

CHAPTER 1

Tortious Liability in General

INTRODUCTION

1.01 Within a relatively short history, the Hong Kong Special Administrative Region ('Hong Kong') has been transformed from a wilderness of barren rocks into one of the leading international centres of business, finance and industry in Asia, and, indeed, the whole world. Over seven million people¹ inhabit an area of just 426 square miles. Nevertheless, it is one of the busiest cities where there exist numerous engineering works, industries and businesses, requiring the constant movement of people, machinery and materials by land, sea and air. Hong Kong has the second tallest building in the Peoples Republic of China and the fifth tallest in the world. The turnover of money in Hong Kong's stock exchange is over billions of dollars each day. As in other developed countries, complex engineering projects undertaken in Hong Kong multiply the opportunity for injury. Hong Kong is as accident prone as any other commercial and industrial city in the world. Buildings collapse, trains derail, motor vehicle accidents occur every day, fake and defective products are freely circulated. People suffer huge financial losses and serious physical injuries at the hands of criminals and fraudsters as well as through negligent professional advice, conduct and activities.

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

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

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

needed³; '38 die in Hong Kong ferry disaster'; 'Three dead as speeding minibus rams truck'⁴; 'Worker impaled in deadly accident at highway site'⁵; 'Flashing signs and billboards bring misery to many residents'⁶; 'Investor's minibond lawsuit a first for consumer action fund'⁷; 'Guidelines ignored on checking tree that killed girl'⁸.

1.03 It can be seen that with a city that is prone to accidents, redress is often sought. In Hong Kong one of the sources of law for redress is the law of tort and the source and the foundation of the law of tort in Hong Kong are to be found mainly in English law, both statutory and common law. After the 1997 handover, English law still retains its persuasive effect in Hong Kong courts. The law of tort as a separate branch of civil liability is of comparatively recent origin; the first English textbook on the subject, which was by Addison, was published as late as 1860.⁹ Yet, it is one of the most rapidly growing subjects.

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

MEANING AND SCOPE OF TORT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Tort and insurance

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

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

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

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

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

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

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

Tort and crime

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

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

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

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

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

20 See Holdsworth ii, pp 43–54.

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

- 1.15 The objective of criminal law is to punish the wrongdoer in order to protect society as a whole. Imprisonment, non-custodial sentences and pecuniary fines are among the most important types of punishment. The essential characteristic of a tort action is not to seek punishment of the wrongdoer (even though sometimes punishment is an underlying reason) but to claim monetary compensation for the victim. On the other hand, a criminal court in some cases may order an offender to pay monetary compensation to the injured party²² and a civil court may award exemplary

21 See *infra* at paras 1.28-1.31.

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

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

- (a) personal injury;
- (b) loss of or damage to property; or
- (c) both such injury and loss or damage, as it thinks reasonable.

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

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

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

Tort and contract

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

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

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

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

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

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

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

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

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

which the property might not have been let, might be subject to a rent-free period for a new tenant to renovate the premises, or might be vacant during works under a building authority order.¹⁵¹

- 8.76 The plaintiff can claim damages whether the premises were occupied by the defendant himself or by a tenant holding under him.¹⁵² Not only can the plaintiff claim all his losses resulting from the wrongful use of his land, he can also claim the profits made by the defendant in the course of using his land on the principle that a person cannot benefit from his own wrong.¹⁵³ A claim for mesne profits may be joined with the action for the recovery of possession of land. Where the plaintiff sues only for the recovery of possession of land, he can subsequently sue for mesne profits, provided he has gained possession of the land, for trespass is a wrong to possession. In such cases, the plaintiff is awarded for loss of former profits by the application of the doctrine of trespass by relation.¹⁵⁴

151 *A-G v Chiu Kwok Chun Stephen* [1985] 1 HKC 199, CA; *Eastlord Development Ltd v Broadway Photo Supply Ltd* [1990] 1 HKC 336, HC; applying *Swordheath Properties v Tabet* [1979] 1 All ER 240, [1979] 1 WLR 285, CA (Eng); see also *Camsilk Co Ltd v High Fashion Corner Ltd* [1990] 1 HKC 499, HC.

152 *Doe v Harlow* (1840) 12 A&E 40.

153 *Bilambil-Terranova Pty Ltd v Tweed Shire Council* [1980] 1 NSWLR 465. See also F Trindade and P Cane, *The Law of Torts in Australia* (3rd edn, 1999) p 103.

154 See *Southport Tramways v Gandy* [1897] 2 QB 66. No recovery of mesne profits is allowed where the plaintiff's right to recover his land is extinguished by adverse possession: *Mount Carmel Investment Ltd v Peter Thurlow Ltd* [1988] 5 All ER 129, [1988] 1 WLR 1078, CA (Eng).

CHAPTER 9

Trespass to Chattels

INTRODUCTION

- 9.01 Trespass to chattels¹ (or goods) is an old form of action, originally used against people hunting or chasing another person's sheep or cattle. It is primarily concerned with interference with goods in the possession of another person. Recently, however, this tort has been invoked by website owners against persons² misusing information stored by them on their computer system.³ The pre-requisites for founding an action in this tort are that the defendant's interference must be direct and intentional. There is a view that actions in trespass to chattels must only be grounded where this tort was committed intentionally and that where trespass to chattels was committed unintentionally, the action should be vested in negligence.⁴ In fact, while dealing with the question of an unintentional trespass, Lord Denning said that negligence was the only cause of action in such cases.⁵
- 9.02 This Chapter briefly explains the meaning of goods and items of value. Second, it deals with acts that constitute trespass to chattels.

1 An old expression for goods.

2 In *Thrifty-Tel Inc v Bezenek* 54 Cal Rptr 2d 468 (Cal Ct App 1996), the defendant was held liable for using the plaintiff's access code without the plaintiff's authority to make 13,000 telephone calls. In *Register.com Inc v Verio Inc* Supp 2d 238 (SDNY, 12 December 2000), the defendant without the plaintiff's permission obtained information about the plaintiff's customers from the plaintiff's database. In *Intel v Hamidi* Cal App Lexis 3107 (3d Dist, 10 December 2001), the defendant, a dismissed employee of the plaintiff, sent six emails to the plaintiff's 35,000 employees, interfering with the plaintiff's email system.

3 DK Srivastava, 'Trespass to Chattels: On the Internet?', *Hong Kong Lawyer*, November 2002, p 63. See also DM Fritch, 'Click Here For Lawsuit – Trespass to Chattels in Cyberspace', 9(1) *Journal of Technology & Policy*, 2004, pp 31-60. For a contrary view, see R Warner, *Border Disputes: Trespass to Chattels on the Internet*, 47 *Vill. L. Rev.* 117, 2002.

4 *Letang v Cooper* [1965] 1 QB 232, [1964] 2 All ER 929, CA (Eng).

5 *Ibid* at p 240.

Third, the Chapter examines what interferences are direct. Fourth, the Chapter explains the meaning of possession. Fifth, the Chapter examines the meaning of what is an intentional conduct. Finally, it sets out what damages can be awarded to a successful plaintiff suing in the tort of trespass to chattels.

GOODS AND OTHER ITEMS OF VALUE

9.03 The Sale of Goods Ordinance (Cap 26) defines goods, *inter alia*, as including all chattels personal.⁶ Simple examples of such chattels are cars, bicycles, animals, clothes, items of jewellery and so forth. Judicial decisions in the United States have extended the traditional boundaries of trespass to chattels, to include websites which are treated as sharing the characteristics of property. It is argued that a website is a product of one's labour and a person has a propriety right in his labour and that the theories of property that underlie the law of trespass would justify extending the doctrine of trespass to include unauthorised access to a website.⁷

ACTS CONSTITUTING TRESPASS TO CHATTELS

9.04 Trespass to chattels may take various forms. It is trespass to a chattel to dispossess the plaintiff of his chattel or damage it. Unauthorised use or handling may also amount to trespass. Acts such as riding another person's horse, driving another person's car or scratching a panel of a car⁸ are all equally trespasses.⁹ In the case of animals, beating, wounding, killing or infecting them with diseases are also trespasses.

9.05 Trespass to chattels was originally called trespass *de bonis asportatis*, a form of action for recovery of damages resulting from the defendant taking the chattel or personal property away from the possession of the plaintiff. This tort, however, is no longer confined to this situation and the defendant can be liable even though his act may not have involved an actual carrying away of a chattel.

6 Section 2 of the Sale of Goods Ordinance (Cap 26). It also includes leasehold interest chattels real as well as any tangible goods, except for freehold land.

7 DK Srivastava, *Trespass to Chattels: On the Internet?* *Hong Kong Lawyer*, November 2002, p 63 at 66. See also *eBay Inc v Bidders edge Inc* No C-99-21200 RMW; *Thrifty-Tel Inc v Bezenek* 46 Cal. App. 4th 1559 and *Intel v Hamidi* 30 Cal. 4th 1342.

8 *Everitt v Martin* [1953] NZLR 298.

9 There may be conversion as well.

9.06 Given that the primary purpose of this tort, like other torts of trespass, was to prevent violence or confrontation leading to breaches of the peace, trivial interferences with the chattel, even mere asportation of the chattel or carrying away of the chattel without dispossession or mere touching of the chattel could also amount to trespass.¹⁰ Such a principle is necessary to meet special situations such as where the defendant touches wet paints, waxworks or museum exhibits.

9.07 In *Kirk v Gregory*,¹¹ the plaintiff's testator died. The defendant, who was the testator's sister-in-law, removed some rings and jewellery from the room where the testator lay dead, to another room from where it was stolen. It was held that the defendant was liable in trespass, for there clearly was an asportation.

9.08 In *Fondues v Willoughby*,¹² although the court found that the taking of the plaintiff's horses by the defendant on board a ferry boat and turning them out would not be conversion, yet it held that the plaintiff might have maintained an action in trespass. Judicial opinion, however, is divided on whether the plaintiff can sue where there has been no asportation of a chattel and no dispossession.

9.09 In the New Zealand case of *Everitt v Martin*,¹³ Adams J said that 'for the mere touching of another's goods without damage or asportation, there could be no action for trespass to chattels'. The prevailing view, however, is that trespass to chattels is actionable *per se*, without proof of any damage.¹⁴ However, a mere casual or accidental unintentional contact with a chattel without causing any damage would not amount to trespass. In the context of the Internet, an action of trespass to chattels would lie, for example, where an unauthorised use is made of the plaintiff's website or online devices. American law recognises that trespass may be committed by means of electronic interference.¹⁵

10 See *Leith & Co Ltd v Leydon* [1931] AC 90.

11 (1876) 1 Ex D 55.

12 (1841) 8 M & W 540.

13 [1953] NZLR 298.

14 K Barker, P Cane, M Lunney and F Trindade, *The Law of Torts in Australia* (5th edn, 2012) p 104.

15 See eg *TicketmasterCorp v Tickets.com Inc* US Dist CD Ca (27 March 2000); *Thrifty-Tel Inc v Bezenek* 54 Cal Rptr 2d 468 (Cal Ct App 1996); *Register.com Inc v Verio Inc* Supp 2d 238 (SDNY, 12 December 2000).

INTERFERENCE MUST BE DIRECT

9.10 As in the case of other forms of trespass, no action can succeed unless the act is direct. It is no trespass to lock a room in which the plaintiff has stored his goods. Street says that 'although he who mixes a drug with the feed of a racehorse commits a trespass to the feed, he does not commit a trespass to the racehorse when it is later given the feed'.¹⁶ It will be a direct interference to beat or shoot the plaintiff's animals including dogs,¹⁷ birds¹⁸ or fish. Modern cases meticulously apply the test of directness, for example, where the plaintiff's animal dies or becomes ill as a result of eating the defendant's contaminated food, the latter's liability would depend on whether the animal's death or illness was caused by a direct act on his part.

9.11 In *Hutchins v Maughan*,¹⁹ the defendant had laid poisoned baits on his land. The plaintiff's dogs picked up some baits, ate them and died. Herring CJ said:

Trespass does not lie in respect of the defendant's act in laying the baits. Had the baits been thrown by the defendant to the complainant's dogs, then no doubt the injury could properly have been regarded as directly occasioned by the act of the defendant, so that trespass would lie. His position is like that of a man who, going along the road upon which a log has been thrown, receives an injury by falling over it. In such a case the man who threw the log upon the road has, of course, caused the mischief, but trespass does not lie, as the injury is consequential upon his act and not immediately or directly occasioned thereby. Had the man who fell over the log not passed that way, he would have suffered no injury from the others act.

9.12 This decision, however, should not be taken literally to mean that a direct physical contact is always essential to constitute trespass. Directness here means that an act of the defendant had set in motion an unbroken series of consequences, the last of which caused contact with the plaintiff's chattel or goods.²⁰ Thus, it would be trespass to wilfully frighten a horse so that it runs away or to drive cattle out of a field.²¹

16 *Street on Torts* (13th edn, 2012) p 303.

17 *Wright v Ramscot* (1665) 2 KB 311.

18 *Hamps v Darby* [1948] 1 Wms Saund 183.

19 [1947] VLR 131

20 K Barker, P Cane, M Lunney and F Trindade, *The Law of Torts in Australia* (5th edn, 2012) pp 101-102.

21 Salmond and Heuston, *The Law of Torts* (21st edn, 1996) p 94.

PLAINTIFF MUST HAVE POSSESSION OF THE CHATTEL

9.13 Trespass to goods is essentially an invasion of the plaintiff's possession. In a narrow sense, a person possesses what the person has in physical control, for example, the clothes that he is wearing. However, the word 'possession' has not been used in such a limited sense. The essence of possession is that of exercising effective control, not necessarily immediate physical control over the chattel. Thus, a person is in possession of his car and other household items in his place while he is away. This is because he still has effective control over such things, though he does not have immediate physical control over such items.²²

9.14 To succeed in trespass to chattels, the plaintiff need not establish ownership but possession, that is, good against the wrongdoer. Possession connotes both the power (*factum*) and intention (*animus*) to exercise physical control. Even the owner of goods not in possession may not be allowed to maintain an action in trespass. The owner may even be liable in trespass for interfering with his own goods which are lawfully in the possession of another, for example, a bailee for a fixed term,²³ and a thief whose possession has been violated can sue the defendant and the defendant cannot be allowed to set up *jus tertii*, that is, a third party has a right to possession unless the defendant has been authorised to deal with the chattel by the owner or the person with the right to immediate physical possession.²⁴

9.15 Possession may be either actual or constructive. A legal right to immediate possession, such as the right of a bailor in the case of bailment at will or of a principal where the goods are in the possession of the agent or of an employer (master) in the case of employee (servant), is thus sufficient to found an action in trespass to chattels.²⁵ Likewise, a trustee may sue for trespass to chattels in the hands of the beneficiary as the trustee is deemed to share possession with the beneficiary.²⁶ Executors or administrators are considered to have possession of the goods of the deceased from the moment of the deceased's death. Their appointment relates

22 For suing in trespass to chattels on the Internet, the requirement is similar. The plaintiff must establish that he had control of the relevant website.

23 *Keenan Bros Ltd v CIE* (1962) 97 ILTR 54.

24 This rule has statutory force in England: see s 8 of the Torts (Interference with Goods) Act 1977 (UK).

25 *Johnson v Diprose* [1893] 1 QB 512; *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204.

26 *White v Morris* (1852) 11 CB 1015.

back. They can sue for any trespass committed to the goods of the deceased after the deceased's death and before their appointment.²⁷ Where the plaintiff holds a franchise in wrecks and the defendant removes some articles from the wreck, the plaintiff, though not in actual possession, is entitled to sue the defendant.²⁸

DEFENDANT'S CONDUCT MUST BE INTENTIONAL

9.16 Any act of the defendant which is to be actionable must be intentional. The law does not recognise any liability for accidental trespasses to chattels.

9.17 In *National Coal Board v Evans (JE) & Co*,²⁹ the defendant accidentally damaged an underground electric cable laid by the plaintiffs or their predecessors. The plaintiff's claim failed because the defendant's act was not intentional. Perhaps if a breach of duty by the defendant had been proved, the plaintiff would have had an action in negligence.

9.18 An act done by the defendant to another's goods under the mistaken belief that the goods belonged to the defendant will still be regarded as intentional. 'Intentional' here means intentional as to contact or interference.³⁰ So long as the desired act is done, the belief of the defendant is immaterial. Mistake of fact does not make the act less intentional.

9.19 Thus if A damages B's goods believing the goods to be his, A would be liable in trespass to chattels.³¹ In the American case of *Ranson v Kilner*,³² the defendant shot the plaintiff's dog believing it to be a wolf. He was held liable in trespass. In *Wilson v Lombank Ltd*,³³ the plaintiff had bought a car from a person who had no title to sell it. As the car needed repairs, the plaintiff entrusted it to a garage. The defendant believing, though wrongly, that the car was his, removed it from the garage. On these facts, the plaintiff succeeded in an action for trespass to goods against the defendant. Equally, the defendant will be liable for trespass to chattels where he takes away the plaintiff's book believing it was his.

27 *Tharpe v Stallwood* (1843) 5 M & G 760.

28 *Dunwich Corp v Sterry* (1831) 1 B & Ad 831.

29 [1951] 2 KB 861.

30 WVH Rogers, *The Law of Tort* (London, Sweet & Maxwell, 2010) p 821.

31 See *Street on Torts* (13th edn, 2012) pp 305-306.

32 (1888) 31 III App 241.

33 [1963] 1 All ER 740, [1963] 1 WLR 1294.

JUS TERTII AND TRESPASS TO CHATTELS

9.20 A person whose actual or constructive possession is violated can sue in trespass to chattels, whether or not he was the true owner of the chattel. The defendant cannot plead *jus tertii*, that is, that another person has better title to it. In such cases, there are, however, two defences. First, where the defendant defends the action on behalf of the true owner, who in law is entitled to the possession of the chattel. Second, where the defendant committed the trespass on behalf of the person who was entitled to the possession.

MEASURE OF DAMAGES

9.21 Since trespass to chattels is actionable *per se*, that is, without the need to show proof of any actual damage, it is not essential for the plaintiff to prove the nature or the extent of the damage caused. The plaintiff will be at least entitled to nominal damages. However, where the defendant has destroyed or disposed of the plaintiff's goods, the plaintiff will be entitled to recover the full value of the goods.³⁴ 'Value' here means the market price or the cost of replacement³⁵ or the highest possible value if there is any doubt about the value of the chattel.³⁶ Where the chattel is only damaged, the damages must be the cost of repair to put the chattel back into its former position. The plaintiff will also be entitled to any consequential loss which is not too remote, such as loss of profits of a profit-earning chattel³⁷ or loss of use.³⁸ Where a carpenter's tools are damaged, destroyed or taken away, the carpenter may be awarded loss of earnings caused by the defendant's interference with the tools.³⁹

9.22 Aggravated and even exemplary damages may be awarded in exceptional circumstances, for example, where the defendant, who has a position of authority, conducts himself oppressively.⁴⁰

34 *Wilson v Lombank* [1963] 1 All ER 740, [1963] 1 WLR 1294.

35 *Hall v Barclay* [1937] 3 All ER 620.

36 See *Armory v Delamirie* (1721) 1 Stra 505.

37 See *Liesbosch Dredger v The Edison* [1933] AC 449, HL.

38 *The Mediana* [1900] AC 113, HL.

39 See *Bodley v Reynolds* (1846) 8 QB 779; cf *Chubb Cash Ltd v John Crilley & Son* [1983] 2 All ER 294, [1983] 1 WLR 599, CA (Eng).

40 *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, [1972] 2 WLR 645, HL; *Pargiter v Alexander* (1995) 5 Tas R 158, 168.

might be, until it felt the time was right for it to fall into line with the position in the UK'.

CHAPTER 20

Breach of Statutory Duty

INTRODUCTION

20.1 Besides the general duty discussed in earlier chapters, statutes also impose particular duties on private individuals and public authorities. In Hong Kong, civil actions for the breach of statutory duty increased significantly with the volume of industrial and social welfare legislation being put in place.¹ In some cases, the statute more or less corresponded with the common law duties. But the main question is, what happens when those duties are not performed properly, can those affected sue those who failed to perform such duties? Another question is, whether such duties arise under common law, statute or both?² Examples of breach of statutory duties include the failure or neglect by an employer to provide safety equipment or gear (such as protective glasses), safe access to and egress from work sites,³ an effective guard for machines,⁴ failure to fence dangerous machinery or provide suitable anchorage for safety belts and failure to ensure that scaffolders wear safety belts.⁵

¹ See eg the Factories and Industrial Undertakings Ordinance (Cap 59) and regulations made thereunder, the Occupational Safety and Health Council Ordinance (Cap 388), the Public Health and Municipal Services Ordinance (Cap 132) and regulations made thereunder, the Mining Ordinance (Cap 285) and regulations made thereunder, the Road Traffic Ordinance (Cap 374), the Air Pollution Control Ordinance (Cap 311), the Oil Pollution (Land Use and Requisition) Ordinance (Cap 247), the Water Pollution Control Ordinance (Cap 358), the Waste Disposal Ordinance (Cap 354) and the Securities and Futures Ordinance (Cap 571).

² In *R v Deputy Governor of Parkhurst Prison Ex parte Hague* [1992] 1 AC 58 at 170, [1991] 3 All ER 733, [1991] 3 WLR 340, HL, Lord Jauncey said: 'The fact that a particular provision was intended to protect certain individuals is not of itself sufficient to create a civil remedy for aggrieved individuals'.

³ Construction Sites (Safety) Regulations (Cap 59I) reg 38Q(2), (3) and (5).

⁴ Factories and Industrial Undertakings (Guarding and Operation of Machinery) Regulations (Cap 59Q) regs 4, 5 and 8.

⁵ Construction Sites (Safety) Regulations (Cap 59I) reg 38A.

20.2 The common law recognises breach of statutory duty as a separate and distinct tort for which damages can be awarded.⁶ In many circumstances, the plaintiff may be able to sue either for the tort of breach of statutory duty or in negligence at common law, or concurrently in both.⁷ Sometimes, a breach of statutory duty may support a common law action as being prima facie evidence of negligence. In such a case, the defendant may argue that he had acted reasonably in the circumstances, despite the fact that he had breached the statutory provision, but that he should not be held liable. This is illustrated in the Canadian case of *The Queen in the Right of Canada v Saskatchewan Wheat Pool*.⁸ In that case, the defendant wanted to avoid the imposition of strict liability, but strict liability in industrial safety legislation was regarded as an exception. Therefore, the breach of statutory duty in that case acted as evidence of negligence and was not considered as a separate tort. It is possible that both common law action and breach of a statutory duty may succeed. It is also possible that an action for breach of statutory duty may fail while one in negligence may succeed,⁹ and vice versa.¹⁰ Although the two actions may arise from the same set of circumstances, they are separate actions having different requirements to satisfy: one should not be confused with the other.¹¹

20.3 There are several advantages of suing in this tort. First, the plaintiff need only prove that there was a breach of a statutory duty according to the standard set out in the statute. Second, it is easier for the plaintiff to prove the breach of the statutory standard than that prescribed by the common law. A worker who suffers injury may in some cases be unable to prove negligence at common law, but may be able to do so if suing for the breach of statutory duty because he only has to prove that the legislative standard was not adhered to. Third, the plaintiff suing for the breach of statutory duty is not usually required to establish either negligence or intention on the part of the defendant. Fourth, recognising breach

6 Breach of statutory duty will not give rise to a cause of action unless there exists a right of 'action for breach of statutory duty simpliciter': Lord Browne-Wilkinson in *X (Minors) v Bedfordshire CC* [1995] 2 AC 633, [1995] 3 All ER 353, [1995] 3 WLR 152, HL.

7 See eg *Dah Sing Insurance Services Ltd v Gill Gurbux Singh* [2013] HKCA 644. (1983) 143 D.L.R. (3d) 9.

8 See eg *Kilgollan v William Cooke & Co* [1956] 1 WLR 527, [1956] 2 All ER 294, CA (Eng); *Bux v Slough Metals Ltd* [1974] 1 All ER 262, [1973] 1 WLR 1358, CA (Eng).

9 See eg *Kelly v WRN Contracting Ltd* [1968] 1 All ER 369, [1968] 1 WLR 921; *Denyer v Charles Skipper and East Ltd* [1970] 2 All ER 382, [1970] 1 WLR 1087, CA (Eng).

11 *London Passenger Transport Board v Upson* [1949] AC 155, [1949] 1 All ER 60, HL.

of statutory as a separate tort gives the courts authority to protect workers, especially industrial workers, who are most vulnerable. A worker may not succeed at common law because those who are really responsible for his injury, such as the principal contractor, may not have a duty of care towards him. In *X (Minors) v Bedfordshire County Council*,¹² Browne Wilkinson LJ said:

This basic position is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction, that statutory duty was imposed for the protection of a limited class of the public and the Parliament intended to confer on members of that class a private right of action for breach of the duty.

20.4 In this context, statutes could be classified in three broad categories: (1) those which specifically confer a right to bring a private law action (including statutes that provide new civil remedies and those created to modify or clarify existing common law actions);¹³ (2) those which specifically deny such right;¹⁴ and (3) those which are silent on this question.¹⁵ It is with the third category that we are mainly concerned with in this chapter.

20.5 In order to determine whether an action for the tort of breach of statutory duty would succeed, five matters need to be considered:

- (1) whether there is a legislative intent to confer a right to pursue a claim for the breach of statutory duty;
- (2) whether the breach on question falls within the ambit of the statute which it intended to protect;
- (3) whether the prescribed statutory duty has been breached by the defendant;
- (4) whether the breach of the statutory duty caused the injury or damage; and
- (5) what defences, if any, are available to the defendant.

LEGISLATIVE INTENT

Ascertainment of statutory intention necessary

20.6 The existence of a statutory duty and the right to sue for the breach of such a duty are ascertained by looking at the intention of the

12 [1995] 2 AC 633, [1995] 3 All ER 353, [1995] 3 WLR 152, HL.

13 See eg the Sex Discrimination Ordinance (Cap 480) s 76(1).

14 See eg the Mass Transit Railway Ordinance (Cap 556) s 57(1).

15 See eg Construction Sites (Safety) Regulations (Cap 591) reg 31.

statute.¹⁶ Sadly, most of the legislation has failed to provide any clear guidance on whether a cause of action is available for its breach. Case law has, therefore, developed a body of principles known as canons of construction which the court may apply in order to ascertain legislative intent.¹⁷ Still, it is difficult to predict how the courts will interpret a statute. As Lord Denning remarked in *Ex parte Island Records Ltd*¹⁸ that 'you might as well toss a coin to decide it'.

Reading legislation as a whole

20.7 Where the statute clearly confers a private right to sue in tort for the breach of a statutory duty¹⁹ or it is clear that no such right exists, it does not affect the claim in this tort.²⁰ The main point is whether the statute is aimed to confer a general benefit to the public, or whether it is specifically designed with the aim of allowing an individual a right against those who are in breach of the statutory duty.²¹ It is in the latter that the tortious liability will arise. However, all too often, statutes do not give any clear guidance or indication. The only rule, said Lord Simonds in *Cutler v Wandsworth Stadium Ltd*,²² which in all circumstances was valid was that the answer must depend on a consideration of the whole

16 Section 19 of the Interpretation and General Clauses Ordinance (Cap 1) provides that 'an Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit'.

17 In *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405, Kitto J pointed out 'that the question whether a contravention of a statutory requirement of the kind of question here is actionable at the suit of a person injured thereby is one of statutory interpretation'. See eg *HKSAR v Cheung Kwun Yin* (2009) 12 HKCFAR 568 at para 15: '... statements made by officials of the Government in relation to the bill in the Legislative Council may be used to identify the purpose of the statutory provision'.

18 [1978] Ch 122 at 135, [1978] 3 All ER 824, [1978] 3 WLR 23, CA (Eng). See also Barbara McDonald, 'Legislative Intervention in the Law of Negligence: The Common Law Interpretation and Tort Reform in Australia' [2005] SydLawRw 22.

19 See eg the Consumer Protection Safety Regulations made under the United Kingdom Consumer Protection Act 1987 s 41.

20 Section 12(1)(b) of the United Kingdom Nuclear Installations Act 1965 provides for compensation for breaches of some duties imposed by it but then states that 'no other liability shall be incurred by any person in respect of that injury or damage'. See also s 3 of the Safety of Sports Grounds Act 1975 (UK); and s 5(2) of the Guard Dogs Act 1975 (UK).

21 See also, the definition provided by the House of Lords in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 652, [1995] 3 All ER 353, [1995] 3 WLR 152, HL.

22 [1949] AC 398, [1949] 1 All ER 544, HL.

legislation and the circumstances, including the pre-existing law, in which it was enacted.

20.8 In *Stovin v Wise*,²³ Lord Hoffmann expressed the same view:

Whether a statutory duty gives rise to a private cause of action is a question of construction: see *R v Deputy Governor of Parkhurst Prison, ex p Hague*.²⁴ It requires an examination of the policy of the statute to decide whether it was intended to confer a right to compensation for breach.²⁵

Whether duty is intended for the benefit of the public or a class

20.9 Two points may be emphasised. First, where a statute is created for the benefit of the public at large, the courts are not likely to construe it as conferring a private right of action on individuals unless the statutory provisions expressly so declare.²⁶ Second, when the statute is enacted for the benefit of a class, it does not necessarily mean it will automatically give rise to a common law action. It only means the courts are more willing to allow a member of that class to sue for its breach. This is so even if the statute imposes penal sanction for its breach.

20.10 In *Groves v Lord Wimborne*,²⁷ the United Kingdom Factory and Workshop Act 1878 required the fencing of dangerous machinery and provided only for a maximum fine of £100 for the breach of that provision. The Act also provided that the Secretary of State could use the fine so received for the benefit of a person injured due to the breach.²⁸ The court held the defendant liable in tort and said that in this case, the statute intended to protect those who could be classified as employees. Vaughan Williams LJ said that where a statute provided for the performance by certain persons of a particular duty, and someone belonging to a particular class of persons for whose benefit and protection the statute imposed the duty, was injured by a failure to perform that duty, *prima facie*,

23 [1996] AC 923, [1996] 3 All ER 801, [1996] 3 WLR 388, HL.

24 [1992] 1 AC 58, [1991] 3 All ER 733, [1991] 3 WLR 340, HL.

25 [1996] AC 923 at 952F, [1996] 3 All ER 801, [1996] 3 WLR 388, HL; followed in *Kaisilk Development Ltd v Urban Renewal Authority* [2004] 1 HKLRD 907, CA.

26 *Li Yuk Lan v Lau Kit Ling* [1989] HKCA 247

27 [1898] 2 QB 402.

28 The United Kingdom Health and Safety at Work Act 1974 has to some extent affected the authority of the decision in *Groves*. Section 47(1)(a) of the Act provides that a breach of the general duties contained in ss 2-7 is not actionable in tort. However, by s 15 breach of any health and safety regulations made by the Secretary of State will be actionable unless the regulations in issue provide otherwise.

and, if there be nothing to the contrary, an action by the person so injured would lie against the person who had failed to perform the duty.

- 20.11 In *Estinah v Golden Hand Indonesian Employment Agency*,²⁹ the defendant was an employment agency who assisted the plaintiff to obtain a domestic helper's job. The defendant, in breach of the Employment Ordinance (Cap 57) and the Employment Agency Regulations (Cap 57A), charged the plaintiff more agency fees than permitted. The plaintiff succeeded at the Small Claims Tribunal and recovered the extra amount paid by her to the defendant. An appeal against this decision was dismissed by the Court of First Instance. Kwan J said:

... [the fact that] a particular provision was intended to protect certain individuals is not of itself sufficient to confer private law rights of action upon them, and that 'something more is required to show that the legislature intended such conferment'.³⁰ In my view, there is such an indicator in favour of a private right of action in the present situation. The criminal sanction imposed on an employment agency would not be a sufficient remedy to those who had paid a commission in excess of the prescribed amount. This would give no financial protection to those who are most in need of such protection and it was mainly for the protection of this class of persons that section 57(a) and the related provisions were enacted. It would be right to interpret the statute as conferring a right of action, despite the existence of a criminal sanction.

- 20.12 On the other hand, in *Cutler v Wandsworth Stadium Ltd*,³¹ the court took a different view. The United Kingdom Betting and Lotteries Act 1934 provided that an occupier of a dog-racing track must not exclude licensed bookmakers from the tracks. A bookmaker who was not admitted onto the track sued the defendant for breach of the Act. Since the purpose of the Act was to regulate dog racing and not to protect the bookmakers as a class, it was held by the House of Lords that the bookmaker had no claims against the defendant and that the penalty provided a sufficient remedy for the enforcement of the statute.
- 20.13 *Atkinson v The Newcastle and Gateshead Waterworks Co*³² suggests that even a trivial penalty for the breach of a statutory

29 [2001] 4 HKC 607, CFI.

30 *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58 at 170H-171A, [1991] 3 All ER 733, [1991] 3 WLR 340, HL, per Lord Jauncey.

31 [1949] AC 398, [1949] 1 All ER 544, HL.

32 (1877) LR 2 Ex D 441.

duty may exclude any private action by an aggrieved person. In that case, section 42 of the Waterworks Clauses Act 1847 had provided a penalty of £10 for failure by a water company to maintain sufficient pressure in its water pipes to which water plugs were fixed. The defendant company neglected its duty. The pressure in its pipe was insufficient and as a result the firemen could not prevent the plaintiff's house from being gutted by fire. It was held that the Act was not designed to protect householders from damage or destruction of their property resulting from the breach of the Act. The English Court of Appeal said that the purpose of the Act was not to make a water company an insurer of safety from fire so far as water could do. The decision turned on the consideration that a householder could easily secure that protection by insuring himself.³³ In *Phillips v Britannia Hygienic Laundry Co*,³⁴ the English Court of Appeal also rejected the plaintiff's contention that the statute allowed an action by a person belonging to the class of the public using the highway. Bankes LJ said that in his view, 'the public using the highway is not a class; it is itself the public, and not a class of the public'.

- 20.14 In *Tse Lai Yin & Ors v Incorporated Owners of Albert House & Ors (No 6)*,³⁵ several pedestrians were injured and killed when the whole of a concrete canopy fell on them from the defendants' building. The plaintiffs sued both in negligence and for breaches of duties contained in the Buildings Ordinance (Cap 123) and the Building Management Ordinance (Cap 344). As regards the liability for breaches of these Ordinances, Suffiad J said such breaches did not give rise to any cause of action as the legislature did not intend to either protect any specific class of the public or give members of that class a right of action for such breaches. Similarly, in *Mohammed Yaqub Khan v Attorney General*,³⁶ the appellant, a member of the Kowloon Club, made allegations by telephone to the Independent Commission Against Corruption ('ICAC') of corruption against the manager and officers and members of the committee of the Club. The telephone call was tape recorded by the ICAC. The officers of the ICAC played the tape to persons against whom the allegations had been made. The appellant was subsequently expelled from the Club. He sued the

33 Note, however, that in those days insurance cover was not so widespread. Cf *Dawson & Co v Bingley Urban District Council* [1911] 2 KB 149.

34 [1923] 2 KB 832, CA (Eng).

35 [2001] 3 HKLRD L9, CFI.

36 [1987] HKLR 145, CA.

the margins calls and the false representation afterwards were acts of a completely different character from X's normal duty.¹¹²

FALSE REPRESENTATION AS TO CREDIT OF ANOTHER

32.49 In the United Kingdom, until 1828, if a person gave a false guarantee by word of mouth, he could not be sued in contract because the Statute of Frauds provided that no guarantee could be enforced unless it was in writing but he could be sued in tort for deceit if it was established that the defendant had made a false representation as to the creditworthiness of a third party. Such attempts to evade the Statute of Frauds resulted in the passing of Lord Tenterden's Act 1828 (an amendment to the Statute of Frauds) which in section 6 provides that a fraudulent misrepresentation as to 'the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods' is not actionable unless it is made in writing and signed by the defendant. Hong Kong adopted the United Kingdom provision under section 13 of the Law Amendment and Reform (Consolidation) Ordinance (Cap 23). Consequently, in Hong Kong too, no action can be brought in deceit unless the false representation or assurance is made in writing, signed by the defendant.¹¹³

112 *Armagas Ltd v Mundogas SA* [1986] 2 WLR 1063 followed. See also *Petrotrade Inc & Ors v Smith & Ors* [2000] 1 Lloyd's Rep 486.

113 *Choy v Nissei Sangyo America Ltd* [1991] 2 HKC 173, CA.

CHAPTER 33

Breach of Confidence

*Confidentiality is a virtue of the loyal, as loyalty is the virtue of faithfulness.*¹

INTRODUCTION

33.1 Breach of confidence is a relatively new tort and is still evolving reflecting the changes in society, technology and business practice.² However, betrayal of confidential information or its unauthorised use to the detriment of the person from whom it is acquired has long been treated as a legitimate concern of the courts which, by using their ingenuity, have granted relief to the aggrieved party under familiar non-tort concepts. Thus, in *Albert v Strange*,³ a case decided in the middle of the nineteenth century, the court granted an injunction restraining the defendant from publishing some drawings of the royal couple. The decision of the court was based on the recognition that creators of literary and artistic works had proprietary interests in their creations which merited protection by the law. Bokhary J applied *Albert v Strange*⁴ in *Dr Koo Chih Ling Linda & Anor v Dr Lam Tai Hing*.⁵ In this case, the plaintiffs had prepared a questionnaire to carry out medical research in the causes of lung cancer among non-smoking Chinese women in Hong Kong. The defendant surreptitiously obtained a copy of the plaintiffs' questionnaire and reproduced a substantial part of their questionnaire in a material form, and used the information in the questionnaire for his own purposes. The court said that there

1 Edwin Louis Cole, available at <http://www.brainyquote.com/quotes/quotes/e/edwinlouis360081.html#U5mSgZyqbGt1GBTA.99>.

2 *Douglas v Hello! Ltd* [2001] QB 967, [2001] 2 All ER 289, [2001] 2 WLR 99, CA (Eng) (photographs taken at a private occasion protectable as confidential information).

3 (1849) 2 De G & Sm 652. See also *Li Yau-wai, Eric v Genesis Films Ltd* [1987] HKLR 711, HC.

4 (1849) 2 De G & Sm 652. See also *Li Yau-wai, Eric v Genesis Films Ltd* [1987] HKLR 711, HC.

5 [2000] 1 HKC 193, HC.

was no general rule in law that researchers shared the unpublished fruits of their labour. Considerable judgement, skill and labour had gone into the drawing up of the questionnaire. The plaintiffs had to decide what to ask, how to ask it and what not to ask. Bokhary J held that:

... a man's confidential information is his property. The courts have jurisdiction to protect such property from misuse. Such jurisdiction is not confined to cases in which such information has been imparted in confidence or to cases in which an obligation to keep the same confidential arises under contract. Any use, including self-use by the wrongdoer, following any misappropriation — whether by force, menaces, trickery or stealth — is, in general, misuse which is liable to be restrained or made the subject of an order for damages or an account.⁶

- 33.2 It is clear that the basis of the tort is the existence of an obligation of confidentiality on the part of the defendant towards the plaintiff. As Lord Denning MR said in *Nichrotherm Electrical Co Ltd v Percy*,⁷ liability rests on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it or profit from the wrongful use of publication of it.⁸ He must not make use of it to the prejudice of him who gave it without obtaining⁹ his consent.¹⁰ This general principle may not be enforced if overriding public interest requires disclosure of confidential information.¹¹

6 [2000] 1 HKC 193 at 225, HC. See also *Pollard v Photographic Co* (1888) 40 Ch D 345; and *Argyll v Argyll* [1967] Ch 302, [1965] 1 All ER 611, [1965] 2 WLR 790. An appeal against the decision of the High Court was dismissed by the Court of Appeal in [1993] 2 HKC 1; Penlington JA said (at 14) that even if the material necessary to draft the respondent's questionnaire were in the public domain, as the authors had used skill and produced something novel from that material, the questionnaire was confidential to them.

7 [1956] RPC 272.

8 *Jockey Club v Buffham* [2002] EWHC 1866 (QB), [2003] QB 462.

9 *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, [1988] 3 All ER 545, [1988] 3 WLR 776, HL.

10 *Quaere* whether this tort has its genesis in equity.

11 *Attorney General v Observer Ltd* [1990] 1 AC 109 at 256, [1988] 3 All ER 545, [1988] 3 WLR 776, HL, per Lord Keith: 'it is in the public interest that confidences should be respected.'

INGREDIENTS

Overview

- 33.3 The obligation of confidence arises when a person (confider) entrusts to another (confidant) information of a confidential nature on the understanding that the latter will not disclose such information to a third party or use it to the detriment of the former without his consent or against his wishes, or in circumstances where the confidant is relied on by the confider to keep the confidence¹². A third party who knows that the confidant has disclosed the information to the confider, is also under a duty of confidence to the confider.¹³ There are three ingredients of the tort of breach of confidence.¹⁴ First, the information must be confidential meaning it has yet to be generally accessible by the public. Second, there must be an obligation on the part of the confidant to keep the information confidential. Third, the breach of confidential information must be to the detriment of the confider.¹⁵

Confidentiality of information

- 33.4 The information disclosed must have the necessary quality of confidence. Thus, the information is in the public domain when, for example, the information has been presented in court; there is no question of the information being confidential.¹⁶ Moreover, trivial information cannot be considered to have the quality of confidentiality.¹⁷ The test seems to be whether the disclosure of the information in question will be detrimental to the interests of the plaintiff including, for example, family peace and stability. The court must, however, strike a balance between two sets of

12 See *Street on Tort* (11th edn, 2003) pp 170–172.

13 *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, [1988] 3 All ER 545, [1988] 3 WLR 776, HL; *Nichrotherm Electrical Co Ltd v Percy* [1956] RPC 272; *Printers & Furnishers Ltd v Holloway* [1965] RPC 239; cf *Allilueva v Flegon* (*Times*, 18 August 1967).

14 *Li Yau-Wai, Eric v Genesis Films Ltd* [1987] HKLR 771, HC; *Coco v AN Clark (Engineer) Ltd* [1969] RPC 41 applied.

15 *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, [2004] 2 All ER 995.

16 *Allied Group Ltd & Anor v Secretary for Justice & Anor* [2003] HKEC 1221, CA.

17 *Coco v AN Clark (Engineer) Ltd* [1969] RPC 41; *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, [1988] 3 All ER 545, [1988] 3 WLR 776, HL; *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, [2004] 2 All ER 995.

competing interests, namely, the private interest of the plaintiff and the interest of the public in the freedom of speech.¹⁸ In *Nam Tai Electronics Inc v Pricewaterhouse Coopers*,¹⁹ Waung J observed that it was possible to regard the true state of the law as giving no absolute right to confidence or to its enforcement. In so doing, he referred to Scott J's dictum in *Webster v James Chapman & Co.*²⁰

The court must balance on the one hand the legitimate interests of the plaintiff in seeking to keep the confidential information suppressed and on the other hand the legitimate interests of the defendant in seeking to make use of the information. There is never any question of an absolute right to have the confidential information protected. The protection is on the consequence of the balance to which I have referred.²¹

33.5 In *Campbell v MGN Ltd*,²² concerning a photograph of a celebrity attending a meeting for her drug addiction which was taken in a public place, the court balanced the claimant's interest in keeping the information private against the countervailing interest of the recipient in publishing it.²³

33.6 A person cannot, however, claim a private right to information where its disclosure is prejudicial to public interest,²⁴ such as information relating to the commission of a criminal offence. However, the information that is sought to be protected must serve a legitimate interest of the public, more substantial and valuable than the appetites of gossipmongers, or the prurient tastes of the corrupt and depraved.²⁵

33.7 For the confider to succeed, it is necessary for him to identify the information which he regarded as confidential and which was disclosed to another person without the confider's consent

18 Freedom of speech, however, is subject to defamation and national security: see *Re X* [1975] Fam 47.

19 [2005] 2 HKLRD 461 at 476.

20 [1989] 3 All ER 939 at 945.

21 Bokhary K, Sarony N and Srivastava DK, *Tort Law and Practice in Hong Kong* (2nd edn, Sweet & Maxwell/Thomson Reuters 2011) p 822.

22 [2004] UKHL 22, [2004] 2 AC 457, [2004] 2 All ER 995, HL.

23 Dugdale A, Clerk J.F. & Lindsell W.H.B., *Clerk & Lindsell on Torts* (19th edn, Sweet & Maxwell 2006) p 1776.

24 See *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, where Lord Greene MR said that the information that was public property or in the public domain could not be classified as confidential.

25 See *infra* under the section on 'Justification'.

or authority.²⁶ This is also essential to determine the limits of the injunction if it is sought to be granted.²⁷

Obligation of confidentiality

33.8 The information must have been communicated in circumstances importing an obligation of confidence. The test is whether a reasonable person standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence.²⁸ A wide range of circumstances may impose such obligation. In this connection, the following may be noted:

(1) Where there is a contractual relationship between the confider and the confidant, for example, there is an employment contract which imposes the obligation of confidence either expressly or by necessary implication.²⁹ The English Court of Appeal in *Campbell v Frisbee*³⁰ raised the possibility that an obligation of confidence could survive the repudiation of the contract.³¹

(2) Where there exists an intimate relationship between the confider and the confidant.³² In *Yeko Trading Ltd v Chow Sai Cheong Tony*,³³ it was held that whether the information is within the scope of protection is not purely a matter of law; it is to be decided according to the facts of the case. Factors such as the nature of the employment, the nature of the information, the relative ease of isolation of the confidential information from the common stock of information, which the employee may use, will be taken

26 *Inline Logistics Ltd v UCL Logistics Ltd* [2002] RPC 611.

27 *Li Yau-Wai, Eric v Genesis Films Ltd* [1987] HKLR 771, HC.

28 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41. See Bokhary K, Sarony N and Srivastava DK, *Tort Law and Practice in Hong Kong* (2nd edn, Sweet & Maxwell/Thomson Reuters 2011) p 824.

29 *Electro CAD Australia Pty Ltd & Ors v Mejati RCS Sdn Bhd & Ors* [1999] FSR 291; *Campbell v Frisbee* [2002] EMLR 656; *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96.

30 [2002] EMLR 656.

31 Dugdale A, Clerk J.F. & Lindsell W.H.B., *Clerk & Lindsell on Torts* (19th edn, Sweet & Maxwell 2006) p 1776.

32 *AvB plc* [2002] QB 195, where the court recognised the extensive range of relationships beyond marriage that now exist; Dugdale A, Clerk J.F. & Lindsell W.H.B., *Clerk & Lindsell on Torts* (19th edn, Sweet & Maxwell 2006) p 1785.

33 [2000] 2 HKC 612.

into consideration.³⁴ For example, when a spouse confides in the other spouse his or her past sexual experiences or present likes, dislikes or preferences in sex life.³⁵ Where such information is confided by one friend in another in privacy,³⁶ an obligation of confidence arises.

- (3) Where there exists a relationship of trade or business, for example, where an employer who is engaged in competitive trade or business confides trade secrets such as those relating to marketing strategies or manufacturing processes or technologies in his employees, either voluntarily or because it is necessary in the nature of his trade or business to make such information available to them; such circumstances import an obligation of confidence binding on the confidant of the information.³⁷
- (4) Where there exists a fiduciary relationship between the confider and the confidant, for example, director-corporation,³⁸ doctor-patient,³⁹ priest-penitent and solicitor and client.⁴⁰
- (5) Where there exists a business or professional relationship, for example, banker and customer relationships, and relationships between an insurance company and its

34 Bokhary K, Sarony N and Srivastava DK, *Tort Law and Practice in Hong Kong* (2nd edn, Sweet & Maxwell/Thomson Reuters 2011) p 831.

35 *Argyll v Argyll* [1967] Ch 302, [1965] 1 All ER 611, [1965] 2 WLR 796; *Barymore v News Group Newspapers Ltd* [1997] FSR 600.

36 *Stephens v Avery & Ors* [1988] Ch 449, [1988] 2 All ER 477, [1988] 2 WLR 1280; *A v B Plc* [2002] EWCA Civ 337, [2003] QB 195, [2002] 2 All ER 545 (a footballer's transient relationship with two women); *Campbell v Frisbee* [2002] EMLR 31 (a supermodel's sexual relations with an actor).

37 *Lion Laboratories Ltd v Evans* [1985] QB 526, [1984] 2 All ER 417; *Inline Logistics Ltd v UCL Logistics Ltd* [2002] RPC 32, CA (Eng); *Electro CAD Australia Pty Ltd v Mejati RCS Sdn Bhd* [1999] FSR 291 at 306, where it was held that 'it is the practice of the industry that such information be kept confidential and as such it is my finding that it was implied that such information was conveyed upon an obligation of confidence.'

38 *Electro CAD Australia Pty Ltd v Mejati RCS Sdn Bhd* [1999] FSR 291.

39 *W v Egdell* [1990] Ch 359, [1989] 1 All ER 1089, [1989] 2 WLR 689; *Venables v News Group Newspaper Ltd* [2001] EMLR 255; *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, [2004] 2 All ER 995.

40 *A v B* [2000] EMLR 1007; *Deacons v White & Case LLP* [2003] 3 HKLRD. The communication between a solicitor and his client will be protected by professional privilege: *R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563, [2002] 3 All ER 1. See Bokhary K, Sarony N and Srivastava DK, *Tort Law and Practice in Hong Kong* (2nd edn, Sweet & Maxwell/Thomson Reuters 2011) p 827.

clients.⁴¹ In *Re G (A Minor)*⁴² it was held that information obtained by social workers in the course of their duties was also confidential. In the case of banker and customer relationships, banks are obliged to maintain the confidentiality of their customers' accounts, transaction information and other information relating to customers acquired by them.⁴³ The duty of confidentiality may be expressly incorporated into bank and customer contracts. In the absence of such express terms, such a duty may be implied.⁴⁴ Referring to insurance contracts between the defendant's insurance company and its clients, the plaintiff (also an insurance company), Deputy Judge To in *AXA China Region Insurance Co Ltd & Anor v Pacific Century Insurance Co Ltd & Ors*⁴⁵ observed that being in the insurance business, the defendant must appreciate the confidential nature of the client data, particularly the policy details and that it mattered not whether the defendant or its clerical staff processing the applications knew the information. The client data which the plaintiff sought to protect had the necessary quality of confidence about them. The defendant must know that the information was confidential and that it must have been imparted in circumstances importing an obligation of confidence. The Duty of disclosure is, however, not absolute.⁴⁶ It may be founded under compulsion of law, where there is a duty to the public to disclose, where the interests of the bank require disclosure or where the disclosure is made with the express of implied consent of the customer.⁴⁷

41 *AXA China Region Insurance Co Ltd & Anor v Pacific Century Insurance Co Ltd & Ors* [2003] 3 HKC 1, CFI. Cf *Oriental Machinery Ltd v Choi Kin On* [2003] 3 HKC 398, CFI.

42 [1996] 2 All ER 65, [1996] 1 WLR 1407, CA (Eng) (social worker disclosure).

43 *XAG v A Bank* [1983] 2 All ER 464.

44 D Roebuck, DK Srivastava and HM Zafrullah, *Banking Law in Hong Kong* (Butterworths Asia, 1995) p 656. There are four exceptions to the duty of confidentiality set out in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, CA (Eng).

45 [2003] 3 HKC 1, CFI.

46 See Bokhary K, Sarony N and Srivastava DK, *Tort Law and Practice in Hong Kong* (2nd edn, Sweet & Maxwell/Thomson Reuters 2011) p 827.

47 *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461.