

DK Srivastava & AD Tennekone

**THE LAW OF TORT IN
HONG KONG**

Third Edition by

DK Srivastava

Charu Sharma

Anna Lui Hoi Yan

Sara Tsui Fung Ling



LexisNexis®

their appreciation of the services rendered by the research assistants. A special word of thanks is due to Miss Loletta Tsang who with painstaking care and meticulous attention to detail typed the manuscript. Without her assistance the work would not have been completed on time.

Last, but not least, the authors thank the staff of Butterworths Asia, especially Miss Khadija Kalim and Mr Andrew Yeoh, for their characteristically high standard of co-operation and assistance. Mr Yeoh was a very helpful and compassionate editor.

We alone accept responsibility for any shortcomings in the book.

DK Srivastava

AD Tennekone

City University of Hong Kong

30 June 1995

Contents

<i>Foreword to the Third Edition</i>	v
<i>Preface to the Third Edition</i>	vii
<i>Preface to the Second Edition</i>	ix
<i>Foreword to the First Edition</i>	xiii
<i>Preface to the First Edition</i>	xv
<i>Table of Cases</i>	xxxii
<i>Table of Statutes</i>	cv
PART ONE INTRODUCTION	
Chapter 1 Tortious Liability in General	3
Introduction	3
Meaning and Scope of Tort	4
Tort and insurance	6
Tort and crime	7
Tort and contract	9
Tort and breach of trust	11
Tort and liability on bailment	11
Origin and Development	12
Trespass	15
Trespass on the case	17
Negligence	19
Strict liability	21
Statutory torts	21
Administrative remedies	22
Chapter 2 Liability under Statutory Compensation Schemes	23
Introduction	23
Employees' Compensation Scheme	24
Employer's liability to pay compensation	25
Accident	27
Persons entitled to compensation	28
Entitlement to compensation	28
Compensation under the ECO	32
Occupational diseases	32
Compulsory Insurance against Employers' Liability	33
Compulsory Motor Vehicle Insurance	34
Motor Insurers' Bureau	35

Private Insurance	36
Criminal Injuries Compensation	36
Compensation under the Criminal Procedure Ordinance	36
Injuries Compensation Scheme	37
Other Forms of Social Welfare Assistance	39
Chapter 3 Reception of the English Law of Torts	41
Introduction	41
Common Law and Equity	42
Legislation	47
Conclusion	48
PART TWO SOME PARTICULAR TORTS	
Chapter 4 Intentional and Negligent Torts	53
Introduction	53
The Classification	55
The Provinces of Intentional and Negligent Torts	57
Limitation	59
Chapter 5 Trespass to the Person	61
Introduction	61
Absence of measurable loss	63
Directness of injury	63
Defendant's act must be intentional	64
Assault	65
Battery	69
Acts constituting battery	69
Nature of acts constituting battery	71
Mistake	72
False Imprisonment	73
Restraint must be total	73
Reasonable means of escape	76
Use of force and knowledge of imprisonment	78
Defence — Justification and Consent	79
Damages for Assault and Battery and False Imprisonment	82
Chapter 6 Intentional Infliction of Physical or Mental Harm other than Trespass to the Person	85
Introduction	85
Intention to Produce the Harm	85
Is it Necessary for the Statement to be Made in the Plaintiff's Presence?	88
Does the Statement Need to be False?	89
What Kind of Injury Must be Proved	89
Necessity for the Rule in <i>Wilkinson v Downton</i>	91

Chapter 7 Sexual Harassment as a Tort	93
Common Law Background	93
Sexual Harassment as a Tort Under Legislation	94
Scope of the tort of sexual harassment	94
Meaning of sexual harassment	98
Unwelcome sexual advance, request for sexual favours and conduct of sexual nature	99
Defendant's conduct must be unwelcome, offending, humiliating or intimidating	100
Creating a sexually hostile or intimidating work environment	100
Defendant's conduct must be intentional	101
Proving the wrong of sexual harassment	102
Remedies for sexual harassment	105
Chapter 8 Trespass to Land	111
Introduction	111
Land	112
Acts Constituting Trespass	113
Continuing trespasses	114
Plaintiff's Interest	115
Possession and the right to possession	115
Legal and equitable interest	117
Exclusive possession	117
Some Specific Kinds of Trespass to Land	120
Trespass to airspace	120
Trespass beneath the surface	122
Trespass by animals	123
Public places	124
Trespass <i>ab initio</i>	124
Trespass <i>pro tanto</i>	126
Act must be Direct and Intentional	126
Defences	129
Leave and licence	129
Exercise of legal authority	129
Entry to retake or remove goods	130
Remedies	131
Damages	131
Re-entry and ejectment	133
Injunction	134
Mesne profits	136
Chapter 9 Trespass to Chattels	139
Introduction	139
Goods and Other Items of Value	140
Acts Constituting Trespass to Chattels	140
Interference must be Direct	142

Plaintiff Must Have Possession of the Chattel	143
Defendant's Conduct must be Intentional	144
<i>Jus Tertii</i> and Trespass to Chattels	145
Measure of Damages	145
Reversionary Interest	146
Chapter 10 Conversion	149
Introduction	149
Acts Constituting Conversion	150
Receiving chattels	151
Dispossession	154
User, damaging and destruction	156
Sale and other dispositions	158
Interest of the Plaintiff	160
Bailor	160
Bailee	161
Licensee	161
Servant or employer	162
Finder	162
Co-owners	164
Lienor and pledgor	165
Plaintiff and Third Party Rights	166
The Subject Matter	167
Defendant's Act must be Intentional	170
Remedies	171
Reversionary Interest	177
Chapter 11 Detinue	179
Introduction	179
Acts Constituting Detinue	179
Demand	180
Refusal	181
Plaintiff's Interest	183
Subject Matter of Detinue	183
Remedies	183
Defences	185
<i>Jus tertii</i>	185
Defendant acquiring chattel under an illegal contract	185
Defendant bought chattel in market overt	185
Advantages and Disadvantages	185

PART THREE NEGLIGENCE

Chapter 12 Duty of Care	189
Introduction	189

Development before <i>Donoghue v Stevenson</i>	191
Early position	191
<i>Donoghue v Stevenson</i> : the neighbour principle	195
New categories of negligence	196
Foreseeability	204
Proximity	209
Fairness, justice and reasonableness	214
Policy considerations	219
The three-stage test and Bokhary PJ's holistic approach	224
Omissions	227
Duty to control others	229
Types of plaintiffs	233
Types of defendants	234
Duties to the unborn	236
Claims for wrongful life	242
Claims for loss of parental autonomy	243
Claims for failure to improve wrongful life	245
Product Liability at Common Law	246
Development of product liability law	246
Product liability and <i>Donoghue v Stevenson</i>	249
Manufacturer	249
Product	250
When is a product defective?	252
Duty to recall defective products	255
Ultimate consumer (who can recover?)	255
Product must be intended to reach in the form in which it left the manufacturer	255
No possibility of intermediate examination	256
Psychiatric Illness (Nervous Shock)	258
Overview	258
Recognised psychiatric illness	259
Primary victims	263
Secondary victims	267
When can rescuers recover?	280
Shock from danger or destruction to property or some object	281
Summarising the scope of duty for causing psychiatric injury	282
Rescuers	284
In general	284
Rescuer's duty	285
Rescuer's duty to the subsequent rescuer	285
Duty to rescuers	288
The independent nature of duty to rescuer	290
Rescue of property	291
Defences	292
Causing of Economic Loss	294
Overview	294
Economic loss but no physical harm to person or property	296

Damage to property not under the plaintiff's legal ownership or possessory title	300
Pure economic loss and construction of buildings and installation of fittings	301
Negligent statements	307
Assumption of responsibility and reliance	310
Professional skill not necessary to impose liability	312
Proving contractual or fiduciary relationship not necessary for recovery	313
How far does the duty extend beyond the direct recipient of information/advice?	316
Statutory tort of misrepresentation	324
Chapter 13 Breach of Duty	327
Introduction	327
The Reasonable Person	327
Overview	327
Knowledge	328
Skill	330
Physical and intellectual differences	336
Age and infirmity	337
Acting in situations of peril	339
Emergencies on the road	340
Sports injuries	343
The Reasonable Person in Action	344
Foreseeability of injury	344
Seriousness of injury	346
Importance of the end served by the defendant's activities	347
Practicality of precautions	349
Frequency of accidents	350
Common practice followed by a profession	351
Proof of Negligence	354
In general	354
<i>Res ipsa loquitur</i>	355
Accident, an exceptional occurrence	357
Thing causing damage must be under defendant's exclusive control	359
Absence of explanation	360
Defendant's negligence must be the only probable inference	361
Effect of the application of <i>res ipsa loquitur</i>	363
<i>Res ipsa loquitur</i> and section 62 of the Evidence Ordinance (Cap 8)	365
Chapter 14 Causation	367
Causation in Fact	367
In general	367
The 'but for' test	368
Application of the 'but for' test	368
Multiple causes	373

Simultaneous causes	378
Consecutive events	379
Vicissitudes of life	380
Intervening causes (novus actus interveniens)	381
Negligent or intentional interventions by a third party	383
When negligent or intentional interventions by a third party are foreseeable by the defendant	386
Intervening conduct of the plaintiff himself	388
Remoteness of Damage	390
Present law	392
Kind of harm	394
Extent of harm	396
'Eggshell skull' principle	398
How the damage occurred	401
Chapter 15 Defences to Negligence	405
Introduction	405
Contributory Negligence	405
Meaning of contributory negligence	405
Contributory negligence and apportionment	406
Contributory negligence and causation generally	414
Causation: A decisive factor in apportionment under the LARCO	420
Plaintiff's standard of care	421
Standard of care of certain classes of persons	422
Breach of statutory duty by employer	428
Proof of contributory negligence	432
Imputed contributory negligence	433
Volenti Non Fit Injuria	434
Overview	434
Development of the doctrine	434
Meaning of ' <i>voluntas</i> '	435
Knowledge and consent	438
Agreement to run the risk	439
Volenti non fit injuria and drunk driving	441
Exclusion of Liability	442
Illegality	444
In general	444
Affront to public conscience	446
Reliance on the illegality	451
Plaintiff's conduct must be causally related to the tort	451
Setting a standard of care	453
PART FOUR EMPLOYER'S LIABILITY AND BREACH OF STATUTORY DUTY	
Chapter 16 Vicarious Liability	457
Introduction	457

What is Vicarious Liability	458
Elements of the tort	460
Chapter 17 Employer's Liability	461
Introduction	461
Employer's Liability in Respect of Employees	462
Who is an employee?	462
Casual and Gratuitous Employees	473
Borrowed Employees	475
Hospital Employees	478
Course of Employment	480
General principles	480
Prohibited conduct	481
Frolics and detours	486
Liability for trespass to the person	490
Liability for fraud	495
Liability for theft	496
Employer's Liability for Independent Contractors	497
Overview	497
Employer's personal negligence and ratification	498
Employer's non-delegable duties	499
Collateral or casual negligence of independent contractor	514
Principal and Agent	515
Basis of principal's liability	515
Liability for misrepresenting principal	517
Liability of car owners and car users	518
Liability for agent's fraud	523
Chapter 18 Employer's Liability in Negligence	525
Introduction	525
Safe Place of Work	527
Competent Staff	531
Proper Plant and Appliances	533
Safe System of Work	536
Breach of Duty and Causation	541
The Question of Course of Employment	544
Defences	545
Volenti non fit injuria	545
Contributory negligence	547
Chapter 19 Liability of the Government of the Hong Kong Special Administrative Region (the HKSAR) as an Employer	551
Introduction	551
Vicarious Liability	552
In general	552

Liability for employees	554
Liability for agents	556
Course of employment	557
Direct Liability	560
Overview	560
Government of the HKSAR's liability as an employer	560
Government of the HKSAR's liability as an occupier	560
Breach of statutory duty	561
Immunity from Liability	562
The Hong Kong Garrison	562
Postal packets	564
Judicial errors	565
Negligence in relation to management of any ship, dock and harbour owned by the Government of the HKSAR	565
Chapter 20 Breach of Statutory Duty	567
Introduction	567
Legislative Intent	569
Ascertainment of statutory intention necessary	569
Reading legislation as a whole	570
Whether duty is intended for the benefit of the public or a class	571
Where a specified method of enforcement is prescribed	575
Where other adequate remedies exist	577
Where statute imposes a duty on public authorities	579
Where discretionary power is vested in a public authority	582
Whether Breach Falls within Ambit of the Statute	584
Defendant owed a duty	585
Plaintiff was within the protected class of persons	586
Whether Prescribed Standard in the Legislation has been Breached by Defendant	590
Whether Breach of Statutory Duty Caused the Injury or Damage	592
Defences	594
Volenti non fit injuria	594
Contributory negligence	594
Delegation	597
Novus actus interveniens	597
Act of God and inevitable accidents	598
PART FIVE LIABILITY IN RESPECT OF PREMISES	
Chapter 21 Occupiers' Liability	601
Introduction	601
Scope of Occupiers' Liability Ordinance: 'Occupancy Duty' and 'Activity Duty'	603
Meaning of Premises	605
Who is an Occupier?	606

Lawful Visitors	613
Common Duty of Care	617
General principles	617
Children as visitors	622
Skilled visitors	627
Warning	630
Independent contractors	634
Exclusion of liability by the occupier	638
Defences	640
Assumption of risk	640
Contributory negligence	641
Trespassers	642
Overview	642
<i>Bird v Holbrook to Addie</i>	643
<i>Videan to Herrington</i>	645
Scope of the <i>Herrington</i> principle	647
United Kingdom Occupier's Liability Act 1984	647
Future of occupiers' liability towards trespassers	648
Chapter 22 Nuisance	651
Introduction	651
Categories of Nuisance	652
Private Nuisance	652
Elements	652
Continuous interference	652
Substantial interference	654
Unreasonableness of interference	655
Indirect interference	662
Interference with use, enjoyment of land, some right over or in connection with it	662
Plaintiff's interest	663
Reversionary rights	664
Defendant	665
Causation and remoteness of damage	668
Public Nuisance	678
Definition	678
Materiality of interference	678
Highway nuisances	679
Test of lawfulness	681
Reasonable comfort and convenience	682
A class of subjects	682
Burden of proof	683
Remedies	684
Defences	687
Distinction between Private and Public Nuisance	687
Statutory Nuisance	688

Chapter 23 Rylands v Fletcher	691
Introduction	691
The Rule	692
<i>Rylands v Fletcher</i> and Nuisance	694
<i>Rylands v Fletcher</i> and Negligence	695
Conditions of Liability	695
The thing causing damage must be brought on the land	695
Nature of things brought on land	696
Non-natural user	697
Escape	702
For defendant's own purposes	703
Who can sue? (status to sue)	704
Remoteness and causation	705
Defences	706
In general	706
Act of a stranger	706
Plaintiff's default	707
Statutory authority	707
Consent	708
Act of God	709
Damages for Personal Injuries	710
Future of <i>Rylands v Fletcher</i>	710
Where does the rule in <i>Rylands v Fletcher</i> stand today?	712
Chapter 24 Liability for Damage by Animals	713
Introduction	713
Strict Liability under the <i>Scienter</i> Action	714
Overview	714
Dangerous and non-dangerous species of animals	715
Plaintiff's burden of proof	717
Scope of liability	720
Who is liable?	721
Defences	721
Cattle Trespass	723
In general	723
Damages	724
Liability in Negligence and Other Torts	725
Negligence	725
Rule in <i>Searle v Wallbank</i>	730
Nuisance	733
Trespass to the person	734
Defamation	734

PART SIX DEFAMATION

Chapter 25 Defamation	737
Introduction	737
Historical Roots	738
Essential Elements	740
Defamatory statement	741
Defamation must refer to plaintiff	759
Publication	765
Defences to Defamation	775
Introduction	775
Justification (or truth)	775
Fair comment	778
Absolute privilege	790
Qualified privilege	795
Remedies	804
General	804
Damages: general considerations	804
Aggravated damages	810
Exemplary and punitive damages	813
Special damages	815
Mitigatory factors	816
Injunction	819

PART SEVEN ECONOMIC TORTS

Chapter 26 Development of Economic Torts	827
Introduction	827
Development	830
Chapter 27 The Tort of Unlawful Interference with Trade or Business	835
Introduction	835
Types of Contracts Protected	837
Ingredients of Interference with Contract	838
General	838
Unenforceable and voidable contracts	838
Knowledge	839
Intention to interfere	840
Is breach of contract necessary?	843
Types of Interference	845
Overview	845
Direct inducement	845
Unlawful interference tort	847
Justification	849

Remedies	851
Injunction	851
Damages	852
Chapter 28 Malicious Falsehood	855
Introduction	855
Examples of Malicious Falsehood	856
Conditions of Liability	857
In general	857
Statement must be false and communicated to another	858
Malice	859
Damages	865
Injunction Relief	867
Chapter 29 Intimidation	869
Introduction	869
Two or Three Party Intimidation Situation	871
Essential Ingredients of Intimidation	873
Threat and using unlawful means	873
Causing harm intentionally	875
Justification	876
Remedies	876
Chapter 30 Conspiracy	877
Meaning of Conspiracy	877
Origin and History	879
Interests Protected	882
Means of Committing Conspiracy	883
Overview	883
Lawful means conspiracy	883
Unlawful conspiracy	890
Damages	892
Justification	893
Remedies	894
Chapter 31 Passing Off	897
Introduction	897
The Elements	899
General	899
Goodwill	900
Misrepresentation	907
Damages to the plaintiff and his remedies	919
Plaintiff's Burden of Proof	924

Chapter 32 Deceit	927
Introduction	927
Elements of Deceit	928
Basis of tort	928
Statement of fact	929
Representation by opinion	933
Statement of law	934
Meaning of falsity	935
Defendant must have intended plaintiff to act upon the statement	937
Plaintiff must act in reliance on defendant's statement	938
Damages	941
Principal's Liability for his Agent's Statement	944
False Representation as to Credit of Another	946
Chapter 33 Breach of Confidence	947
Introduction	947
Ingredients	949
Overview	949
Confidentiality of information	949
Obligation of confidentiality	951
Detriment to the confider	954
Forms of Breach	956
Interests Protected	957
Justification/Defences	957
Remedies	960
PART EIGHT LIMITATION OF ACTIONS	
Chapter 34 Limitation of Actions	965
Introduction	965
Accrual of cause of action	965
Necessity for Statutory Restriction	966
Limitation Periods	968
In general	968
Property damage, economic loss, defamation and trespass	968
Conversions and detainee	969
Negligence, nuisance and breach of duty in respect of personal injuries	969
Claims on behalf of the estate	974
Adverse possession and section 10 defence	975
Disapplying time limit for personal injuries and death	978
Latent damages to property and economic loss (not involving personal injuries)	982
Disability of claimant	986
Fraud, concealment and mistake	988
Time limit for claim contribution	994

Table of Cases

References are to paragraph numbers

A	
A v B [2000] EMLR 1007	33.8
A v B plc (a company) [2002] EWCA Civ 337	33.8, 33.16
A v Essex CC [2003] EWCA Civ 1848	12.144
A v Hoare [2008] UKHL 6	34.19, 34.20
AA Albery & Sons Ltd v South China Morning Post & Ors (1983) HC No 11 810	25.176
AB & Ors v South West Water Services Ltd [1992] 4 All ER 574	22.88
AB v Ministry of Defence [2012] UKSC 9, [2013] 1 AC 78, [2012] 3 All ER 673, [2012] 2 WLR 643	34.21
AB Marintrans v Comet Shipping Co Ltd [1985] 3 All ER 442, [1985] 1 WLR 1270	15.6
Abbott v Dunster [1953] 2 All ER 1572, [1954] 1 WLR 58	21.6
AC Billings & Sons Ltd v Riden [1958] AC 240	21.26
AD v East Kent Community NHS Trust [2003] PIQR P286	14.49
Adam v Ward [1917] AC 309	25.120
Adams v Bracknell Forest BC [2004] UKHL 29, [2005] 1 AC 76, [2004] 3 All ER 897	34.20
Adams v Nayler [1946] AC 543	19.03, 19.25
Adamson v Motor Vehicle Trust (1957) 58 WALR 56	13.20
Admiralty Commissioner v SS Volute [1922] 1 AC 129	15.5, 15.15
Admiralty Commissioners v SS Amerika [1917] AC 38	34.22
Adnam v Earl of Sandwich (1877) 2 QBD 485	34.4
Adsett v K and L Steelfounders and Engineers Ltd [1953] 2 All ER 320, [1953] 1 WLR 773	20.48
Advance Equipment Services (Hong Kong) Ltd v Tonge (Hong Kong) Ltd [2009] HKEC 110	11.04
Advanced Technology Corp Ltd v Bond Street Jewellers Ltd [2006] EWCA Civ 923	32.5
A-G v Chiu Kwok Chun Stephen [1985] 1 HKC 199, CA	8.75
A-G (St Christopher, Nevis and Anguilla) v Reynolds [1980] AC 637, [1979] 3 All ER 129, [1980] 2 WLR 171, PC	5.52
AG's Reference (No 6 of 1980), Re[1981] QB 715, [1981] 2 All ER 1057, CA	5.47
AG Spalding & Bros AW Gamage Ltd [1915] 32 RPC 273	31.18, 31.19, 31.39, 31.44
Agricultural Bank of China v Lau Yuet Wah [2013] HKEC 421	30.32, 30.40
Aiken v Kinborough Corp (1939) 62 CLR 179	21.36
Aitken v Gardiner (1956) 4 DLR (2d) 119	10.67
Aktieselskabet Dansk Skibsfli nansiering v Wheelock Marden & Co Ltd [1994] 2 HKC 264	30.4

- is primarily fixed by law (common or statutory law).
- (2) Generally, privity between the parties is necessary for an action for breach of a contract; whereas in tort the duty is towards persons generally.
 - (3) While damages in contract take into account what the position of the plaintiff would have been had the contract been performed, the object of awarding damages in tort is to restore the *status quo ante*, as if the tort did not occur.
 - (4) Where a breach of contract occurs, the court awards damages to the injured party only by way of compensation; in tort, in addition to compensatory damages, aggravated punitive or exemplary damages may be awarded.

1.19 None of these distinctions can be accepted as completely accurate or as a complete distinction of the two. As in the case of a contract, many duties in tort are voluntarily assumed. For example, an occupier of land or premises puts himself under a duty of care by inviting others onto his land or premises or in negligent misstatement, you assume a duty to give non-negligent advice. Several tort duties are owed only to specific persons or classes of persons. For example, the duty not to convert goods is only owed towards those who have possession of the goods or a right to immediate possession. The view that tort damages seek to restore the *status quo ante* is also not totally correct, as it is well established that the plaintiff can now claim damages for not only misfeasance but also for non-feasance.²⁸ The doctrine of implied terms, particularly the recent paternalistic trend to impose non-excludable contractual duties by legislation, cuts at the very root of the doctrine of freedom of contract. For a large variety of contracts, important terms are fixed not by the parties but by the law.²⁹

1.20 It seems that the traditional distinctions between tort and contract are fading away with the expansion of the tort of negligence and the *Hedley Byrne* principle³⁰ as well as the modification of some of the well-established doctrines of contract. The doctrine of promissory estoppel, for example, could be expanded to include all negligence actions under the doctrine of 'detrimental reliance'.

28 For the meaning of misfeasance and non-feasance, see *infra* para 1.39.

29 For example, the Control of Exemption Clauses Ordinance (Cap 71), Misrepresentation Ordinance (Cap 284) and Sale of Goods Ordinance (Cap 26).

30 See *infra* para 1.39.

Indeed, it seems that a breach of duty in contract could be grounds for an action in tort for failure to take reasonable care.³¹

Tort and breach of trust

1.21 Trust is an equitable obligation imposed on the trustee to deal with the trust property for the benefit of persons (the beneficiaries) named in the trust of whom the trustee himself may be one. Where there is a breach of trust, as when the trustee misappropriates money or unlawfully deals with some other property belonging to the trust, the beneficiaries may claim compensation. The differences between an action in tort and in breach of trust is that the compensation in breach of tort are not damages of any sort, liquidated or unliquidated; the compensation can be ascertained even before the plaintiff commences his action. On the other hand, when the plaintiff successfully brings an action in tort, he is awarded unliquidated damages. Further, tort may also be distinguished from breach of trust on the ground that while tortious claims are primarily based on common law principles, actions for a breach of trust are primarily decided on equitable principles. But again, such distinctions are general statements only as equitable principles are sometimes used in actions in tort.

Tort and liability on bailment

1.22 A bailment is a legal relationship based on the delivery of and the possession of goods to the bailee where the ownership remained with the bailor on the condition, expressed or implied, that after the expiry of the period of bailment or the fulfilment of the purpose for which the goods are bailed, the possession of the goods will be restored to the bailor or delivered according to his instructions. The deposit of goods, for example, keeping jewellery with a bank, or a loan of goods, such as lending one's car to a friend, are common examples of bailment. Where the bailee misuses or damages the goods, he is liable to the bailor. The action against the bailee by the bailor may be founded on contract, tort or the bailee's common law duties. Where the action is founded neither on contract nor tort but the bailee's common law duties, the plaintiff is in a better position as the burden of proof shifts to the defendant to explain how the loss occurred.

31 See Jane Swanton, 'The Convergence of Tort and Contract' (1989) 12 Syd LR 40.

ORIGIN AND DEVELOPMENT

- 1.23 The law of tort, like many other branches of common law and equity, which existed in England on 5 April 1843, was introduced into Hong Kong by the Supreme Court Ordinance 1844.³² Its development since has followed substantially the developments in England, although here and there changes have been introduced to take into account local needs.³³ Decisions from other jurisdictions also had to be considered.³⁴ The backbone of tort law is still largely English based and therefore we must turn our attention to English law.
- 1.24 The English law of tort has been developed by the courts which, in the beginning, transmuted rules of custom into principles of law.³⁵ This does not, however, mean that the process of development took place quite unaided by legislation.³⁶ In fact, the Statute of Westminster II (1285)³⁷ gave the clerks of the Chancery authority to create new writs by analogy to existing writs, thus expanding the scope of remedies in claims founded on tortious liability. Further, as will be discussed later, the law of tort has been modified considerably by statute, both in substance and in procedure. Legislative activity was much more pronounced during the post-World War II period, but still can be seen today.

32 Until 1 July 1997, the main reception provisions were contained in the Application of English Law Ordinance 1966 (Cap 88) ss 3, 4 and 8. After the 1997 handover, as stipulated by Article 8 of the Basic Law, the laws previously in force in Hong Kong including the common law and rules of equity are maintained. For further details, see Chap 3.

33 For details, see Chap 3.

34 See *Chan Mei Yiu Paddy v Secretary for Justice (No 2)* [2012] 3 HKLRD 65.

35 The common law of tort has drawn considerably on two major sources during its formative years, namely, Roman law and Germanic custom, the latter as embodied in *Lex Salica*. Some scholars regard these two sources as the twin parents of the common law: see OW Holmes Jr, *The Common Law* (London, MacMillan and Co, 1911) p 34. For the extent of the Roman influence on the English formulary system, see DJ Siepp in *Legal Record and Historical Reality*, p 9; 7 LHR 175. Pollock and Maitland hold a contrary view: see *History of English Law II* (Lawyers' Literary Club, Washington DC, 2nd edn, 1959) p 558.

36 The word 'legislation' is used here in its limited sense, referring to legislation made by Parliament as distinguished from law-making by the other two branches of government, the executive and the judiciary. For in early times in England, when there was no clear-cut demarcation between legislative, executive and judicial functions of government, the courts themselves made law (as they still do, though to a lesser extent) just as Parliament decided cases of law. For the role of judges as law-makers, see CK Allen, *Law in the Making* (7th edn, 1964) Chap IV.

37 Historians disagree as to the role of this statute: see TH Baker, *An Introduction to English Legal History* (3rd edn, 1990) p 73.

- 1.25 As with any other society in the early stages of its legal evolution, in England, the procedural institutions preceded the substantive law. Form had assumed, by far, greater importance than substance. The early development was summarised by the well-known legal scholar Sir Anthony Fitzherbert in 1534 in the preface to his work *Natura Brevium*: 'The forms were the fundamentals on which the whole law depends.'³⁸ Indeed they were the basis of the law.³⁹ There was a law of form before there was a law of tort, contract or property. The principles of common law grew around those forms called writs⁴⁰ through which the King's courts⁴¹ centralised and administered justice.
- 1.26 Until the reign of Edward III (1327–77), a person could commence an action before the royal justices in eyre⁴² or justices *coram rege*⁴³ without a writ of any kind on a mere *querela* or informal complaint or bill. If he wished to commence an action in the Common Pleas or in the King's Bench sitting in a county other than Westminster, he had to purchase a royal writ from the King's Chancery to authorise the commencement of proceedings. However, by then, the variety of writs had increased by leaps and bounds and the process of inventing new writs continued at such a pace that in 1258, upon complaints made, the Provisions of Oxford were enacted which required the Chancellor not to
- 38 See Stonor J in *Horthwait v Courtenay* (1315) 45 SS 5.
- 39 This phenomenon is common to most early systems of law. For a similar development in Roman law, see WW Buckland, *A Textbook of Roman Law* (3rd edn, 1963) Chaps XIII–XV; see also Justinian's Institutes, Bk V.
- 40 Originally writs were documents under the seal of the Crown, a court or an officer of the Crown commanding the persons to whom they are addressed to do or forbear from doing some acts. There were two kinds of principal writs: prerogative writs and writs of right. The former were issued at the discretion of the Crown while the Crown was bound to issue the latter. Writs of right are of two kinds: original and judicial. An original writ was the mode of commencing an action at common law.
- 41 In early times in England, there were two principal systems of courts to administer justice, namely, royal courts, known as King's courts, and feudal courts. The King's courts comprised the King's representatives and those who were closely associated with or related to the King. There were three such courts: *coram rege* (King's Bench), *in Banco* (Common Pleas), and *ad scaccarium* (Exchequer). The King's courts were based in Westminster and periodically went on circuit to hear complaints addressed to the King and gave relief declaring principles of law which became the common law of England. The feudal courts were courts maintained by feudal lords and those who functioned under them.
- 42 Eyre was an ancient institution of royal justice first used as an instrument of central government and later endowed with exclusive jurisdiction over major crimes. It was headed by the King's personal representatives.
- 43 This was a group drawn from those closest to the King and who travelled with him wherever he went. They sat in the presence of the King and dispensed justice.

issue any unprecedented writs without the consent of the King's Council. Henceforth, the categories of actions became more or less closed.

1.27 Every action had its own writ and every writ had its own formula. Procedures and methods of trial available in one action were not necessarily available in another action begun by a different writ. A person who wished to sue in the Common Pleas or in the King's Bench had to see to it that his case fitted into one of the established writs and its formula. However genuine his complaint might be, he could not obtain any relief unless his case fitted, but even if his case did not fit, he was not precluded from seeking relief from the local courts. It was of crucial importance that a plaintiff should select the most appropriate writ for his case because the whole course of his litigation and its ultimate result depended on his choice of writ. Diverse and numerous were the situations which called for relief but unless there was a writ there was no remedy. This was the unenviable position in which those responsible for the administration of justice must have found themselves. They had to adhere to the form and at the same time do substantive justice as and when the occasion demanded it. Three distinct but related agencies were concerned in this process and they were the lawyers, the clerks of the Chancery and the judges. A lawyer advising a client would have to select the writ which was the most appropriate to his client's case, a task not altogether free from peril. Sometimes a case would not quite fit into any one of the existing writs; the lawyer would then try to colour the facts to accommodate his client's case. However, in exceptional cases where the case was such that any fudging of the facts could not help the client, the lawyer would then have to use his legal ingenuity and persuade the Chancery clerks to invent a new writ. When the client's cause would fall equally well under more than one writ, he had to persuade the Chancery clerks to issue the particular writ which was the most advantageous to his client. Invariably, his opponent would advance arguments to show that the plaintiff's case did not fall within the writ in question or that the wrong formula had been used. The judge would then rule, accepting or rejecting the plaintiff's case and giving reasons for that ruling. When the clerks of the Chancery were forbidden to make writs to measure, judges would find ways of meeting new needs. If the categories of writs could not be increased, judges would extend the scope of existing ones. 'They did this in different ways, bringing all kinds of conflicts on new sets of facts within the

old formulae, sometimes by fictions and sometimes by winking at technical requirements.⁴⁴ Sometimes a judge might be so brave as to disregard form altogether and give relief in a deserving case.⁴⁵ The modern law of tort has evolved from this welter of writs formulae, lawyers' arguments and judges' reasonings. The development of tort as well as several other branches of the common law took place mainly through procedural means rather than through legislation *stricto sensu*. One has, therefore, to look within the interstices of the writ system for the substantive law of tort. We shall now turn to those old writs which have spawned the main principles of our modern tort law.

Trespass

1.28 The modern English law of tort has sprung from the old common law actions of *trespass vi et armis*, case and detainee, and the writs by which they were commenced or 'originated'.⁴⁶

1.29 The action of *trespass vi et armis* was not in common use until the thirteenth century. Presumably, it had developed from the old appeals of felony such as the appeals of larceny and mayhem, which were used as a means of recovering stolen goods or of achieving the execution of an aggressor. Those appeals, except the appeal of death, could easily be converted into actions for damages by omitting the word 'felony'.

1.30 The action of *trespass vi et armis* commenced as a combined civil and criminal proceeding designed not only to give the plaintiff damages, but more importantly, to punish the defendant with a fine payable to the Crown. This was because its original or primary purpose was the maintenance of peace and order which was the responsibility of the Crown. As far as the Crown was concerned, this action served the dual purpose of securing peace and order; and, at the same time, of strengthening the coffers of the Crown. The fine was, however, abolished at the end of the seventeenth century.

1.31 In its earliest form, the writ of trespass alleged that the defendant injured the plaintiff *vi et armis et contra pacem regis* ('by force

⁴⁴ See D Roebuck, *The Background of the Common Law* (2nd edn, 1990) Ch 6, especially p 42.

⁴⁵ *Ibid*, p 84.

⁴⁶ The process by which an action was commenced in court was and still is called 'originating' or 'original' writ or summons.

and arms and against the King's peace') or that he infringed a royal franchise. The King was brought into the picture in order to render the matter justiciable in the King's courts. Otherwise, it would have to be dealt with by the local courts according to customary law, which the same course of action might or might not have produced the desired result. Besides, local courts were forbidden to entertain actions where the claim exceeded 40 shillings in value. The writ also alleged specific acts such as assaulting, beating, wounding, taking and imprisoning the plaintiff, *insultum fecit et ipsum verberavit, vulneravit et ipsum cepit et imprisonavit* (he assaulted, beat, wounded and took and imprisoned him) which the plaintiff was required to prove in order to establish his case. In the course of time, however, the criminal and civil aspects of the action were separated. The action of trespass in its civil aspect became the appropriate recourse for claiming damages for any direct violation of a right by some physical interference. The writ, nevertheless, continued to allege the use of force and arms by the defendant but those allegations soon became mere fictions.⁴⁷ Judges ignored them and required no proof of them treating them as mere superfluous formal verbiage or appendages.⁴⁸ The requirement of *vi et armis* finally was abandoned by the middle of the fourteenth century.

1.32 If trespass were to the person, the action was called assault, battery or false imprisonment, as the case may be, depending on the circumstances and actions of the defendant. If the trespass were to chattels, it was trespass *de bonis asportatis*, although the defendant's act might not have involved an actual carrying away of the goods from the plaintiff. If the trespass were to land, it was trespass *quare clausum fregit* — the wrong of breaching the close. Originally the word 'land' in this context meant 'enclosed land' but later the action came to embrace all land (enclosed or not) and buildings.

1.33 The action of trespass *vi et armis* had, however, three limitations which prevented any further expansion of its scope. These took the form of three conditions which the plaintiff had to satisfy. First, there had to be an act as opposed to an omission, except in the case of continuing trespass. Secondly, the act had to be a

47 Fictions were resorted to in both the common law and Roman law to overcome the rigidity of the formulary system when the demands of justice made it necessary to give effect to substance at the expense of form: see RW Lee, *The Elements of Roman Law* (4th edn, 1956) p 9.

48 See *supra* p 10.

voluntary act of the defendant; any act done under irresistible force or compulsion, or circumstances beyond the defendant's control could not ground an action in trespass *vi et armis*.⁴⁹ Thirdly, the act had to amount to a direct and forcible invasion of the plaintiff's rights. 'Direct' meant that the injury must have been the immediate consequence of the act, not necessarily immediate in time but in causal sequence. If the injurious result followed a break in the chain of causation, it would be consequential and therefore would not fall within the ambit of the action for trespass *vi et armis*.⁵⁰ It is thus obvious that not every situation that arose in actual life and which called for a remedy would fall within the rigid framework of the action. There would be a multitude of acts and omissions which resulted in loss or damage but which would have to go unremedied.

Trespass on the case

1.34 We have already seen that the Statute of Westminster II (1285), c 24 provided that the clerks of the Chancery should draw up a new writ 'whenever henceforth it should happen in the Chancery that a writ is found in one case but none is found in a like case (*in consimili casu*) falling under the same law (*cadente sub eodem jure*) and requiring a like remedy'. However, this provision could not be construed as a licence to overlook the three requirements stated above.⁵¹ The remedy had to be found elsewhere or in the form of a new action. Hence, the invention of a new action called 'trespass on the case (*trespass super casum*)' or 'action on the case' where all that the plaintiff had to do was to set out in detail what the wrong was and show that he had a special case.

1.35 The distinction between the two can be illustrated by the following oft cited example of Fortescue J.⁵² If A threw a log which directly hit B, then B could sue A in trespass. However, if A threw a log on the road and B later stumbled over it, an action on the

49 See *Smith v Stone* (1647) Sty 65; 82 ER 533 (defendant forcibly carried upon plaintiffs' land by third parties); *Gibbons v Pepper* (1695) 1 Ld Raym 38; 91 ER 922 (defendant carried upon plaintiff's land by runaway horse); see also Glanville Williams and BH Hepple, *Foundations of the Law of Tort* (1976) Ch 2, especially p 39.

50 *Scott v Shepherd* (1773) 2 W Bl 892; cf *Hutchins v Maughan* [1947] VLR 131; *Southport Corporation v Esso Petroleum Co Ltd & Anor* [1954] 2 QB 182, [1954] 2 All ER 561, CA (Eng).

51 See *infra* 'Trespass'.

52 *Reynolds v Clarke* (1725) B & M 354.

case would lie but no action of trespass *vi et armis* because B's injury was not a direct result of A's throwing of the log.⁵³ Another example may be taken from false imprisonment and malicious prosecution. When the defendant unlawfully locks the plaintiff up or otherwise deprives him of his liberty of movement, the defendant is liable in false imprisonment because this is a direct physical interference. On the other hand, where the defendant has maliciously and without reasonable and probable cause instituted criminal proceedings against the plaintiff and the charge has been dismissed, the defendant has not directly interfered with the plaintiff. The chain of causation is interrupted by the interposition of the act of a third party, namely, the judge or magistrate, who is not an agent of the defendant. 'In trespass the plaintiff complains of an immediate wrong, and in case, of a wrong that is the consequence of another act.'⁵⁴ The insistence on directness for the writ of trespass also explains why an action on the case was made available for nuisance early in the fifteenth century. We have already seen how social pressures had led judges to resort to fictions and other devices to overcome differences of form in order to do justice. The trend had gone much further by the year 1833, when it was established that the action upon the case for negligence overlapped trespass.⁵⁵ The fact that the plaintiff had an action in trespass was no bar to him bringing an action on the case for negligence as well. Thus, when the forms of action were abolished, the law of tort stood as follows.

1.36 If the plaintiff's injury was both wilful and direct, trespass would be the only remedy. If the injury was direct but not wilful, either trespass or case may be maintained. If the injury arose from the negligence of the defendant's servant, case would be the only remedy for the simple reason that the act was not done by the defendant himself but by the servant. Trespass arising directly from the defendant's act had come to be associated with intentional or wilful injuries, and case with negligence. Since trespass was basically a crime it remained actionable *per se* (without proof of damage) whereas damage was the gist of an action on the case. In all cases of doubt and where the plaintiff could not show that the

53 For trespassers injured by spring guns, the injury was held to be consequential: *Holt v Wilkes* (1820) 3 B & Ald 304; *Bird v Holbrook* (1828) 4 Bing 628.

54 *Reynolds v Clarke* (1725) B & M 354.

55 See *Williams v Holland* (1833) 10 Bing 112.

act complained of was done wilfully and by design, action would be filed on the case.⁵⁶

1.37 Of all the ancient forms of action, case was the most fertile. It has given birth to the bulk of the modern law of tort as well as the whole of the law of simple contract. All those torts which were not redressable by the actions of *trespass vi et armis* and *detinue* were the products of case. They include defamation, deceit, conversion, malicious prosecution, negligence, nuisance, the rule in *Rylands v Fletcher* and a host of others.

1.38 One thing, however, remained unsettled and that was the question of liability in tort for non-feasance or the neglect of a duty to act. The law of tort up to that time was only concerned with liability for positive acts. Inaction was not actionable in trespass.⁵⁷ There was an action for neglect of a duty to act but this was available only where the duty in question was one imposed by law. Such duties included duties imposed by undertakings, custom of the realm, local custom and those arising out of an office. In other words, non-feasance was actionable only on the basis of a pre-existing relationship but not as a breach of a general duty. Even so, it was actionable in *assumpsit*, a species of action on the case, but not in trespass because, as the judges used to put it, it 'sounded in covenant' rather than in trespass.⁵⁸ Although this attitude had the most salutary effect of developing a new law of contract with a unified theory of contract, a unified theory of negligence was, however, long in coming.⁵⁹

Negligence

1.39 Judges had recognised negligence as the basis of collision cases but this remained largely confined to road accidents. An early attempt to articulate a general theory of duty in negligence failed to gain general acceptance,⁶⁰ and it was not until the case of

56 See *Williams and Hepple*, op cit p 44.

57 See *Johnson v Baker* (1493) BRM 399 at 400 per Rede sjt. *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439, [1968] 3 All ER 442.

58 For a full discussion, see *Baker*, op cit Ch 19, especially pp 379-382.

59 The first and foremost concern of the courts during this period was to respond expeditiously to the needs of an emerging laissez-faire economy by developing a unified theory of contract. In the process, the need to develop a unified theory of negligence was thrust to the background. See PJ Cooke and DW Oughton, *The Common Law of Obligations* (1989) pp 11-13.

60 *Heaven v Pender* (1883) 11 QBD 503.

*Donoghue v Stevenson*⁶¹ that an attempt was made to unite the various negligence actions under the common denomination of the tort of negligence. In that case, Lord Atkin laid down his famous 'neighbour test' which requires a man to take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to injure his neighbour. One's neighbours, according to Lord Atkin, were 'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question'. The Atkin doctrine, in the beginning, however, applied only to what are termed acts of misfeasance, but not to non-feasance or omissions in the absence of a pre-existing relationship between the parties. Certain positive acts such as legitimate trade competition which resulted in damage to others were not actionable in negligence. The duty of care recognised by the Atkin doctrine only extended to physical damage to the person or property and not to pure economic loss caused by negligent misstatements. Such matters had to wait until the 1960s and 70s to be resolved by the courts. In *Hedley Byrne & Co v Heller & Partners Ltd*,⁶² the House of Lords held that an action lay for a negligent misstatement causing a pure economic loss. The principle was soon extended to cover negligent advice and negligent information, or conduct resulting in economic loss. The result is that today third parties may sue for economic loss resulting from their reliance on negligent misstatements or advice or information given to others.⁶³ The attempt to extend the scope of the tort of negligence to cover divergent situations seemed to be based not so much on legal or logical reasoning as on policy considerations.⁶⁴

- 1.40 After *Donoghue v Stevenson*, negligence assumed such importance that the tort of trespass faded into the background. Tortious injuries are now classified, in the main, either as intentional or as negligent.⁶⁵

61 [1932] AC 562, HL.

62 [1964] AC 465, [1963] 2 All ER 575, HL.

63 *Yianni v Edwin Evans & Sons* [1982] QB 438, [1981] 1 All ER 592.

64 See *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, [1970] 2 All ER 294, HL; *Anns v Merton London Borough Council* [1978] AC 728, [1977] 2 All ER 492, HL.

65 *Letang v Cooper* [1965] 1 QB 232, [1964] 2 All ER 929, CA (Eng). The position in other jurisdictions is not so clear. See F Trindade (1971) 20 ICLQ 706.

Strict liability

- 1.41 Meanwhile, in *Rylands v Fletcher*,⁶⁶ the House of Lords had to grapple with a novel issue, in which the plaintiff had suffered considerable financial loss due to the flooding of its mine by water escaping from the defendants' reservoir. The plaintiff could not sue in trespass because the defendants' act was indirect. There was no nuisance because there was no recurring interference. Nor was there any negligence on the part of the defendants because the damage was caused due to the presence of a disused mine shaft of whose existence the defendants could not have been aware. Blackburn J, nevertheless, held the defendants liable on the following rule of strict liability:

a person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

- 1.42 The forms of action were abolished in England between 1832 and 1875,⁶⁷ but the substantive law which had been developed within them was preserved. Although the plaintiff is no longer required to plead his cause of action to be successful, he must plead the facts which disclose a cause of action. There is no denying the truth of Maitland's celebrated aphorism, 'the forms of action we have buried, but they still rule us from their graves'.⁶⁸

Statutory torts

- 1.43 Apart from the development of various aspects of liability in negligence, there have been, of late, new areas of liability created by statute in response to the needs of the community. These cover both intentional and negligent acts. The Sex Discrimination Ordinance (Cap 480), enacted in 1996, for example, creates the new tort of sexual harassment in Hong Kong. The considerations of the enactment of an anti stalking law by the Law Reform Commissioner of Hong Kong which may create a new tort of stalking, is a further example. Moreover, the existing principles of

66 (1866) LR 3 HL 330.

67 The Common Law Procedure Act 1852 (UK) and Judicature Act 1873 (UK) are of particular relevance. This reform was adopted in Hong Kong.

68 Maitland, *Equity, also the forms of action at common law, two courses of lectures* (Cambridge UP, 1984) p 296.

tortious liability have been realigned to protect the common man who is not so familiar with the niceties of the law.⁶⁹ Institutions which were not subject to liability have also been brought under the regime of the law of tort.⁷⁰

Administrative remedies

- 1.44 Yet another significant development has been to give or enlarge the jurisdiction of bodies other than courts to provide alternative remedies. Some of that which was the province of the courts has now become a matter for administrative action.⁷¹
- 1.45 In other jurisdictions, compensation for accidents has been taken out of the tort system and replaced by a compensation scheme set up by legislation.⁷²

69 See, for example, the Misrepresentation Ordinance (Cap 284) and the Control of Exemption Clauses Ordinance (Cap 71).

70 See the Crown Proceedings Ordinance (Cap 300) s 4 which, subject to certain conditions, imposes liability in tort on the Crown.

71 The Employees' Compensation Ordinance (Cap 282) establishes Employees' Compensation (Ordinary Assessment) Boards and Employees' Compensation (Special Assessment) Boards to deal with any claim for compensation for an injury to an employee: see ss 16D and 16E.

72 In 1974, New Zealand set up the no fault accident compensation scheme to compensate persons in personal accident cases to replace tort law damages.

CHAPTER 2

Liability under Statutory Compensation Schemes

INTRODUCTION

2.01 Over the last few years, on average, 19,000 people were killed or injured every year on the roads in Hong Kong, an average increase of 613 cases annually during the past three years.¹ Deaths and injuries occur in factories, mills, construction sites and other places of work.² In 2009, the number of employees who were reported to have suffered from industrial or occupational accidents was 39,579.³ The numbers for the following two years show some fluctuation — in 2010, the number increased to 41,907; but in 2011, the number came down to 40,578.⁴ Numerous criminal offences that are committed almost daily also result in death or injury to the victims and leave their families destitute. Some families undergo severe financial distress. In addition to causing death or injury, the wrongdoer may also cause destruction or damage to property. The law of tort, in general, provides compensation only to those who could establish fault on the part of the wrongdoer. On the other hand, there are comprehensive accident compensation schemes, based on the no-fault theory, providing compensation to accident victims or their dependants irrespective of whether the wrongdoer caused the death, injury or loss, or the victim was at fault. In New Zealand, there is a comprehensive accident compensation scheme through the Accident Compensation Corporation under which compensation is paid in respect of personal injuries caused

1 Transport Department, *Road Traffic Accident Statistics (Year 2011)*, Summary of Key Statistics.

2 The accident rate per 1,000 employees in industrial employment dropped from 19.2% in 2002 to 14.6% in 2011, a 2.4% decrease. See Labour Department, *Occupational Safety and Health Statistics Bulletin* (Issue No 12, 2012) p 2.

3 Labour Department, *Occupational Safety and Health Statistics Bulletin* (Issue No 12, 2012) p 2.

4 *Ibid* p 1.

by accidents, including occupational diseases.⁵ There, the rights of action in tort have been abolished in respect of claims arising from such injuries. In the United Kingdom, the Department of Health set up an alternative to claims in tort in relation to certain law value claims due to adverse incidents by the NHS Redress Act 2006, which came into force in 2007. Moreover, ad hoc selective no-fault schemes have been created in respect of motor vehicle and industrial accidents as well as criminal injuries.⁶ In Hong Kong, there is no comprehensive no-fault compensation scheme comparable to that in New Zealand, nor is there any equivalent of the United Kingdom's Criminal Justice Act 1995.⁷ Some of the United Kingdom Acts which provide for compensation schemes have been reenacted. These will be referred to at the appropriate places.

2.02 Although the primary concern of this book is the subject of tort, alternative compensation schemes must be discussed briefly because they affect remedies under tort.

EMPLOYEES' COMPENSATION SCHEME

2.03 The Employees' Compensation Ordinance (Cap 282) ('the ECO') contains a comprehensive scheme for providing compensation for injury to employees. The ECO refers to five situations in which an employer is liable to pay compensation to the employee or his dependants, viz, injury causing permanent total incapacity, permanent partial incapacity, temporary incapacity, death and occupational diseases. The employer is liable to pay irrespective of whether the employee's injury or death was due to the employer's fault or not. Also, as a general rule, the employer cannot contract out his liability under the ECO.⁸ In some cases, an employee or his

⁵ See the Accident Rehabilitation and Compensation Insurance Act 1992 (NZ), which 'establishes 'an insurance-based scheme to rehabilitate and to compensate in an equitable and financially affordable manner those persons who suffer personal injury'.

⁶ See the Road Traffic Act 1988 (UK), Law Reform (Personal Injuries) Act 1948 (UK) and the Criminal Justice Act 1995 (UK).

⁷ Although there is no statute along the lines of the United Kingdom Act, there is a non-statutory scheme similar to the scheme under the United Kingdom Act.

⁸ Section 31 of the ECO provides:

'(1) Any contract or agreement whether made before or after the commencement of this Ordinance, whereby an employee relinquishes any right to compensation from an employer for personal injury by accident arising out of and in the course of his employment, shall, subject to subsection (2), be null and void in so far as

dependants may be able to claim compensation even though his injury or death was caused by the employee's own negligence.

Employer's liability to pay compensation

2.04 The employer's liability to pay compensation is subject to certain conditions laid down by the ECO.⁹

2.05 Section 5 of the ECO provides, *inter alia*, that:

- (1) Subject to subsections (2) and (3), if in any employment, personal injury by accident arising out of and in the course of the employment is caused to an employee, his employer shall be liable to pay compensation in accordance with this Ordinance.
- (2) No compensation shall be payable under this Ordinance in respect of —
 - (a) any injury, other than an injury which results in partial incapacity of a permanent nature, which does not incapacitate the employee from earning full wages at work at which he was employed; (Amended 67 of 1996 s. 2)
 - (b) any incapacity or death resulting from a deliberate self-injury;
 - (c) any incapacity or death resulting from personal injury if the employee has at any time represented to the employer that he was not suffering or had not previously suffered from that or a similar injury, knowing that the representation was false; or
 - (d) any injury, not resulting in death or serious and permanent incapacity, caused by an accident which is directly attributable to the employee's addiction to drugs or his having been at the time of the accident under the influence of alcohol.

it purports to remove or reduce the liability of any person to pay compensation under the provisions of this Ordinance.

- (2) The Commissioner may, if satisfied that, by reason of old age or serious physical defect or infirmity, a person, if employed as an employee, is specially liable to meet with an accident, or, if he meets with an accident is specially liable to sustain injury, in connection with any contract of such employment, authorize the person and the employer to enter into an agreement in writing reducing or giving up the right of such person to compensation under the provisions of this Ordinance in respect of any accident which is caused or contributed to by the old age or serious physical defect or infirmity.
- (3) An agreement entered into under subsection (2) shall be ineffective unless the Commissioner certifies that in his opinion such agreement is fair and reasonable.⁹

⁹ See s 5 of the ECO.

- (3) In any proceedings under this Ordinance where it is proved that the injury to an employee is attributable to the serious and wilful misconduct of that employee, or that an injury by accident arising out of and in the course of his employment is deliberately aggravated by the employee, any compensation claimed in respect of that injury shall be disallowed; except that where the injury results in death or serious incapacity, the Court on consideration of all the circumstances may award the compensation provided by this Ordinance or such part thereof as it shall think fit.'

2.06 There are three general rules laid down by the section. The first rule is that for an injury to be compensated, it must be such as to prevent the employee from earning full wages at work for which he was employed for more than three consecutive days. The second rule is that where the employee's injury is caused by the employee's own serious and wilful misconduct or resulting from the employee's deliberate self injury or alcohol and drug consumption, the employee's compensation claim will be denied. The third rule is that, the employee will lose his compensation claim if he has deliberately aggravated his own injury. To trigger section 5, there must be either serious or wilful conduct or deliberate aggravation of the injury by the employee: mere contributory negligence will not suffice. There is an exception to these rules set out in section 5(3) which relates to a situation where the employee's injury results in death or serious incapacity.

2.07 In *Yuen Yuk Ying v Chan Kam Wing*,¹⁰ a 36-year-old van driver died as the result of severe multiple injuries suffered in a traffic accident. The accident was caused because the deceased's judgment was impaired by alcohol. The court said that although the accident was caused due to the employee's serious and wilful misconduct, it would exercise its discretion and allow employee's compensation to the estate of the deceased. Godfrey JA said that although 'no compensation was payable for any injury caused by an accident, which was directly attributable to the employee having been under the influence of alcohol at the time of the accident, that bar did not operate when the injury resulted in death. Section 5(3) of the Ordinance provided that where an injury resulted in death, the court, on consideration of all the circumstances, might award the compensation provided by the Ordinance or such part thereof as it

¹⁰ [1997] HKLRD 149 at 150, 152, CA.

thought fit to the employee, even where his injury was attributable to his serious and wilful misconduct.'¹¹

Accident

2.08 In order to qualify for employees' compensation, the applicant must establish that his injury is caused by an 'accident'.¹² The question of when an injury has been caused by an accident, however, is not free from difficulty. In common parlance, accident refers to an unexpected distinct event,¹³ such as objects falling on and injuring an employee or the employee suffering from a back injury while lifting a heavy object.¹⁴ However, judicial decisions suggest that the term 'accident' not only refers to a sudden event caused by inadvertence, but also includes injuries caused by intentional acts, such as criminal assaults. In *Cheng Wai-yin v Lung Fung Estate Agency*,¹⁵ the applicant received injuries when a gang barged into the office where he was working and deliberately attacked him. The court found that the incident was an accident. Judge Li said that:

the fact that the incident was the result of a planned or deliberate action is immaterial. For instance, if workers in a factory were injured as a result of an arsonist setting fire to the factory, clearly the workers cannot be denied compensation on the ground the fire was started deliberately.

2.09 Whether there was an accident or not should be assessed from the point of view of the employee.¹⁶ The crucial test is whether such injury could also have been caused to another employee in the same situation.¹⁷

¹¹ At pp 150 and 152. See also *LKK Trans Ltd v Wong Hoi Chung* [2006] 1 HKLRD 980.

¹² Section 5(4) of the ECO.

¹³ Hong Kong Courts adopted the definition of 'accident' laid down in the English case of *Fenton (Pauper) v J Thorley & Co Limited* [1903] AC 443 at 451. See also *Chief Adjudication Officer v Faulds* [2000] 2 All ER 961, [2000] 1 WLR 1035; *Tang Siu Chun v Yau Chung Yee & Ors* [2002] HKEC 100, DC; *Wong Chick v Swire Pacific Ltd* [1992] HKLY 460, DC.

¹⁴ *Chao Yuan Chiao v Regal Hotel's International Ltd & Anor* [2002] HKEC 939, DC.

¹⁵ [2001] HKEC 1147, DC.

¹⁶ *Cheung Shuk Wah Jessica v Wong Kang Hung Darwin formerly t/a New Voice Pub* [2009] 6 HKC 182.

¹⁷ *So Yiu Sang v Manow Co* [2001] HKEC 86, DC; applied in *Cheng Wai-yin v Lung Fung Estate Agency* [2001] HKEC 1147, DC.