capable of being defamatory and that the injury to feelings and annoyance was not relevant in this case. The court held that the defendant was liable though his words did not mean to link the plaintiff's business conduct to disgrace or deficiency.

144. The issue of innuendo may arise. In law, innuendo means that the defendant has used some libellous language and the extrinsic facts or circumstances mean that the plaintiff could sue. A situation in which defamatory innuendos may be actionable is where the words are neutral but become defamatory after being combined with some extrinsic circumstances in relation to someone. In *Cassidy v. Daily Mirror Newspapers, Limited,*[274] a photographer sent a photo with a description of Mr Corrigan, saying he was engaged Miss X. The defendant newspaper company was not aware that the plaintiff, Mrs. Cassidy, was the lawful wife of Mr Corrigan. The plaintiff brought a claim in libel on the basis that the photo constituted innuendo and imputed that the plaintiff was an immoral person who was cohabiting with Mr Corrigan. The defendant argued on appeal that the article was not referring to the plaintiff; it was not defamatory to the plaintiff. However, the court held that the article concerned the plaintiff for any right-thinking person who knew the plaintiff, and the false information that Mr Corrigan was an unmarried man would affect the reputation of the plaintiff, and hence the plaintiff was awarded damages.

145. Defamatory innuendo can be inferred from the natural meaning of the words used by a reasonable person. The test is objective, based on what a reasonable person would perceive in the natural and ordinary meaning of the words.[275] In *Far East Engineering Services Ltd v. Choy Yau Chiu,*[276] the plaintiff and defendant were both involved in the construction of five schools in Tuen Mun. The defamatory statement implicated the plaintiff in corruption. The court allowed the claim and accepted that there was innuendo in the words used.

B. The Defamatory Statement Referred to the Claimant

146. Defamatory statements could use express or implied references, like name, nickname or position, etc., as long as an ordinary and reasonable person would link such statement to the plaintiff and the plaintiff was defamed. The plaintiff has to prove that the subject of the defamatory statement was him and, if the name is not in the statement, then the court would either look into the inference of the plaintiff's friends or what an ordinary reader would see from the statement.

273. [1996] 4 All ER 1008 (CA).
274. [1929] 2 KB 331(CA).
275. *Lewis v. Daily Telegraph Ltd* [1963] 2 All ER 151.
276. [2005] HKCU 1400 (unreported HCA 2146 of 2004, 7 Oct. 2005).

147. In *Oriental Press Group Ltd v. Hong Kong Daily News Ltd & Anor*,[277] a defamatory statement was made with reference to the Sun Group as 'the Sun Newspaper Group'. Deputy Judge Wesley Wong stated that extrinsic evidence must be provided to connect the libel to the plaintiff where the libel does not *ex facie* refer to the plaintiff. From the evidence, the article was sufficiently connected to the plaintiff and a reasonable person would conclude that such statements were referring to the plaintiff. In *Newstead v. London Express Newspapers,*[278] a newspaper published an article concerning the bigamy of a barman named Camberwell, and the plaintiff also had a business named Camberwell. The question before the courts was whether an ordinary person would connect the statement to the plaintiff. It was held by the courts that a reasonable person would have found that the statement was linked to the plaintiff and it would be immaterial whether such statement was referring to someone else; what needed to be established was whether such statement was defamatory in nature.

C. *Publication (Communicated to a Third Party)*

148. The defamatory statement must be communicated to someone other than the plaintiff, and, hence, the plaintiff can claim each and every time the defamatory statement is publicized. Publication could be in any form, including books, articles, etc. both print and digital versions. Two important issues should be considered in relation to publication: intention and dissemination. In cases where there is disputed intention, where the re-publication is not intentional, the court will apply the reasonable foreseeability test to consider whether it could have been known that such re-publication would take place. This point is illustrated by *Theaker v. Richardson*[279] where the defendant was liable for the fact that she foresaw that her husband would open the letter.

149. For dissemination, we have to first distinguish republication and mechanical distribution. The three defendants in *Bunt v. Tilley*[280] were accused of posting defamatory opinions on websites. The plaintiff also sued the Internet Service Providers ('ISPs'). The court held that it was too much to impose liability on the service provider as they could not monitor each posting, considering them akin to a telephone service provider. They facilitated a means of communication.

150. There are some common law exceptions where the communication to a third party does not amount to publication: (1) If a third party opens and reads someone's letter without authorization; (2) if the defamatory statement is communicated to a person who could not understand the language or a person with unsound mind [Official Languages Ordinance (Cap 5) 1974]; (3) if the defamatory statement is made to a blind, deaf or other person who could not comprehend that the statement was referring to the plaintiff; (4) if a post office delivers a letter to the plaintiff; (5) if a library or bookshop provides a book contain defamatory statements but does it innocently; (6) if a defamatory statement is published by person linked to the publication industry and who was doing it innocently; or (7) under the Hong Kong Defamation Ordinance

277. [1997] 3 HKC 622.
278. [1940] 1 KB 377 (CA).
279. [1962] 1 WLR 151 (CA).
280. [2007] 1 WLR 1243.

(Cap 21) section 25 the defendant could exempt his liability if the plaintiff accepts that the defendant was acting innocently and offered actions to correct such conduct.

151. Publication on the internet should also be considered, as it could widely spread defamatory statements. In Hong Kong, there are no specific statutes made or provisions in the Defamation Ordinance (Cap 21) that deal with cyber defamation. It shall be noted that in the Defamation Ordinance (Cap 21), some changes about innocent dissemination[281] are made. However, there are no similar provisions to the UK Defamation Act 2013 that provide some special protection to ISPs. The Act provides defences for operators if they did not personally post the defamatory material. This is, in effect, a codified version of *Bunt v. Tilley.*[282] Generally, service providers who upload or are agents for passing on defamatory material can be liable for defamation in Hong Kong. Storage of defamatory information can amount to publication if any subscriber entered the server and viewed it. The court would weigh the aggravating effect if the publication appears in both paper form and on the internet. In the case of *Chu Siu Kuk Yuen v. Apple Daily Ltd and Others,*[283] the defendant published the defamatory statement both in digital and paper form and the court stated that this did not aggravate the defamation as the paper copies were already in huge numbers.

152. In Hong Kong, internet publications stored on internet servers would still be defamation, as can be seen from *Godfrey.*[284] In this case, the defendants were an ISP operating a UseNet newsgroup. Someone posted something defamatory in the US, which originated from the defendants' new group, and the defendant delayed before removing such posts, and the court allowed damages for the delay.

153. Similarly, the forum operators would generally be considered subordinate distributors, as in *Oriental Press Group Ltd v. Fevaworks Solutions Ltd.*[285] The verdict was handed down to the plaintiff on the basis that the defendant was not a publisher but a 'subordinate distributor' of the defamatory statement.

154. In some cases, ISPs have been sued in the Hong Kong and courts have taken various approaches in dealing with these defamation cases. In *Investasia Ltd & Anor v. Kodansha Co Ltd & Anor,*[286] the first plaintiff was a company who had a business in Hong Kong but established it in the British Virgin Islands, while the second plaintiff was a businesswoman. The defendant was a Japanese company which published two defamatory articles, one of which was downloaded by many Hong Kong people on the internet while the other was published in magazines. Therefore, the plaintiff sued the defendant's company in Hong Kong and they succeeded in showing a sufficient link to Hong Kong to bring such claim (*See* Order 11 r. 1(1) f of the Rules of the High Court (Cap 4A).

281. Section 25 of the Defamation Ordinance concerns unintentional defamation. Subsection (1) (a) provides that if a person innocently publishes words which are defamatory of another person, he or she can make an offer of amend. If such an offer is accepted, no legal proceedings shall be taken by that another person.
282. [2007] 1 WLR 1243.
283. [2001] 1 HKLRD 1.
284. *Godfrey v. Demon Internet Ltd* [2001] QB 201.
285. [2012] 1 HKLRD 848 (CA); [2013] 5 HKC 253 (CFA).
286. [1999] 3 HKC 515.

155. It is unclear whether hyperlinks count as publications, but in Canada it was considered as a neutral reference in *Crookes v. Newton*.[287] As for tweets, in *Cairns v. Modi*,[288] the defendant was liable for a 140 character tweet accusing Chris Cairns, a New Zealand cricketer, of being connected to match mixing. For emails, the place where it was downloaded would be the place of publication. In the case of *Emperor (China Concept) Investment Ltd v. SBI E-2 Capital Securities Ltd and Another*,[289] the court granted the defendants a stay of proceedings in Hong Kong because the email was received in Singapore, though it was sent from Hong Kong.

IV. Defences to the Tort of Defamation

A. Statutory Defences (Unintentional Defamation/Innocent Dissemination)

156. Under the Defamation Ordinance (Cap 21), sections 4 and 25 provide defences of apology and unintentional defamation respectively to avoid or reduce the damages. Under section 25(1) of the Defamation Ordinance, if the publisher makes an offer to make amends and if the apology is accepted by the plaintiff and the compensation is settled, then no proceedings for libel or slander may be brought. Section 25(5) of the Defamation Ordinance provides a defence of innocent or unintentional defamation, which could be pleaded if the publisher can prove that he did not intend to publish the defamatory words concerning the plaintiff, or that all reasonable care had been taken by the publisher to avoid any defamatory material in the publication, etc. In *Oriental Press Group Ltd & Others v. Fevaworks Solutions Ltd & Others*[290] where the appellant sued the respondent, a website provider and administrator of a very popular internet discussion forum, for three defamatory statements on its website, the CFA found the respondent a 'subordinate' publisher of the defamatory statement, and held the respondent to be an innocent disseminator and that the respondent could not have known the defamation prior to its publication due to the high volume of traffic on the forum, which later removed the defamatory statements.

157. Under section 4 of the Defamation Ordinance (Cap 21), the publisher can avoid liability if he provides a reasonable apology and proves that the libel was inserted in the newspaper without actual malice or gross negligence[291] and an apology was offered before the commencement of the action or at the earliest opportunity afterwards. Generally, the apology or retraction of publication would serve as mitigating factors for the court in assessing damages, since such defamatory statements would have already caused some harm to the plaintiff.[292] Section 17 of the Defamation Ordinance allows defendants to provide evidence in mitigation, like the fact that the plaintiff has

287. [2011] SCC 47.
288. [2012] All ER 203.
289. [2005] HKLRD L13.
290. [2013] HKEC 1025.
291. *Chu Siu Kuk Yuen v. Apple Daily Ltd & Others* [2002] 1 HKLRD 1.
292. *Chan Kwong Wai v. Lo Sau King and Others* [1963] HKLR 692.

already recovered its damages, or has brought actions for damages, or has received or agreed to receive compensation, etc.

B. Privilege (Absolute and Qualified)

158. As a matter of public policy and in the public interest on certain privileged occasions, freedom of speech overrides the protection of reputation. The maker of a defamatory statement on a privileged occasion may avail themselves of absolute or qualified privilege from the defamation action.

159. Absolute privilege applies to three situations: parliamentary proceedings, judicial proceedings and executive/official proceedings.

160. Parliamentary proceedings: In Hong Kong, the Legislative Council (Powers and Privileges) Ordinance (Cap 382) provides protection to the freedom of speech of members of the Legislative Council (LegCo). This privilege includes freedom of speech and debate during LegCo sessions (section 3), immunity from legal proceedings (section 4) and freedom from arrest (section 5). No action under the tort of defamation can be taken against the members of LegCo for statements (no matter how defamatory they are) made during debates in LegCo or proceedings before a committee, and such freedom of speech and debate shall not be liable or questionable in any court or place outside LegCo.[293] Under section 14 of Legislative Council (Powers and Privileges) Ordinance (Cap 382), lawful witnesses attending and producing documents before the council also enjoy the absolute privilege. The publishers involved in the publications of LegCo papers are also protected. Section 10 of the Defamation Ordinance (Cap 21) stays judicial proceedings against persons involved in the publication of papers printed by an order of LegCo upon production of the certificate and affidavit of authority to publish. Further, newspapers can rely on absolute privilege if their report was published or broadcasted contemporaneously with the committal proceedings.[294]

161. Judicial proceedings: Statements made during the course of court proceedings are also privileged, and the people involved in court proceedings, such as witnesses, solicitors, judges and juries, are immune from an action of defamation for statements made during court proceedings or during relevant investigations. Hence, anyone involved in the process of administration of justice, such as witnesses, cannot be sued for defamation.[295] This privilege extends to proceedings before tribunals and commissions.[296] Further, fair and accurate newspaper or broadcast reports on judicial proceedings which are in public interest are protected, provided that they are published contemporaneously or as soon as practicable after the hearing.[297]

162. Executive privilege: Some government officers and government communications enjoy absolute privilege in respect of the statements made in the performance of their official duties.[298] For instance, under section 18 of the Ombudsman Ordinance (Cap

293. *Church of Scientology of California v. Johnson-Smith* [1972] QB 522.
294. *See* Legislative Council (Powers and Privileges) Ordinance (Cap 382) s. 13(2); Magistrates Ordinance (Cap 227) ss 87A(5) and (6).
295. *Taylor v. Director of the Serious Fraud Office* [1998] 4 All ER 801(HL).
296. *Wong Shui Kee Roger v. Victor LL Chu* [2000] 3 HKC 589 (CA).
297. Defamation Ordinance (Cap 21) s. 13.
298. *Li Ngan Shui Brumen v. Official Receiver* [1995] 1 HKC 133.

397), for the purposes of the law of defamation, absolute privilege shall be attached to the publication of any matter *'(a) by the Ombudsman or his staff to any person for the purpose of an investigation under this Ordinance…'*. Likewise, under section 14 of the Electoral Affairs Commission Ordinance (Cap 541), immunity is provided where *'(a) the Commission in respect of anything done, or omitted to be done, by it in good faith in the performance of a function or the purported performance of a function under this or any other Ordinance…'*. In *Chatterton v. Secretary of State for India in Council,*[299] the plaintiff brought an action in libel against the defendant in relation to a communication in writing made by the defendant, the Secretary of State, to an Under-Secretary of State in the course of the performance of his official duties. The Court of Appeal held that such cases should not be allowed, because to inquire into the motives of an officer of state with respect to an official communication made to another high state official would 'tend to take from an officer of state his freedom of action in a matter concerning the public interest'.[300]

163. Qualified privilege: Under the common law, a privilege arises in relation to a statement where the defendant has 'an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential'.[301] Traditionally, focus was on the relationship between the giver of information and recipient of the relevant information. However, the qualified privilege is displaced if the defendant makes a statement with malice and abuses the privileged occasion.

164. In the landmark case of *Reynolds v. Times Newspaper Ltd,*[302] Albert Reynolds (former Prime Minister of the Republic of Ireland) sued the defendant for libel for a story concerning his resignation. Lord Nicholls stated that the focus on reciprocity in *Adam v. Ward*[303] should not be allowed to obscure the rationale of the underlying public interest on which privilege is founded.[304] Lord Nicholls also set out the responsible journalism test and listed non-exhaustive factors to determine whether the publication of relevant information is in the public interest or not and listed relevant factors as including: (1) the seriousness of the allegations; (2) tThe nature of the information; (3) the source of information; (4) the steps taken to verify the information; (5) the status of information; (6) the urgency of the matter; (7) whether comment was sought from the plaintiff; (8) whether the article contained the gist of plaintiff's side of story; (9) the tone of the article; and (10) the circumstances of the publication.[305] The House of Lords in *Jameel v. Wall Street Journal Europe SPRL*[306] elaborated on the applicability of the *Reynolds* privilege. Lord Hoffmann, allowing the appeal, held that the article as a whole was a matter of public interest and that the inclusion of a defamatory statement may be justifiable so long as it made a proper contribution to the whole thrust of the publication. As to whether the publisher satisfied the test of responsible

299. [1895] 2 QB 189.
300. *Chatterton v. Secretary of State for India in Council* [1895] 2 QB 189, 190 (Lord Esher MR).
301. *Adam v. Ward* (1917) AC 309, 334 (Lord Atkinson).
302. [2001] 2 AC 127.
303. (1917) AC 309.
304. *Reynolds v. Times Newspaper Ltd* [2001] 2 AC 127, 195.
305. *Reynolds v. Times Newspaper Ltd* [2001] 2 AC 127, 205.
306. [2007] 1 AC 359.

journalism, it was held that since reasonable steps had been taken to verify the facts, the failure to obtain the claimants' response was an insufficient ground to deny this defence.

165. Hong Kong follows the UK position on qualified privilege, which is illustrated in *Ming Kee Manufactory Ltd v. Man Shing Electrical Manufactory Ltd,*[307] where the defendant falsely communicated to the plaintiff's customers that the plaintiff was selling unapproved products. The court held that no privilege arose as the defendant did not have any legal, social or moral duty to make such a communication; nor did the customers have a corresponding interest to receive such information. Likewise, in *Pui Kwan Kay v. Ming Pao Holdings Ltd,*[308] which concerned suspected football match-fixing, the Hong Kong Court of Appeal for the first time followed the *Reynolds v. Times Newspaper Ltd* approach, and found that the reporters of Ming Pao met the requirements for the defence of responsible journalism.

166. Under the Defamation Ordinance (Cap 21), the instances when the qualified privilege will apply include the reports of the legislature (section 12), reports of judicial proceedings (section 13) and, reports published in newspapers and broadcasts (section 14).

C. *Justification (Truth)*

167. The defence of truth is based on the logic that truth is not defamatory as such the claimant cannot complain of a true statement even if he thinks such a statement tends to lower his reputation. For this reason, the defendant is entitled to the complete defence of truth in an action for defamation where he publishes a statement that is true in substance and fact i.e., when statement is substantially true. In Hong Kong, section 26 of the Defamation Ordinance (Cap 21) provides the defence of justification and states that *'in an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the t'plaintiff's reputation having regard to the truth of the remaining charges'*. The onus is on the defendant to prove the truth of the statement. The defendant has only to satisfy that the material content of the alleged defamatory statement is true and it is not a requirement that truth of each word must be proven. This is illustrated by *Alexander v. North Eastern Railway Co,*[309] where the defendant published that the plaintiff was charged and convicted before a magistrate for an offence of not paying proper train fares and that the plaintiff served three weeks in prison, when in reality the plaintiff had served only two weeks in prison. Blackburn J held that 'the question is whether what is stated inaccurately is the gist of the libel',[310] and, in this case, the defendant's statement was accepted as substantially true.

168. The defendant is required to demonstrate that the words are true in substance and in fact, as against having to prove that they are literally true in every detail. In

307. [1992] 1 HKC 442.
308. [2015] HKCU 2771.
309. (1865) 6 Best and Smith 340.
310. *Alexander v. North Eastern Railway Co* (1865) 6 Best and Smith 340, 344.

Kwan Siu Wa Becky v. Marla Susilo,[311] the plaintiff sued the defendant for publishing two defamatory emails to a group of cabin crew. In understanding the meaning of the emails, the court considered: (1) express meaning of the alleged defamatory words; (2) any implied or inferred meaning of those words; and (3) the context of the alleged defamatory words. After review the court found that both emails were defamatory in nature and ruled in favour of the plaintiff. The defendant failed to prove that the defamatory statements were substantially true.

169. For an action in defamation, the presence of malice or spitefulness does not defeat the defence of truth as long as the words complained of are proven to be true. This is illustrated by *McPherson v. Daniels*,[312] where the court held that the plaintiff was not entitled to recover damages if the statement was true. Littledale J. stated 'the law will not permit a man to recover damages in respect of an injury to a character which he does not or ought not to possess'.[313]

170. For a successful defence of truth, the defendant needs to prove that the 'sting' of the defamatory statement was substantially true and that will turn on the interpretation of facts of each case. For example, in *Wakley v. Healey and Cooke*,[314] the defamatory statement, which stated that the claimant was a 'liabelist journalist' was interpreted to mean that he was a habitual liabelist who had a habit of writing libels. The court's interpretation favoured the claimant argument. Further the defendant may not be absolved of defamation where he only proves the truth of unconnected statement/s. In such a situation, it is no defence for the defendant to rely on the truth of the other unconnected statements that are not related to defamatory statements that are present in the same publication.

171. Where the plaintiff does not identify a distinct statement on which to bring an action of defamation, the defendant does not have to show the truth of all the allegations, provided that 'the words not proved to be true do not materially injure the t'plaintiff's reputation having regard to the truth of the remaining'.[315] In any event, the plaintiff is not allowed to cherry pick statements if such statements are interconnected and the plaintiff knows that the defendant would not be able to prove the truth of such statements. In such circumstances, the rule is that the sting of the defamatory statement must be understood in the context of the whole article.[316]

D. *Fair Comment*

172. The complete defence of fair comment protects the defendant's democratic right to freedom of expression on matters of public interest as long as the comment is honestly and fairly made and based on a true statement of fact. Since the defence of fair comment allows criticism of the plaintiff on matters of public interest, it is perceived

311. [2011] HKCU 904.
312. (1829) 10 Barnewall and Cresswell 263.
313. *'M'Pherson v. Daniels* (1829) 10 Barnewall and Cresswell 263, 272.
314. (1849) 4 Exchequer Reports (Welsby, Hurlstone and Gordon) 53, 154 ER 1122.
315. *See* s. 26 Defamation Ordinance (Cap 21) Also *see China Bocom Insurance Company Limited v. Next Magazine Publishing Limited & Anor* [2010] HKCU 2647.
316. *Alice Li Miu Ling v. Hong Kong Polytechnic University* [2013] 3 HKC 221; *Oriental Daily Publisher Ltd v. Ming Pao Holdings Ltd* [1999] 4 HKC 354.

as essential for the efficient working of any public institution.[317] To succeed in the defence of fair comment it must be proven that the comments were honestly based on a true set of facts, that such comments were identifiable as remarks and that the comments were not motivated by malice. Section 27 of the Defamation Ordinance (Cap 21) offers a defence of fair comment and the test for this defence is whether the comment was based on proven facts, even if not all alleged facts can be proved.[318] This defence could be availed of as follows: (1) the statement was of the public interest; (2) the statement was a comment or opinion based upon the true facts; and/or (3) the statement was honestly held.

173. The scope of this defence is wide and the general understanding is that the opinions that are of public interest could be on the conduct of a person holding public office, including politicians, as well as on a wide range of topics, including artistic exhibitions, and the ethical standards of news media. In *London Artists Ltd v. Littler,*[319] Lord Denning M.R. defined the public interest widely, stating that it should not be confined within narrow limits. He stated: '*Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on, or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make fair comment.*'[320]

174. The comment must be a remark based on true facts and the defendant is required to show that. Then the judge will determine the connection between the comments and facts with respect to content and the context of those facts.[321] In *Oriental Daily Publisher Ltd v. Ming Pao Holdings Ltd,*[322] a case about two articles published by Ming Pao perceived as 'an assault by Oriental Press against TVB', the court held that the statement should be considered in terms of both its content and its context, and the test is therefore whether a reasonable ordinary reader would regard the statement as a comment or fact.[323] Accordingly, the fairness is judged by the objective standard of whether any fair-minded person could honestly express the opinion in question if he would have known the facts accurately. In interpreting this standard, the courts consider comments fair only if they are relevant to the facts to which they are addressed, and the defendant must not indulge in unwarranted imputations under a cloak of criticism. Hence, the true test is whether the opinion, however exaggerated, obstinate or prejudiced, was honestly held by the person expressing it.[324] The presence of malice or lack of genuine belief in the comment defeats the defence of fair comment. Clearly the meaning of malice for the defence of honest comment and qualified privilege is different. In terms of fair comment, malice means spite, evil motive and dishonesty, whereas for the defence of qualified privilege, the meaning of malice is broader and

317. *Cheng & Another v. Tse Wai Chun* [2000] 3 HKLRD 419.
318. *China Bocom Insurance Company Limited v. Next Magazine Publishing Limited & Anor* [2010] HKCU 2647, para. 23.
319. [1969] 2 QB 375 (CA).
320. *London Artists Ltd. v. Littler* [1969] 2 QB 375 (CA), 391.
321. *China Bocom Insurance Company Limited v. Next Magazine Publishing Limited & Anor* [2010] HKCU 2647, paras 22–23.
322. [1999] 4 HKC 354.
323. *Oriental Daily Publisher Ltd v. Ming Pao Holdings Ltd* [1999] 4 HKC 354, 367 (Yuen J).
324. *Silkin v. Beaverbrook Newspapers Ltd.* [1958] 1 WLR 743, 747 (Diplock J).

the maker of statement is not required to possess an honest belief in his statement but merely show that he did not abuse the privileged occasion at which the defamatory statement was made. This could be illustrated by *Reynolds v. Times Newspaper Ltd.*[325] In this case, although the defendant abandoned the plea of fair comment, Lord Nicholls took the chance to clarify that fair comment cannot 'be used as a cloak for mere invective'.[326]

E. Consent

175. There is no cause of action under the tort of defamation if the plaintiff consents to the publication of the defamatory statement. The reasoning is straightforward, as the plaintiff in such circumstances is seen to have authorized the publication of the defamatory statement and waived his right to bring an action. As such, it is unfair to hold the defendant liable for the dissemination of such defamatory information.[327]

§5. Interference by a Third Person with Contractual Relations (Intentional Economic Loss)

176. Economic torts impose liability for infringement of the plaintiff's legitimate economic interests and compensate any intangible commercial losses caused by intentional and unlawful acts of the defendant (e.g., unlawful interference that does not include fair competition). For a further discussion on economic torts, specialist works should be referred to,[328] as they coincide with other administrative bodies and statutes (e.g., labour law, competition law, some intellectual property laws like unfair competition). This text will focus on tortious liability only. Actions for pure economic loss under the tort of negligence could sometimes perform the function of an economic tort, as demonstrated by *Hedley Byrne.*[329] However, a significant point to remember is that the reason for liability under economic torts and negligence are distinct: the former are intentional torts, and the latter is not.

177. Economic torts were developed during the early twentieth century, mainly to provide a remedy for the loss sustained by parties affected by trade unions organizing industrial disputes. Hence, most cases then were in industrial settings[330] with trade unions, or commercial disputes.[331] Nowadays, there is a statute protecting the rights of participation in trade unions/industrial action for workers, so economic torts remain

325. [2001] AC 127 (HL).
326. *Reynolds v. Times Newspaper Ltd* [2001] AC 127 (HL), 193.
327. Also *see* Defamation Ordinance (Cap 21), Sch Part II, (Statements Privileged Subject to Explanation Or Contradiction).
328. H. Carty, *An Analysis of the Economic Torts* (2nd edn, OUP 2010); P. Cane, *Tort Law and Economic Interests* (2nd edn, Clarendon Press 1996); H. Carty, '*The Economic Torts in the Twenty First Century*', 124 L.Q. Rev. (2008) 641; S. Deakin & J. Randall, '*Rethinking the Economic Torts,*' 72 Modern L. Rev. 519 (2009).
329. *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465 (HL).
330. *Quinn v. Leathem* [1901] AC 495 (HL).
331. *Lumley v. Gye* [1854] 3 E & B 114; *Torquay Hotel v. Cousins* [1969] 1 All ER 522 (CA); *Merkur Island Shipping v. Laughton* [1983] 2 All ER 189 (HL).

mostly to protect against unfair competition. Historically, English judges ruled in favour of competition due to the *laissez faire* philosophy, thus restricting the application of economic torts.[332] Over the years, economic torts became increasingly significant, but also confusing. Courts viewed causing loss by unlawful means as inducing or procuring a breach of contract, unlawful interference with contractual relations,[333] intimidation or indirect ways of committing the *Lumley* tort.[334] These torts are dealt with under the unified theory. This confusion was eventually brought to an end by the House of Lords decision of *OBG v. Allan,*[335] which described it as *'un-natural union'*[336] that must be brought to an end. They stated that inducing or procuring a breach of contract and causing loss by unlawful means are different concepts. Another landmark decision, *Total Network v. Revenue,*[337] clarified the concept of unlawful means under the concept of conspiracy.

178. Currently, there are two different kinds of economic torts: (1) direct interference (e.g., inducing a breach of contract, causing loss by unlawful means and conspiracy); and (2) false representation (e.g., passing off, deceit and injurious falsehood). The second category of economic torts remains unchanged. In Hong Kong, it seems that the *OBG* and *Total Network* approaches have been adopted.[338] For example, in *Shenzhen Fuhaitong Precision Industry Co Ltd v. Byd Company Ltd,*[339] *'leading counsel for the plaintiffs and the defendants by counterclaim relies on the speech of Lord Hoffman in* OBG Ltd *case and submits that the unlawful means must be actionable by the third party or would have been actionable if the third party had suffered loss'.* In that case, the parties were competitors. The plaintiffs developed confidential information for their business operations, which the defendants procured from the plaintiff's employees, thus making them in breach of their duties. The approach was also applied in *Total Lubricants Hong Kong Ltd v. Christophe de la Cropte de Chanterac and Ors,*[340] wherein the plaintiff relied on the principle of *Total Network* in his argument, which was that conspiracy to commit criminal conduct to inflict loss on plaintiff constitutes 'unlawful means'.[341] The defendants were former employees of the plaintiff that conspired to steal confidential information from the plaintiff before defecting.

332. *Mogul Steamship Co Ltd v. McGregor, Gow & Co* [1892] AC 25; *Allen v. Flood* [1898] AC 1.
333. *Thomson & Co Ltd v. Deakin* [1952] 2 All ER 361 (CA); *GWK Ltd v. Dunlop Rubber Co Ltd* [1926] 42 TLR 376.
334. *Lumley v. Gye* [1854] 3 E & B 114.
335. [2007] UKHL 21 (HL).
336. [2007] UKHL 21 (HL), para. 38 (Lord Hoffmann).
337. [2008] UKHL 19 (HL).
338. *Wong Chun Tak v. The Registrar Of High Court* [2015] HKCU 1255; *Pido v. Compass Technology Company Ltd* [2010] 2 HKLRD 537 (CA), *C Y Foundation Group Ltd Anor v. Best Max Holdings Ltd & Ors* [2013] HKCU 1273; *Axa China Region Insurance Company Limited v. Lin Kwai Ying Katie* [2012] HKCU 853; *Formerly Known as v. Eton Properties Limited* [2012] HKCU 1268 etc.
339. [2010] HKCU 1813.
340. [2012] HKCU 268.
341. [2012] HKCU 268, para. 12.

I. Direct Interference Economic Torts

179. The direct interference economic torts include: (1) procuring a breach of contract; (2) causing loss by unlawful means; and (3) conspiracy to injure (lawful and unlawful). There are a couple of points to note about these torts after *OBG*. First, *Lumley* and unlawful means torts are separate. Second, in *OBG*, Lord Hoffmann stated that the *Lumley* principle differs from unlawful means torts in at least four aspects:

> First, unlawful means is a tort of primary liability, not requiring a wrongful act by anyone else, while Lumley v Gye created accessory liability, dependent upon the primary wrongful act of the contracting party. Secondly, unlawful means requires the use of means, which are unlawful under some other rule ('independently unlawful'), whereas liability under Lumley v Gye requires only the degree of participation in the breach of contract, which satisfies the general requirements of accessory liability for the wrongful act of another person… Thirdly, liability for unlawful means does not depend upon the existence of contractual relations. It is sufficient that the intended consequence of the wrongful act is damage in any form; for example, to the m'claimant's economic expectations… Fourthly, although both are described as torts of intention… the results which the defendant must have intended are different. In unlawful means, the defendant must have intended to cause damage to the claimant (although usually this will be, as in Tarleton'v 'M'Gawley, a means of enhancing his own economic position). Because damage to economic expectations is sufficient to found a claim, there need not have been any intention to cause a breach of contract or interfere with contractual rights. Under Lumley v Gye, on the other hand, an intention to cause a breach of contract is both necessary and sufficient. Necessary, because this is essential for liability as accessory to the breach. Sufficient, because the fact that the defendant did not intend to cause damage, or even thought that the breach of contract would make the claimant better off, is irrelevant.[342]

A. *Inducing a Breach of Contract*

180. This tort historically suffered uncertainties, and it was recognized mostly in trade and industrial disputes. However, it also applied to other contractual situations, which led to the expansion of its ambit, and its link to interference with contractual relations. This tort developed from *Lumley v. Gye,*[343] where the plaintiff theatre owner contracted a famous singer (third party) to perform at his theatre only. The defendant was a rival theatre owner who, upon finding out about the contract, offered money to the singer to break it, and she did. The court held the defendant liable, on the basis that the action for inducement can apply beyond the strict master-servant relationship. The court stated that if a defendant induces a contracting party to commit a breach of contract (or other actionable wrong), then the defendant is only liable as an *accessory*,

342. *OBG v. Allan* [2007] UKHL 21; [2008] 1 AC 1 (HL), para. 8, concurred with by Lord Nicholls [paras 168–198], Lord Walker [para. 264], Baroness Hale of Richmond [para. 302] and Lord Brown [para. 320].
343. 118 ER 749.

since the main purpose of this tort is to prove he 'joined with' the third party to breach its contract with the plaintiff. This tort is committed when the defendant intentionally interferes with the existing contractual rights between the parties, so persuasion to undertake lawful means to end a contract does not count.

181. In *Lumley* the defendant, knowing that a contract existed between a third party and the defendant, intentionally and unlawfully induced the third party to breach his contract. The defendant was liable under the 'inducing breach of contract' tort. Liability can only be established if there is an actual breach by the contracting party, so merely making statements to convince the contracting party will be insufficient.[344] Secondary liability can only occur if primary liability is found.

182. The requirements[345] that the plaintiff has to prove are: (1) knowledge of the contract's existence; (2) intention to induce or procure a breach of contract; and (3) breach of contract. To succeed it must be proven that the defendant had knowledge of the existence of the contract, as well as awareness that the inducement would lead to a breach. In *Merkur Island Shipping Corp v. Laughton,*[346] the plaintiff employed a third party. The defendants subsequently asked the third party to work for them, and their business was similar to the plaintiff's. It was presumed that the defendant knew of the existence of the plaintiff's contract. The defendant is not liable if he did not know of such a contract, or its precise terms. To prove that first requirement, the defendant must have knowledge of any possibly relevant contractual terms that might be broken if the third party acts in response to the inducement. The law will not presume the defendant to have constructive knowledge of the terms' existence if the defendant had some agreement with the third party and unintentionally failed to make appropriate inquiries about its contractual obligations. This was clarified in *Mainstream Properties v. Young,*[347] where the House of Lords stated that lack of knowledge limits the liability incurred. However, if the defendant deliberately refrains from making inquiries, because he suspects that he will be disadvantaged after information is revealed, then he will be liable under the 'blind eye knowledge' principle. In *Emerald Construction Co Ltd v. Lowthian,*[348] Lord Denning stated that it would be sufficient to prove liability if they did not know the actual terms but intentionally disregarded available means of knowledge, like the man who turns a blind eye. In *Peter Geoffrey De Krassel v. Vincent Julia Chu & Ors,*[349] a distinction was made between 'blind eye knowledge' and mere suspicion. 'Blind eye knowledge' has a legal effect on the induced, regarding his contract, through the defendant's conduct.[350] The defendant may know about the existence of the contractual terms, but not realize that the third party will be in breach of its contract by responding to the inducement. Lord Hoffmann stated, *'To be liable for inducing a breach of contract, you must know that you are inducing a breach of contract.'*[351] It was also stated in *OBG* that, *'It is not enough that you know that you*

344. *OBG v. Allan* [2007] UKHL 21; [2008] 1 AC 1 (HL), paras 39–44, esp. para. 44.
345. *Peter Geoffrey De Krassel v. Vincent Julia Chu & Ors* [2010] 2 HKLRD 937, para. 64.
346. [1983] 2 AC 57.
347. [2007] UKHL 21 (HL).
348. [1966] 1 WLR 691.
349. *Peter Geoffrey De Krassel v. Vincent Julia Chu & Ors* [2010] 2 HKLRD 937.
350. *OBG v. Allan* [2007] UKHL 21; [2008] 1 AC 1 (HL) (Lord Nicholls).
351. *Mainstream Properties v. Young* [2007] UKHL 21 (HL).

are procuring an act which as a matter of law or construction of the contract is a breach. You must actually realize that it will have this effect.'[352]

183. The second requirement for inducing a breach of contract is that the defendant knew about the existence of the contract and deliberately interfered, to the detriment of the plaintiff. In *Quinn v. Leathem*,[353] the appellant trade union wanted to enforce a closed shop agreement with the respondent butcher, by convincing one of his customers to refuse trading with respondent unless he hired employees from the union. The union representative threatened to call a strike among the customer's workers if he did not do as he was told. There was a '*conspiracy to injure*'. It was found that, *'It is a violation of legal rights to interfere with contractual relations recognized by law if there be no sufficient justification for the interference.'*[354] It is no defence for him to show that he was not malicious or spiteful, or that his motive was not to cause damage to the claimant. If the defendant had no intention, despite his knowledge of contract, he may not be found liable.[355] In *Millar v. Bassey*,[356] the defendant singer allegedly breached her contract with Dreampace, a record company, preventing their contract with the plaintiff being executed. The issue for the court was whether the conduct of the defendant was aimed directly at the plaintiff, or whether it is sufficient for the conduct to lead to the natural and likely consequence of the contract being breached. However, the distinction was disapproved of in *OBG* afterwards.[357] Lord Hoffmann noted that it was important to distinguish between *'ends, means and consequences'*.[358] Merely having a causative participation is insufficient.[359] Where ends and means are identified, except in consequential circumstances, liability could arise as they were incidental to the defendant's purpose.

184. Since the inducement is directed to the third party, it would not require any unlawful action by the defendant per se to incur liability. In *OBG*, Lord Hoffmann stated, *'the distinction between direct and indirect interference is unsatisfactory, and it is time for the unnatural union between* Lumley v Gye *tort and the tort of causing loss by unlawful means to be dissolved'*.[360] Direct interference by the defendant towards the third party to break his contract with the plaintiff is the only form that survived after *OBG*. In *Exchange Telegraph Co v. Gregory & Co*,[361] related to malicious inducement to break contracts. The defendant stole and published information that the plaintiff gave to subscribers about the stock exchange. By inducing subscribers to pass on the information, the defendant induced them to break their contracts. It should be noted that indirectly interfering with contractual relations is not included under this tort.

352. *OBG v. Allan* [2007] UKHL 21; [2008] 1 AC 1 (HL), para. 39.
353. [1901] AC 495.
354. [1901] AC 495, 511 (Lord McNaghten).
355. *Club Deluxe Ltd v. Club Metropolitan Ltd and Ors* [1995] 2 HKLR 69.
356. 1994 EMLR 44.
357. *OBG v. Allan* [2007] UKHL 21; [2008] 1 AC 1 (HL).
358. *OBG v. Allan* [2007] UKHL 21; [2008] 1 AC 1 (HL), para. 42.
359. *OBG v. Allan* [2007] UKHL 21; [2008] 1 AC 1 (HL), para. 191.
360. *OBG v. Allan* [2007] UKHL 21; [2008] 1 AC 1 (HL), para. 38.
361. [1896] 1 QB 147.

185. Lastly, since inducing a breach of contract incurs secondary liability, there is no liability if there is no breach of contract. The defendant cannot be liable if it persuades a party to a contract to terminate their contract by proper means, and the party uses lawful means. In *RCA Corp v. Pollard*,[362] the court held that making a contract less valuable is not actionable, unless there is an actual breach of contract. In *Torquay Hotel v. Cousins*,[363] the Court of Appeal took it a step too far by treating the prevention of contractual performance as an extension of the *Lumley* tort.

186. As a defence the interference may be permissible where the defendant is securing the performance of his prior contract or where an equal or superior right of performance of contract exists. In Hong Kong, the Trade Unions Ordinance (Cap 332) under section 43, protects registered trade unions from tortious actions. The defendant can also plead moral or social duty as a defence, but that is insufficient on its own.[364] The plaintiff can claim damages and injunctions as remedies.

B. Causing Loss by Unlawful Means

187. This is a generic tort, confirmed by *OBG*, which includes direct interference torts (e.g., interference with contractual relations/business/rights, or intimidation). All of them were seen as freestanding torts, except it was suggested by some case law[365] that interference with contractual relations was an 'indirect' form of committing the 'direct' *Lumley* tort (i.e., inducing a breach of contract). The *OBG* decision described this distinction as an 'unnatural union' to be dissolved. It was accepted that the 'indirect' manner of committing the *Lumley* tort is the same, and could be put together under 'causing loss by unlawful means'. Therefore, the earlier confusion was brought to an end by the *OBG* decision.

188. The requirements to prove that the defendant has committed unlawful means torts are that the defendant has acted and: (1) the act is unlawful; (2) the act must affect third party's freedom to deal with the plaintiff; and (3) the intention is to cause loss to the plaintiff. First, wrongful acts against a third party will count as unlawful only if they are actionable in civil law, directed towards them by the defendant, for the purposes of "unlawful means torts'. This acts as a suitable 'control mechanism'.[366] Second, the defendant must affect the third party's freedom to deal with the plaintiff, but the third party does not 'join with' the defendant to bring about a loss on the plaintiff.[367] In *RCA Corp v. Pollard*,[368] the defendant sold illegal copies of the records of Elvis Presley made at concerts, while the plaintiff had the exclusive rights to sell records by the artist. The defendant's appeal was allowed by the Court of Appeal. It was found that for the tort of wrongful interference, it must be shown that the harm

362. [1983] Ch 135.
363. [1969] 2 Ch 106.
364. *Abdul Razzak Yaqoob and Ors v. Asia Times Online Ltd and Anor* [2008] HKCU 679.
365. *Thomson & Co Ltd v. Deakin* [1952] 2 All ER 361 (CA); *GWK Ltd v. Dunlop Rubber Co Ltd* [1926] 42 TLR 376.
366. *OBG v. Allan* [2007] UKHL 21; [2008] 1 AC 1 (HL), para. 266 (Lord Walker).
367. *OBG v. Allan* [2007] UKHL 21; [2008] 1 AC 1 (HL), para. 52 (Lord Hoffmann).
368. *RCA Corp v. Pollard* [1983] Ch 135.

was in some way intended to affect the plaintiff. In that situation, the estate may have had rights to sue, but not the plaintiff.

189. Third, the defendant's intention does not have to be very specific to 'target' the plaintiff. In *OBG*, Lord Hoffmann stated that narrow interpretation would strain the concept of intention, and cause trouble in cases where the defendant has really used unlawful means. The plaintiff should be allowed to rely on the infringement of a third party's rights. For example, in *Tarleton v. M'Gawley*,[369] the shipmaster moored off by the West African coast and later used cannon shots to repel a canoe from a rival British trading ship, which also wished to trade with the West African natives. The master of the ship only intended to monopolize the local trade, but that was at the expense of causing loss to the plaintiff. An action would lie for frightening African natives, as third parties, from coming to the plaintiff's vessel to trade.

190. Lord Hoffmann clarified by reference to *Rookes v. Barnard*,[370] and *J T Stratford & Son Ltd v. Lindley*,[371] that 'unlawful' for 'unlawful means' torts have two elements: *'(a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant...[Or, simply put,] intentionally causing someone loss by interfering with the liberty of action of a third party in breach of a contract with him is unlawful'*.[372] As per Lord Nicholls, it would be insufficient and inadequate to suggest that ''unlawful' simply meant a wrongful act, or an act that caused a wrong to the claimant.[373]

191. Rookes created a tort of intimidation which is now part of a generic tort of 'causing loss by unlawful means'.[374] It is a reminder that in *OBG*, the court allowed intimidation to be bi- or tripartite. However, Lord Hoffmann clarified that such a fact is minor, and it would *'only add one footnote to this discussion of unlawful means'*. He further stated that, *'In defining the tort of causing loss by unlawful means as a tort which requires interference with the actions of a third party in relation to the plaintiff, I do not intend to say anything about the question of whether a claimant who has been compelled by unlawful intimidation to act to his own detriment, can sue for his loss. Such a case of 'two party intimidation' raises altogether different issues.'* Moreover, Lord Walker in *Total Network* asserted that a two-party intentional harm tort (i.e., intimidation) is an exceptional situation.[375]

192. Remedies may be awarded for all not-too-remote economic losses caused by unlawful means torts. Usually, compensatory damages are provided when the loss is exemplary.[376] Damages for pain, suffering and distress caused by the defendant's actions can be recovered. Aggravated damages may be awarded where the defendant's conduct increases the injury sustained by the plaintiff through additional distress,

369. (1790) 1 Peake NPC 270.
370. [1964] UKHL 1.
371. [1965] AC 269.
372. *OBG v. Allan* [2007] UKHL 21; [2008] 1 AC 1 (HL), para. 47.
373. *OBG v. Allan* [2007] UKHL 21; [2008] 1 AC 1 (HL), para. 146.
374. *Rookes v. Barnard* [1964] AC 1129.
375. *Revenue and Customs Commissioners v. Total Network SL* [2008] UKHL 19; [2008] 1 AC 1174 (HL), para. 100.
376. *Rookes v. Barnard* [1964] AC 1129.

embarrassment or humiliation. Injunctions may be given to stop the defendant from committing wrongful acts that are imminent but not yet in action.

C. *Conspiracy*

193. The tort of conspiracy is committed when two or more parties reach an agreement to engage in conduct, which can be lawful or unlawful, with the intention to cause damage to the plaintiff's economic interests.[377] The element of agreement is decided in the context of the facts of the matter, as adopted in Hong Kong from the British case of *Kuwait Oil Tanker Co SAK v. Al Bader:*[378] *'In most cases it will be necessary to scrutinise the acts relied upon in order to see what inferences can be drawn as to the existence or otherwise of the alleged conspiracy or combination. It will be the rare case in which there will be evidence of the agreement itself.'* The two main categories of the offence are lawful and unlawful conspiracy. Lawful conspiracy is committed when the conduct agreed to is intended to cause loss or damage to the plaintiff, but the means themselves do not need to be unlawful. As Lord Wright stated in *Crofter Hand Woven Harris Tweed Co Ltd v. Veitch,*[379] *'It is in the fact of the conspiracy that the unlawfulness resides.'* The elements of unlawful conspiracy require that the agreement between the defendants must be to do an unlawful act engaging in unlawful means, with the intention of causing damage to the plaintiff.

194. For lawful means conspiracy, the defendants cannot be found liable if they were acting with the dominant purpose of self-interest.[380] However, as stated by Lord Diplock in *Lonrho plc v. Fayed,*[381] *'...When conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful.'* If the offence is ongoing or the acts conspired over have not occurred, an injunction may be granted. This tort is mainly for the recovery of financial loss – and not for injury to reputation or feelings – and damages may be granted for, among others, loss of wages and expenses incurred in finding out the conspiracy.[382]

1. Lawful Means Conspiracy

195. The tort of conspiracy became increasingly utilized due to economic growth during and after the industrial revolution. Employers brought cases against trade unions

377. *Mulcahy v. R* [1868] LR 3 HL 306.
378. [2000] 2 All ER (Comm) 271; this has been adopted in Hong Kong and is cited in, among others, *Sinodental Investments Ltd and Others v. Sin Chung Yin Ronald and Others* and *Hengshi International Investments Ltd v. Bayspring International Ltd and Another* (22 Jul. 2014, HCA2176/2012).
379. [1942] 1 All ER 142, 462.
380. *Crofter Hand Woven Harris Tweed Co Ltd v. Veitch* [1942] 1 All ER 142.
381. [1992] 1 AC 448, 465G-466A.
382. *Lonrho Plc. v. Fayed* (No. 5) [1993] 1 WLR 1489; *Tse's Forex Investment Co Ltd v. Man Yuk Lan & Anor* [1995] HKLY 1001, CA.