TORT LAW IN HONG KONG

FIFTH EDITION

Rick Glofcheski

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DUTY OF CARE

Duty of care serves to carve out the boundaries of liability in negligence. Not everyone who causes injury will bear responsibility. Only those found to owe a duty of care will be answerable for any damage caused.

Duty of care is an issue of law, and as such carries influence as precedent. The judges bear this in mind in deciding cases about duty of care. Thus, there is a policy dimension implicit in the determination of this issue.

As an issue of law, it is open to the defendant to apply to have the duty of care issue decided by the court before trial, that is, in a pre-trial interlocutory application to have the action struck out. If successful, there will be no trial. Many of the leading duty of care cases were decided this way.

Duty of care is often explained in terms of relationships: was the plaintiff who was injured by the defendant's carelessness in a sufficiently close relationship with the defendant such that the defendant should be made responsible for the harm caused? It might be thought (quite reasonably) that such a question is unnecessary, and that it is enough that the plaintiff was injured by the defendant's carelessness, in order to justify holding the defendant accountable. But the tort of negligence has not evolved in that way. As stated by Esher MR in *Le Lievre v Gould* [1893] 1 QB 491, "a man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them".

From the bigger perspective of tort law and the legal system, duty of care is the key device through which the flow of liability and the range of protected interests in the tort of negligence can be controlled and in fact, restricted. As such it has proved to be a changing concept and can only be defined by reference to current judicial pronouncements. This has been particularly true after the UKSC decision in *Robinson v Chief Constable of West Yorkshire Police* [2018] 2 WLR 595, considered at various places in this chapter. Any attempt to try to reduce the duty of care issue to simple precepts, however attractive, is bound to mislead. What can be agreed is that in those commonplace cases where the defendant's wrongful conduct directly causes physical injury or damage, a duty of care will almost always be recognised by the court. It is only in other cases, that is, cases involving other forms of damage, for instance economic loss, or cases where the harm comes about in an unusual way, that the court will require a more elaborate proof for the existence of a duty of care.

Although a pre-condition for negligence liability, its importance in tort litigation should not be over-stated. The fact is that in the vast majority of negligence cases encountered daily in the courts, the facts present themselves according to familiar, routine patterns in which the duty of care does not require fresh consideration. Indeed, in most negligence cases heard by the courts, the issue is not raised at all.

5.1 GENERAL PRINCIPLES IN THE DETERMINATION OF DUTY OF CARE

5.1.1 The neighbour principle

The starting point for an understanding of duty of care is the English House of Lords decision in *Donoghue v Stevenson* [1932] AC 562. The plaintiff and a friend went to a café, where the friend ordered some ginger beer for the plaintiff. The bottle was

apparently contaminated by a decomposed snail. The plaintiff drank some of the ginger beer before discovering the decomposed snail and became ill. She sued the defendant manufacturer of the ginger beer in the tort of negligence. The defendant successfully applied on a preliminary point of law to have the action struck out on the basis that, in these circumstances, a manufacturer owed no duty of care to a consumer. The plaintiff's appeal was successful. Lord Atkin, giving the lead judgment for the majority, said that it was no longer necessary, in establishing a duty of care, to identify a factually similar precedent as authority. Rather, the key was foreseeability. The correct approach should be to ask whether, if the defendant's activity is carried out negligently, is harm to persons such as the plaintiff reasonably foreseeable?

> 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.

Lord Atkin's pronouncement came to be known as the "neighbour principle", because he analogised the duty relationship as being one between "neighbours". However, it is better understood as a relationship built around the concept of reasonable foreseeability of harm.

Home Office v Dorset Yacht Co Ltd [1970] AC 1004 reinforced the importance of the neighbour principle as the key determinant for duty of care. The case involved an overnight outing to an island by a group of seven young offenders (borstal boys) under the supervision of borstal officers employed by the defendant Home Office. The officers went to sleep, leaving the boys unsupervised, contrary to Home Office guidelines. The boys escaped, boarded a nearby yacht, started the engine and collided with the respondents' yacht, which they also boarded and damaged. The respondents sued the Home Office for damages in the tort of negligence. The Home Office applied on a preliminary point of law to have the action struck out, on the basis that the law did not recognise a duty of care in such circumstances. The application was dismissed, and so the Home Office appealed. In the House of Lords a majority dismissed the appeal, largely on the strength of the neighbour principle, despite the difference in the factual matrix with *Donoghue v Stevenson*. The majority thought that property damage to the plaintiffs' nearby yachts was reasonably foreseeable, the yachts providing an obvious means of escape from the island for the borstal boys.

Issues and Questions

(1) Is the reasonable foreseeability concept very precise? As formulated in *Donoghue v Stevenson* and as applied in cases since, it is a very open-ended concept with arguably very little content. How foreseeable is *reasonably* foreseeable? In *Chiang Ki Chun Ian v Li Yin Sze* [2011] 5 HKLRD 727 (5.3.6.2

below), Bharwaney J thought that "a neighbour must refrain from an act or omission . . . if he reasonably foresees a real, as opposed to a fanciful, risk of harm to his neighbor", but does this not leave a huge potential for subjective decision making? Is it not common to have a divergence of opinion amongst ordinary people as to the likely or expected or reasonable consequences of events or behaviour? Little in the way of objective data will be available to assist the judge in making this determination. As it happens, the foreseeability requirement has proved to be an extremely low threshold and, in most cases, is generally easy to satisfy, given that the exact concatenation of events leading to the accident need not be reasonably foreseeable.

(2) The duty to drive with reasonable care that is owed by a motor vehicle driver to other road users is a well-established duty category. Moreover, it has been held that the duty to take care "extends not merely to how he drives the motor vehicle but where he parks it" (*Cheng Kin Ping v Woo Cho Wing* (2000) 3 HKCFAR 333 (4.2 above)) and applies to how the driver manages a post-accident situation (*Chan Wai Chung v China Travel Service (Hong Kong) Ltd* (HCPI 914/2015, [2022] HKEC 5178 (4.2.1.3 above)), all explained on the basis of reasonable foreseeability of harm.

(3) *Wong Rocky Lok Kun v Wu Kwong Sum* (DCPI 2514/2015, [2018] HKEC 117) is a rare case in which the action failed on the basis of the failure to prove reasonable foreseeability. The court found that "as a matter of common sense" it was not reasonably foreseeable that the plaintiff would suffer psychiatric injury as a result of the defendant surgeon having negligently failed to remove a piece of surgical gauze from the plaintiff's wife's abdomen following the delivery of her baby. So too in *Hon Kwan v Zara Asia Ltd* [2021] CHKEC 963, where the court found it not reasonably foreseeable that the plaintiff, having purchased shoes from the defendant that were not properly de-magnetised, would suffer psychiatric injury when on a later occasion, in another of the defendant's stores, the shoes triggered the anti-theft alarm, resulting in a consensual search of the plaintiff.

(4) The duty of care in regard to products for sale to the public is not restricted to manufacturers but extends to suppliers and retailers who perform some work on the goods, "including those checks which a retailer of the goods would reasonably be expected to make", in particular in regard to dangerous goods (*Yeung Man Yee and others v Kam Shing, Hip Sang Oil Company and Hong Kong Oil Company Limited* (HCA001558/1980, [1988] HKEC 46) (3.1 above), and *Kristan Bowers Phillips v Initial Environmental Services Ltd* (HCPI 580/1996, 31 July 1997)).

(5) A typical example of the court's approach to the reasonable foreseeability requirement can be found in *Lilley v Hong Kong and Kowloon Ferry Ltd* [2012] 1 HKLRD 916, a case involving a ferry passenger lost overboard. The court found that the bulwarks were too low, the aft deck dimly lit, and there were inadequate handholds making it unsafe for passengers to go on deck to access the toilet, particularly in pitching and rolling seas. Deputy Judge Mimmie Chan explained:

> It is hence reasonably foreseeable by the defendants that by virtue of the conditions to which passengers of the Vessel are exposed during the voyage from Central to Yung Shue Wan, there is a risk of such passengers falling overboard if the aft deck is not adequately supervised, protected, or made safe. If an accident or the risk of an accident is foreseeable, the precise way in which the accident occurred need not be foreseen.

(6) One of the few areas in which reasonable foreseeability has proved to be a difficult question is psychiatric injury suffered by a witness to a particularly horrendous accident caused by the defendant's negligence (see 5.2.1 below). Debate has also ensued as to whether death by suicide is a reasonably foreseeable consequence of negligent police supervision of prisoners in their custody, as opposed to prisoners with known suicidal tendencies (see *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 (HL), and *Orange v Chief Constable of West Yorkshire Police* [2001] 3 WLR 736).

(7) Social policy was a driving force behind the finding of duty of care in *Donoghue v Stevenson* — the emergence of factory-based mass production of packaged food not susceptible of inspection and a consumer class with few options and growing expectations. In the process, a principle for duty of care was introduced that would eventually have general application well beyond the facts of that case.

(8) For a recent local example of a *Donoghue v Stevenson* factual scenario with a similar outcome, see *Wat Ting Cheong Paul v Prosper Jet Ltd* (DCPI 1067/2017, [2021] HKEC 6026) (3.4.1 above) (liability established for injury caused to the plaintiff's tooth after eating the defendant restaurant's food containing pieces of metal).

(9) In *Home Office v Dorset Yacht*, the borstal boys and not the defendant Home Office inflicted the property damage on the plaintiffs' yachts. In this sense the case is quite different from *Donoghue v Stevenson*, where the defendant manufacturer inflicted the harm in question. Cases where the defendant is sued in negligence for the harm inflicted by a third party, usually someone with whom the defendant has a supervisory or other relationship, pose special problems in the duty of care determination, as will be seen in the proximity line of cases in the next section.

5.1.2 Proximity

In the later decades of the 20th century, a view emerged in the highest courts in the UK and elsewhere that Lord Atkin's neighbour principle, although of general relevance, was not in itself suitable to settle the duty of care issue in all negligence cases. Modifications

to the neighbour principle approach would be required where the facts of the case were unusual, sometimes described as "non-straightforward", for instance where the plaintiff's harm was not inflicted by the defendant's positive act. According to this view, in such cases, a closer relationship would be required, referred to as "proximity", a term that Lord Atkin had in fact used in his judgment in *Donoghue v Stevenson* to explain his neighbour principle. Moreover, in these non-straightforward cases, the court would also reserve the right to take into account less tangible considerations that go beyond foreseeability of harm, namely, social policy and general notions of justice and reasonableness before deciding the duty of care issue. These further requirements, introduced in a series of House of Lords decisions, were thought to be necessary in order to contain the growth of the duty of care within manageable limits.

One of the first cases to introduce this more restrictive approach was *Yuen Kun Yeu v Attorney-General* [1987] HKLR 1154, a decision of the Privy Council on appeal from Hong Kong. The plaintiffs held accounts with a financial institution, a company that the defendant (the Commissioner for Deposit-Taking Companies) had placed and maintained on the register of companies pursuant to his powers under the Deposit-Taking Companies Ordinance (Cap.328). As a result of mismanagement and fraud by its directors, the company went into liquidation, and the plaintiffs lost the value of their deposits. Their action against the Commissioner (represented by the Attorney-General of Hong Kong) for permitting the continued registration of the company, and therefore bringing about the plaintiffs' loss, was struck out by the trial judge as disclosing no duty of care owed. The Privy Council dismissed the appeal, also finding that no duty of care was owed, interpreting Lord Atkin's neighbour principle as having a composite meaning, requiring proximity in addition to reasonable foreseeability of harm. No attempt was made to define proximity, but the finding that the necessary proximity was absent was explained on the basis of a number of factors: there was no intention in the legislation conferring powers on the Commissioner such that the Commissioner owed a duty to potential depositors, and therefore it would be odd to impose a common law duty; the relationship between the Commissioner and members of the public who made or might make deposits was distant; the Commissioner did not have day-to-day control over the directors; and the Commissioner did not assume responsibility to individual members of the public who might invest or make a deposit.

The proximity principle as formulated in *Yuen Kun Yeu v Attorney-General* was applied in the case that follows:

Hill v Chief Constable of West Yorkshire
[1989] AC 53

The plaintiff's 20-year-old daughter was attacked at night in a city street in the area for which the defendant was chief constable, and died from her injuries. Her attacker, Sutcliffe, who was eventually convicted for her murder, had committed a series of offences including rape, murder and attempted murder against young women in the area in similar circumstances over a period of years before the deceased's murder. The plaintiff claimed damages on behalf of her deceased daughter's estate against the defendant for negligence, arguing that in the conduct of investigations into the crimes that had been committed, the police negligently failed to apprehend Sutcliffe and prevent the murder of her daughter (Sutcliffe had been questioned and released by

the police on nine occasions during the investigation). On the defendant's application, the judge at first instance and the Court of Appeal ordered the striking out of the action as disclosing no cause of action, and the plaintiff appealed.

Lord Keith . . .

Miss Hill's mother and sole personal representative now sues the Chief Constable of West Yorkshire, claiming on behalf of Miss Hill's estate damages on the ground of negligence, for inter alia loss of expectation of life and pain and suffering. The defendant is sued under section 48(1) of the Police Act 1964, enacting that the chief officer of police for any police area shall be liable in respect of torts committed by constables under his direction and control in the performance or purported performance of their functions. The plaintiff in her statement of claim sets out the 20 offences committed by Sutcliffe before the death of Miss Hill and avers that the circumstances of each of these were such that it was reasonable to infer that all were committed by the same man and further that it was foreseeable that, if not apprehended, he would commit further offences of the same nature. The pleadings go on to allege that it was accordingly the duty of the defendant and all officers in his police force to use their best endeavours and exercise all reasonable care and skill to apprehend the perpetrator of the crimes and so protect members of the public who might otherwise be his future victims. A substantial number of matters are set out and relied upon as indicating that the West Yorkshire police force failed in that duty. It is unnecessary to set out these matters in detail. They amount broadly to allegations of failure to collate properly information in possession of the force pointing to Sutcliffe as a likely suspect, and of failing to give due weight to certain pieces of information while according excessive importance to others . . .

The *Dorset Yacht* case was concerned with the special characteristics or ingredients beyond reasonable foreseeability of likely harm which may result in civil liability for failure to control another man to prevent his doing harm to a third. The present case falls broadly into the same category. It is plain that vital characteristics which were present in the *Dorset Yacht* case and which led to the imposition of liability are here lacking. Sutcliffe was never in the custody of the police force. Miss Hill was one of a vast number of the female general public who might be at risk from his activities but was at no special distinctive risk in relation to them, unlike the owners of yachts moored off Brownsea Island in relation to the foreseeable conduct of the Borstal boys. It appears from the passage quoted from the speech of Lord Diplock in the *Dorset Yacht* case that in his view no liability would rest upon a prison authority, which carelessly allowed the escape of an habitual criminal, for damage which he subsequently caused, not in the course of attempting to make good his getaway to persons at special risk, but in further pursuance of his general criminal career to the person or property of members of the general public. The same rule must apply as regards failure to recapture the criminal before he had time to resume his career. In the case of an escaped criminal his identity and description are known. In the instant case the identity of the wanted criminal was at the material time unknown and it is not averred that any full or clear description of him was ever available. The

alleged negligence of the police consists in a failure to discover his identity. But if there is no general duty of care owed to individual members of the public by the responsible authorities to prevent the escape of a known criminal or to recapture him, there cannot reasonably be imposed upon any police force a duty of care similarly owed to identify and apprehend an unknown one. Miss Hill cannot for this purpose be regarded as a person at special risk simply because she was young and female. Where the class of potential victims of a particular habitual criminal is a large one the precise size of it cannot in principle affect the issue. All householders are potential victims of an habitual burglar, and all females those of an habitual rapist. The conclusion must be that although there existed reasonable foreseeability of likely harm to such as Miss Hill if Sutcliffe were not identified and apprehended, there is absent from the case any such ingredient or characteristic as led to the liability of the Home Office in the *Dorset Yacht* case. Nor is there present any additional characteristic such as might make up the deficiency. The circumstances of the case are therefore not capable of establishing a duty of care owed towards Miss Hill by the West Yorkshire Police . . .

Appeal dismissed.

The meaning of proximity is unclear, as no judicial definition has been attempted, whether in *Yun Kun Yeu* or *Hill*, or in subsequent cases. It is evident from Lord Keith's judgment that reasonable foreseeability of harm is necessary but not sufficient for a duty of care, and that some further connector between defendant and plaintiff is required. But what exactly is required is not clear, and in *Hill* the proximity issue was decided by comparison to and distinction from the *Dorset Yacht* case. Proximity remains an elusive concept and can only be understood through a comparative reading of those cases where it was found to exist and those where it was not.

Hill v Chief Constable of West Yorkshire was applied and *Home Office v Dorset Yacht Co Ltd* distinguished in *Michael v Chief Constable of South Wales Police* [2015] AC 1732. A woman, on receiving a death threat from her ex-partner, made an emergency 999 telephone call seeking help from the police. The gravity of her predicament was miscommunicated by the call handler to the local police force, and what should have been classified as an urgent situation requiring police attendance at her home within five minutes was mistakenly classified as one requiring a response within 60 minutes. By the time the police arrived, the woman had been stabbed to death by her ex-partner. The defendant police's application to strike out the negligence action was dismissed by the trial judge but accepted by the Court of Appeal, and by the Supreme Court, in a 3-2 decision. Lord Toulson for the majority rejected the claimant's contention that the police owe a duty of care in negligence where they are aware, or ought to be aware, of a threat to the life or physical safety of an identifiable person, or members of an identifiable small group. The duty was owed to the public at large and did not involve the kind of special relationship necessary for the imposition of a private law duty of care, despite the phone call and the conveying of basic information regarding her perilous situation. It was difficult to see why the duty should be limited to particular potential victims and not others, or to certain types of injury and harm and not others. Moreover, it was mere speculation as to whether the addition of potential liability would improve the police

department's performance of its duty, and imposing a duty would have significant financial implications for the police. Accepting the call and receiving the information from the victim did not in itself signify an assumption of responsibility to the victim. The only assurance given to Ms Michael was that the call would be passed to the South Wales Police. The call handler gave no further instructions to her. According to Lord Toulson, the principle is not one of police immunity from suit, but an application of the general common law rule of no liability for omissions.

Issues and Questions

(1) Is proximity merely a higher degree of foreseeability? Is the court requiring, as a matter of policy, that where the defendant is not the immediate wrongdoer, a higher degree of foreseeability of harm to the plaintiff must be established, to the point where the plaintiff is proved to be in a special category of victim?

(2) The importance of proximity seems diminished or even not relevant in cases in which the plaintiff's injury or damage was inflicted by the defendant's positive act. In a series of House of Lords decisions in the 1980s and 1990s the point was repeatedly made that in such cases proximity can be established on the basis of proof of reasonable foreseeability of harm. In the words of Lord Oliver in *Murphy v Brentwood* [1991] 1 AC 398 in "the straightforward case of the direct infliction of physical injury by the act of [the defendant] there is . . . no need to look beyond the foreseeability by the defendant of the result in order to establish that he is in a 'proximate' relationship with the plaintiff". According to this logic, in such cases proximity is implicit in the reasonable foreseeability of harm.

(3) The proximity question can arise in interesting ways. Consider the case of a doctor advising a male patient on a sterilisation procedure. The patient is certainly owed a duty of care, but what of his sexual partners? In *Goodwill v British Pregnancy Advisory Service* [1996] 1 WLR 1397, the sterilisation reversed itself and the plaintiff, the patient's sexual partner, became pregnant. The court rejected the argument that a duty of care was owed to all of the patient's future sexual partners. However, where the plaintiff is the patient's spouse, the position is apparently otherwise, and a duty of care has been imposed (see *Thake v Maurice* [1986] QB 644, and *McFarlane v Tayside Health Board* [2000] 2 AC 59).

(4) Although a hospital owes a duty of care to the patients it treats, including those who attend at the Accident and Emergency unit (*Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428, and *Darnley v Croydon Health Services NHS Trust* [2019] AC 831), it is otherwise where hospital facilities are provided in circumstances where the patient is admitted under the care of an attending doctor who is neither the employee nor the agent of the facility provider. The doctor alone will be held responsible for his negligent medical treatment: *Cassidy v Ministry of*

Health [1951] 2 KB 343 and *Roe v Ministry of Health* [1954] 2 QB 66. This position is broadly consistent with the proximity requirement discussed in this section. However, and not surprisingly, a duty will be owed by the hospital regarding the provision of facilities, and the conduct of any hospital staff involved in the treatment of the patient, and this duty will extend to the act of discharge of the patient: *Luk Mary v Hong Kong Baptist Hospital* (HCPI 151/2006, [2007] HKEC 2312).

(5) That a hospital and its medical staff owe a duty of care to its patients is uncontroversial, but does the duty extend to the hospital's non-medical staff? According to Lord Lloyd-Jones JSC in *Darnley v Croydon Health Services NHS Trust* (above), a case concerning misinformation provided by the Accident and Emergency receptionist regarding the expected waiting time before treatment, "it is not appropriate to distinguish between medically qualified professionals and administrative staff in determining whether there was a duty of care. That distinction may well be highly relevant in deciding whether there was a negligent breach of duty; there the degree of skill which can reasonably be expected of a person will be likely to depend on the responsibility with which he or she is charged".

(6) It is generally understood that, leaving aside the sterilisation cases (see para 3 above), a duty of care is not owed by a medical service provider to anyone other than the patient (see eg *Palmer v Tees Health Authority* [2000] PIQR P1, and *Wong Rocky Lok Kun v Wu Kwong Sum* (DCPI 2514/2015, [2018] HKEC 117) (2.2 above)). However, and with possible lessons for anticipated Covid-19 litigation, the position in Hong Kong may be different, at least where infectious disease is concerned. In *Luk Mary v Hong Kong Baptist Hospital* (above), the plaintiff's brother, a patient under treatment for a urological condition in the defendant hospital during the 2003 SARS epidemic, was released from hospital and returned to his home without any warning that he might have been exposed to the SARS virus despite there having been suspected SARS infections on the same hospital floor where the patient was treated. In the event, he and certain members of his family were infected with SARS and died. The plaintiff, who did not live with her brother, was also infected with SARS but survived, and sued the hospital in negligence. The defendant's application to strike out the claim for want of a duty of care was dismissed, the court taking the view that, in Hong Kong at least, "local circumstances must be taken into account [and] that the concept of family in Hong Kong, including as it does parents, children, siblings, wives or husbands of children or siblings, their children and even parents-in-law, enables [plaintiff's counsel] to contend that the determinant cohort . . . may well include Ms Luk".

(7) Compare *Hill v Chief Constable of West Yorkshire* to *Home Office v Dorset Yacht Co Ltd*. Despite their broad factual similarities different results were reached in these cases. The proximity requirement as developed in *Yuen* and applied in *Hill* was not expressly addressed in

Home Office, which pre-dated those cases, but on close examination, the methodology was similar, as the court considered the various policy reasons why a duty might not be owed, despite the finding of reasonable foreseeability of harm. In hindsight, *Home Office* can easily be read as a proximity case.

(8) The proximity argument in *Michael v Chief Constable of South Wales Police* in the form of assumption of responsibility was arguably much stronger than in *Hill* and for that matter *Yuen Kun Yeu v Attorney-General*. Through the telephone call, the defendant had knowledge of the victim's predicament, and undertook to pass on the information to the local police force. Nonetheless, Lord Toulson found no assumption of responsibility: The only assurance which the call handler gave to Ms Michael was that she would pass on the call to the South Wales Police. She gave no promise how quickly they would respond. She told Ms Michael that they would want to call her back and asked her to keep her phone free, but this did not amount to advising or instructing her to remain in her house, as was suggested. Ms Michael's call was made on her mobile phone. Nor did the call handler's inquiry whether Ms Michael could lock the house amount to advising or instructing her to remain there. The case is very different from *Kent v Griffiths* [2001] QB 36 where the call handler gave misleading assurances that an ambulance would be arriving shortly. From this it seems that the issue is extremely fact-sensitive, and that on slightly different facts, an assumption of responsibility might have been found.

(9) A recent development in UK case law suggests something of a breakthrough in corporate negligence liability, imposing a duty of care on corporations for injury and damage caused to foreign citizens by the corporation's overseas subsidiaries' industrial operations. This form of liability has been characterised by the UK Supreme Court not as vicarious (see Chapter 11 below) but as a direct duty, based on ordinary negligence principles for liability of a third party's tortious conduct such as was found in *Home Office v Dorset Yacht*. In *Vedanta Resources plc v Lungowe* [2020] AC 1045, a case concerning personal injury and property damage caused to citizens in Zambia by the UK-domiciled defendant corporation's Zambian subsidiary, Lord Briggs JSC stated (despite not citing precedent) that this is not a novel category of negligence liability, and as such can be decided on the basis of ordinary duty of care principles (see also *Okpabi v Dutch Shell plc* [2021] 1 WLR 1294, and *Hamida Begum (on behalf of MD Khalil Mollah) v Maran (UK) Ltd* [2021] EWCA Civ 326).

(10) Does the operator of a licensed restaurant or bar stand in sufficient proximity to patrons to ensure they do not become intoxicated to the point of being a risk to their own safety or the safety of others? That is a question courts in other jurisdictions have not always agreed upon and is one that may require decision by the Hong Kong Court of First Instance in *Liu Shih Teng v HKCC Dotcod Ltd* (HCPI 879/2018, [2022] HKEC 1576) (currently in the interlocutory stage).

5.1.3 Justice and reasonableness

As with proximity this requirement came to be introduced over a series of decisions in the later decades of the 20th century, as a further mechanism to contain the duty of care and the expansion of negligence liability.

In *Marc Rich & Co v Bishop Rock Marine Co Ltd* [1996] AC 211, the plaintiffs were owners of cargo being carried on the ship *Nicholas H* under bills of lading (shipping contracts) incorporating the Hague-Visby Rules (international shipping terms). A crack developed in the main body of the ship, and so the ship owners requested a survey from the defendant classification society to determine the ship's seaworthiness. Initially, the defendant recommended that the ship undergo permanent repairs, which would require unloading of the cargo. The ship owners effected temporary repairs, and with this the defendants reversed their earlier recommendation and declared the ship "in class" (seaworthy for the voyage). Shortly after resuming the voyage, the ship developed further cracks and sank, with a loss of all the cargo on board. The plaintiffs sued the defendants in negligence for the amount of their lost cargo, and their action was dismissed on the preliminary ground that no duty of care was owed. They appealed to the House of Lords. Lord Steyn for the majority ruled that damage was reasonably foreseeable, and was prepared to accept that proximity could also be established. Nonetheless, he ruled against the plaintiffs because it would not be just and reasonable to impose a duty. The plaintiffs had a contractual remedy, and to impose a parallel tort duty would undermine the negotiated positions of the parties and the integrity of the Hague-Visby international shipping convention rules that apply worldwide, and would possibly trigger commercial uncertainty and instability in the shipping world. The effect might even result in the withdrawal of surveying services such as provided by the defendant surveyors in this case. Lord Steyn concluded:

> . . .the recognition of a duty would be unfair, unjust and unreasonable as against the ship owners who would ultimately have to bear the cost of holding classification societies liable, such consequence being at variance with the bargain between ship owners and cargo owners based on an internationally agreed contractual structure. It would also be unfair, unjust and unreasonable towards classification societies, notably because they act for the collective welfare and unlike ship owners they would not have the benefit of any limitation provisions. Looking at the matter from the point of view of cargo owners, the existing system provides them with the protection of the Hague Rules or Hague-Visby Rules. But that protection is limited under such rules and by tonnage limitation provisions. Under the existing system any shortfall is readily insurable. In my judgment the lesser injustice is done by not recognising a duty of care. It follows that I would reject the primary way in which counsel for the cargo owners put his case. For the reasons already given I would dismiss the appeal.

Interestingly, in his dissent, Lord Lloyd would have found for the plaintiffs on the simple basis of reasonable foreseeability of the loss. In his view the case was one of direct infliction of physical damage, and therefore proximity, and justice and reasonableness were irrelevant to the duty determination.

Issues and Questions

(1) As with proximity, justice and reasonableness is vague and open-ended, providing little guidance for the court, while leaving litigants uncertain as to the outcome of cases.

(2) In *Luen Hing Fat Coating & Finishing Factory Ltd v Waan Chuen Ming* (2011) 14 HKCFAR 14 (for facts see 5.1.5 below) Bokhary PJ of the Court of Final Appeal envisioned justice and reasonableness not merely as a control device but as a basis for grounding a duty of care., Bokhary PJ said: "The tendency in the past was to invoke policy considerations to justify not imposing a duty of care. But, as pointed out in *Street on Torts* (13th ed., 2012) 48, 'considerations of fairness, justice and reasonableness can also be employed to ground the *imposition* of a duty of care; either in circumstances in which no such duty has previously existed, or in circumstances where a duty has previously been denied'".

(3) As with proximity, the justice and reasonableness concept has no role to play in the straightforward case where the defendant, through positive although negligent conduct, inflicts personal injury or physical damage on the plaintiff. In such cases, a consideration of justice and reasonableness forms part of the basis on which the law has arrived at the relevant principles (per Lord Reed in *Robinson v Chief Constable of West Yorkshire Police* [2018] 2 WLR 595). Or, to put it another way, in such cases proximity and justice are implicit in the reasonable foreseeability of harm.

(4) Justice and reasonableness is the third piece in what came to be known as the *Caparo* three-part test (with reference to the House of Lords decision in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, discussed below). In recent decades the three-part test has been accepted by Hong Kong courts as applicable in most duty of care cases (outside of those involving the defendant's direct infliction of harm). It received strong endorsement in the Court of Final Appeal decision in *Luen Hing Fat Coating & Finishing Factory Ltd v Waan Chuen Ming* (5.1.5 below), so much so that in Hong Kong *Luen* stands as the present-day authority for the three-part approach (see eg *Wong Rocky Lok Kun v Wu Kwong Sum* (DCPI 2514/2015, [2018] HKEC 117), *So Kai Hau v YSK2 Engineering Co Ltd* (CACV 417/2018, [2019] HKEC 1683), *Liu Shih Teng v HKCC Dotcod Ltd* (HCPI 879/2018, [2022] HKEC 1576) (5.1.2 above), and *Wong Kin Man v Ma Tsz Wai* (HCPI 1339/2016, [2022] HKEC 235)).

(5) However, it would be a mistake to treat the approach as an operational formula in three distinct parts. As emphasised by Bokhary PJ in *Luen*, citing various House of Lords decisions, there is no clear demarcation between proximity and fairness: "They shade into each other. Both involve value judgments". And citing Sir Robin Cooke P in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations*

Ltd [1992] 2 NZLR 282, 294: "There is no escape from the truth that, whatever formula be used, the outcome in a grey area case has to be determined by judicial judgment" and that "[f]ormulae can help to organise thinking but they cannot provide answers".

(6) Despite the ascendancy of the three-part test in Hong Kong, the UK Supreme Court has in recent years stepped away from the notion that it is a test of general application. Duty of care can and should in most cases be decided according to precedent decisions, those with similar fact patterns to that under consideration. Only in novel cases is a full-blown discussion of the duty of care criteria needed. In deciding the duty of care issue in such cases, the court should be careful to develop the law incrementally and by analogy to recognised duty categories, while taking into account the policy implications of a decision to impose or not impose a duty: *Robinson v Chief Constable of West Yorkshire Police* (above); *James-Bowen v Commissioner of Police of the Metropolis* [2018] 1 WLR 4021; *Darnley v Croydon Health Services NHS Trust* [2019] AC 831. This adjustment in approach is likely to be adopted in Hong Kong (see eg *Wong Rocky Lok Kun v Wu Kwong Sum* (DCPI 2514/2015, [2018] HKEC 117) and *Credit One Finance Ltd v Yeung Kwok Chi* (HCA33/2016, [2020] HKEC 2982), where the established/novel cases distinction was expressly adopted). It is bound to have serious implications for litigants and the courts, and will bring uncertainties of its own (eg What is the meaning of novel case? Is mine a novel or an established category? If novel, what policy considerations will influence the court?).

5.1.4 The role of policy in duty of care

The concept of "policy" is a broad one and is concerned with the social, economic and administrative impact of judicial decision-making. If a particular legal decision is likely to have significant and adverse implications for society or the economy, or the administration of justice, the court may opt for a different decision.

Policy as a determinant in judicial decision-making is a contested issue. Few if any English (and Hong Kong) judges perceive their function to be the creation or implementation of social policy. That is a role that is best left to the democratically elected legislature, with its constitutional mandate to develop and implement policy that reflects the values of the electorate. The objection has less force in Hong Kong where there is no democratically elected government. At any rate, the reality is clear: this function cannot be avoided by judges, and policy making is indeed the province of the judge, whether it is done implicitly or occasionally, as with more candid judges, explicitly. Where policy considerations are engaged by the court, it will most often be done through the duty of care mechanism.

Hill v Chief Constable of West Yorkshire
[1989] AC 53

For a summary of the facts, see 5.1.2 above.

Lord Keith . . .

In my opinion there is another reason why an action for damages in negligence should not lie against the police in circumstances such as those of the present case, and that is public policy. In *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175, 193, I expressed the view that the category of cases where the second stage of Lord Wilberforce's two stage test in *Anns v Merton London Borough Council* [1978] AC 728, 751–752 might fall to be applied was a limited one, one example of that category being *Rondel v Worsley* [1969] 1 AC 191. Application of that second stage is, however, capable of constituting a separate and independent ground for holding that the existence of liability in negligence should not be entertained. Potential existence of such liability may in many instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying on of various different types of activity. I do not, however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some such actions might involve allegations of a simple and straightforward type of failure — for example that a police officer negligently tripped and fell while pursuing a burglar — others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime.

Closed investigations would require to be reopened and re-traversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted. I therefore consider that Glidewell LJ, in his judgment in the Court of Appeal [1988] QB 60, 76 in the present case, was right to take the view that the police were immune from an action of this kind on grounds similar to those which in *Rondel v Worsley* [1969] 1 AC 191 were held to render a barrister immune from actions for negligence in his conduct of proceedings in court.

My Lords, for these reasons I would dismiss the appeal.

Appeal dismissed.

The policy aspect of the duty of care analysis shows that an important factual element in the duty determination is the nature of the defendant. In particular, where public authorities are concerned, the courts have been reluctant to impose a duty of care, as will be seen at 5.3.3 below. In both *Home Office v Dorset Yacht* and *Yuen Kun Yeu v Attorney-General*, the court provided extensive policy reasons in its analysis of the duty of care issue.

The "core principle" of liability established in *Hill v Chief Constable of West Yorkshire* was applied by the House of Lords in *Smith v Chief Constable of Sussex* [2008] UKHL 50. The claimant reported to the police that he had received persistent threats from his ex-partner, but no action was taken. He was attacked by his ex-partner. The House of Lords found no duty owed, upholding the policy of no liability in *Hill* that, it was contended, operated in the interests of the whole community, and ensured that public resources were used properly. *Michael v Chief Constable of South Wales Police* [2015] AC 1732 (above) was decided in largely the same way.

The decisions in *Hill v Chief Constable of West Yorkshire* and *Smith v Chief Constable of Sussex* were relied on by the Hong Kong Court of Appeal in *Liu Mei Huei v Government of the HKSAR* [2016] 2 HKLRD 249 in finding that, for public policy reasons similar to those expressed in the *Hill* and *Smith* cases, no duty of care was owed by the police to take action on a complaint made by the plaintiff that her ex-spouse was not making his maintenance payments.

Another area of activity that for policy reasons has attracted immunity from liability is that of court advocates, whether barristers or solicitors, concerning their litigation work (*Rondel v Worsley* [1969] 1 AC 191). The immunity was thought justified on the basis of the advocate's overriding duty to the court and the need to avoid a conflict of interest if a duty is also owed to the client, a concern about re-litigation of cases if advocates are sued for negligence (related perhaps to a floodgates concern), and the "cab-rank rule" which prevents advocates from selecting or rejecting clients. However, the immunity from negligence suits brought by their clients was abolished by the House of Lords in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615. Although strictly speaking not necessary for the decision, which concerned the liability of solicitors in their non-advocate capacity, the seven-member House of Lords unanimously agreed that advocates' immunity in civil cases should be abolished. Lord Steyn remarked that the immunity from suit was damaging public confidence in the profession, and could no longer be justified on public interest grounds. By a majority (4:3) the House of Lords ruled that the immunity should also be abolished in criminal cases. The minority

of three thought that as a matter of public policy, advocates in criminal proceedings should not be exposed to the risk of being held liable in negligence, for fear of the potential adverse impact on the administration of justice. *Arthur JS Hall & Co v Simons* was subsequently confirmed by the House of Lords in *Moy v Pettman Smith* [2005] 1 WLR 581, another civil case (although on the facts of the case the court found no breach of duty (3.2.6.4 above)). The language in the judgments suggests that the immunity is now abolished for both civil and criminal proceedings. However, in Hong Kong the position is still unsettled. In *Lam Chi Kong v Tai Siu Ching* (HCA 344/2006, [2007] HKEC 1042), Registrar Chan granted the defendant barrister's application to strike out the plaintiff's claim on the view that barristers' immunity still applied in Hong Kong, citing the *dicta* of Li CJ in *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614 that the issue was an open question until decided in an appropriate case. The issue of barristers' immunity in Hong Kong awaits consideration by a higher court.

Perhaps the most notorious category in which the courts have firmly established a policy against the finding of a duty of care is that of pure economic loss. Pure economic loss, even if foreseeable, does not attract a duty of care, save in circumstances of a special relationship or close relationship of proximity as defined in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (5.2.2.2 below). For a summary of the considerations that have led to this position, see the discussion of *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27 (5.2.2.1 below).

That a doctor owes a duty to his patient is uncontroversial and as a general principle is not subject to reconsideration based on policy considerations. However, the House of Lords referred explicitly to notions of justice and reasonableness and policy in the "wrongful conception" case of *McFarlane v Tayside Health Board* [2000] 2 AC 59. In that case, a doctor had advised a patient that his sterilisation operation was a success. This advice proved incorrect and the plaintiff, the patient's spouse, became pregnant and gave birth to a healthy child. Lord Hope rejected the plaintiff's claim for the cost of bringing up the healthy child as not being fair, just and reasonable. Other members of the court relied on policy, including notions of distributive justice (Lord Steyn) in rejecting the claim (the only damages awarded were in respect of the pain and suffering during the pregnancy and in giving birth). The decision effectively overrules the *obiter dictum* in *Ho Yee Sup v Dr Chan Yuk May* [1991] 1 HKC 499 (3.2.6.1 above), the only Hong Kong case to consider the issue. In that case the court would have awarded substantial damages if it had found that the duty of care had been breached.

The basic principle of *McFarlane v Tayside Health Board* was confirmed in *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, a case in which a visually disabled mother gave birth to a healthy child following a negligent sterilisation performed by the defendant. The House of Lords, by a majority, reversed the decision of the Court of Appeal to the effect that, as a disabled mother, the plaintiff was at least entitled to the extra costs of child-rearing referable to her disability. However, a conventional sum of £15,000 was awarded in recognition of the legal wrong committed against the plaintiff and to mark the loss of the plaintiff's opportunity to live her life as she wished and planned. This award was not referable to the plaintiff's disability, but applies to all parents, healthy or disabled, who find themselves in the predicament of the plaintiffs in *McFarlane* and *Rees*.

Where the child is born with disabilities, the position may be different from that in *McFarlane* and *Rees*, or so it was held by the English Court of Appeal in *Parkinson v*

St James and Seacroft University Hospital NHS Trust [2002] QB 266. In that case the parents were awarded damages not for the full costs of child-rearing, but for the costs over and above the costs of raising a healthy child.

A policy argument similar to that in *Hill v Chief Constable of West Yorkshire* was considered in *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, a case of four consolidated actions brought by former students against educational psychologists and school authorities. The House of Lords rejected the argument that the imposition of a duty of care on school authorities would divert the limited resources of education authorities and teachers away from teaching and into defending unmeritorious claims.

A question that naturally arises is what, if anything is the difference between considerations of policy, on the one hand, and justice and reasonableness on the other? Some academics and judges are of the view that they are two expressions for the same thing. For instance, in *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335 Steyn LJ said that "[t]hese considerations [including proximity] . . . inevitably . . . shade into each other". In *Cowan v Chief Constable for Avon & Somerset Constabulary* [2002] HLR 44, Lord Justice Keene said "for my part, I would regard [public policy] as being covered by the third . . . criteria, namely whether it is fair, just and reasonable to impose a duty". Moreover, the reasons supporting the decision in *Marc Rich & Co v Bishop Rock Marine Co Ltd* (5.1.3 above) are as much considerations of policy as they are of justice and reasonableness. It may simply be that judges would prefer to couch their reasons in the language of fairness and justice rather than policy because judges are reluctant to admit their roles in determining policy (they like to be seen as merely applying the law).

However, one could make an argument that justice and reasonableness is different from policy. From some of the case law, it could be argued that justice and reasonableness is concerned with fairness as between plaintiff and defendant in the circumstances of the particular case before the court whereas policy (for instance as applied in *Hill v Chief Constable of West Yorkshire*) is concerned with broad, society-wide considerations of a social or political nature which go beyond the immediate complaint which the plaintiff has brought to the court for adjudication. In *Luen Hing Fat Coating & Finishing Factory Ltd v Waan Chuen Ming* (2011) 14 HKCFAR 14 (5.1.5 below), the Court of Final Appeal seems to have taken a combined approach, examining in considerable detail the circumstances on the factory floor and the defendant's degree of awareness of the contractor's dangerous method, while taking into account the more general policy consideration that where human life and safety are at risk, a duty of care should not be lightly excluded.

In both Hong Kong and the UK, justice and reasonableness has, at least in name, become the device most used by the court in its policy/fairness deliberations. Hence, the rise of the so-called three-part test. However, this should not disguise the impact of wider social policy considerations which, as will be seen below, work more often to provide a blanket protection for categories of defendants from negligence liability.

One observation that stands is that through either device, whether expressly or tacitly applied, the judges will continue to exercise considerable control over the outcome of a case in ways that may not always be easy to predict.

Issues and Questions

(1) Does the *Hill* decision confer a blanket immunity on the police? Restricted to its facts, as it must be, the police immunity only applies to cases of failure through negligent investigation to prevent the plaintiff from being injured by unknown third-party criminals. In *Brooks v Commissioner of Police for the Metropolis* [2005] 1 WLR 1495 (see below), three of the five members of the House of Lords expressed reservations about the effect of the *Hill* decision, and expressly confirmed that it did not confer a blanket immunity. Investigations aside, the police are under a duty of care as regards injuries caused directly as a result of police negligence, such as a police constable's negligent driving, the negligent use of firearms, and the negligent handling of a plaintiff's property. Moreover, the police owe a duty of care to a prisoner in custody where they have reason to know of his suicidal tendencies (*Reeves v Commissioner of Police of the Metropolis* [1999] QB 169 (CA) (6.3.1 below)), although apparently not in the absence of known suicidal tendencies (*Orange v Chief Constable of West Yorkshire Police* [2002] QB 347)). Any immunity conferred by *Hill* most certainly does not apply to deliberate wrongful acts such as battery or false imprisonment (although statutory defences may be available — see Chapter 16 below).

(2) In *Michael v Chief Constable of South Wales* (5.1.2 above), Lord Toulson reasoned that to characterize the police as being subject to an "immunity is not only unnecessary but unfortunate". For Lord Toulson, the axiom that applied in determining police's duty of care to the general public is the "ordinary application of the common law principle" that, other than under some recognised exceptions, the common law does not find a duty of care and impose liability for mere omission. Lord Toulson took it to apply to public authorities no less than to private persons. Yet one might well question whether the omissions objection should ever apply to public authorities. Public authorities are created for the very purpose of providing services to the public. See generally Tofaris and Steel, "Negligence Liability for Omissions and the Police" (2016) 75 Cambridge LJ 128.

(3) Does a police officer owe a duty of care to take reasonable care to ensure that an arrested person is not injured in the course of escaping from the arrest? In *Vellino v Chief Constable of Greater Manchester Police* [2002] 1 WLR 218, two police officers did nothing to prevent the arrested plaintiff from jumping from a second floor window. The Court of Appeal held that for policy reasons, in particular that it was a crime to escape custody, no duty of care was owed. Sedley LJ dissenting would have found a duty of care owed, given that the plaintiff's predilection for doing himself serious harm was known to the police. Sedley LJ would have found the plaintiff 2/3 contributorily negligent.

(4) Other cases involving immunities based on policy include *Sirros v Moore* [1975] QB 118 (no duty owed by a judge to the parties to legal

resulting in defective building) brought by the plaintiff because the limitation period for breach of contract actions had expired.

In *Kwok Wai Hing Selina v HSBC Private Bank (Suisse) SA* (HCCL 7/2010, [2012] HKEC 903), in which the plaintiff bank client sued the defendant bank alleging negligent financial advice and services rendered by the bank, Reyes J acknowledged concurrent actions available to the plaintiff:

> It is possible to claim pure economic loss under the law of tort when a defendant has breached a duty of care arising by reason of a special relationship between plaintiff and defendant. There is here a special relationship between Ms Kwok and HSBC. However, that special relationship is defined by the contract between Ms Kwok and HSBC contained in and evidenced by the Account Opening Booklet and Risk Disclosure Statement. It follows that recourse to the law of tort cannot add significantly to an analysis based upon the law of contract.

Although Reyes J provided no authority for his narrow reading of the scope of the duty in tort, Kwan JA expressed a similar view in *Shine Grace Investment Ltd v Citibank NA* (CACV 483, 484 and 485/2018, [2022] HKEC 3719), and cited *Titan Steel Wheels Ltd v Royal Bank of Scotland plc* [2010] 2 Lloyd's Rep 92, and *CGL Group Ltd v Royal Bank of Scotland plc* [2018] 1 WLR 2137 in support.

Issues and Questions

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

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

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

CHAPTER 6

DEFENCES TO NEGLIGENCE

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

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

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

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

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

6.1 CONTRIBUTORY NEGLIGENCE

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

Although originally a creature of the common law, contributory negligence is now a statutory defence. In its common law form, it was a complete defence, effectively depriving the plaintiff of a claim to damages. Under that rule, a plaintiff even 1%

contributorily negligent (defendant 99% negligent) would get no damages whatsoever. Then, in 1945, in both the United Kingdom and Hong Kong, legislation was passed to mitigate the harshness of the common law rule. Now, a successful plea of contributory negligence will result only in a reduction of the award of damages.

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

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

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

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

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

6.1.1 Standard of care

The Law Amendment and Reform (Consolidation) Ordinance defines fault by reference to negligence, and, therefore, the common law must be referred to in order to determine

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

The practice in the cases demonstrates that the standard of care according to which the plaintiff's conduct should be measured in determining the question of contributory negligence is the same as that to be expected of a defendant engaging in the same activity — the standard of the reasonable person in the circumstances. In theory, at least, this will be determined according to the same considerations that apply to a defendant in the breach of duty, although in practice, it is fair to say that judges rarely, if ever, provide the degree of analysis found in the breach of duty cases.

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

The first plaintiff, a passenger in the car driven by the third plaintiff, was injured in an accident caused by the negligence of the defendant driver. The first plaintiff was not wearing a seat belt at the time of the collision. At trial, the first plaintiff was found not contributorily negligent. The defendant appealed. [Note that, at the time of judgment, s.7 of the Cap.374 mandating the wearing of a seat belt, had not yet been enacted. The Highway Code has been replaced by the Road Users Code.]

Roberts CJ . . .

The first plaintiff, who was sitting in the front seat of the car, which was owned by her but driven by the third plaintiff, suffered substantial facial injuries. It was submitted, both during the trial and before us, that any damages awarded to her should be reduced because she had been guilty of contributory negligence, by reason of her failure to wear a seat belt.

The leading English authority is *Froom v Butcher* (1976) QB 286 in which the plaintiff, who was not wearing a seat belt, suffered head and chest injuries which he would not have sustained had he been wearing one. . . .

The principles on which this decision was based can be derived from the following passages from the judgment of Lord Denning MR:

(a) "In seat belt cases the cause of the accident is one thing. The cause of the damage is another. The accident is caused by the bad driving. The damage is caused in part by the bad driving of the defendant, and in part by the failure of the plaintiff to wear a seat belt." (p.292)

(b) "Everyone knows, or ought to know, that when he goes out in a car he should fasten the seat belt. It is so well known that it goes without saying, not only for the driver, but also the passenger. If either the driver or the passenger fails to wear it and an accident happens and the injuries would have been prevented or lessened if he had worn it — then his damages should be reduced." (p.293)

(c) "The law requires everyone to exercise such precautions as a man of ordinary prudence would observe." (p.294)

Froom thus establishes that a man of ordinary prudence in England would take the precaution of wearing a seat belt, where this is available. Should the same test be applied to Hong Kong?

By virtue of the Application of English Law Ordinance (Cap.88), the common law is in force in Hong Kong, so far as applicable to the circumstances of Hong Kong or its inhabitants.

Tortious liability is a subject which has been developed mainly at common law. The decision in *Froom* that a man of ordinary prudence would wear a seat belt, expounds common law. It therefore becomes also the law of Hong Kong unless it can be said that it is a rule which ought not to be applied to Hong Kong, because the latter's circumstances are so different to those of England that the rule should be modified.

Are we prepared to say that a man of ordinary prudence in Hong Kong would act differently, in relation to the wearing of seat belts, to his counterpart in England?

We should make it clear that we are not talking about what the average man actually does. We are prepared to accept the submission of counsel that many drivers and passengers in Hong Kong do not fasten seat belts, even when these are fitted in the vehicles in which they are travelling. We are concerned with what, as a matter of prudence, the average man ought to do.

In general terms, motoring in England and Hong Kong is similar. In both places, we find the same kind of motor vehicles; they operate in not dissimilar road conditions; the laws governing driving are similar; drivers in both countries probably display the same degree of skill.

In *Froom* Lord Denning commented on the wearing of seat belts as being a sensible practice in the following terms:

"Seeing that it is compulsory to fit seat belts, Parliament must have thought it sensible to wear them. But it did not make it compulsory for anyone to wear a seat belt. Everyone is free to wear it or not, as he pleases. Free in this sense, that if he does not wear it, he is free from any penalty by the magistrates. Free in the sense that everyone is free to run his head against a brick wall, if he pleases. He can do it if he likes without being punished by the law. But it is not a sensible thing to do. If he does it, it is his own fault: and he has only himself to thank for the consequences."

We think that these comments are equally apposite in Hong Kong. While many people here, as is doubtless the case in England, fail to wear seat belts, this does not make such failure any more sensible. The Highway Code in force in Hong Kong contains the following paragraph:

"15. Seat belts can save your life or prevent serious injury. Use them even on short journeys."

> . . . if a motorist were warned that, within the next few minutes, he was going to be involved in a collision, surely if he were a prudent man he would immediately fasten his seat belt. The reluctance of many drivers to do so is an indication of their belief in their invulnerability on the road, rather than of disagreement with the proposition that the use of a seat belt is a sensible precaution.
>
> It must be obvious to any normal person that some injuries, among them facial damage of the kind involved in this case, could be prevented or reduced by the wearing of the seat belt.
>
> *Froom* decides that a man of ordinary prudence in England would wear a belt. We are not prepared to say that a prudent man in Hong Kong is less prudent, or less able to grasp the obvious, than his counterpart in England . . .
>
> It is for the courts to decide, in negligence actions, whether a particular course of conduct is prudent or imprudent. We have no hesitation in saying that the wearing of a seat belt in any car in which this is available, is a practice which a man of ordinary prudence should observe. If he does not do so, he is at least partly to blame for the consequences of his failure.

Appeal allowed.

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

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

Issues and Questions

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

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

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

(4) As with breach of duty, there is plenty of room for disagreement as to what constitutes unreasonable behaviour for the purposes of contributory negligence. For instance, is it reasonable in Hong Kong for a pedestrian to simply obey the green traffic light while crossing the road, without checking for oncoming traffic that might enter the pedestrian crossing against the traffic rules? Apparently not: see *Chun Sung Yong v Au Sze Hung* [1991] 1 HKC 556 (pedestrian 25% contributorily negligent). Is it reasonable for a woman to push a hand cart down a busy roadway with

her back to traffic? Apparently it is: see *Siu Wai Yee v Lau Sin Hang* (HCPI 700/2004, [2005] HKEC 1604) (no contributory negligence). Is it reasonable for a pedestrian to ignore the location of the pedestrian crosswalk and cross where he likes? In the view of Chung J in *Li Chu Ying v Ho Cheung Shing* [2000] 4 HKC 250, a pedestrian can cross a roadway wherever he likes, so long as he takes reasonable care for his own safety. Yet on similar facts Deputy Judge Sakhrani came to a contrary view in *Wong Sun Cheong v Choi Chi Kong* (HCPI 1129/2014, [2016] HKEC 1334), holding the plaintiff pedestrian contributorily negligent for not crossing at the nearby pedestrian crosswalk.

(5) What about intoxication? In *Chan Kam Ming v Huen Po Leung* (HCPI 436/1999, [2000] HKEC 732), in which the drunk plaintiff fell asleep in the defendant's carpark space and was run over when the defendant was parking his car, Deputy Judge Chu remarked: "in as much as intoxication *per se* is not negligence, it is also not itself a want of care for personal safety for the purpose of contributory negligence". In the event, the plaintiff's contributory negligence was assessed at 30%.

(6) What about knowledge of intoxication? In *Chan Tat Yan v Lo Yin Yee* (DCPI 1230/2019, [2021] HKEC 993), the plaintiff passenger was wearing a seatbelt but his knowledge that the driver of his vehicle was intoxicated resulted in a finding of 20% contributory negligence.

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

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

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

(10) However, as with defendant's negligence, compliance with a statutory standard is not a guarantee of no contributory negligence. In *Chan Tsz On v Ma Chi Shing* (DCPI 2275/2017, [2021] HKEC 3601) the plaintiff was found contributorily negligent despite driving 30–40 km in a 50 km zone, in circumstances of a busy road with vehicles parked in both lanes, in rainy conditions.

(11) Is the standard of care for the plaintiff really the same as that of a defendant performing the same activity? Cane (2018) at 2.5.1.1 suggests that it is not, because for most activities, it is normally the defendant alone who carries insurance:

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

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

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

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

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

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

6.1.1.1 Children

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

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

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

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

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

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

Huggins JA . . .

> The question which has been raised for our consideration is whether a child of six is capable of contributory negligence. In my view he is so capable and so to hold is not inconsistent with *Gardner v Grace* (1858) 1 F & F 359 and *Latham v R Johnson & Nephew Ltd* [1913] 1 KB 398, where the children were under the age of four years. *Andrews v Freeborough* [1967] 1 QB 1 is obiter upon this point but it is not inconsistent with the principle of *Gough v Thorne* [1966] 3 All ER 398 that a child must be of such age that he can be expected to take precautions in the circumstances

> and I adopt a statement of the Canadian Supreme Court in *McEllistrum v Etchers* (1956) 6 DLR (2d) 1, 6:
>
> "It should now be laid down that where the age is not such as to make a discussion of contributory negligence absurd, it is a question for the jury in each case whether the infant exercised the care to be expected from a child of like age, intelligence and experience."
>
> Was the judge entitled to find here that the Appellant did not take such precautions as a child of six should have taken in the circumstances? The judge does not appear to have considered this question in relation to the finding that the sister, aged ten, who was with the small boy, who had crossed the road and who called him across, may herself have been guilty of negligence. She said that she did not see any traffic coming. The judge made no definite, clear finding on this matter but clearly, in my view, on the evidence the little girl was negligent: either she looked and did not look properly or she did not look and ought not to have called the small boy across. Now does the negligence of the sister affect the Appellant? This is a question which has never been argued before us and, in my view, it would not be right for us, therefore, to deal with it at all. I think the learned judge was wrong in his finding that the boy was contributorily negligent because in all the circumstances it was natural for a small boy aged six to accept the call of an elder sister as an indication that the road was clear. That being so I would hold that the boy was not contributorily negligent . . .
>
> *Appeal allowed.*

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

The question is prompted whether the courts are asking too much of children in Hong Kong. One possible policy argument is that, given Hong Kong's busy and congested roadways and living conditions, it is imperative that children learn from an early age to take responsibility for their own road safety. On the other hand, are young children ever likely to respond to such deterrence factors? Moreover, drivers

are insured, ensuring a ready source of compensation, and there is very little risk that children will be less careful because of the presence of compulsory insurance. By way of comparison, the UK Royal Commission on Civil Liability and Compensation for Personal Injury (Cmnd 7054, (1978) Vol.1, [1077]) recommended that in road traffic cases, contributory negligence should not be available as a defence in regard to actions brought by children under the age of 12.

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

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

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

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

6.1.1.2 The infirm

There is some authority to the effect that a lower than usual standard of care may be applicable to plaintiffs who are infirm as a result of disability or age (see *Daly v Liverpool Corp* [1939] 2 All ER 142 — plaintiff's lack of mobility taken into account in assessing contributory negligence). According to Jones (2002) p.626, such a person "must exercise such care as is reasonable having regard to his age and physical condition (citing *Clerk & Lindsell*, para.3–25); but not, apparently, his mental condition, which must be judged objectively: *Baxter v Woolcombers Ltd* (1963) 107 Sol Jo 553". In *Cheung Yuet Har v Force Team Ltd* (DCPI 44/2009, [2010] HKEC 267), the 72-year-old plaintiff slipped on entering the defendant restaurant's lift, the floor of which was found to be wet and oily probably due to food deliveries earlier in the day. The court found no contributory negligence, holding that "in the present case, the age and circumstances of Cheung should also be relevant considerations". In *Kwok Yim Kwan v Carnival Seafood Restaurant Ltd* (DCPI 2700/2007, [2008] HKEC 1651), the plaintiff, who was blind in one eye, tripped over an unmarked step in the defendant's restaurant and was injured. Although the court did not expressly apply a different standard, it found no contributory negligence, taking the view that there was "no evidence to show that the loss of eyesight had in any way affected the plaintiff's judgment about the general surroundings of the passageway". And in *Law Sze Chun v Li Mie Chun* (DCPI 1700/2016, [2018] HKEC 2740) (3.2.2 above), the court found the 73 year-old pedestrian not contributorily negligent because "bearing in mind her old age and slow movement, there was little she could have done to avert the collision". See 3.2.2 above for a further discussion of this issue.

6.1.1.3 Workers

A worker injured by his employer's negligence can, like any other plaintiff, be held contributorily negligent. However, there appears to be a judicial reluctance to make such a finding against workers who, quite typically, have to work under demanding conditions, or in a monotonous environment, and are often called upon to get the job done quickly, with the threat of job loss for slow work always looming. Such are the realities of the workplace and the circumstances that, as with defendants, judges must take into account in determining the standard of care applicable to plaintiffs injured in employment. This results in a more pragmatic approach, if not a judicial sympathy, in the determination of the standard of care applied to workers, and some of the *dicta* in the cases are suggestive of this tendency. There is even a judicial suggestion that the approach taken by Hong Kong courts is more generous to plaintiffs than that in England (see *Alam Zafar v Cheuk Fung Engineering Co Ltd* (DCPI 421/2018, [2022] HKEC 4841) discussed below at 7.5.2).

Sun Wan Co v Ng Kam
[1988] HKC 358

The plaintiff was an experienced stevedore employed by the defendant in the loading and unloading of ships. In the course of such work he was lowering ship's derrick by hand when he was injured. Although the defendant's system lowering the derrick by hand was widely used in Hong Kong, the trial judge found it to be unsafe and the defendant

negligent. No contributory negligence was found on the part of the plaintiff. The defendant appealed the ruling on contributory negligence.

Fuad V-P . . .

> The judge also found that the plaintiff was not guilty of contributory negligence in not waiting or asking for help. Nor would there have been contributory negligence on the part of the plaintiff if he had stood on the wire when he was lowering the derrick so that he was swept off his feet when the derrick began to fall. This, he considered, fell to be decided as part of the work system provided by the company. In his view, the plaintiff was simply going about his employer's business in the way they would have him do it.
>
> The judge, here, clearly had in mind the message he had cited from Earl Jowitt's speech in *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, where, at p.187, he agreed with Denning LJ's observations in his judgment in the Court of Appeal where he had said:
>
> > "At the hearing of the appeal it was suggested that the accident might have been avoided if the man had put in a chock to prevent the bottom sash coming right down as it did. This was, in effect, a suggestion of contributory negligence. This was negatived by the judge and I agree with him. You cannot blame the man for not taking every precaution which prudence would suggest. It is only too easy to be wise after the event. He was doing the work in the way which the employe[r] expected him to do it, and, if they had taken proper safeguards, the accident would not have happened."

Mr Wong submitted that the judge should have found a measure of contributory negligence on the part of the plaintiff in view of the fact that with all his years of experience he should have realized that he was lowering the derrick in a way that had obvious dangers to his own safety and that, at least, he should have waited until someone could help him and supervision could be provided.

The plaintiff was not performing his task in a dangerous way to save himself trouble. He was doing it in that way to get on with his employer's business: in a way, as the judge found, that was condoned and tacitly encouraged by his employer. There were safer systems available but they were not ones which, in practice, were used. Indeed, as I have mentioned, the chief foreman himself had employed the same method on the evidence accepted by the judge. In these circumstances, I do not think that an employer can be heard to say that his employee was being negligent in carrying out the work in that manner. It seems to me that the approach of Denning LJ in the Court of Appeal hearing of the *General Cleaning Contractors* case which I have just read is applicable.

As to the suggestion that the plaintiff should have obtained or waited for help, there was no room for a finding that the plaintiff ought to have taken his own precautions to make the condoned unsafe system more safe. In the long passage from the speech of Lord Reid in the *General Cleaning Contractors* case quoted by the judge, occurs the following observation, at p.194:

> "Where a practice of ignoring an obvious danger has grown up, I do not think that it is reasonable to expect an individual workman to take the initiative in devising and using precautions."
>
> In my view, that statement of principle is in point here . . . In our case the dangers in lowering the derrick by hand were by no means obvious to the plaintiff despite his years of experience. He had performed this operation in the same way all his working life as a stevedore (as had others) without mishap and, it seems, no accidents arising out of the use of that method had been reported. One must wonder how long the plaintiff would have remained employed, engaged on daily rates as he was despite his long service with the company, if he had insisted upon using one of the safer methods (which took more time) described by Captain Lloyd.
>
> I find myself quite unable to disturb the judge's finding that no contributory negligence had been established against the plaintiff. On the evidence that he accepted for the cogent reasons that he gave, in my judgment, no other conclusion was possible.
>
> *Appeal dismissed.*

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

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

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

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

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

A worker's knowledge of a danger is not itself evidence of contributory negligence. It was so held by the Court of Appeal in *Wong Lok Keung v Discovery Bay Transportation*