the review of this accident it is clear Shineford had some sort of duty towards all potential user of the lift to maintain it to a certain standard, a duty that arises in law of tort.

1.08 From the review of this incident, we can conclude that the law of torts is a rather fascinating subject with which we can relate to, due to our everyday encounters with some of its factual aspects. Other incidents that may fall under the law of tort are noisy neighbours, medical negligence or road accidents. This chapter aims to recognise the range of activities to which the law of tort applies to and in the process, this chapter will distinguish the law of tort from other branches of the law. Another aspect of this law is a facet of the rule of law[13] which has many corollaries such as equality before the law, law and order, predictable and efficient rulings, and protection of human rights and people's interests. These ends are distinct, likely to meet different types of resistance and support within countries undergoing reform, and are often in tension with one another in practice.[14] The law of torts as such assists in preserving fundamental principles of law that govern the way in which power is authoritatively exercised. The law of torts demands that if there is no legal justification for governmental or civilian actions, the affected person can apply to a court for compensation. It is fundamental that under tort law all plaintiffs, regardless of race, rank, politics or religion, are subject to the same rules. Any decision that is made without providing the litigating party an opportunity to be heard would not be legally valid.

1.09 The law of torts, or simply torts, covers a significant facet of civil law in common law countries and regions, including Hong Kong. In tort litigation, the plaintiff must prove that they are harmed by the tortfeasor's negligence, trespass, nuisance or statutory tort. They also need to prove a causal connection between the injuries sustained and the tortfeasor's behavior. In deciding tortious claims, judges always make choices, sometimes tragic and keeping in view policy considerations, to uphold justice, fairness and rule of law. This introductory chapter will explain

13 See generally, F N Lone (2013), 'Rule of Law: Tort Law Perspective, in G. Wang & Y. Fan (eds) *The Rule of Law: A Comparative Perspective'*, City University of Hong Kong Press, Hong Kong.

14 Rachel Kleinfeld-Belton, 'Competing Definitions of the Rule of Law'(Carnegie Endowment for International Peace, 2005) <www.carnegieendowment.org/files/CP55.Belton.FINAL.pdf>

the importance of the law of torts, its origins, applicability and the types of interests it protects.

1.10 The purpose of tort law is to ensure that the plaintiff is compensated for harm that was wrongfully sustained.[15] The plaintiff is allowed recourse to the justice system against a person who has committed a wrong against him, whether it is deliberate, as in trespass, or unintentional, as in negligence. Hence, the law of torts supports the idea of the rule of law as a notion of fairness, equality and access to justice. Torts law protects the interests of the plaintiff and guarantees social security where the plaintiff's rights are invaded by the wrongful behaviour of the defendant. Thus, it protects integrity of land, goods and person, as well as the reputation and economic rights of the plaintiff. Finally, the law of torts functions as a social deterrent in the form of compensation that is payable by the wrongdoer.

1.11 It is to be reminded that tort law is a body of rules created by judges, now supplemented by legislation where required. The victim's loss is ascribed to the wrongful behaviour of the tortfeasor if that fell below the reasonable man's standards as laid down in *Donoghue*.[16] Lord Atkin in this case introduced an entirely new concept, the neighbour principle, into the law of negligence: 'Love thy neighbour' is not to be interpreted with reference to a moral code, but according to certain restrictions given by his Lordship. In law, 'neighbour' refers to 'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'.[17] This principle in itself is a reincarnation of justice, fairness and rule of law in the area of negligence of law of torts.

1.12 This Chapter will review the intersection of tort law and the concept of rule of law in England and its relations with Hong Kong. Through judge-made tort law, legitimate processes of fairness in deciding claims are applied at an individual level, adding to societal morality. Judges perform a balancing act and make choices where policy matters are involved, making sure that rules are enforceable; this will be demonstrated throughout

15 Tony Weir, *A Casebook on Tort* (10th edn, Sweet and Maxwell 2004) 1.

16 *Donoghue v Stevenson* [1932] AC 562 (HL).

17 Ibid at 580.

courts) and the PRC national law as listed in Annex III to the Basic Law.[131]

1.134 The origin of Hong Kong Tort law is related to the Application of English Law Ordinance, 1966 (Cap 88) and other Ordinances such as the Bill of Rights Ordinance (Cap 383) and laws such as Basic Law. In Hong Kong tort law was introduced initially by the Supreme Court Ordinance (No 15 of 1844). Later a modified reception of the English Law, applied by the Application of English Law Ordinance 1966 (Cap 88) ('AELO'), was applied and under Section 3 (1) it stated: 'The common law and the rules of equity shall be in force in Hong Kong…so far as they are applicable to the circumstances of Hong Kong or its inhabitants'.

1.135 With the PRC's resumption of sovereignty over Hong Kong on 1 July 1997, the Application of English Law Ordinance (Cap 88) is not adopted as the Laws of the HKSAR. This was decided by the Standing Committee of the National People's Congress on the Treatment of Laws Previously in Force in Hong Kong. This decision was in accordance with Article 160 of the Basic Law of HKSAR and the People's Republic of China, which is quoted below:

> Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law. Documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognised and protected by the Hong Kong Special Administrative Region, provided that they do not contravene this Law.

131 Johannes Chan, C.L. Lim, *Law of the Hong Kong Constitution* (Sweet & Maxwell, 2011) pp. 46–47

1.136 Further the Basic Law of the HKSAR 1997 replaced the Royal Orders on Hong Kong. This is clearly shown by Article 5 and 8 of the Basic Law.

> **Article 5**
>
> **The socialist system and policies shall not be practiced in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.**
>
> **Article 8**
>
> **The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.**

1.137 Hence it is clear that the English common law continues to apply in Hong Kong and new Hong Kong case law as developed in the local courts add to the sources of tort law. Also, various statutes and ordinances have in certain areas supplemented, modified or displaced the common law. We will discuss them at appropriate places in this book.

1.138 Finally the Hong Kong Reunification Ordinance (Cap 2601) confirms the operation of common law and maintenance of laws previously in force in Hong Kong after the hand over:

> **Section 5**
>
> **All laws previously in force shall be construed with such modifications, adaptations, limitations and exceptions as may be necessary so as not to contravene the Basic Law and to bring them into conformity with the status of Hong Kong as a Special Administrative Region of the People's Republic of China.**
>
> **Section 7(1)**
>
> **The laws previously in force in Hong Kong i.e. the common law, rules of equity, ordinances, subsidiary legislations and customary law, which have been adopted as the laws of the HKSAR, shall continue to apply.**

to recover full damages sought simply because the defendant may have been successful in raising a valid legal defence. For instance, the defendant may rely on contributory negligence, where a plaintiff cannot recover full damages sought from the defendant, if his/her own negligence contributed in any way to the harm that he suffered. The defendant may also rely on the assumption of risk: that if a person voluntarily encounters a known danger and decides to accept the risk of that danger, he or she may be prevented from recovering for related negligent acts by a defendant.

D. Special duty problems within negligence: omissions, psychiatric injury, economic loss and unborn children

2.17 It is important to note that a higher threshold is required for claims in relation to omission, psychiatric injury, economic loss and injury to unborn children. One of the key criteria, as will be detailed in the following chapters, is that the focus is primarily on proximity when determining the duty of care in the first place.

(a) Omission

2.18 Regarding omissions, does one's failure to act render him liable under the tort of negligence? Generally, tort law does not attach liability onto someone who fails to act. This may be attributed to the doctrine of individualism that personal liberty would be affronted when one is required to act for another's interest[24]. However, exceptions to this general position can be found in special relationships, for examples, parent and child, employer and employee, doctor and patient etc.

2.19 In a recent case *Lou Siu Ping & Anor v Lam Tse Man & Anor*[25], the court held that the second defendant, a solicitor, owed a duty of care to his clients (the plaintiffs). The plaintiffs had bought a house which was, unknown to them, subject to a mortgage. The house was later foreclosed pursuant to the mortgage. In failing to advise the plaintiffs of the risks of a property transaction and

24 Rick Glofcheski, *Tort Law in Hong Kong* (2nd edn, Sweet & Maxwell) 200.
25 [2012] 4 HKC 394.

to explain comprehensively any legal documents, the second defendant was held to be in breach of his duty of care.

> …If, as Woo suggests in his Defence, there are questions of the agreement made between Lam and the plaintiffs for sale and purchase of the Property being illegal or unenforceable, then it is incumbent on Woo as the plaintiffs' solicitor to warn them of such risks. There is no evidence, in the Acknowledgment or elsewhere, of Woo having done so…The duty to advise and warn the client of any specific risks inherent in the transaction and the duty to explain any legal document fully and adequately to the client are all part of the specific duties which a lawyer owes to his client. There is no evidence of Woo explaining the nature and effect of Lam's Will and the Power of Attorney to the plaintiffs. Nor is there evidence of his giving any advice to the plaintiffs on the risks of their accepting the Will, Power of Attorney and Guarantee in lieu of an agreement for sale and purchase or an assignment, that such documents do not confer any immediate interests in the Property on the plaintiffs, and on the risks of further dealings made by Lam in the Property. It is reasonably foreseeable that the plaintiffs would suffer damage as a result of their not being made aware of these inherent risks…
>
> I consider that Woo was negligent in failing to exercise due skill and care in advising the plaintiffs on their intended purchase of the Property. His failure also constitutes breach of the duties he owed to the plaintiffs under his contract to act on the plaintiffs' behalf in relation to the dealings and transactions in the Property…[26]

(b) Psychiatric injury

2.20 Turning to the issue of psychiatric injury, the imposition of duty of care is quite complicated. Common law recognises two types of victims in a claim for psychiatric injury: (1) the primary victim and (2) the secondary victim. The plaintiff will be able to claim as a primary victim, if the physical injury that the plaintiff suffered also resulted in psychiatric injury. The plaintiff will then have to prove that such psychiatric injury is reasonably foreseeable injury as a potential result arising from the defendant's action. Only upon satisfying the abovementioned criteria will the court be prepared to regard the resultant psychiatric injury as reasonably foreseeable.[27] For primary victims who do not sustain

26 Ibid, paras 62, 64 & 66. See also 10-133 to 10-136 in *Clerk and Lindsell on Torts*, 20th Ed.
27 *Simmons v British Steel plc (Scotland)* [2004] ICR 585 (HL).

– falling overboard with the possible result of drowning or being crushed by a mooring or moored ferry.

38. A reasonable employer must, in the circumstances, realise that there would be a risk of the employees tripping over the raised metal plate with serious consequences and must therefore exercise greater care. DBTS should have taken steps to eliminate such risk.

39. We are persuaded that the judge was wrong in his conclusion that DBTS had not been negligent. We are of the view that DBTS had failed to take reasonable precautions for the safety of its employees and had failed to provide and maintain a safe place of work for them.

The appeal was allowed and the plaintiff was held to have contributed negligence at the value of 20%.

A. Introduction

3.01 This chapter will explain a fundamental concept to determine the breach of duty in tort law; the reasonable person test which is also known as the test of reasonableness. The relationship between the duty of care and the standard of care will also be explained in this chapter. Normally, the court will use an objective test to determine whether breach of duty has occurred. The court is essentially trying to ascertain whether or not the defendant's conduct has fallen below the standard of care which the circumstances demand. The application of the objective test will hence vary from different defendants. This variation can be seen in the defendant acting in emergency situations, during sports, the age of the defendant and the incapacity of the defendant. In such cases additional special rules will apply. In fact, there are a number of factors to consider when determining standard of care under the reasonable person test which include the foreseeability of harm, the seriousness of the harm or magnitude of risk, the object to be achieved, the practicability of precautions and finally, the standard of care adopted by common practice of professionals. Last but not least, the rule of *res ipsa loquitur* will be discussed which encompasses circumstances when an accident could not have occurred without negligence. For this doctrine to apply, the accident must be the sort of an unknown cause which would not have occurred without the negligence of the defendant who had control of the object or activity causing the accident.

B. The relationship between the duty of care and the standard of care of the reasonable person

3.02 The concepts of duty of care (as discussed in Chapter 2), and the standard of care raise the questions of whether the defendant was under any duty (the existence of certain relationships between the parties imposing an obligation on one of them in relation to the other) and if so, whether he observed the 'standard of care' (the level of performance for meeting such an obligation) that was required of him in the circumstances.[1] In other words, the 'standard of care' required is generally seen as what would be reasonable in the circumstances and takes into consideration the conduct of the defendant, and not the relationship between the parties.[2]

3.03 In *Caritas-Hong Kong v Yu Kwong Man*,[3] an accident was caused by the defendant's negligence when the defendant failed to provide a reasonably secure installation of a wall-mounted cabinet (which housed the mattress board of the folded bed). This resulted in the folding bed falling and injuring the plaintiff's employee, a nurse in the hostel owned by the plaintiff. The question relevant to the standard of care was therefore not the position of the defendant as designer of the furniture, but whether installing one (and not two) screws in the folding bed was insufficient to provide a reasonably secured installation.

3.04 The starting point in finding out whether there is a breach of duty or not is to determine whether the defendant has fallen below the 'standard of care' that was expected of the 'reasonable person' in the circumstances of the case. This is called a 'reasonable person test' which determines whether the defendant has breached his duty of care. Hence two significant points must be taken into account while determining the standard of a reasonable person: 1) the standard is objective and 2) the standard may not always reflect 'average' behaviour.[4] It should be borne in mind that in certain cases meeting an 'average' standard may not be conclusive

1 See *Salmond & Heuston on the Law of Torts* (21st edn, Sweet and Maxwell, 1996), p 196.
2 See *Clerk & Lindsell on Torts*, (20th edn, Sweet & Maxwell Ltd, 2010), p 8-137.
3 [2009] HKCU 641(unreported, DCCJ 2441/2007, 5 May 2009) (DC).
4 Paula Giliker and Silas Beckwith, *Tort* (4th ed, Sweet & Maxwell, 2011) at 138.

defendants had fired at the plaintiff since both were aiming in the plaintiff's direction. In these situations, the 'but for' test failed to identify which of the particular defendants had been the cause of the plaintiff's injury. This is an example of concurrent causes (material causes taking place more or less simultaneously) involving 'indeterminate cause'. In indeterminate cause situations more than one defendant is involved but there is only one 'operative cause' of the plaintiff's injury.

4.19 The second problem arises in situations where there is more than one cause of plaintiff's injury and they operate at the same time and each cause is capable of producing the full extent of harm to the plaintiff, e.g. where concurrent or simultaneous causes are involved. Consider this scenario. A passenger is sitting in a car driven by A. The passenger is injured due to an accident caused by both A's negligent driving and the negligence of the driver of the other car B. In applying the 'but for' test, it surely cannot be satisfied by stating that the passenger would not have suffered the injury 'but for' A's negligent driving *and* 'but for' B's negligent driving. In such cases, to avoid any unjust outcomes, the court would probably treat the case as one of cumulative causes and may hold both defendants jointly liable for the full extent of damage caused to the plaintiff.

4.20 Further, another difficult situation arises where the plaintiff had already been suffering from an injury which was later aggravated by the defendant's conduct, i.e. consecutive causes. In *Fitzgerald v Lane*[19], the plaintiff was walking and was hit by the car of the first defendant. He was flung in the air and then hit again by the car of the second defendant. The second defendant had increased the risk of the plaintiff suffering a particular kind of loss. In this scenario the 'but for' test would fail to determine whether the first defendant or the second defendant has materially contributed to the injury of the plaintiff.

4.21 Lastly, a problem arises in situations where there has been an intervening act or event created by a third party, or the plaintiff himself, thus breaking the chain of causation. In other words, situations where an event occurs later which is totally unrelated to the previous negligent act or omission that first gave rise to the plaintiff's loss.

19 [1987] QB 781 (CA).

C. The existence of multiple causes

4.22 It has been established in the previous section that the 'but for' test is insufficient in filtering out a single material or operative cause in cases where there is an existence of multiple causes. When this happens, the courts need to ascertain and decide issues such as how the causes of the injury should be determined, in what ways the tortfeasors should be held liable, and what the burden of proof is for both the plaintiff and the defendant. Factors such as the defendant's material contribution to the injury or the material increase of the risk of the injury will be taken into consideration to find out the operative cause of the plaintiff's injury. Within the broad category of multiple causes, there are subcategories which include simultaneous causes and consecutive causes that we briefly examined above.

(a) Multiple independent causes

4.23 In proving causation, courts take different approaches to determine liability where there are competing acts or conduct involved in the defendant's loss. Depending on the circumstances of the case, the court will use the most appropriate approach.

i. Material contribution to the injury

4.24 In cases where there are two or more causes that contribute to the plaintiff's injury and difficulties arise in the evidential proof, the preliminary approach of the court would be to hold the defendant entirely liable once it has been proved that the defendant's negligence had materially contributed to the plaintiff's injury, despite the fact that the defendant may only have contributed partially to the injury.

4.25 The case that best illustrated this concept would be *Bonnington Castings Ltd v Wardlaw.*[20] In this case, the plaintiff contracted pneumoconiosis, a lung disease, due to a cumulative inhalation of silicon dust after working in dusty conditions for years. It was ascertained that there were two possible sources of dust that contributed to the plaintiff's disease and one of these came from swing grinders, which must be kept free from obstruction by the employer pursuant to Regulation 1 of the Grinding of Metals

20 [1956] AC 613 (HL).

Critical Thinking Exercise:

If the defendant was a learner driver and the plaintiff knew it, would that not be equivalent to running a risk or consenting to it? This is not such an easy question. You may have to take into consideration some of the following factors:

- whether the plaintiff was a professional driving instructor;
- the fact that the defendant's car might not have the necessary equipment for the plaintiff to properly control the car;
- whether the plaintiff was paid to give such driving lesson; and
- whether the defendant was insured, etc.

5.78 Note that especial rules apply in Hong Kong for the protection of passengers of motor vehicles. The Motor Vehicle Insurance (Third Party Risks) Ordinance (Cap 272) makes it obligatory on users of motor vehicles to be insured against third party risks (section 4) and provides that the defence of *volenti non fit injuria* will not be available in certain cases. Keeping in view these sections, it is a public policy to only allow vehicles that have been insured for third party risks on the road. Hence it makes sense to disallow *volenti* which will defeat the purpose of this Ordinance.

Section 4: Obligation on users of motor vehicles to be insured against third party risks

(1) Subject to the provisions of this Ordinance it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Ordinance.

(2)(a) If a person acts in contravention of this section, he shall be liable to a fine of $10000 and to imprisonment for 12 months, and a person convicted of an offence under this section shall (unless the court for special reasons thinks fit to order otherwise) be disqualified from holding or obtaining a licence to drive a motor vehicle for such period as the court may determine being not less than 12 months nor more than 3 years from the date of conviction.

(b) A person disqualified by virtue of a conviction under this section or of an order made thereunder for holding or obtaining a licence shall, for the purposes of the Road Traffic Ordinance (Cap 374), be deemed to be disqualified by virtue of a conviction under the provisions of that Ordinance.

(3) Notwithstanding any enactment prescribing a time within which proceedings may be brought before a court of summary jurisdiction, proceedings for an offence under this section may be brought–

(a) within a period of 6 months from the date of the commission of the alleged offence; or

(b) within a period which exceeds neither 3 months from the date on which it came to the knowledge of the prosecutor that the offence had been committed nor 1 year from the date of the commission of the offence,

whichever period is the longer.

(4) This section shall not apply to–

(a) any motor vehicle which is the property of Her Majesty or the Government upon any occasion upon which such vehicle is being used by a person authorized by Her Majesty or the Government to use the same on such occasion; or

(b) any motor vehicle at any time when it is being driven for police purposes by, or under the direction of, any police officer; or

(ba) any motor vehicle at any time when it is being driven by a public officer–

(i) in connection with a driving or instructor's test conducted by him under the Road Traffic Ordinance (Cap 374);

(ii) for the purpose of carrying out any examination, inspection, weighing or testing of that vehicle required under that Ordinance; or

(iii) in the course of its removal from a road tunnel to which the Road Tunnels (Government) Ordinance (Cap 368) applies; or

(iv) in the course of its removal from a restricted road, or any place on a restricted road or a parking place or car park, in an estate managed by the Housing Authority under the Housing Ordinance (Cap 283); or

(bb) any motor vehicle at any time when it is being driven within the Cross-Harbour tunnel area by an authorized officer as defined in the Road Tunnels (Government) Ordinance (Cap 368) in the course of its removal from the tunnel; or

(bc) any motor vehicle at any time when it is being driven by an employee of the MTR Corporation Limited in

7.61 In view of this situation and for the better protection of consumers in Hong Kong, the Law Reform Commission (the 'LRC') has raised three possible directions for reform of product liability:

(1) to extend the law of contract to provide additional rights and remedies to persons who are not parties to the contract;
(2) to change the law of negligence concerning the requirement to prove failure to take reasonable care;
(3) to establish a set of product liability rules **without** reference to any contractual link and any breach of duty of care in addition to the existing contract and negligence law.[69]

7.62 The LRC is of the view that extending contractual remedies to non-contracting parties is too radical a solution and the contract-tort boundary should be preserved.[70] Similarly, it also considers changing the general law of negligence as too sweeping a reform.[71] The LRC prefers to follow the route other jurisdictions have already taken, that is, a separate set of product liability law.

7.63 Having decided that a separate product liability law is preferable, the jurisdiction upon which it should be modelled upon must be decided upon. The LRC has singled out United Kingdom and New Zealand models for reference. Both these statutory schemes will be briefly outlined below.

(a) Consumer Protection Act 1987 (United Kingdom) ('CPA') – Defect approach

7.64 The CPA was modelled on the Product Liability Directive 1985, which employs the defect approach (ie the tort victim is required only to prove the damage, the defect and the causal relationship between defect and damage). Negligence is no longer a relevant consideration in a product liability claim. The comparison between a pre-CPA and a post-CPA judgment can show how the

69 Consultative Paper, The Law Reform Commission of Hong Kong, Product Liability Sub-Committee, Civil Liability for Unsafe Products, January 1997, para 3.6.

70 Consultative Paper, The Law Reform Commission of Hong Kong, Product Liability Sub-Committee, Civil Liability for Unsafe Products, January 1997, para 3.7.

71 Consultative Paper, The Law Reform Commission of Hong Kong, Product Liability Sub-Committee, Civil Liability for Unsafe Products, January 1997, para 3.8.

law has changed since then. In *Daniels and Daniels v R White & Sons Ltd*,[72] in a case with facts similar to *Donoghue v Stevenson*, a couple sued the manufacturers and retailer of a bottle of lemonade containing excessive carbolic acid. While the husband had a contractual relationship with the retailer and could rely on the Sale of Goods Act 1893 to sue, the wife however, could not rely on these and had to count on the law of negligence. In this particular case, the court held that the duty owed by the manufacturers was merely to take reasonable care that no injury would be done to the consumer. Since the manufacturer was under no fault, the court held the manufacturer was not liable but subsequently reversed the law on this issue.

7.65 When the CPA was enacted, Section 3 of the Act stated that defects exist where 'the safety of the product is not such as persons generally are entitled to expect'. To determine whether there is defect in a product, the following factors will be taken into consideration:

(a) the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product;
(b) what might reasonably be expected to be done with or in relation to the product; and
(c) the time when the product was supplied by its producer to another

7.66 The case of *A v National Blood Authority*[73] illustrates the judicial approach post-CPA. This case involved a class action by 100 plaintiffs who suffered an infection of Hepatitis C as a result of infected blood transfusions. The court in rejecting the defence of development risks, confirmed that the CPA no longer requires proof of fault or negligence and the matter in issue is the public's legitimate expectation. Even if the supplier could not have avoided the defect at the time, it is no defence to a CPA claim. Burton J concluded the issue as follows:

> [The products] were not *ipso facto* defective (an expression used from time to time by the claimants) but were defective because I am satisfied that the public at large was entitled to expect that the

72 [1938] 4 All ER 258.
73 [2001] 3 All ER 289.

(a) *Special pre-existing relationship/assumption of responsibility*

9.13 In certain circumstances, the law imposes a duty on the defendant based on the pre-tort relationship that existed between the defendant and claimant whereby the former had assumed responsibility of the latter and look after its life or property. For example, mental institutions have a duty to make sure that their mentally ill inmates will not commit suicide or harm other inmates, escape or harm other people. Similarly, the relevant authorities would be held liable for failure to control children in childcare homes. The same principle applies to relationships, including but not limited to, prison authorities and prisoners, teachers and pupils, employers and employees.

9.14 In *Costello v Chief Constable of Northumbria Police*,[9] the plaintiff, was a woman police constable serving in the Northumbria Police. She was attacked and injured by a woman prisoner in a cell at a police station. At the time a police inspector, B, was standing nearby but he did not come to the plaintiff's help when she was attacked. The plaintiff brought an action for damages against the chief constable. The trial judge found that B was in breach of his duty under both common law and that there had been good reason for him to help the plaintiff when she had been attacked. On appeal, the courts, held the defendant liable since if a police officer has assumed a responsibility to a member of the public or towards a colleague where failure to do so would expose the persons or officer to unnecessary risk of injury, that police officer should have a duty in law to help the persons. The court used the following analogy to differentiate between situations where liability in tort arises and situations where no general duty of care is owed:

> For public policy reasons, the police are under no general duty of care to members of the public for their activities in the investigation and suppression of crime. But this is not an absolute blanket immunity and circumstances may exceptionally arise when the police assume a responsibility, giving rise to a duty of care to a particular member of the public. The public policy consideration which prevailed in *Hill*'s case[10] may not always be the only relevant public policy consideration. Neither the police nor other public rescue services

9 [1999] 1 All ER 550 (CA).
10 *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238.

> are under any general obligation, giving rise to a duty of care, to respond to emergency calls, nor, if they do respond, are they to be held liable for want of care in any attempt to prevent crime or effect a rescue. But if their own positive negligent intervention directly causes injury which would not otherwise have occurred or if it exacerbates injury or damage, there may be liability…If a police officer tries to protect a member of the public from attack but fails to prevent injury to the member of the public, there should in my view generally be no liability in tort on the police officer for public policy reasons. This is analogous to the law relating to the fire services and quite close factually to *Alexandrou v Oxford*.[11] If a police officer tries to protect a fellow officer from attack but fails to prevent injury to the fellow officer, there should in my view generally be no liability in tort. The relationship between the two police officers is arguably closer than the relationship between the police officer and the member of the public, but the public policy considerations are essentially the same and are compelling…But in this case, Insp Bell acknowledged his police duty to help the plaintiff. Yet he did not, on the extraordinary facts found by the judge, even try to do so. In my judgment, his acknowledged breach of police duty should also incrementally be seen as a breach of a legal duty of care. The duty is a duty to comply with a specific or acknowledged police duty where failure to do so will expose a fellow officer to unnecessary risk of injury.[12]

9.15 Likewise in *Reeves v Metropolitan Commissioner of Police*,[13] the deceased was held in a cell at a police station under the custody of the defendant's officers. The officers were aware of the risk that the deceased may commit suicide but did not take any further action since upon his arrival at the police station, a doctor who examined him stated that the deceased showed no evidence of psychiatric disorder or clinical depression. The deceased made use of a hatch on his cell door which had been negligently left open, and hanged himself. The plaintiff, as administratrix of the estate of the deceased, brought an action against the defendant for negligence. The trial judge found for the defendants in reliance upon the defence of *novus actus interveniens* because the deceased was of sound mind in conducting a deliberate act. However, on appeal to the House of Lords, the defendant was held liable based on the grounds that there was a duty of care owed to the deceased irrespective of his state of mind, and that

11 [1993] 4 All ER 328.
12 [1999] 1 All ER 550 at 563 and 564.
13 [2000] 1 AC 360 (HL).

consequential upon physical damage) and, on the other hand, economic loss which is not consequential upon physical damage, commonly known as pure economic loss. The law of contract provides one, and perhaps the main, cause of action for claims of pure economic loss. The torts commonly referred to as the economic torts (such as conspiracy and interference with contractual relations) require greater culpability than negligence, and they provide other causes of action for claims of pure economic loss. The tort of wrongful interference with goods provides another cause of action by which pure economic loss may be recoverable. None of these causes of action are relied on in this case. As Lord Oliver said in the context of the law of negligence in *Murphy v Brentwood DC* [1991] 1 AC 398, 487:

> "The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not. If it is to be categorised as wrongful it is necessary to find some factor beyond the mere occurrence of the loss and the fact that its occurrence could be foreseen [emphasis added]. Thus the categorisation of damage as economic serves at least the useful purpose of indicating that something more is required"

56. This passage is cited by the editors of *Clerk & Lindsell on Torts* 19th ed, at para 1-33. The Defendants invited the court to adopt as the law the next sentence but one in that paragraph: "Physical damage, in the context of Lord Oliver's dictum, means actual tangible harm to the fabric of the property, or to the land itself, caused by a factor external to the property".

57. That sentence is to be read in its context, which was the damage alleged in the Murphy case itself (which concerned a house with defective foundations). That is clear from the next sentence, which refers to safety, when plainly there can be damage to property which does not affect safety: "Defects in the property which simply render it less valuable, affect quality, but which do not affect safety, do not constitute physical damage".

...

66. In *Muirhead v Industrial Tank Specialities Ltd* [1986] 1 QB 507, the plaintiff reared lobsters in tanks into which seawater was pumped for the purpose of oxygenation. The whole purpose of the pumps was to preserve the health of the lobsters. Due to the negligence of the third defendant, the pumps were cut off and the lobsters died from lack of oxygen. Robert Goff LJ held that the killing of the lobsters was physical damage: p 532–533.

...

74. The Claimants submit that this analysis fails to address the particular features of animal and vegetable produce that distinguish it from many types of inorganic matter. Buyers will commonly be unwilling to take

organic produce which is beyond or below a certain stage of natural development. Meat products are commonly required to have a limited range of ratios of fat to lean. As the Defendants noted in their written argument, larger carcasses are hard to handle at abattoir and have higher fat content. So too, fruit, vegetables and flowers are commonly required by buyers to be at no more than a given stage of their natural processes of ripening or maturing. The environments in which animal and vegetable produce is grown and transported (including ships, trucks and warehouses) are commonly subject to cooling and other controls of air quality to ensure the required condition at the expected time of sale. Failure of the pumps (as in the *Muirhead* case) may result in death (which was there held to be physical damage), but it may also result in accelerated growth which is either impossible or expensive to reverse. Clearly, the breaking of a leg of sheep, the skin of a potato, or the stem of a flower, is physical damage. If the produce is too fat (or thin), or too ripe, as a result, for example, of the failure of a ventilation pump, or subject to delay, caused by breach of duty of care, then a court could conclude that that was as much the result of an external factor (in the sense meant in the passage from *Clerk & Lindsell*), as would the death of the produce. If a relevant duty of care is breached, and it results in the produce passing the stage of its natural development at which it can be marketed, then I consider that there is a real prospect of a court accepting that as physical damage. In the present case, the prospects of success of such an argument may depend upon more detailed information as to the precise losses and their causes that are not available at this stage of the proceedings.

...

84. Subject to the observations on the loss of condition claims in para 74 above, I conclude that all the damage claimed by some of the Claimants, and much of the damage claimed by the others, is pure economic loss. I therefore turn to the question whether the Claimants can recover damages for pure economic loss.

THE EXCLUSIONARY RULE

85. The Defendants submit that there is a rule, sometimes referred to as the exclusionary rule (*Clerk & Lindsell on Torts* 19th ed para 8-115), that there can be no recovery in any of the three torts in respect of loss resulting from damage which is done to property which is not the property of the claimant, but of a third party with whom the claimant is in contractual relations.

...

112. The Defendants submit that the scope of the duty in this case is restricted in accordance with the exclusionary rule, discussed above, including the principles that there are excluded from the scope of the duty both pure economic loss and indirect physical injury. The reasons

into consideration while identifying the employer-employee relationship. However the task of identifying an employer could be particularly daunting for courts where there is more than one employer of an employee who may exercise control over him or where employees are recruited without a clear indication as to their original employer. For example, on construction sites where an employee may seem to take instructions or to be paid by more than one employer or an outsider. A good example of this situation is represented by *Chan Sik Pan & Another v Wylam's Services Ltd & Others*.[24]

Case Study 2:

Chan Sik Pan & Another v Wylam's Services Ltd & Others [2001] 1 HKLRD 687

In this case, Chan (the plaintiff) was a fire installation technician working on a site. He was injured when he lost his balance and fell from a platform with no guard rails while using a defective pair of chain pliers. The main contractor for the renovation work was OSL International Company, who had sub-contracted the electrical work to Carrier Ltd. Carrier Ltd further subcontracted the fire installation work to Wylam's Services Ltd (the first defendant). Wylam then subcontracted the work to Leung Kwok-Chau (second defendant), who again sub-contracted the work to Yu Chi-Kong (third defendant). The plaintiff was asked to work on the site by a man named Tong. In this case, only the first defendant was covered by insurance whereas the subcontractors were not. Furthermore, in the Employee's Compensation Ordinance claim, the first defendant filled in the required forms as the employer of the plaintiff.

At first instance, Deputy Judge Li found that the first defendant was solely liable as employer and contractor for failing to provide guard rails on the working platform, and hence a safe system of work. The claims against the second and third defendants were discharged. The third defendant then entered into and paid compensation to the plaintiff under two compensation agreements.

However, on appeal the Court of Appeal overruled the judge's findings. It was found that overwhelming evidence showed that the third defendant was in fact the real employer of the plaintiff. Furthermore, it was also found that the plaintiff was fully aware that

24 [2000] 1 HKLRD 687, [2000] HKCFI 1035.

work had been sub-contracted out by the first defendant. The fact that the third defendant labelled itself as the employer in the Employee's Compensation Ordinance forms does not change the situation; and the fact that the first defendant was covered by insurance whereas the second and third defendants were not was only one of the factors to be considered.

The matter was taken to the Court of Final Appeal, on the basis that the third defendant had not been given an opportunity to be heard at first instance. The CFA held that there was no sufficient evidence from the trial judge or the Court of Appeal to rule on the matter of who was the employer. A retrial was ordered.

Finally, on retrial, it was confirmed that the third defendant was the employer of the plaintiff. Suffiad J. held that:

87. From all the evidence I find the following facts:

(1) There was a subcontract between the first defendant and the second defendant whereby the second defendant was subcontracted the wet part of the fire installation works for the project at Windsor House sometime in March or April 1992.

(2) The second defendant further sub-subcontracted the labour, tools and small metal part of his subcontract in the project to the third defendant. As such it was left to the third defendant solely to decide on the number of workers to engage to perform the works.

(3) A special arrangement was agreed to by all concerned to increase the day workers to about 30 and for night work to be carried out in order to hurry up the works to meet the deadline in October. The special arrangement did not alter the underlying relationship between all three defendants in the project.

(4) The third defendant recruited and hired the plaintiff (with the assistance of Tong Hung and Ng Chi Hung) as one of the additional worker in respect of the special arrangement to hurry up the works in mid August 1992.

(5) Whilst the first and second defendants were present on site either through representatives (in the case of the first defendant) or in person (as in the case of the second defendant) to supervise the quality and progress of the works, the supervision and instruction of each of the worker including the plaintiff remained in the domain of the third defendant solely. The right to hire and fire workers remained solely the responsibility of the third defendant.

(6) All the tools including the tools for the additional workers during the special arrangement were provided ultimately at the expense of the 3rd defendant.

(c) Abatement

15.93 Alternatively, the plaintiff may also make recourse to abatement or self-help which is not encouraged by the courts. As such the courts rarely allow it. Abatement refers to a situation where the plaintiff himself tries to abate nuisance by taking reasonable steps to remove the nuisance. This is an extra-judicial remedy, which is not favoured by the courts. It can only be favoured in circumstances where the plaintiff is in an exceptional situation and is facing an imminent threat which then must be abated causing little damage to the plaintiff and the defendant such as cutting an overhanging branch which could cause damage. In *Burton v Winters*,[107] the court held that:

> …Ever since the assize of nuisance became available, the courts have confined the remedy by way of self-redress to simple cases such as an overhanging branch, or an encroaching root, which would not justify the expense of legal proceedings, and urgent cases which require an immediate remedy. Thus, it was Bracton's view that where there is resort to self-redress, the remedy should be taken without delay. In 3 Bl Com (17th edn, 1830) p 5 we find:
>
> > 'And the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy: and cannot wait for the slow progress of the ordinary forms of justice.'
>
> The modern textbooks, both here and in other common law jurisdictions, follow the same line (see *Salmond and Heuston on the Law of Torts* (20th edn, 1992) p 58[illegible]; *Clerk and Lindsell on Torts* (16th edn, 1989) p 364, Fleming, *The Law of Torts* (7th edn, 1987) p 415 and *Prosser and Keeton on the Law of Torts* (5th edn, 1984) p 641). In *Prosser and Keeton* we find:
>
> > 'Consequently the privilege [of abatement] must be exercised within a reasonable time after knowledge of the nuisance is acquired or should have been acquired by the person entitled to abate; if there has been sufficient delay to allow a resort to legal process, the reason for the privilege fails, and the privilege with it.'
>
> The authority cited for this proposition is *Moffett v Brewer* (1948) Iowa Rep (1 Greene) 348 at 350, where Greene J said:

107 [1993] 3 All ER 847 (CA).

> 'This summary method of redressing a grievance, by the act of an injured party, should be regarded with great jealousy, and authorised only in cases of particular emergency, requiring a more speedy remedy than can be had by the ordinary proceedings at law.'

Applying this stream of authority to the facts of the present case, it is obvious that it is now far too late for the plaintiff to have her remedy by way of abatement. The garage wall was built in 1975. Not only was there ample time for the plaintiff to 'wait for the slow progress of the ordinary forms of justice'; she actually did so.

But it is not only a question of delay. There is modern House of Lords authority for the proposition that the law does not favour the remedy of abatement (see *Lagan Navigation Co v Lambeg Bleaching Dyeing and Finishing Co Ltd* [1927] AC 226 at 244, [1926] All ER Rep 230 at 238 per Lord Atkinson). In my opinion, this never was an appropriate case for self-redress, even if the plaintiff had acted promptly. There was no emergency. There were difficult questions of law and fact to be considered and the remedy by way of self-redress, if it had resulted in the demolition of the garage wall, would have been out of all proportion to the damage suffered by the plaintiff.

But even if there had ever been a right of self-redress, it ceased when Judge Main refused to grant a mandatory injunction. We are now in a position to answer the question left open by Chitty J in *Lane v Capsey* [1891] 3 Ch 411. Self-redress is a summary remedy, which is justified only in clear and simple cases, or in an emergency. Where a plaintiff has applied for a mandatory injunction and failed, the sole justification for a summary remedy has gone. The court has decided the very point in issue. This is so whether the complaint lies in trespass or nuisance. In the present case, the court has decided that the plaintiff is not entitled to have the wall on her side of the boundary removed. It follows that she has no right to remove it herself…[108]

K. Appropriate defences

(a) Statutory authority

15.94 As the name suggests for the defence of statutory authority, the interference that the plaintiff complains about could be authorised either expressly or tacitly by the statute. In *Lam Yuk*

108 [1993] 3 All ER 847 at 851-52 (CA).

18.14 A conditional threat such as 'If you don't leave I will kill you' could also constitute an assault as decided by the New Zealand court in *Police v Greaves*.[19] In this case the police arrived at a crime scene when a distressed woman called for assistance due to the defendant's abuse. The defendant pointed a carving knife towards police and it was seen as assault as he had means to carry out his conditional threat.

(b) Battery

18.15 A battery is the actual intentional, direct and immediate infliction of unlawful force on another person. The requirements hence are that the force applied should be intentional, the force must be direct and immediate and that contact must be unlawful and it need not be 'hostile'. The contact need not be flesh to flesh; any physical contact with the plaintiff in excess of that generally accepted in daily life would constitute battery. The only difference would be in the amount of damages claimable and it will vary from nominal and aggravated damages to exemplary damages depending on the severity of the defendant's actions and its flagrance.

i. Application of force must be intentional

18.16 In any event, when speaking of intention the defendant does not need to foresee or intend the consequences. As long as intention for the unlawful act is proved the defendant is liable even if he injures a different person under the concept of 'transferred intention'.

18.17 In certain instances if a person acted unintentionally but at some point intended to apply force he is liable. This is demonstrated by *Fagan v Metropolitan Police Commissioner*[20] where the defendant stopped his car on a policeman's foot. At this stage it was said no battery was committed. However, he deliberately failed to move until the police officer several times shouted 'get off his foot'. At this stage, this was seen as battery. James J said that the failure to move was not '…a mere omission or inactivity. There was an act constituting battery…'.

19 [1964] NZLR 295.
20 [1969] 1 QB 439.

18.18 Although the list is not exhaustive, acts that might constitute battery include striking the plaintiff with or without an object; unlawful handcuffing;[21] unlawfully forcing another's head to hit an object;[22] pushing the plaintiff against a wall; seizing another's coat lapels; kissing a newly arrived colleague without consent, etc.

ii. Direct and immediate force

18.19 Battery is said to happen when affirmative acts result in actual physical bodily contact with the plaintiff. As such, battery would include kicking, punching, etc. In the case of *William Alan Terence Crawley v Attorney General*,[23] the court held that handcuffing an arrested person in circumstances in which there was no need for doing so amounts to assault and battery. Likewise in *DPP v K*[24] the force used was seen as direct when a schoolboy aged 15, poured some sulphuric acid in a hand dryer which he stole from chemistry lesson. Later a pupil used the hand dryer resulting in sulphuric acid blown on his face leaving permanent marks. The court held that the defendant had full knowledge that he had created a danger and had taken a risk of injuring others. It does not matter if he panicked and intended to remove the danger by removing sulphuric acid.

iii. The contact must be unlawful but not hostile

18.20 The requirement of use of immediate force may pose some problems. It is important to distinguish between actionable battery and ordinary social contact, otherwise courts will find themselves vexed in litigation. Over the years, courts have found it difficult to come to conclusive rulings and have mentioned different legal criteria to resolve this issue. The problem remained unsettled until the case of *Collins v Wilcock*.[25] In this case, two police officers suspected that the defendant was a prostitute. One of the police officers requested for the defendant to get into the police car but the defendant refused to do so and walked away. The policewoman cautioned the defendant in accordance with the approved police procedure, but the defendant still refused

21 *William Alan Terence Crawley v Attorney General* [1987] 3 HKLR 379.
22 *Cheung Yee Mong Edmond v So Kwok Yan Bernard* [1996] 2 HKC 360.
23 [1987] 3 HKLR 379 (HC).
24 [1990] 1 W.L.R 1067.
25 [1983] 3 All ER 374.

22.09 On the other hand, liability for negligence is imposed for unintentional acts or omissions that cause foreseeable loss to the plaintiff. When speaking of the imposition of liability for pure economic loss, which is a special category of negligence and has been discussed in Chapter 11 of this book, the justification is that the defendant should be subject to an 'indeterminate liability', which is caused by negligent activity (such as drafting a will) or statement. Therefore, liability for negligence such as in pure economic loss could make the defendant liable indeterminately and unintentionally because the aim is to achieve a consistent and dependable outcome. In other words there has remained an opposition not to allow indeterminate liability and affect the contractual obligations of parties.[19] However, economic torts are very specific to protect the plaintiff from intentional unlawful interferences or misrepresentation.[20]

22.10 Furthermore the parties to disputes in negligence and economic torts are treated on a completely different basis. For negligence, protecting a plaintiff is based on the neighbour principle which encompasses those who are so closely and directly harmed. For economic torts, protection is extended to the plaintiffs from any unfair trading practice. As early as the 1920s, the English courts rejected the idea of a general protection of economic interest. Atkin LJ in *Ware and de Freville Ltd v Motor Trade Association*[21] provided a clear explanation for it:

> … the right of the individual to carry on his trade or profession or execute his own activities, whatever they may be, without interruption, so long as he refrains from committing tort or crime, affords an unsatisfactory basis for determining what is actionable, inasmuch as such right is conditioned by precisely similar right in the rest of his fellow men. Such co-existing rights do in a world of competition necessarily impinge upon one another… The true question is, was the power interrupted by an act which the law deems wrongful?[22]

22.11 Economic torts are very special and serve the purpose of protecting the plaintiffs against unfair competition because in common law there are no general torts[23] that can serve this

19 *Ultramares Corp v Touche* (1931) 255 NY 170 at 179, as per Justice Cardozo.
20 See Chapter 11 of this book on economic torts.
21 [1921] 3 KB 40 (CA).
22 [1921] 3 KB 40 (CA) at 79.
23 J Murphy, C Witting and J Goudkamp, *Street on Torts* (13th edn, OUP 2012) ch 12.

specific need. This was made clear by the *OBG* case where it was held that:

> On the wider interpretation of "unlawful means" the rationale is that by this tort the law seeks to curb clearly excessive conduct. The law seeks to provide a remedy for intentional economic harm caused by unacceptable means. The law regards all unlawful means as unacceptable in this context.[24]

22.12 Likewise for conspiracy, the rationale is to avoid gaining an unfair and illicit advantage over its rival which is again to avoid unfair competition.[25] All in all, economic torts set limits to competition and maintain it at a healthy level. The meaning of competition is wider and includes trade competitions as in *Lumley v Gye* (above) and immigration frauds of a commercial nature as in *Pido v Compass Technology Co Ltd.*[26]

22.13 In the case of *Murphy v Brentwood DC,*[27] which is on the point of pure economic loss, the court made it clear that causing pure economic loss does not require a justification, unlike infliction of physical injury to the person or property. As stated by Lord Oliver:

> The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not. If it is to be categorised as wrongful it is necessary to find some factor beyond the mere occurrence of the loss and the fact that its occurrence could be foreseen.

22.14 The courts have realised that as a special case of negligence, pure economic loss could interfere with the role of economic torts to maintain fair competition practices. For this reason, in the past, no liability was even imposed for negligent interference with contract or with trade. The present status is that economic torts play a significant role in maintaining commercial links and profitability between the plaintiff and (potential) customers or consumers.[28]

22.15 That being said, the scope of economic torts itself, as stated by the editors of *Clerk & Lindsell on Torts* that the general patterns

24 *OBG Ltd v Allan* [2007] UKHL 21; [2008] 1 AC 1 para [153] (HL).
25 At para [160] (HL).
26 [2010] 2 HKLRD 537 (CA).
27 [1991] 1 AC 398 (HL) at p 487.
28 H Carty, *An Analysis of the Economic Torts* (2nd edn, OUP 2010) 2.

its active utilisation in the course of business and promotion of its services through a domain name and website bearing its name and also having received multiple industry awards for excellence. Moreover, given the prima facie distinctiveness of the word 'Menfond', there was a reasonable probability of deception arising from its use by the defendants and causing misrepresentation to the public.

In the proving of actual damage, the courts followed the decision held in *Bulmer (HP) Ltd v J Bollinger SA* [1978] RPC 79 per Buckley LJ:

> It is well settled that the plaintiff in a passing off action does not have to prove that he has actually suffered damage by loss of business or in any other way. A probability of damage is enough, but actual or probable damage must be damage to him in his trade or business, that is to say, damage to the goodwill in respect of that trade or business.

The second defendant argued that it was only a mere payment collection agent and was not competing with the plaintiff, but the court did not entertain such a defence since 'there would be no need for it to advertise itself at all'. In fact even though the second defendant's assertion was true, there was still a probability of loss to the plaintiff. The court held at para 93:

> '[I]f customers approach the 2nd Defendant thinking that it is the Plaintiff and the 2nd Defendant turns them away saying that it does not provide digital animation and CGI services, their business could be lost to the Plaintiff.

Thus, the courts held the defendants liable for passing off, by the use of 'Menfond' in its name and the display of its name and contact details on the website, and the making of a representation that it is the plaintiff or is associated with the plaintiff which is in fact false.

A. Introduction

26.01 The tort of passing off is of great significance in Hong Kong due to cheaper fake goods infiltrating Hong Kong's market. Hong Kong's standing as a world class commercial centre can be affected if fake goods remain at large. Essentially, passing off is concerned with unfair trading. In a literal sense, passing off is where the defendant passes on his own goods as if they were goods or services of the plaintiff. For example, when someone sells fake Gucci or Prada bags to consumers representing them as real Gucci or Prada bags, it will necessarily damage or injure the goodwill and reputation of Gucci or Prada's business.

26.02 The tort of passing off, being a special case of misrepresentation is a significant common law tool in the fight against unfair trading. Passing off is said to be committed by the defendant when he represents his goods in such a manner as to mislead the public to believe that goods offered are goods of the plaintiff. This is often a case of intentional misrepresentation but fraud is not a necessary element. Besides, the mere possibility that the act would cause damage to the plaintiff's business would be sufficient in a claim of passing off. The plaintiff can claim damages and bring an action against the defendant in order to protect the goodwill of his business.

Case Study 2:

The Chamber of Hong Kong Computer Industry Company Limited v Hong Kong Computer Association Limited [2010] HKCU 2028 (unreported, HCA 621/2010, 21 September 2010)

The plaintiff together with the Shamshuipo District Council had been organising a 'Large-Scale Computer Exhibition' ('LSCE') since 2002 in Shamshuipo District. The plaintiff claims that their LSCE which is called 'Hong Kong Computer Festival' as its trade name has established its own goodwill and reputation. Further, as a result of media reporting, it has acquired a reputation with a number of names including 'Shamshuipo Computer Festival'.

The defendant, Hong Kong Computer Association Ltd organised a LSCE called 'Shamshuipo Computer Malls Computer Festival' at four computer shopping malls in Shamshuipo just three days before the plaintiff's LSCE which was called 'Hong Kong Computer Festival 2009 IT Show' at Cheung Sha Wan Playground. The plaintiff brought proceedings against the defendant for passing off its LSCE as that of the plaintiff's.

The major issue was whether the plaintiff had acquired a goodwill and reputation in the name of 'Hong Kong Computer Festival' to such an extent that anyone using these few words in any combination would be guilty of passing off its own name as that of the plaintiff's. That is, has the name of 'Hong Kong Computer Festival' become so distinctive to the public that the get-up is recognised by the public as being that of the plaintiff's services?

Tak Securities Ltd & Anor,[43] the defendant was held vicariously liable for the fraudulent acts of its agent, Miss Chan. The court reaffirmed Lord Keith's allegation in *Armagas* that:

> the essential feature for creating liability in the employer is that the party contracting with the fraudulent servant should have altered his position to his detriment in reliance on the belief that the servant's activities were within his authority, or, to put it another way, were part of his job.[44]

27.36 Based on the evidence produced, there was actual or ostensible authority conferred on Miss Chan to conduct the business of an account executive and settlement clerk as an everyday transaction, which led the plaintiff to change her position and trust Miss Chan with her money. Miss Chan committed the fraud in the course of business which she was authorised to conduct or held out as authorised to transact on behalf of her principal. Accordingly the defendant was liable for Miss Chan's acts.

Case Study 3:

Wocom Commodities Ltd v Texuna International Ltd [1986] HKC 392 (CA)

Mr Agarwal, the director of the plaintiff company, assigned Mr Saxena, the dealers' representative for the defendant company, to buy and sell commodities, commodities futures or options on margin on behalf of the plaintiff's account. Mr Saxena then carried out speculative dealings to the plaintiff's account, none of which were authorised by Mr Agarwal. Due to strong opposition demonstrated by Mr Agarwal against the unauthorised speculative dealings, both parties reached an agreement that all the dealings prior to 13 October, 1982 would be transferred back into Mr Agarwal's personal account except one dealing involving Japanese Yen. In order to purchase several raw materials from Japan, Mr Agarwal instructed the defendant to purchase a total of ¥500m for delivery to the plaintiff between December 1982 and March 1983. Because of the fluctuations in the prices of Japanese Yen, the defendant needed to make margin calls in order to secure their position. These calls were made to no one but Mr Saxena, who failed to answer the call. As a result, the Yen positions were closed out with a loss of

43 [2006] 4 HKLRD 525, [2006] HKCU 1894 (unreported, DCCJ 1437/2004, 15 November 2006).

44 [1986] 1 AC 717 (HL) at 781.

US$140,900. When Mr Agarwal became aware of the loss, Mr Saxena lied to him about the close-out and said that the position had already been rectified by buying back of a similar quantity of Yen. As there was no further action taken by Mr Saxena after that, Mr Agarwal complained to the defendant, who completely ignored Mr Agarwal's request. Thus the plaintiff brought a claim against the defendant for breach of contract and tort of deceit. The trial judge found in favour of the plaintiff and award them damages in the sum of US$348,886.79 together with interest and costs. The defendant appealed to the Court of Appeal.

It was held, allowing the appeal, that:

(1) the question was whether the circumstances under which X made the fraudulent misrepresentation which caused the loss to the plaintiff were such that it was just for the defendant, as X's employer, to bear the loss. Such circumstances existed if an employer had induced the injured party to believe that its servant was acting in the lawful course of the employer's business. They did not exist where such belief was brought about through misguided reliance on the servant, when the servant was not authorised to do what he purported to do, when what he purported to do did not fall within the class of acts that an employee in his position was usually authorised to do and when the employer had done nothing to represent that he was so authorised;

(2) in the circumstances, failure to pass on margin calls was clearly outside the authority of a commodities agent. Moreover, it was not within X's authority to inflict the buying back of the yen with the prior loss on his principal. Therefore, X was not actually or expressly authorised to do what he purported to do;

(3) the defendant had made no representations to the plaintiff that X had authority to do any acts beyond the usual course of dealing. Furthermore, X's failure to convey the margin calls and the false representations were acts of a completely different character to his normal duties and were not such as to fix his principal with liability. Accordingly, X did not have ostensible or implied authority either;

(4) if the defendant were liable to the plaintiff in the tort of deceit, the award for damages should be one which would put the plaintiff in the position he would have been in if the representation had not been made and not into the position he would have been in if the representation had been true, as would be applicable to damages for breach of conditions or warranties in a contract. The measure of damages claimed and awarded was therefore wrong.

Baroness Hale:

> The tort of defamation exists to protect, not the person or the pocket, but the reputation of the person defamed…
>
> My Lords, in my view such a requirement would achieve a proper balance between the right of a company to protect its reputation and the right of the press and public to be critical of it. These days, the dividing line between governmental and non-governmental organisations is increasingly difficult to draw. The power wielded by the major multi-national corporations is enormous and growing. The freedom to criticise them may be at least as important in a democratic society as the freedom to criticise the government…
>
> For these short reasons, I would have allowed the appeal against the award to the Company in any event. But as a majority of your Lordships take a different view, and the appeals against each claimant are in any event to be allowed on the Reynolds point, there is no need to say more.[27]

30.27 This case confirms that a corporate entity has the right to sue in defamation.

(b) Groups (class defamation)

30.28 The general rule is that class libel or defamation of a class is not recognised as defamation of any particular individual belonging to that class. Therefore with broad statements such as 'all bankers commit fraud' which, includes a number of plaintiffs and has no reference to any one of them, no cause of action will lie in defamation. In the case of *Knupffer v London Express Newspaper Ltd,*[28] the defendant newspaper published an article about the Young Russian Party alleging that the plaintiff's political party was unpatriotic and willing to work with Hitler in order to advance fascism in Russia. The plaintiff was the head of a political group of 24 members which composed of exiled Russians. The party also was an international one with not easily identifiable members and right-thinking members of society would not have thought that the statement referred to the plaintiff. Lord Atkin stated:

> the reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement.[29]

27 [2007] 1 AC 359 (HL) at paras 152, 158 and 159.
28 [1944] AC 116 (HL).

30.29 It was held by the courts that there is no rule against liability in defamation as long as it is proven that the defamatory statement is referring to members of a specific group. The proper test from this case's perspective is: was a statement made without naming a specific person and was it possible for a reasonable person who was acquainted with the plaintiff to automatically know that the defamatory statement was referring to them? In this case, the plaintiff failed this test as they failed to prove that the article was referring to the plaintiff directly. The action therefore failed.

30.30 Where a defamatory statement is targeted on a class of persons but the construction of the words or the circumstances surrounding publication are such that it indicates that a particular plaintiff or plaintiffs are referred to, there could be a cause of action. This is illustrated by *Charles Sin Cho Chiu v Tin Tin Publication Development Ltd & Louie King-Bun*[30] where the defendants' newspaper reported that a 'delegation of elders of the securities industry' including the plaintiff (name mentioned) had gone to Beijing. There were about 20 members in the said delegation. The newspaper mentioned that this was the first time that the plaintiff had been invited to Beijing to reflect opinions since 'Seven Honorable Men' including the plaintiff had been charged with corruption offences, though the plaintiff had been acquitted and discharged. The article included the remark that 'most of the members of the delegation are 'tainted elements'.

30.31 The court held that in the circumstances of this case it was not difficult for the ordinary reader to come to the conclusion that the plaintiff is referred to in the article as one of the members who were referred to as tainted elements. As a result of the statement, the courts reasoned that any reasonable reader who takes an impressionistic approach would draw inferences from the literal words to conclude that the plaintiff should have been convicted of corruption. As a result, the court found in favour of the plaintiff and held that the defendant had published defaming materials.

29 [1944] AC 116 (HL) at 122.
30 [2001] HKCU 1196 (unreported, HCA 6662/1997, 3 December 2001).

at least in general terms the facts on which it is based. Lord Phillips held that:

> …The comment must, however, identify at least in general terms what it is that has led the commentator to make the comment, so that the reader can understand what the comment is about and the commentator can, if challenged, explain by giving particulars of the subject matter of his comment why he expressed the views that he did. A fair balance must be stuck between allowing a critic the freedom to express himself as he will and requiring him to identify to his readers why it is that he is making the criticism.[39]

31.33 Prior to the judgment in *Spiller v Joseph*, the courts had adopted a more restrictive approach which can be demonstrated by the case of *Telnikoff v Matusevitch*[40] where the House of Lords held that the context in which the defamatory words were published should not be understood by relying on the portions of the original article which the defendant had not quoted in his letter in response to an article in the Daily Telegraph, and calling the plaintiff racist and anti-Semitic. In other words, before *Spiller v Joseph* it meant that the defendant should make it explicitly or implicitly clear as to what statement of facts his or her comment relates to. The judge will then try to consider the contextual connection between the statement of facts and the comment in question.[41] However the correct approach is whether a reasonable ordinary reader would regard the statement in question as a comment or a statement of fact.

31.34 In cases where the comment is not identifiable, it could sometimes be construed as a statement of fact. However, in such cases, the defence of fair comment will not succeed. This is illustrated in *China Bocom Insurance Company Limited v Next Magazine Publishing Limited & Anor*,[42] where Judge Jack Wong of the District Court refused to accept the defence of fair comment and held that:

> …Defendants 3rd statement was a comment. It was the strongest statement made in the Article. Could the conduct of the Plaintiff be described as "despicable", "disgraceful" or "dishonorable" in all

39 [2010] UKSC 53 (SC) at para 104 per Lord Phillips.
40 [1992] 2 AC 343 (HL).
41 See Yuen J in *Oriental Daily Publisher Ltd v Ming Pao Holdings Ltd* [1999] 4 HKC 354 (CFI) at 367.
42 [2010] HKCU 2647 (unreported, DCCJ 6640/2004, 6 December 2010).

the circumstances as a concluding remark? It suffices for me to say that… I do not consider that such choice of words was fair at all.[43]

Critical Thinking Exercise:

Good and Bad are rivals. Good publishes an article stating that Bad (i) indecently assaulted X and (ii) is a disgrace to society. Is this comment protected and which part of the statement is a fact and which part is a comment?

(c) *Comments must be honest*

31.35 The third and final criterion for the defence of fair comment is that, to be successful in raising such a defence, the comment must be an honest opinion which is based on a true statement of facts. In short, it may mean that the defence of fair comment will be unsuccessful if the same was motivated by malice or suggests malicious innuendos. So a comment could be said to be honest if the maker did not exaggerated it nor was prejudiced. In the case of *Merivale v Carson*,[44] which involved the review of a play which used an innuendo to imply that the play was immoral, it was noted by Lord Esher that:

> Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work… mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this – would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticized?[45]

31.36 In the case of *Reynolds v Times Newspaper Ltd*,[46] the court held that the 'test is of honesty'[47] of the comment or opinion, Such test is not to be confused with whether a fair minded person based on the true facts could form that same opinion. Lord Nicholls made this clearer in the following statement:

43 Ibid at para 23.
44 (1887) 20 QBD 275 (CA).
45 (1887) 20 QBD 275 (CA) at 280–81.
46 [2001] 2 AC 127 (HL). Also see *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 (Denning MR).
47 V. Bermingham & C Brennan, *Tort Law Directions* (OUP 2008) 293.