

ANALYSIS



Implementing Equality: An Analysis of Two Recent Decisions Under Hong Kong's Anti-Discrimination Laws

Introduction

Hong Kong's first anti-discrimination laws, the Sex Discrimination Ordinance (the 'SDO') and the Disability Discrimination Ordinance (the 'DDO'), went into force in late 1996. Since that time, the Equal Opportunities Commission (the 'EOC') has received a substantial number of complaints of unlawful discrimination and harassment. While many complaints have been successfully conciliated by the EOC, others have been slowly working their way to court. In March 1999 the District Court gave judgement in the first two cases to be tried as a result of individual complaints.¹

Part I of this article analyses the liability issues in the case of *Yuen Sha Sha v Tse Chi Pan*,² in which the court held that secret video-taping of a university student (while she was undressing in her room) constituted unlawful sexual harassment under the SDO. This is one of the few reported cases (from any jurisdiction) in which liability for sexual harassment has been based entirely upon acts that violated a woman's privacy. It is therefore an important precedent and likely to be relied upon by other women in Hong Kong.

Part II of the article considers the remedies in *Yuen Sha Sha*. The court awarded a total of \$80,000 in damages, (including \$30,000 in aggravated and exemplary damages). This is arguably a reasonable award, given that the plaintiff did not claim any economic loss. However, in my view the award for injury to feelings should have been larger. The court's analysis of damages missed the crux of her claim and focussed too heavily on the issue of damage to her reputation.

Part III of the article discusses the case of *Ma Bik Yung v Ko Chuen*,³ in which a taxi driver was found to have committed disability discrimination and harassment against his passenger. This case offers a dramatic illustration of the open hostility that disabled people often face in our community. It also demonstrates the limitations of the 'unjustifiable hardship' defence, which the defendant (who also suffered from a disability) unsuccessfully argued. The court

¹ The only cases decided before these two (relating to discriminatory advertisements) were initiated by the EOC. See, for example, *Equal Opportunities Commission v Apple Daily Ltd* [1999] 1 HKC 202, in which the EOC successfully appealed a decision of the District Court (on the question of whether an advertisement violated s 43 of the SDO).

² *Yuen Sha Sha v Tse Chi Pan* [1999] 1 HKC 731 (hereinafter referred to as '*Yuen Sha Sha*').

³ *Ma Bik Yung v Ko Chuen* [1999] 1 HKC 714 (hereinafter referred to as '*Ma Bik Yung*'). In July 1999, Judge Wong refused the defendant's request for leave to appeal. However the Court of Appeal subsequently granted leave and the appeal will likely be heard in early 2000.

awarded a total of \$20,000 in damages, including exemplary damages for the particularly oppressive behaviour of the defendant. The decision represents an important affirmation of the rights of the disabled under the new legislation. However, the damages award was quite small and may discourage other victims (particularly those who have not suffered any tangible economic loss) from litigating their claims.

Part IV concludes by briefly commenting upon the court's approach to the issue of legal costs. The anti-discrimination legislation departs from the general rule in Hong Kong by providing that the parties will normally bear their own respective legal costs. (As I will argue below, this makes it especially important that successful plaintiffs receive reasonable damage awards.) However, costs may be awarded if special circumstances warrant it.⁴ In the two cases discussed here, the court did find special circumstances and awarded costs to the plaintiffs. As discussed below, the awards of costs could not be enforced in these two cases, as both defendants received legal aid. However, the court's reasoning may encourage parties in future cases to act reasonably and to take better advantage of the conciliation services offered by the EOC.

I. Videotaping as a form of sexual harassment: the liability issues in *Yuen Sha Sha*

The law of sexual harassment was initially developed through judicial interpretation of statutes that prohibited sex discrimination.⁵ However many jurisdictions have recently taken the concept a step further and enacted statutes that expressly define and prohibit sexual harassment.⁶ This approach eliminates the need for the plaintiff to show that the harassment constituted unfavourable treatment on the ground of her sex, which can be problematic in some cases. For example, a defendant might claim that *both* male and female employees were equally offended by pornographic posters and lewd jokes at the workplace, arguably defeating the claim that they constituted unfavourable treatment on the ground of sex.⁷ However, in the statutory model, this would

⁴ District Court Ordinance, ss 73(B)(3), 73(C)(3), and 73(D)(3).

⁵ See, for example, *Strathclyde Regional Council v Porcelli* [1986] IRLR 134 CS (sexual harassment can constitute discrimination within the meaning of the UK Sex Discrimination Act 1975); and *Meritor Savings Bank, FSB v Vinson*, 477 US 57 (1990) (in which the United States Supreme Court endorsed guidelines of the Equal Employment Opportunities Commission that characterised sexual harassment as a form of unlawful sex discrimination).

⁶ In 1993, the Canadian Human Rights Act was amended so as to expressly prohibit sexual harassment. See Canadian Human Rights Act, s 14. In Australia, the Federal, Victorian, New South Wales, South Australian, Western Australian, Australian Capital Territory and Northern Territory legislation all contain specific provisions prohibiting sexual harassment. See *Australian and New Zealand Equal Opportunities Law and Practice* (CCH Australia Limited), at 59-500.

⁷ See, for example, *Stewart v Cleveland Guest (Engineering) Ltd* [1994] IRLR 440, in which the Employment Appeal Tribunal upheld a decision that pictures of nude women did not constitute sex discrimination under the UK Sex Discrimination Act because a man might have found the pictures equally offensive.

not be a defence, as the conduct would still meet the definition of prohibited sexual harassment.

As a relative newcomer to the field of anti-discrimination law, Hong Kong was in a position to learn from the experience of other jurisdictions and adopt a progressive model. Unfortunately, with respect to most of the provisions of the SDO, the Government did not take that opportunity and instead slavishly copied the UK Sex Discrimination Act 1975. However, the UK Act did not include provisions that expressly prohibited sexual harassment and the Hong Kong Government had promised women's organisations that the SDO would do so. Thus the Government decided to use Australian federal legislation as its model (with some additional language provided from Anna Wu's Equal Opportunities Bill, which was based upon Western Australian law).

As a result, the SDO expressly defines sexual harassment and prohibits it in a wide range of activities, including employment, the provision of goods, facilities and services, and education. In the field of education, the classic case of sexual harassment is that of a teacher harassing a student (for example by making good marks conditional upon sexual relations). In such cases, the educational institution (as the employer of the teacher) also would normally be held liable for the unlawful harassment.⁸

However, the SDO also prohibits student to student sexual harassment (at s 39(3)). This form of harassment is most common at universities (where students live together in close quarters) and it has recently generated considerable public attention in Hong Kong.⁹ The SDO does not normally make a university liable for an unlawful act committed by a student.¹⁰ Nonetheless, educational institutions have an obligation to address sexual harassment by students. It is most often directed at female students and can significantly interfere with their right to an equal and respectful learning environment.

⁸ SDO s 46 makes the employer liable for the unlawful acts of its employees, regardless of whether the acts were done with the employer's knowledge or consent. However, it is a defence for the employer to show that it took 'such steps as are reasonably practicable' to prevent the unlawful behaviour. For a discussion of the steps that an employer should take to prevent unlawful discrimination and harassment, see Carole J. Petersen, 'Hong Kong's First Anti-Discrimination Laws and their Potential Impact on the Employment Market' 27 HKLJ 324 (1997).

⁹ See, for example, Shirley Kwok, 'Medical student banned over dormitory assault', South China Morning Post, 3 February 1999, p 3 (reporting on a university student who pleaded guilty to assault causing actual bodily harm after he attacked a woman in her dormitory). Another student admitted sending pornographic and threatening emails (including a death threat) to a student feminist group. He was convicted of criminal intimidation (see Angela Lau, 'Email offender spared jail', South China Morning Post, 15 July 1999, p 7), and expelled from the University of Hong Kong. The primary victim also filed a complaint for sexual harassment with the EOC, which was successfully conciliated (the settlement terms are confidential). It has also been alleged that one or more students have taken peep-shot photographs of female students in dormitory rooms and bathrooms, which have then been posted on the internet. See 'Nude "students" on Net', South China Morning Post, 13 April 1999, p 6.

¹⁰ Of course, if the alleged harasser was an employee as well as a student (for example, a graduate student who was also appointed as a tutor), then the normal rule of employer's liability (stated in s 46 of the SDO) would apply.

The facts of *Yuen Sha Sha* demonstrate just how serious the problem can be. In March 1997, the plaintiff, a female student at the Chinese University of Hong Kong, accidentally discovered a camcorder hidden inside a paper box on top of her roommate's wardrobe. The camcorder contained a working videotape and was pointed toward the plaintiff's bed and wardrobe, where she normally changed clothes. The plaintiff also found some books beneath the camcorder, one of which bore the name of the defendant, the boyfriend of the plaintiff's roommate. The plaintiff confronted the defendant and he admitted that he had been filming her over a period of several months.¹¹ According to an agreed statement of scenes, the videotape showed the plaintiff in various states of undress. One scene also showed the defendant adjusting the angle of the camcorder in front of the plaintiff's wardrobe and pointing at the lens, indicating that he had deliberately targeted her dressing area. He also admitted showing at least one videotape of the plaintiff to a male friend who knew her.¹²

The Chinese University of Hong Kong expelled the defendant (as a result of a complaint filed under its own sexual harassment procedures). However, the plaintiff herself could not receive compensation under those procedures and therefore exercised her right to file a complaint under the SDO. Although there was very little dispute over the facts, the defendant refused to settle the matter or even to give a genuine apology for his actions.¹³

At the trial (held almost two years after the plaintiff discovered the camera), the defendant did not give evidence or call any witnesses, and on the second day of the hearing his counsel indicated that he admitted liability.¹⁴ As a result, the judge apparently decided that it was not necessary to give a detailed analysis of liability in her decision. This is unfortunate, not only because the case was the first complaint of sexual harassment to be tried in the District Court but also because there are very few reported decisions on this type of sexual harassment. The vast majority of sexual harassment complaints arise in the context of employment and can be classified into one of two general categories: (i) *quid pro quo* harassment, which occurs when a person in power makes an unwelcome sexual advance in return for a benefit or under threat of a detriment; or (ii) hostile environment harassment, which occurs when the defendant uses sexual conduct (such as lewd jokes, photographs or gestures) to overtly embarrass and intimidate the plaintiff. *Yuen Sha Sha* is one of the few reported cases of sexual harassment arising from secret videotaping and it could be applied to a number of similar activities. For example, it could be applied to the alleged peep-shot photographs of students¹⁵ or to a case in which a woman

¹¹ Note 2 above, p 736.

¹² Ibid, p 735-737.

¹³ Ibid, p 744-46.

¹⁴ Ibid, p 735.

¹⁵ See note 9 above.

catches a man hiding in a bathroom and spying on her (which has occurred recently at a university in Hong Kong). Thus it is appropriate to consider precisely how the defendant's actions satisfied the statutory definition of unlawful harassment.

Section 2(5)(a) of the SDO provides the definition of sexual harassment that applies to the field of education:

- ... a person (howsoever described) sexually harasses a woman if-
- (a) the person-
 - (i) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to her;
 - or
 - (ii) engages in other unwelcome conduct of a sexual nature in relation to her,

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that she would be offended, humiliated or intimidated

As the defendant did not make sexual advances to the plaintiff, s 2(5)(a)(ii) is obviously the relevant definition. It can be divided into four elements: (1) unwelcome conduct; (2) of a sexual nature; (3) in relation to the plaintiff; and (4) which is such that a reasonable person would anticipate that the plaintiff would be offended, humiliated or intimidated. The court did not expressly consider these elements in any detail. However, given the importance of the case, it would have been useful to do so and I would suggest the following analysis:

(1) unwelcome conduct

In many cases of *quid pro quo* sexual harassment, this is the most contentious issue. The defendant will often testify that the plaintiff's behaviour at the relevant time made him believe that she welcomed his advances. However, in *Yuen Sha Sha* the defendant filmed the plaintiff without her knowledge and did not allege that she did anything to invite or solicit his behaviour.¹⁶ Indeed, the defendant admitted to a police officer that he had obtained the key to the room from his girlfriend (the plaintiff's roommate) and checked the plaintiff's lecture

¹⁶ In a case such as this one (where the behaviour was so outrageous that no reasonable person would think that it would be welcome), the court can easily infer that the conduct was unwelcome. See, for example, *Insitu Cleaning Co Ltd v Heads* [1995] IRLR 4 ('no one, other than a person used to indulging in loutish behaviour, could think that the remark made in this case was other than obviously unwanted.'). However, if the nature of the conduct was such that some people might welcome it, the court would normally consider whether the plaintiff did anything to 'solicit or invite' the conduct. See *Aldridge v Booth* (1988) EOC 92-222, p 77-086.

timetable so that he could install the camcorder while she was in class.¹⁷ Thus, although it is not necessary under the law to show that the defendant *knew* that his conduct was unwelcome, the care he took to conceal his conduct makes it clear that he did.

(2) conduct of a sexual nature

The plaintiff testified that when she confronted the defendant he told her that he had filmed her because he was secretly in love with her and sexually attracted to her.¹⁸ Although he later denied saying this (in his written defence), he did not testify or introduce any evidence to contradict the plaintiff's testimony and the court thus found his denial to be unproven.¹⁹ However, the court also noted that the defendant may well have falsely declared love for the plaintiff (in an effort to 'get off the hook') and that he may have simply filmed the plaintiff for entertainment.²⁰ Thus it is clear that the court did not consider the alleged sexual attraction as necessary to the finding that the defendant engaged in conduct of a sexual nature. This approach was entirely correct, as neither the SDO nor the relevant case law from other jurisdictions requires a plaintiff to show that the harasser acted out of sexual desire.²¹ What matters is the nature of the conduct itself.²²

In this case, the relevant conduct can be defined as follows: secretly filming a woman while she was in a state of undress. Society has long recognised the sexual connotations of viewing a woman's body without her consent. For example, in criminal law, the removal of a woman's clothing without consent (or some other legal justification) constitutes an indecent assault and therefore is classified as a sexual offence. This is true, regardless of whether the defendant acted out of sexual desire, a desire to humiliate her, or simply a desire to steal her clothing.²³ What is significant is that 'right thinking people' would consider the act to be 'an affront to the sexual modesty of a woman'.²⁴

¹⁷ Note 2 above, p 736.

¹⁸ *Ibid*, p 735-36.

¹⁹ *Ibid*, p 738.

²⁰ The defendant told the police that he filmed the plaintiff for fun and told the Privacy Commissioner that he did it so he and his friend could watch the video together. *Ibid*, p 744.

²¹ See, for example, *Strathclyde Regional Council v Porcelli* (note 5 above), in which the defendants embarked upon a campaign of sexual harassment to compel the plaintiff to quit or apply for a transfer.

²² The Queensland Anti-Discrimination Act is a rare example of a statute which (unlike the SDO) refers to the defendant's intentions in the definition of prohibited sexual harassment. However, even that statute does not require that a defendant acted out of sexual desire, but rather that he acted 'with the intention of offending, humiliating, or intimidating the other person'. The Queensland Act is also much broader in application than the SDO in that it is not restricted to particular areas (such as work and education), but rather applies generally and states simply that a person must not sexually harass another person.

²³ See *R v Court* [1988] 2 All ER 221, in which the House of Lords stated that certain acts (such as removing a woman's clothes without her consent) are unambiguously indecent, regardless of whether the defendant acted out of sexual desire.

²⁴ *Ibid*, p 223 (per Lord Griffiths).

The law of sexual harassment also recognises that certain acts have inherent sexual connotations, irrespective of the harasser's motive. Sending or displaying graphic pornography to a woman,²⁵ asking her explicit questions about her sexual life,²⁶ or making insulting sexual comments about her body²⁷ all fall within the category of 'conduct of a sexual nature'. Provided that the other elements of the definition are also satisfied, such acts constitute sexual harassment regardless of whether a defendant acts out of sexual desire. This is an important principle, as harassers often do not act out of sexual desire but rather out of a desire simply to hurt or humiliate the victim. For example, in *Insitu Cleaning Co Ltd v Heads*, the defendant made insulting comments to the plaintiff (such as 'Hiya, big tits') at work. The defendant was much younger than the plaintiff and there was no indication that he was sexually attracted to her. The defendant thus attempted to argue that his remarks were not 'sex related', but rather were the equivalent of commenting upon a man's balding head. The Employment Appeal Tribunal rejected this argument as absurd, noting that 'a remark by a man about a woman's breasts cannot sensibly be equated with a remark by a woman about a bald head or a beard. One is sexual, the other is not.'²⁸

Similarly, in *Yuen Sha Sha*, the secret filming of the plaintiff while she undressed cannot sensibly be equated with other non-sexual invasions of privacy (such as tapping one's telephone line). While both activities are to be deplored, the former is sexual in nature, is a clear affront to the plaintiff's sexual modesty, and is properly addressed as a form of sexual harassment.

(3) in relation to the plaintiff

The requirement that the conduct was in relation to the plaintiff is sometimes problematic in cases of hostile environment harassment, as the conduct may be part of the general environment and not specific to one person. It is for this reason that women's organisations persuaded the Government to add an alternative definition of hostile environment harassment, s 2(5)(b), which does not expressly require that the conduct be in relation to the plaintiff. However that alternative definition applies only to employment cases. A woman can still allege hostile environment harassment in the other protected spheres (such as education), but she would have to prove that the conduct was in relation to her.

²⁵ See, for example, *Robinson v Jacksonville Shipyards, Inc*, 760 F Supp 1486 (MD Fla 1990); *Horne & Anor v Press Clough Joint Venture & Anor* (1994) EOC 92-556 (Western Australian Tribunal).

²⁶ See, for example, *Hall & Ors v A & A Sheiban Pty Ltd & Ors* (1989) EOC 92-250, in which questions in pre-employment interviews (as to whether applicants were having sex with their boyfriends, using contraceptives, or had ever had an abortion) were held to constitute unlawful sexual harassment.

²⁷ *Insitu Cleaning Co Ltd v Heads* (note 16 above).

²⁸ *Ibid*, p 5.

However, this requirement was easily satisfied in *Yuen Sha Sha* as the filming was clearly directed at the plaintiff. It should also be noted that after this case was decided, the requirement that conduct be in relation to the plaintiff was considered in an action for judicial review (of a decision that a police officer had violated a Police Headquarters Order which included the SDO definition of sexual harassment). While the application for judicial review was successful, the applicant's argument for a narrow interpretation of this requirement (so as to exclude sexual comments made to a woman which were not actually about her) was rejected.²⁹ This indicates that the Hong Kong courts are unlikely to adopt an unduly narrow interpretation of the phrase.

(4) the reasonable person test

The final requirement is that a reasonable person would have anticipated that the plaintiff would have been offended, intimidated, or humiliated. This is often controversial and there is an ongoing debate in the literature on the question of how the hypothetical reasonable person should be defined.³⁰ Is it the average male supervisor or the average female secretary? They may have significantly different views as to whether a course of conduct is likely to offend or intimidate. However, in this case, it is difficult to see how any reasonable person (male or female) could fail to anticipate that the average woman would be offended, humiliated (and very likely frightened) to discover that a man had been secretly filming her in her bedroom while she changed her clothes.

The one argument that the defendant might have made regarding this element is that a reasonable person would not have anticipated that the plaintiff would be offended or humiliated by the filming because the expectation was that she would never find out about it. On its face, this argument may seem reasonable, as one normally cannot feel harassed without some awareness of the relevant conduct. However, a similar argument was rejected in *Liberti v Walt Disney World*,³¹ one of the few reported cases of sexual harassment based upon secret videotaping. In that case, a male employee had drilled holes in the walls of the female dancers' dressing area and videotaped them in various states of undress. The defendant argued (in a motion for summary judgement) that the plaintiffs could not have perceived a hostile environment, as they were unaware of the videotaping until after it stopped. The court rejected this argument and held that the plaintiffs' after-the-fact knowledge could serve as

²⁹ See *Ratcliffe v Secretary for the Civil Service*, Civil Appeal No 57 of 1999 (on appeal from AL 43 of 1998), pp 12-13.

³⁰ For example, in *Ellison v Brady*, 934 F.2d. 872, 878-81 (9th Cir. 1991), the trial court held that love letters and persistent requests for dates were trivial and unlikely to intimidate. However, the appellate court disagreed and expressly adopted a reasonable woman standard for assessing whether conduct constituted unlawful harassment.

³¹ 912 F Supp 1494, 1504 (MD Fla 1995) (denying defendant's motion for summary judgement). The case settled before trial.

the basis for their perception that a hostile work environment existed. The same principle could be applied to the reasonable person test in *Yuen Sha Sha*, as the statute does not require that a reasonable person would anticipate that the plaintiff would feel offended, humiliated, or intimidated while the acts were actually ongoing.

II. Remedies for sexual harassment

Although Judge Wong did not provide much analysis of the liability issues, she discussed the issue of remedies in more detail. Counsel for the defendant had offered an apology in court on behalf of the defendant. However, the plaintiff had requested a written apology (under s 76(3A)(b) of the SDO) and the judge ordered the defendant to provide it.³²

The question of damages was more difficult. In many cases of sexual harassment, the plaintiff alleges some economic loss. For example, she may have been fired from her job for resisting the harassment or may have quit in order to escape it. Victims may also suffer long-term damage to their physical and emotional health (and thus to their earning potential) as a result of the harassment. In this case, however, the plaintiff did not allege any economic loss. She was a full-time student at the time of the incident and although it caused her to miss classes for a period of time, she nonetheless graduated with an upper second class honours degree a few months later.³³ At the time of the trial, she was employed as a teacher³⁴ and apparently did not allege that the incident had adversely affected her career.

Thus, the bulk of the damages awarded were for injury to feelings (which are expressly provided for by s 76(6) of the SDO), for which the court awarded the plaintiff \$50,000. The incident caused the plaintiff considerable distress and humiliation. As the court summarised,

... the incident had left her feeling violated, exploited, betrayed, humiliated and hurt. This was particularly so when she regarded the Defendant as one of her good friends. For sometime after the discovery, she was afraid to stay in her hostel room, and for the month following she was unable to go to sleep alone, and she did not attend class for 2-3 weeks. She felt she was watched whenever she changed her clothes.³⁵

As I noted earlier, there are very few reported cases of sexual harassment based entirely upon an invasion of privacy. In searching for comparable cases, the court referred to one case of racial discrimination and also to defamation

³² Note 2 above, p 746.

³³ *Ibid*, p 741.

³⁴ *Ibid*, p 745.

³⁵ *Ibid*, p 737.

cases. The rationale for considering defamation cases was apparently the theory that the plaintiff's reputation had been damaged. In my view this focus was inappropriate, as it only reinforces the outdated presumption that a woman is somehow less reputable after a man violates her dignity. It also missed the real crux of the plaintiff's claim for injured feelings, which was her sense of violation, betrayal, and fear. The incident left her unable to stay alone in her room, to fall asleep on her own, or to escape the feeling that she was being watched when she changed her clothes. These feelings are similar to those experienced by victims of a sexual assault. An award that is based upon ordinary defamation cases simply cannot compensate for such feelings of violation and emotional distress.

The other problem with relying so heavily upon defamation cases is that this inevitably leads a court to devalue the feelings of a woman who is not well known in the community. This is precisely what the court did in this case, noting that the plaintiff 'was a student and not, at the time, a person enjoying a reputation in the community'.³⁶ While this might be appropriate in measuring the element of hurt feelings (if any) that was based upon injury to reputation, it is entirely irrelevant to the other feelings (fear, betrayal and violation) to which the plaintiff testified. In my view, the court's approach caused it to seriously undervalue the damages suffered by the plaintiff.

The court did, however, also award exemplary and aggravated damages (totalling \$30,000) and this part of the judgement shows greater sensitivity to the feelings of the plaintiff and the violation of her dignity.³⁷ The court found that the defendant's acts were aggravated by his perverted lewdness (demonstrated by the care he took in directing the lens to the plaintiff's dressing area), the fact that he had filmed her over an extended period of time, and the fact that he showed the tape to his friend.³⁸ The defendant had also tormented the plaintiff after the complaint was filed. In particular, he had initiated (with his girlfriend) a civil action in nuisance³⁹ against her and had persuaded a schoolmate to telephone her on the day before the hearing to pressure her to abandon the complaint.⁴⁰ The plaintiff testified that these calls made her feel further upset and threatened, and that she became sleepless and vomited the next day.⁴¹ As the court concluded, the defendant 'deliberately added insult to injury. He was defiant, unrepentant and vindictive. His behaviour is tantamount to flouting the legislation. Such behaviour is reprehensible and should not be condoned.'⁴²

³⁶ Ibid, p 741.

³⁷ Ibid, pp 742-46.

³⁸ Ibid, p 743-44.

³⁹ Ibid, p 744. The action in nuisance (which alleged that the plaintiff breached rules regarding guests in rooms) was unsuccessful. See *South China Morning Post*, 6 March 1999, p 3.

⁴⁰ Note 2 above, p 744.

⁴¹ Ibid, p 738.

⁴² Ibid, p 746.

The court's strong language is appropriate. In most sexual harassment cases (particularly where the plaintiff claims no economic loss), the complaint can be settled with a genuine apology and a fairly small amount of monetary compensation. Most victims of sexual harassment do not want to go to court. Like victims of sexual assault, they do not relish the idea of having to relive the violation of their dignity, answer endless questions, and endure hostile cross-examination (all of which is likely to be reported in the press). Nor do they want to wait two years (as this plaintiff did) for compensation and resolution. This is one of the reasons that the legislature established the EOC and gave it the power to conciliate cases. But conciliation will only work if both parties approach it in good faith. The court's decision to increase damages as a result of this defendant's poor behaviour after the complaint was filed will hopefully encourage future defendants to behave more reasonably.

III. Disability discrimination: *Ma Bik Yung v Ko Chuen*

Like the SDO, the DDO also prohibits discrimination in a wide range of protected spheres, including employment, education, and the provision of goods and services. In particular, s 26(1) prohibits providers of goods, services and facilities from discriminating against disabled persons by failing to serve them, by giving them less favourable terms and conditions, or in the manner in which they serve them. Transportation is, of course, one of the most important services consumed by people with physical disabilities, particularly since Hong Kong is far from being a 'barrier free' society.

The definition of discrimination under the DDO can be found in s 6. It employs the traditional two-part structure, prohibiting both direct and indirect discrimination. Direct discrimination (which is what was alleged in this case) is a relatively straightforward concept. It occurs when a person treats another person, on the ground of his disability, less favourably than he treats or would treat a person without a disability. For example, if a restaurant refuses to serve anyone who uses a wheelchair, that is a clear example of direct discrimination.

Indirect discrimination (which was not alleged in this case) is more complicated. It occurs when a person applies a requirement or condition equally (to people with and without a disability) but the requirement is such that the proportion of persons with a disability who can comply with it is considerably smaller than the proportion of persons without a disability who can comply with it and the defendant cannot justify the requirement under the circumstances. For example, if the restaurant required all patrons to climb a flight of stairs (because it wanted to keep the elevator available to move food supplies up to the restaurant), that would be an example of indirect discrimination. Although it might be applied equally to all customers, those who use wheelchairs would be unable to comply with it and would be adversely

affected by it. Unless the restaurant could justify the requirement under the circumstances, it would be considered unlawful discrimination.

The DDO also prohibits disability *harassment*, which occurs where a person:

engages in unwelcome conduct (which may include an oral or written statement) on account of [the] second-mentioned person's disability, or on account of the disability of an associate of that second-mentioned person, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the second-mentioned person would be offended, humiliated or intimidated by that conduct.⁴³

In certain respects this definition is similar to the definition of sexual harassment.⁴⁴ For example, both definitions employ a partly objective test: the court must decide whether a 'reasonable person' would have anticipated that the conduct would be offensive, humiliating, or intimidating. However, the definition of disability harassment differs from that of sexual harassment in that it includes statements and conduct made 'on account of the disability of an associate of the second-mentioned person'.⁴⁵ This was considered necessary in order to protect relatives, friends, co-workers, and caregivers of people with disabilities, who also may be subjected to harassment as a result of their relationship.

In *Ma Bik Yung* the plaintiff alleged both direct discrimination and disability harassment against the defendant, a taxi driver. The plaintiff, a paraplegic, was waiting for a taxi in her wheelchair. She was taking her sister (who suffered from schizophrenia, stiff limbs, and trembling hands) to a medical appointment. The plaintiff testified that she repeatedly waved to the defendant but received no response. She moved toward his taxi and had to knock several times on the passenger door before he eventually opened it.⁴⁶ When she asked for assistance with her wheelchair, she claimed that he responded rudely, saying 'who do you think you are, my responsibility is to drive and I have no responsibility [for] your wheelchair.'⁴⁷ Eventually, a passer-by helped the plaintiff with the wheelchair.

The plaintiff further alleged that the defendant abused her verbally on the way to the clinic and refused to retrieve the wheelchair from the boot, forcing her to wait in the taxi until she could once again ask a passer-by for assistance. She testified that by the time she left the taxi, she was in tears and her sister was agitated and trembling more than usual.⁴⁸ She further testified that she felt

⁴³ DDO, s 2(6).

⁴⁴ Compare with s 2(5) of the SDO, quoted above.

⁴⁵ See s 2 for the definition of "associate", which is quite comprehensive.

⁴⁶ Note 3 above, p 717-18.

⁴⁷ *Ibid*, p 718.

⁴⁸ *Ibid*.

humiliated and upset for a long time afterward and that the incident affected her ability to care for her sister (who committed suicide before the trial).⁴⁹

The defendant taxi driver testified to a significantly different version of the facts. He claimed that he did not notice the plaintiff until she knocked on the back of his taxi, at which point he got out and held open the door for her. He testified that he explained to the plaintiff that he was unable to lift the wheelchair by himself due to his own disability (he had undergone hip surgery in 1974) and that he instead asked passers-by to help him. He also denied abusing the plaintiff verbally.⁵⁰

Thus, the outcome of the case depended to a large extent on the judge's assessment of the witnesses' credibility. The judge found that the plaintiff was an honest witness who provided many details of the incident when questioned by the defendant's counsel.⁵¹ In contrast, the court found that the defendant became evasive, hesitant, and uncertain when cross-examined and gave vague and contrived answers. The court concluded that the defendant was 'a completely unreliable witness and his evidence unconvincing.'⁵² The court thus found as facts that the defendant had failed to acknowledge the plaintiff when she tried to request his services, refused to help her with her wheelchair, made rude, hurtful, and derogatory remarks about her physical disability on the way to the clinic, and upon arrival once again refused to either help with the wheelchair or to summon help from passers-by.⁵³

Having accepted entirely the plaintiff's version of the facts, the court then easily concluded that the defendant had committed unlawful disability harassment. The driver's conduct was clearly unwelcome conduct on the account of the plaintiff's disability, and a reasonable person would anticipate that she would have been offended, humiliated, or intimidated by it.

The analysis of direct discrimination was somewhat more complicated. According to the court's decision, the defendant argued that the correct comparator was another disabled person with a piece of heavy luggage, apparently on the rather strained theory that what was actually alleged here was simply discrimination on the ground of the plaintiff's wheelchair (prohibited by s 9 of the DDO). The court correctly rejected this argument and held that the correct question was whether the plaintiff had been treated less favourably than a person without a disability would have been treated.⁵⁴

The defendant also argued that his own disability (a hip problem) brought him within the unjustifiable hardship exemption provided in s 26(2). The

⁴⁹ Ibid, pp 718-19.

⁵⁰ Ibid, p 719.

⁵¹ Ibid, p 720.

⁵² Ibid, p 721.

⁵³ Ibid, pp 721-22.

⁵⁴ Ibid, pp 724-25. However the defendant has argued in his application for leave to appeal that the court misunderstood the argument on this point.

unjustifiable hardship defence is designed to protect defendants from having to make very expensive or burdensome accommodations for disabled persons. However, it is not meant to exempt providers of services from the obligation to make reasonable accommodations for their disabled customers. This is clear from the definition, which states that in determining what constitutes an unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including:

- (a) the reasonableness of any accommodation to be made available to a person with a disability;
- (b) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned;
- (c) the effect of the disability of a person concerned;
- (d) the financial circumstances of and the estimated amount of expenditure (including recurrent expenditure) required to be made by the person claiming unjustifiable hardship.

Thus the concept of unjustifiable hardship requires the court to balance the needs of the disabled person against those of the defendant. The fact that the defendant may have to exert some special effort or spend some money to accommodate the needs of the disabled is not necessarily a defence. The question is whether the extra effort required of the defendant was truly unreasonable under the circumstances.

In this case, although it was not disputed that the defendant himself suffered from a disability, the court refused to hold that this brought him within the exemption in s 26(2). The defence might have been successful had the plaintiff alleged that the defendant should have personally lifted the wheelchair. However, the plaintiff's argument was that he had a duty to offer services to her in a civil manner, and to summon help if he could not lift the wheelchair on his own. Instead of doing so, he tried to avoid serving her and verbally abused her. As the court correctly stated '[h]is own disability certainly does not give him a license to be uncivil, to insult and to treat a fellow human being with contempt, particularly someone with a disability.'⁵⁵

The court then considered the issue of damages. Once again, the plaintiff had not alleged any specific economic losses. The court took into account the fact that the discrimination and harassment took place within a relatively short period of time and awarded significantly less than in the case of *Yuen Sha Sha*. Unfortunately, since the damages awarded in *Yuen Sha Sha* were (in my opinion) insufficient, this approach resulted in a very small award in this case. The court awarded only \$15,000 for injury to feelings, plus \$5,000 in punitive

⁵⁵ *Ibid*, p 727.

damages (which is expressly provided for in s 72(4)(f) of the DDO).⁵⁶ The court also ordered the defendant to deliver a written apology for his actions.⁵⁷

In calculating damages, the court noted that the 'award should not be minimal as it would trivialise or diminish respect for the public policy and the spirit on which the Ordinance was based.'⁵⁸ Unfortunately, this award may do precisely that. A total of \$20,000 in damages is quite small and may discourage other victims of disability discrimination and harassment (particularly those who cannot show any tangible economic loss) from litigating. A victim could rationally decide that a potential award of \$20,000 simply does not justify: (1) the legal expenses (which, as explained in the next section are normally not recoverable); and (2) the physical and emotional stress of testifying (which may be particularly trying for a person with a disability). Of course, if respondents know that victims are unlikely to litigate, this will undermine respect for the law, as well as the ability of the EOC to obtain reasonable settlement offers in the conciliation process.

IV. Legal costs in actions for discrimination and harassment

The normal rule in civil actions in Hong Kong is that the court will award costs to the prevailing party (i.e. 'costs follow the event'). While this has the beneficial effect of deterring frivolous litigation, it can also deter people with legitimate claims from commencing lawsuits. A potential plaintiff can never be certain of winning a lawsuit and would understandably be afraid to sue if there was a chance that she could be held liable for the defendant's legal costs.

In order to remove this fear, the District Court Ordinance provides that each party to any proceedings brought under Hong Kong's anti-discrimination ordinances 'shall bear its own costs unless the Court orders otherwise on the ground that (a) the proceedings were brought maliciously or frivolously; or (b) there are special circumstances which warrant an award of costs.'⁵⁹ This is a sensible approach, one which seeks to protect defendants from frivolous litigation but also enables plaintiffs with reasonable claims to sue without fear of being bankrupted. However, since successful plaintiffs normally will not recover their legal costs, it is very important that judges give reasonable damage awards, not only for economic losses but also for injury to feelings.

Interestingly, in both cases discussed here, the court did find special circumstances and awarded costs (although, as noted below, the awards could not be enforced). The court's decision to award costs in *Yuen Sha Sha* is not surprising, as the court found that the defendant had behaved outrageously

⁵⁶ Ibid, pp 730.

⁵⁷ Ibid.

⁵⁸ Ibid, p 729.

⁵⁹ District Court Ordinance, ss 73B and 73C.

(perhaps even maliciously) after the complaint was filed. Although the defendant did not dispute the facts, he refused to apologise or conciliate the matter, forcing the plaintiff to wait two years for a remedy, to relive the entire event in court, and to suffer the embarrassment of having the matter reported, yet again, in the press. Moreover, he embarked upon a deliberate strategy to further intimidate her, initiating a nuisance action against her (which was thrown out of court), persuading his friend to pressure her to drop the complaint, and 'threatening to adduce evidence from witnesses' to show that she had lied.⁶⁰ Such behaviour constitutes more than enough special circumstances to justify an award of costs. Indeed, if costs were not awarded in this case, it is hard to imagine circumstances in which they would be awarded.

However, the special circumstances in the disability case are much less clear. There was a genuine dispute over the facts and the decision does not report any post-complaint intimidation by the taxi driver. The court simply stated that the award of costs was based upon the defendant's conduct and failure to apologise. The judge may also have taken into account the fact that she found the defendant to be a 'completely unreliable witness' and accepted the plaintiff's testimony in every disputed question of fact. The parties' two versions of the facts were so different that the discrepancies could not have been the result of a mistake on the part of the defendant. Thus, the court essentially found that the taxi driver had lied on the stand. This factor, combined with his failure to apologise and settle the matter in conciliation, arguably does justify an award of costs. However, the judge should have been more explicit in her reasons for departing from the presumption provided in the legislation.

In any event, the judge's decision to award costs in these two cases could not be enforced. This is because the defendants in both cases received legal aid. Section 16C(1) of the Legal Aid Ordinance provides that where a court makes an award of costs against an aided person, neither that person nor the Director of Legal Aid shall be liable for such costs (unless the non-aided person was a defendant or respondent in the proceedings). Given that a court can only make an award of costs (in cases brought under the anti-discrimination ordinances) in the presence of *special circumstances*, it is arguable that this provision in the Legal Aid Ordinance should be reconsidered.⁶¹

It should also be noted that in both cases discussed here the plaintiffs had similarly requested legal aid but were turned down by the Legal Aid Department.

⁶⁰ Ibid. In fact, the defendant did not call any witnesses.

⁶¹ The EOC has also suggested that the anti-discrimination ordinances be amended so as to make it clear that if an award of costs is made in favour of a plaintiff who received assistance from the EOC, then the EOC could recover its costs for legal work done by its own lawyers, in the same manner as the Legal Aid Department. See EOC, Equal Opportunities Legislative Review: Proposals for Amendment of the Sex Discrimination Ordinance and the Disability Discrimination Ordinance (February 1999), para 11. At present the legislation clearly states that the EOC can recover its expenses, but it is unclear as to whether it can recover its costs. See s 85(4) of the SDO and s 81(4) of the DDO.

Fortunately, the EOC granted them legal assistance, allowing their complaints to be litigated. However, the EOC has limited funds for this purpose and cannot grant legal assistance to every meritorious case. I would suggest that a review is needed regarding the criteria that are applied by the Legal Aid Department to requests for legal aid. In these two cases, the damages awarded were not large (and in my opinion, were not sufficient). However, this is a very new area of law in Hong Kong, one that seeks to enhance social justice in our community. It is important that meritorious cases are tried in the courts, even if they are not likely to result in large damage awards. If it becomes apparent that complainants will not receive legal aid, then the law will be weakened as an agent of social change. The ability of the EOC to successfully conciliate complaints will similarly be undermined, as respondents will know that litigation is unlikely. Like all laws, Hong Kong's anti-discrimination ordinances will only have a positive impact if they can be effectively enforced. Supporting valid complaints with legal assistance is one essential element of that enforcement process.

Carole J. Petersen*

Corporate Governance in the Information Age: The Impact of Information Technology and Emerging Legal Issues

Introduction

Corporate governance has, as its primary objective, the enhancement of corporate profits and shareholder gain.¹ It has been defined as the 'rules and practices put in place within a company to manage information and economic incentive problems inherent in the separation of ownership from control in large enterprises' and as dealing with 'how, and to what extent, the interests of various agents involved in the company are reconciled and what checks and incentives are put in place to ensure that managers maximise the value of the investment made by shareholders.'²

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¹ American Law Institute, *Principles of Corporate Governance: Analysis and Recommendation* (Philadelphia: American Law Institute, 1994), principle 2.01.

² Corporate Law Economic Reform Program (Australia), 'Directors Duties and Corporate Governance: Facilitating Innovation and Protecting Investors' Paper no 3, para 7.2.1.