(7) A result similar to that in *Rothwell* was reached by the English Court of Appeal in *Greenway v Johnson Matthey Plc* [2016] 1 WLR 4487. The mere risk of allergy caused by the employer negligently exposing employees to platinum salts was not actionable damage. But the issue is not clear of subtleties. *Rothwell* was distinguished by the English Court of Appeal in *Carder v University of Exeter* [2017] ICR 392. Carder died of asbestosis, a dose-related disease, caused by exposure to asbestos at his various places of work. The defendant's contribution of 2.3% of the total exposure to asbestos was considered sufficiently material. In the court's view, it was enough that the plaintiff was "materially worse off".

CHAPTER 3

BREACH OF DUTY

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As indicated in Chapter 1, a person is liable in tort only if he was at fault in causing the injury or damage. The fault concept permeates the various aspects of the tort of negligence, but finds its clearest expression in the issue of breach of duty, concerned as it is with the nature and quality of the defendant's conduct.

Breach of duty in negligence is a largely factual issue, decided on a case-by-case basis having regard to only a few broad legal principles. Hence, this is a largely stable area of negligence law, not prone to significant change through the development of common law principles in the case law. However, the years since the previous edition of this book did witness one significant change, introduced by the United Kingdom Supreme Court, pertaining to the approach to be followed by medical practitioners in their explanation to patients of proposed medical treatment, the risks involved, and possible alternative treatments. This change in the UK law is likely to be followed in Hong Kong, indeed, has already been applied by a lower court in Hong Kong, and is considered at 3.2.6.1 below.

The question of the defendant's breach of duty presumes the existence of a known standard against which the defendant's conduct can be judged. A defendant is in breach of duty only if his conduct falls below the required standard. The court must develop some idea of the appropriate standard that, if not reached by the defendant, gives rise to negligence liability.

General legal principles broadly define the standard that applies to the defendant. However, the question of whether or not the defendant attained that standard in a particular case is largely a question of fact to be determined on a case-by-case basis.

According to accepted tort law doctrine, the standard of care is defined in terms of *reasonableness*. A defendant will be found to be in breach of his duty of care only if his conduct can be said to have fallen below that which was reasonable to expect of him in all of the circumstances. This is explained by judges as being an objective standard. However, in the majority of cases, especially those involving familiar, commonplace activities, what is reasonable is determined by the judge according to his own observations and experiences in life. As Lord Macmillan acknowledged in *Glasgow Corp v Muir* [1943] AC 448 (3.1 below) "What to one judge may seem far-fetched may seem to another both natural and probable". Therefore, one should not be surprised to encounter different outcomes in cases with apparently similar facts.

In yet other cases, especially those involving a defendant's conscious risk-taking, and assuming the availability of relevant information, the judge may engage in a more explicit analysis of what constitutes reasonable care. An economic approach to the standard of reasonable care is an approach that has come to be accepted in Hong Kong in recent years, and is evident from a number of the cases cited and discussed below. Moreover, proof of a common practice, normally within a profession or industry, will also be relevant in assisting in the determination of what is reasonable in Hong Kong.

One of the most important sources of evidence of the reasonableness standard is found in legislation. Hong Kong, like other developed jurisdictions, has a wealth of primary and secondary legislation (ordinances and regulations) that sets standards (and imposes penalties in the event of a failure to meet those standards) for a range of activities, in particular industrial and occupational safety and the use of motor vehicles. In Hong Kong, the standards established by legislation will be accepted by the judge as strong evidence of what is reasonable.

It is probably fair to say that Hong Kong is a risk-prone society. Its crowded conditions and hurried pace are conducive to its citizens taking chances in activities as simple as driving a car or crossing the street. A culture of risk-taking has evolved, in which even the government appears to have turned a blind eye in the under-regulated laissez-faire environment of Hong Kong. Characteristic examples include the ubiquitous elderly scavenger pushing an overloaded handcart down a busy thoroughfare, the motorcyclist weaving through traffic while ignoring lane markings and traffic rules in order to reach the head of the queue, and the ad hoc and illegal pedestrianisation of roadways as a result of overflow from crowded pavements in some of the busier parts of Hong Kong. All of these are common occurrences in Hong Kong, and all of them create great risks to the persons involved and to others, risks that must be obvious to them. Such risk-taking is not as common in other developed societies. A question naturally arises: if a majority of people are willing to take the risk, does it become reasonable to do so?

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3.1 THE STANDARD OF THE REASONABLE PERSON

In almost all cases, the standard against which the defendant is judged is the standard of the reasonable person.

Glasgow Corp v Muir
[1943] AC 448

The appellant, a municipal corporation, owned and operated a mansion house for the selling and serving of teas and sweets. The mansion house was located in a public park under the appellant's management. The appellant's manager, Mrs Alexander, permitted a church picnic party of 30–40 people to take shelter from the weather in the mansion house and to use the tea-room for the purpose of taking tea. Two men from the picnic party carried a large, heavy tea urn into the mansion house. While proceeding past the counter where children (about 12 in number) were buying sweets and ices, one of the men suddenly lost his grip and dropped the urn, causing some of the children (the respondents) to be scalded. The children sued the appellant, alleging that Mrs Alexander was negligent in allowing the urn to be carried into the tea-room. The children succeeded at trial and before the Court of Appeal, and so the appellant corporation appealed to the House of Lords.

Lord Macmillan…

> My Lords, the degree of care for the safety of others which the law requires human beings to observe in the conduct of their affairs varies according to the circumstances. There is no absolute standard, but it may be said generally that the degree of care required varies directly with the risk involved. Those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life…Legal liability is limited to those consequences of our acts which a reasonable man of ordinary intelligence and experience so acting would have in contemplation…The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension

and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen. Here there is room for diversity of view, as, indeed, is well illustrated in the present case. What to one judge may seem far-fetched may seem to another both natural and probable.

With these considerations in mind I turn to the facts of the occurrence on which your Lordships have to adjudicate…The question, as I see it, is whether Mrs Alexander, when she was asked to allow a tea urn to be brought into the premises under her charge, ought to have had in mind that it would require to be carried through a narrow passage in which there were a number of children and that there would be a risk of the contents of the urn being spilt and scalding some of the children. If, as a reasonable person, she ought to have had these considerations in mind, was it her duty to require that she should be informed of the arrival of the urn, and, before allowing it to be carried through the narrow passage, to clear all the children out of it in case they might be splashed with scalding water? The urn was an ordinary medium-sized cylindrical vessel of about fifteen inches diameter and about sixteen inches in height made of light sheet metal with a fitting lid, which was closed. It had a handle at each side. Its capacity was about nine gallons, but it was only a third or a half full. It was not in itself an inherently dangerous thing and could be carried quite safely and easily by two persons exercising ordinary care. A caterer called as a witness on behalf of the pursuers, who had large experience of the use of such urns, said that he had never had a mishap with an urn while it was being carried. The urn was in charge of two responsible persons, McDonald, the church officer, and the lad, Taylor, who carried it between them. When they entered the passage way they called out to the children there congregated to keep out of the way and the children drew back to let them pass. Taylor, who held the front handle, had safely passed the children, when, for some unexplained reason, McDonald loosened hold of the other handle, the urn tilted over, and some of its contents were spilt, scalding several of the children who were standing by. The urn was not upset, but came to the ground on its base.

In my opinion, Mrs Alexander had no reason to anticipate that such an event would happen as a consequence of granting permission for a tea urn to be carried through the passage way where the children were congregated, and, consequently, there was no duty incumbent on her to take precautions against the occurrence of such an event. I think that she was entitled to assume that the urn would be in charge of responsible persons (as it was) who would have regard for the safety of the children in the passage (as they did have regard), and that the urn would be carried with ordinary care, in which case its transit would occasion no danger to bystanders…The only ground on which the view of the majority of the learned judges of the First Division can be justified is that Mrs Alexander ought to have foreseen that some accidental injury might happen to the children in the passage if she allowed an urn containing hot tea to be carried through the passage, and ought, therefore, to have cleared out the children entirely during its transit, which Lord Moncrieff describes [1942] SC 126, 135 as "the only effective step". With all respect, I think that this would impose on Mrs Alexander a degree of care higher than the law exacts.

Appeal allowed.

By virtue of its general nature, the reasonable person standard is sometimes criticized as being imprecise, providing little guidance to people in their activities, and leaving great scope to judges in determining the outcome of a case.

Note that the standard of the reasonable person ignores what the defendant thought about the risks in question. Indeed, the defendant may have given no thought to the risks, but this is not a relevant consideration. The court is only concerned about how the reasonable person would have acted.

Although the standard of the reasonable person is said to be objective, disregarding the personal characteristics of the defendant, it nonetheless has a subjective aspect in the sense described by Lord Macmillan. The judge must decide whether or not what the defendant did was reasonable *in the circumstances*. And of course, in doing so, the judge must rely largely on his own experiences and observations in life.

Relevant circumstances might include the plaintiff's age, as in *Tse Parc Ki v Atlantic Team Ltd* (DCPI 1981/2006, [2007] HKEC 2224), where the defendant school teacher slammed the door and crushed the finger of the two-year-old plaintiff/pupil; in *Amrol v Rivera* [2008] 4 HKLRD 110, where the defendant failed to control its dog in an open plaza where children, including the four-year-old plaintiff, were playing; and *Leung Sze Nok v Tsuen Wan Properties Ltd* (DCPI 1470/2007, [2010] HKEC 1144) where the nine-year-old plaintiff, instructed to follow closely behind to copy the manoeuvers of her ice-skating coach, was injured by her coach's skate blade. Relevant circumstances also include the plaintiff's build and mobility, as in *Keeling v Hebe Haven Yacht Club Ltd* [2005] 4 HKC 277, where the defendant boat club and its boatman were held liable for the plaintiff's injury when the plaintiff, an elderly lady of medium build who "moved slowly", slipped while attempting to board the defendant's sampan without being offered assistance by the defendant's employees. However, in *Moy Ngain Gyi v Leung Chi Kuen* [2017] 3 HKLRD 782, the plaintiff bus passenger's use of a concessionary octopus card and her "appearance of a lady in her 60s" were not in themselves factors that the bus driver was required to take into account in driving the bus and waiting for the passenger to be seated.

In the context of motor vehicles, relevant circumstances may include adverse weather conditions, proximity to traffic lights and pedestrian crossings, the presence of a minibus slowing down, as in *Cheng Wai Chuen v Tsang Kwai Yan* (HCPI 1409/2003, [2005] HKEC 1762), the presence of parked cars on both sides of the road, as in *Lau Sum Long v Tang Pak Chuen* (DCPI 463/2008, [2008] HKEC 2044), and the possibility of pedestrians emerging from between parked vehicles, as in *Yau Kam Ching v Cheung Shun Kau* (DCPI 522/2012, [2014] HKEC 447) and *Wong Sun Cheong v Choi Chi Kong* (HCPI 1129/2014, [2016] HKEC 1334). In *Lam Chu v Tse Lum Wong* (HCPI 626/2003, [2004] HKEC 1149), the defendant driver was found to be in breach of his duty of care despite driving at a speed beneath the posted speed limit, because the court considered the defendant's speed unreasonable in the circumstances of heavy rain and limited visibility. A driver should also take into account the special circumstances of child pedestrians. In *Lam Chor Mun v Ho Tin Wah* (DCPI 1093/2005, [2007] HKEC 462), where the defendant was found liable in an accident in which the 12-year-old plaintiff was injured, the court cited *Moore v Poyner* [1975] RTR 127 to the effect that a driver must "test his duty of care not by what the plaintiff actually did but by what sort of conduct by any child, at any moment of time, the defendant ought reasonably to have anticipated, and to consider what course of action he would have had to take if he was going to make quite certain that no accident would occur".

The reasonable person is not to be mistaken for the "average person". Although the judge is sure to take into account what most people do, and to that extent, common practice is

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important evidence of what is reasonable, popular habits can sometimes be misleading as an indicator of what is reasonable. As stated by Roberts CJ in *Ho Wing Cheung v Liu Siu Fun* [1980] HKLR 300, a case concerning the use of seat belts in a motor vehicle, in determining the reasonable person standard, "we are not talking about what the average man actually does. We are prepared to accept the submission of counsel that many drivers and passengers in Hong Kong do not fasten seat belts, even when these are fitted in the vehicles in which they are travelling. We are concerned with what, as a matter of prudence, the average man ought to do". Reasonableness is ultimately for the judge to decide, and if the majority of people have developed risky habits, the common practice may be rejected as the reasonable person standard.

Of course, the reasonable person refers to the reasonable person in Hong Kong. The determination of what is reasonable is a question of fact. What is reasonable in Hong Kong may not be so elsewhere, including England—the source of many of the precedents cited by Hong Kong judges. It is a matter of debate as to whether different standards of care prevail between Hong Kong and other common law jurisdictions, but given the vastly different geographic and demographic conditions that exist in Hong Kong, and given the hurried pace for which Hong Kong is famous, it is at least arguable that the reasonable person in Hong Kong will take greater risks than his counterparts elsewhere.

The determination of what is reasonable is made with reference to the state of knowledge at the time the act was committed and not at the time of trial. This point has repeatedly been made in Hong Kong in negligence actions against solicitors. In *Foshan Hua Da Industrial Co v Johnson Stokes & Master* [1999] 1 HKLRD 418, *Whale View Investment Ltd v Kensland Realty Ltd* [2000] 2 HKLRD 261, and *Feerni Development Ltd v Daniel Wong & Partners* [2001] 2 HKLRD 13, all cases in which the plaintiffs alleged solicitors' negligence, the dicta of Megarry J in *Duchess of Argyll v Beuselinck* [1972] 2 Lloyd's Rep 172 was cited:

> In this world there are few things that could not have been better done if done with hindsight. The advantages of hindsight include the benefit of having a sufficient indication of which of the many factors present are important and which are unimportant. But hindsight is no touchstone of negligence.

This principle is often relevant in medical negligence cases where accepted practices may change with advances in research and the development of new techniques (see *Ho Yee Sup v Dr Chan Yuk May* [1991] 1 HKC 499, where the practice of warning of pregnancy risk after a sterilisation operation changed between the time of the operation in 1980 and the trial in 1991).

Moreover, the fact that after the accident, the defendant has taken steps to reduce the risk of further accidents is not treated as evidence of his failure to meet the standard of reasonable care. According to Keith JA in *Wong Wai Ming v Hospital Authority* [2001] 3 HKLRD 209, the installation of protective screens and an emergency button system following the attack on a receptionist nurse in the Hospital Authority's psychiatric clinic was "not to be regarded as an admission by the Authority that it ought to have appreciated at the time of the attack on the plaintiff that precautions needed to be taken".

Because the standard of the reasonable person disregards the defendant's personal characteristics, a defendant may be held at fault for failing to meet a standard that he was simply not capable of achieving. This has the effect of diluting the moral aspect of negligence liability: a defendant may be found at fault even though he has tried hard to be careful. Note the justifications for this position given by Megaw LJ in the case that follows.

Nettleship v Weston
[1971] 2 QB 691

The plaintiff, Nettleship, agreed to act as the driving instructor for his friend, Weston (the defendant). The defendant's husband provided his car for the purposes of the lessons. Before undertaking the lessons, the defendant assured the plaintiff that he would be covered by the insurance policy. The plaintiff was injured when the defendant, probably through her nervousness and inexperience, lost control of the car and crashed into a lamppost. The defendant was convicted of the criminal offence of driving without due care and attention. The plaintiff brought a negligence action against the defendant for personal injury damages. At trial, his action was dismissed, and so he appealed.

Megaw LJ…

> The important question of principle which arises is whether, because of Mr Nettleship's knowledge that Mrs Weston was not an experienced driver, the standard of care which was owed to him by her was lower than would otherwise have been the case.
>
> In *The Insurance Commissioner v Joyce* (1948) 77 CLR 39, 56–60, Dixon J stated persuasively the view that there is, or may be, a "particular relation" between the driver of a vehicle and his passenger resulting in a variation of the standard of duty owed by the driver. He said, at p.56:
>
> > "The case of a passenger in a car differs from that of a pedestrian not in the kind or degree of danger which may come from any want of care or skill in driving but in the fact that the former has come into a more particular relation with the driver of the car. It is because that relation may vary that the standard of duty or of care is not necessarily the same in every case. …the gratuitous passenger may expect prima facie the same care and skill on the part of the driver as is ordinarily demanded in the management of a car. Unusual conditions may exist which are apparent to him or of which he may be informed and they may affect the application of the standard of care that is due. If a man accepts a lift from a car driver whom he knows to have lost a limb or an eye or to be deaf, he cannot complain if he does not exhibit the skill and competence of a driver who suffers from no defect."
>
> He summarised the same principle in these words, at p.59:
>
> > "It appears to me that the circumstances in which the defendant accepts the plaintiff as a passenger and in which the plaintiff accepts the accommodation in the conveyance should determine the measure of duty."
>
> Theoretically, the principle as thus expounded is attractive. But, with very great respect, I venture to think that the theoretical attraction should yield to practical considerations.
>
> As I see it, if this doctrine of varying standards were to be accepted as part of the law on these facts, it could not logically be confined to the duty of care owed by learner drivers. There is no reason in logic why it should not operate in a much wider sphere. The disadvantages of the resulting unpredictability, uncertainty and, indeed,

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impossibility of arriving at fair and consistent decisions outweigh the advantages. The certainty of a general standard is preferable to the vagaries of a fluctuating standard...

Again, if the principle of varying standards is to be accepted, why should it operate, in the field of driving motor vehicles, only up to the stage of the driver qualifying for a full licence? And why should it be limited to the quality of inexperience? If the passenger knows that his driver suffers from some relevant defect, physical or temperamental, which could reasonably be expected to affect the quality of his driving, why should not the same doctrine of varying standards apply? Dixon J thought it should apply. Logically there can be no distinction. If the passenger knows that his driver, though holding a full driving licence, is blind in one eye or has the habit of taking corners too fast, and if an accident happens which is attributable wholly or partly to that physical or that temperamental defect, why should not some lower standard apply, *vis-à-vis* the fully informed passenger, if standards are to vary?

Why should the doctrine, if it be part of the law, be limited to cases involving the driving of motor cars? Suppose that to the knowledge of the patient a young surgeon, whom the patient has chosen to operate on him, has only just qualified. If the operation goes wrong because of the surgeon's inexperience, is there a defence on the basis that the standard of skill and care is lower than the standard of a competent and experienced surgeon? Does the young, newly qualified, solicitor owe a lower standard of skill and care, when the client chooses to instruct him with the knowledge of his inexperience?

...In my judgment, in cases such as the present it is preferable that there should be a reasonably certain and reasonably ascertainable standard of care, even if on occasion that may appear to work hardly against an inexperienced driver, or his insurers. The standard of care required by the law is the standard of the competent and experienced driver: and this is so, as defining the driver's duty towards a passenger who knows of his inexperience, as much as towards a member of the public outside the car; and as much in civil as in criminal proceedings.

It is not a valid argument against such a principle that it attributes tortious liability to one who may not be morally blameworthy. For tortious liability has in many cases ceased to be based on moral blameworthiness. For example, there is no doubt whatever that if Mrs Weston had knocked down a pedestrian on the pavement when the accident occurred, she would have been liable to the pedestrian. Yet so far as any moral blame is concerned, no different considerations would apply in respect of the pedestrian from those which apply in respect of Mr Nettleship.

In criminal law also, the inexperience of the driver is wholly irrelevant. In the phrase commonly used in directions to juries in charges of causing death by dangerous driving, the driver may be guilty even though the jury think that he was "doing his incompetent best": see *R v Evans* [1963] 1 QB 412, 418 and *R v Scammell* (1967) 51 Cr App R 398. There can be no doubt that in criminal law, further, it is no answer to a charge of driving without due care and attention that the driver was inexperienced or lacking in skill: see *McCrone v Riding* [1938] 1 All ER 157.

In the present case, indeed, there was a conviction for that offence.

If the criminal law demands of an inexperienced driver the standard of care and competence of an experienced driver, why should it be wrong or unjust or impolitic for the civil law to require that standard, even *vis-à-vis* an injured passenger who knew of the driver's inexperience?

...I would allow the appeal in full and hold that Mr Nettleship is entitled to the whole of the agreed amount of damages.

Appeal allowed.

Salmon LJ and Lord Denning agreed with Megaw LJ's finding that the defendant was negligent, but concurring with the trial judge, found the plaintiff equally to blame for the accident. Accordingly, the plaintiff's damages award was reduced by 50%.

A similar approach was taken by Mustill LJ in *Wilsher v Essex Area Health Authority* [1987] QB 730, where he rejected the defendant doctor's inexperience as a consideration in determining the standard of care.

Issues and Questions

(1) Who is the reasonable person? Male or female? Young or old? Chinese or expatriate? Christian, Muslim, or agnostic? Well-educated, or a school drop-out? In fact, the reasonable person does not exist, except as constructed in the mind of the judge. This construction is inevitably influenced by the judge's particular experiences in life. Given that judges tend to come from affluent backgrounds, predominantly male, well-educated, with little first-hand experience in most of the risky activities that arise in the cases other than the driving of motor vehicles, are they really capable of formulating the characteristics of the reasonable person? Does the reasonable person test reinforce socially determined conceptions of the "ordinary" or "normal", thus entrenching existing stereotypes and inequalities? For instance, in *McHale v Watson* (1966) 115 CLR 199 (3.2.1 below), is the standard applied by the court a gender-neutral standard? Would the result have been the same if the defendant had been a girl?

(2) Moreover, the concept of the reasonable person may tend to obscure what judges actually do. Since there is in reality no such person, the concept does not actually provide a reference point for judges. It is for the judge to decide according to his own conception of what is reasonable (see Cane (2006) pp.36–39).

(3) The traditional formulation of the reasonable person standard is that of the "reasonable man", as seen for instance in the speeches of the judges in *Glasgow Corp v Muir*. In fact, many references in textbooks, and certainly in most of the cases, are to the reasonable man. Is this a concept that truly takes into account the reasonable woman? Is there a difference? Is the role of women obscured or, to put it differently, are men privileged by the use of this terminology?

(4) How far should the reasonable person standard be influenced by the defendant's personal characteristics? From *Nettleship v Weston*, it seems clear that the defendant's skills and intelligence levels should be ignored, but what about physical characteristics? Megaw LJ cited the example of a driver blind in one eye, and thought that the standard should not be varied. But should the same reasoning apply to pedestrians who cause accidents? Should a blind or lame pedestrian be expected to meet the standard of a fully sighted or able reasonable pedestrian? Can he truly be said to be at fault in failing to do so? See 3.2.2 below.

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(5) In *Nettleship v Weston*, the defendant's husband had made his own car available for the driver training lessons. Before undertaking the lessons the plaintiff inquired about insurance coverage and was assured by the defendant and her husband that the insurance policy in force would cover him in the event of an accident. The fact of the plaintiff's inquiry about insurance coverage proved crucial to the outcome. The court ruled against the defendant's plea of voluntary assumption of risk (see Chapter 6): the plaintiff could not possibly have been willing to accept the risk of accident and waive his rights given his concern that there was an adequate insurance policy in place.

(6) In *Nettleship v Weston*, Megaw LJ cited Australian case law holding that a different standard of care might apply where the passenger accepts a ride knowing of some physical defect of the driver. That case law has since been overruled, and the Australian legal position is now the same as in the UK: see *Imbree v McNeilly* (2008) 236 CLR 510.

(7) Has the widespread use of liability insurance influenced the judicial determination of the standard of care? It has been observed by some commentators that a finding of liability (breach) is more likely if the defendant is known, or certain, to have liability insurance. See for instance the comments of Stone J in *Poon v Kan Wai Yu* [2002] 1 HKLRD 733 (3.2.4 below). For more on this and related questions, see Cane (2006), ch.9, and Lewis (2005).

(8) Certainly the burden on motor vehicle drivers in Hong Kong is a heavy one, whether or not influenced by the insurance factor. The law reports in Hong Kong are awash with cases in which the driver is found liable in circumstances where the pedestrian appears to be the real culprit: see *Lee Hon Cheung v Chan Tang Kai Lan* [1995] 3 HKC 640 where a driver approaching a studded pedestrian crossing was held liable even where the pedestrian was crossing outside, although adjacent to, the pedestrian crossing. Moreover, a driver is not exonerated merely because the pedestrian crosses in disregard of the red light. In such circumstances, a driver is not entitled to observe a lower standard of care, and is not entitled to disregard the presence of pedestrians: *Cheung Bing Kai v Tsui Kam Hung* (HCPI 116/2000, [2001] HKEC 432), *Tang Hoi Ping v Wong Chi Ho* (DCPI 680/2008, [2009] HKEC 472), and *Mak Hoi Chu v Lui Chi Yin* [2011] 5 HKLRD 157 (10.6.2.2 below). In the same vein, in *Li Chu Ying v Ho Cheung Shing* [2000] 4 HKC 250, the court held that a pedestrian could cross a highway wherever he chose to do so, provided that he took reasonable care for his own safety. He was not obliged to cross at a nearby signal-controlled crossing, and was entitled to assume that users of vehicles on the road would drive carefully. A similar judicial attitude is applied to passengers on public transportation. In *Ip Yin Fun v Kowloon Motor Bus Co (1933) Ltd* (HCA 1624/1986, [1987] HKEC 324), where a bus passenger stood up before the bus had come to a stop, and fell and suffered injury when the bus suddenly halted, the driver was found to have been negligent, and the passenger not contributorily negligent. Pedestrianisation of roadways is a common enough occurrence in Hong Kong, but a measure of the court's approach can be seen from the case of *Yeung Yuk Yiu v Cheung Tung Ho* (HCPI 573/2004, [2006] HKLRD (Yrbk) 380), in which a driver was found to be in breach of the duty of care owed

to pedestrians walking on the pavement, one of whom suddenly stepped onto the roadway, into the path of the defendant's approaching car (plaintiff found to be 2/3 contributorily negligent). To similar effect see *Siu Wai Yee v Lau Sin Hang* (HCPI 700/2004, [2005] HKEC 1604), where the plaintiff, pushing a handcart down the roadway and knocked down from behind by the defendant driver, succeeded in her action against the defendant and was found not contributorily negligent for the accident. Surprising as the result may seem, it is largely consistent with the guidance in the Road Users' Code made under s.109 of the Road Traffic Ordinance (Cap.374) (see chapter 2 of the Code).

(9) *Ip Yin Fun v Kowloon Motor Bus Co (1933) Ltd* (above) must now be read against *Moy Ngain Gyi v Leung Chi Kuen* [2017] 3 HKLRD 782, where Judge Andrew Li said, citing English authority, that "as a matter of law, I do not consider that a bus driver owes a duty to wait for all his passengers to find a seat to sit down first before driving off his bus from a bus stop or terminus". However, it is submitted that this should not be understood as a hard and fast rule. Surely the driver must always exercise judgment in the circumstances. The manner of his driving, having regard to the safety of passengers, cannot give way to general legal proclamations.

(10) Sadly, bicycle accidents are now entering the tort litigation lexicon in Hong Kong. In recent years, the number of deaths and injuries has risen to alarming levels (10 deaths and 2583 injuries in 2015—see Transport Department website Fig. 3.4 at http://www.td.gov.hk/filemanager/en/content_4757/f3.4.pdf), with an increasing number of cases going to litigation (see eg, *Lam Ling Leong v Kwok Pang Che* (DCPI 1845/2008, [2010] HKEC 182) *Au Tsz Wai v Ho Tin Kau* (DCPI 2581/2009, [2012] CHKEC 195), and *Yeung Wai Kit v Poon Pak Ho* (DCPI 2258/2015, [2017] HKEC 948)).

(11) Should evidence of post-accident improvements implemented by the defendant ever be taken into account in determining whether the defendant was in breach? Keith JA in *Wong Wai Ming v Hospital Authority* (3.1 above) suggests not, but the High Court of Australia would allow such evidence "not to support a conclusion of breach of duty…but to show what could have been done, not what should have been done. Whether what was done later should have been done earlier depends, inter alia, on whether it was inordinately expensive or in any other way disadvantageous" (*Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 (Heydon, Crennan and Bell JJ)). In *Fung Siu Lung v Prosperity Land Estate Management Ltd* (DCPI 417/2006, [2007] HKEC 2091), the court made reference to post-accident improvements in finding a breach of duty, observing "it is not difficult to see that practical and effective measures can be effected to reduce the risks that visitors may encounter".

(12) On a related point, should an apology made by the defendant to the plaintiff for the injury caused to the plaintiff, be taken as an admission of fault or liability by the defendant? By virtue of a recent statutory enactment, such an apology cannot be taken as an admission of liability against the defendant and cannot be taken into account in determining fault or liability (see s.7 of the Apology Ordinance (Cap.631) (which comes into operation on 1 December 2017)).

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(13) The reasonable man standard is a phraseology that is often traced to the decision in *Vaughan v Menlove* (1837) 3 Bing NC 468, 132 ER 490. Today, that term is outdated, and possibly even misleading. For the purposes of this book, the term "the reasonable person standard" is preferred.

3.2 SPECIAL CATEGORIES

3.2.1 Children

Children are rarely sued in tort, presumably because plaintiffs recognise that children do not have the resources to pay the amount awarded in any judgment that might be obtained against them. Moreover, there is no principle in tort law that makes parents vicariously liable for the negligence of their children.

Nonetheless, and despite the absence of reported cases, children can be sued and can be found liable in negligence. The relevant principles can be inferred from the contributory negligence cases, in which child-plaintiffs suing for damages are often found to have been contributorily negligent (ie to have fallen below the standard of reasonable care expected of the plaintiff). Indeed, in the Australian case that follows, a rare example of a negligence case involving a child-defendant, the court referred to the contributory negligence cases in formulating the principle that was applied to the child-defendant.

McHale v Watson
(1966) 115 CLR 199

During play, the respondent, a boy aged 12, attempted to throw a sharp metal spike into a wooden post approximately one or two feet away. The spike glanced off the post and struck and injured the appellant, a nine-year-old girl standing four or five feet to his left. The appellant sued the respondent, but her action was dismissed by the trial judge and in the Court of Appeal, on the basis that there was no breach of duty. She appealed to the High Court of Australia.

Kitto J…

The appellant invites us to hold that the [trial decision] was wrong both in law and in fact. The principal argument submitted on her behalf was directed to the question of law. It was that the common law prescribes a minimum standard of care to be observed by everyone for the safety of all who may be injured by non-observance of it, and that that is the standard of care reasonably to be expected of a man of reasonable foresight and prudence in the circumstances…

The standard of care being objective, it is no answer for [a child], any more than it is for an adult, to say that the harm he caused was due to his being abnormally slow-witted, quick-tempered, absent-minded or inexperienced. But it does not follow that he cannot rely in his defence upon a limitation upon the capacity for foresight or prudence, not as being personal to himself, but as being characteristic of humanity at

his stage of development and in that sense normal. By doing so, he appeals to a standard of ordinariness, to an objective and not a subjective standard…

The law does not arbitrarily fix upon any particular age for this purpose, and tribunals of fact may well give effect to different views as to the age at which normal adult foresight and prudence are reasonably to be expected in relation to particular sets of circumstances. But up to that stage the normal capacity to exercise those two qualities necessarily means the capacity which is normal for a child of the relevant age…

Assistance on the subject is not to be found in the shape of specific decision in England or in this country, and judicial opinions in the United States and Canada have varied both in result and in reasoning. It seems to me, however, that strong support for the view I have indicated is provided by decisions on the cognate subject of contributory negligence… It seems never to have been doubted in any reported case…that contributory negligence on the part of a child consists in a failure to exercise the care reasonably to be expected of an ordinary child of the same age…In these words…the whole matter is summed up: the standard of care is objective; it is the standard to be expected of a child, meaning any ordinary child of comparable age…not that which is to be expected of an adult; and the child's blamelessness, by the standard so determined, is treated as saving his conduct from being regarded as such a cause of his injury as to affect the question of the defendant's liability…

I am therefore of [the] opinion that the learned trial judge did not misdirect himself on the question of law. There remains the question of fact: did the respondent, in throwing the spike as he did though aware of the proximity of the appellant, do anything which a reasonable boy of his age would not have done in the circumstances—a boy, that is to say, who possessed and exercised such degree of foresight and prudence as is ordinarily to be expected of a boy of twelve, holding in his hand a sharpened spike and seeing the post of a tree-guard before him? On the findings which must be accepted, what the respondent did was the unpremeditated, impulsive act of a boy not yet of an age to have an adult's realization of the danger of edged tools or an adult's wariness in the handling of them. It is, I think, a matter for judicial notice that the ordinary boy of twelve suffers from a feeling that a piece of wood and a sharp instrument have a special affinity. To expect a boy of that age to consider before throwing the spike whether the timber was hard or soft, to weight the chances of being able to make the spike stick in the post, and to foresee that it might glance off and hit the girl, would be, I think, to expect a degree of sense and circumspection which nature ordinarily withholds till life has become less rosy.

Sympathy with the injured girl is inevitable. One might almost wish that mediaeval thinking had led to a modern rule of absolute liability for harm caused. But it has not; and, in the absence of relevant statutory provision, children, like everyone else, must accept as they go about in society the risks from which ordinary care on the part of others will not suffice to save them. One such risk is that boys of twelve may behave as boys of twelve; and that, sometimes, is a risk indeed.

In my opinion the appeal should be dismissed.

Appeal dismissed.

In *Mullin v Richards* [1998] 1 WLR 1304, also a case of a child defendant, the *McHale* principle was followed by the English Court of Appeal. The 15-year-old defendant schoolgirl

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had been play-fencing with a plastic ruler with her classmate (the plaintiff) when a fragment of the ruler broke off, striking her classmate and causing eye damage. The court found the defendant not negligent, holding that an ordinary prudent child of the same age would not have known of the risk of the ruler shattering on such contact.

In *Chan Kin Bun v Wong Sze Ming* [2006] 3 HKLRD 208, a case factually similar to *Mullin v Richards*, the same result was reached but for slightly different reasons. The plaintiff and 1st defendant, both 14-year-old secondary school students, were mock sword-fighting on school grounds with their T-square drafting instruments, when one of the T-squares broke and struck the plaintiff, damaging his eye. The 1st defendant was held not liable. No reference was made to the standard of the ordinary prudent child, although one might assume that the same or a similar standard was applied by the court, when it stated that "there was no evidence that the 1st defendant conducted himself recklessly or with a high degree of carelessness".

However, where the child is engaging in an adult activity, the child will be held to the adult standard. In the Canadian case of *Ryan v Hickson* (1974) 55 DLR (3rd) 196, the court held that a child driving a snow-mobile must adhere to the reasonable person standard. This ruling is consistent with the principle in *Nettleship v Weston* (3.1 above), which imposes an invariable standard for the driving of cars. A child driving a motorised vehicle should be held to the standard of a reasonable driver, not that of a reasonable child driver.

In *Leung Kwok Lung v Ling Wai* (DCPI 2076/2007,1521/2008, [2010] HKEC 544), the plaintiff motorcyclist was injured when he crashed into a taxi door just opened by the defendant passenger as she was alighting. The 14-year-old defendant was held solely liable, the court satisfied "that a person of that age in a busy metropolis like Hong Kong will have acquired sufficient experience and knowledge to appreciate the need to pay heed to surrounding traffic conditions as a road user".

In *Zanner v Zanner* [2010] NSWCA 343, the appellant, an 11-year-old boy, was trying to park the family car in the carport with his mother's permission. He had apparently done so on previous occasions in the presence of his mother or father. His foot slipped from the brake pedal, and he crashed the car, injuring his mother. The mother's action against her son was successful, the court finding "no reason why the appellant was not bound to exercise reasonable care not to permit his foot to so slip". The mother was found 80% contributorily negligent.

It has been held that a very young child cannot be guilty of contributory negligence (*Gough v Thorne* [1966] 1 WLR 1387, 1390 (6.1.1.1 below)). The child in question must first be shown to be capable of understanding and appreciating the nature of the risk involved in the accident-causing activity (*Ho Kwai Loy v Leung Tin Hong* [1978] HKLR 72), and then the precise standard will depend on the age of the child. Logically, the same rule should apply to child-defendants. Hong Kong courts have been surprisingly quick to ascribe to children the necessary ability to appreciate the quality and nature of their activities. One might well question decisions such as *Chow Wai Keung v Hui Kwok To* (HCA 6820/1982, [1984] HKEC 338) and *Ho Kwai Loy*, where, at trial, children aged five and six respectively were held to be capable of understanding the risk in question and, therefore, contributorily negligent (the finding of contributory negligence in *Ho Kwai Loy* was reversed by the Court of Appeal on a different view of the facts, but the ruling that the child was capable of contributory negligence was affirmed).

3.2.2 The physically infirm

There is some, however scant, authority to the effect that very elderly or physically infirm persons may be entitled to observe a lower standard than that of the reasonable person, at least as regards their physical characteristics. Social policy would seem to support such a position, as such persons should not be discouraged from participating in ordinary activities such as walking in the streets. Again, there is little or no reported case law, presumably because such defendants are rarely sued. What authority there is derives from the contributory negligence cases involving elderly or infirm plaintiffs who as pedestrians are frequently injured by motor vehicles. The courts are prepared to make allowances for their lack of mobility in determining the question of their possible contributory negligence (*Daly v Liverpool Corp* [1939] 2 All ER 142). Logically, a similar argument would seem to apply where the elderly or infirm person is a defendant, having apparently caused an accident in moving more slowly than a reasonable person. For such a defendant, the standard may be lower than that to be expected of a reasonable person.

However, such reasoning should not apply where the elderly or infirm person is driving a motor vehicle. As contended by Megaw LJ in *Nettleship v Weston* (3.1 above), the public is entitled to expect a common minimum safety standard from all drivers. To hold otherwise would run counter to the objectives of compulsory insurance regimes. Where a compulsory insurance plan is in effect, there would seem to be no need for such concessions, although there is no authority on this point.

3.2.3 The mentally incompetent

It is generally thought that any allowances for failure to meet the reasonable person standard should not be extended to mental capacity. The objective standard should prevail. After all, ordinary persons possess varying degrees of intelligence, and it is consistent with the broad principle in *Nettleship v Weston* that the same invariable standard should be applied. In *Dunnage v Randall* [2016] QB 639, the deceased, suffering from florid paranoid schizophrenia, set fire to himself in the claimant's kitchen, killing himself. The claimant was badly burned while attempting to rescue the deceased. The Court of Appeal applied the standard of the ordinary reasonable person and found the deceased to have breached his duty to the claimant. The court was of the view that the only exception to the usual, objective standard of care was where the medical condition was such that it entirely eliminated responsibility, as where the defendant was sleepwalking or in a state of automatism. An example may be *Mansfield v Weetabix Ltd* [1998] 1 WLR 1263, where the defendant car driver suffered an unexpected loss of consciousness. The standard of care was "that which is to be expected of a reasonably competent driver unaware that he is or may be suffering from a condition that impairs his ability to drive". The principle in *Mansfield* was applied in *Mok Ka Yin v Tsang Hing On* [2007] 2 HKLRD 858. A van driver who suffered a heart attack of which he had no forewarning, and who subsequently lost control of the vehicle and crashed, was found not in breach of duty and thus not responsible for the death and injuries to passengers.

3.2.4 Sports

Where competitive sports activities are concerned, the standard of care is arguably lower than that expected in routine daily activities. This is so either because participants impliedly

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defendant. There is here a special relationship between Ms Kwok and HSBC. However, that special relationship is defined by the contract between Ms Kwok and HSBC contained in and evidenced by the Account Opening Booklet and Risk Disclosure Statement. It follows that recourse to the law of tort cannot add significantly to an analysis based upon the law of contract.

Reyes J provided no authority for his narrow reading of the scope of the duty in tort, limiting it, as he does, to the terms of the contract. There would seem to be no reason why the circumstances of the dealings between the parties cannot give rise to a duty that goes beyond the contract, subject of course to any express limitations or exclusion in the contract itself.

For a further look at the topic of concurrency after *Henderson v Merrett Syndicates Ltd*, see Glofcheski (1996).

Issues and Questions

(1) Duty of care is a hugely important issue in the determination of liability for negligence. At the same time, given the imprecise nature of the presently accepted conditions for duty of care, it is a device that is susceptible of easy manipulation by judges. Since the duty concept defines the outer limits of liability in negligence, it is a powerful device in the hands of judges to control liability for inadvertently caused harm.

(2) It should not be assumed that negligence law could not function without the duty of care concept. Duty of care was described by one eminent writer as "an unnecessary fifth wheel on the coach" (Buckland (1935) p.639). Arguably, control devices already exist which adequately contain the tort. Certainly, this is so in situations of direct physical harm, for here, liability should normally attach to unreasonable conduct that has caused that harm, and control devices are provided by other aspects of the tort. The real value of the duty concept is in those situations where indirect or non-physical harm has occurred, for here, control devices are more necessary.

(3) The function of the duty concept should be borne in mind when considering other aspects of the tort of negligence, in particular, remoteness of damage and the standard of care, concepts that, like duty of care, also incorporate the notion of reasonable foreseeability. Indeed, there is an unavoidable overlap, even a blurring, of these concepts.

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Chapter 6

DEFENCES TO NEGLIGENCE

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Defences are about risk-taking. The plaintiff has been injured by the defendant's negligence, but the facts may suggest that the plaintiff was not acting carefully at the moment of the accident. They may suggest that the plaintiff, showing a lack of concern about his own safety, was engaging in overtly risky conduct, perhaps of a criminal nature, apparently not caring whether he is hurt. The judicial assessment of plaintiff's conduct in the case law marks out the boundaries of expected, reasonable behavior in Hong Kong. The cases reveal some surprises, for instance, in the standard of care expected of children, and of pedestrians.

The notion of a plaintiff's responsibility for his own injury presents itself in one of three ways. The plaintiff may have been contributorily negligent, so as to warrant a reduction in the award of damages payable by the defendant; the plaintiff may be deprived altogether from recovering damages, either because he is found to have consented to and accepted the risk created by the defendant (*volenti non fit injuria*); or, for reasons of public policy, because the plaintiff had been wilfully engaging in criminal conduct when injured by the defendant's negligence (*ex turpi causa non oritur actio*).

The issue of the plaintiff's responsibility for his own damage touches on a central issue in tort law theory. On the one hand, basic tort law morality calls for responsibility for damage to be borne by those at fault in causing it. The concept of defences supports this notion. On the other hand, a primary, if not *the* primary objective of tort law is to provide compensation to persons injured by another's activity. The concept of defences works against that objective. The law of defences in tort law must negotiate a course between these two positions.

As for the burden of proof, although there is some controversy as regards *volenti* and *ex turpi causa*, the best view is that it is always for the defendant to prove any defence relied on, and the standard of proof is, as elsewhere in the tort of negligence, on a balance of probabilities.

These defences are related and, depending on the facts of the case, may be pleaded together or in the alternative. However, there is very evidently a judicial preference for apportionment of damages, rather than a total denial of damages. Therefore, a finding of contributory negligence (which leads to apportionment) is much more common than a finding of *volenti* or *ex turpi causa* in the assessment of liability.

6.1 CONTRIBUTORY NEGLIGENCE

Contributory negligence means a plaintiff's failure to take reasonable care for his own safety that contributes to his injury. The plaintiff may have been a victim of the defendant's negligence, but may have caused or contributed to the injury through carelessness. The defence of contributory negligence requires the defendant to prove that the plaintiff's conduct fell below the standard expected, and was a cause of the accident leading to the injuries, or at least was a cause of the worsening of the injuries. Any contributory negligence of the plaintiff then has to be assessed comparatively against the defendant's conduct, in order to determine the appropriate level of apportionment.

Although originally a creature of the common law, contributory negligence is now a statutory defence. In its common law form, it was a complete defence, effectively depriving the plaintiff of a claim to damages. Under that rule, a plaintiff even 1% contributorily negligent (defendant 99% negligent) would get no damages whatsoever. Then, in 1945, in both the United Kingdom and Hong Kong, legislation was passed to mitigate the harshness of the common law rule. Now, a successful plea of contributory negligence will result only in a reduction of the award of damages.

The defence of contributory negligence is the most important of the defences in the tort of negligence and the one most commonly resorted to by defendants and preferred by judges. Apportionment is seen as more conducive to a just solution than the all-or-nothing approach offered by the other defences.

The relevant provision in Hong Kong is s.21 of the Law Amendment and Reform (Consolidation) Ordinance (Cap.23), which reads in part:

> (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage…
>
> (10) "fault" means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this section, give rise to the defence of contributory negligence.

Section 21 will be activated when the plaintiff's conduct can be characterised as "fault" as defined in s.21(10). This entails taking into account the relevant standard of care, as defined in negligence law, or in the plaintiff's breach of statutory duty, the standard stipulated in the legislation. Proof of causation is also necessary, given the language in s.21(1) ("Where any person suffers damage *as the result* partly of his own fault"). Fault, therefore, requires consideration of the standard of care, as well as causation.

Moreover, the plaintiff's conduct in contributory negligence can take one of two forms. In most instances, the plaintiff's conduct will actually have been a cause of the accident itself that led to the injury. For instance, in crossing the road, the plaintiff may have failed to look to see if the road was clear. The plaintiff's conduct is a cause of the accident, as is the speeding car that runs him down. However, it is not always necessary that the plaintiff's conduct be shown to be a cause of the accident in order for the defendant to rely on contributory negligence. As will be seen below, in some cases, the plaintiff will be held to be contributorily negligent for failing to take precautions to minimise the injuries in the event that the defendant's negligence causes an accident. The classic example of this is where the plaintiff's injuries in the car accident are more serious as a result of the failure to wear a seat belt. As a matter of principle the reduction of damages under s.21(1) should normally be greater where the plaintiff's conduct is found to be a cause of the accident, as opposed to a mere failure to take precautions to minimize injuries.

6.1.1 Standard of care

The Law Amendment and Reform (Consolidation) Ordinance defines fault by reference to negligence, and, therefore, the common law must be referred to in order to determine the relevant standard of care. A useful statement of the general principle was provided by Denning LJ in *Jones v Livox Quarries Ltd* [1952] 2 QB 608: "a person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless".

The practice in the cases demonstrates that the standard of care according to which the plaintiff's conduct should be measured in determining the question of contributory

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negligence is the same as that to be expected of a defendant engaging in the same activity—the standard of the reasonable person in the circumstances. In theory, at least, this will be determined according to the same considerations that apply to a defendant in the breach of duty, although in practice, it is fair to say that judges rarely, if ever, provide the degree of analysis found in the breach of duty cases.

Ho Wing Cheung v Liu Siu Fun
[1980] HKLR 300

The first plaintiff, a passenger in the car driven by the third plaintiff, was injured in an accident caused by the negligence of the defendant driver. The first plaintiff was not wearing a seat belt at the time of the collision. At trial, the first plaintiff was found not contributorily negligent. The defendant appealed. [Note that, at the time of judgment, there was no legislation mandating the wearing of a seat belt, as there is today. The Highway Code has been replaced by the Road Users' Code.]

Roberts CJ...

> The first plaintiff, who was sitting in the front seat of the car, which was owned by her but driven by the third plaintiff, suffered substantial facial injuries. It was submitted, both during the trial and before us, that any damages awarded to her should be reduced because she had been guilty of contributory negligence, by reason of her failure to wear a seat belt.
>
> The leading English authority is *Froom v Butcher* (1976) QB 286 in which the plaintiff, who was not wearing a seat belt, suffered head and chest injuries which he would not have sustained had he been wearing one...
>
> The principles on which this decision was based can be derived from the following passages from the judgment of Lord Denning MR:
>
> (a) "In seat belt cases the cause of the accident is one thing. The cause of the damage is another. The accident is caused by the bad driving. The damage is caused in part by the bad driving of the defendant, and in part by the failure of the plaintiff to wear a seat belt." (p.292)
>
> (b) "Everyone knows, or ought to know, that when he goes out in a car he should fasten the seat belt. It is so well known that it goes without saying, not only for the driver, but also the passenger. If either the driver or the passenger fails to wear it and an accident happens and the injuries would have been prevented or lessened if he had worn it—then his damages should be reduced." (p.293)
>
> (c) "The law requires everyone to exercise such precautions as a man of ordinary prudence would observe." (p.294)
>
> *Froom* thus establishes that a man of ordinary prudence in England would take the precaution of wearing a seat belt, where this is available. Should the same test be applied to Hong Kong?
>
> By virtue of the Application of English Law Ordinance (Cap.88), the common law is in force in Hong Kong, so far as applicable to the circumstances of Hong Kong or its inhabitants.

> Tortious liability is a subject which has been developed mainly at common law. The decision in *Froom* that a man of ordinary prudence would wear a seat belt, expounds common law. It therefore becomes also the law of Hong Kong unless it can be said that it is a rule which ought not to be applied to Hong Kong, because the latter's circumstances are so different to those of England that the rule should be modified.
>
> Are we prepared to say that a man of ordinary prudence in Hong Kong would act differently, in relation to the wearing of seat belts, to his counterpart in England?
>
> We should make it clear that we are not talking about what the average man actually does. We are prepared to accept the submission of counsel that many drivers and passengers in Hong Kong do not fasten seat belts, even when these are fitted in the vehicles in which they are travelling. We are concerned with what, as a matter of prudence, the average man ought to do.
>
> In general terms, motoring in England and Hong Kong is similar. In both places, we find the same kind of motor vehicles; they operate in not dissimilar road conditions; the laws governing driving are similar; drivers in both countries probably display the same degree of skill.
>
> In *Froom* Lord Denning commented on the wearing of seat belts as being a sensible practice in the following terms:
>
> > "Seeing that it is compulsory to fit seat belts, Parliament must have thought it sensible to wear them. But it did not make it compulsory for anyone to wear a seat belt. Everyone is free to wear it or not, as he pleases. Free in this sense, that if he does not wear it, he is free from any penalty by the magistrates. Free in the sense that everyone is free to run his head against a brick wall, if he pleases. He can do it if he likes without being punished by the law. But it is not a sensible thing to do. If he does it, it is his own fault: and he has only himself to thank for the consequences."
>
> We think that these comments are equally apposite in Hong Kong. While many people here, as is doubtless the case in England, fail to wear seat belts, this does not make such failure any more sensible. The Highway Code in force in Hong Kong contains the following paragraph:
>
> > "15. Seat belts can save your life or prevent serious injury. Use them even on short journeys."
>
> ...if a motorist were warned that, within the next few minutes, he was going to be involved in a collision, surely if he were a prudent man he would immediately fasten his seat belt. The reluctance of many drivers to do so is an indication of their belief in their invulnerability on the road, rather than of disagreement with the proposition that the use of a seat belt is a sensible precaution.
>
> It must be obvious to any normal person that some injuries, among them facial damage of the kind involved in this case, could be prevented or reduced by the wearing of the seat belt.
>
> *Froom* decides that a man of ordinary prudence in England would wear a belt. We are not prepared to say that a prudent man in Hong Kong is less prudent, or less able to grasp the obvious, than his counterpart in England...

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> It is for the courts to decide, in negligence actions, whether a particular course of conduct is prudent or imprudent. We have no hesitation in saying that the wearing of a seat belt in any car in which this is available, is a practice which a man of ordinary prudence should observe. If he does not do so, he is at least partly to blame for the consequences of his failure.

Appeal allowed.

General standards of conduct are identifiable, but will vary in application depending on the circumstances. Although a motor vehicle passenger who fails to wear a seat belt will normally be found to be (contributorily) negligent, it will not always be so. What is reasonable to expect of the plaintiff will depend on a consideration of all of the circumstances of the case. In *Chan Wing Kin v Fonnie Co Ltd* [1983] HKLR 102, a case in which the pregnant plaintiff was injured in an automobile accident, the court said:

> Both the 1st and the 2nd defendants admit liability for the accident but claim that because the 2nd plaintiff was not wearing a seat belt during the journey and at the time of the accident, she sustained more serious injuries to her face than would otherwise have been the case and that therefore she is guilty of contributory negligence in relation to such of her injuries which could have been prevented or minimised by the wearing of a seat belt following *Froom v Butcher* and *Ho Wing Cheung v Liu Siu Fun*…It has been submitted on her behalf that her not wearing a seat belt was not unreasonable and Counsel referred to the following passage of the judgment of Lord Denning MR in *Froom's* case [1976] QB 286 in support of this view: "Thus far I have spoken only of the ordinary run of cases. There are, of course, exceptions. A man who is unduly fat or a woman who is pregnant may rightly be excused because, if there is an accident, the strap across the abdomen may do more harm than good". Whilst there is no medical evidence to indicate what injuries, if any, could or could not have been attributable to the non-wearing of a seat belt by a woman five months' pregnant at the time of the accident, nevertheless, the non-wearing of a seat belt by the 2nd plaintiff is not unreasonable in the circumstances nor is it imprudent since the possibility of injury to her unborn child would have been greater if she had worn a seat belt. The question was canvassed in the cross-examination of the 2nd plaintiff as to whether it would have been more prudent that a woman in her condition should have sat in the rear seat of the car in order to prevent injuries to her face. Her answer was that she always sat in the front seat with her husband when she travelled in his car. If it is neither unreasonable nor imprudent for her to have sat in the front seat without wearing a seat belt, could she be guilty of contributory negligence if she did not sit in the rear seat? I think it would be unreasonable to require a wife to take the rear seat of a car under these circumstances when she is travelling in the same car as her husband, and pregnant, unless there is a specific requirement either in the relevant insurance policy or in law to the effect that if a passenger was either fat or pregnant, she should be relegated to the rear seat. Neither do I think it imprudent where a passenger is excused from wearing a seat belt that it is incumbent upon that passenger to take other steps to reduce or extinguish contributory liability in the event of an accident. What should a passenger do, for instance, where the vehicle is a two-seater car? Whilst it is obvious that a normal person would have both head and face injuries minimised or avoided altogether by wearing a seat belt the condition of the 2nd plaintiff is not a normal one and is one which is envisaged in the passage cited from *Froom's* case, [1976] QBD 286 with which contents I fully and respectfully agree. In the result, the non-wearing of a seat belt by the 2nd plaintiff does not render her guilty of any contributory negligence.

Issues and Questions

(1) In *Ho Wing Cheung v Liu Siu Fun*, was the court correct to say that by virtue of the Application of English Law Ordinance (Cap.88), the English decisions holding that a reasonable person would wear a seat belt are applicable in Hong Kong? Is the content of the standard of care not a question of fact, to be determined on a case-by-case basis?

(2) In *Chan Wing Kin v Fonnie Co Ltd*, was the court correct to say that it is not incumbent on a passenger excused from wearing a seat belt because of pregnancy or similar reason to take other steps to reduce or extinguish contributory liability in the event of an accident? Should a passenger not always take all reasonable steps that might improve safety and reduce contributory liability?

(3) The factual premise for the decision in *Chan Wing Kin v Fonnie Co Ltd*, that the wearing of a seatbelt might harm the pregnant passenger and foetus, has been put in doubt by recent research—see "Third of heavily pregnant Hong Kong women put themselves at risk by shunning seat belts, study finds" (*SCMP* 7 October 2016, p.C7).

(4) As with breach of duty, there is plenty of room for disagreement as to what constitutes unreasonable behaviour for the purposes of contributory negligence. For instance, is it reasonable in Hong Kong for a pedestrian to simply obey the green traffic light while crossing the road, without checking for oncoming traffic that might enter the pedestrian crossing against the traffic rules? Apparently not: see *Chun Sung Yong v Au Sze Hung* [1991] 1 HKC 556 (pedestrian 25% contributorily negligent). Is it reasonable for a woman to push a hand cart down a busy roadway with her back to traffic? Apparently it is: see *Siu Wai Yee v Lau Sin Hang* (HCPI 700/2004, [2005] HKEC 1604) (no contributory negligence). Is it reasonable for a pedestrian to ignore the location of the pedestrian crosswalk and cross where he likes? In the view of Chung J in *Li Chu Ying v Ho Cheung Shing* [2000] 4 HKC 250, a pedestrian can cross a roadway wherever he likes, so long as he takes reasonable care for his own safety. Yet on similar facts Deputy Judge Sakhrani came to a contrary view in *Wong Sun Cheong v Choi Chi Kong* (HCPI 1129/2014, [2016] HKEC 1334), holding the plaintiff pedestrian contributorily negligent for not crossing at the nearby pedestrian crosswalk.

(5) Less surprisingly, it has been held not contributorily negligent for a passenger to be asleep in the car that was negligently driven resulting in an accident (*Fok Por v Sum Shuk Ching* (HCA 2555/1992, [1993] HKLY 474)).

(6) What about intoxication? In *Chan Kam Ming v Huen Po Leung* (HCPI 436/1999, [2000] HKEC 732), in which the drunk plaintiff fell asleep in the defendant's carpark space and was run over when the defendant was parking his car, Deputy Judge Chu remarked: "in as much as intoxication *per se* is not negligence, it is also not itself a want of care for personal safety for the purpose of contributory

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negligence". In the event, the plaintiff's contributory negligence was assessed at 30%.

(7) What about rescue? The law is slow to attribute fault—see *Lai Tai Tai v Lam Pak Lo* [2000] 1 HKLRD 499 (5.3.4 above).

(8) Cell phone usage is likely to be an area of growth in terms of contributory negligence case law, given the potential for users to be distracted when engaging in potentially risky activities such as crossing the street. *Chan Yuk King v Tung Chun* (DCPI 2289/2008, [2010] HKEC 1557) was just such a case (plaintiff found 75% contributorily negligent).

(9) As with defendant's negligence, statutory standards are relevant to the determination of the plaintiff's standard of care for contributory negligence purposes. This is borne out by the seatbelt line of cases. In *Chong Ngan Seng v China Harbour Engineering Co Ltd* (DCPI 2078/2009, [2011] HKEC 1663), the plaintiff, an upper deck bus passenger, was injured when, having stood up to prepare to alight at the next stop, the bus came to a sudden halt having been cut off by another vehicle, throwing the plaintiff forward. The court referred to reg.13A(2)(b) of the Public Bus Services Regulations (Cap.230A, Sub.Leg.), prohibiting upper deck passengers from standing while the bus is moving, but in the event, found no causation (see 6.1.2 below) and thus no reduction for contributory negligence.

(10) Is the standard of care for the plaintiff really the same as that of a defendant performing the same activity? Cane (2006) p.56 suggests that it is not, because for most activities, it is normally the defendant alone who carries insurance:

> to find a defendant guilty of negligence shifts a loss away from the plaintiff and typically spreads it by means of insurance or other processes. A finding of contributory negligence usually has precisely the opposite effect, which is to leave part or all of the loss on the plaintiff. Thus, reduction of damages for contributory negligence typically falls much more heavily on the plaintiff than liability for negligence bears on the defendant.

(11) Support for Cane's view can be found in *Li Chu Ying v Ho Cheung Shing* [2000] 4 HKC 250, where Chung J cited *Charlesworth & Percy on Negligence* (1990):

> It has been suggested that, "it is both in accordance with common sense and with good morals to hold that a man need not pay as much attention to his own safety as he does to the safety of others", with an illustration given: "thus the inadvertence of a pedestrian who may step from the pavement into the road is not comparable to that of a driver who is proceeding at such a speed that he cannot stop within a reasonable distance. It is one thing to take a slight inadvertent risk with one's own life, even though one is not entitled to endanger it deliberately; it is an entirely different thing to risk the life of another by taking insufficient care".

Chung J found no contributory negligence for a pedestrian who was knocked down by a minibus while crossing the street, despite the fact that the pedestrian did not cross at the crosswalk.

(12) A pro-plaintiff bias in determining standard of care may also be a carry-over from the cases heard in the era before apportionment legislation was passed, when even the slightest contributory negligence was a complete defence. A lower standard of care for plaintiffs was understandably allowed from time to time in order to avoid the harsh result of a total deprivation of damages. Although a finding of contributory negligence is not *per se* binding as precedent, the historically more tolerant attitude toward plaintiffs may inform judicial sympathies today.

As in the breach of duty issue, a different (lower) standard may be applied to certain categories of plaintiffs.

6.1.1.1 *Children*

A child will not be found contributorily negligent unless the child is of an age whereby he or she can reasonably be expected to take precautions for his or her own safety. As stated by Lord Denning MR in *Gough v Thorne* [1966] 1 WLR 1387, a case concerning a 13-year-old who crossed the road without looking, after being encouraged to do so by a waiting lorry driver:

> I am afraid that I cannot agree with the judge. A very young child cannot be guilty of contributory negligence. An older child may be; but it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as reasonably to be expected to take precautions for his own safety: and then he is only to be found guilty if blame should be attached to him. A child has not the road sense or the experience of his elders. He is not to be found guilty unless he is blameworthy.

There is a subjective element, as acknowledged by Judge Mimmie Chan in *Lau Sum Long v Tang Pak Chuen* (DCPI 463/2008, [2008] HKEC 2044) when she said of a nine-year-old injured while crossing a busy road: "after hearing Ivan's evidence, I have come to the view that he understands the importance of taking precautions on the road". However, it is submitted that children beyond tender years can be assumed to understand certain obvious dangers such as when crossing a road with vehicular traffic.

Assuming that the child is expected to take some precautions, precisely what standard is to be exacted will depend on the age of the child. The question is whether an "ordinary child" of the claimant's age could be expected to have done any more than the claimant, and an ordinary child is neither a "paragon of prudence" nor "scatter-brained" (*Lau Sum Long v Tan Pak Chuen*). The position is similar to that where the child is a defendant, considered earlier at 3.2.1 above.

Ho Kwai Loy v Leung Tin Hong
[1978] HKLR 72

The six-year-old plaintiff, in response to a call from his ten-year-old sister, ran out from behind a parked car and was knocked down by an oncoming vehicle. At trial, the plaintiff was found to have been contributorily negligent, and he appealed.

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Huggins JA…

> The question which has been raised for our consideration is whether a child of six is capable of contributory negligence. In my view he is so capable and so to hold is not inconsistent with *Gardner v Grace* (1858) 1 F & F 359 and *Latham v R Johnson & Nephew Ltd* [1913] 1 KB 398, where the children were under the age of four years. *Andrews v Freeborough* [1967] 1 QB 1 is obiter upon this point but it is not inconsistent with the principle of *Gough v Thorne* [1966] 3 All ER 398 that a child must be of such age that he can be expected to take precautions in the circumstances and I adopt a statement of the Canadian Supreme Court in *McEllistrum v Etchers* (1956) 6 DLR (2d) 1, 6:
>
> > "It should now be laid down that where the age is not such as to make a discussion of contributory negligence absurd, it is a question for the jury in each case whether the infant exercised the care to be expected from a child of like age, intelligence and experience."
>
> Was the judge entitled to find here that the Appellant did not take such precautions as a child of six should have taken in the circumstances? The judge does not appear to have considered this question in relation to the finding that the sister, aged ten, who was with the small boy, who had crossed the road and who called him across, may herself have been guilty of negligence. She said that she did not see any traffic coming. The judge made no definite, clear finding on this matter but clearly, in my view, on the evidence the little girl was negligent: either she looked and did not look properly or she did not look and ought not to have called the small boy across. Now does the negligence of the sister affect the Appellant? This is a question which has never been argued before us and, in my view, it would not be right for us, therefore, to deal with it at all. I think the learned judge was wrong in his finding that the boy was contributorily negligent because in all the circumstances it was natural for a small boy aged six to accept the call of an elder sister as an indication that the road was clear. That being so I would hold that the boy was not contributorily negligent…

Appeal allowed.

Very young children in Hong Kong have been held to be capable of contributory negligence. A five-year-old pedestrian was found contributorily negligent in *Aqsa Rana v Tsui Luk Pui* (DCPI 68/2007, [2007] HKEC 1807), as was the six-year-old pedestrian in *Ho Kwai Loy v Leung Tin Hong* (although, on the facts, found not contributorily negligent on appeal), the seven-year-old pedestrian in *Lee Nga Lai v Kong Man Pui* (DCPI 268/2004, [2006] HKEC 1326), the eight-year-old pedestrian in *Ho Tze Ho v Chui Chung Wah* (DCPI 994/2004, [2005] HKLRD (Yrbk) 361), the eight-year-old MTR passenger in the company of his mother in *Fu Cheung Chun Tom v MTR Corp Ltd* (DCPI 1707/2005, [2009] HKEC 370), the nine-year-old pedestrian in *Chan Hoi Shan v Chan Man Hing* (HCPI 199/2005, [2006] HKEC 2282) (3.3.3 above), and the 11-year-old pedestrian in *Chung Kai Nok v Ng Yuet Ming* (HCPI 412/2009, [2012] HKEC 327). A line appears to have been drawn in *Law Yuen Wan v Tai Kam Tong* (HCA 5443/1979, [1983] HKEC 388), where a child of the tender years of four-and-a-half was held not capable of contributory negligence.

The question is prompted whether the courts are asking too much of children in Hong Kong. One possible policy argument is that, given Hong Kong's busy and congested roadways and living conditions, it is imperative that children learn from an early age to take responsibility for their own road safety. On the other hand, are young children ever likely to respond to such deterrence factors? Moreover, drivers are insured, ensuring a ready source of compensation, and there is very little risk that children will be less careful because of the presence of compulsory insurance. By way of comparison, the UK Royal Commission on Civil Liability and Compensation for Personal Injury (Cmnd 7054, (1978) Vol.1, [1077]) recommended that in road traffic cases, contributory negligence should not be available as a defence in regard to actions brought by children under the age of 12.

Happily, there is some evidence, however scant, of a judicial softening in Hong Kong. In *Yuen Yan Ting v Yan Yan Motors Ltd* (HCPI 956/2000, [2001] HKLRD (Yrbk) 638), the court held that the plaintiff of three years and nine months could not reasonably be expected to take precautions for her own safety. More heartening is the *dicta* of Seagroatt J in *Lam Kin Ping v Tsang Kam Cheong* (HCPI 1458/2000, [2002] HKEC 614). A seven-year-old school girl entered a marked pedestrian crossing on a flashing green signal. She was at the tail of a group of pedestrians and was likely caught in the crossing when the light turned red. She was struck and injured by the defendant, driving a heavy goods lorry, who quickly moved forward on the signal change, anxious to make a right-hand turn. He was found negligent in doing so, and in failing to check carefully for pedestrians. On the question of contributory negligence, Seagroatt J said:

> I have already pointed out that it is a sad commentary on the sense of responsibility of a number of pedestrians that she was left to her own judgment and company in crossing. I am far from saying that contributory negligence cannot be proved against a child of such tender years but the circumstances to support it would need to be clear-cut and powerfully convincing. Such circumstances or evidence are totally lacking in this case.

However, in *Ho Tze Ho v Chui Chung Wah* (above) the court took what would appear to be a more harsh line with a child pedestrian. The plaintiff, an eight-year-old boy, had reached the safety island in the middle of the road. He saw people still crossing the remaining section of the marked zebra crossing and followed them at a fast pace. While in the zebra crossing he was struck by a car driven by the defendant. The defendant had entered the zebra crossing without stopping and without noticing the plaintiff. Nonetheless, the plaintiff was found 20% to blame for the accident. The court also found 20% contributory negligence in the case of the five-year-old pedestrian in *Aqsa Rana v Tsui Luk Pui* (above), despite circumstances where, according to the court's description:

> …there was no traffic light and no pedestrian crossing at Tak Yan Street, it is a stretch of road where pedestrians would be expected to cross close to the junction with Oi Kwan Road and children are known to cross on their way to the playground. It is undisputed that a 5 years old child would not have appreciated the danger on the road as an older child might have; furthermore, this is in a quiet school area where children with their parents are seen in the vicinity, this may have given her a false impression of safety crossing Tak Yan Street even if she had emerged from the top of a parked taxi outside the playground on Tak Yan Street.

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6.1.1.2 *The infirm*

There is some authority to the effect that a lower than usual standard of care may be applicable to plaintiffs who are infirm as a result of disability or age (see *Daly v Liverpool Corp* [1939] 2 All ER 142—plaintiff's lack of mobility taken into account in assessing contributory negligence). According to Jones (2002) p.626, such a person "must exercise such care as is reasonable having regard to his age and physical condition (citing *Clerk & Lindsell*, para.3-25); but not, apparently, his mental condition, which must be judged objectively: *Baxter v Woolcombers Ltd* (1963) 107 Sol Jo 553". In *Cheung Yuet Har v Force Team Ltd* (DCPI 44/2009, [2010] HKEC 267), the 72-year-old plaintiff slipped on entering the defendant restaurant's lift, the floor of which was found to be wet and oily probably due to food deliveries earlier in the day. The court found no contributory negligence, holding that "in the present case, the age and circumstances of Cheung should also be relevant considerations". In *Kwok Yim Kwan v Carnival Seafood Restaurant Ltd* (DCPI 2700/2007, [2008] HKEC 1651), the plaintiff, who was blind in one eye, tripped over an unmarked step in the defendant's restaurant and was injured. Although the court did not expressly apply a different standard, it found no contributory negligence, taking the view that there was "no evidence to show that the loss of eyesight had in any way affected the plaintiff's judgment about the general surroundings of the passageway". See 3.2.2 above for a further discussion of this issue.

6.1.1.3 *Workers*

A worker injured by his employer's negligence can, like any other plaintiff, be held contributorily negligent. However, there appears to be a judicial reluctance to make such a finding against workers who, quite typically, have to work under demanding conditions, or in a monotonous environment, and are often called upon to get the job done quickly, with the threat of job loss for slow work always looming. Such are the realities of the workplace and the circumstances that, as with defendants, judges must take into account in determining the standard of care applicable to plaintiffs injured in employment. This results in a more pragmatic approach, if not a judicial sympathy, in the determination of the standard of care applied to workers, and some of the *dicta* in the cases are suggestive of this tendency.

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Sun Wan Co v Ng Kam
[1988] HKC 358

The plaintiff was an experienced stevedore employed by the defendant. He was in the process of lowering a derrick for the purpose of unloading a ship when he was injured. Although the defendant's system of unloading was widely used in Hong Kong, it was shown to be unsafe. At trial, the defendant was found negligent, and no contributory negligence was found on the part of the plaintiff. The defendant appealed the ruling on contributory negligence.

Fuad V-P…

> The judge also found that the plaintiff was not guilty of contributory negligence in not waiting or asking for help. Nor would there have been contributory negligence on the part of the plaintiff if he had stood on the wire when he was lowering the derrick so that he was swept off his feet when the derrick began to fall. This, he considered, fell to be decided as part of the work system provided by the company. In his view, the plaintiff was simply going about his employer's business in the way they would have him do it.
>
> The judge, here, clearly had in mind the message he had cited from Earl Jowitt's speech in *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, where, at p.187, he agreed with Denning LJ's observations in his judgment in the Court of Appeal where he had said:
>
>> "At the hearing of the appeal it was suggested that the accident might have been avoided if the man had put in a chock to prevent the bottom sash coming right down as it did. This was, in effect, a suggestion of contributory negligence. This was negatived by the judge and I agree with him. You cannot blame the man for not taking every precaution which prudence would suggest. It is only too easy to be wise after the event. He was doing the work in the way which the employe[r] expected him to do it, and, if they had taken proper safeguards, the accident would not have happened."
>
> Mr Wong submitted that the judge should have found a measure of contributory negligence on the part of the plaintiff in view of the fact that with all his years of experience he should have realized that he was lowering the derrick in a way that had obvious dangers to his own safety and that, at least, he should have waited until someone could help him and supervision could be provided.
>
> The plaintiff was not performing his task in a dangerous way to save himself trouble. He was doing it in that way to get on with his employer's business; in a way, as the judge found, that was condoned and tacitly encouraged by his employer. There were safer systems available but they were not ones which, in practice, were used. Indeed, as I have mentioned, the chief foreman himself had employed the same method on the evidence accepted by the judge. In these circumstances, I do not think that an employer can be heard to say that his employee was being negligent in carrying out the work in that manner. It seems to me that the approach of Denning LJ in the Court of Appeal hearing of the *General Cleaning Contractors* case which I have just read is applicable.
>
> As to the suggestion that the plaintiff should have obtained or waited for help, there was no room for a finding that the plaintiff ought to have taken his own precautions to make the condoned unsafe system more safe. In the long passage from the speech of Lord Reid in the *General Cleaning Contractors* case quoted by the judge, occurs the following observation, at p.194:
>
>> "Where a practice of ignoring an obvious danger has grown up, I do not think that it is reasonable to expect an individual workman to take the initiative in devising and using precautions."
>
> In my view, that statement of principle is in point here…In our case the dangers in lowering the derrick by hand were by no means obvious to the plaintiff despite his years of experience. He had performed this operation in the same way all his working life as a stevedore (as had others) without mishap and, it seems, no accidents arising out of the use of that method had been reported. One must wonder how long the plaintiff would have remained employed, engaged on daily rates as he was despite his long service with the company, if he had insisted upon using one of the safer methods (which took more time) described by Captain Lloyd.

> I find myself quite unable to disturb the judge's finding that no contributory negligence had been established against the plaintiff. On the evidence that he accepted for the cogent reasons that he gave, in my judgment, no other conclusion was possible.

Appeal dismissed.

Moreover, in *Tang Shau Tsan v Wealthy Construction Co Ltd* (HCPI 1092/1998, [1999] HKLRD (Yrbk) 374), Deputy Judge Woolley said:

> ...one has to distinguish between a workman deliberately taking risks, possibly as a shortcut, where he is being paid on piece work and wishes to achieve as much as possible in the time available, and one who is using the only method provided to do the best job he can.

In *Mak Woon King v Wong Chiu* [2000] 2 HKLRD 295, another case involving a worker paid according to the amount of production, Ribeiro JA said:

> The deceased's omissions must be viewed against the Judge's findings as to the piece rate arrangements with their built-in temptation to speedier, incautious, work practices; the complete lack of any safety instruction by the employer or indeed of any attempt to promote safety consciousness, as evidenced by the employer's dismissive attitude towards the safety leaflets in his office, as well as the complete inadequacy of supervision over the way the deceased and the other sawmill workers did their jobs. The Judge found that the defendant simply left them to adopt whatever working methods they pleased, being well aware of how they worked, necessarily implying that the employer knew that his employees were adopting unsafe practices, in breach of the regulations.

Hence, the Court of Appeal reduced the judge's finding of 40% contributory negligence to 15%.

A worker's knowledge of a danger is not itself evidence of contributory negligence. It was so held by the Court of Appeal in *Wong Lok Keung v Discovery Bay Transportation Services Ltd* (CACV 238/2005, [2006] HKEC 259), where the plaintiff knew of the presence of the metal plate over which he tripped, and by the Court of First Instance in *Yeung Tai Hung v Hong Kong Baptist Hospital* (HCPI 686/2004, [2006] HKEC 1358) where the plaintiff kitchen worker knew the floor on which he slipped was wet. In *Lauw Ka Fong v Best City Ltd* (HCPI 436/2004, [2005] HKEC 810), where the plaintiff worker used a ladder which she knew to be defective, having complained to the defendant about it, Suffiad J found no contributory negligence, on the basis that:

> ...a court must be slow to find contributory negligence where the employer has failed or refused, as in the present case, to replace defective equipment which ultimately was the cause of the accident. In so doing, the employer effectively forces his employees to use the defective equipment thereby risking the safety of those employees. It therefore cannot be right for the employer to later turn around and say that the employee was guilty of contributory negligence when he, with eyes wide open, has voluntarily taken on and assumed the risk of injury to his employee by refusing to replace defective equipment provided by him for use by his employees thereby being in breach of his duty towards his employees.

And in *Tamang Tikaram v Tong Kee Co Ltd* (HCPI 19/2013, [2015] HKEC 539), the court found the plaintiff's failure to fasten a safety belt not contributory negligence because there was nothing secure to which he could have attached the safety belt.

However, contributory negligence may be found where the worker takes a shortcut for his own convenience and at the expense of his own safety (*Poon Chi Kwong v Poon Wing Kee (Metal Work)* (HCPI 1340/2003, [2006] HKLRD (Yrbk) 367)), or where he turns a blind eye to an obvious danger (*Au Hon Ling v Ching Hoi Keung* (HCPI 416/2003, [2004] HKLRD (Yrbk) 407)), or where he expressly disregards the employer's instructions regarding the operation of a machine (*Chan Ming Yat v Youh Eng Lai* (DCPI 201/2003, [2004] HKEC 672)).

Where a negligent employer is also guilty of a breach of statutory duty, the standard of behaviour for the plaintiff for the purposes of assessing any contributory negligence will be less demanding. This is so because a too ready finding of contributory negligence will defeat the object of the statute, which puts a primary duty on the defendant not only to follow the statute but also to see to its enforcement. This principle is applied primarily in the workplace: see eg *Tang Shau Tsan v Wealthy Construction Ltd* (HCPI 1092/1998, [1999] HKLRD (Yrbk) 374) where in the context of the employer's breach of regulations to provide a guard on a cutting machine, Deputy Judge Woolley said that "the employee should not be expected to do what the employer has failed to do, and thereby defeat the object of the regulations...where there is a breach of statutory duty, the standard by which the plaintiff's contributory negligence is judged is less exacting than that used for ordinary negligence".

6.1.1.4 *Emergency*

Similar to the analysis of the defendant's standard of care (3.2.5 above), where through the defendant's negligence, the plaintiff is suddenly put in a position of apparent danger to which he must react, the standard of care to be imposed on the plaintiff will be relaxed and a finding of contributory negligence less likely (see *Jones v Boyce* (1816) 1 Stark 493, 171 ER 540). *Bushra Bibi v Method Building & Engineering Works Ltd* (HCPI 301/2012, [2014] HKEC 617) may be an example of such a case. A gondola being operated by the deceased according to a crude and unsafe method devised by the employer malfunctioned and, unexpectedly, continued to rise despite the deceased's attempt to stop it by climbing onto the working platform and activating its emergency stop button. He was holding on to the toe-board of the working platform with both hands, with the intention of climbing on board the working platform. He soon found that he could not raise his legs over the toe-board to climb into the working platform, and he just hung on, eventually falling to his death. In these circumstances the court found no contributory negligence:

> In this case, the deceased made a spur of the moment decision to try to stop the gondola from rising further. He did so, not on a frolic of his own, but to prevent the gondola from rising to the top where it would have been extremely difficult to access and to retrieve...the deceased did not have plenty of time to think about what he was going to do. He was faced with a dilemma caused by the negligence of the 1st and 2nd defendants and he reacted to that dilemma by acting, in the interests of the 1st and 2nd defendants, to protect their property. He was not acting in defiance of any established

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practice. He was trying to reach the emergency button of the control box to stop the gondola, as he had been taught to do.

6.1.2 Causation

To establish contributory negligence, the defendant must show that the plaintiff's conduct was either a cause of the accident, or a cause of the damage, in the sense that the damage would have been lessened or avoided if the plaintiff had taken reasonable care. A failure to so prove, even where the plaintiff's conduct is plainly unreasonable, will lead to a finding of no contributory negligence.

Wong So Ching v Official Administrator
[1987] 2 HKC 213

The plaintiff, a passenger in the defendant's car driven by A, was thrown out of the car by virtue of the force resulting from a collision, and was injured. At the time of the accident, the plaintiff was not wearing the seat belt provided. At trial, the plaintiff was found 25% contributorily negligent and she appealed.

Clough JA…

> It seems clear that the judge was intending to apply *Froom v Butcher* [1976] QB 286 and *Ho Wing Cheung's* case [1980] HKLR 300 (6.1.1 above) and to determine whether the injuries actually sustained by the plaintiff would have been prevented or lessened had she been wearing a seat belt. However, in my judgment, the judge's conclusion is not sustainable on the evidence which was before him. His conclusion was that if the plaintiff had been wearing a seat belt, she would not have been thrown out of the car and would, therefore, not have sustained the injuries she did. In the absence of direct or circumstantial evidence to establish on the balance of probabilities that the plaintiff's injuries were caused by her being thrown out of the vehicle, his conclusion cannot stand…
>
> If the damage is required to be shown to have been caused in part by the plaintiff's failure to wear a seat belt, it follows that where she is thrown from a vehicle, it must first be determined whether she sustained her injuries at the time she was thrown or while she was still in the vehicle. The next question is whether her injuries would have been prevented or lessened if the plaintiff had been wearing a seat belt.
>
> In the present case, the plaintiff's evidence was that she remained in the vehicle after the impact with the hillside and while it "overturned twice". Hence, Mrs Kaplan's persuasive argument that the plaintiff's injuries were equally consistent with their having been sustained before the plaintiff emerged from the car. The judge made no finding and there was no evidence from which it could be inferred that the plaintiff was ejected from the vehicle at the very moment of the vehicle's impact with the hillside. The plaintiff's injuries were not by themselves of a nature which indicated with any degree of probability whether they were sustained in the car or upon ejectment from it.
>
> There was no evidence from any doctor or engineer regarding the likely actual cause of the plaintiff's injuries. The photographs of the vehicle taken after the accident indicate that, as might be expected, it was badly damaged in the front from what must have been a severe impact with the rock face of the hillside before it turned over twice. Furthermore, all the windows, including the windscreen, were shattered.
>
> In the absence of any expert or other evidence connecting the plaintiff's injuries with the moments of her ejectment from the vehicle, after it had rolled over twice rather than the period of time when she was still in the vehicle between the collision with the hillside and her ejectment, it seems to me that there was no evidential basis for a finding on the balance of probabilities that the plaintiff's injuries, or any of them, were caused by her failure to wear a seat belt…
>
> There is no hard and fast rule that expert evidence from a doctor or engineer is required to establish contributory negligence in a seat belt case. The primary facts of some cases will speak for themselves on this issue. In other cases, as in this case, the issue of causation will only be determinable in favour of the defence if there is satisfactory medical or other evidence called specifically to deal with the issue and to tip the evidential balance in favour of the defence.
>
> Failure to call such evidence in such cases may result in failure to establish contributory negligence, as happened in *Leung Nai Wing v Hsing Kieng Shing* [1985] 2 HKC 206 which was cited to the trial judge. However, I emphasize that there is no universal rule that requires expert evidence to be called on these matters.
>
> Accordingly, I would allow this appeal on the issues of liability and contributory negligence which have been argued before us.

Appeal allowed.

In his judgment, Clough JA conceded that "the primary facts in some cases will speak for themselves", implying that in such cases, specific evidence about causation is not necessary. However, it is not clear from his judgment how to identify such cases. In the absence of specific judicial guidance, the only safe course for defendants is to adduce evidence on the causation issue.

6.1.3 Apportionment

Assuming that the plaintiff has been found to be contributorily negligent, apportionment becomes a live issue: by how much should the plaintiff's damages be reduced? Section 21(1) of the Law Amendment and Reform (Consolidation) Ordinance says that the damages "shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage…". Unfortunately, in most cases, little is ever given in the way of reasons to explain the methodology employed by judges in the apportionment exercise. However, according to Lord Reid in *Baker v Willoughby* [1970] AC 467, this determination is a function of two factors: blameworthiness and causation. The court compares the plaintiff's conduct with the defendant's conduct, measuring their respective blameworthiness, and their causal potency, ie the degree to which their conduct caused the damage or injury.

In *World Wide Stationery Manufacturing Co Ltd v Fong Chi Leung* [1994] 2 HKC 449, the plaintiff's hand was badly injured at work while operating an unfenced automatic power press, and so he sued his employers. At trial, he was found to be 50% contributorily negligent. On appeal to the Court of Appeal, Mortimer J agreed with the trial judge's assessment, and said:

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In *Stapley v Gypsum Mines Ltd* [1953] AC 663, Lord Reid dealt with the principles at p.682 when he said:

> "A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but "the claimants" share in the responsibility for the damage cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness."

It would appear that there ought to be taken into account, first, the relative blameworthiness of the parties and, secondly, their responsibility for the injury which has been caused—meaning their contribution to that injury. Here, the plaintiff was taking a short-cut. He failed to use the emergency button. For that there was no excuse and he really did not advance one. He should not have done it and it was a cause of his injury. He was in breach of a duty to take reasonable care not to expose himself to foreseeable risk of injury. No statutory duty was alleged against him in the pleadings nor was it open to the judge to find any.

In *Chan Cheung v Leung Kwok Wai* (CACV 107/2003, [2005] HKEC 669) (leave to appeal to the Court of Final Appeal refused, at (FAMV 1/2006, [2006] HKEC 416)) the plaintiff, a truck driver injured in a collision with a truck driven by the 1st defendant on a container terminal service road controlled by the 3rd defendant, was found at trial to be 60% contributorily negligent because he was found to have lowered his head just before the collision to look for something he thought he had dropped (1st and 3rd defendants liable for 20% each). In affirming the trial judge's apportionment, Rogers V-P explained the role of blameworthiness in relation to causation by reference to the *dictum* of Lord Pearce in *Miraflores v George Livanos* [1967] 1 AC 826:

> [apportionment] is concerned with "fault" which includes blameworthiness as well as causation; and no true apportionment can be reached unless both those factors are borne in mind…This is most easily illustrated by taking an extreme case from a type of litigation which is tried daily in the courts. A dangerous machine is unfenced and a workman gets his hand caught in it. So far as causation alone is concerned it may be fair to say that at least half the cause of the accident is the fact that the workman put his hand into the danger; but so far as "fault" (and therefore liability) is concerned the answer may be very different. Suppose that the workman was a normally careful person who, by a pardonable but foolish reaction, wanted to save an obstruction from blocking the machine and so put his hand within the danger area. Suppose further that the factory owner had known that the machine was dangerous and ought to be fenced, that he had been previously warned on several occasions but through dilatoriness or on grounds of economy failed to rectify the fault and preferred to take a chance. In such a case the judge, weighing the fault of one party against the other, the deliberate negligence against the foolish reaction, would not assess the workman's fault at anything approaching the proportion which mere causation alone would indicate.

Naturally, in assessing relative blameworthiness, the nature of the plaintiff will be taken into account so that, for instance, as less care is expected from a child than from an adult, defendants will carry more of the burden of liability in actions brought by children.

Where more than one defendant is found liable for the damage, the plaintiff's blameworthiness has to be compared with the combined blameworthiness of the defendants: *Chan Cheung v Leung Kwok Wai* (above).

Despite the guidance offered by the *dicta* in *Stapley v Gypsum Mines Ltd* [1953] AC 663 and *Miraflores v George Livanos* (above), the determination of apportionment is in practice a largely intuitive exercise, and is treated on a case-by-case basis, what Lord Reed in *Jackson v Murray* (below) described as "inevitably a somewhat rough and ready exercise (a feature reflected in the judicial preference for round figures), and that a variety of possible answers can legitimately be given". Calculations are not governed by precedent, as made clear by Yuen JA in *Christopher Gordon Young v Lee Chu* (CACV 131/2003, [2004] HKEC 595):

> There is little value in citing cases for the apportionment of liability on the individual facts of those cases. An apportionment of liability is not an arithmetical calculation with one absolute answer. As with all exercises of discretion, an appellate court should only interfere, in the absence of mistake of law or misapprehension of fact, where the judge's apportionment is 'outside the generous ambit within which a reasonable disagreement is possible'.

Moreover, there may in some cases be a policy dimension to the apportionment exercise. Bokhary PJ intended as much in *Poon Hau Kei v Hsin Chong Construction Co Ltd* (2004) 7 HKCFAR 148, a case concerning actions in negligence, occupiers' liability and a breach of the Construction Sites (Safety) Regulations (Cap.59I, Sub.Leg.), when he quoted Lord Hoffmann in *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 to the effect that "an assessment of responsibility must take into account the policy of the rule, such as the Factories Acts, by which liability is imposed". In a case not concerning a breach of safety legislation, but solicitors' common law negligence, *Hondon Development Ltd v Powerise Investments Ltd* [2005] 3 HKLRD 605 (3.2.6.4 above), Cheung JA said that "as a solicitor is remunerated for his services and it is his duty to advise the lay client and protect his interest, public policy requires that such a professional's claim of contributory negligence by the client may only be successfully raised in very limited circumstances…".

In the context of motor vehicle accidents involving pedestrians, blameworthiness and causal potency point, all things being equal, to a heavier share of responsibility to be borne by motorists. That is because the destructive potential of motor vehicles is relevant to both blameworthiness and causal potency. A motorist knows his vehicle can kill, and for that reason should be very careful when driving in a vicinity where pedestrians may be present or may suddenly appear: "A motorist is driving a potentially lethal piece of machinery while a pedestrian is basically harmless" (Simon Brown LJ in *Wells v Trinder* [2002] EWCA Civ 1030). For this reason it will be rare for a pedestrian to be found more liable than a motorist. The principle should apply no less where the plaintiff is a bicyclist (*McGeer v Macintosh* [2017] EWCA Civ 79).

This difference in causal potency, what Hale LJ in *Eagle v Chambers* [2004] RTR 9 termed "destructive disparity", was acknowledged by the Supreme Court in *Jackson v Murray* [2015] 2 All ER 805. The facts concerned a 13-year-old school girl who stepped into the highway from behind the school bus from which she had just alighted when she was struck by the defendant's car. The first instance judge put contributory negligence at 90%, which was reduced to 70% by the Court of Appeal. The Supreme Court reduced her contributory negligence to 50%:

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> "a 13-year-old will not necessarily have the same level of judgment and self-control as an adult… she had to take account of the defender's car approaching at speed, in very poor light conditions, with its headlights on…the assessment of speed in those circumstances is far from easy, even for an adult, and even more so for a 13-year-old. It is also necessary to bear in mind that the situation of a pedestrian attempting to cross a relatively major road with a 60 mph speed limit, after dusk and without street lighting, is not straightforward, even for an adult."

Although the amount of apportionment is often the subject of appeal, an appellate court will interfere only in exceptional circumstances, where it is demonstrated that the trial judge was clearly wrong in his assessment of the weight to be given to the facts that he had found: *Wong Tang Keung v Lee Wai Engineering Co Ltd* [2013] 4 HKLRD 150, applying *Wishing Long Hong v Wong Kit Chun* (2001) 4 HKCFAR 289; or where the award was "outside the limits reasonably available to the court below", as in *Cai Guoping v Yim Hok Wing* (CACV 96/2015, [2015] HKEC 1944). In *Jackson v Murray* Lord Reed explained the appellate jurisdiction:

> The question, therefore, is whether the court below went wrong. In the absence of an identifiable error, such as an error of law, or the taking into account of an irrelevant matter, or the failure to take account of a relevant matter, it is only a difference of view as to the apportionment of responsibility which exceeds the ambit of reasonable disagreement that warrants the conclusion that the court below has gone wrong. In other words, in the absence of an identifiable error, the appellate court must be satisfied that the apportionment made by the court below was not one which was reasonably open to it.

The apportionment process has been described as "analogous to exercising discretion" and involving "a considerable range of possible choices within which a trial judge is entitled to apportion responsibility as he sees fit. So in the absence of any error of law or primary fact, his choice is not to be disturbed on appeal unless it plainly falls outside such range" (*Poon Hau Kei v Hsin Chong Construction Co Ltd* (2004) 7 HKCFAR 148 (Bokhary PJ)). *Ng Shing Yan Vincent v Poon Kin Pong* (CACV 170/2009, [2011] HKEC 1490) is an example of an appeal court's interference with apportionment. The trial judge's ruling that cleared the defendant of any liability in regard to a nine-year-old pedestrian was replaced by the Court of Appeal with 30% liability and 70% contributory negligence. More recently, in *McCracken v Smith* [2015] PIQR P19 the English Court of Appeal, citing *Jackson v Murray* (above), raised the percentage of contributory negligence from 45% to 65% because the plaintiff, a passenger on the co-defendant's motorcycle, was, in effect, participating with the driver in the joint criminal enterprise of dangerous driving.

Recall that in some instances, the plaintiff's conduct was not a cause of the accident resulting in injury, but was merely a cause of the plaintiff having suffered more serious injury. Here, the tendency is toward lower levels of reduction of damages, when compared with those plaintiffs whose conduct was a cause of the accident.

At one time it was thought that a finding of 100% contributory negligence was logically impossible (*Pitts v Hunt* [1991] 1 QB 24, 6.2.5 below). But consider *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, where the trial judge found the plaintiff's suicide to constitute 100% contributory negligence (adjusted to 50% by the House of Lords, which made no comment on the logic or otherwise of a finding of 100% contributory negligence). It is submitted that a finding of 100% contributory negligence is inconsistent with the

wording of s.21 of the Law Amendment and Reform (Consolidation) Ordinance, where the provision speaks of damage suffered by the plaintiff "as the result *partly of his own fault and partly of the fault of any other person*".

Moreover, in *Chung Ting San v Tong Tai Nam* (CACV 204/1999, [1999] HKEC 605), Keith JA held that a plaintiff's contributory negligence should never be assessed as low as 5 or 10%, because if "a plaintiff is held to have been only one-twentieth to blame for an accident, it may be unrealistic to regard him as having contributed to the accident at all".

6.1.3.1 *Seat belt cases*

In at least one category, that of injured motor vehicle passengers who neglect to wear a seat belt, the courts have adopted guidelines in determining apportionment.

Ho Wing Cheung v Liu Siu Fun
[1980] HKLR 300

For a summary of the facts, see 6.1.1 above.

Roberts CJ…

> The leading English authority is *Froom v Butcher* [1976] QB 286 in which the plaintiff, who was not wearing a seat belt, suffered head and chest injuries which he would not have sustained had he been wearing one.
>
> The Court of Appeal decided that, in determining whether an injured person has been guilty of contributory negligence, the question to be asked is not "what was the cause of the accident" but "what was the cause of the damage". If a person's injuries are due to his failure to wear a seat belt, he is guilty of contributory negligence and there should be a reduction in the damages awarded to him. The court suggested that the reduction should vary between 15% and 25%, according to whether the injuries sustained would have been less severe or avoided altogether had a seat belt been worn…
>
> We…conclude that the first plaintiff was guilty of contributory negligence in relation to her injuries though not in relation to the negligence which caused the collision. The medical evidence is that she might have suffered some injuries from flying glass, if wearing a seat belt, but no more.
>
> Taking this into account, we think that her share of responsibility for her injuries should be assessed at 20%, which was the figure submitted by counsel for the appellant.
>
> To what damages should this reduction be applied? The general principle, which is derived from *Froom* is that it should be applied only to such injuries, and the consequences therefrom, as could have been prevented by the wearing of a seat belt.
>
> Among the items of special damages were sums for the damage to the motorcar owned by the first plaintiff, towing and storage charges and damage to clothing. We assess these sums at $15,000.
>
> The reduction in the award to the first plaintiff should be 20% of the figure reached by deducting $15,000 from the total of general and special damages.

Appeal allowed.

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Chapter 15

TRESPASS TO PERSON

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15.2 Battery 592
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Trespassory torts are not as frequently litigated as the negligence-based torts. This is so, not so much because trespassory torts are not often committed, but that when committed, they often constitute criminal offences as well for which the wrongdoer is prosecuted and imprisoned. Murder, rape, and assault all constitute torts, but are usually only dealt with as crimes by the criminal courts. Often, such wrongdoers have insufficient resources to pay an award of damages and therefore, the potential plaintiff does not bother to sue, although she has the right to sue.

Nonetheless, a study of trespassory torts is important because the subject matter of these torts embraces a wide spectrum of important concerns and social issues, including matters such as personal liberties (freedom of movement and freedom from bodily interference) in the context of police and other State activities, property rights, and the right to control what will happen to one's body in the context of medical treatment. These are important interests worth protecting in themselves. Moreover, in these instances, the defendant probably has money, and therefore damages are recoverable.

In Hong Kong, the main areas of trespass to person litigation include actions by asylum seekers against the immigration and prison authorities, actions by migrant domestic workers against their employers, and actions by victims of aggressive behavior perpetrated by debt collectors or even by spurned ex-lovers. Some of these themes are also relevant to Chapters 16 and 17.

15.1 HISTORICAL

It will be remembered that prior to the 19th century, the important distinction in tort was not, as it is today, between intentional and negligent conduct. The old forms of action provided specific, formal writs of trespass and case, depending on whether the injury was direct or consequential (Chapter 2 above). The defendant's mental state (intention or negligence) was apparently not relevant to the determination of liability.

An action in trespass was said to be actionable *per se*, that is, could be maintained even in the absence of actual damage (in which event a small money award (nominal damages) could be made), whereas proof of actual damage was required in order to maintain an action on the case. In trespass, it was for the defendant to raise any issue of justification or excuse, whereas in case it was for the plaintiff to prove either wrongful intention or negligence on the part of the defendant.

By the middle of the 19th century, with the complexities of industrialisation and the migration from the countryside to the cities, the frequency of accidents naturally increased. The courts shifted away from liability based merely on causation (directness) of injury. Fault, that is, either intention or a failure to take reasonable care, came to displace causation as the determinant for tort liability.

The forms of action were abolished by the Judicature Acts of the 1870s, but the distinction between trespass and case remained for some time thereafter. Eventually, the distinction gave way to that between trespass (intentional torts) and negligence as we now know it. With respect to trespass, the burden of proving fault (intention) eventually came to be imposed on the plaintiff (*Fowler v Lanning* [1959] 1 QB 426), bringing that tort action into line with negligence which, even in its earlier form as the action on the case, placed the burden of proving fault (negligence) on the plaintiff.

Letang v Cooper
[1965] 1 QB 232

The plaintiff was sunbathing in the grounds of a hotel when the defendant inadvertently drove over her in his motorcar, causing personal injury. She sued the defendant for her injuries, but did not commence the action until more than three years after the accident. The Law Reform (Limitation of Actions) Act 1954 required that an action for personal injuries for "negligence, nuisance or breach of duty" be commenced within three years of the date of the accident. However, the plaintiff argued that her action was for trespass to the person, and that she was therefore not bound by the three-year rule. At trial, her argument was successful and she obtained judgment. The defendant appealed.

Lord Denning MR…

The argument, as it was developed before us, became a direct invitation to this court to go back to the old forms of action and to decide this case by reference to them. The statute bars an action on the case, it is said, after three years, whereas trespass to the person is not barred for six years. The argument was supported by reference to text-writers, such as *Salmond on Torts* (13th ed.) p.790. I must say that if we are, at this distance of time, to revive the distinction between trespass and case, we should get into the most utter confusion. The old common lawyers tied themselves in knots over it, and we should find ourselves doing the same. Let me tell you some of their contortions. Under the old law, whenever one man injured another by the direct and immediate application of force, the plaintiff could sue the defendant in trespass to the person, without alleging negligence (*Leame v Bray* (1803) 3 East 593) whereas if the injury was only consequential, he had to sue in case. You will remember the illustration given by Fortescue J, in *Reynolds v Clarke* (1795) 1 Str 634:

> "If a man throws a log into the highway and in that act it hits me, I may maintain trespass because it is an immediate wrong; but if, as it lies there, I tumble over it and receive an injury, I must bring an action upon the case because it is only prejudicial in consequence."

Nowadays, if a man carelessly throws a piece of wood from a house into a roadway, then whether it hits the plaintiff or he tumbles over it the next moment, the action would not be trespass or case, but simply negligence…

I must decline, therefore, to go back to the old forms of action in order to construe this statute. I know that in the last century Maitland said "the forms of action we have buried but they still rule us from their graves". But we have in this century shaken off their trammels. These forms of action have served their day. They did at one time form a guide to substantive rights; but they do so no longer. Lord Atkin told us what to do about them:

> "When these ghosts of the past stand in the path of justice, clanking their mediaeval chains, the proper course for the judge is to pass through them undeterred" (see *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1).

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> The truth is that the distinction between trespass and case is obsolete. We have a different sub-division altogether. Instead of dividing actions for personal injuries into trespass (direct damage) or case (consequential damage), we divide the causes of action now according as the defendant did the injury intentionally or unintentionally. If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault and battery, or, if you so please to describe it, in trespass to the person. "The least touching of another in anger is a battery." If he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care. If the plaintiff cannot prove want of reasonable care, he may have no cause of action at all. Thus, it is not enough nowadays for the plaintiff to plead that "the defendant shot the plaintiff" (*Cole v Turner* (1704) 6 Mod 149, 90 ER 958). He must also allege that he did it intentionally or negligently. If intentional, it is the tort of assault and battery. If negligent and causing damage, it is the tort of negligence.
>
> The modern law on this subject was well expounded by my brother Diplock J, in *Fowler v Lanning* (1959) 1 QB 426 with which I fully agree. But I would go this one step further: when the injury is not inflicted intentionally, but negligently, I would say that the only cause of action is negligence and not trespass. If it were trespass, it would be actionable without proof of damage; and that is not the law today.
>
> In my judgment, therefore, the only cause of action in the present case (where the injury was unintentional) is negligence and is barred by reason of the express provision of the statute…
>
> I come, therefore, to the clear conclusion that the plaintiff's cause of action here is barred by the statute of limitation. Her only cause of action here, in my judgment (where the damage was unintentional), was negligence and not trespass to the person. It is therefore barred by the word "negligence" in the statute; but even if it was trespass to the person, it was an action for "breach of duty" and is barred on that ground also.

Appeal allowed.

The trespass/case distinction, although obsolete, has left its mark on the requirements of the modern law of trespass. The tort of battery still retains the requirement that the injury to the plaintiff be immediate, if not direct. Thus an intentional but consequential injury does not constitute a battery. Nor does it constitute negligence, which may create a lacuna in the law. *Wilkinson v Downton* [1897] 2 QB 57 (18.2 below), and the academic commentary on that case, may provide a clue as to how this lacuna may be filled.

Battery, assault, and false imprisonment involve the direct and immediate application or threatened application of force to the person, and for that reason they are all described and classified as "trespass to the person". The features common to these three torts are that they are intentionally committed against a person, and they are committed through direct and immediate means. Directness and immediacy will be discussed in the context of battery (15.2 below). Intention requires that the relevant consequence (contact, apprehension or detention) must have been desired. The plaintiff has the burden to prove the elements of the tort (*Wu Shu Bun v Secretary for Justice* (HCPI 1348/2000, [2008] HKEC 854)), including the necessary intention, relying on inferences to be drawn from the defendant's conduct, and the surrounding circumstances. Proof of the elements of the tort is on the balance of probabilities (see 15.2 below).

Finally, it is a feature of these torts that an action can be maintained in the absence of damage suffered by the plaintiff (these torts are "actionable *per se*"). Most other tort actions cannot be maintained unless actual damage is suffered. That is because it is thought that the trespassory torts serve functions in addition to compensation and deterrence, in particular, that they serve to vindicate, and protect against the violation of, certain fundamental rights that may not have resulted in damage. Indeed, this vindicatory function was expressly mentioned by the House of Lords in *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962 (discussed further in Chapter 16 below), as justifying the plaintiff's decision to sue in battery in addition to negligence, despite no financial advantage in doing so.

Issues and Questions

(1) *Letang v Cooper* is generally regarded as confirmation that the modern law has moved beyond the trespass/case distinction. This position is accepted in Hong Kong (see for instance *Secretary for Justice v Ng Kwan Lung* (DCCJ 480/2006, [2007] HKEC 60)). However, in the context of *Letang v Cooper*, the pronouncement of Lord Denning on the trespass/case distinction was necessary in order to determine the limitation issue. On the basis of the limitation periods as understood by Lord Denning, was his rejection of the trespass/case distinction crucial to his determination of the case, or would he have reached the same result anyway?

(2) Despite the decision in *Letang v Cooper*, there exists some academic controversy as to whether or not a trespass can be committed negligently. Witting (2015) at pp.251–252, *Street on Torts* (2015) at pp.251–252, holds that a motor vehicle accident in which a pedestrian is injured could be treated as a trespass. However, as can be seen from *Letang v Cooper*, the judicial tendency is to treat such cases as negligence, or to make actions for unintentional trespass subject to the same rules as negligence. See for instance, Croom-Johnson LJ in *Wilson v Pringle* [1987] QB 237: "it has long been the law that claims arising out of an unintentional trespass must be made in negligence". And in *Home Office v Wainwright* [2002] QB 1334, Buxton LJ expressly approved of Lord Denning's statement of the law. In *Letang v Cooper*, Diplock LJ conceded that it may be possible to sue for negligent trespass, but then most of the cumbersome elements of the negligence tort would have to be proved (save duty of care), thereby depriving the plaintiff of the advantages of the trespass action, while imposing some of the disadvantages (the requirement of proving directness and immediacy). If the rules for recovery of damages are different as between negligence and battery, perhaps a slight advantage could accrue (17.1.1 below).

(3) In Australia, *Letang v Cooper* is not followed, and a negligent trespass action is still a possibility. For a discussion, see Barker, Cane, Lunney and Trindade (2012).

(4) The ruling in *Letang v Cooper*, to the effect that the three-year limitation period applied to trespass to the person, was overruled by the House of Lords in *Stubbings v Webb* [1993] AC 498. However, in 2008, *Letang v Cooper* was restored in *A v Hoare* [2008] 1 AC 844, according to which, the same provisions

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providing for a three-year limitation period for personal injuries caused by a breach of duty should apply to personal injuries caused by a trespass.

15.2 BATTERY

Battery involves the intentional, direct and immediate infliction of unwanted, harmful or offensive bodily contact. It can occur in a variety of factual contexts. Examples include a physical attack on a person, an excessive use of force against an opponent on a sports field, and an unconsented to (even if well intended) medical procedure.

The requirement of directness which derives from this tort's origins as a trespass action should not be taken too literally. For instance, pouring water over the plaintiff, throwing an object at the plaintiff, or pulling a chair from beneath the plaintiff are sufficiently direct for this purpose. It was even considered sufficiently direct where the defendant threw a lighted gunpowder squib onto the market stall of Y, whereupon Y to save himself suddenly threw it away, where it landed on the stall of R who also threw it away, finally resulting in injury to the plaintiff (*Scott v Shepherd* (1772) 2 W Bl 892, 96 ER 525). Exceptionally, in *Roberts v Chief Constable of Kent* [2008] EWCA Civ 1588, the court appears to have considered it sufficiently direct for battery where the defendant police officer set his dog upon the plaintiff during the course of an arrest (defendant not liable, the court finding the use of the dog as reasonable force in the circumstances). On the other hand, setting a trap or contaminating someone's wine with poison which he later drinks is not sufficiently direct to qualify as battery.

Note that the "intention" necessary for this tort relates to the contact with the plaintiff and not to the infliction of injury. Intention to injure is not a requirement of battery (*Wilson v Pringle* [1987] QB 237). Knowledge of wrongdoing is not even a requirement. An attack by a person with a diseased mind is a battery, so long as the bodily contact was intended (*Morriss v Marsden* [1952] 1 All ER 925).

The case that follows involves a direct application of force, a gunshot, but the shot hit someone other than the intended victim.

Livingston v Ministry of Defence
[1984] NI 356

The plaintiff was struck by a gunshot fired by a soldier after the security forces were attacked by rioters. The soldier had not aimed at the plaintiff but at another person. The plaintiff sued the defendant (the soldier's employer) in negligence and battery. The trial judge dismissed the negligence action. The plaintiff appealed, arguing that the trial judge did not properly consider the action in battery. The defendant argued that no battery was committed in the absence of proof that the soldier deliberately fired the gun with the intention of striking the plaintiff.

Hutton J…

Mr Kerr's principal submission in reply to this question was that the tort of battery was not committed unless the defendant, or the servants or agents of the defendant, deliberately fired a round with the intention of striking the plaintiff, and Mr Kerr submitted that if, in dispersing a riot, a soldier fired a shot at one rioter in the riotous crowd but missed him and struck another rioter in the crowd, the soldier had not committed battery against the rioter who was struck (assuming that the force used was unjustified) because the soldier had not intended to hit that particular rioter. Therefore Mr Kerr argued that the soldier who fired the baton round which struck the plaintiff was not guilty of the tort of battery towards him, because there was no evidence that the soldier had intended to hit the plaintiff and the soldier may well have intended to hit a rioter but struck the plaintiff by mistake. In support of that submission Mr Kerr relied on the judgment of Lord Denning MR in *Letang v Cooper* [1965] 1 QB 232…

Hutton J then quoted the passage from Lord Denning's judgment at 15.1 above in which Lord Denning explained the historical distinction between trespass and case, and continued…

Mr Kerr also cited the definition of battery in *Winfield & Jolowicz on Tort* (12th ed.) at page 54:

"Battery is the intentional and direct application of force to another person."

However, I consider it to be clear that when Lord Denning and Winfield and Jolowicz refer to doing an injury "intentionally" or to the "intentional" application of force, they mean that the application of force towards some person is intended, even although the person directly struck may not be the person whom the assailant intended to strike. In my judgment when a soldier deliberately fires at one rioter intending to strike him and he misses him and hits another rioter nearby, the soldier has "intentionally" applied force to the rioter who has been struck. Similarly if a soldier fires a rifle bullet at a rioter intending to strike him and the bullet strikes that rioter and passes through his body and wounds another rioter directly behind the first rioter, whom the soldier had not seen, both rioters have been "intentionally" struck by the soldier and, assuming that the force used was not justified, the soldier has committed a battery against both.

Hutton J then quoted a passage from *James v Campbell* (1832) 5 C & P 372 as follows:

Assault and battery. It appeared that, at a parish dinner, the plaintiff and defendant (who it seemed were not on good terms, in consequence of something which took place with respect to a leet jury), together with a Mr Paxon and others were present. Mr Paxton and the defendant quarrelled, and had proceeded to blows, in the course of which the defendant struck the plaintiff, and gave him two black eyes, and otherwise injured him…

Mr Justice Bosanquet (to the jury): "If you think as I apprehend there can be no doubt, that the defendant struck the plaintiff, the plaintiff is entitled to your verdict, whether it was done intentionally or not. But the intention is material in considering the amount of the damages."

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> …Therefore I consider that the soldier who fired the baton round which struck the plaintiff was guilty of battery to the plaintiff and the plaintiff is entitled to damages unless the first-named defendant could establish that the firing was justified…

Appeal allowed, new trial ordered.

In battery, as in the other torts of trespass to the person, the conduct must be intentional. This means that the relevant consequence must have been desired. In battery, the relevant consequence is bodily contact. Therefore, to succeed in battery, the plaintiff must show that the bodily contact was desired by the defendant. This can be termed actual intention. However, where the bodily contact is not specifically desired, but is substantially certain to result from conduct that the defendant has knowingly undertaken, the necessary intention for the battery is also established. This can be termed imputed or oblique intention. An example might be the destruction of a rail line by persons whose only desire is to commit a robbery. Harmful bodily contact to the train driver and passengers is sure to follow. Similar, but not identical, is the situation where A, intending to strike B, but having a bad aim, in fact strikes C. Here, the necessary intention is sometimes described as being transferred. This is the type of intention involved in *Livingston v Ministry of Defence*.

The case that follows is a criminal law case (an appeal against conviction for the offence of assaulting (battering) a police officer in the course of her duty), but involves a comprehensive consideration of the common law tort of battery. Note the specific factual elements that constitute the battery in this case. Although a criminal case, the tort action of battery enables the accused to enforce a basic human right.

Collins v Wilcock
[1984] 1 WLR 1172

Under s.1(1) of the Street Offences Act 1959, it was an offence for a common prostitute to loiter in a public place for the purpose of prostitution, and under s.3(3) a constable was empowered to arrest anyone reasonably suspected of an offence under s.1(1). Moreover, police procedures adopted in the district provided for a system of cautioning, whereby, a constable, when seeing a person for the first time suspected of an offence under s.1(1), would first request the suspect's name and address and advise on the availability of counselling from a moral welfare organization. A record of the incident would be kept at the police station. According to this procedure a constable would only make an arrest for a s.1(1) offence on the third occasion of seeing the suspect loitering in the street. The accumulation of evidence would assist to support the conviction for being a "common prostitute". The respondent, a police constable, spotted the appellant loitering in the street, and suspecting her of engaging in the solicitation of customers for the purposes of prostitution, asked the appellant to get into the police car to provide personal details. When the appellant refused, the respondent repeated her request. The appellant walked away. The respondent got out of the car and followed the respondent on foot, and asked for her name and address. The appellant replied to the respondent in rude terms and again walked away, upon which the respondent took hold of the appellant's arm to restrain her. The appellant shouted "fuck off copper" and scratched the respondent's forearm with her fingernails. The appellant was then arrested for assaulting a police officer in the execution of her duty. The appellant was convicted of this offence, and appealed.

Robert Goff LJ…

The fundamental principle, plain and incontestable, is that every person's body is inviolate. It has long been established that any touching of another person, however slight, may amount to a battery. So Holt CJ held in 1704 that "the least touching of another in anger is a battery": see *Cole v Turner* 6 Mod Rep 149, 90 ER 958. The breadth of the principle reflects the fundamental nature of the interest so protected; as Blackstone wrote in his Commentaries, "the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner" (see 3 Bl Com 120). The effect is that everybody is protected not only against physical injury but against any form of physical molestation.

But so widely drawn a principle must inevitably be subject to exceptions. For example, children may be subjected to reasonable punishment; people may be subjected to the lawful exercise of the power of arrest; and reasonable force may be used in self-defence or for the prevention of crime. But, apart from these special instances where the control or constraint is lawful, a broader exception has been created to allow for the exigencies of everyday life. Generally speaking, consent is a defence to battery; and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact. So nobody can complain of the jostling which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street; nor can a person who attends a party complain if his hand is seized in friendship, or even if his back is (within reason) slapped (see *Tuberville v Savage* (1669) 1 Mod Rep 3, 86 ER 684). Although such cases are regarded as examples of implied consent, it is more common nowadays to treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life. We observe that, although in the past it has sometimes been stated that a battery is only committed where the action is "angry, or revengeful, or rude, or insolent" (see 1 Hawk PC c 62, s.2), we think that nowadays it is more realistic, and indeed more accurate, to state the broad underlying principle, subject to the broad exception.

Among such forms of conduct, long held to be acceptable, is touching a person for the purpose of engaging his attention, though of course using no greater degree of physical contact than is reasonably necessary in the circumstances for that purpose. So, for example, it was held by the Court of Common Pleas in 1807 that a touch by a constable's staff on the shoulder of a man who had climbed on a gentleman's railing to gain a better view of a mad ox, the touch being only to engage the man's attention, did not amount to a battery (see *Wiffin v Kincard* (1807) 2 Bos & PNR 471, 127 ER 713, for another example, see *Coward v Baddeley* (1859) 4 H & N 478, 157 ER 927). But a distinction is drawn between a touch to draw a man's attention, which is generally acceptable, and a physical restraint, which is not. So we find Parke B observing in *Rawlings v Till* (1837) 3 M & W, 28 at 29, 150 ER 1042, with reference to *Wiffin v Kincard*, that "There the touch was merely to engage a man's attention, not to put a restraint on his person". Furthermore, persistent touching to gain attention in the face of obvious disregard may transcend the norms of acceptable behaviour, and so be outside the exception.

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We do not say that more than one touch is never permitted; for example, the lost or distressed may surely be permitted a second touch, or possibly even more, on a reluctant or impervious sleeve or shoulder, as may a person who is acting reasonably in the exercise of a duty. In each case, the test must be whether the physical contact so persisted in has in the circumstances gone beyond generally acceptable standards of conduct; and the answer to that question will depend on the facts of the particular case…

Of course, a police officer may subject another to restraint when he lawfully exercises his power of arrest; and he has other statutory powers, for example, his power to stop, search and detain persons under s.66 of the Metropolitan Police Act 1839, with which we are not concerned. But, putting such cases aside, police officers have for present purposes no greater rights than ordinary citizens. It follows that, subject to such cases, physical contact by a police officer with another person may be unlawful as a battery, just as it might be if he was an ordinary member of the public. But a police officer has his rights as a citizen, as well as his duties as a policeman. A police officer may wish to engage a man's attention, for example if he wishes to question him. If he lays his hand on the man's sleeve or taps his shoulder for that purpose, he commits no wrong. He may even do so more than once; for he is under a duty to prevent and investigate crime, and so his seeking further, in the exercise of that duty, to engage a man's attention in order to speak to him may in the circumstances be regarded as acceptable (see *Donnelly v Jackman* [1970] 1 WLR 562). But if, taking into account the nature of his duty, his use of physical contact in the face of non-co-operation persists beyond generally acceptable standards of conduct, his action will become unlawful; and if a police officer restrains a man, for example by gripping his arm or his shoulder, then his action will also be unlawful, unless he is lawfully exercising his power of arrest. A police officer has no power to require a man to answer him, though he has the advantage of authority, enhanced as it is by the uniform which the state provides and requires him to wear, in seeking a response to his inquiry. What is not permitted, however, is the unlawful use of force or the unlawful threat (actual or implicit) to use force and, excepting the lawful exercise of his power of arrest, the lawfulness of a police officer's conduct is judged by the same criteria as are applied to the conduct of any ordinary citizen of this country…

We now return to the facts of the present case. Before us, counsel for the respondent police officer sought to justify her conduct, first by submitting that, since the practice of cautioning women found loitering or soliciting in public places for the purposes of prostitution is recognised by s.2 of the 1959 Act, therefore it is implicit in the statute that police officers have a power to caution, and for that purpose they must have the power to stop and detain women in order to find out their names and addresses and, if appropriate, caution them. This submission, which accords with the opinion expressed by the magistrate, we are unable to accept. The fact that the statute recognises the practice of cautioning by providing a review procedure does not, in our judgment, carry with it an implication that police officers have the power to stop and detain women for the purpose of implementing the system of cautioning. If it had been intended to confer any such power on police officers that power could and should, in our judgment, have been expressly conferred by the statute.

Next, counsel for the respondent submitted that the purpose of the police officer was simply to carry out the cautioning procedure and that, having regard to her purpose, her action could not be regarded as unlawful. Again, we cannot accept that submission. If the physical contact went beyond what is allowed by law, the mere fact that the police officer has the laudable intention of carrying out the cautioning procedure in accordance with established practice cannot, we think, have the effect of rendering her action lawful. Finally, counsel for the respondent submitted that the question whether the respondent was or was not acting in the execution of her duty was a question of fact for the magistrate to decide; and that he was entitled, on the facts found by him, to conclude that the respondent had been acting lawfully. We cannot agree. The fact is that the respondent took hold of the appellant by the left arm to restrain her. In so acting, she was not proceeding to arrest the appellant; and since her action went beyond the generally acceptable conduct of touching a person to engage his or her attention, it must follow, in our judgment, that her action constituted a battery on the appellant, and was therefore unlawful. It follows that the appellant's appeal must be allowed, and her conviction quashed.

Appeal allowed. Conviction quashed.

Note that in Hong Kong there is a similar criminal offence as that referred to in *Collins v Wilcock* for assaulting or resisting a police officer acting in the execution of his duty—see s.63 of the Police Force Ordinance (Cap.232). The same ordinance provides a list of police officer's duties in s.10 which could be relevant to the s.63 offence. Section 10 is a broad list of duties, and includes:

(a) preserving the public peace;
(b) preventing and detecting crimes and offences;
(c) preventing injury to life and property;
(d) apprehending all persons whom it is lawful to apprehend and for whose apprehension sufficient grounds exists;
(e) regulating processions and assemblies in public places or places of public resort;
(f) controlling traffic upon public thoroughfares and removing obstructions therefrom;
(g) preserving order in public places and places of public resort, at public meetings and in assemblies…

Attorney-General v Kong Chung Shing [1980] HKLR 533 concerned facts broadly similar to *Collins v Wilcock*. The defendant, holding three packets in his clenched fist, was stopped and arrested by a police officer in plain clothes, who suspected that the packets contained dangerous drugs. The defendant struck the police officer and ran away. The packets did not contain dangerous drugs. Nonetheless, the defendant was charged with resisting a police officer in the execution of his duty. At trial the prosecution conceded that there was no evidence to suggest that the defendant was acting in a suspicious manner, and there was otherwise no evidence to support a reasonable suspicion that the accused was committing an offence. As such, the police officer could not have been acting in the execution of his duty, and the defendant was not guilty of resisting a police officer in the execution of his duty. On this basis the charges against the defendant were dismissed by the magistrate and the Court of Appeal.

Intentionally harmful acts such as striking, raping, or shooting someone, are all batteries (however much they may also constitute crimes, subjecting the wrongdoer to criminal prosecution). Of course, as such wrongs result in personal injury, substantial damages can be awarded, as in *Au Kam Han v Au Kam Ming* (HCPI 1069/1998, [2001] HKEC 279) (10.6.2.2

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above), a kidnap and murder case in which $13,474,500 was awarded, including $300,000 for pain and suffering, *Ng Ching Ying v Lee Siu Yeung Danny* [2002] 1 HKC 154, a case of throwing sulphuric acid on the plaintiff in which an agreed sum of $720,0000 was awarded, *Mir v Mir* [2012] 1 HKLRD 671, a case of domestic violence in which $140,000 was awarded, including $100,000 for pain and suffering, and *Tangarorang v Chan Chau Wing* [2013] 5 HKC 304, a case of sexual assault against a domestic worker in which $367,790 was awarded, including $140,000 for pain and suffering.

Equally, any unconsented to intentional bodily contact is also a battery, even in the absence of actual damage. However, if the intentional bodily contact, although not specifically consented to, is within the accepted usages of daily life, no battery is committed. This principle was affirmed in the court's reasoning in *Collins v Wilcock*.

Is hostile intent a requirement for battery? *Wilson v Pringle* [1987] QB 237 concerned two schoolboys involved in horseplay. The defendant admitted that he had pulled the plaintiff's schoolbag, causing the plaintiff to fall and injure his hip. Despite this admission, the English Court of Appeal held that the tort of battery had not been proved, because it had not been shown that the defendant had acted with "hostility". The case aroused academic and judicial controversy in respect of the statement that hostility is a necessary element in battery (see for instance the view of Lord Goff in *F v West Berkshire Health Authority* [1990] 2 AC 1 who plainly disagreed with *Wilson v Pringle* on this point). The dilemma is exacerbated by Lord Justice Croom-Johnson's failure to positively define the concept of hostility in his judgment. Instead, he provided only a negative definition, describing what it is not rather than what it is ("...it cannot be equated with ill-will or malevolence. It cannot be governed by the obvious intention shown in acts like punching, stabbing or shooting. It cannot be solely governed by an expressed intention, although that may be strong evidence...").

Need one be angry or hostile in order to commit a battery? It would seem not. For instance, a doctor's physical contact when treating a patient without the patient's consent has long been held to constitute battery, even though the doctor is acting with no hostile intention. There would seem to be no good policy reason to require that the plaintiff in a battery action prove that the defendant acted with hostility.

In *Saeed v Secretary for Justice* [2015] 1 HKLRD 1030, a case of wrongful executive detention of a foreign national who unlawfully entered Hong Kong, the Court of Final Appeal rationalized the *Wilson v Pringle* principle in these terms: "Although it has been said that an element of hostility is required for battery, such hostility is not to be equated with ill-will, but evidence is required of an act contrary to the claimant's right to freedom from unwarranted physical contact". While no one would dispute the correctness of the latter part of that statement, it is submitted that it would be correct, and more coherent, to acknowledge that hostility is not a requirement of battery. The examples of non-hostile battery (unwanted but well-intentioned medical treatment, and unwanted acts of affection being obvious examples) are too well-known to be doubted and argue against the requirement for hostility, a requirement that, at any rate, has only meagre authority in the case law, limited perhaps to *Wilson v Pringle* itself. The tort is sufficiently contained by the requirements that the contact be unconsented to, and that mere touching is actionable only if offensive, ie outside of accepted usages of daily life.

Battery is actionable *per se*. Where no actual damage has been suffered, an action can be brought resulting in an award of nominal damages. A person who has been the victim of a battery or assault or false imprisonment who has suffered no actual damage might wish to sue, if only as vindication because his dignity has been offended (see eg *Yu Ka Yui v Chong Chi Fai* (DCPI 1994/2014, [2017] HKEC 236)). A tort action may help restore his dignity and

vindicate his rights. The availability of the tort action on this basis ensures a more powerful deterrent effect for the tort.

By the same token, one need not be aware of the offensive contact when it occurs in order to have an action in battery. The dignity of the person has been offended, and the infringement of rights is in need of vindication no less in these circumstances.

It is important to bear in mind the admonition from *Re H (Minors)* [1996] AC 563 that the more serious the allegation (for instance, an intentional tort, as opposed to negligence) the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. This approach was approved by the Court of Final Appeal in *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117, and was applied in the context of battery in *Wu Shu Bun v Secretary for Justice* (HCPI 1348/2000, [2008] HKEC 854) (alleged assault by police) and *Wang Xi v Lee Pok Hok Andrew* [2012] 1 HKLRD 1134 (alleged rape), and in the context of false imprisonment in *Kosasih Muanto v Lei Robert Bo* [2008] 5 HKLRD 605 (plaintiff kidnapped and forced to sign deeds of transfer). In *Faridha Sulistyoningsih v Mak Oi Ling* (DCPI 1575/2005, [2007] HKLRD (Yrbk) 418), the defendant employer had been earlier acquitted in Magistrate's Court of the criminal charges of assaulting and wounding the plaintiff, her domestic helper, but in the civil action, the court found the defendant liable for damages for battery and false imprisonment (the defendant had prevented the plaintiff from leaving the flat throughout the three months of the employment), applying the civil standard of proof. The court acknowledged that the civil standard in such cases was higher, citing *Re H (Minors)*, but nonetheless found the necessary proof made out.

An important instance of battery occurs in the medical context. An unconsented to medical treatment is a battery (*Cheng Man Chi v Tam Kai Tai* (HCPI 1094/2006, [2009] HKEC 205) (3.2.6.1 above)). This is so, even if the treatment was administered by the doctor with the best of intentions. In *Airedale NHS Trust v Bland* [1993] AC 789 Lord Griffiths said that "it is unlawful, so as to constitute both a tort and the crime of battery, to administer medical treatment to an adult, who is conscious and of sound mind...such a person is completely at liberty to decline to undergo treatment, even if the result of his doing so will be that he will die". A graphic instance of the application of this principle can be seen in *Re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290. The patient, a prisoner, was diagnosed as a chronic paranoid schizophrenic. He developed an ulcerated and gangrenous foot, and against medical advice, withheld consent to amputation. Having found that the patient's mental capacity was not so impaired as to prevent him understanding the nature of his condition and the nature of the treatment, the patient's application for an injunction preventing amputation was granted.

The subject of medical battery is somewhat complex, particularly because of its uneasy relationship with the more common action of medical negligence, and will be examined in greater detail in Chapter 16.

Another important instance of battery is in the context of arrest. An unlawful arrest, for instance one made without legal justification, or without the provision of reasons for the arrest, or in circumstances where excessive force is used, for instance the unnecessary use of handcuffs, or strip searches, is a battery (*Leung Kwok Hung v Secretary for Justice* [2009] 4 HKLRD 247, *Saeed v Secretary for Justice* [2015] 1 HKLRD 1030). As the issue of battery in the context of arrest arises in the context of the defence of legal authority, a detailed examination will also be postponed to Chapter 16.

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Issues and Questions

(1) Could *Scott v Shepherd* (1772) 2 Wm Bl 892, 96 ER 525 (15.2 above) be explained as a case of transferred intention?

(2) Note that some English commentators doubt whether transferred intention is fully part of English tort law. See, for instance, Witting (2015) p.253 and Baker (1996) p.20. The writers of these books consider transferred intention to be a criminal law principle only, arguing that, despite its adoption in the US civil law, it has no place in the English civil law. Baker argues that the tort of negligence would in any event provide a remedy so there need not be resort to the doctrine of transferred intention in tort law. The matter should now be beyond doubt after the Court of Queen's Bench decision of *Bici v Ministry of Defence* [2004] EWHC 786 (QB), a case concerning facts similar to those in *Livingston v Ministry of Defence* [1984] NI 356 (15.2 above). The court applied the principle of transferred intention.

(3) Is it really true, as suggested by Baker in the previous paragraph, that negligence can provide the necessary remedy? In *Livingston v Ministry of Defence*, what causes of action were pleaded by the plaintiff? On which did he succeed? On which did he fail? At any rate, is it true that negligence is a suitable theory of liability with which to resolve cases involving the intentional infliction of bodily harm?

(4) Which of the following are batteries: a stranger taps you on the shoulder at the MTR to ask for directions; a colleague who has fallen in love with you gives you a kiss; your basketball coach pats you on the backside after you score the winning point in the game?

(5) Can the mere touching of the clothes constitute a battery? It would seem so (*R v Day* (1845) 1 Cox CC 207). It may even be so where the victim does not feel the impact (see *Thomas v National Union of Mineworkers (South Wales Area)* [1986] Ch 20).

(6) Can shouting at someone constitute a battery? Do sound waves constitute bodily contact? There is no authority to support such a proposition in tort law, but it was so held in Hong Kong in the criminal case of *HKSAR v Leung Chun Wai* (HCMA 152/2002, [2003] HKEC 1509). The use of a loudhailer in close proximity to the victim's ear was said to be sufficient to constitute the criminal offence of battery.

(7) It would seem that drunkenness does not negate the intention necessary for battery, given the finding of battery committed by the defendant when drunk in *Wong Ka Wai v Lee Man Wai* (DCPI 145/2010, [2012] HKEC 75).

15.3 ASSAULT

Assault is another tort of trespass to the person. Like battery, it is actionable *per se*. Unlike battery, assault involves no bodily contact. Rather, it involves the apprehension of imminent bodily contact. The tort consists of the intentional creation in another person of an apprehension of imminent harmful or offensive bodily contact. It has been described in the English Court of Appeal as "an overt action, by word or deed, indicating an immediate intention to commit a battery and with the capacity to carry the threat into action" (*Home Office v Wainwright* [2002] QB 1334 (Buxton LJ)).

This tort can be committed in a number of ways. Pointing a gun at the plaintiff, raising a fist as if to strike a blow at the plaintiff, or throwing an object at the plaintiff (even if no contact is made) are all examples of assaults. Subjective fear for one's safety is not a requirement of the tort. Mere apprehension (with or without such fear) of imminent harmful or offensive bodily contact will complete the tort. Of course, as the tort of assault involves apprehension, no tort is committed if the victim is unaware of the threat, as where he is asleep, or did not otherwise see the attacker.

In the common case where the plaintiff apprehends the attack and actual bodily contact occurs, the victim will have actions in both battery and assault. However, in most such cases, the assault tends to become subsumed in the battery. There is little or no discussion of the assault, and a single award of damages is made. In most such cases the transition from assault to battery is instantaneous, and the real harm stems from the physical injuries arising from the battery.

In *Pong Seong Teresa v Chan Norman* [2014] 5 HKLRD 60 the court held that to succeed the plaintiff must show that the act "would put a reasonable person *in fear of physical violence*" (my emphasis). This suggests, correctly it is submitted, that the threatening words or act must have been such that a reasonable person would have anticipated the threatened physical contact. Assault was found on the basis of the defendant's shouting of obscenities whilst pointing and gesturing towards the plaintiff "in a progressively angry, hostile, and aggressive manner", and the spraying of red paint on the walls of the plaintiff's premises. However, there is in law no requirement that physical violence was intended or that the plaintiff be put in fear of physical violence in order to establish an assault. A plaintiff can succeed in assault where what he reasonably apprehended was something less than physical violence. It is enough if the conduct he apprehended was merely offensive, for instance, unwanted touching, as amply demonstrated in the authorities.

To impose a condition does not negative an assault if the effect of the condition is to require the victim to do something that he is not otherwise required to do. In the New Zealand case of *Police v Greaves* [1964] NZLR 295, a criminal case but of relevance to the civil law of assault, police officers were called by a distressed woman complaining of abuse by the respondent. When the police arrived, the respondent came to the door with a carving knife in his right hand poised at waist height and pointed toward one of the police officers and said, "don't you bloody move. You come a step closer and you will get this straight through your…guts". On these facts the respondent was convicted of the crime of assault, but the conviction was quashed in the Supreme Court on the ground that the threat was conditional and did not constitute assault. In the New Zealand Court of Appeal the conviction was restored. North P said that:

> A threat in its very nature usually provides the person threatened with an alternative, unpleasant though it may often be. It is only necessary to recall the oft repeated threat of the highwayman, "your money or your life" to see that if a pistol be pointed at the victim it would be idle to say that there was not a threat to apply force to the person of another in circumstances in which the person making the threat had, or at least caused the other to believe on reasonable grounds that he had, present ability to effect his purpose, and therefore that an assault had been committed. On the facts of the present case it was enough that the menacing attitude of the respondent caused the police officers to retire…We can see no difference in principle between a demand that the

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> person threatened should retire and a demand that he should not proceed further on his lawful occasions. The policemen were present here on their lawful occasions and their entry was barred; that in our opinion was sufficient…

In *Police v Greaves* the court laid emphasis on the fact that the police were "present on their lawful occasions" (having been summoned by the complainant to investigate a crime and to prevent further harm). The assault is not dispelled merely by the offering of an alternative ("get off this property or I will shoot") that the defendant is not privileged to enforce. On this basis, the result would be different if the victim had been a trespasser rather than the police acting on their lawful occasions.

It is a requirement of this tort that there be an apparent ability to carry out the threat immediately. This is the same thing as saying that the apprehension of immediate force must be reasonable. In *Thomas v National Union of Mineworkers (South Wales Area)* [1986] Ch 20, a case in which striking miners made threats to co-workers who were crossing the picket lines, Scott J said:

> The tort of assault is not, in my view, committed, unless the capacity in question [to carry out the threat] is present at the time the overt act is committed. Since the working miners are in vehicles and the pickets are held back from the vehicles, I do not understand how even the most violent of threats or gestures could be said to constitute an assault.

It was once thought that mere words without some bodily movement could not constitute an assault (*R v Meade and Belt* (1823) 1 Lewin 184, 168 ER 1006 is normally cited for this proposition), but such a generalisation may be misleading. Consider a person in a completely dark corridor, threatened by someone he cannot see who says "give me your money or I will shoot". Although the victim did not see any bodily movement, has he not been assaulted?

In *Wong Kwai Fun v Li Fung* [1994] 1 HKC 549, the defendant was persuaded by the plaintiff to borrow HK$148,500 at what proved to be an effective annual interest rate of 400%. As security, he signed six post-dated cheques, as well as a power of attorney authorising the sale of his flat should he default in repayment. He did default and, in an effort to exact repayment, the plaintiff subjected the defendant to intimidation, including occasional physical contact, but more often, verbal threats on his life and on the lives of the members of his family. The defendant suffered illness, including suicide attempts, for which he was hospitalised. In reply to the plaintiff's civil action for payment of the loan, the defendant counterclaimed for *inter alia* assault. Woo J said:

> Merely uttering annoying statements or singing or causing a nuisance outside another's house may not amount to a tort, but if threats of physical violence are uttered and, *a fortiori*, in close proximity of one's residence, and reasonably appreciated by those inside it to be able to be carried out, then they are actionable torts. In the present case, the threats were uttered face to face, outside the door, and over the telephone or intercom system. The plaintiff and his pawns could easily have access to and did on a number of occasions [visit] the property, absolutely uninvited and taking the defendant and his family members by surprise. In the circumstances, it is reasonable for the defendant to apprehend imminent danger that the threats were presently capable of being carried into execution. These threats amount to trespasses to the person of the defendant.

The defendant was awarded HK$200,000 as compensatory damages (including aggravated damages) and HK$200,000 as exemplary damages.

Moreover, developments in technology may require a rethink of the traditional position on words and assault. In the Australian case of *Barton v Armstrong* [1969] 2 NSWR 451, the threats were made over the telephone. In refusing the defendant's application to strike out the claim, Taylor J said:

> I am not persuaded that threats uttered over the telephone are to be properly categorised as mere words. I think it is a matter of the circumstances. To telephone a person in the early hours of the morning, not once but on many occasions, and to threaten him, not in a conversational tone but in an atmosphere of drama and suspense, is a matter that a jury could say was well calculated to not only instill fear into his mind but to constitute threatening acts, as distinct from mere words. If, when threats in this manner are conveyed over the telephone, the recipient has been led to believe that he is being followed, kept under surveillance by persons hired to do him physical harm to the extent of killing him, then why is this not something to put him in fear or apprehension of immediate violence? In the age in which we live threats may be made and communicated by persons remote from the person threatened. Physical violence and death can be produced by acts done at a distance by people who are out of sight and by agents hired for that purpose. I do not think that these, if they result in apprehension of physical violence in the mind of a reasonable person, are outside the protection afforded by the civil and criminal law as to assault. How immediate does the fear of physical violence have to be? In my opinion the answer is it depends on the circumstances. Some threats are not capable of arousing apprehension of violence in the mind of a reasonable person unless there is an immediate prospect of the threat being carried out. Others, I believe, can create the apprehension even if it is made clear that the violence may occur in the future, at times unspecified and uncertain. Being able to immediately carry out the threat is but one way of creating the fear or apprehension, but not the only way. There are other ways, more subtle and perhaps more effective.
>
> Threats which put a reasonable person in fear of physical violence have always been abhorrent to the law as an interference with personal freedom and integrity, and the right of a person to be free from the fear of insult. If the threat produces the fear or apprehension of physical violence then I am of opinion that the law is breached, although the victim does not know when that physical violence may be effected. I would for these reasons reject Mr Staff's first and second propositions and hold that there is material in these particulars which a trial judge might think fit to be submitted to the jury as evidence of an assault…I have in these reasons already made it clear that it would be open to a jury to take the view that there was more involved in the threats made over the telephone than mere words.

Note that Taylor J did not expressly deviate from the conventional position that mere words cannot constitute assault. Rather, he argued that telephone threats may not, in all cases, be properly categorised as mere words, and that this was such a case. Nonetheless, the approach of the court in dealing with the peculiar facts of the case offers an interesting variant on the traditional view, forced on it to some extent by developments in technology.

R v Ireland [1998] AC 147 was a criminal case concerning assault by means of telephone calls. The accused made numerous telephone calls to his victims, but said nothing during the

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phone calls. He apparently intended to instil fear by remaining silent. The victims suffered psychological injuries. The House of Lords upheld the convictions for assault causing actual bodily harm. The crime of assault is contained within this offence, and that crime for present purposes is the same as the tort of assault. The House of Lords held that in appropriate circumstances, mere words can constitute assault, and went further, holding that silence, in the absence of threats or any words, could suffice for the offence. Lord Steyn said:

> Counsel argued that as a matter of law an assault can never be committed by words alone and therefore it cannot be committed by silence. The premise depends on the slenderest authority, namely, an observation by Holroyd J to a jury that "no words or singing are equivalent to an assault:" *Rex v Meade and Belt* (1823) 1 Lew 184. The proposition that a gesture may amount to an assault, but that words can never suffice, is unrealistic and indefensible. A thing said is also a thing done. There is no reason why something said should be incapable of causing an apprehension of immediate personal violence, eg a man accosting a woman in a dark alley saying, "Come with me or I will stab you". I would, therefore, reject the proposition that an assault can never be committed by words.
>
> That brings me to the critical question whether a silent caller may be guilty of an assault. The answer to this question seems to me to be "Yes, depending on the facts". It involves questions of fact within the province of the jury. After all, there is no reason why a telephone caller who says to a woman in a menacing way "I will be at your door in a minute or two" may not be guilty of an assault if he causes his victim to apprehend immediate personal violence. Take now the case of the silent caller. He intends by his silence to cause fear and he is so understood. The victim is assailed by uncertainty about his intentions. Fear may dominate her emotions, and it may be the fear that the caller's arrival at her door may be imminent. She may fear the possibility of immediate personal violence. As a matter of law the caller may be guilty of an assault: whether he is or not will depend on the circumstance and in particular on the impact of the caller's potentially menacing call or calls on the victim. Such a prosecution case under section 47 may be fit to leave to the jury. And a trial judge may, depending on the circumstances, put a common sense consideration before jury, namely what, if not the possibility of imminent personal violence, was the victim terrified about? I conclude that an assault may be committed in the particular factual circumstances which I have envisaged. For this reason I reject the submission that as a matter of law a silent telephone caller cannot ever be guilty of an offence under section 47.

There is no clear and unambiguous tort law authority to the effect that an assault can take place by words alone without some apparent bodily movement indicating an intention to make contact, but on principle, and by analogy to the developments in the criminal law it would seem that an assault could be so committed. This possibility seems to be contemplated in some of the comments of Woo J in *Wong Kwai Fun v Li Fung* (above), and by comments in the following case.

Wong Wai Hing v Hui Wei Lee
(HCA 2901/1998, [2000] HKEC 329)

The defendant (a doctor practising medicine in Hong Kong) had previous business dealings with the plaintiffs (a husband and wife who ran an insurance business called "AIA") and felt cheated by them after an investment (a restaurant business in Toronto) went bad. Her demand for a return of her initial investment was not satisfied. One of her patients ("Chiu") offered to visit the plaintiffs to try to get the money back, and the defendant agreed. During this visit to the plaintiffs' business premises (7 October 1996) Chiu demanded to see the plaintiffs and failing to find them, made threats to the staff to the effect that the second plaintiff would be physically harmed if he did not repay the money. Later, in January 1998, the defendant hired a debt collection agency ("Yue Hoi") to try to collect the debt. In the standard form letter appointing the collection agency, it was stated that no illegal means were to be used to collect the debt. However, on numerous occasions, the two employees of Yue Hoi assigned to collect the debt ("Kwong" and "Chan Ming Fat") attended at the plaintiffs' business premises, demanded to see the first plaintiff (the husband), threatened the staff, and intimidated the second plaintiff (the wife). On other occasions they made telephone calls to the staff and to the second plaintiff threatening violence if the debt was not repaid. The plaintiffs sued the defendant for the assaults committed by Kwong and Chan Ming Fat. The court found that although Kwong and Chan Ming Fat were agents of the defendant, the defendant was not liable for their torts as she had not authorised such behaviour. In reaching this conclusion, the court assessed the conduct of Kwong and Chan Ming Fat, and found that torts of assault had been committed.

Sakhrani J…

> It is clear that threats and vile abuse *per se* do not constitute assault (*Clerk & Lindsell on Torts* 17th ed., para.12–12).
>
> I was referred to *Barton v Armstrong* [1969] 2 NSWR 451 by Counsel for the plaintiff, Mr Kwok. In that case, it was held, inter alia, that threats which put a reasonable person in fear or apprehension of physical violence can constitute an assault, although the victim did not know when that physical violence may be effected. In dealing with whether threats made over the telephone can amount to an assault, Taylor J said at 455:

[see passage from *Barton v Armstrong* above]

> *Barton v Armstrong* was applied in *R v Ireland* [1996] 3 WLR 690. I accept that the law is as stated by Taylor J in *Barton v Armstrong* and as applied in *R v Ireland*.
>
> There is as yet no tort of harassment in our law. However, the tort of intimidation by way of a threat to commit a criminal or tortious act is well established (see *Rookes v Barnard (No 1)* [1964] AC 1129)…
>
> I find that on 7 October 1996 two men went to AIA's premises asking to see the 1st plaintiff. In my judgment, one of them must have been Chiu. He was the one who had agreed with the Defendant to go and talk with the 1st plaintiff about returning the money to the Defendant that she felt that she had been cheated out of by the 1st plaintiff. This visit was shortly after the Defendant's discussion with Chiu. Also, the Defendant said that she knew that one of the two men was Chiu. I am satisfied that they were impolite and rude and made the threat that the police would come to the office very soon and take away all the documents and computers and that the press would also come. Lau was asked to get in touch with the 1st plaintiff or else they would take action and the 1st plaintiff would have to bear all the consequences. This was intended to be conveyed to the 1st plaintiff. I also accept Connie Mo's evidence that one of the two

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men said that some people would just disappear without any apparent reason. This was also obviously intended to be conveyed to the 1st plaintiff. This was, in my view, calculated to extract from the 1st plaintiff the money said to be owing by him to the Defendant under a threat that he might well disappear if he did not repay. Although neither the 1st nor the 2nd plaintiff gave evidence to the effect that they were frightened by this visit, I am satisfied that there was a reasonable apprehension of physical injury to the 1st plaintiff. This was, in my view, sufficient to constitute an assault on the 1st plaintiff. I am also satisfied that the tort of intimidation against the 1st plaintiff has been established.

I am also satisfied that the 2nd plaintiff did receive the telephone calls on 9 October 1996. The inference I draw is that it was probably Chiu who made the telephone calls. He said that the 1st plaintiff had absconded. I do not, however, think that constituted an assault or intimidation even though the telephone calls must have been worrying and unpleasant. In my view, they were not actionable wrongs.

I am also satisfied, on the evidence of the 2nd plaintiff, Lau and Connie Mo, that on 9 February 1998 and 13 February 1998 Kwong and Chan Ming Fat, as employees of Yue Hoi, assaulted and intimidated the 1st and 2nd plaintiffs. I am satisfied that both of them shouted and used foul language on those occasions.

I am also satisfied that on 9 February 1998 Kwong threatened to go to the 1st plaintiff's home to search him out. I have no doubt that the 2nd plaintiff was scared by this incident and I accept her evidence in this regard. I also believe and accept the 1st plaintiff's evidence that he was scared by the visit of the two men on 9 February 1998 and was concerned for his safety, the 2nd plaintiff's safety and the safety of the other colleagues so much so that a report was made to the police. Apart from behaving in a rude and impolite manner and using foul language, a threat was made to search the 1st plaintiff out of his home. This was obviously intended to be conveyed to the 1st plaintiff as well as to the 2nd plaintiff and would have caused a reasonable apprehension of physical violence. This, in my judgment, amounted to an assault and intimidation of both the 1st and 2nd plaintiffs…

I am also satisfied that on 13 February 1998 Kwong made a threat that 15 young men would come up to AIA's premises and cause a disturbance on being told that the 1st plaintiff was not in. This was again no doubt intended to be conveyed to the 1st and 2nd plaintiffs. There was a reasonable apprehension of damage to property and physical injury to the person with the threatened presence of 15 young men coming into AIA's premises to cause a disturbance. In my judgment, it constituted an assault on, as well as intimidation of, both the 1st and 2nd plaintiffs.

I am also satisfied that the debt collectors Kwong and Chan Ming Fat were responsible for the red paint that had been sprayed outside AIA's premises with Chinese characters asking the 1st plaintiff to repay. I infer that this was done by either Kwong or Chan Ming Fat or both of them. This was not, in my view, strictly an assault but I am satisfied that this amounted to intimidation of the 1st plaintiff.

The next thing that occurred was on 20 February 1998 when Lau received a menacing and threatening phone call. I am satisfied that the message was intended to be conveyed to the 1st and 2nd plaintiffs. There was a direct threat to cause physical violence to the 1st and 2nd plaintiffs as well as to Lau. I am satisfied that the caller threatened to chop up the 1st plaintiff and disfigure them unless the 1st plaintiff paid the money back to the Defendant. I disbelieve Kwong on these matters and reject his evidence. I am satisfied that the caller was either Kwong or Chan Ming Fat. They must,

in my view, have been angry with the 1st plaintiff for reporting the matter to the police. This led to the arrest of Kwong and Chan Ming Fat on 18 February 1998 and the telephone conversation to Lau occurred shortly after that on 20 February 1998. In my judgment, it was either Chan Ming Fat or Kwong who made that menacing phone call. This constituted an assault on both plaintiffs as well as on Lau. This also amounted to the tort of intimidation against them.

[Sakhrani J went on to consider the issue of whether the defendant, having hired the debt collectors, was vicariously liable for the torts committed by them. He determined that vicarious liability could not be proved, and therefore dismissed the action against the defendant.]

Action dismissed.

Note that the decision as regards the defendant's vicarious liability for the torts of her agents was reversed by the Court of Appeal in *Wong Wai Hing v Hui Wei Lee* [2001] 1 HKLRD 736 (11.3 above).

Li Wai Ying v West Global Ltd (HCA 1810/2000, [2001] HKEC 205) involved facts similar to those of *Wong Wai Hing v Hui Wei Lee*. Relying on *Barton v Armstrong*, Deputy Judge Kwan implied that words spoken on the telephone can, in appropriate circumstances, constitute an assault: "The threat on the telephone which would have put a reasonable person in fear or apprehension of physical violence, in view of what happened in the LSY office a short while ago, also constituted an assault". However, no liability was imposed on the defendant creditors because they had not authorised the use of unlawful means of debt collection.

The problem of shady debt collection agencies engaging in dubious and heavy-handed collection tactics has been the subject of public concern for some time. The crux of the problem is that, as in *Li Wai Ying v West Global Ltd* and *Wong Wai Hing v Hui Wei Lee*, the creditor may be able to rely on the term of the contract with the debt collection agency instructing that "no unlawful means" be used in the debt collection. Such a term is hardly enough to encourage strictly lawful practices by the debt collection agents, whose only interest is in receiving the hefty collection fee from the creditor on completion of the debt collection. Yet it may provide a means of avoiding liability by the creditors. Employers' vicarious liability cannot normally be imposed on the creditor because the debt collection agents are not servants. And although the debt collectors may be agents of the creditor, no vicarious liability attaches to the creditor unless the creditor authorised the torts. Some time ago Hong Kong's Law Reform Commission examined the issue of unlawful means of debt collection (see Regulation of Debt Collection Practices (2002)). The recommendations were to regulate debt collectors more closely, to establish a new licensing scheme, and to criminalise certain forms of debt collection. However, the recommendations fell short of imposing liability on a creditor who retained the services of a debt collection agency that engages in unlawful debt collection tactics. Moreover, there appears to be little or no prospect that the reforms will be turned into law in the foreseeable future.

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Issues and Questions

(1) Pointing an unloaded gun at the plaintiff can constitute an assault: see *R v St George* (1840) 9 Car & P 483, 173 ER 921. However, does it matter whether the plaintiff knows that the gun is unloaded? For a discussion of the reasonableness of the apprehension, see Trindade (1982) p.233.

(2) Is there sufficient intention for assault where the defendant fired a gun in the plaintiff's direction, and the plaintiff, although unhurt, heard the shot and apprehended contact? In *Bici v Ministry of Defence* [2004] EWHC 786 (QB), a case involving the shooting of civilians by members of Her Majesty's armed forces, Elias J held that intention, whether actual or imputed, could not be made out. Intention involves a subjective state of mind, and according to Elias J, "it would have to be shown that the soldiers must subjectively have appreciated that by their conduct the claimants would be put in fear of the immediate application of a battery…There is no evidence that it crossed their minds at all".

(3) Does the principle of transferred intention, applied to a case of battery in *Livingston v Ministry of Defence* (15.2 above), apply equally to assault? There would seem to be no reason in principle why not. Nonetheless, in *Bici v Ministry of Defence* (above), Elias J doubted whether the principle would apply to assault: "the fear that [the plaintiff] experienced as a consequence of the shooting would have been felt quite independently of the chosen target…This extension of the principle would considerably widen the scope of what is essentially a tort of intention and nudge it ever closer to the tort of negligence, without any obvious purpose or justification". He nonetheless applied the principle to the battery that had taken place in that case. Is there really any justification for the distinction made by Elias J?

(4) Assault and battery are crimes as well as torts. Hong Kong has followed the English approach in enacting that summary proceedings before a magistrate for assault (including battery) in which the complaint was "preferred by the victim", shall be a bar to civil proceedings. Section 38 of the Offences Against the Person Ordinance (Cap.212) reads:

> If any person against whom any such complaint [ss.34–37 dealing with the crimes of assault and battery] is preferred by or on behalf of the party aggrieved obtains such certificate of dismissal, or, having been convicted, pays the whole amount adjudged to be paid, or suffers the imprisonment awarded, in every such case he shall be released form all further or other proceedings, civil or criminal, for the same cause.

The effect of s.38 is that if the criminal proceedings were conducted by way of private prosecution ("complaint is preferred by…the party aggrieved"), no civil action can be brought, whether the proceedings resulted in an acquittal or a conviction. A victim who has not managed to persuade the authorities to prosecute has a choice: either sue in tort, or proceed with private prosecution, in which case rights in tort are foregone. The equivalent UK provision was applied by the English Court of Appeal in *Wong v Parkside Health NHS Trust* [2003] 3 All ER 932 to prevent a civil action in assault following a criminal conviction obtained by private prosecution.

(5) Could s.38 not be circumvented by bringing the civil action first and making the criminal complaint sometime later?

(6) For the authority to bring private prosecutions, see s.14(1) of the Magistrates Ordinance (Cap.227). For an example of a case that applies s.38, see *Tam Chui v Hui Fat* [1959] HKDCLR 116.

(7) Of course, criminal prosecutions commenced in the ordinary way are no bar to a civil action, indeed may assist it (see s.62 of the Evidence Ordinance (Cap.8), and discussion at 3.4.3 above). In *Wong Yin Wa v Chan Shing* (HCPI 1125/2000), the defendant who was earlier convicted of assaulting his co-worker with a chopper, was found liable in trespass and was ordered to pay the plaintiff damages in the amount of HK$745,428. In *Au Kam Han v Au Kam Ming* (HCPI 1069/1998, [2001] HKEC 279), the defendants were earlier convicted for the beating to death of a business rival. In the civil action the court ordered them to pay damages to the dependents and estate of the victim, in an amount exceeding HK$13 million, Seagroatt J observing that this was a rare case in which convicted criminals had money to pay a large award of civil damages. Moreover, an acquittal in the criminal proceedings does not clear the defendant of liability in subsequent civil proceedings, because the civil standard of proof applies (see eg *Faridha Sulistyoningsih v Mak Oi Ling* (DCPI 1575/2005, [2007] HKLRD (Yrbk) 418) and the discussion at 15.2 above). For a historical examination of the relationship between criminal and civil proceedings, see Dyson (2011).

(8) In the UK, s.329(2) of the Criminal Justice Act 2003 restricts the bringing of civil claims that concern the events which led to the plaintiff's conviction for an imprisonable offence, apparently because such claims are thought to denigrate the criminal justice process. The plaintiff must obtain leave to bring the trespass claim and leave is only granted where the defendant's acts were grossly disproportionate (see Dyson (2011) p.1).

(9) What interests are meant to be protected by the tort of assault, as compared with the tort of battery?

(10) For a discussion of the nature of intention in assault and battery, see Cane (2000).

15.4 FALSE IMPRISONMENT

This tort is committed when the defendant intentionally causes the plaintiff to be restrained or confined within a particular limited area. The tort can be committed in various ways, for instance by making a wrongful arrest, by detaining a person for longer than is justifiable, or by simply preventing a person from leaving the place where he is (as in *Faridha Sulistyoningsih v Mak Oi Ling* (DCPI 1575/2005, [2007] HKLRD (Yrbk) 418) (15.2 above)).

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Bird v Jones
(1845) 7 QB 742, 115 ER 668

A portion of a public footbridge was blocked off with a temporary fence to create space for seats for spectators to view a regatta on the river. The plaintiff insisted on passing along the blocked off part of the bridge, and succeeded in climbing over the fence. The defendant (clerk of the bridge company) then stationed two policemen to prevent, and who did prevent, the plaintiff from proceeding forward. The plaintiff was invited to go back the way he came, but he refused, and remained in the spot for half an hour. He brought an action in false imprisonment against the defendant.

Coleridge J…

> I am of opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only: it may itself be moveable or fixed but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom; it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own…

Lord Denman CJ (dissenting)…

> There is some difficulty perhaps in defining imprisonment in the abstract without reference to its illegality; nor is it necessary for me to do so, because I consider these acts as amounting to imprisonment. That word I understand to mean any restraint of the person by force…
>
> I had no idea that any person in these times supposed any particular boundary to be necessary to constitute imprisonment, or that the restraint of a man's person from doing what he desires ceases to be an imprisonment because he may find some means of escape.
>
> It is said that the party here was at liberty to go in another direction…But this liberty to do something else does not appear to me to affect the question of imprisonment. As long as I am prevented from doing what I have a right to do, of what importance is it that I am permitted to do something else? How does the imposition of an unlawful condition show that I am not restrained? If I am locked in a room, am I not imprisoned because I might effect my escape through a window, or because I might find an exit dangerous or inconvenient to myself, as by wading through water or by taking a route so circuitous that my necessary affairs would suffer by delay?
>
> It appears to me that this is a total deprivation of liberty with reference to the purpose for which he lawfully wished to employ his liberty; and, being effected by force, it is not the mere obstruction of a way, but a restraint of the person…

Action dismissed.

As can be seen from *Bird v Jones*, for the tort to be committed, the restraint must be total. Here, although the plaintiff's path across the bridge was blocked, he could have returned from whence he came and therefore the restraint was not total.

In 鍾振興對黎秀峯 (DCCJ 2341/2012, [2014] CHKEC 856), the plaintiff, a hotel swimming pool lifeguard, was accosted on the street and questioned by his employers about the removal of lifeguard uniforms. The plaintiff complained that the defendant committed false imprisonment when one of the defendants tried to block the plaintiff's way back to the hotel. The court reasoned that a partial interference with the plaintiff's freedom of movement in circumstances where the plaintiff was free to turn back or take a detour does not amount to false imprisonment [the court cited *Clerk & Lindsell on Torts* at paras.15-23]. On the facts, the defendant only used his body to block the plaintiff, and the plaintiff did manage to bypass him through another path.

However, where the only means of escape is unreasonable, the restraint will be considered total. The means of escape will not be reasonable if it involves danger to the plaintiff. For instance, to state an obvious case, if the plaintiff is locked in a room with an open window on the 25th storey of a tower block, there may be a means of escape, but as it is not reasonable, the tort of false imprisonment is committed.

The confinement must occur against the plaintiff's will. This issue can be complicated where the entrance or exit is governed by contract, as in the case that follows.

Herd v Weardale Steel, Coal and Coke Co Ltd
[1915] AC 67

The plaintiff was an employee in the defendant's mine, which operated a shift system. At 9:30 am, the plaintiff descended the mine, and ordinarily would have terminated work at 4:30 pm. On the day in question, the plaintiff was ordered with two others to do certain work that they believed was unsafe. The workers refused to do the work. At about 11:00 am, they asked to leave the mine but the defendant refused to allow the men onto the lift until their shift was completed. The men were eventually permitted to leave at 1:30 pm. At trial, the plaintiff was successful in his action for false imprisonment. However, the Court of Appeal reversed that decision, and the plaintiff appealed to the House of Lords.

Viscount Haldane LC…

> My Lords…if a man gets into an express train and the doors are locked pending its arrival at its destination, he is not entitled, merely because the train has been stopped by signal, to call for the doors to be opened to let him out. He has entered the train on the terms that he is to be conveyed to a certain station without the opportunity of getting out before that, and he must abide by the terms on which he has entered the train. So when a man goes down a mine, from which access to the surface does not exist in the absence of special facilities given on the part of the owner of the mine, he is only entitled to the use of these facilities (subject possibly to the exceptional circumstances to which I have alluded) on the terms on which he has entered. I think it results from what was laid down by the Judicial Committee of the Privy Council in *Robinson v Balmain New Ferry Co* [1910] AC 295 that that is so. There was a pier, and by the regulations a penny was to be paid by those who entered and a penny on getting out. The manager of the exit gate refused to allow a man who had gone in, having paid his penny, but having changed his mind about embarking on a steamer, and wishing to

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