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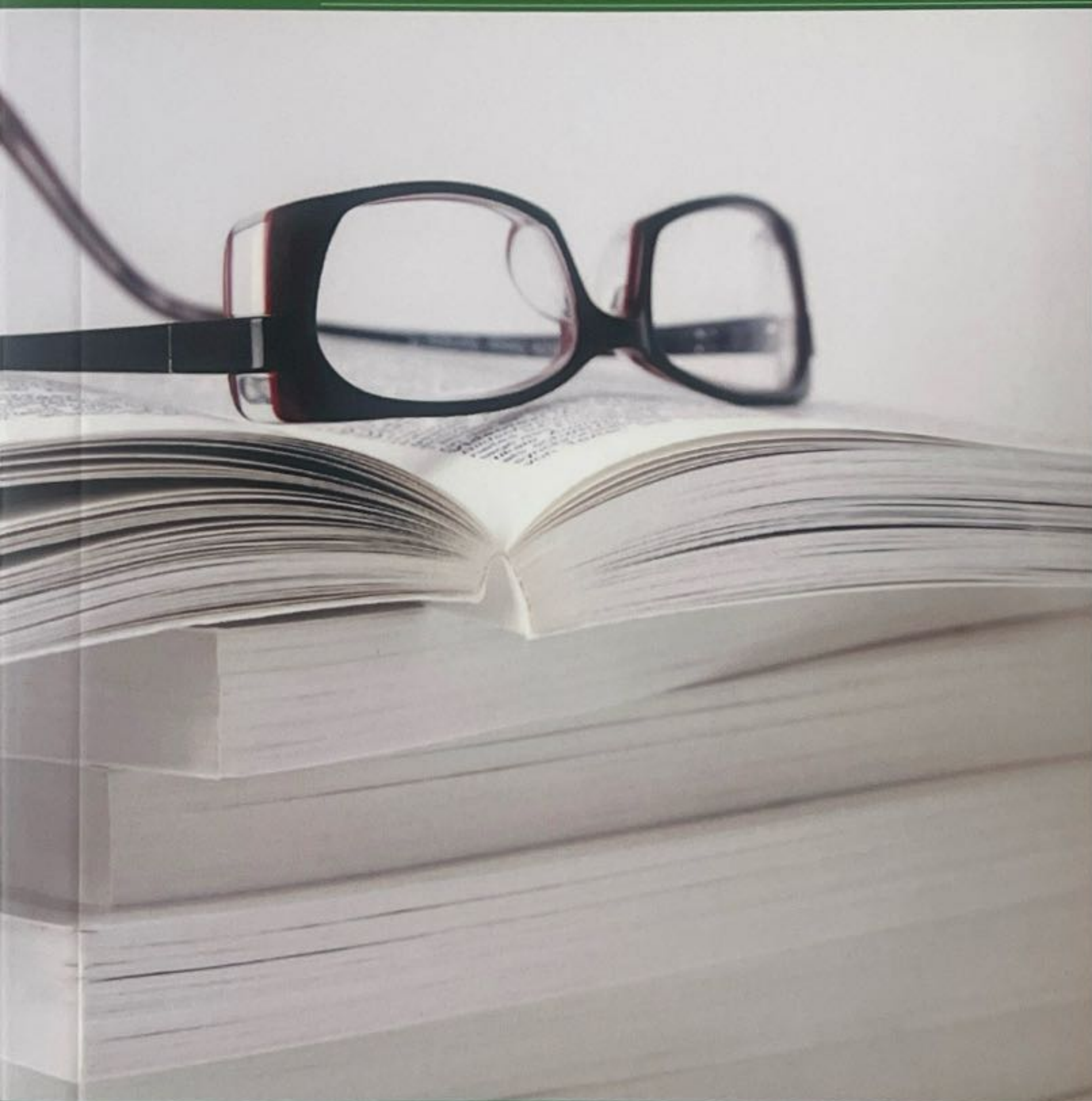
Second Edition

Tort Law in Hong Kong

An Introductory Guide



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Foreword

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ıtablished in 1984, the Hong Kong Institute of Surveyors (HKIS) strives serve the surveying profession. In 2010, the HKIS began sponsoring pub-ation of reference books that are relevant to the needs and requirements the local surveying practice. The HKIS is pleased to have funded another a series of books authored by Stephen D. Mau. Like its sister publica-n, *Property Law in Hong Kong: An Introductory Guide* (second edition) by . Mau, this second edition of his book on tort law in Hong Kong is not ly intended for the surveying industry and its students, but also for the n-legal professional and the general public.

The real estate and construction-related industry has experienced sub-ntial growth over the past few years. In response to this growth, there a large number of individuals interested in entering this industry and ıers in the industry who are interested in further advancing their careers expanding their knowledge of law. This book serves both groups as this tion of *Tort Law in Hong Kong: An Introductory Guide* has been revised, lated, and re-organized to enhance the reader's experience and under-ıding. The second edition continues to be written in non-legal English h a comprehensive endnotes section which provides further and more ailed explanations of the main text along with references for those who interested.

This book comprises several chapters which discuss torts that are re frequently encountered in daily activities. Hence, this book is rel-nt to both professionals and lay readers. It is also an excellent reference undergraduate and postgraduate student studying courses related to industry.

Sr Vincent Ho
President
The Hong Kong Institute of Surveyors

nuisance.[19] Another authority is of the opinion that Rylands
less important with the development of the law of negligence
of *Donoghue v Stevenson* in 1932.[20] In Australia, the case
Authority v General Jones Pty Ltd (1994) 179 CLR 520,
Rylands has been replaced by developments in the tort of

C. Negligence

The broadest category of tort is the tort of negligence. The
growing category in tort law and the most frequently litigated
The following two chapters concentrate on this category
out the elements of the tort of negligence, then present
available.

D. Other Torts

In Chapter 5, there will be discussion of several other types
are anticipated to have the most impact upon the general
ous liability of employers for the torts of their employees
out of breach of statutory duty; occupier's liability; nuisance
defamation. Each of these types of torts will be discussed
tive sections within the chapter.

3

Tort of Negligence

he tort of negligence is the right to protect one's self and one's property rom harm caused by the unreasonable behaviour of another.[1] *Negligence* is efined as carelessness or lack of proper care and attention in performing ome act.[2] A person is negligent as a tortfeasor, even if that person did not itend the consequences of the act (injury to another person or damage to nother's property). Rather, the tortfeasor instead acted indifferently to (or, as unaware of) the consequences of his or her actions.[3] Another authority has compared negligence with other categories of tort:

> Negligence is a specific tort and . . . is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all. . . . An act of negligence may also constitute a nuisance where it occasions a dangerous state of affairs and satisfies the other requirements of that tort. Equally it may also be a breach of the rule in *Rylands v Fletcher* if it allows the escape of a dangerous thing which the defendant has brought onto his land. Negligent failure to maintain safety standards by an employer may give rise to both liability for negligence and for the tort of breach of statutory duty. Negligent harm to reputation may give rise to both liability for negligence where it occurs within a special relationship causing economic loss, and for defamation. Negligence liability may also overlap with non-tortious grounds of liability under contractual, equitable or public law principles.[4]

Legal negligence measures a person's behaviour against an objective ndard. As will be discussed in Section B of this chapter, if a person's

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behaviour falls below the objective standard for the g
person belongs, that person is negligent regardless of the
The court in *Blyth v Birmingham Waterworks Co* (1856)
legal negligence: "Negligence is the omission to do s
reasonable man . . . would do, or doing something wh
reasonable man would not do."[6] Legal negligence is n
tortfeasor's state of mind. Nor does negligence itself im
negligence causing injury or damage to another may
Only certain types of damage can result in a negligence

In a prior edition, the authors Winfield and J
"Negligence as a tort is a breach of a legal duty to take c
in damage to the claimant."[9] Therefore, this tort consis
In order to successfully bring a negligence action, an i
may also be referred to as a *claimant* or a *plaintiff*) nee
four elements of negligence in a claim against a tortfeas
be referred to as a *respondent* or a *defendant*):

- the defendant owes a duty of care to the injured pa rather than a moral duty;
- the defendant must have breached the duty of care o victim who is bringing the claim to court;
- the victim's injury or damage must be caused by the de of the duty of care, i.e., causation; and
- the victim must suffer injury or damage.

We will now review each of these elements in turn i sections.

A. Duty of Care

The first element of the tort of negligence is the duty of requires a person to use reasonable care to avoid risks or their property. There can be no legal claim of neglig is a duty of care owed by a tortfeasor to the injured victim imposes a requirement to meet a standard of conduct The duty of reasonable care is to prevent injury where o to act) creates a foreseeable risk of harm to another.

The development of the common law can be seen the principle of duty of care in the following cases. Unti no general principle of the duty of care in the tort of neg of *Donoghue v Stevenson* [1932] AC 562, HL established

determining the exercise of a duty of care. Donoghue, the plaintiff in s case, became ill after drinking a bottle of ginger beer which contained lecomposed snail. Stevenson, the defendant brewery, produced this beer. ie issue was whether Stevenson owed a duty of care to the consumer that the brewery sent the ginger beer to a wholesaler, who then sent ginger beer to a retail store, then ultimately to Donoghue's friend who rchased the ginger beer for Donoghue. The plaintiff could not sue the fendant for breach of contract because there was no contract between noghue and Stevenson.

The court, however, decided the case in favour of Donoghue. The irt noted that the ginger beer bottle had been sealed at the brewery and s not opened until immediately before drinking. None of the handlers this product had an opportunity to inspect the bottle's contents as the ttle was opaque. The defendant manufacturer of the ginger beer owed uty of care to Donoghue, as the ultimate consumer of the ginger beer, take reasonable care to ensure that the bottle did not contain any subnce which was likely to cause injury to health. The court established the ghbour principle where:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[12]

To summarize the principle set out in *Donoghue*:
A duty of care is owed to those individuals who, one ought reasonably to foresee, might be harmed by one's actions.
The manufacturer of the ginger beer knew that someone would consume the ginger beer. Although the brewery did not know who would consume the beer or when the beer would be consumed, the brewery knew that the ginger beer would be consumed eventually. Thus the brewery owed a duty of care to the ultimate consumer.

Later, the court reformulated the principle of duty of care and sug- ted the use of a two-stage test in the case of *Anns v London Borough of ton* [1977] 2 All ER 492, HL by stating that:

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> the question has to be approached in two stages. First ... ask whether, as between the alleged wrongdoer and the pe... has suffered damage there is a sufficient relationship of... or neighbourhood such that, in the reasonable contempla... former, carelessness on his part may be likely to cause... the latter, in which case a *prima facie* duty of care arises... if the first question is answered affirmatively, it is nece... consider whether there are any considerations which ough... tive, or to reduce or limit the scope of the duty or the class... to whom it is owed or the damages to which a breach... give rise.[13]

Thus, under the two-stage test, the injured party mus... the damage was foreseeable based on a relationship of suffi... and whether any policy factors might affect a duty of care... include morality, sociology, economics, politics, comm... or administrative convenience. Different policy factors... ered according to different types of damage, leading to di... towards the feasibility of allowing a duty of care. The prin... will be the possibility of opening up a floodgate of claims... court's decision will result in an indeterminate number of... tiffs, and, whether there will be liability for an indetermina... policy factor may be found in the cases discussed below.

Courts should be cautious when applying the *Ann*... In the later case of *Leigh and Sillivan Ltd v Aliakmon Shipp*... 1 QB 350, CA, the judge stated that the courts were not fre... own conception of policy, as it was not correct:

> to regard *Anns'* case . . . as establishing some new and revo... test of the duty of care the logical application of which... enable the court in every case to say whether or not a du... exists. Nor . . . can it properly be treated either as establis... new approach to what the policy of the law should be or... ring upon the court a free hand to determine for itself... what limits are to be set.[15]

A few years later, the Privy Council decided the c... *Yeu v Attorney-General of Hong Kong* [1988] AC 175. Th... a lawsuit by the plaintiffs against the Commissioner... Companies for placing a deposit-taking company on the... to the *Deposit-taking Companies Ordinance* (Cap 328)...

...placed money with a deposit-taking company on the government's regis-...er. The company went bankrupt and the plaintiffs lost their money. The ...laintiffs sought to bring a negligence action against the Commissioner.

> The foremost question . . . is whether in the present case the commissioner owed to members of the public who might be minded to deposit their money with deposit-taking companies in Hong Kong a duty, in the discharge of his supervisory powers under the Ordinance, to exercise reasonable care to see that such members of the public did not suffer loss through the affairs of such companies being carried on by their managers in fraudulent or improvident fashion.[16]

Thus, the issue here was the scope of the duty of care owed by the ...ommissioner. The Privy Council determined, in part, that "the two-stage ...st formulated . . . [in *Anns*] for determining the existence of a duty of ...re in negligence has been elevated to a degree of importance greater than ... merits, and greater perhaps than its author intended".[17] The judicial ...ody continued by stating:

> In view of the direction in which the law has since been developing . . . that for the future it should be recognized that the two-stage test in [*Anns*] is not to be regarded as . . . a suitable guide to the existence of a duty of care.[18]

The Privy Council concluded:

> there was clearly no voluntary assumption by the commissioner of any responsibility towards the plaintiffs . . . It was argued, however, that the effect of the Ordinance was to place such a responsibility upon him. Their Lordships consider that the Ordinance placed a duty on the commissioner to supervise deposit-taking companies in the general public interest, but no special responsibility towards individual members of the public. . . . While the investing public might reasonably feel some confidence that the provisions of the Ordinance as a whole went a long way to protect their interests, reliance on the fact of registration as a guarantee of the soundness of a particular company would be neither reasonable or justifiable, nor should the commissioner reasonably be expected to know of such reliance . . . Accordingly their Lordships are unable to accept the plaintiffs' arguments about reliance as apt, in all the circumstances, to establish a special relationship between them and the commissioner such as to give rise to a duty of care.[19]

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The case of *Junior Books v Veitchi* [1982] 3 All ... recovery to instances of very close proximity where ... ance on a defendant's skills.[89] The rule against reco... loss has been expanded to include pure economic lo... conduct, as opposed to negligent statements.[90] "Gene... allow recovery for pure economic loss where it can b... ant has assumed a responsibility to the plaintiff and ... of a duty would be fair."[91]

4

Defences to the Tort of Negligence

...ll that tort law may involve both a civil case and a criminal case result-...rom the same act. In a civil case, the burden of proving liability is ...r than in a criminal case. The injured party in a civil case must prove ...e elements of the tort of negligence on the *balance of probabilities* ...lard; otherwise, the injured victim has failed to prove its case and the ...dant is free of liability. A tortfeasor may raise a defence which would ...e the tortfeasor from full or partial liability for the injury caused to ...ictim. Defences available to a tortfeasor against a claim of negligence ...ainly contributory negligence and *volenti non fit injuria*.

...ontributory Negligence

...mmon law, the defence of contributory negligence could completely ...nt an injured victim's court action, provided that the victim was ...sonable in avoiding risks, and if this unreasonableness was a sub-...al factor in producing the injury. This would be the result even if ...efendant was also negligent.[1] In other words, if some contributory ...gence could be shown on the injured victim's part, the victim would ...e able to claim any damages in a negligence action.[2]

...n Hong Kong, the potentially harsh application of this common ...ule has been made less severe by the *Law Amendment and Reform ...olidation) Ordinance* (Cap 23) which provides for an apportionment ...mages. This is because the negligence of both parties is taken into ...deration, i.e., the injured party's negligence is compared with that of ...rtfeasor.[3] (In some countries, this comparison of the parties' negli-... and resulting apportionment of damages is known as *comparative ...ence*.) Section 21(1) of the Ordinance states:

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> Where any person suffers damage as the result of his own fault and partly of the fault of any other person or persons, damages recoverable . . . 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.[4]

The *Law Amendment and Reform* (Consolidation) ... changes the consequences of negligence.[5] The question ... has been contributory negligence is still determined ... In *Nance v British Columbia Electric Railway Co Ltd* ... court said that:

> when contributory negligence is set up as a defence ... does not depend on any duty owed by the injured party ... sued, and all that is necessary . . . is to prove ... party did not in his own interest take reasonable ... contributed . . . to his own injury.[6]

Should an injured party's conduct fall below ... care and thus contribute to the injuries, an apportionment ... will be made. As mentioned earlier, Section 21(1) ... *and Reform (Consolidation) Ordinance* provides ... damages may be reduced as a court thinks is ... share in the responsibility for the damage. One ... cludes that this determination has two factors: ... ness. The court compares the injured party's ... conduct, measuring their respective blame, and ... conduct caused the damage.[7]

B. *Volenti Non Fit Injuria* (Assumption of ...

Volenti non fit injuria is translated to mean no injury ... consents to the risk of injury.[8] *Volenti* is a complete ... party's lawsuit.[9] If a victim knowingly and voluntarily ... of injury by the defendant's negligence, the ... for any loss, damage or injury.[10] Courts generally ... narrowly as courts are reluctant on policy grounds ... compensation.[11]

The tortfeasor must prove that the injured party ... to the risk of injury. In other words, the injured ... of the risk, along with the nature of the risk, ...

...urt will need to determine the injured party's subjective state of mind, ...pposed to the objective, reasonable standard required in (contribu... negligence."[12] In *Bowater v Rowley Regis Corporation* [1944] KB 476, ...ourt stated that:

> a man cannot be said to be truly "willing" unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will.[13]

...n *Dann v Hamilton* [1939] 1 KB 509, the court decided that mere ...ledge of the danger is not sufficient to establish the defence of *volenti*. ...efendant in the court case must prove that the injured party agreed to ...k, not simply that the victim had knowledge of the risk.[14] ...ne authoritative source has explained the difference between ...ption of risk and contributory negligence:

> it is a good defence that the plaintiff consented to that breach of duty, or, knowing of it, voluntarily incurred the whole risk entailed by it. In such a case the maxim volenti non fit injuria applies. This literally means that no wrong is done to one who consents. This defence is to be distinguished from the plea of contributory negligence, for a plaintiff may have voluntarily exposed himself to the risk of being injured while himself exercising the utmost care for his own safety; and, conversely, while knowledge of the risk may show contributory negligence, it does not prove voluntary assumption of risk.[15]

...te that the *Control of Exemption Clauses Ordinance* (Cap 71) is a ...ive attempt to restrict the use of exemption clauses by commer... ...erprises in order to avoid business liability.[16] Section 7(3) of this ...ce specifies that a person's agreement to or awareness of a contract ...on limiting liability for negligence does not necessarily indicate ...son's acceptance of a risk.[17] Section 7(1)[18] of this ordinance pro... ...at liability for death or personal injury resulting from negligence ...xcludable. In respect of other property loss or property damage, ... 7(2)[19] requires that the terms in the exemption clause limiting lia... ...ust meet the reasonableness requirement in Section 3.[20] Section 5 ...rdinance sets out the varieties of exemption clauses.[21] (This ordi... ...ill be discussed again in Chapter 5 Section D.)

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5

Other Tortious Liabilities

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ıere are various other forms of tortious liability not based upon the ›ighbour principle laid down in *Donoghue v Stevenson*. These include:

) vicarious liability
) breach of statutory duty
) employer's liability to workers
) occupier's liability
) nuisance
trespass
) defamation

ɛ will now discuss each of these in turn.

Vicarious Liability

icarious liability is legal responsibility imposed on a person for the torts others, regardless of any fault on the part of the non-tortfeasor."[1] :arious liability generally arises from an employer and employee ationship and is conceptually similar to strict liability in tort. Under arious liability, an employer's liability does not depend upon the employ- › personal fault. Rather, an employer is strictly liable for an employee's gligent acts performed in the course of employment.[2] Here, vicarious)ility is not based upon a duty of care personally owed by an employer an injured plaintiff. Instead, liability is based upon the employment ıtionship between the defendant (the employer) and the tortfeasor (the ployee).[3]

Thus, an employer's liability is completely dependent upon the ployee's liability. For an employer to be vicariously liable, the primary

tortfeasor (the employee) must be shown to be at fault
coexists with the tortfeasor's liability.[4] Should an emplo
liable, then the employer cannot be vicariously liable. How
employer vicariously liable does not remove an employe
the employer and the employee may be liable as joint
liability of tortfeasors will be discussed in Chapter 6 Se

The requirements for vicarious liability are:

- the tortfeasor is hired by the employer as an employe
- the employee committed the tortious act; and
- the employee's tortious act was in connection with
  employment.

This act may be either expressly or impliedly authoriz
careless or mistaken. Unless outside the scope of emplo
ful way or an unauthorized mode of performance, eve
employer's instructions, will cause the employer to be lia
tortious act is incidental or necessary to employment is

The prohibition of an act does not necessarily place
the scope of employment. An employer cannot avoid li
forbidding any negligent acts or any acts outside of exp
A prohibition is only effective if it limits the scope of em
depends on whether the prohibited act limits the sphe
(an act which is outside the scope of employment) or
within the sphere of employment (an act which is wi
employment). In other words, if the employee breache
instructions, the employee will be considered to be
employment if the instructions set out the limits of the
employee's conduct is merely an unauthorized manne
authorized act which is sufficiently connected with the
will be vicarious liability.[7]

Whether a worker is an employee or an indepe
will determine its employer's obligations and respo
affected by the worker's actions. The classification of a
employee or as an independent contractor is therefor
parties involved.[8] This distinction is, at times, a diffic

An example is the case of *Chan Sik Pan v Wylam's*
1 HKLRD 687. The court stated that this case "would
sonal injury claim but for issues relating to employm
the time of the accident".[9] The judge continued:

> Windsor House in Causeway Bay, was being re-fitted . . . The general contractor had a main sub-contractor for electrical and mechanical work. This main sub-contractor further sub-contracted the fire installation work to the first defendant. According to the first defendant, it appointed one Joe Wong trading in the name of United Company as its agent for such work. Joe Wong on behalf of the first defendant "sub-delegated" part of the work to the second defendant. The second defendant says that he sub-sub-contracted work to the third defendant and so he (the second defendant) had no relationship with the workers like the plaintiff. The third defendant says he was at the material time not a sub-sub-contractor. He (the third defendant) merely supervised the workers like the plaintiff and the work at site.
>
> The plaintiff . . . had no idea as to all the contractual relationships between the defendants and other superior contractors. According to him, an old friend telephoned him about work available at the site. He went and reported to the third defendant. He regarded the third defendant as the foreman. It was the third defendant who handed him wages in cash twice a month on pay day. The plaintiff had no dealing or knowledge of the other defendants until after the accident. It is undisputed fact that after the accident the first defendant filed a statutory industrial accident report (Form II) with the Labour Department. This Form II is the form that an employer must file on every industrial accident that has occurred to a worker under his employ. After filing the report, months later, the first defendant twice reached a written agreement with the plaintiff on the amount of allowance payable under the Employees' Compensation Ordinance (Cap 282). And the allowance was paid to the plaintiff as agreed.
>
> . . .
>
> To complicate matters further, neither the second defendant nor the third defendant is covered by any employee compensation insurance. Only the first defendant took out compulsory employee compensation insurance; but because there is evidence that the first defendant sub-contracted work to other parties, the insurers of the first defendant deny that the plaintiff is covered by the insurance of the first defendant.[10]

The following sections review the differences between the two classifications of workers and the guidelines for determining the status of a worker.[11] Then follows a brief review of the requirement that the act be in the course of employment. To conclude this topic of vicarious liability, a short section on an employer's liability for independent contractors.

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i. Employee or Independent Contractor

Traditionally, an employer and an employee were co[...] master-servant relationship. Today, this affiliation is co[...] to as an employer-employee relationship. This rela[...] the employee provides services or labour in return fo[...] by the employer, is created by a contract of service[...] themselves exclusively to their employer's business f[...] employment.[12]

An independent contractor is employed under a co[...] An independent contractor provides a particular se[...] from outside the employer's organization to produce a[...] for which the independent contractor is generally paid[...] There is no general obligation to serve the employer[...] contractor's performance of the assigned task need not b[...] employer's supervision.

ii. Criteria for Determining Status

There are several indicators used to distinguish betw[...] and an independent contractor. Despite these indica[...] the parties' relationship is not always simple. Several ca[...] strate the difficulty in classifying a worker as an emplo[...] pendent contractor.

The first of these cases is *Mersey Docks & Harbo[...] & Griffith* [1947] AC 1. The court used the control te[...] parties' employment relationship. Under this test, an e[...] relationship exists if an employer exercises control over[...] do and how that work is to be done. Where the nature[...] is too technical or skilful for an employer to exercise[...] the control test determines whether the employer has th[...] control. An independent contractor relationship exists w[...] assigns a task to a person but has no right to determ[...] which the work is performed.

In *Stevenson, Jordan & Harrison Ltd v MacDo[...]* 1 TLR 101, the court used the *integration test*, also kn[...] *zation test*, to determine the employment relations[...] a person is considered to be an employee if that pers[...] integral part of the employer's organization rather[...] an accessory to the business.[13] Under a contract of s[...] is employed as part of the business organization. U[...]

[...]ervices, the worker is not integrated into the business but is only supplementary or ancillary to the business.

In the third case, *Wong Po-sin v New Universal Paper Co Ltd* [1973] HKLR 59, the court listed some factors to be considered in determining the existence of an employment relationship:

- Selection: if an employer has the power to select the individual to work for the employer, whether the selection is made personally by the employer or through the employer's agent, the relationship is likely to be that of an employer-employee.
- Power of dismissal: if an employer has the power to dismiss a person, this power is more likely to indicate an employer-employee relationship.
- Remuneration: if a worker is paid periodic wages or a salary which is calculated by reference to piece work or time worked, the relationship is likely to be that of an employer-employee. If a worker is paid a commission or a lump sum, the worker is more likely to be considered to be an independent contractor.
- Performance: if at least part of the work is performed by the employee alone or independently, i.e., if a worker could delegate the entire performance of work to another person, this would indicate the existence of a contract for services.
- Exclusive services: an employer has the right to demand the exclusive services of its employees. While an individual is at work, if there is only one employer, that person is likely to be an employee. If an individual simultaneously works for several employers, that person is likely to be an independent contractor.
- Place of work: if the worker's services are to be performed at the employer's premises rather than at the worker's premises, the worker is more likely to be an employee.
- If the worker's services cannot be considered to be provided as part of an independent business carried out by the worker, this suggests an employer-employee relationship rather than an independent contractor relationship.
- Supply of equipment: the obligation to provide tools or equipment for a worker indicates an employer-employee relationship.
- Hours of work: if the employer determines working hours, the worker is likely to be an employee. If the worker determines the working hours, the worker is likely to be an independent contractor.
- Type of work: where the worker is engaged generally without reference to any particular task or outcome, the relationship is more likely to be that of an employer-employee.[14]

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