place was held to have met an accident arising out and in the course of his employment. The employee must prove that he was by his employment exposed to risks not incurred by an ordinary member of the public: see *Smith v Stepney Corp* (1929) 2 BWCC 451. See further the following cases in which an injury by assault was held to have arisen out of the employment: see *Challis v London and South Western Rly Co* [1905] 2 KB 154; *Anderson v Balfour* [1910] 2 IR 497; *Nisbet v Rayne and Burn* above; *Trim School v Kelly* above; *Weekes v William Stead Ltd* (1914) 83 LJKB 1542; *Shaw (Glasgow) Ltd v Macfarlane* [1915] SC 273; *Reid v British and Irish Steam Packet Co* [1921] 2 KB 319; *Powell v Great Western Rly Co* [1940] 1 All ER 87. For further cases, see Willis WA & Everett RM, Willis's Workmen's Compensation (Butterworths, 37th Ed) pp 109-111.

To establish liability in cases of this nature, an employee may gain support from the presumption under subs (4)(a) which provides inter alia that 'an accident arising in the course of employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment'. See [5.13] and [5.14] below and the following cases: *Tsang Yuk Chung v China Fleet Club - Royal Navy Restaurant Caterer Overseas Assurance Corp Ltd* (DCEC 92/72, 17 February 1973, DC, unreported); *Wong Gun Fook v Mrs JLG McLean* [1973] HKDCLR 75, [1973] HKCU 56 (overruled by the Court of Appeal in *Fong Fung Ying v A -G* [1991] 2 HKLR 133); *Fan See Yuk v Ocean Tramping Co Ltd* [1974] HKDCLR 1; *Ma Yuet Yin v Patt Manfield & Co Ltd* [1980] HKDCLR 92, [1980] HKCU 95; *Fong Fung Ying v A-G* [1991] 2 HKLR 133; *Yu e Sang v International United Shipping Agency Ltd* [1992] 1 HKC 542; *Kong Hon Hung v Yuen Hing (China) Transportation Ltd* (DCEC 150/1998, 5 January 2001, DC, unreported); *Cheng Wai Yin, Timothy v Lung Fung Estate Agency o/b Legend Star Development Ltd* (DCEC 797/2000, 24 September 2001, DC, unreported); *Law Yim Ming v Cheung Hang Kook t/a Tung Lok Villa & Anor* (DCEC 450/2001, 7 June 2002, DC, unreported) and *Lam Chi Biu v Mak Kee Ltd & Anor* (DCEC 1203/2002, 4 June 2004, DC, unreported, [2004] HKCU 790).

Drunkenness

Where an accident is due entirely to the employee's drunken condition, it is not one arising out of the employment: see *Frith v Louisianian (Owners)* [1912] 2 KB 155; *Nash v Owners of SS Rangatira* [1914] 3 KB 978; *W Thomson & Co v Anderson* (1921) 91 LJPC 87; *Murphy v Cooney* [1914] 2 IR 76; *Renfrew v M'Crae Ltd* [1914] SC 539. If, however, an accident happens to an employee acting within the scope of his authority and doing an act which is part of his duty and the accident arises from his doing that act and being thereby exposed to a special risk, then the fact that he was drunk when the accident happened will not prevent the accident from being one arising out of the employment: see *Williams v Llandudno Coaching and Carriage Co Ltd*

however address the issue of drunkenness with care when dealing with employees' compensation claims involving death and serious and permanent incapacity: see subs (2)(d) and [5.10]-[5.11] below.

[5.08] In the course of employment

In *Moore v Manchester Liners Ltd* [1910] AC 498(HL), Lord Loreburn defined the term to mean an accident which occurs while the employee is doing what someone 'so employed may reasonably do within the time during which he is employed, and at a place where he may reasonably be during that time'. In *Low (or Jackson) v General Steam Fishing Co Ltd* [1909] AC 523 at 532, Lord Loreburn further elaborated that the phrase should not be construed in a narrow manner. When a man is employed, he is not usually expected to be at work unceasingly, without either rest or pause. Everything must depend upon the nature of what he has to do, but allowance should be made for the ordinary habits of human nature and the ordinary way in which those employed in such an occupation may be expected to act. Bokhary DJ adopted a liberal approach in construing the phrase in *Lam Sik v Sen International Venture Corp (HK) Ltd* [1994] 3 HKC 405, ruling 'anything that happens to a person while he or she is at work happens in the course of employment'.

A causal relationship between the work and the injury is to be established under the 'arising out of' limb of the section. The requirement that the injury arose 'in the course of' employment means no more than that the worker is injured while engaged in the employment: see *Kavanagh v The Commonwealth* (1960) 103 CLR 547.

'In the course of the employment' does not mean during the currency of the engagement, but means in the course of the work which the employee is employed to do and what is *incidental* to it. Absence on leave for the employee's own purposes is an interruption of the employment: see *Charles R Davidson & Co v M'Robb* [1918] AC 304, followed in *Lam Min v Yau On Construction Co* [1981] HKLR 646, [1981] HKCU 67.

In general terms, the test whether an employee was acting in the course of his employment is whether his act was something incidental to his contract of service, although he might be under no duty to do it. This is a question of fact and degree. Applying this test, an employee was held to have taken himself out of the course of employment by overstaying the tea-break allowed by the employer: see *R v Industrial Injuries Commissioner, ex p Amalgamated Engineering Union* [1966] 2 QB 21, [1966] 1 All ER 97(CA).

However, for an injury to qualify for employees' compensation, that injury must have been suffered in the course of the work which the injured employee is employed to do, or have been incidental to that work. It is not enough that the injury was suffered during the employee's contract of service. Nor, so far as the adjective 'incidental' is concerned, is it sufficient for the injury to have

On Construction Co at 650 above,. In other words, it is not enough to show that the injury is the result of some event 'incidental to the employment'. The injury has to be incidental to the 'work' which the injured employee was employed to perform: see *Wong Kam Ho v Chim Ching Lam* [1989] HKDCLR 11.

An employee is acting in the course of employment when he is doing something in discharge of his duty to his employer, directly or indirectly imposed upon him by his contract of service. The true ground upon which the test is to be based is a duty to the employer arising out of the contract of employment; but it is to be borne in mind that the word 'employment' also covers and includes things belonging to or arising out of it: see *St Helen Colliery Co Ltd v Hewitson* [1924] AC 59, [1923] All ER Rep 249. In other words, before an accident can be said to have occurred *during* the employment of the employee, it must have occurred while the employee was doing something which 'his employer could and did, expressly or by implication, employ him to do or order him to do': see *St Helen Colliery Co Ltd v Hewitson* at 91 above.

Where there is no doubt that an accident has taken place during the time and at the place of employment, but the exact circumstances are unknown, if there are facts from which it may be deduced that the employment brings the employee within, or allows him to be within, the proximity of the peril to which his injury or death can properly be ascribed, the court is entitled on such evidence as there is to come to the conclusion that the accident arises in the course of the employment: see *Fisher or Simpson v London, Midland and Scottish Railway Co* [1931] AC 351, [1931] All ER Rep 590(HL), followed in *Siu Yau Tai v Hung Chun Hing* [1989] 1 HKLR 347 at 349. See also *Fung Po Chun v Mollers Ltd* [1966] HKDCLR 96, where it was held that, in the absence of violence or suicide, the inference was that the death of the employee was due to some accident within the scope of his employment, and the onus was on the employer to displace that inference. If the court is not satisfied that the death of the employee was caused by suicide, the only alternative left is death by accident: see *Fan See Yuk v Ocean Tramping Co Ltd* [1974] HKDCLR 1and *Ng Mung Khian v Wing Kwong Painting Co Ltd & Anor* [2005] 3 HKC 48.

Regarding cross-border employees, it is not accepted that they should be viewed as having engaged themselves continuously in the course employment from the moment they cross the border until the moment they return to the jurisdiction. It is still necessary to determine whether at the time of accident the employment continues to run its course. Deputy Judge A To had this to say in *Li Hon Shuen the administrator of the estate and as dependent for himself and on behalf other dependants of Li Wai Ming, deceased v Man Ming Engineering Trading Co Ltd* [2006] 1 HKLRD 84:

employment when his duty hours are over or when he clocks off work until he resumes duty on the following day. The situation may be more complicated in the case of an employee on overseas duty or a cross-border employee. But, the test whether such an employee is in the course of employment after his duty hours is the same. This question may be answered by considering whether the employee has the freedom to go where he pleases and do what he pleases, whether the employer is concerned with how the employee disported himself during the off duty hours or whether he was required to go and stay at a particular place in the interim period for the employer's purpose such as on standby duty or on call. Resting and sleeping is a necessary and natural physiological activity of the body in a 24-hour cycle. Thus, prima facie, resting and sleeping at the end of the day creates a natural break in the continuity of employment unless the employee is required by his employer to sleep and rest at a particular place so as to make himself available for the employer's purpose as and when required.'

The above dicta of Deputy Judge A To was echoed by District Judge Marlene Ng in *Leung Pok Sang (梁博生) v Chan Kwong (陳光) t/a Yau Lee transp Hong (有利運輸行)* (DCEC 1192/2003, 13 November 2007, DC, unreported).

Commencement and termination of employment

It is a general rule that a person's employment does not begin until he has reached the place where he has to work or the ambit, scope or scene of his duty, and it does not continue after he has left it, and the periods of going and returning are generally excluded: see *Benson v Lancashire & Yorkshire Rly* [1904] 1 KB 242and other authorities referred to in Willis WA & Everett RM, Willis's Workmen's Compensation (Butterworths, 37th Ed) p 24 et seq.

There may however be cases in which the employee's employment exists before the commencement, or continues after the termination, of his actual work, and even before he has arrived at, or after he has left the scene of labour. Such cases may arise from the express or implied terms of his contract with his employer, or from necessities and circumstances of the case. It is possible for employment extended beyond the usual place and times of work as accepted by the Court in *Kwong Fuk Wai Mike v Hero Glory Ltd t/a U-Two* (DCEC 1296/2007, 4 June 2009, DC, unreported, Chinese Judgment). Summaries of the relevant decisions can be found in Willis WA & Everett RM, Willis's Workmen's Compensation (Butterworths, 37th Ed) pp 27-38. In brief terms, these exceptions are:

(1) ***Time spent in transport***

As to this, see subs (4)(d)-(g) for various presumptions which, in effect, supersede the decision in *Lo Kwai Chun v Hong Kong Oxygen and Acetylene*

to the particular facts of that case. For street accidents to an employee, see *Bell v Sir WE Armstrong, Whitworth & Co Ltd* (1919) 35 TLR 479 which held that, in order for the employer to be made liable for a street accident to an employee, the employee must have been in the street on the employer's business or in pursuance of a duty owed to the employer. If the employee is in the street for pleasure or for some necessary purpose of his own, such as obtaining food, the employer is not liable for any accident to him. Cf, however, *Yan Tong Kan Alice v Gammon (HK) Ltd* [1981] HKDCLR 1. See also *Po Kwong Mui v Cheoy Lee Shipyards Ltd* [1993] HKDCLR 1. In *Chan Man Lap v Secretary for Justice* (DCEC 261/1998, 29 October 2001, DC, unreported), an employee who was injured on the way back to the workplace from a canteen was held to be entitled to compensation. This, it is submitted, must be correct, for common sense dictates that the act of returning to the workplace after taking a meal is to be regarded as incidental to employment.

In the context of a road accident to the employee, it has also been held that whether the accident arose in the course of employment should be decided by considering all material factors, with no one factor being so decisive as to outweigh the others, and that there is no test based on whether the employee was at the material time acting in the course of his contractual obligations to his employer: see *Nancollas v Insurance Officer* [1985] 1 All ER 833(CA). This was applied in *Chan Lap Sin Alexander v Gold Lion Productions Co* (ECC 300/90, 6 April 1995, DC, unreported, [1995] HKCU 119), in which the court decided the issue by considering the following factors:

(i) the place of work;
(ii) the hours of work;
(iii) the nature of what the employee was doing, and whether it was done with the employer's consent;
(iv) whether the work was done under orders from the employer; and
(v) whether in doing the work the employee was acting in the employer's interest or in furtherance of the employer's purpose.

The paramount principle in law remains to be that an employee travelling on the street will be acting in the course of his employment if, and only if, he is at the material time going about his employer's business or in pursuance of a duty owed to his employer. In *Chow Shu Ki v Osram Prosperity Company Ltd* (DCEC 1059/2000, 21 November 2001, DC, unreported), the deceased employee sustained fatal injury while on a bus trip one evening after leaving his office. As the Court was satisfied on the evidence that deceased was on his way to visit customers, it was held that at the material time the deceased was still acting in the course of employment and an award of compensation was made.

Other important legal propositions had been stated by Lord Lowry in a

(i) An employee travelling from his ordinary place of residence to his regular place of work, whatever the means of transport and even if it is provided by the employer, is not on duty and is not acting in the course of his employment;
(ii) If an employee is obliged by his contract of service to use the employer's transport, he will normally, in the absence of an express condition to the contrary, be regarded as acting in the course of his employment whilst doing so;
(iii) Travelling in the employer's time between workplaces (one of which may be the regular workplace) or in the course of a peripatetic occupation, whether accompanied by goods or tools or simply in order to reach a succession of workplaces (as an inspector of gas meters might do), will be in the course of the employment;
(iv) Receipt of wages (though not receipt of travelling allowance) might indicate the employee is travelling in the employer's time and for his benefit and is acting in the course of his employment, and in such a case the fact that the employee may have discretion as to the mode and time of travelling will not take the journey out of the course of the employment;
(v) An employee travelling *in the employer's time* from his ordinary residence to a workplace other than his regular workplace or in the course of a peripatetic occupation or to the scene of emergency (such as a fire, an accident and a mechanical breakdown of plant) will be acting in the course of his employment;
(vi) A deviation from or interruption of a journey undertaken in the course of employment (unless the deviation or interruption is merely incidental to the journey) will for the time being (which may include an overnight interruption) take the employee out of the course of his employment; and
(vii) Return journeys are to be treated on the same footing as outward journeys.

(2) ***Means of access to and egress from place of work***

There must in all cases be an interval of time and space in going to or returning from the scene of work during and in which the employment lasts. The employment of an employee is not limited to the moment when he reaches the place where he is to begin his work and to the moment when he ceases that work. It includes a reasonable interval of time and space: see *Gane v Norton Hill Colliery Co* [1909] 2 KB 539.

(3) ***Attendance before starting time***

The course of employment may be taken to have commenced although the hour for the actual work has not started, if the employee's arrival on the premises is either not unreasonably early, or is necessitated by the circumstances of the employment, or if, at the time of the accident, he is doing

[38.06] Employer

This refers to the direct or immediate employer who is required to take out an employees' compensation policy, complying with the requirement under Sch 4: see *Leung Siu Mui v Tai Ping Insurance Co Ltd* [2002] 2 HKC 314.

[38.07] Injury

See [5.05] above.

[38.08] Accident

See [5.06] above.

[38.09] In the course of employment

See [5.07] and [5.08] above.

[38.10] Definitions

For 'employee', see s 2 above; for 'compensation', 'employer' and 'insurer', see s 3 above.

39. Application of this Part

(1) Subject to subsection (2), this Part shall apply to all employments other than any employment exempted under subsection (3).

(2) Notwithstanding section 4, this Part shall not apply to any employment by or under the State.

(3) The Chief Executive in Council may, by notice in the Gazette, exempt any employment from the application thereto of this Part.

(Amended 56 of 2000 s 3)

[39.01] Enactment history

The word within square brackets in subs (2) was amended pursuant to Sch 4 of the Adaptation of Laws (No 9) Ordinance 2000 (56 of 2000), commencing 1 July 2000.

The words within square brackets in subs (3) were amended pursuant to Sch 4 of the Adaptation of Laws (No 9) Ordinance 2000 (56 of 2000), commencing 1 July 2000.

[39.02] England

(Cap 1) to the Chief Executive acting after consultation with the Executive Council.

[39.04] Gazette

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean:

(a) the Government of the Hong Kong Special Administrative Region Gazette and any supplement thereto;

(b) the Gazette published by the Administration on or between 12 October 1945 and 1 May 1946;

(c) the Government of the Hong Kong Special Administrative Region Gazette Extraordinary;

(d) the Hong Kong Government Gazette and any supplement thereto published before 1 July 1997;

(e) any Special Gazette or Gazette Extraordinary published before 1 July 1997.

40. Compulsory insurance against employer's liability

(1) Subject to subsections (1B) and (1C), no employer shall employ any employee in any employment unless there is in force in relation to such employee a policy of insurance issued by an insurer for an amount not less than the applicable amount specified in the Fourth Schedule in respect of the liability of the employer.

(Amended 47 of 1995 s 4)

(1A) Subsection (1) does not require an employer to obtain insurance for any liability he may have in respect of damages awarded by a court outside Hong Kong to an employee referred to in section 30B.

(Added 59 of 1988 s 12)

(1B) A principal contractor who has undertaken to perform any construction work may, in compliance with subsection (1), take out a policy of insurance issued by an insurer for an amount not less than the amount specified in the Fourth Schedule in relation to a principal contractor in respect of the liability of the principal contractor and the liability of his sub-contractor.

(Added 47 of 1995 s 4)

[36O.04] Definitions

For 'employee', see s 2 above; for 'compensation', see s 3 above; for 'Director', 'prosthesis' and 'surgical appliance', see s 36A above and notes thereto.

PART IV

COMPULSORY INSURANCE

37. (Omitted)

[37.01] Enactment history

This part was substituted pursuant to s 28 of the Employees' Compensation (Amendment) Ordinance 1982 (76 of 1982), commencing 1 July 1983.

38. Interpretation

In this Part, unless the context otherwise requires-

'the available amount covered by the policy of insurance' (可得的保險單承保款額) means the amount covered by the policy of insurance after deducting therefrom any amount which is either paid or due and payable by the insurer under the policy in respect of the same event;

(Added 47 of 1995 s 3)

'company' (公司) has the meaning assigned to it by section 2 of the Companies Ordinance (Cap 32);

(Added 47 of 1995 s 3)

'construction work' (建造工作) means-

(a) the construction, erection, installation, reconstruction, repair, maintenance (including redecoration and external cleaning), renewal, removal, alteration, improvement, dismantling, or demolition of any structure or works specified in the Fifth Schedule;

(b) any work involved in preparing for any operation referred to in paragraph (a), including the laying of foundations and the excavation of earth and rock prior to the laying of foundations;

'domestic premises' (住宅處所) means any premises used exclusively for residential purposes;

'holding company' (控股公司), 'group of companies' (公司集團) and 'subsidiary' (附屬公司) mean, respectively, holding company, group of companies and subsidiary within the meaning of section 2 of the Companies Ordinance (Cap 32);

(Added 47 of 1995 s 3)

'policy of insurance issued for the purposes of this Part' (因本部的規定而發出的保險單) means any policy of insurance issued by an insurer that insures or purports to insure an employer against his liability to pay compensation for the injury by accident or for the death of an employee that arises out of and in the course of employment.

(Added 66 of 1993 s 8)

[38.01] Enactment history

The definitions of 'the available amount covered by the policy of insurance', 'company', 'holding company', 'group of companies' and 'subsidiary' were added pursuant to s 3 of the Employees' Compensation (Amendment) (No 2) Ordinance 1995 (47 of 1995), commencing 1 August 1995.

The definition of 'policy of insurance issued for the purposes of this Part' was added pursuant to s 8 of the Employees' Compensation (Amendment) Ordinance 1993 (66 of 1993), commencing 23 July 1993.

[38.02] England

This section does not have an equivalent in the UK Acts.

[38.03] Company

This is defined in s 2 of the Companies Ordinance (Cap 32) to mean a company formed and registered under that Ordinance or a company formed and registered under the Companies Ordinance 1911 (58 of 1911).

[38.04] Group of companies

This is defined in s 2 of the Companies Ordinance (Cap 32) to mean any two or more bodies corporate one of which is the holding company of the other or others.

the liabilities of the companies, bodies corporate and corporations in the group specified in the policy.

(Added 47 of 1995 s 4)

(1D) For the purposes of this section, section 44B and the definition of 'the available amount covered by the policy of insurance' (可得的保險單承保款額) in section 38, 'accident' (意外) means an accident or a series of accidents arising out of one event, and in relation to an occupational disease-

(a) where incapacities or deaths of more than one employee are attributable to a cause that does not arise out of a sudden and identifiable event, the incapacities or deaths of such employees are regarded as being caused by separate accidents arising out of separate events; and

(b) where incapacities or deaths of more than one employee are attributable to a cause that arises out of a sudden and identifiable event, the incapacities or deaths of such employees are regarded as being caused by an accident or a series of accidents arising out of one event.

(Added 47 of 1995 s 4)

(1E) For the avoidance of doubt, it is declared that-

(a) the amount required by subsection (1) is ascertained by reference to the number of employees in relation to whom the policy is in force and in accordance with the Fourth Schedule;

(b) the amount that may be taken out under subsection (1B) or (1C) is irrespective of the number of employees in relation to whom the policy is in force and in the case of subsection (1B), is also irrespective of the number of sites on which construction work undertaken by a principal contractor is performed;

(c) the amount required by subsection (1), (1B) or (1C) may be inclusive of interest, costs and expenses indemnified under the policy and other costs and expenses incurred by the employer (including a principal contractor, a sub-contractor, a holding

contractor and a sub-contractor insured under the policy shall be regarded as having complied with subsection (1);

(e) where a group of companies has taken out a policy of insurance under subsection (1C), all the companies, bodies corporate and corporations in the group insured under the policy shall be regarded as having complied with subsection (1).

(Added 47 of 1995 s 4)

(1F) The reference in this section to the liability of a person is a reference to the liability of the person under this Ordinance and independently of this Ordinance for any injury to his employee by accident arising out of and in the course of the employee's employment.

(Added 47 of 1995 s 4)

(2) An employer who contravenes subsection (1) commits an offence and is liable-

(a) on conviction upon indictment to a fine at level 6 and to imprisonment for 2 years; and

(b) on summary conviction to a fine of at level 6 and to imprisonment for 1 year.

(Amended 52 of 2000 s 19)

[40.01] Enactment history

The words within square brackets in subs (1) were substituted pursuant to s 4 of the Employees' Compensation (Amendment) (No 2) Ordinance 1995 (47 of 1995), commencing 1 August 1995.

Subsection (1A) was added pursuant to s 7 of the Employees' Compensation (Amendment) Ordinance 1993 (66 of 1993), commencing 23 July 1993.

Subsections (1B)-(1F) were added pursuant to s 4 of the Employees' Compensation (Amendment) (No 2) Ordinance 1995 (47 of 1995), commencing 1 August 1995.

The words within square brackets in subs (2) were amended pursuant to s 19 of the Employees' Compensation (Amendment) (No 2) Ordinance 2000 (52 of 2000), commencing 1 August 2000.

[40.02] England