JUSTITIA

HONG KONG UNIVERSITY LAW ASSOCIATION REVIEW

1979-80

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CONTENTS

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EDITORIAL BOARD

FOREWORD

The publication of *Justitia* always arouses in me a feeling of pride. It represents a major achievement on the part of the students of the University's School of Law and it not only demonstrates those intellectual qualities which we value so highly but it also represents splendid endeavour on their part and undoubtedly adds to the stock of Hong Kong's legal literature.

Justitia is always pleasing to read, both from the point of view of the carefully chosen contents and from the point of view of its careful design and the editing which goes into it. The writing of it is a major effort and its actual production is attended by the sort of devoted care which will stand its editors in good stead when they join the legal profession. They already appreciate the impact which a well-presented and attractive piece of work can make and the impact is that much greater when both form and content are married so happily.

It is difficult not to feel somewhat paternal about one's students and I confess to paternal pride in mine. That is why I welcome the appearance once again of a new edition of *Justitia.* I am very happy to be associated with its publication and I take this opportunity to wish *Justitia* a long life in the hope that its tradition now well established will continue through succeeding generations of students in the School of Law.

D.M.E. Evans

PREFACE

It is a concrete and happy fact that law students in the University of Hong Kong have in the last ten years turned the publication of *Justitia* into an established tradition. It is an equally concrete but sad fact that the circulation of *Justitia* has consistently remained small, not only with reference to the general public but also to the small legal profession in Hong Kong itself. As members of the Editorial Board of this issue of *Justitia,* we could not help asking ourselves whether inertia is the only force propelling us forward. What, after all, is the value of and meaning in our present efforts?

Upon reflection we find at least three distinct objectives that *Justitia* have sought and will seek to achieve, or three functions that it can perform. In the first place, it enables students' legal dissertations to be published. Under the existing LL.B. regulations, a law student has to produce a dissertation as part of his coursework, which is counted as the equivalent of one examination paper. Selection for publication in *Justitia* is based mainly on the academic quality of the works and their topical significance. If, as we hope to be the case, to see his or her dissertation appear in *Justitia* supplies some incentive for a law student to produce a better work and seeing it so published constitutes a source of joy and pride to the student, then the work of successive Editorial Boards throughout these years has not been in vain. For then *Justitia* is something that we law students do cherish among ourselves.

Secondly, since the dissertations published in *Justitia* are mainly concerned with Hong Kong law, they form part of the small volume of legal research activities in Hong Kong and may, hopefully, be of some assistance to the local practitioner who is trying to find out or surveying the law in a particular area. As mere students we would be the last to boast about the value of our contribution in this respect. Yet it is still comforting to imagine a barrister glancing through volumes of *Justitia* while preparing for a case, somewhere, sometime.

Thirdly, and this is the most important potential function of *Justitia* and the most difficult of the three aims to be fulfilled, *Justitia* can be used to promote law reform and hence social justice. By directing our attention to a particular social problem, by researching into its legal aspects, by a careful evaluation of the relevant legal rules and by a critical examination of the practical operation of the law in respect of the problem, suggestions on and recommendations for changes in the law can be arrived at. *Justitia* can play a most useful role by providing a forum for the public presentation of such research results, which, we believe, are probably the most natural, direct and efficient expression of the law student's social concern.

This brings us right up to the research project on industrial accidents in Hong Kong carried out by this Editorial Board for publication in this present volume of *Justitia.* We decided to embark upon this project on the suggestion of one of our Honorary Advisers and former lecturer, Mr Robert Ribeiro, at the

end of June 1979. The bulk of the research was done in the following three months. It was an unfortunate coincidence that public outcry against the rising toll of industrial accidents reached a new climax during this period, just after our decision to research into the topic. Public concern has not subsided since. A recent illustration was the plea for moves to remedy the situation by the Most Reverend John Baptist Wu, the Catholic Bishop of Hong Kong, in the celebration of Mission Sunday on October 19, 1980.

Yet despite the wide publicity, no detailed study of the problem has been produced and no commission has been appointed by the Government to look into it. The discussion in the mass media has been necessarily and inevitably on a superficial level. For instance, no one has brought up the fact that a committee called the Robens Committee was appointed in Britain several years ago to report on the industrial safety scene there. The recommendations in the resultant Report on Safety and Health at Work were adopted by the British Government and incorporated into legislation in 1974. This was a step-forward in the English law on industrial accident prevention. Since Hong Kong law is generally based on the English model, there is a clear case for considering the implications of these new English developments for Hong Kong. This is but one illustration of the necessity of research into the problem of industrial accidents in Hong Kong. We hope that our project as published here will serve as a catalyst for such research.

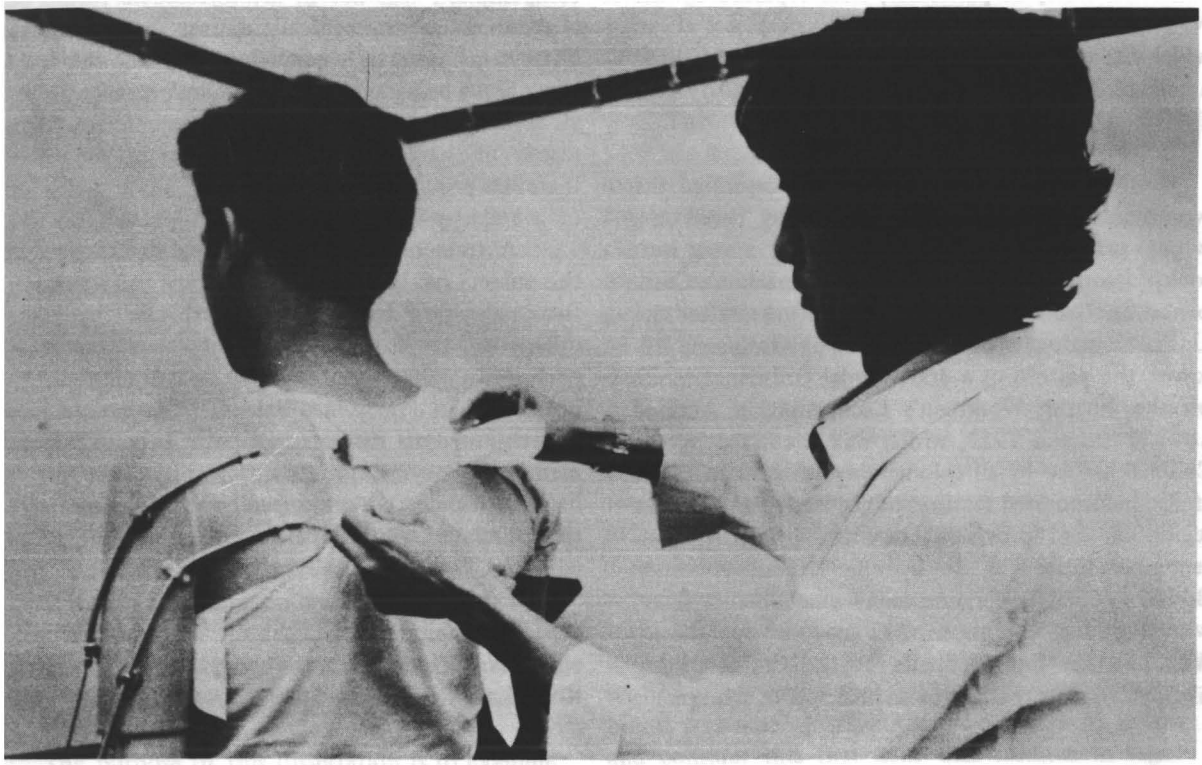
As for the dissertations published in this volume, it is hoped that the reader will find them both academically interesting and practically useful. 'Workmen's Compensation: A Survey of Hong Kong Cases on the Workmen's Compensation Ordinance' is a fairly detailed statement on the law on liability to workmen's compensation (or employees' compensation as it is now called). 'Review of Sentence on the Application of the Attorney-General in Hong Kong' is a highly original piece of research in a relatively unexplored area of the law in Hong Kong. 'Obstruction of Police Officers in the Execution of Their Duties' is a subject of much social significance in Hong Kong. And 'Conditional Intention: Theft and Related Inchoate Crimes' is concerned with an aspect of the criminal law that is highly interesting theoretically. A word of caution, however, must be added. Since the dissertations were all written at the end of 1978, subsequent legal developments in the relevant areas have not been taken into account.

Finally, we would like to express here our gratitude to Mr R.A. Ribeiro, on whose suggestion the research on industrial accidents was carried out, to Mr John Miller, a former lecturer of ours who has now returned to New Zealand, who gave us some valuable advice, to the Honourable Mr Justice Yang, for his continuous interest in and moral support for our efforts throughout these years, to our Dean Professor Dafydd M.E. Evans, for his kind concern and encouragement, to all our Honorary Advisers and all judges, barristers, solicitors' firms, solicitors and past students of our Law School for their generous donations. Without the advice, support and encouragement, intellectual, moral and financial, which all these people have kindly and generously given to this Editorial Board, the publication of this present issue of *Justitia* would not have been made possible.

The Editorial Board

WORKMEN'S COMPENSATION: A SURVEY OF HONG KONG CASES ON THE WORKMEN'S COMPENSATION ORDINANCE

by Albert Hung-yee Chen



photograph by courtesy of Hong Kong Government

I. INTRODUCTION

The enactment of Britain's first Workmen's Compensation Act in 1897 marked the beginning of a new era in the country's history, in which Britain soon grew up to become one of the most advanced welfare states in the world. The idea of workmen's compensation was first developed by Bismark in Germany. A series of acts insuring workers against sickness, accident and old age was passed by the parliament of the German Reich in the 1880's. In England, the very concept of workmen's compensation under which employers were made responsible for 'personal injuries caused by accidents arising out of and in the course of the employment' of their workers irrespective of fault was a great innovation, especially from the legal point of view. It was a fundamental departure from the existing tort system, in which liability for injury, damage and other losses was based on negligence.[1] On the other hand, the principle of workmen's compensation was still far away from the modern one of contributory insurance. It was a scheme of employers' insurance at most. It served, however, as an important bridge between the traditional tort system on the one hand, and Britain's modern social security system on the other.

Before 1946, the series of Workmen's Compensation Acts 1897 - 1945, together with national insurance based on the National Insurance Act 1911, stood as the two great pillars of Britain's social security system. Following Lord Beveridge's *Report on Social Insurance* in 1942,[2] the whole system was reconstructed in 1946, when a unified and comprehensive national scheme of contributory insurance providing for unemployment, sickness, injury at work and old age was introduced. The Workmen's Com-

1 But it was still similar to the tort system in some respects. See Atiyah, *Accidents, Compensation and the Law* (London: Weidenfeld and Nicolson, 1970) 341-350.

2 *Social Insurance and Allied Services*, Report by Sir William Beveridge (1942; cmd 6404).

pensation Acts, in particular, were replaced by the National Insurance (Industrial Injuries) Act 1946 which has now been supplanted by the Act of 1965, amended in 1967 and by the Social Security Act 1973.[3]

Although the *Beveridge Report* described the workmen's compensation scheme as being 'based on a wrong principle' and 'dominated by a wrong outlook,'[4] Hong Kong passed its own Workmen's Compensation Ordinance in 1953, seven years after the United Kingdom abandoned it. The Ordinance followed the pattern of a draft Model Ordinance based on the English Workmen's Compensation Acts of 1897, 1906 and 1925, which was circulated by the Colonial Office to all colonial governments in 1937. It also incorporated features of the Kenya and Ceylon legislation and provisions resulting primarily from recommendations made by the Labour Advisory Board. It has undergone many amendments since, with a gradual extension of its scope of operation.[5] While further improvements of the Ordinance are likely,[6] it seems that the basic principle of workmen's compensation will not in the foreseeable future be abandoned in favour of alternatives such as contributory insurance, the unworkability of which in Hong Kong being among Government's strongest convictions. An investigation into the judicial performance of the Hong Kong Courts in this area may therefore be worthwhile.

A tremendous volume of English case law in this subject has been generated in some forty years of fierce litigation between workers backed by trade unions and employers supported by insurance companies. In comparison, Hong Kong cases amount to no more than a drop in the ocean. This can perhaps be attributed to the success of the Labour Department[7] in carrying out its quasi-arbital function in handling claims, with the result that the vast majority of claims are settled by agreement, and those which spill over into the courtroom are few.

For the purposes of this dissertation, all reported cases on workmen's compensation in the Hong Kong Law Reports and the District Court Law Re-

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3 For this system, see generally KW Wedderburn, *The Worker and the Law* (Penguin Books, 2nd ed 1971); Olga Aikin and Judith Reid, *Employment, Welfare and Safety at Work* (Penguin Books, 1st ed 1971).

4 The disadvantages of the workmen's compensation system are set out in paras 79 and 80 of the Beveridge Report (ibid). The major ones are : (1) The scheme rested in the final resort on the threat or reality of litigation, so that 'A misfortune which is often not in any sense the fault of the employer and which he could not have prevented is treated by methods applicable to fault.' (2) There was no machinery for assisting an employee in presenting his claims unless he was backed up by his trade union, so that employees were often in a weaker bargaining position in the settlement of claims. (3) The scheme did not provide complete security unless employers were obliged to insure. (4) The scheme failed in many cases to secure maintenance of necessary income, because of the right to settle for a lump sum; and in the process of bargaining about a lump sum, the injured worker was discouraged from recovery or from taking any kind of work lest he should prejudice his bargain. (5) Demarcation disputes were inevitable if compensation for disabilities had to be provided from different funds in the hands of different companies or authorities, according to what might often be a difficult decision as to causation. (6) The costs of administering the scheme were higher than might be expected of a compulsory insurance scheme, for example. (7) The scheme did not do enough to promote what ought to be its most important objective – rehabilitation and the return of the man to his maximum productive capacity as soon as possible.
For the validity of these criticisms as they apply to Hong Kong, see Joe England and John Rear, *Chinese Labour Under British Rule* (Hong Kong: OUP, 1975) 201-204.

5 For a history of the Ordinance, see England and Rear, op cit, 195-196.

6 The Labour Department has set up a working party in February 1978 to review the existing Ordinance, and a report was to be submitted to the Commissioner for Labour in December 1978. In the near future, some significant changes in the Ordinance can therefore be expected, such as the coverage of all employees, the general introduction of compulsory insurance, improvements in the method of assessing compensation to take into account relevant factors in assessing the loss of earning capacity, substantial increases in the maximum limits of compensation payable, and practical measures to speed up the payment of compensation. (South China Morning Post, Nov 17, 1978, at 12).

7 The Workmen's Compensation Unit of the Department is responsible for dealing with workmen's compensation cases. A claimant only goes to the District Court when the parties fail to reach an agreement for compensation in accordance with the Ordinance, which is also approved by the Commissioner for Labour. Appeal lies to the Court of Appeal.

ports have been surveyed, as well as a few unreported cases mentioned in the Hong Kong Law Journal. The survey reveals that the main problem areas are (i) what constitues a contract of service so as to bring a claimant within the definition of 'workman' in section 2(1) of the Ordinance,[7a] and (ii) under what circumstances in relation to the employee's injury are the requirements of section 5 satisfied so that the employer's liability arises.[8]

While the second problem area is peculiar to workmen's compensation as far as Hong Kong is concerned, the significance of the first one, that is, the identification of a contract of service, goes far beyond this particular area of the law. Classification is relevant to questions of vicarious liability, the applicability of legislation protecting workmen's interests, such as the Employment Ordinance,[8a] priorities in insolvency situations,[9] the payment of salaries tax,[10] and common law implied contractual terms. In Britain, where social legislation is more highly developed, the use of the concept of the contract of service is even more widespread.[11]

The purpose of this dissertation is to examine in some detail how the Hong Kong Courts have dealt with the issues involved in these two problem areas – the approaches they have used, the ways in which they have applied the largely imported English case law, the solutions they have come up with. The merits of the individual decisions will be discussed, and the state of the law as a whole summarised. Special attention will be paid to the doubtful or unsatisfactory aspects, and possibilities of future developments will be investigated.

II. THE CONTRACT OF SERVICE

Section 2(1) of the Ordinance

This section defines a 'workman' as any person who has entered into or works under a contract of service or apprenticeship with an employer in any employment, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing, the definition being subject to some provisos and a special section dealing with workmen employed under the Crown.

How then is a contract of service established in a particular facts-situation? Although the precise reasoning process has seldom been made explicit in judgments, it is submitted that it should be as follows. In order to establish a contract of service between two parties, it must first be shown that a contract exists between them, which means that basic elements like offer and acceptance must be present.[12] This seems too simple to deserve mention, but it was nothing other than the failure to isolate and consider this first issue that resulted in vague reasoning and confused judgments in many cases.[12a] Having satisfied itself as to the existence of a contractual nexus between the two parties, the next step for the Court is to ascertain the rights and obligations of the parties under the contract. Where the contract is express, this is mainly a question of construction. Where it is implied, the court may have to look more into the actual behaviour of the parties. The third and final step is to decide, according to the relevant tests and criteria of contracts of service, whether

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7a Cap 282, LHK, 1974 ed.

8 In the area of workmen's compensation, there are ten cases in the Hong Kong Law Reports and 28 in the District Court Law Reports. Two of the former and two of the latter are on (i), and ten of the latter 28 are on (ii).

8a Cap 57, LHK, 1977 ed.

9 The relevant legislative provisions are s 265 of the Companies Ordinance (Cap 32, LHK, 1975 ed) and s 38 of the Bankruptcy Ordinance (Cap 6, LHK, 1977 ed). The existence of a contract of service is essential to a claim under these sections: *Re General Radio Co.* [1929] WN 172, *Re CW & AL Hughes* [1966] 2A11 ER 702.

10 See the Inland Revenue Ordinance (Cap 112, LHK, 1975 ed).

11 See *Employment, Welfare and Safety at Work*, op cit, 22-26; RA Ribeiro, 'The Law and Practice of the Labour Tribunal - Part I' (1978)8HKLJ 5, 14, fn 46.

12 It is well-established that the rules applicable generally to the formation of contracts apply also to the formation of contracts of service: See FR Batt, *The Law of Master and Servant* (5th ed 1967) 51; DW Crump, *Dix on Contracts of Employment* (4th ed 1972) 3.

12a Especially in the 'gang' cases (see below, esp fn 46).

the particular contractual relationship before the Court is one of service.

The tests and criteria used by the English Courts in this classification problem have been well-documented, and it is not expedient to go over them here.[13] It suffices to re-emphasize that the modern tendency is to take into account all possibly relevant factors and to reject any single test as conclusive. To quote again a much-quoted passage, 'Clearly not all of these factors will be relevant in all cases or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should in any given case be treated as the determining ones. The plain fact is that in a large number of cases the Court can only perform a balancing operation, weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction. In the nature of things it is not to be expected that this operation can be performed with scientific accuracy.'[14] What follows is an examination of what the Hong Kong Courts have done in this area.

Yuen Mei v Hop Sze Machine Shop:[15] *Employee or independent contractor?*

This relatively simple case serves as a good

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13 See Atiyah, *Vicarious Liability in the Law of Torts* (London: Butterworths, 1967) 31-95; Willis and Everett, *Willis' Workmen's Compensation* (36 ed 1944) 160-169; also see standard textbooks in tort and labour law for brief summaries.

The following is an attempt to summarise the position:

The traditional formula used by the Courts to mark the distinction between a servant employed under a contract of service and an independent contractor engaged under a contract for services is that of 'control'. (For an early statement of the control test, see *Yewens* v *Noakes* (1880) 6 QBD 530, 532-3, per Branwell B. For its development, see Atiyah, op cit, 40-4.) Thus it was supposed that whereas an independent contractor would only be told 'what' to do, a servant was subject to his master's control as to 'what' to do as well as 'how' to do it. The test of 'control' was developed in an age when the ownership of the means of production coincided with the possession of technical knowledge and skill in a simple industrial society. (See O Kahn-Freund, 'Servants and Independent Contractors' (1951) 14 MLR 504) Under the modern conditions of professional training and specialisation, this test has become a legal fiction rather than a technical reality.

The Courts have responded to the new socio-economic reality in at least two ways. First, attempts have been made to reinterpret the 'control' test so as to focus on the incidental features of the employment such as the 'when' and the 'where' of the work instead of the 'how'. (eg *Walker* v *Crystal Palace Football Club Ltd* [1910] 1 KB 87; *Zuijis* v *Wirth Brothers Property Ltd* (1955) 93 CLR 561; *Mersey Docks and Harbour Board* v *Coggins & Griffith (Liverpool) Ltd* [1947] AC 1) Secondly, other new tests have been introduced. These include 'integration into the alleged employer's business' (Denning LJ in *Stevenson, Jordan & Harrison Ltd* v *McDonald and Evans* [1952] 1 TLR 101, 111; Lord Wright in *Montreal Locomotives Works* v *Montreal* [1947] 1 DLR 161, 169), the 'entrepreneurial' test (Cooke J in *Market Investigations Ltd* v *Minister of Social Security* [1968] 3 All ER 732, 737) and the 'economic realities' test (Mackenna J in *Ready Mixed Concrete (South East) Ltd* v *Minister of Pensions and National Insurance* [1968] 2 QB 497). These are not clearly distinct tests, however, neither can they be applied universally. In the final analysis, a Court must fall back on the multiciplicity of factors and perform what Atiyah calls the 'balancing operation'. The complexity of life makes judicial certainty impossible, and, indeed, undesirable.

The major factors that have been held relevant in previous cases are grouped and listed here:

A Factors relating to the basic structure of the contract:
   1 the mode of formation of the contract ie power of appointment or selection
   2 the mode of discharge of the contract ie power of dismissal or suspension
   3 the duration of the contract
   4 the mode of remuneration
   5 the terminology of the contract

B Factors relating to the performance of the services:
   1 control as to manner, time, place or other incidental features of work
   2 the ownership of the place at which the services are performed
   3 the ownership of the tools or equipment with which the services are performed
   4 delegation of the work and employment of assistants

C Factors relating to the business and financial positions of the parties:
   1 integration into the business or organisation
   2 chance of profit and risk of loss
   3 responsibility for management and investment

14 Atiyah, ibid, 38, judicially approved in Hong Kong by Rhind DJ in *Lee Chi-fai* v *Sunrise Knitting Factory Ltd* [1973] DCLR 61 and by Blair-Kerr SPJ in *Wong Po-sin* v *New Universal Paper Co Ltd* [1973] HKLR 59.

15 [1961] DCLR 193.

starting-point for our discussion. A engaged B[16] to polish a quantity of plough points at a particular rate, the job to be completed before a certain date, which was about three months later. The work was to be done at A's machine shop, using A's equipment. One friend of B's also helped in the work. Being satisfied that A did not interfere with B or tell him how to do the job, that as far as A was concerned B could employ all the workers he wanted to do the job, and that the job was left entirely to B in the way he pleased and in his own time, provided that it was completed by the agreed date, Wylie DJ held that B was not a 'workman' within the Ordinance by applying the 'control' test.[17] The unfortunate result was that the dependants of B, who was killed in an explosion of an abraisive flint while working, could obtain no compensation.

This is a marginal case, and it is difficult to argue convincingly that the decision was wrong. However, it may be pointed out that it is clearly unsatisfactory in some respects. The evidence was scanty,[18] but even on the facts found by the judge, the decision was far from flawless. The reasoning in the use of the 'control' test was unduly telescopic. The learned judge failed to draw a distinction between the actual exercise of control and the right of control. Only the latter is crucial, though the former may constitute evidence on which to infer the existence and extent of the latter. As Lord Porter said in *Mersey Docks and Harbour Board* v *Coggins and Griffith (Liverpool) Ltd,*[19] 'the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give orders as to how the work should be done.' Therefore the fact that (ie what the judge found as a fact) A 'had no control and indeed no supervision over the deceased as to how the work was to be done,' which seemed to Wylie DJ to be conclusive, was not really so. Moreover, 'the nature of the control which is required in order to bring the employment within the scope of a contract of service varies almost infinitely with the general nature of the duties involved.'[20] There seemed to be not much scope for the exercise of control in the polishing of plough points, especially if B was skilled in this job.

It is doubtful whether the engagement of his friend by B to help with the work should be considered a factor weighing heavily against a contract of service in this case. It is reasonably clear that an essential feature of a contract of service is the performance of at least part of the work by the servant himself, and therefore a complete delegation of the work is inconsistent with such a contract,[21] but the present case does not fall within the latter proposition.[22] The only factor which was really against the claimants was probably that A could not control the time for which B was to work. Yet two other factors pointing in the opposite direction were that B was to work at A's premises with A's equipment.[23] B died as a result of nothing other than the explosion of part of the equipment. If these had been given due consideration by the Court, the decision might will have turned the other way.

Given the unhappy outcome of the *Yuen Mei* case, the decision by the same Court in *Lee Chi-fai* v *Sunrise Knitting Factory Ltd*[24] is especially welcome. In this case, A, a manufacturer of wollen garments, engaged B, a machinist skilled in the making of button holes and sewing in buttons, to work at

16 B had known A since three years before when he worked for A on one occasion. There was no evidence that B was in regular employment in A's machine shop.

17 He relied on the statements of the test in *Underwood* v *T Perry and Son* (1922) 15 BWCC 131 and *Simmons* v *Health Laundry Co* [1910] 1 KB 543. See Willis, op cit, 163-4.

18 Eg it was not clear when exactly did B start to work at A's shop. The agreement was made some time in April 1961. The date for completion was July 8, 1961. We know that B's friend went alone to the shop in June 15 to work, and B only came on June 18. But had B worked there before June 15? If he had, what were his hours of work? These relevant facts were missing.

19 [1947] AC 1, 17.

20 per Megaw J, *Amalgamated Engineering Union* v *Minister of Pensions and National Insurance* [1963] 1 WLR 441, 453-4.

21 See Atiyah, op cit, 59-61; *Hill* v *Beckett* [1915] 1 KB 578; *Robinson* v *Hill* [1910] 1 KB 94.

22 See also *Lee Chi-fai* v *Sunrise Knitting Factory Ltd* [1973] DCLR 61, which is discussed below. Rhind DJ summarised the position as follows: 'It is clear from the reported cases that to be a servant a person must be personally obligated to perform at least part of the work himself but he will not automatically lose that status merely because he delegates part of the work.' (at 71)

23 *Simmons* v *Heath Laundry Co* [1910] 1 KB 543, 550; *Binding* v *Great Yarmouth Port and Haven Commissioners* (1923) 16 BWCC 28; Atiyah, op cit, 63-5.

24 [1973] DCLR 61.

A's factory, using A's machines and thread. No direction was given by A on how the work was to be carried out, the work being done in a separate partitioned part of the factory. B engaged two or three assistants of his own choice to help him. Payment was at piece-work rates, and B paid his assistants seperately. B worked the same ordinary factory hours as A's other piece-workers, and was paid for five public holidays a year. Rhind DJ inferred that 'it was contemplated that (B) would do a substantial part of the work.' 'Having considered all the facts in the light of all the various tests and having balanced all the factors involved,' he arrived at the conclusion that B was employed by A under a contract of service.

Although *Lee Chi-fai* is a case on the Employment Ordinance,[25] it is interesting to compare the District Court's approach to the identification of a contract of service in this case with that in *Yuen Mei*. In *Lee Chi-fai* the Court took into account a wider range of authorities,[26] going beyond those decided under the old Workmen's Compensation Acts, and showed a fuller appreciation of the variety of tests in this area.[27] It has recognised that 'control' is no longer a sufficient or even necessary condition for the existence of a contract of service, however important a position it assumed in the past,[28] and it has lent its support to the re-interpretation of the 'control' test so that 'it is not so much the master's control of the "how" which matters but his control of the "where" and the "when".'[29] The judgment contains the most thorough and balanced treatment of the subject that has ever appeared in the law reports of Hong Kong.

The two cases can, of course, be distinguished on their facts and therefore reconciled. The contract in *Lee Chi-fai* was of a more permanent nature, and there were regular hours of work as well as paid public holidays. Control of the time of work is therefore a crucial factor. But should this be regarded as so determinative? Now that a composite test has been adopted by the Court, it can perhaps go forward to build up a more systematic approach[29a] in the consideration of the various factors,[30] always bearing in mind the employment situations frequently found in Hong Kong, and the particular purpose for which classification is required. It is submitted that, for the purposes of workmen's compensation, the place of work and the provision of equipment should be regarded as major factors in cases like *Yuen Mei*, since these two are at least permanent features in the context of some light industries with a fluctuating demand for labour supply and a highly mobile labour pool. Whatever course the Court takes in future, however, it is hoped that it has outgrown the vague and narrow considerations of *Yuen Mei* once and for all.[31]

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25 Cap 57, LHK, 1977 ed.

26 Such as *Montreal Locomotive Works Ltd* v *Montreal* [1947] 1 DLR 161; *Stevenson, Jordan & Harrison Ltd* v *McDonald and Evans* [1952] 1 TLR 101; *Bank Voor Handel on Scheepvaart NV* v *Slatford* [1952] 2 All ER 956; *Ready Mixed Concrete (South East) Ltd* v *Minister of Pensions and National Insurance* [1968] 1 All ER 433; *US* v *Silk* (1946) 331 US 704; *Market Investigations Ltd* v *Minister of Social Security* [1968] 3 All ER 732. Some of these cases, of course, were decided after *Yuen Mei*.

27 Such as the 'integration' test, the 'entrepreneurial' test and the 'economic realities' test.

28 'Control of how the work should be done seems to have been relegated to the level of being merely one of the factors to be taken into account in deciding whether a master-servant relationship exists. It is still important but not determinative.' [1973] DCLR 61, 67.

29 Ibid, at 68.

29a It must be recognised, however, that a *perfectly* systematic approach is quite impossible even in theory and certainly unrewarding in practice, because of the complexity of the factors involved and the existence of so many different criteria for so many different contexts.

30 See fn 13 above.

31 From the information provided by an officer of the Workmen's Compensation Unit of the Labour Department, who was interviewed for the purposes of this dissertation, the guidelines adopted by the Unit in the preliminary determination of whether a victim is a 'workman' are mostly based on the 'control' test. They relate to the giving of working orders, supervision during work, rectification of mistakes and remuneration. The approach is therefore rather traditional, and is closer to *Yuen Mei* than *Lee Chi-fai*. However, the Unit only gives advice to the claimants, and even if it is of the opinion that there is no contract of service in a particular case, claimants are informed of the non-conclusive nature of the Unit's opinion and, if they intend to pursue their claims, referred to the Legal Aid Department or advised to apply to Court directly. Thus the Court would still have abundant opportunities to revise and develop the law.

The trilogy of 'gang' cases

In each of the two cases above, there is no doubt that a contractual relationship exists between the parties. The only problem is to decide what kind of contract it is – whether it is a contract of service or a contract for services. There is, however, a special situation in which the major difficulties centre around whether there is a contract between the parties at all. This is what will be called here the 'gang' problem.

The problem is illustrated by three local cases[32] with the same basic pattern of facts. A, which is a firm, wants to effect delivery of some goods to certain addresses, and this is part of the firm's business. A engages B to do the job. B recruits C and D to help him. A is to pay B a lump-sum for the work, which B shares with C and D. C is injured or killed in the course of doing the work. Compensation is sought from A. The problem arises as to whether a contract of service exists between A and C, who have never come into direct contact.

In the earliest case, *Chan Shek-kiu* v *Hip Shing Printing Press,*[33] A was not aware of the identity of C or D, but he was 'well aware that other coolies would of necessity work with (B) in carrying out (A)'s instructions.'[34] A also gave money to B to buy a rope to effect the delivery. In *Wong Man-luen* v *Hong Kong Wah Tong Stevedore Co,*[35] the second case, the facts found by the Full Court were that A asked B to go along with C to effect the delivery and told B that they should get two more men to assist them and that they should hire the necessary lorries on his behalf. The cost of hiring the lorries was included in the remuneration. Both B and C had worked for A many times before. In the last case, *Wong Po-sin* v *New Universal Paper Co Ltd,*[36] A knew that B could not do the work by himself and had to obtain other labourers, but nothing was said about this. A neither knew the number nor the identities of the others. Planks were supplied by A, a trolley used was owned by the labourers. After disbursements on the cost of hiring lorries, paying ferry fares for the lorries, and purchasing tools, the remuneration, which was given according to the quantity of goods delivered, was divided equally between the men involved. B and C had worked for A for at least one month before the date of the accident.

In the first case the District Court held that C was A's employee.[37] In the second, the District Court held that C in that case was not, but the decision was reversed by the Full Court. In the third, the District Court found that C was not A's employee, and this time the Full Court upheld the decision.

This 'gang' situation is a common one in Hong Kong. As Pickering J pointed out in *Wong Man-luen,* 'A feature of the labour situation in Hong Kong ..... is the existence of a body of labourers the members of which, though not employed on a permanent basis by any firm or individual, are to be found, day by day, in specific locations holding themselves available for employment by any employer who has work for them to do.'[38] In fact it is not only limited to coolies engaged in delivering goods, but is also a widespread phenomenon in the manufacturing and construction industries.[39] A full examination of what exactly is the law for this area in Hong Kong is therefore desirable. And the trilogy of cases above is all we have to start with.[40]

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32 See John Rear, 'Self-Employment in the Building Industry' (1972) 2 HKLJ 151. The article contains a summary of the facts of the three cases, viz, *Chan Shek-kiu* v *Hip Shing Printing Press* [1965] DCLR 93; *Wong Man-luen* v *Hong Kong Wah Tung Stevedore Co* [1971] HKLR 390; *Wong Po-sin* v *New Universal Paper Co Ltd* [1973] HKLR 59. It was written before the last case was heard by the Full Court.

33 [1965] DCLR 93.

34 Ibid, at 97.

35 [1971] HKLR 390.

36 [1973] HKLR 59.

37 [1971] HKLR 390, 392.

38 Ie employed under a contract of service.

39 See John Rear, 'Self-Employment in the Building Industry' (1972) 2 HKLJ 150; RA Ribeiro, 'The Law and Practice of the Labour Tribunal - Part I' (1978) 8 HKLJ 5, 16. Also see generally Atiyah, op cit; KW Wedderburn, *The Worker and the Law* (Penguin Books, 2nd ed 1971); *Report of the Committee of Inquiry under Professor Phelps Brown* (1968; cmnd 3714). The cases of *Yuen Mei* and *Lee Chi-fai* considered above also illustrate this phenomenon.

40 *TK Shen Construction Co* v *Yip Pak-ying,* the subject-matter of Mr RA Ribeiro's case commentary entitled 'Workmen's Compensation and Informal Work Practices' (1974) 4 HKLJ 65, also touched upon this problem, but the Full Court did not explain its reasoning in detail and the decision does not throw much light on the problem. But see fn 46 below.

Can the three decisions be reconciled? It is submitted that they can, though not necessarily by using the arguments propounded by the judges. The resultant state of the law seems to be as follows. In a 'gang' situation consisting of at least A, B and C (A being the firm or person contracting for services, B being the 'leader' of the 'gang', C being a member of B's 'gang'), there are four distinct legal possibilities:[41]

1 B is A's employee, who as a foreman or a superior servant with authority to engage inferior servants engages C on A's behalf, so that C is also A's employee.

2 B is A's employee and C is B's employee but not A's. This is an unusual but not impossible arrangement.[42]

3 B is an independent contractor, C is his employee.

4 B and C (and all other members of the 'gang') are independent contractors vis-a-vis A, and they are partners inter se, or there is no contractual relationship between them. (However, B and C may be partners inter se and at the same time satisfy possibility 1, ie they are jointly employed under a contract of service.)

The starting-point in analysis is therefore whether B is A's employee.[43] The major test to be applied in this respect is that of 'control'. In the case of delivery of goods, this test is not satisfied and a contract of service cannot be established between A and B unless A gives sufficiently detailed instructions to B in regard of the hiring of other labourers and transport, for example, by specifying the number of men to be recruited for the job and explicitly mentioning that the necessary lorries should be hired on A's behalf.[44] If it is found that B is not A's employee, then, a fortiori, C cannot be A's employee.[45] If, on the other hand, B is A's employee, then the fact that A is aware that B will engage some others to help him may support the existence of implied authority on B's part to employ C on A's behalf, even though A may not know of C's identity beforehand.[46]

It is further submitted that this present state of the law is not satisfactory. Why should the success or failure of a workmen's compensation claim be made to depend on a few words used orally by the employer of services (ie A in our terminology) – whether he indicates the number of workers to be recruited, whether he says that vehicles are to be hired on his

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41 See Atiyah, op cit, 93, quoted by the Full Court in *Wong Po-sin* [1973] HKLR 59, 77.

42 Loc cit.

43 In *Chan Shek-kiu* [1965] DCLR 93, this point was presumably conceded by A. On p 95 there appears this sentence, 'It is common ground that the second respondent (B in our terminology) is not an employee of the first respondent firm (A in our terminology).' Reading the judgment as a whole, however, and also taking into account the fact that it would be absurd if B was not A's employee and was therefore an independent contractor but C was A's employee (which was so held by the Court), the word 'not' in the sentence is most probably printed there by mistake and should be deleted. Mr John Rear in his article also assumed that B was A's employee, so that possibility 1 was satisfied: (1972) 2 HKLJ 150, 158.

44 It is submitted that whether this has been done is the true distinction between *Wong Man-luen* and *Wong Po-sin*. See especially Pickering J's judgment in the latter case, [1973] HKLR 59, 79, where he distinguished the two cases and said that he saw no reason why the former case was wrong, given the Full Court's finding of fact in that case.

45 If B is not A's employee, he must be an independent contractor. This means that the situation falls within either possibility 3 or 4, in none of which will C be A's employee.

46 It is submitted that this is the ratio decidendi of the decision in *Chan Shek-kiu*. As pointed out in fn 43, it was conceded in that case that B was A's employee, so that the only real question was whether B was given implied authority to engage C on A's behalf. *TK Shen Construction Co* v *Yip Pak-ying* (1974) 4 HKLJ 65 also supports this principle. See the part of the judgment quoted at 67, and also Mr Riberio's view on Chan's case at 69, which lends some support to the former submission.

It is further submitted that this principle of implied authority to engage servants on one's behalf is an answer to the problem of the existence of contractual nexus posed by Mr Ribeiro at 68-9. An offer made by B to C is made on A's behalf, and its acceptance results in the formation of a contract of service between A and C. In other words, B performs an agency function in bringing A and C into contractual relationship. For the relationship between the concepts of agency, servant and independent contractor, which is a difficult topic, see Fridman, *The Law of Agency* (4th ed 1976).

behalf? Is it not enough that he knows that a few more will as a matter of necessity or practice be engaged, and pays a lump-sum for them to divide among themselves? Surely the substance of the transaction should be considered rather than mere spoken words which may be used quite casually. It is therefore highly desirable that the Court of Appeal should throughly review the position in future.

Meanwhile, it may be suggested, with respect, that while *Wong Po-sin* is the last of the trilogy of cases and was decided by the Full Court, it is by no means the most convincing authority. Firstly, the Court attempted to distinguish its previous decision in *Wong Man-luen,* and in doing so introduced a strained and artificial distinction according to the arguments in the last paragraph. Secondly, although Blair-Kerr SPJ described *Bobbey* v *Crosbie,*[47] which Pickering J relied on heavily in *Chan Shek-kiu,* as 'a decision which has assumed an importance in Hong Kong in matters relating to workmen's compensation which, with respect, I do not think it merits,'[48] the Court did not express any views as to whether *Chan Shek-kiu* could stand on its own rights.[49] Thirdly, the Court concentrates its attention on the contractual relationship between A and C,[49a] whereas the most logical approach should have been, as submitted above, to consider first whether a contract of service existed between A and B.[50] Finally, although the Court paid lip service to the more modern tests such as 'economic realities,' 'integration into the business' and the 'entrepreneurial' test, the case was decided chiefly by the 'control' test, and even in applying this the nature of the job and the scope for control did not seem to have been fully considered. In comparison, Pickering J's approach in *Wong Man-luen* is more intellectually attractive, and the following passage in his judgment offers a more useful guide for the Court of Appeal in its future development of the law:

> 'In *Market Investigations Ltd* v *Minister of Social Security,*[51] it was held that control, although a matter for consideration, was not decisive, and the fundamental test in determining whether a person was performing services under a contract "of service" or "for services" was whether the person engaged to perform those services was performing them as a person in business on his own account and thus under a contract for services. As we see it the status of being in business on one's account implies the possibility not only of profit but also of loss and when this test is applied to the appellant's situation in relation to the work which he was performing at the time of his injury, it is impossible to perceive the possibility of financial loss accruing to him. His contract was to deliver certain goods with the assistance of vehicles and additional coolies and to be paid for that service upon its conclusion by reference to the cost of hiring the vehicles and to the number of cases transported by the gang of coolies. No possibility of loss existed and applying this modern test it would appear that both from the viewpoint of the exercise of control by the respondent firm and of the method of remuneration adopted that the appellant was in fact a workman rather than an independ-

47 (1916) 85 LJKB 239.

48 [1973] HKLR 59, 61. The question in *Bobbey* v *Crosbie* was whether there was any evidence to support the County Court judge's finding that there was a contract of service. The House of Lords held that there was 'material which justified' the judge's finding. See Atiyah, op cit, 33-4, for the danger of citing appellate decisions in English workmen's compensation cases.

49 As pointed out in fn 43, *Chan Shek-kiu* can be regarded as authority for an important proposition, which also finds support in *Shen Construction.*

49a Nowhere in the judgments did the Full Court turned its attention to the nature of the contractual relationship between A and B.

50 The applications of these factors to a person directly appointed and employed such as B and to one indirectly appointed and employed such as C may very well be different.

51 [1969] 2 WLR 1.

52 [1971] HKLR 390, 400. It should also be noted that Yang DJ in *Wong Po-sin* also applied this 'entrepreneurial' test, but reached a result opposite to that in *Wong Man-luen* because he found that there was clearly a degree of financial risk involved and a slight degree of business sense and management required in that case. This aspect was not considered by the Full Court when the case went on appeal. See John Rear, 'Self-Employment in the Building Industry' (1972) 2 HKLJ 150, 161-2.

ent contractor.'

The failure to establish a contract of service may not be fatal to a workmen's compensation claim, since by section 24 of the Ordinance,[53] a workman employed by an independent contractor may also claim from the principal.[54] But that section is subject to a number of additional requirements and it is not therefore always possible for a victim who falls outside section 2 to avail himself of section 24.[55] Moreover, as pointed out at the beginning of this dissertation, the classification problem is by no means confined to workmen's compensation. The necessity for a comprehensive review and authoritative formulation of the law by the Hong Kong Courts in this area cannot be too strongly stressed, for the confused and unsatisfactory state of the present case law necessarily results in uncertainty in a wide range of situations and unpredictability of judicial behaviour, which in turn breed injustice. This assumes, of course, that the law in this area can be improved, and made more logical and rational. It is submitted that, given the present scanty authorities in Hong Kong, there exists much room for such improvement. In the final analysis, however, it cannot but be admitted that logic is not invincible, and when it has done its utmost, intuitive judgments have to be relied on. In this latter context, the executive can help by appointing better judges, and the legislature by enacting general definitions, formal requirements and legislative presumptions.[55a]

III. PERSONAL INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT

Section 5(1), (2), (6)

Subject to the other provisions of the Ordinance,[56] an employer is liable to pay compensation to his workman if personal injury by accident arising out of and in the course of the employment is caused to the workman,[57] and the injury results in partial incapacity of a permanent nature or incapacitates the workman for a period of at least three consecutive days from earning full wages at the work at which he was employed,[58] provided that no compensation is payable in respect of any incapacity or death resulting from a deliberate self-injury,[59] or on proof that the injury is attributable to the serious and wilful misconduct of the workman, or is deliberately aggravated by the workman, unless the injury results in death or serious incapacity, in which case the Court on consideration of all the circumstances may award compensation.[60]

There are two 'deeming' provisions. An accident arising in the course of a workman's employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment.[61] An accident to a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the workman for the purposes of and in connexion with his employer's trade or business.[62]

The law on this section is not so unsettled or

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53 Cap 282, LHK, 1974 ed.

54 According to the source in the Workmen's Compensation Unit, the 'gang' situation does not in practice create problems in most cases because of the existence of s 24, especially where construction site accidents are concerned (because s 24(5) would not create difficulties in such cases). Problems do arise, however, in the application of the Employment Ordinance (Cap 57, LHK, 1977 ed).

55 See RA Ribeiro, 'Workmen's Compensation and Informal Work Practices' (1974) 4 HKLJ 65, especially 70-1, 73, and Rear's article, ibid. s 24 was discussed in *Chan Shek-kiu* [1965] DCLR 93, 97-100. For the interpretation of s 24, see Willis, op cit, 210-222.

55a Eg employers can be required to state in writing their views of the contracts with persons they engage, ie whether in their views the contracts are contracts of service or contracts for services. This can give rise to a presumption in classification which will be rebutted if it is shown that the substance of a contract indicates the contrary.

56 Especially those in s 5 other than in subsections (1), (2), (6).

57 s 5(1).

58 s 5(1), proviso (a).

59 s 5(2).

60 s 5(1), proviso (b).

61 s 5(6).

62 s 5(1).

difficult to apply as in the identification of contracts of service in marginal cases, and nearly all aspects have been analysed in detail in English cases on the corresponding provisions in the Workmen's Compensation Acts[63] and the National Insurance (Industrial Injuries) Acts.[64] What follows is a general discussion of the principles that have been used and applied by the Hong Kong Courts,[65] or, more accurately, the District Court, which decided all the reported cases in this area.

'Accident'

The definition of the word 'accident' that has been most frequently used in Hong Kong[66] is that of Lord Macnaghten's in *Fenton* v *J Thorley & Co Ltd.*[67] The word 'accident' is used 'in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed.'[68] The mishap or occurrence must be looked at from the workman's standpoint, and, whatever its cause or origin, it will be accidental unless it was designed by the workman himself.[69] Sudden physiological changes have thus been held by the District Court to be 'accidents'. Examples are a stroke causing fainting,[70] a rupture of aortic aneurysm causing sudden profuse bleeding from the nose and then unconsciousness,[71] a heart failure due to insufficient blood supply,[72] and a collapse due to a ruptured arch of aorta,[73] all resulting in death shortly afterwards.[74]

'Accident' may also include occurrences intentionally caused by others.[75] In *Tsang Yuk-chung* v *China Fleet Club,*[76] an assault by a fellow worker was held to be an accident. So also was the murder in *Wong Gun-fook* v *Mrs JLG McLean.*[77] 'Although it might seem strange that this word should include an occurrence intentionally caused by others, it is clear that this was the construction which the Courts in England placed on the corresponding section of the English Workmen's Compensation Acts and on the corresponding section of the National Insurance (Industrial Injuries) Act 1946.'[78]

Suicide is self-inflicted and is therefore not generally[79] within the meaning of 'accident'.[80] There is, however, a presumption against suicide, and the Hong Kong case of *Madam Fan See-yuk* v *Ocean Tramping Co Ltd*[81] is clear authority for the proposition that an applicant for workmen's compensation can take advantage of this presumption in discharging the onus of proving death by accident so that the burden of rebutting this presumption by convincing

63 See Willis, op cit, 6-158.

64 Whereas workmen's compensation was dealt with in England by the ordinary Court system, under the National Insurance scheme disputes are decided by tribunals specially set up under the Acts. See KW Wedderburn, op cit, 287-8, for the system. Some decisions of the Commissioners on the Acts are cited in *Halsbury's Laws of England,* 3rd ed, vol 27.

65 There are many more reported cases in Hong Kong in this area than in that of the contract of service. Moreover, according to the source in the Workmen's Compensation Unit, more disputes occur over this area in practice than in that of the contract of service.

66 *Ho Woon-king* v *Hong Kong & Kowloon Wharf & Godown Co Ltd* [1965] DCLR 265, 270; *Wong Yau-ho* v *Hei Hing Tea House* [1966] DCLR 124, 126; *Yip Ho* v *Hong Kong & Kowloon Wharf & Godown Co Ltd* [1969] DCLR 1, 4; *Chow Mui* v *Chow Cheuk-chung* [1970] DCLR 94. 101; *Tsang Yuk-chung* v *China Fleet Club* (1973) 3 HKLJ 350, 351; *Wong Gun-fook* v *Mrs JLG McLean* [1973] DCLR 75, 77.

67 [1903] AC 443.

68 Ibid, 448.

69 *Madam Fan See-yuk* v *Ocean Tramping Co Ltd* [1974] DCLR 1, 4, where Power DJ adopted Willis' statement at Willis, op cit, 9.

70 *Ho Woon-king* v *Hong Kong & Kowloon Wharf & Godown Co Ltd* [1965] DCLR 265.

71 *Wong Yau-ho* v *Hei Hing Tea House* [1966] DCLR 124.

72 *Yip Ho* v *Hong Kong & Kowloon Wharf & Godown Co Ltd* [1969] DCLR 1.

73 *Chow Mui* v *Chow Cheuk-chung* [1970] DCLR 94.

74 For similar English decisions, see Halsbury, op cit, 804, fn (1).

75 *Anderson* v *Balfour* [1910] 2 IR 497 (attack by poachers on gamekeeper); *Nisbett* v *Rayne and Burn* [1910] 2 KB 689 (murder of bank cashier); *Trim Joint District School Board of Management* v *Kelley* [1914] AC 667 (murder of schoolmaster by pupils).

76 (1973) 3 HKLJ 350.

77 [1973] DCLR 75, (1973) 3 HKLJ 350.

78 per Hopper DJ, *Wong Gun-fook* [1973] DCLR 75,77.

79 ie unless there is, as a result of an accident or of a shock resulting from an accident, a condition of nervous or mental derangement which leads to a man committing suicide. See fn 80 below.

80 This is so quite independent of s 5(2) of the Ordinance. See Halsbury, op cit, 802, and fns (r), (s) there.

81 [1974] DCLR 1

evidence rests on anyone suggesting suicide.[82] This was a case where a seaman disappeared at sea and his widow's claim for compensation was allowed.

'Arising ..... in the course of the employment'

In *Lai Fong and Yeung Yip-chun* v *Shun Fung Iron-works,*[83] Garcia DJ adopted Lord Finlay's words in *Charles R Davidson & Co* v *M'Robb*[84] in holding that 'in the course of the employment' means 'in the course of the work which the workman is employed to do and what is incident to it.'[85] The idea of obligation is central to the interpretation of this phrase. The workman must be 'doing something in discharge of a duty to his employer, directly or indirectly, imposed upon him by his contract of service,'[86] and 'if there is only a right and there is no obligation binding on the man in the matter of his employment there is no liability.'[87]

The main question is therefore what is reasonably incidental to the performance of the employee's contractual obligations to his employer. Some situations are well-governed by authorities. For example, the course of employment does not normally begin until the employee reaches his place of work,[88] but it will extend to the journey to and from work by means of transport provided by his employer if he is using the means of transport in discharge of some contractual duty owed to his employer, either by reason of express or implied directions given by the employer, or by reason of his being at the time subject to the control of his employer, or by reason of some proved necessity to use the provided means of transport as being the only means for travelling to and from his work.[89] The 'proved necessity' rule[90] has been neatly illustrated by *Lau Mon* v *Vianini SPA,*[91] where an employee injured in a road accident while using the charter-bus service arranged by his employer operating between the construction site in Sai Kung and Choi Hung estate was allowed to claim. It was very early in the morning and there was no other means of transport available.

Given the English workmen's compensation authorities on this area, the result in *Lau Mon* would have been different if the employee was travelling on the charter-bus later in the morning, when the public bus service had started, even though the charter-bus service might well have been the most convenient means of transport for him to use. It is to be noted here that the position in the United Kingdom regarding journeys between home and work in employers' transport is now specifically governed by a statutory provision which has abolished the 'contractual obligation' requirement in this respect.[92] There is no reason why the Hong Kong legislature should not enact a similar provision.

Lai Fong is a case where the Court had to apply directly the difficult test of what is reasonably incidental to the employment. Two smelting furnace

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82 An interesting argument was put forward by counsel in this case, to the effect that the presumption (established by *Bender* v *SS 'Zent'* [1909] 2 KB 41, 45; *Southall* v *Cheshire County News Co* (1912) 5 BWCC 251) arose only because suicide was a crime under English law (in fact, as Power DJ noted in passing when discussing this argument, since the Suicide Act 1961 suicide is no longer a crime in Britain), and that if the death took place where suicide was not a crime, then no presumption arose. Power DJ's answer to this was that the presumption against crime was only a part of the wider presumption of innocence, ie that all acts and conduct are in accordance with law and morality. 'The killing of oneself is prima facie an immoral act and I hold that the presumption of innocence arises when such an allegation is made.' (at 6).

83 (1977) 7 HKLJ 386.

84 [1919] AC 304.

85 At 314.

86 per Lord Atkinson, *St. Helen's Colliery Co.* v *Hewitson* [1924] AC 59, 71.

87 per Lord Wrenbury, ibid, 95.

88 *Benson* v *L & YR* [1904] 1 KB 242; *Low or Jackson* v *General Steam Fishing Co* [1909] AC 523, 531, 533; *Netherton* v *Coles* [1945] 1 All ER 227. See generally Willis, op cit, 24-7; Halsbury, op cit, 806.

89 *St Helen's Colliery* v *Hewitson* [1924] AC 59; Willis, op cit, 27-30.

90 See also *Richards* v *Morris* [1915] 1 KB 221. *Mole* v *Wadworth* (1913) 6 BWCC 129; willis, op cit, 30.

91 (1976) 6 HKLJ 264.

92 According to s 8 of the National Insurance (Industrial Injuries) Act 1965 (which is in substantially the same terms as s 9 of the 1946 Act), an employee who is injured while travelling to or from work in a vehicle which (i) is being operated by or on behalf of his employer or some other person by whom it is provided in pursuance of arrangements made with his employer, and (ii) is not being operated in the ordinary course of a public transport service, has benefit rights.

93 (1977) 7 HKLJ 386.

workers on a night shift had finished their work and gone to sleep when they were attacked and injured. In the absence of evidence that the activity of sleeping was usual or permitted by the employers, Garcia DJ held that it was doubtful whether the accident occurred 'in the course of the employment.'[94] It may be questioned, however, whether this was the proper way to deal with the matter. The true question should perhaps have been whether such conduct was reasonable in the circumstances, given the nature and extent of the employees' obligations under the employment contract; the question whether it was usual or permitted was relevant only in so far as it threw light on the answer to the former, and should not have been regarded as decisive.

The onus is on the applicant to prove that the accident occurred in the course of the employment.[95] Where the course of employment is continuous, as in the case of a seaman at sea or a resident domestic servant,[96] no problem arises. However, where the course of service is intermittent, as in the case of daily labourers, the onus may be more difficult to discharge, especially if the claim is by a dependant of a workman who has been killed and whose evidence is not therefore available. This is illustrated by *Yeung Ying* v *Ching Hing Construction Co Ltd.*[97] An earth coolie left home in the morning in apparent good health. After working in a trench fitting sewer pipes on a site for about an hour, he made a complaint to a fellow worker who was then working on the surface. He worked on the surface for the remainder of the day and the fellow worker took his place in the trench where the work was heavier. When last seen by the worker, he was still wearing both his shoes and appeared to be walking normally. On arriving home he was seen by his wife to be wearing only one shoe. He made a complaint to her and she saw a 'rather long' cut on the underside of his left big toe. He later died from an infection of the left foot. The Court drew the inference that the accident occurred when the deceased was working rather than on the way to or from work, because there was 'nothing in the evidence' to suggest the latter.[98]

'Arising out of..... the employment'

According to *Davidson* v *M'Robb,*[99] ' "arising out of the employment" obviously means arising out of the work which the man is employed to do and what is incident to it.'[1] This still leaves open the question of what is meant by 'arising out of.' Lord Sumner put forward the following test: 'Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury?'[2] The central question is therefore whether there is any causal connection between the accident and the em-

94 Ibid. In his commentary, Mr Riberio criticised this part of the decision. He argued that having completed their assigned tasks, the applicants' contractual obligations to the employer were to remain on the premises and be ready and willing to work, until the end of the night shift, and that it was reasonable for them to go to sleep while waiting for further instructions. See Halsbury, op cit, 805, esp fns (c), (d).

95 *Pomfret* v *L & YR* [1903] 2 KB 718; *Ashley* v *Lilleshall Co* (1911) 5 BWCC 85; Willis, op cit, 116-118. s 5(6) of the Ordinance only relates to the proof of the accident 'arising out of the employment,' and does not affect that of its being 'in the course of the employment.'

96 *Clifford* v *Joy* (1909) 2 BWCC 32; *Codling* v *Ridley* (1933) 26 BWCC 3; Willis, op cit, 23; Halsbury, op cit, 805, esp fns (q), (r). That a seaman's employment at sea is continuous was recognised in two local cases, *Fung Po-chun* v *Mollers' Ltd* [1966] DCLR 96; *Madam Fan See-yuk* v *Ocean Tramping Co Ltd* [1974] DCLR 1. A local case involving a domestic servant is *Wong Gun-fook* v *McLean* [1973] DCLR 61.

97 [1960] DCLR 129.

98 Springall DJ relied here on *Mitchell* v *Glamorgan Coal Co Ltd* (1907) 23 TLR 588, where a workman went to work in a colliery and returned home with his finger crushed. The English Court of Appeal held that 'the probability was that the accident happened at the time when the workman was at the pit because accidents did happen there, rather than at a time when in the ordinary course of life accidents did not happen.' See Willis, op cit, 116-150, esp Lord Low's proposition in *Grant* v *Glasgow & SW Rail Co* (1907) 1 BWCC 17: 'The onus may be shifted, especially when the claim is by a dependant of a workman who has been killed, and whose evidence is therefore not available. If in such a case facts are proved, the natural and reasonable inference from which is that the accident happened while the deceased was engaged in his employment, I think that it falls upon the employer, if he disputes the claim, to prove that the contrary was the case.'

99 [1918] AC 304.

1 Ibid, at 314.

2 *L& YR* v *Highley* [1917] AC 352, 372.

ployment.

The 'deeming' provision of section 5(6) was introduced in 1969, following section 7(4) of the National Insurance (Industrial Injuries) Act 1946.[3] This was not present in the old Workmen's Compensation Acts. Thus the onus is on the claimant to prove that the accident arose in the course of the employment;[4] when this has been done the presumption that it arose out of that employment arises in the absence of evidence to the contrary and not unless the contrary is proved.[5] If there is evidence to the contrary,[6] the presumption disappears and that evidence must be considered with all the other evidence available.

In *Madam Fan See-yuk* v *Ocean Tramping Co Ltd,*[7] a seaman serving on board a ship at sea in fine weather disappeared and there was no evidence as to the immediate circumstances of his disappearance. After holding that it was by accident and not suicide,[8] Power DJ further decided that the presumption which arose because of section 5(6) was not displaced because 'nobody knows how the accident happened,' there were 'a number of conflicting possibilities,' so that no 'inferences of sufficient weight can be drawn from the know facts to displace the presumption in section 5(6).'[9]

The operation of this subsection is also illustrated by two local cases involving assault. In *Tsang Yuk-chung* v *China Fleet Club,*[10] a quarrel between two cooks in their employer's kitchen during working hours led to one of them being assaulted and killed. There was no evidence whether it was due to a private dispute or a dispute about work. Neither was there any evidence of previous disputes or bad feeling between the cooks. The deceased's widow was allowed to claim workmen's compensation. A commentator[11] described this case as being 'extremely valuable to applicants who are unable to explain the precise cause' of the injury, because of the Court's refusal to treat the inference unfavourable to the applicant as 'evidence to the contrary' where conflicting inferences of equal probability could be drawn from the proved facts.[12] This case can be contrasted with *Wong Gun-fook* v *McLean,*[13] in which Hooper DJ found that there was 'evidence to the contrary' where a young amah was murdered by strangulation and knife wounds during working hours in her employer's premises by a stranger to the employer, and nothing had been stolen from the flat, although drawers and

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3 ie s 6 of the more recent Act of 1965.

4 See fn 95 above.

5 *R* v *National Insurance (Industrial Injuries) Commissioners, Ex parte Richardson* [1958] 2 All ER 689, cited and applied in *Wong Gun-fook* [1973] DCLR 75 and *Madam Fan See-yuk* v *Ocean Tramping Co Ltd* [1974] DCLR 1.

6 ie 'evidence fit to be left to the jury,' per Delvin J, *Ex parte Richardson,* ibid.

7 [1974] DCLR 1.

8 See above, esp fns 81, 82.

9 [1974] DCLR 1, 6-7. In this context, it may be worthwhile to refer back to *Fung Po-chun* v *Mollers' Ltd* [1966] DCLR 96, which was decided before s 5(6) was introduced. In this case, a seaman at sea went overboard and was drowned at day-time and in fine weather, but the exact circumstances which led to his disappearance were not clear. Williams DJ, relying on the House of Lords decisions in *Simpson* v *LM & S Ry Co* [1931] AC 357 and *Lendrum* v *Ayr Steam Shipping Co* [1915] AC 217, held that the burden was on the employers to displace the inference that the death was due to some accident on the part of the seaman within the scope of his employment. Now that s 5(6) has been enacted, it would seem that this should a fortiori be the rule in the case of a seaman's unexplained disappearance.

10 (1973) 3 HKLJ 350.

11 Ibid, 351, commentary.

12 He argued that 's 5(6) would be robbed of all meaning if the Court were to treat one of several equally possible or probable inference as sufficient "evidence to the contrary" to prevent the operation of the section,' and suggested that the adoption of s 10 of the National Insurance (Industrial Injuries) Act 1965 would 'remove considerable uncertainties in the present law without imposing unbearable economic risks in the context of local industrial conditions.' The latter section provides that where an accident arising in the course of a claimant's employment is caused 'by any other person's misconduct, skylarking or negligence,' and where the claimant himself 'did not directly or indirectly induce or contribute to the happening of the accident by his conduct outside the employment or by any act not incidental to the employment,' it will be deemed also to arise out of the employment. See *Halsbury's Statutes of England,* 3rd ed, vol 23, 485-6, 495-6.

13 [1973] DCLR 75, commented on in (1973) 3 HKLJ 351.

the refrigerator door were found open.[14] The case suggests that 'evidence that injuries were received in an assault is sufficient in itself to displace the presumption and that the burden of proof in assault cases is always on the claimant,'[14a] and is therefore quite inconsistent with *Tsang Yuk-chung*. It is submitted that the approach in *Tsang Yuk-chung* should be preferred. The circumstances of the assault as a whole and not the mere fact of the assault alone should be taken into account in considering whether there is sufficient evidence to displace the presumption that the accident arose out of the employment.

Where the 'accident' is a sudden physiological change,[15] such as a stroke or heart failure, there is a special problem in establishing that it 'arises out of the employment,' since in such a situation a predisposing physical condition, such as high blood pressure or a gradual heart disease, like the thickening of the blood vessel wall, is usually present.[16] This is especially so when the work the workman was doing at the time of the 'accident' did not require excessive exertion or was no heavier than what was usual in his ordinary work. In *Ho Woon-king* v *Hong Kong & Kowloon Wharf & Godown Co Ltd,*[17] Pickering DJ embarked upon a comprehensive survey of the English authorities on this area, only to come up, after a consideration of 37 cases, with the statement that 'A study of all these cases has led me to the conclusion that (the) principle is difficult, if not actually impossible, to discern.'[18] 'That being so I decline to enter the maze but turn my back on it and resort to first principles.'[19] The test that he ultimately adopted, and which was applied in three subsequent cases by Yang DJ,[20] was that formulated by Lord Loreburn LC in *Clover, Clayton & Co Ltd* v *Hughes.*[21] 'In each case the arbitrator ought to consider whether in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone or from the disease and employment taken together, looking at it broadly. Looking at it broadly, I say, and free from over-nice conjectures, was it the disease that did it, or did the work he was doing help in any material degree?'[22] This 'looking at it broadly' test is clearly a concession to intuitive judgment, but, in the absence of any other workable alternatives, it is submitted that this test should now be regarded as authoritative in Hong Kong and be followed in future.

Section 5(6) was not considered in any of these four Hong Kong cases, but probably it cannot help applicants in such situations, since the existence of the predisposing condition or a possible inference of its existence will presumably amount to 'evidence to the contrary' so as to displace the presumption.

'Acting in contravention of.....'

The combined effect of this 'deeming' provision in section 5(1) and the 'serious and wilful misconduct' rule in proviso (b) of the same subsection is a problem unique to Hong Kong's Workmen's Compensation Ordinance, for whereas the operations of these two provisions largely overlap, the similar provisions

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14 The commentary points out at 352, ibid, that the learned judge 'appeared to think that evidence that the injuries were received in an assault is sufficient in itself to displace the "presumption".' A reading of the judgment, particularly at [1973] DCLR 75, 83-6, would suggest that this comment is quite valid.

14a [1973] DCLR 75, 85.

15 See fns 70-74 above.

16 Examples are provided by *Ho Woon-king* v *Hong Kong & Kowloon Wharf & Godown Co Ltd* [1965] DCLR 265 (labourer working aboard lighter died from stroke, probably due to persistent high blood pressure); *Yip Ho* v *Hong Kong & Kowloon Wharf & Godown Co Ltd* [1969] DCLR 1 (labourer in heavy work died because of sudden insufficient supply of blood to heart muscle due to thickening of blood vessel wall); *Chow Mui* v *Chow Cheuk-chung* [1970] DCLR 94 (workman of age 62 on board ship died from rupture of blood vessel, due to aging process in coronary arteries).

17 [1965] DCLR 265.

18 Ibid, 285.

19 Ibid, 287.

20 *Wong Yau-ho* v *Hei Hing Tea House* [1966] DCLR 124; *Yip Ho* v *Hong Kong & Kowloon Wharf & Godown Co Ltd* [1969] DCLR 1; *Chow Mui* v *Chow Cheuk-chung* [1970] DCLR 94.

21 [1910] AC 242.

22 Ibid, at 247.

in the English Acts dealt with mutually exclusive areas.[23]

In *Cheung Tam Loy* v *Cheung Hing Construction Co,*[24] a surveyor's coolie engaged in the repair of a road whose particular duty was to assist the surveyor, inter alia, by carrying his line and level, tried to drive a mechanical shovel and was killed when it went out of control. Having found that it was no part of the deceased's duty to drive the shovel and that there were express instructions to all the workers that only authorised drivers were to drive, Huggins DJ held that the accident did not 'arise out of and in the course of the employment' and that the 'deeming' provision had not swept away this fundamental requirement.[25] However, he did not go on to explain when the provision would apply. This had in fact been the subject-matter of much litigation in England and was considered five times by the House of Lords.[26] The most useful formulation, it is submitted, is that by Lord Russel of Killowen when he delivered the unanimous opinion of the House in *Victoria Spinning Co* v *Matthews,*[27] the last of the five House of Lords cases: 'If a workman at the time of the accident is doing something which is not his job at all and in doing that job contravenes a regulation or order to which those whose job it is are subject (as distinguished from the case of a workman whose job is subject to a regulation or order which he contravenes while doing his job) he is not within the provisions of subsection 2 (similar to our 'deeming' provision).'

The 'deeming' provision will, if Lord Russell of Killowen was right, come into operation if the workman contravened a regulation or order 'while doing his job.' The next question concerns the onus of proof as to whether the workman's act was done 'for the purposes of and in connexion with his employer's trade or business,' so that the 'deeming' provision operates in the applicant's favour. There is a faint implication from *TK Shen Construction Co* v *Yip Pak-ying*[29] that the burden is on the employer to prove that the act was not so done. Despite English

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23 See Willis, op cit, 6-7, 80-1. In England, the 'serious and wilful misconduct' rule applied *only* to injuries *other than* those resulting in death or serious and permanent disablement, which were *exclusively* covered by the 'deeming' provision on contravention of regulations or instructions: s 1(1) proviso (b) and s 1(2) of the Workmen's Compensation Act 1925. It is respectfully submitted that Huggins DJ (as he then was) had overlooked this when he compared the similar provisions of the Hong Kong Ordinance and the English Act in *Cheung Tam Loy* v *Cheung Hing Construction Co* [1958] DCLR 60, 62-3. (At the time of this decision, the degree of overlapping between the two provisions was not as great as is the case at present, since the 'deeming' provision was only limited to 'an accident resulting in the death or serious and permanent incapacity of a workman': see s 5 of the Workmen's Compensation Ordinance, No 28 of 1953, which was in force at the time of the decision. However, this degree of overlapping was already a material difference between the positions under the English and the HK statutes.) However, it is also submitted that Huggins DJ's interpretation of the 'deeming' provision on contravention of regulations or instructions is nevertheless correct, though, strictly speaking, the English authorities he cited are not directly applicable. For the reasons, see fn 25 below.

24 [1958] DCLR 60.

25 In this he relied on *Kerr and M'Aulay* v *James Dunlop & Co Ltd* [1926] AC 377 and *Privet* v *Darracq* (1934) 27 BWCC 325. Despite fn 23 immediately above, it is submitted that he was correct in so holding. The effect of the alternative, ie not treating the 'deeming' provision as being subject to the requirement of 'accident arising out of and in the course of the employment,' would be to bring an act completely outside the scope of the employment within the employment for the purposes of the Ordinance, which would however be quite useless to the applicant (because such an act would certainly be held to amount to 'serious and wilful misconduct' within proviso (b)), except that the Court would be given a discretion to award compensation where the injury results in death or serious incapacity even though it is brought about in the first place by an act completely outside the scope of the employment. If the legislature had intended to achieve this latter effect, then it had taken a most intricate route indeed.

26 *M'Ferrin* v *Wilson & Clyde Coal Co* (1925) 18 BWCC 630; *Kerr and M'Aulay* v *James Dunlop & Co Ltd* [1926] AC 377; *Garrallan Coal Co* v *Anderson or Devlin* [1927] AC 59; *Thomas* v *Ocean Coal Co* [1933] AC 100; *Victoria Spinning Co* v *Matthews* [1936] 2 All ER 1359. See generally Willis, op cit, 80-96, for the English interpretation of the 'deeming' provision.

27 [1936] 2 All ER 1359.

28 But note that the English provision only applied to cases where the accident resulted in the death or serious and permanent disablement of a workman.

29 (1974) 4 HKLJ 65. See esp 72 (case involving workmen remaining on construction site on approach of typhoon).

authorities to the contrary,[30] it is submitted that this should be the law in Hong Kong, for, unlike under the English Workmen's Compensation Acts, the employer in Hong Kong can still defeat the applicant even if the 'deeming' provision in section 5 (1) operates in the latter's favour, by relying on proviso (b) in the same subsection and proving that the injury is attributable to the 'serious and wilful misconduct' of the workman.

Some major issues remain unsettled, however. What, for example, is the relationship between 'acting in contravention of any statutory or other regulation applicable to his (the workman's) employment, or of orders given by or on behalf of his employer, or ..... acting without instructions from his employer' and 'serious and wilful misconduct'? The English Acts did not raise this question. Does the former phrase refer to a lesser degree of misconduct? To what extent do the English workmen's compensation authorities on provisions containing phrases identical to these but having different spheres of operation apply in the interpretation of this part of the Hong Kong Ordinance?[31] The Courts will have to answer these difficult questions when the occasion arises in future. It is submitted here that the position will be greatly simplified and clarified if the legislature intervenes and amends section 5(1) by adopting the relevant words of the 'deeming' provision in section 7 of the National Insurance (Industrial Injuries) Act 1965.[32]

Novus actus interveniens

In a claim for workmen's compensation, a causal link which must be established is that between the 'personal injury by accident' and the employment. Where there is a deterioration in the workman's condition after he first sustained the 'personal injury by accident,' and compensation is sought for his ultimate condition, which may be death or a state of incapacity, another causal link has to be established between this ultimate condition and the initial condition immediately after the accident. In other words, it must be inquired whether the chain of causation between the two conditions has been broken by a novus actus interveniens, 'so that the old cause goes and a new one is substituted for it.'[33]

The local case of *Lai Tak* v *Leung Yau Kan*[34] provides a good illustration. The applicant sustained injuries to his head, right hand and left foot in the course of his employment. He was taken, in accordance with his own wish, to a Chinese herbalist for treatment. Three days later, the herbalist told him that he must go to hospital. In hospital, his right index finger and left leg were found to be infected and amputated. The doctor said in evidence that he could not say definitely that the condition of the wounds when he saw the patient was not the result of the accident, though that condition could have been attributable to treatment by some other person. The employer argued that the injuries were attributable to the applicant's serious and wilful misconduct in not going to hospital immediately but going to the herbalist instead. Pickering DJ held that the proviso regarding 'serious and wilful misconduct' has no application to conduct after the time of the accident.[35] He decided further that the onus was on the employer to show that the incapacity was due

30 There is plentiful English authorities in this respect, eg *Garrallan Coal Co* v *Anderson or Devlin* [1927] AC 59; *Guest* v *Gaston* [1927] 1 KB 1. See Willis, op cit, 94-6.

31 ie the English cases covered by Willis, op cit, 80-96, 153-157.

32 ie s 8 of the 1946 Act. An accident shall be deemed to arise out of and in the course of an insured person's employment notwithstanding that he is at the time of the accident acting in contravention of any statutory or other regulations applicable to his employment or of any orders given by or on behalf of his employer, or that he is acting without instructions from his employer if (i) the accident would have been deemed so to have arisen had the act not been done in contravention as aforesaid or without instructions from his employer, as the case may be; and (ii) the act is done for the purposes of and in connection with the employer's trade or business. There is no separate provision for 'serious and wilful misconduct' in the English Act.

33 per Collins MR, *Dunham* v *Clare* [1902] 2 KB 292, 296. For the subject of novus actus interveniens, see generally Willis, op cit, 245-6, 272-6, and standard textbooks on tort.

34 [1961] DCLR 185.

35 English cases on the 'misconduct' provision were all about misconduct prior to the injury (see Willis, op cit, 253-8). In holding that it did not apply (at least in relation to a particular choice of medical treatment made after the accident), therefore, Pickering DJ was in a 'negative' sense making new law.

to a novus actus interveniens, [36] in this case, defective medical treatment by the herbalist. Since the employer failed to discharge this onus, the learned judge found for the applicant.

IV. CONCLUSION

This dissertation has examined two main areas of the Workmen's Compensation Ordinance. They are but tiny areas amidst the many detailed provisions and rules in the Ordinance, yet they do lie at the heart of it. The contract of service is a fundamental concept in labour law, and 'personal injury by accident arising out of and in the course of the employment' is the essential condition to be satisfied before liability exists on the part of an employer. As one ventures deep into the maze of cases—a summation of people's experience in their legal system, one cannot but give some thoughts to the integral picture as a whole.

Legislation is the modern and most powerful agency of law reform. Common law concepts and rules, useful as they might have been at one time or another in history, cannot necessarily be developed at such a rate as to adapt to the rapid changes in modern society. This is illustrated in this dissertation by the problems surrounding the application of the 'contract of service' concept to the mobile labour pool in Hong Kong. Such special local circumstances should perhaps be dealt with by specific legislative enactments, rather than by relying on common law principles.

This dissertation also shows that the National Insurance (Industrial Injuries) Acts contain provisions similar to but improved compared with those in the old Workmen's Compensation Acts. While Hong Kong may not adopt a state insurance scheme, there is no reason why it cannot adopt the useful provisions[37] in the modern English legislation without accepting its basic principle of contributory insurance. This would also enable the Hong Kong Courts to use modern English authorities, now that the old ones on the Workmen's Compensation Acts have been deprived of living experience for nearly thirty years. As far as the use of these old authorities is concerned, the Courts should constantly bear in mind the fact that they have become static and frozen since 1946 in Britain. To quote one writer, 'Dusty fossils of another age are a poor basis for the practical and human questions of accident compensation.'[37a] The Hong Kong Courts should therefore adopt a liberal approach in using these cases and never hesitate to develop Hong Kong's own case law in the subject.

Last but not least of all, it is perhaps time for Government to consider the setting up of tribunals presided by qualified lawyers specialising in workmen's compensation law to administer the scheme, on the lines of the Labour Tribunal and the Small Claims Tribunal, using the inquisitorial system. Alternatively, the limited jurisdiction in labour matters of the Labour Tribunal can be expanded to fulfil this need. Justice and efficiency will then be promoted better than under the present system, with Labour Department officers in their quasi-arbital role and the District Court dealing with a tiny proportion of cases. It is certainly not too much to demand such a separate system in a society which produces some 37,000 industrial injuries annually in its factories and construction sites, victims of industrial accidents being more than those of traffic accidents.

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36 In applying the concept of novus actus interveniens, he referred to English cases where it was alleged that incapacity resulted from defective medical treatment: *Doolan* v *Henry Hope and Sons Ltd* (1948) 11 BWCC 93; *Laverick* v *William Gray & Co Ltd* (1919) 12 BWCC 176; *Humber Towing Co Ltd* v *Barclay* (1911) 5 BWCC 142. In deciding on the onus of proof, he relied on *Bower* v *Megitt* (1916) 10 BWCC 146. However, in that case it was decided that if the incapacity may be due to the accident or equally due to the alleged bad treatment of the injury, the onus of proof lies on the employers to establish the latter, and if they fail to do so, the workman ought to suceed on this issue. Quaere, whether Pickering DJ had extended this principle to cases where the more probable inference, or, at least, the slightly more probable inference, is that the incapacity results from the defective treatment.

37 Such as ss 8, 10, 7 of the National Insurance (Industrial Injuries) Act 1965, discussed at fns 92, (and after 99) 12, 32 respectively.

37a Ribeiro, commentary, (1977) 7 HKLJ 386, 388.

38 South China Morning Post, Dec 13, 1978. 'Industrial injuries' refers to injuries which give rise to potential workmen's compensation claims.

REVIEW OF SENTENCE ON THE APPLICATION OF THE ATTORNEY-GENERAL IN HONG KONG

by Jacob Yui-suen Tse

A SHORT NOTE

Two things about this article require some explanation. First, the analysis in the article relies heavily on unreported cases. This recourse to unreported decisions is due to the scarcity of relevant reported cases. The search in the unreported cases on applications for review of sentence was quite thorough. It appears to the author that it is safe to rely on these decisions and nothing important has been missed out.

Secondly, it can be seen that only very few articles have been used as reference materials. Although every effort has been made to find useful articles in many different journals and periodicals, it turned out to be abortive. There was difficulty in trying to find even bits and pieces of relevant material in various articles.

I. INTRODUCTION

'This section, which is of somewhat novel nature and which has no counterpart in the law of England as administered in the United Kingdom.....'

Attorney General v *Lam Kam-tai,* per Rigby C J[1]

Chief Justice Rigby was referring to section 81A of the Criminal Procedure Ordinance[2] which provides that the Attorney General may, with the leave of the Court of Appeal, apply to the Court of Appeal[3] to review any sentence (other than a sentence which is fixed by law) passed by any court other than the Court of Appeal, on the grounds that it is not authorized by law, is wrong in principle or is

1 [1972] HKLR 324 at 326.
2 Cap 221, LHK, 1972 ed.
3 Formerly the Full Court.

mainifestly excessive or manifestly inadequate.

This section, together with sections 81B and 81C, came into force in 1972. They govern all matters concerning review of sentence on the application of the Attorney General.

By section 81C(3), all three sections were to expire on 30th April, 1975 unless extended by a resolution of the Legislative Council. But subsection (3) was replaced by section 2 of the Criminal Procedure (Amendment) (No 3) Ordinance 1978 and so all three sections are now permanent.

In moving the second reading of the Criminal Procedure (Amendment) (No 3) Bill 1978, the Solicitor General said:

> 'When the Bill introducing the provisions in question was before this Council, the view was taken that the legislation should be enacted on a temporary basis so that in due time it could be reviewed. Six years have now passed and the Government is convinced that the usefulness of these provisions has been established. The Chief Justice also agrees that sections 81A, 81B and 81C should be made permanent.'[4]

In view of this change, this article attempts to assess the desirability and value of this piece of legislation in relation to the Hong Kong context, to analyse some problems arising from these sections and to suggest some solutions.

II. CRIMINAL APPEALS AGAINST SENTENCE–A COMPARATIVE STUDY

In contrast with the quotation at the very beginning of this article, Mr D.T.E. Roberts, the Attorney General (as he then was), when moving the second reading of the Criminal Procedure (Amendment) Bill 1972 which introduced sections 81A, 81B and 81C, said :

> 'There is nothing novel about legislation of this nature, though it is not present in the law of the United Kingdom. A power of review of this kind, or of a similar nature, can be found in at least twenty Commonwealth countries ...'[5]

Two such countries are New Zealand[6] and Canada[7]. In fact section 81A was modelled on the New Zealand enactment.

Leaving aside the question of the novelty of the power to apply for review of sentence, it is logical to ask whether any procedural deficiencies in relation to criminal appeals against sentence in Hong Kong and in those countries mentioned by the Attorney General had prompted the introduction of such legislation. Even though the legislation is foreign to England, it does not follow that the English criminal procedures do not suffer from such deficiencies. A study of the position of criminal appeals against sentence in England and in Hong Kong will give a clearer picture.[8]

In England, the prosecution has no right of appeal against sentence. Only the convicted person has that right. On a conviction on indictment, the convicted person may, with the leave of the Court of Appeal,[9] appeal against sentence to the Court of Appeal.[10] If he is convicted otherwise than on indictment, he may, with leave,[11] appeal to the Court of Appeal from the Crown Court[12] or he may appeal from the magistrates' court to the Crown Court.[13]

On the appeal to the Court of Appeal, the Court may, if it considers that the appellant should be sentenced differently, quash the sentence which

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4 Hong Kong Legislative Council – 10th May, 1978.
5 Hong Kong Legislative Council 1971-2, 476.
6 The relevant enactment is Crimes Act 1961, s383(2).
7 Criminal Code (Canada), s584(1)(b).
8 While a detailed treatment would be most useful, only a brief account can be given here because of the limitation on the number of words of the dissertation. For an expert treatise, see Celia Hampton, *Criminal Procedure* (2nd ed, 1977).
9 Criminal Appeal Act 1968, s11(1).
10 Ibid, s9.
11 Ibid, s11(1).
12 Ibid, s10.
13 Magistrates' Courts Act 1952, s83(1).

is the subject of the appeal and in place of it pass another sentence appropriate for the case.[14] But such alteration can only be made in the appellant's favour.[15] On the appeal to the Crown Court, however, the Court may impose a heavier sentence than the one passed in the court below.[16]

In Hong Kong, the existence of a prosecution right to apply for a review of sentence does not affect the convicted person's right of appeal against sentence.[17] On an appeal from the magistrates' court to the High Court, the position is the same as an appeal from the magistrates' court to the Crown Court in England.[18] However, on an appeal to the Court of Appeal,[19] the position here is slightly different. The Court of Appeal, in quashing the original sentence and passing another sentence, can pass whatever sentence (whether more or less severe) they think appropriate.[20]

In England, since only on an appeal against sentence to the Crown Court can a sentence be increased and such an appeal can only be brought by the convicted, it can fairly be said that the chance of a clearly wrong sentence being corrected is rare. This is supported by statistics which shows that there were very few appeals to the Crown Court.[21] Thus it is clear that a prosecution right of appeal against sentence would be very desirable.

Assuming that a prosecution power to apply for review of sentence does not exist, is the situation in Hong Kong any better than in England so as not to necessitate the introduction of such a power? It seems that it is not. No doubt, as distinct from England, on any appeals against sentence here, the appellate court has the power to increase a sentence. However, again, as in England, this can only happen if the convicted person wants to try his luck. And this is unlikely to happen in the case of an outrageously lenient sentence. But it is in the case of such a sentence that most calls for justice to be done. Thus, in order that such a sentence can always be corrected, a prosecution right of appeal against sentence or a right to apply for review of sentence[22] is very desirable.

III. THE CRIMINAL PROCEDURE ORDINANCE – SECTIONS 81A, 81B & 81C

The main parts of these three sections are :

Section 81A. (1) The Attorney General may, with the leave of the Court of Appeal, apply to the Court of Appeal for the review of any sentence (other than a sentence which is fixed by law) passed by any court other than the Court of Appeal, on the grounds that the sentence is not authorized by law, is wrong in principle or is manifestly excessive or manifestly inadequate.

Section 81B. (1) Upon the hearing of the application the Court of Appeal may, by order –

(a) if it thinks that the sentence was not authorized by law, was wrong in principle or was manifestly excessive or manifestly inadequate, quash the sentence passed by the court and pass such other sentence (whether more or less severe) warranted in law in substitution therefore as it thinks ought to have been passed ;

(b) in any other case, refuse to alter the sen-

14 Criminal Appeal Act 1968, s11(3).

15 Ibid, the proviso to s11(3). It reads: 'But the court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with than he was dealt with by the court below.' The difficulty arising from this proviso is the meaning of the word 'severely'. On this point, see D.A. Thomas, 'Increasing sentences on appeal – a Re-examination' [1972] Crim LR 288, 297-8.

16 Courts Act 1971, s9(4).

17 Criminal Procedure Ordinance, s18C(2).

18 Magistrates Ordinance Cap 227, ss113 & 119.

19 Criminal Procedure Ordinance, ss83G & 83H.

20 Ibid, s83I(3).

21 e.g. in 1974, 2,815 persons appealed to the Crown Court following summary conviction for offences classified as indictable in the *Criminal Statistics 1974;* this number represents only 0.9% of those found guilty. In the same year 4,976 persons appealed following summary conviction for offences classified as non-indictable, a figure which represents only 0.3% of the total defendants convicted. The above figures are taken from Friesen and Scott, *English Criminal Justice* (1st ed, 1977) 55.

22 A right of appeal against sentence and a right to apply for review of sentence are different, as will be seen later.

tence.

Section 81C. (1) The Court of Appeal shall not review a sentence under section 81B if the respondent has –

(a) appealed under this Part, unless the appeal has been withdrawn ;

(b) applied under section 104 of the Magistrates Ordinance to a magistrate to review his decision, unless the application has been withdrawn or disposed of; or

(c) applied under section 105 of the Magistrates Ordinance to a magistrate to state a case, unless the application has been withdrawn or disposed of.

IV. THE CASE FOR THE ATTORNEY GENERAL'S POWER TO APPLY FOR A REVIEW OF SENTENCE

In Part II,[23] the procedural deficiencies in relation to appeals against sentence have been discussed and strong favour has been found with the prosecution power to apply for a review. In this Part, more specific arguments would be put forward to support such a power. These arguments are as follows :

(1) In *Re Applications for Review of Sentences*,[24] Chief Justice Rigby disclosed that it was he who actually proposed to the Attorney General the procedure which is now embodied in section 81A of the Criminal Procedure Ordinance. He said :

> 'The courts throughout the Colony are increasingly aware of the substantial increase in crimes of violence and robbery committed by young persons and this fact is, indeed, manifest from the considerably heavier penalties that have in recent months been imposed. It is in the occasional case that the judge or magistrate.....imposes a sentence that is not in accord with these principles and is out of line with the normal sentence imposed in such cases. It was in the express recognition of the existence of that occasional case in which the penalty imposed appeared to be wholly incommensurate with the nature of the offence committed, coupled with the publicity almost inevitably and invariably given by the newspapers to the case itself and to the uneasiness and the unfavourable public comment arising therefrom, that I myself proposed to the Attorney General.....'[25]

From what Chief Justice Rigby said, two main reasons can be discerned for supporting such a power to apply for review:

(a) The community's demand for retribution[26] and the desire of seeing justice done in cases involving serious offences must be satisfied.

It is true that public opinion is 'often not only uninformed but fickle'.[27] But, as Huggins J said, 'public opinion is not to be ignored, more particular if it is based upon solid foundations'.[28]

The public would surely feel that justice has not been done if an extremely lenient sentence, which deviates substantially from the norm, is passed on an offender but in whose favour there are no particular mitigating factors justifying a departure from the norm. In such case, had there been no prosecution right to apply for a review of sentence, the Court of Appeal would have had little chance to increase his sentence as it is most unlikely that he would appeal.[29]

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23 Above, 3-6.

24 [1972] HKLR 370.

25 Ibid, 374.

26 'The thirst for vengeance is a very real, even if it be a hideous thing; and states may not ignore it till humanity has been raised to greater heights than any that has yet been scaled in all the long ages of struggle and ascent.': Gardozo J, *Selected Writings*, 378; quoted in Smith & Hogan, *Criminal Law* (4th ed 1978), 7, note 10.

27 per Huggins J, in his speech to the Y Men's Club on 5th February, 1976; reported in volume 3 of Obiter Dicta at 19.

28 *Re Applications for Review of Sentences* [1972] HKLR 370, 374.

29 The majority of Canadian cases in which there is a successful prosecution appeal appear to fall into this category. E.g. *A-G for Quebec* v *Arsenault* (1969) 6 Crim R Can 2; *A-G for Quebec* v *Tremblay* (1969) 6 Crim R Can 11. See also D.A.Thomas, 'Increasing sentences on appeal – a Re-examination' [1972] Crim LR 288, 302.

This kind of problem is more sharply manifested in the case of a disparity of sentence between two co-defendants as the result of one receiving a particularly lenient sentence. In this type of case usually only the one with the heavier sentence will appeal. The appellate court is then in a dilemma. If it upholds his sentence, he would surely feel that justice has not been done. On the other hand, if the appellate court reduces his sentence, it may create fresh disparities between this offender and other offenders convicted of similar but unconnected offences.[30] Faced with this dilemma, the Court of Appeal here has adopted the principle that disparity of sentence between co-accused is irrelevant upon an appeal unless the appellant's sentence is, considered in isolation, itself wrong.[31] This approach, though sensible, would not have been very satisfactory had it stood alone. In that case, a sence of injustice would still be felt as nothing has been or can be done on the one who gets away with the lesser sentence.

A prosecution power to apply for review of sentence can make sure that the community's thirst for vengeance can be quenched and in case of serious disparity of sentence between co-defendants, that justice can be done. An instance of such power being used for the latter purpose can be found in *Attorney General* v *Lam Pun-ho.*[32] In this case Lam was convicted of forging provisional driving licenses and sentenced to a fine of $1500 or 2 months' imprisonment in default. Two other co-defendants, convicted of similar offences, were sentenced to 2 years' and 6 months' imprisonment respectively. The Attorney General applied for a review of Lam's sentence. The Full Court allowed the application and passed a sentence of 4 months' imprisonment in substitution, recognising that there was an undue disparity in the various sentences. Another example is *Attorney General* v *Chan Mui-kam.*[33]

(b) A substantial increase in a particular criminal activity may require some exemplary sentences so as to create a deterrent effect. A prosecution power to apply for review of sentence would be very useful in cases where the trial judges fail to recognise this fact.

Such a power has been exercised to this end in a number of cases. In *Attorney General* v *Cheung Chi-man,*[34] a young person convicted of 2 years. The Attorney General applied for a review. The Full Court allowed the application in the recognition of the fact that offences of this kind committed by young persons were all too prevalent at that time and it was necessary to deter other potential offenders from committing offences of a similar nature.

There is no need to fear that the existence of such a power would make many convicted persons the victims of adverse publicity. First, whether to apply for a review is at the discretion of the Attorney General. And it is unlikely that he will bow to all kinds of adverse publicity indiscreetly. Moreover, as the Full Court said in *Attorney General* v *Liu Wing-cheung*[35] :

> 'The courts are aware of their responsibilities to the public in the matter of sentencing but aware also that one of their primary functions is to maintain a necessary balance, which involves the refusal to be stampeded by public opinion or by the existence of any current campaign into the imposition of penalties which are unduly harsh in all the circumstances of any particular case.'

(2) Such a power can help correct a sentence passed in the lower courts which leaves the public dangerously exposed to a violent offender.[36]

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30 See D.A.Thomas, 'Increasing sentences on appeal – a Re-examination' [1972] Crim LR 288, 301.

31 *Chun Man-chuen* v *R* [1978] HKLR 46, following *Leung Hoi v R* [1973] HKLR 238. See also William Stone, 'Sentence disparity between joint offenders – a principle retrieved' (1973) 3 HKLJ 326 for an analysis of *Leung Hoi* v *R*.

32 Application for Review No 1 of 1974, unreported.

33 Application for Review No 24 of 1975, unreported. In this case Chan and her husband were both convicted of manufacture and possession of dangerous drugs. She was sentenced to 1 year's imprisonment while her husband was sentenced to 15 years' imprisonment. On review, her sentence was increased to 8 years' imprisonment.

34 [1972] HKLR 358. See also *Attorney General* v *Tse Ming-muk,* Application for Review No 14 of 1974, unreported.

35 Application for Review No 7 of 1974, unreported.

36 See D.A.Thomas' article, op cit, 301.

This argument can be illustrated by certain English cases.[37] In *R* v *Gills*,[38] the defendant stabbed to death a woman who rejected his advances. He pleaded guilty to manslaughter on the ground of diminished responsibility and was sentenced to 5 years' imprisonment. This sentence was upheld on appeal. The Court of Appeal found that he was a dangerous psychopath and the prospect of his release after 10 years was not in the public interest. But it had no power to increase the sentence. Similarly, in *R* v *Stofile*,[39] the defendant was convicted of manslaughter on the ground of diminished responsibility and was sentenced to 5 years' imprisonment. Upholding his sentence, the Court of Appeal regretted that they could not vary the sentence to life imprisonment so that he could have been detained until it was safe to release him.

It might be argued that if the two cases had been heard in Hong Kong, the result would have been different as the Court of Appeal here has the power to increase the sentence. But what if the convicted person never appeals? In that case, only a prosecution power to apply for review of sentence can remedy this.

(3) Such a power can also be used for the benefit of convicted persons.

First, an application can be made to reduce an unduly harsh sentence. It should not be forgotten that one of the three grounds of making the application is that the sentence is 'manifestly excessive'. Although so far no application has been made on this ground, an application can also be made on the other grounds to reduce an over-severe sentence. Thus, in *Attorney General* v *Chau Yuen*,[40] the defendant was originally sentenced to detention in a detention centre and subjection to police supervision for 2 years. On review, the order for the police supervision was set aside. And in *Attorney General* v *Wong Loy-ying & another*,[41] orders for detention were substituted for sentences of imprisonment on the review by the Court of Appeal.

Secondly, it can perhaps be argued that the power to apply for review of sentence can be used for the benefit of the individual offender in the situation where the offender escapes with a sentence which is too lenient for his own good. As Huggins J said :

> '.....the interests of the individual may sometimes require severity rather than leniency....'[42]

Examples of this are a mentally disordered offender who is given a suspended sentence instead of being subjected to a hospital order, or a youth who really needs training in a training centre but instead receives a fine.[43]

(4) The operation of this power provides a golden opportunity for the Court of Appeal to give useful guidance to the courts below on the kind and length of sentences which should be imposed for certain offences. This guidance can assist the courts in the difficult task of maintaining uniformity in sentencing practice.

This is clearly recognised by a magistrate in England. In supporting a prosecution right of appeal against sentence, he said :

> 'But the decisions on appeal do more than remedy injustices in these few instances; they help to provide a yardstick which the lower courts can use as a guide for the future.'[44]

The clearest instance where such a yardstick was provided is the recent case of *Attorney General* v *Wong Shui-ying & another*.[45] In that case, Huggins J, referring to the offence of exercising control over prostitutes contrary to section 17(4) of the Protection of Women and Juveniles Ordinance, said :

> 'We have been shown a list of sentences imposed by magistrates for comparable offences in the last twelve months and it appears that in all but the North Kowloon Magistracy the ma-

37 See also *Simcox's* case, discussed in Walker, *Sentencing in a Rational Society* (1st ed 1969), 149-150.
38 [1967] Crim LR 247.
39 [1969] Crim LR 325.
40 Application for Review No 1 of 1975, unreported.
41 [1977] HKLR 96.
42 *Re Applications for Review of Sentences* [1972] HKLR 370, 405.
43 See D.A.Thomas' article, op cit, 301.
44 A stupendiary magistrate, 'Sentencing in Magistrates' Courts' [1963] Crim LR 253, 257.
45 [1978] HKLR 164.

jority of cases attracted substantial fines without imprisonment. In the North Kowloon Magistracy it was last year common to impose a short period of imprisonment, either immediate or suspended, with a longer period of immediate imprisonment where young girls were involved, but more recently fines have been more common even there. I think that the former practice in North Kowloon would be the more appropriate norm.'

Similarly, at the hearing of a number of applications, the Court of Appeal took the opportunity to lay down the norm of sentences in cases of armed robbery,[46] bribery,[47] trafficking of dangerous drugs[48] and aiding and abetting of illegal immigrants.[49]

One of the greatest weaknesses of the existing system as a means of developing sentencing policy is the reluctance of the court at first instance to pronounce on the broader issues in many cases.[50] The fact that an application for review can be brought would tend to remedy this deficiency. There is greater likelihood that the matter would be seen and argued in the Court of Appeal in terms of the wider issues of principle or policy involved, rather than being dealt with solely as an individual case on its own merits.

V. OBJECTIONS TO THE ATTORNEY GENERAL'S POWER TO APPLY FOR A REVIEW OF SENTENCE

(1) In England, the suggestion of having a prosecution right of appeal against sentence was considered by the Donovan Committee[51] which reported in 1965. This suggestion found no favour with the Committee as 'it would be a complete departure from our tradition that the prosecutor takes no part, or the minimum part in the sentencing process'. Such an argument can equally apply to Hong Kong.

The counter argument to this is that as far as Hong Kong is concerned, this argument does not seem very convincing for two reasons.

First, this argument rests on a rather naive view of the role of the prosecution.[52] The prosecution has long been closely connected with the question of sentence at every stage of the proceedings. Having decided to institute a charge, the prosecution must decide whether to ask for summary trial or committal for trial, and at this point the prosecution must consider the appropriate sentence. It is clearly the responsibility of the prosecution to insist on committal for trial where the offence may require a sentence which is beyond the powers of the magistrates' courts.[53] And after conviction it is clearly recognised that the prosecution has the responsibility of placing before the court any evidence which may be relevant to sentence even if this evidence would not have been admissible in the trial.[54] No doubt, the tradition is that 'counsel for the prosecution..... should not attempt by advocacy to influence the Court towards a more severe sentence'.[55] But it is doubtful whether the tradition is really as what the Donovan Committee said, since surely the prosecution plays an important role in the sentencing matters.

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46 See *A-G* v *Shum Shun-hong* [1972] HKLR 254, 257; *A-G* v *Lam Kam-tai* [1972] HKLR 324, 331; *A-G* v *Cheung Chi-man* [1972] HKLR 358, 360; *A-G* v *Pun Tim* (1973) 3 HKLJ 343.

47 See *A-G* v *Lui Yu-choi* (Application for Review No 16 of 1973, unreported); *A-G* v *Li Yuk-hing* (Application for Review No 3 of 1975, unreported); *A-G* v *Yau Ying-hon* (Application for Review No 19 of 1975, unreported); and in *Lee Sui-luen* v *R* [1976] HKLR 34, the Full Court specifically approved of the norm laid down in Application for Review No 3 of 1974 for sentencing offenders under s4 of the Prevention of Bribery Ordinance.

48 *A-G* v *Tse Ming-muk*, Application for Review No 14 of 1974, unreported.

49 *A-G* v *Tsang Sung* [1977] HKLR 548.

50 The view of D.A.Thomas, op cit, 304.

51 The Interdepartmental Committee on the Court of Criminal Appeal.

52 See D.A.Thomas' article, op cit, 304.

53 'What has happened.....often is that a District Judge or magistrate has, in passing the maximum which could be passed in his court, expressed the view that the case should never have been tried in his court.....Yet the courts have no effective control over the court in which a particular case is tried: this is no other hands.' – per Huggins J in his speech to the Y Men's Club on 5th February, 1976.

54 D.A.Thomas' article, op cit, 305.

55 Boulton, *Conduct and Etiquette at the Bar* (4th ed), 73; cited in *Re Applications for Review of Sentences* [1972] HKLR 370, 412.

Secondly, what we have here is a power to apply for a review of sentence; and it is different from a right of appeal against sentence. What is the difference? The difference is :

> 'Upon an appeal the appellant has the right to urge the court to change the decision of the lower court, to present arguments in favour of such a change and to reply to arguments advanced by the other side. On a review of sentence I apprehend it to be the duty of the court to consider the decision without pressure from the applicant.....it is not even necessary that he should indicate in his application the basis of the application, except where the application is on the basis that the sentence is "not authorized by law" or "wrong in principle". In such a case he should go on to indicate the extent of the authority given by law which it is said has been exceeded or the principle which it is said has been broken.'[56]

Thus it can be seen from this that upon a review, the Attorney General has very little to do with the sentencing process.

(2) Such power, as Huggins J said, is 'contrary to the accepted concept of justice that a man should be put in jeopardy twice in respect of the same offence against his will'.[57]

This seems to have the support of a number of members of the judiciary. In *Re Applications for Review of Sentences,*[58] Leonard J said:

> 'However, the sections conferring the right to apply for a review are foreign to the traditions of our law summed up in the maxim "nemo debet bis vexari pro eadem causa".....True, an application under the section may not fall strictly within the primary meaning of the maxim (which prevents a person from being tried twice for the same offence) but reviews under the section do seem to me to offend against the spirit giving life to the maxim.'[59]

And in *Attorney General* v *Yu Kin-keung,*[60] Pickering J A said :

> '..... this is an application for review which means that the respondent has been in peril twice in respect of the same offence with all the anxieties and frustrations attendant upon that circumstances .....'[61]

But with respect, it is questionable whether this is a good reason. On an appeal instituted by the prosecution by way of case stated,[62] it can also be said that the accused is put in jeopardy twice in respect of the same offence against his will. Yet there seems to be no objection to the existence of that right.

(3) Those situations mentioned in Part IV in which there is the need for a variation of sentence are essentially rare. Is it worth, then, in providing for these rare cases, to open the door for the prosecution to make numerous applications and so unnecessarily puts the convicted person in jeopardy and frustration? It must be remembered that under section 81A (3) of the Criminal Procedure Ordinance the Court of Appeal has the power to order a respondent to be detained in custody until a decision has been reached on the hearing of the application for review.

The counter argument to this is that there is nothing wrong in trying to provide for these rare cases. No doubt the risks for abuses are there. But today many discretionary powers are conferred on the Attorney General without any great fear for abuses. It must be asked why the Attorney General should not be trusted at this instance. Secondly, under a number of circumstances, the Court of Appeal would not review a sentence, according to

56 Ibid, per Huggins J at 412.
57 The speech to the Y'Men's Club on 5th February, 1976.
58 [1972]HKLR 370.
59 Ibid, 416.
60 [1976]HKLR 236.
61 Ibid, 238.
62 District Court Ordinance, Cap 336, s84; Magistrates Ordinance Cap 227, s105.

section 81C.[63] This somehow reduces the chances of possible abuses.

(4) Such power would result in the appellate court interfering with the judicial discretion of the lower courts.

But what about the convicted person's right of appeal against sentence? Moreover, as will be seen later, the appellate court has actually laid down stringent rules to prevent itself from lightly interfering with a sentence imposed by the lower court.

VI. REVIEW OF SENTENCE – THE RULES AND PRINCIPLES

In this Part, the principles which the Full Court (now the Court of Appeal) adopts when dealing with applications made on the various grounds specified in section 81A of the Criminal Procedure Ordinance will be considered.

(1) *'manifestly excessive or manifestly inadequate'*[64]

The first application for review to come before the Court was *Attorney General* v *Shum Shun-hong.*[65] But the Court there did not lay down any principles as to how it would deal with applications under section 81A. However, this state of affairs did not last long and in *Attorney General* v *Lam Kam-tai,*[66] the Court took the opportunity to make an elaborate discussion of the general principles. Rigby C J, delivering the judgment of the Court, said :

> 'To justify interfering with the sentence imposed by the lower court it is clearly not enough that the members of this court, whether individually or collectively, consider the sentence a lenient one and themselves, whether individually or collectively, would have passed a different and heavier - or lesser - sentence.'[67]

And as to 'manifestly excessive or manifestly inadequate', he said :

> '.....in construing these terms "manifestly inadequate" and "manifestly excessive" for the purpose of this section, we are entirely satisfied ..... that they impose a much stricter test in relation to the sentence imposed by the trial judge than the test that would justify an Appellate Court in interfering with a sentence on the hearing of an appeal brought by a convicted person.'[68]

Rigby C J then proceeded to lay down 'an appropriate guideline for the purpose of construing and giving effect to the provisions of this section'.[69] He cited with approval the test laid down by Schreiner J in *R* v *Reece*[70] and said:

> 'It is, of course, true that the case before Schreiner J. was an appeal against sentence on the grounds that it was excessive. But we think that the same principles should equally apply whether it be an appeal against manifest excessiveness or manifestly inadequacy.[71] Is the sentence so manifestly inadequate or so grossly excessive that it leaves one with a sense of shock or outrage? Was the punishment imposed so grossly excessive or so manifestly inadequate in the circumstances that no judge or magistrate exercising a proper judicial discretion ought to have imposed it? Is the sentence out of all proportion to the gravity of the offence? In our view, these are the principles and these are the tests which this court ought to apply in considering applications brought before it under the provisions of section 81A of the Criminal Procedure Ordinance.'[72]

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63 See above p7.
64 See s81A of Cap 221, above, p7.
65 [1972] HKLR 254.
66 [1972] HKLR 324. For a detailed discussion of this case, see William Stone, 'The power to review sentence on the application of the Attorney General – The principles delimited' (1973) 3 HKLJ 108.
67 Ibid, at 326.
68 Ibid, at 327.
69 s81A.
70 [1939] SALR (TPD) 242.
71 In *Re Application for Review of Sentences,* Huggins J, referring to this sentence, said: 'There can be no "appeal" against manifest inadequacy and the Court must in the context have meant "or an application for Review on the ground of manifest inadequacy".'
72 Ibid, at 328.

The tests are very clear, but the finishing sentence is quite puzzling. It seems to suggest that the tests should apply to applications made on whatever ground, be it 'manifestly inadequate' or 'wrong in principle'. But the first part of the quotation and indeed the wording of the tests clearly pointed out that the tests should apply only to applications made on the ground that the sentence was manifestly inadequate or manifestly excessive.

Shortly after this case, the Full Court in *Re Applications for Review of Sentences*[73] made an attempt to clarify things. First it explained why the Court would be slower to increase a sentence on review than it would be in a suitable case to increase a sentence on appeal against it by a convicted person. Rigby C J said :

> '..... the principle ..... resorted from time to time by the former Court of Criminal Appeal, now the Court of Appeal Criminal Division, in the United Kingdom, that it will not interfere with a sentence unless it is manifestly excessive or wrong in principle, is a proposition to which that court resorts when it seeks to uphold a particular serious offence; it is not a principle of universal application. When that court ..... thinks it proper to vary a sentence imposed or alter it to an entirely different sentence or order, it does so regardless of any so-called principle of not interfering unless the sentence was manifestly excessive or wrong in principle. On the other hand, the words "manifestly excessive or wrong in principle" are expressly and – certainly as far as I understood the position – intentionally written into section 81A of the Criminal Procedure Ordinance. They are words of universal application directly relevant to the consideration of every application for leave to review a sentence which is made to the Full Court.'[74]

As to the tests laid down in *Attorney General* v *Lam Kam-tai*, it was clear from what Rigby C J said that they applied only to applications made on the ground that the sentence was manifestly inadequate or manifestly excessive. And on the different formulations laid down in *Attorney General* v *Lam Kam-tai*, it seems that Rigby C J favoured the 'shock or outrage' test. He said :

> '.....the word "manifestly" was expressly inserted in this section before the word "inadequate" to emphasize the burden placed upon the Attorney General to show that the sentence imposed was so inadequate ..... to cause a sense of shock or outrage.' [75]

But on this 'shock or outrage' test, Huggins J said :

> 'Speaking for himself I have some doubts whether that is any improvement on the language used by the Legislature, for clearly some judges may be more easily shocked than others.'[76]

Despite what Huggins J said, the 'shock or outrage' test is clearly established after its affirmation in numerous occasions.[77] But it still remains to be seen whether this is just a mere label or cloak, hiding the real stance of the appellate court. Does the Court say one thing but do another? A survey of a number of cases will provide an answer to this question. They are laid out in four tables in the Appendices. In all these cases, the applications were made on the ground (or at least one of the grounds) that the sentence was manifestly inadequate.

Appendix A covers robbery cases. In *Attorney General* v *Chau Wai-ting*, the Court found that the original sentence was manifestly inadequate because

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73 [1972] HKLR 370. For a detailed discussion of this case, see William Stone's article, op cit, 176.

74 Ibid, at 400. Rigby CJ cited 42 cases to support his view. Leonard J also agreed that different standards should be applied when considering a review and an appeal against sentence by a convicted person. To support his view, he referred to D.A.Thomas' book, *Principles of Sentencing*, which suggested as many as five situations in which the Court of Appeal would interfere. Huggins J, however, thought it unnecessary to decide this question.

75 Ibid, at 376.

76 Ibid, at 413.

77 *A-G* v *Pun Tim* (1973) 3 HKLJ 343; *A-G* v *Liu Wing-cheun* (Application for Review No 7 of 1974, unreported); *A-G* v *Li Koon-lun* (Application for Review No 27 of 1975, unreported); *A-G* v *Li Shi-on & others* (Application for Review No 2 of 1976, unreported); *A-G* v *Hector Joseph Carlyle* [1976] HKLR 60.

the respondent's accomplice was armed with a knife. Taking this case as a reference for comparison, both decisions in *Attorney General* v *Cheung Chi-man* and *Attorney General* v *Tung Kan-kong* can be justified. In *Cheung Chi-man,* the respondent himself threatened his victim with a knife. In addition to this factor, the prevalence of such offences also necessitated the imposition of a deterrent sentence. So it is clear that the original sentence was manifestly inadequate. In *Tung Kan-kong,* although no knife had been used, the respondent had threatened his victim and punched him in his stomach. Moreover, the respondent had 29 previous convictions. Therefore in this case also, the original sentence was manifestly inadequate. It can be seen from these cases that the factor that carries a decisive weight is the presence or absence of a knife, or whether violence has been used. Bearing this point in mind, it is clear that the original sentence in *Attorney General* v *Ip Chi-kin* was not manifestly inadequate because in this case neither a knife nor physical violence had been used. However, although the original sentence was not manifestly inadequate, it does not follow that it was correct or adequate as the Court said that they would have passed a custodial sentence had they tried the case at first instance. Thus it can be seen that the Court does not lightly interfere with a sentence which it considers to be wrong, it only interferes when it thinks that the sentence is manifestly inadequate.

Appendix B deals with cases of assault and wounding. In *Attorney General* v *Chequer,* the Court found that a conditional discharge upon entering into a recognizance in the sum of $500 for the offence of wounding was manifestly inadequate. Comparing this case with *Attorney General* v *Pun Tim,* the latter case seems to be quite puzzling at first sight. Here the application for review of a sentence for offences similar to the one in *Chequer* was dismissed. But the offence here was clearly more serious than the one in *Chequer* as a knife had been used. Of course, the original sentences in these two cases are different. But placing a person on probation is not a great improvement over giving him a conditional discharge. The doubt is cleared by looking at the reasons given by the Court. The application was dismissed because the sentence could not be termed 'manifestly inadequate' in that it caused a sense of 'shock or outrage'. Thus, again, the same feature as seen in Appendix A is seen here – that the Court will not lightly interfere with a sentence unless it is manifestly inadequate.

In Appendix C, three cases involving offences of corruptly soliciting money are laid out. The essential facts of these three cases are similar. In *Attorney General* v *Li Yuk-hing & another,* a sentence of 3 months' imprisonment was considered to be manifestly inadequate. In quashing the original sentence, the Full Court passed in substitution a sentence of 12 months' imprisonment. By section 81B of the Criminal Procedure Ordinance, the Court of Appeal, in quashing the original sentence, may pass any other sentence in substitution as it thinks ought to have been passed. So we can take this substituted sentence as a suitable one for such offence in cases with similar facts. Thus, at once, it can be pointed out that the original sentences in *Attorney General* v *Li Koon-lun* and *Attorney General* v *Li Shi-on & others* were inadequate. But in both cases, the applications for review were dismissed. In *Li Koon-lun,* the Court conceded that the sentence might well have been heavier for such offence. But it then pointed out that the test which had been adopted was that there should be a sense of shock resulting from the sentence imposed and such a sense could not be found here. And in *Li Shi-on,* the Court even admitted that in the then climate of public anxiety concerning official corruption, sentences twice as long would not have been untoward; but sentences of 9 months' imprisonment could not be said to occasion feelings of shock or outrage.

Such an attitude of the Court can further be seen by considering the cases in Appendix D. The nature of the offences in the two cases are similar. In *Attorney General* v *Liu Yu-choi,* a fine of $500 was considered to be manifestly inadequate as the Court thought that the proper sentence for a conviction of such an offence was a custodial sentence in all but the rarest of cases. The application was thus allowed and the sentence of a fine of $5000 and 9 months' imprisonment suspended for 2 years was substituted. With reference to this substituted sentence, it can be said that the original sentence in *Attorney General* v *Liu Wing-cheun* was inadequate. But the Court did not interfere because it thought that the original sentence did not provoke a sense of shock or outrage.

It can be seen from the above survey of appli-

cations relating to four different types of offences that the Court really meant what it said. The 'shock or outrage' test was not a mere cloak; the Court did not interfere with a sentence merely because it disagreed with the sentence. This seems to be supported by statistics too. Over the past 5 years, in 21 applications made on the ground that the sentence was manifestly inadequate, only 11 applications were allowed. Thus it seems that the Court will be very slow in interfering with a sentence on which an application for review is brought on the ground that it is manifestly inadequate.

(2) *'wrong in principle'*[78]

This phrase has its origin in some early English cases concerning appeals against sentence by the convicted persons. In *R* v *Ross,*[79] for example, the Lord Chief Justice said :

> 'We only interfere with sentences, as a general rule, when it appears that the sentence has proceeded upon some wrong principle.'

Whether the attitude of the appellate court in Hong Kong now in relation to appeals against sentence by the convicted persons is as what the Lord Chief Justice said,[80] that phrase has been incorporated into sections 81A and 81B of the Criminal Procedure Ordinance and the appellate court must give effect to it.

But when will the court hold that a sentence is wrong in principle?

In *Re Applications for Review of Sentences,* it was said that a court erred in principle if it assessed a penalty on the basis of what was appropriate to the offender without due regard to the requirements of the public interest if the public interest called for an exemplary sentence to deter others with the object of affording protection of the public. But the Court also said that a court should not make a primary decision as to whether a deterrent sentence is appropriate for an offence before even considering the possible effect on the individual criminal.[81] To sum up, in the words of Huggins J, 'a balance must be maintained between the interest of the individual and the interest of the public'. It seems to be correct to say that any departure from a correct balance would result in a sentence which is wrong in principle. This formulation is interesting because of its closeness to the basic principles of the sentencing process.[82] If this formulation is adopted, it is clear that the appellate court can easily find a sentence to be 'wrong in principle'. But this formulation was not followed in subsequent cases.

In *Attorney General* v *Wong Yiu-chung,*[83] another formulation was given. In this case, a 18-year-old youth pleaded guilty to charges of (1) possession of an offensive weapon in a public place and (2) robbery. In respect of the first offence, the magistrate discharged the defendant absolutely under section 36 of the Magistrates Ordinance,[84] without recording a conviction. In respect of the second offence, he sentenced the defendant to detention in a training centre. Upon review, the Court found nothing wrong with the sentence for the second offence. As to the sentence for the first offence, the Court found that the requirements of section 36 did not justify the magistrate in discharging the youth without recording a conviction; the magistrate's order was therefore an improper exercise of his discretion and according wrong in principle.[85]

A common situation in which the appellate court held a sentence to be wrong in principle was

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78 See s81A of Cap 221, above, p7.

79 (1909) 3 Cr App Rep 198. See also *R* v *Gumbs* (1926) 19 Cr App Rep 74; *R* v *Dunbar* (1928) 21 Cr App Rep 19.

80 Above, p15.

81 [1972]HKLR 370.

82 See D.A.Thomas, *Principles of Sentencing* (1st ed, 1970)

83 [1973]HKLR 131.

84 s36 provides that where a magistrate considers the charge proved, but is of the opinion that, having regard to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to the extenuating circumstances under which it was committed, it is inexpedient to inflict any or any other than a nominal punishment, he may, with or without recording a conviction, discharge the offender either absolutely or conditionally.

85 And in *A-G* v *Chau Yuen* (Application for Review No 1 of 1975) the Court said:'.....the facts remain that it is the magistrate who has to decide.....and that it is a matter for his discretion. This Court should not interfere with the exercise of his discretion unless satisfied that it has not been duly exercised.....'

where the lower court imposed a sentence for an offence that was not in line with the norm which the appellate court had repeatedly insisted should be adopted in relation to such an offence. An example is *Attorney General* v *Yau Ying-hon.*[86] In this case, for 9 charges of bribery, Yau was fined $5000 by the magistrate. Upon review, the Court of Appeal held that this sentence was wrong in principle. It said :

> 'This Court has repeatedly stated that the offence bribery merits an immediate custodial sentence in all but the rarest of cases.[87] And we do not think that the present case is one in which a non-custodial sentence should be passed.'

It also seems that a court goes wrong in principle if it fails to maintain a correct balance between the gravity of the offence and the interest of the offender. This is similar to the formulation in *Re Applications for Review of Sentences.*[88] In *Attorney General* v *Yu Kin-keung*[89] and *Attorney General* v *Shing Yat-chi,*[90] the Court of Appeal said that the lower court had not recognised the gravity of the offence and had passed a sentence too much in favour of the defendant. Accordingly the Court of Appeal held that the sentence was wrong in principle. And in *Attorney General* v *Chau Yuen,*[91] the lower court had paid too little attention to the interests of the individual offender and the appellate court also held the sentence to be wrong in principle.

To spell out the precise circumstances in which the appellate court would hold a sentence to be wrong in principle is very difficult. The principles to be applied in fixing an appropriate sentence in different cases are so different that such an attempt would surely be abortive. It seems that little improvement can be made on the expression 'wrong in principle'.

But one thing seems to be quite clear. Applications made on this ground are not subject to those stringent requirements that applications made on the ground of manifest inadequacy are. It is true that the appellate court would be slow to allow a review even if it is made on the ground that the sentence is wrong in principle,[92] but the appellate court has never said that it would interfere only if the sentence is so wrong in principle as to occasion a sense of shock or outrage. All that is required is that the sentence imposed by the lower court comes within the meaning of 'wrong in principle'. However reluctant the court is, once it decides that the sentence is wrong in principle, it must set it aside. As Rigby C J said in *Attorney General* v *Wong Yiu-chung*[93] :

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86 Application for Review No 19 of 1975, unreported. See also *A-G* v *Tsang Wing, A-G* v *Au-yeung Kwan* [1975] HKLR 365.

87 One such instance is *A-G* v *Lui Yu-choi.* See Appendix D.

88 Above, 29.

89 [1976] HKLR 236. In this case a clerk in the Insurance Department of a bank made false workmen's compensation claims against 5 insurance companies and obtained about $40,000 from one of the companies. He pleaded guilty to four charges of endeavouring to obtain property upon forged documents and one charge of actually obtaining property by that means. He was sentenced to 2 years' imprisonment, suspended for 2 years. Upon review, the Court of Appeal held that in the case of carefully executed, deliberate, attempted fraud of this scale, a suspended sentence, despite the respondent's clear record, was wrong in principle.

90 Application for Review No 23 of 1977, unreported. In this case the defendant was employed as an accountant clerk in an investment company and held a position of responsibility and trust in matters concerning share dealings. He pleaded guilty to 10 charges of obtaining property by deception and was sentenced to 2 years' imprisonment, suspended for 2 years. The trial judge stated his reason as that the defendant was put in charge of a pool of easily marketable shares involving millions of dollars and yet her salary was only $900 per month. The Court of Appeal held that this sentence was wrong in principle. It could not be said that a person who was employed in a position of trust was because he was poorly paid to be treated as if he was in a special category. These were grave offences and the original sentence must be set aside.

91 Application for Review No 1 of 1975, unreported. The defendant was convicted of being a member of a triad society. The original sentence was detention in a detention centre and police supervision for 2 years. Upon review, the appellate court held that the police supervision order was wrong because a convicted person for whom a Detention Centre Order was appropriate would necessarily not be a habitual offender for whom a police supervision order was appropriate.

92 See *Re Applications for Review of Sentences,* above, p15.

93 [1973] HKLR 131.

> 'I was, and still am, of the opinion that order was wrong in principle and that this court, in so far as I am concerned, reluctantly has no alternative but to set it aside ..... '[94]

This leads one to the question whether the ground 'wrong in principle' offers some sort of by-pass to surmount the difficulties created by the 'shock or outrage' test. To answer this question one must first ask whether the state of affairs is such that some applications can only be made on the ground that the sentences are manifestly inadequate and some others only on the ground that the sentences are wrong in principle, if any success is to be attained. It seems that both in theory and as shown by a number of cases, that is not the case.

The sentencing process involves the judge applying certain principles to the relevant factors of the case at hand, and therefrom fixing an appropriate sentence. If a sentence is inadequate, then it can be argued that the judge must have erred in some of those principles.

The common situation in which the appellate court held a sentence to be wrong in principle has been mentioned above. But in some similar cases, applications made on the ground that the sentences were 'manifestly inadequate' were also successful. Examples are *Attorney General* v *Shum Shun-hong;*[95] *Attorney General* v *Lui Yu-choi*[96] and *Attorney General* v *Li Yuk-hing.*[97] And in the situation where the length of the imprisonment imposed is too short for a particular serious offence, one would normally expect an application for review of this sentence to be made on the ground that the sentence is manifestly inadequate. However, such an application has also been made successfully on the ground that the sentence was wrong in principle. An instance of this is *Attorney General* v *Mak Kwok-kwong.*[98] Moreover, in *Attorney General* v *Leung Mei-hing,*[99] the application for review was made on both grounds and allowed on both grounds.

The strange thing then seems to be that in relation to a sentence, an application for review can be made on either one of two grounds but one of which gives a higher chance of success. If a sentence is manifestly inadequate, it can fairly be said that some errors in principle must be involved. But the opposite need not be true, a sentence wrong in principle may only be inadequate, and not manifestly inadequate. This strange state of affairs is clearly shown in the case *Attorney General* v *Wong Shui-ying & another.*[1] Here the Court of Appeal expressly said that the sentence was not manifestly inadequate but was wrong in principle and was to be set aside.

(3) *'not authorized by law'*[2]

The rules that the appellate court adopts when considering applications made under this ground are simple. If a sentence is 'not authorized by law', it would interfere. If not, it would not. But under what circumstances will the appellate court hold a sentence to be 'not authorized by law'? So far the applications which were allowed on this ground are of one type. If some Ordinance contains some mandatory provisions as to the way in which a sentence should be made in the case of certain offences, then a sentence otherwise disposed of than in accordance with these provisions would be 'not authorized by law'.

In *Attorney General* v *Chong Hon-ying,*[3] a 15-year-old youth was convicted of possession of an offensive weapon in a public place contrary to section 33(1) of the Public Order Ordinance and was sentenced by a magistrate to detention in a *training centre.* The Attorney General applied for a review of sentence on the ground that the sentence imposed by the magistrate was not authorized by law, section 33(1) of the Public Order Ordinance providing that on conviction an offender shall be sentenced to imprisonment for not less than 6 months or sent to a *detention centre.* The Full Court held that the provisions of section 33(1) were mandatory, a training centre

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94 Ibid, at 137.
95 [1972] HKLR 254.
96 See Appendix D.
97 See Appendix C.
98 Application for Review No 17 of 1976, unreported. A sentence of 2 years' imprisonment for the offence of possession of explosives was increased to 3 years' imprisonment.
99 Application for Review No 22 of 1975, unreported.
1 [1978] HKLR 164.
2 See s81A of Cap 221, above, p7.
3 [1973] HKLR 145. See also *A-G* v *Chu Wing-hing* [1975] HKLR 520.

order was not an option and accordingly it allowed the application.

In *Attorney General* v *Wong Loy-ying & another,*[4] the two respondents were convicted of a charge of robbery and sentenced to detention in a detention centre and of another charge of 'allowing to be carried in a conveyance taken without authority' under section 14(1) of the Theft Ordinance for which they were sentenced to 6 months' imprisonment suspended for 2 years. The Attorney General applied for a review on the ground that the sentences imposed upon the respondents for the offence under section 14(1) of the Theft Ordinance were not authorized by law. The Court of Appeal found that section 4(1) of that Ordinance indicated that no other sentence should be imposed on a person in respect of whom a detention centre order had been made. The application was thus allowed and orders for detention were substituted for sentences of imprisonment.

Any other way of interpretation of 'not authorized by law' has yet to be seen.

Returning to point 4 of the objections to the Attorney General's power to apply for a review of sentence in Part V[5], it seems that the counter argument expressed there is justified in the light of the foregoing discussion of the rules and principles governing review of sentence. It is true that it is still not certain when the Court of Appeal will hold a sentence to be wrong in principle, but it must be admitted that even if an application is made on this ground the Court of Appeal would be very slow to interfere with the sentence. So point 4 does not seem to be very convincing.

VII. CONCLUSION

Having discussed the various pros and cons of the Attorney General's power to apply for a review of sentence and the rules adopted by the Court of Appeal in dealing with applications for review of sentence, it is now possible to comment on the desirability of such a power. It seems to the author that the arguments lie more in favour of having such a power. The objections do not seem to have been justified in the light of the Hong Kong experience.

The Donovan Committee, although disproving of the introduction of such power, conceded that if JUSTICE required the reduction of a manifestly excessive sentence on an appeal by a convicted person, it also required the increase of a manifestly inadequate one :

> '..... if the doing of justice is the principal reason for the power,[6] then it would seem that the prosecution ought to be able to bring before the Court cases where, in its view, the sentence was so inadequate that justice had not been done.'[7]

It is true that there is no such legislation in England. But it does not follow that there should not be any such legislation here. Rather, the introduction of this power of the Attorney General to apply for a review of sentence here is an indication that in not following the footsteps of mother England, the Legislature in Hong Kong has taken the correct steps to remedy the shortcomings of the law in Hong Kong.

VIII. COMMENTS AND RECOMMENDATIONS

In the Editorial of the 1977 Hong Kong Law Journal, Mr Downey, commenting on *Attorney General* v *Hector Joseph Carlyle,*[8] said :

> '..... In all the circumstances, the Court of Appeal did not encounter that sense of shock or outrage which it thought would entitle it to interfere with the sentence ..... But it is questionable whether this is the correct touchstone when it is contended that a particular sentence is "wrong in principle", as distinct from being "manifestly inadequate". Perhaps, the review procedure needs to be reviewed; it appears to be creating misunderstandings which are

4 [1977] HKLR 96.
5 Above, p17.
6 The power of the Court of Appeal to reduce a sentence on an appeal against sentence by a convicted person.
7 Extracted from Walker, *Sentencing in a Rational Society* (1st ed, 1969), 156.
8 [1976] HKLR 60.

more serious than the defects it was designed to remove.'[9]

The perplexity resulting from the review procedure has already been seen in the discussion in Part VI. There it was concluded that in respect of a particular sentence on which an application for review is made, the chances that the application will succeed depend on what ground the application is made. Such an absurd state of affairs clearly must not be allowed to stay. But what can be done about it ?

One suggestion is to do away with all three grounds by amending the relevant sections and let the Court of Appeal formulate its own principles in dealing with applications for review of sentence. However, this would be confronted with the objection that such a move would undermine the base of those limitations which so far have preserved the judicial discretion of the lower courts. It should be recalled that the reason why the Court of Appeal would be slow to interfere with a sentence is that :

> '.....the words "manifestly excessive or wrong in principle" are expressly and – certainly as far as I understood the position – intentionally written into section 81A of the Criminal Procedure Ordinance. They are words of universal application directly relevant to the consideration of every application for leave to review a sentence ..... '[10]

On the other hand, it may also be asked that if the above move is not adopted, what possibly could be done to remove the confusion? The suggestion would be to apply for review alternatively on all grounds. This would seem to remove the confusion arising from the fact that different results may be obtained in respect of the same sentence if the application for its review is made on different grounds.

But it must be said that this does not remove the confusion. It is still there. The difference is only that if a review is made in such a way, the offender will not escape through a wrong choice of the ground for making an application by the Attorney General. Moreover, if the application is made in such a way, there is the risk that the Court of Appeal, whether dismissing or allowing the application, may not indicate the ground or grounds for so deciding. This was exactly what happened in a number of cases;[11] and the principles adopted by the Court in dealing with such applications would once again be unclear.

Of course neither suggestion is overwhelmingly convincing. But it seems that the former one is to be preferred. It would be fanciful to suggest that if the words 'manifestly inadequate' and 'wrong in principle' etc., were deleted, the Court of Appeal would not design other devices for preserving the judicial discretion of their fellow brothers. It is thus submitted that the first suggestion should be adopted.

Another matter worthy of comment is that the law as it stands does not require reasons to be given by the courts for decisions on a review of a sentence imposed by them. However, the present practice of the Court of Appeal is, after leave is granted, to ask the lower courts to supply written reasons[12] and these reasons are always supplied. In view of this, is an amendment to make the supply of reasons a statutory obligation necessary? The magistrates of Hong Kong think so :

> 'We are of opinion that an amendment is necessary. For the present hiatus can only create doubts and may even lead to difficulties. On the one hand due to oversight or shortage of time, reasons may not be asked for under the present informal practice. This might materially affect a review particularly if the defendant is unrepresented. A subsidiary but nevertheless real consideration is the question of courtesy to the magistrate whose decision is being reviewed. On the other hand, on receipt of the present informal memorandum a magistrate might de-

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9 (1977) 7 HKLJ 1,4.

10 Per Rigby CJ in *Re Applications for Review of Sentences*, ante, 15.

11 *A-G* v *Tse Ming-muk* (Application for Review No 14 of 1974, unreported); *A-G* v *Tsai Shen-fong* (Application for Review No 30 of 1975, unreported), etc.

12 In *Re Applications for Review of Sentences*, Rigby CJ said: 'The Attorney General applied for leave to review the sentence.....In accordance with the practice followed, the magistrate was asked for his reasons for sentence.'

> cline to supply reasons. In the absence of any statutory obligation we would doubt whether the inherent jurisdiction of the Full Court or the powers of the prerogative writs would be sufficient to compel a magistrate to supply reasons if he declined to do so. In such a case a defendant, quite apart from any other party or the Court, might well be prejudiced.'[13]

Although these reasons specifically refer to magistrates, it is clear that their applicability is not so limited. They seem also to apply to judges of the District Court and also the High Court. I agree entirely with these reasons and would submit that such an amendment should be made.

13 Obiter Dicta vol 2, 110.

APPENDIX A

CASE	THE OFFENCE	SOME RELEVANT FACTS	ORIGINAL SENTENCE	THE DECISION OF THE COURT OF APPEAL (OR THE FULL COURT, AS THE CASE MAY BE)	GROUND FOR THE APPELLATE COURT'S DECISION
ATTORNEY GENERAL V IP CHI-KIN (APPLICATION FOR REVIEW NO 7 OF 1972, UNREPORTED)	ROBBERY (1 CHARGE)	IT WAS THE ROBBERY OF A HANDBAG FROM A MIDDLE-AGED LADY. NEITHER A KNIFE NOR PHYSICAL VIOLENCE HAD BEEN USED.	PLACED ON BOND OF $ 400 TO BE IN GOOD BEHAVIOUR FOR 2 YEARS ON CONDITION THAT THE RESPONDENT MOVED TO AUSTRALIA.	APPLICATION DISMISSED.	THE MAGISTRATE TOOK AN INDIVIDUALISED APPROACH AND PASSED THIS SENTENCE SO THAT THE RESPONDENT CAN START AFRESH, DESPITE THE *PREVALENCE* OF SUCH ROBBERIES. THE COURT SAID THAT THEY WOULD HAVE PASSED A CUSTODIAL SENTENCE BUT THERE WERE NO SUFFICIENT GROUNDS TO SAY THAT THE SENTENCE IMPOSED BY THE MAGISTRATE WAS MANIFESTLY INADEQUATE.
ATTORNEY GENERAL V CHEUNG CHI-MAN [1972] HKLR 358	ROBBERY (1 CHARGE)	THE RESPONDENT HAD THREATENED HIS VICTIM WITH A KNIFE.	ON PROBATION FOR 2 YEARS.	APPLICATION ALLOWED. A TRAINING CENTRE ORDER SUBSTITUTED.	DESPITE THE RESPONDENT'S AGE (18), HIS CLEAR RECORD AND THE FAVOURABLE PROBATION OFFICER'S REPORT, THE COURT FOUND THAT PUBLIC INTEREST NECESSITATED THE IMPOSITION OF A DETERRENT SENTENCE IN THIS CASE BECAUSE OF THE PREVALENCE OF SUCH OFFENCES.
ATTORNEY GENERAL V CHAU WAI-TING (APPLICATION FOR REVIEW NO 4 OF 1974)	ROBBERY (2 CHARGES)	THE RESPONDENT WAS NOT ARMED ON BOTH OCCASIONS BUT HIS ACCOMPLICE WAS. HE WAS A DRUG ADDICT WITH 3 PREVIOUS CONVICTIONS. HE WAS 20 YEARS OLD.	DETENTION IN ADDICTION TREATMENT CENTRE.	APPLICATION ALLOWED. A SENTENCE OF 18 MONTHS' IMPRISONMENT SUBSTITUTED.	ALTHOUGH THE RESPONDENT DID NOT USE VIOLENCE, HIS ACCOMPLICE WAS ARMED WITH A KNIFE.
ATTORNEY GENERAL V TUNG KAN-KONG (APPLICATION FOR REVIEW NO 6 OF 1974, UNREPORTED)	ROBBERY (1 CHARGE)	THE RESPONDENT HAD THREATENED HIS VICTIM AND PUNCHED HIM IN HIS STOMACH. HE HAD 29 PREVIOUS CONVICTIONS.	DETENTION IN ADDICTION TREATMENT CENTRE.	APPLICATION ALLOWED. A SENTENCE OF 18 MONTHS' IMPRISONMENT SUBSTITUTED.	29 PREVIOUS CONVICTIONS. THE RESPONDENT WAS A HARDENED CRIMINAL.

APPENDIX B

CASE	THE OFFENCE	SOME RELEVANT FACTS	ORIGINAL SENTENCE	THE DECISION OF THE COURT OF APPEAL (OR THE FULL COURT, AS THE CASE MAY BE)	GROUND FOR THE APPELLATE COURT'S DECISION
ATTORNEY GENERAL V PUN TIM [1973] 3 HKLJ 343	ASSAULT WITH INTENT TO ROB (2 CHARGES) WOUNDING WITH INTENT (1 CHARGE)	A KNIFE HAD BEEN USED.	ON PROBATION FOR 2 YEARS.	APPLICATION DISMISSED.	TAKING INTO ACCOUNT THE RESPONDENT'S AGE (22), HIS CLEAR RECORD AND THE FAVOURABLE PROBATION OFFICER'S REPORT, THE COURT FOUND THAT THE ORIGINAL SENTENCE COULD NOT BE TERMED 'MANIFESTLY INADEQUATE' IN THAT IT CAUSED A SENSE OF 'SHOCK OR OUTRAGE'.
ATTORNEY GENERAL V CHEQUER (APPLICATION FOR REVIEW NO 18 OF 1974, UNREPORTED)	WOUNDING (1 CHARGE)	THE VICTIM WAS A TAXI DRIVER. THE RESPONDENT HIT THE DRIVER IN THE CHIN. THE WOUNDING WAS THE RESULT OF A MISUNDERSTANDING BETWEEN HIM AND THE RESPONDENT. NO WEAPON USED.	DISCHARGED CONDITIONALLY UPON ENTERING A RECOGNIZANCE IN THE SUM OF $ 500	APPLICATION ALLOWED. A FINE OF $ 5,000 SUBSTITUTED.	THE ORIGINAL SENTENCE WAS MANIFESTLY INADEQUATE.

APPENDIX C

CASE	THE OFFENCE	SOME RELEVANT FACTS	ORIGINAL SENTENCE	THE DECISION OF THE COURT OF APPEAL (OR THE FULL COURT, AS THE CASE MAY BE)	GROUND FOR THE APPELLATE COURT'S DECISION
ATTORNEY GENERAL V LI YUK-HING & ANOTHER (APPLICATION FOR REVIEW NO 3 OF 1974, UNREPORTED)	CORRUPTLY SOLICITING AND ACCEPTING MONEY CONTRARY TO S 4(2) OF CAP 201	2 POLICE OFFICERS ACCEPTED $ 15 FROM A KEEPER OF AN OPIUM DIVAN, AS 'PROTECTED MONEY'. THEY COMMITTED THESE OFFENCES WHEN IN UNIFORM.	3 MONTHS' IMPRISONMENT.	APPLICATION ALLOWED 12 MONTHS IMPRISONMENT SUBSTITUTED.	THE COURT THOUGHT THAT IN ALL BUT THE RAREST OF CASES AN OFFENCE UNDER THAT SECTION DESERVED A CUSTODIAL SENTENCE AND ONE WHICH TOOK EFFECT IMMEDIATELY.
ATTORNEY GENERAL V LI KOON-LUN (APPLICATION FOR REVIEW NO 27 OF 1975, UNREPORTED)	CORRUPTLY SOLICITING AND ACCEPTING OF BRIBES FROM THE RELATIVES OF 2 ILLEGAL IMMIGRANTS	THE RESPONDENT IS AN AUXILIARY POLICE OFFICER. NO PREVIOUS CONVICTIONS. AGE: 25	6 MONTHS' IMPRISONMENT.	APPLICATION DISMISSED.	THE COURT ACCEPTED THAT THE SENTENCES MIGHT WELL HAVE BEEN HEAVIER. BUT THE TEST WHICH HAD BEEN ADOPTED WAS THAT THERE SHOULD BE A SENSE OF SHOCK RESULTING FROM THE SENTENCE IMPOSED AND SUCH SENSE COULD NOT BE FOUND HERE.
ATTORNEY GENERAL V LI SHI-ON & OTHERS (APPLICATION FOR REVIEW NO 2 OF 1976)	CONSPIRACY TO SOLICIT MONEY PAYMENTS FROM CERTAIN HAWKERS IN RETURN FOR PROTECTION OF HAWKING OFFENCES	THEY WERE POLICE OFFICERS. HAWKERS FROM WHOM MONEY HAD BEEN COLLECTED WERE PROTECTED FROM THE PERIODICAL INVESTIGATION BY THE POLICE.	9 MONTHS' IMPRISONMENT.	APPLICATION DISMISSED.	THE COURT SAID THAT THESE SENTENCES WERE UNQUESTIONABLY LENIENT SENTENCES. THE NATURE OF THESE OFFENCES WERE SUCH THAT, PARTICULAR IN THE THEN CLIMATE OF PUBLIC ANXIETY CONCERNING OFFICIAL CORRUPTION, SENTENCES TWICE AS LONG AS THOSE IMPOSED WOULD NOT HAVE BEEN UNTOWARD. BUT THESE SENTENCES COULD NOT BE SAID TO OCCASION FEELINGS OF SHOCK OR OUTRAGE.

APPENDIX D

CASE	THE OFFENCE	SOME RELEVANT FACTS	ORIGINAL SENTENCE	THE DECISION OF THE COURT OF APPEAL (OR THE FULL COURT, AS THE CASE MAY BE)	GROUND FOR THE APPELLATE COURT'S DECISION
ATTORNEY GENERAL V LUI YU-CHOI (APPLICATION FOR REVIEW NO 16 OF 1973, UNREPORTED)	BRIBERY OF A CROWN SERVANT WHILE HAVING DEALINGS WITH THE GOVERNMENT CONTRARY TO S 8(1) OF THE PREVENTION OF BRIBERY ORDINANCE	THE RESPONDENT WAS A SUB-CONTRACTOR OF CERTAIN BUILDINGS. AN OFFICER OF THE PUBLIC WORKS DEPT. CARRIED OUT AN INSPECTION BUT REFUSED TO GRANT AN OCCUPATION PERMIT BECAUSE OF CERTAIN DEFECTS, ALBEIT OF A MINOR NATURE. THE RESPONDENT GAVE HIM $ 2,000 AS BRIBE.	A FINE OF $ 500.	APPLICATION ALLOWED. A FINE OF $ 5,000 AND 9 MONTHS' IMPRISONMENT SUSPENDED FOR 2 YEARS SUBSTITUTED.	THE COURT THOUGHT THAT THE PROPER SENTENCE FOR A CONVICTION OF SUCH AN OFFENCE WAS A CUSTODIAL SENTENCE IN ALL BUT THE RAREST OF CASES.
ATTORNEY GENERAL V LIU WING-CHEUN (APPLICATION FOR REVIEW NO 7 OF 1974, UNREPORTED)	BRIBERY CONTRARY TO S 8(1) OF THE PREVENTION OF BRIBERY ORDINANCE	THE RESPONDENT HAD OFFERED $ 500 TO AN ASSISTANT DRIVING SUPERVISOR OF THE TRANSPORT DEPT IN RELATION TO A DRIVING TEST THAT THE RESPONDENT WAS UNDERGOING AND THE ASSISTANT SUPERVISOR WAS THE TESTOR.	6 MONTHS' IMPRISONMENT SUSPENDED FOR 18 MONTHS.	APPLICATION DISMISSED.	THE ORIGINAL SENTENCE DID NOT PROVOKE A SENSE OF SHOCK OR OUTRAGE.

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OBSTRUCTION OF POLICE OFFICERS IN THE EXECUTION OF THEIR DUTIES

by Davis Chi-kwan Hui

I. INTRODUCTION

No government department is more often the target of public resentment and criticism than the police. For the police, in the course of pursuing their task of law enforcement, are bound to come in contact with many members of the community and it is undeniable that a majority of these encounters are likely to be of an unpleasant nature which results in frequent conflict between the two parties. When the police have abused their power, the victims can seek various judicial[1] or extra-judicial remedies[2] against the police officers but analysis of these rights would be out of place here. On the other hand 'the police officers are entitled to look to the courts for protection in the performance of their duties'.[3]
By protection, Pickering J actually means punishment of the wrongdoers by the court. The court in giving such 'protection' has always borne in mind the balance between the competing interest of civil liberty of citizens and effectiveness and efficiency of law enforcement by the police officers.

'The conflict between the desire to uphold personal freedom and to give society security from criminals has taken on a more dramatic form in H.K. because of the compactness of its society'.[4]

A person who obstructs a police officer in the execution of his duty can be charged and dealt with in accordance with the law. This offence, as we shall later see, in a large extent interferes with personal and property rights and one expects it to be clear, precise and easily understood by the citizen and the police officer. It is the thesis of this dissertation to show that the law in this aspect is unclear and to a

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1 Prerogative orders of mandamus, certiorari, prohibition and habeas corpus can be obtained from the High Court of HK.

2 Complaints can be made to the Complaints Against Police Office, City District Office, UMELCO or the Urban Council. Petitions are frequently made to the Governor and sometimes to the Queen.

3 *AG* v *CHAN Pui-yin* (1973) Supreme Ct, Jurisdiction, Application for review No 14 of 1973.

4 South China Morning Post (Nov 4, 1978) per Mr J.W.D. Hobley, AG, in his address to members of the HK Society of Accountant at their annual dinner.

certain extent undersirable. There will be an analysis of the statutes and elements constituting such an offence with a subsequent brief survey of two common law countries in this area of law. Finally there will be proposals on possible judicial approaches to achieve a compromise between the two fundamentally conflicting interests of liberty and law enforcement.

II. STATUTES CONCERNING OBSTRUCTION OF POLICE OFFICERS IN THE EXECUTION OF THEIR DUTIES

The above offence finds its place in two ordinances with unlimited scope of application while there are twenty-eight ordinances constituting such an offence with reference to particular crimes as listed in appendix I. The two ordinances are:

(i) Section 36(b) of the Offences Against the Person Ordinance (Cap 212, LHK 1971 ed) –

> 'Any person who
> (b) assaults, resists or wilfully obstructs any police officer in the execution of his duty or any person acting in aid of such officers;
> shall be guilty of a misdemeanor triable summarily, and shall be liable to imprisonment for two years'.[5]

(ii) Section 23 of the Summary Offences Ordinance (Cap 228, LHK, 1977 ed) –

> 'Any person who resists or obstructs a public officer or other person lawfully engaged, authorized or employed in the performance of any public duty or any person lawfully assisting such public officer or person therein shall be liable to a fine of $1,000 and to imprisonment for 6 months.'

It can be noticed that words 'obstruct', 'resist' and 'assault' are used and their meanings are sometimes overlapping. Obstruction in the widest sense can cover all situations but it certainly embraces many situations which do not amount to an assault, e.g. in cases where words amounting to obstruction. However the actual meaning of resist and assault will not be discussed here. It needs be emphasized here that the word 'wilfully' is missing in the latter ordinance.

The English Act which deals with obstruction is section 51(3) of the Police Act 1964 which makes it an offence for any person to resist or wilfully obstruct a constable in the execution of his duty. It was therefore thought in *Victoria KAM Yuet-ling* v *R*[7] that section 63 of the Police Force Ordinance (Cap 232) which deals with 'any person who assaults or resists any police officer acting in execution of his duty' also covers the situation where a police officer is obstructed. However in that case where the defendant on failing to give particulars of her driving licence and drove the car away was charged with obstructing the police officer under this section,[8] Mills-Owens J stated:

> 'In my view it is clear that the charge fails to conform to the terms of the section under which it was brought. The section deals with assaulting or resisting police officers in the execution of their duty and it has been argued that "resist" includes "obstruct", in other words the section justifies a charge of obstruction. It is clear in my mind that in the present context the word 'resist' envisages something in the nature of a physical resistance; it certainly does not extend to a mere failure on the part of the driver to comply with such a request as might be made to him by a police officer to give his name or address or to produce his driving licence. This appears to be borne out by section 23[9] of the Summary Offences Ordinance (Cap 228) which expressly deals with the case of a person who "resists or obstructs" a public officer and thus itself draws the distinction between resisting and obstructing.'[10]

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5 The corresponding English statute, i.e. s38 of the Offences Against the Person Act 1861 only includes 'assault' while the original words of 'shall assault, resist, or wilfully obstruct' in s38 of 24 & 25 Vict c100 had been repealed by s64(2) & (3) of the Police Act 1964.

6 There is no corresponding English Act.

7 [1959] HKLR 534.

8 The charge was 'Obstruction police' Contary to s58 of Cap 232 'Victoria KAM Yuet-ling you are charged that you on the 14th day of July, 1959 at Robinson Road in this Colony, did obstruct PC 5411 TANG Cheung Yuen of uniform branch Upper Level Police Station in the execution of his duty by failing to give particulars of your driving licence and driving your private car No 9104 away.'

9 Quoted as s22 which then was but later amended as s23.

10 [1959] HKLR 534, 535.

This indicates that this section does not cover obstruction and it follows logically that section 25 of Cap 233, LHK, the corresponding section in the HK Auxiliary Police Force Ordinance, does not apply either.

III. PROBLEMS ARISING FROM THE INTERPRETATION OF STATUTES

A. What amounts to obstruction

The word 'obstruction' has often lent itself to wide interpretation and it is quite impossible to have a single definition covering all situations but it can be outlined as follows.

1. The accepted definition

Lord Goddard CJ in *Hinchliffe* v *Sheldon* defined 'obstruction' as 'making it more difficult for the police to carry out their duties.'[11] Since then it has been often cited as authority. It has also been adopted in *R* v *YUEN Tai Bu*[12] – a Court of Appeal (HK) decision. This definition, with due respect, is by no means statisfactory as Coutts, a writer, said' 'The principle here enuniciated is too wide: it would mean, for example, that a guilty man who tells the police that he is not guilty is thereby guilty of obstruction the police.'[13] A person who remains silent or a solicitor who advises his client will in most cases make police investigation more difficult to carry out and be technically guilty of such offence. The most liberal interpretation of this definition will deprive a citizen of all civil rights.

The better view is to adopt the qualification by O'Connor J in *R* v *WONG Kui-ping*[14] that 'When a police officer takes action against a person or orders him to do something the person may lawfully seek in a reasonable manner to persuade the officer that his action or orders are uncalled for or based upon a misapprehension. What is reasonable manner will depend upon the circumstances. As was said by Davey CJ in *R* v *Long* (1970) 2 Candian Criminal Cases 313

> 'An exercise of the right cannot be converted into obstruction unless it be intemperate, unduly persistent, irrelevant or made in an unreasonable manner.'

This is supported by a recent English decision of *Wershof* v *Metropolitan Police Commissioner* [15] that in demanding a receipt from a police officer seizing suspected stolen property without a warrant, the act is reasonable and will not amount to an obstruction.

2. Refusal to co-operate amounts to obstruction

In general, a citizen is under no legal obligation to assist or co-operate with the police but under some particular situations, such obligation will arise under common law. Statute has also abrogated a citizen's right to remain silent and the courts have recently recognised that an implied duty to co-operate will arise when a power is granted by statute. All these situations will be discussed in the following paragraphs.

a. under common law

Refusing to aid and assist a police officer in the execution of his duty, in order to preserve the peace, is an indictable misdemeanor at common law.[16] However it must be proved that the constable saw a breach of the peace committed, that there was a reasonable necessity for calling upon the defendant for his assistance; and that when duly called on to do so, the defendant, without any physical impossibility or lawful excuse, refused to do so.[17]

b. right to remain silent

Lord Parker in the leading case of *Rice* v *Connolly* [18] felt that it is clear that 'though every citizen has a moral duty or, if you like a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority.'[19] But

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11 [1955] 3 All ER 406, 408.

12 CA Crim App No 1147 of 1977. This case was reported in the South China Morning Post on Mar 16, 1978 under the headline 'Appeal opens the door for police' – 'A householder is obliged to open the door to a plain-clothes police officer after the latter has identified himself and produced a search warrant, the Court of Appeal ruled yesterday.'

13 Coutts, 'Obstructiong the Police' (1956) 19 MLR 411, 413.

14 Crim App No 1019 of 1977.

15 *Wershof* v *Metropolitan Police Commissioner* [1978] Crim LR 424.

16 Archbold, Criminal Pleading, Evidence and Practice (39th ed, 1977), para 2722.

17 *R* v *Brown* C & Mar 314.

18 [1966] 3 WLR 17.

19 Ibid at 21.

James J in the same case qualified it by saying, 'I would not go so far as to say that there may not be circumstances in which the manner of a person together with his silence would amount to an obstruction of the police within section 51(3) of the Police Act 1964.' Nevertheless he did not go further to explain what are the situations he had in mind and the position is left somewhat in doubt.

In Hong Kong part of this fundamental right is abrogated by the Public Order Ordinance which requires a person to give his correct name and address and produce any paper in his possession by which he can be identified to a police officer for the purpose of preventing or detecting any offence.[21] In the opinion of the writer this is by no means unwelcomed or felt repressive by law-abiding citizens when compared with its law enforcement value.

c. an implied duty to co-operate when a power is granted by statute

In all the following cases the defendants were found guilty of obstructing the police in the execution of their duties for non-compliance with the implied duty to co-operate.

In *Stunt* v *Bolten*[22] where D was found to have consumed an excess of alcohol, it is the duty of a constable to remove D's car from the highway. The court held that there is an implied duty on D to hand over the car key. In *Dibble* v *Ingleton*[23] where the driver D,knowing that a breath test may be required, was under a duty to stay and not to consume any more alcohol. In *DPP* v *Carey*[24] it was held that the right of a constable to require a driver in certain circumstances to provide a specimen of breath implied a duty on the motorist to remain 'there or nearby' until 20 minutes have elapsed since he had his last drink and the constable has had a reasonable opportunity to carry out the test. One common feature of these cases is that they all concern drunken drivers towards whom the courts are *jealous* because of the loopholes in the statutes. It is possible that in other cases, the courts will be less ready to imply such a duty. It must also be noted that although under *Rice* v *Connolly* [25] there is no duty to answer police questions, there is a duty not to give misleading answers.

3. Words amounting to obstruction

In *Betts* v *Stevens*[26] D in informing a driver who was driving at an excessive speed that there is a speed trap was found guilty of obstruction. Smith and Hogan commented that 'it is very strange that it should be a crime to tell a man who is committing a continuing offence to stop doing so even though the intention is to to frustrate the police.'[27] With this I totally agree. However it is held in *Bastable* v *Little*[28] that there is no offence to warn a driver who is not exceeding the speed limit of such trap. It distinguished from the above case on the fact that when the warning was given the driver was in fact not committing any offence at all. The reasoning is not hard to follow but if in a borderline situation where, for example, the speed limit is 40 mph and driver is driving between 38-42 mph, then the police will be in the difficult position of determining the precise moment and the speed of the vehicle when the words of warning are uttered.

The judicial decisions do not seem to speak with one voice and in *Hinchliffe* v *Sheldon*[29] where it was only suspected and not proved that an offence was being committed, the warning was held to be tantamount to a physical obstruction. In this case, D, a publican's son shouted a warning to his parents that the police were outside the public house. It was 11.17 pm and the lights were on in the bar, so presumably the police suspected that liquor was being consumed after hours. There was a delay of 8 minutes before the police were admitted and no offence detected. *Bastable* v *Little*[30] was distinguished on the ground that police had a right to enter licensed premises under Licensing Act. 1953. Coutts argued that in *Bastable* v *Little* the constable also had the right to enter the place where he had laid the trap and the true distinction 'lies in the difference between the respective acts of obstruction. In the motoring

20 Ibid at 22.
21 s49 of the Public Ordinance (Cap 245, 1970 ed). A person failing to comply with such requirement shall be guilty of an offence and shall be liable on summary conviction to a fine of $1,000 – and to imprisonment for 6 months.
22 [1972] RTR 435.
23 [1972] 1 QB 480.
24 [1970] AC 1072.
25 Op cit.
26 [1910] 1 KB 1.
27 Smith & Hogan, The Criminal Law (4th ed 1978), 355.
28 *Bastable* v *Little* [1907] 1 KB 59.
29 Op cit.
30 Op cit.

cases, others were prevented from approaching the police; in *Hinchliffe* the police were prevented from approaching others.'[31] This contention, with respect, cannot stand the definition of Lord Goddard CJ or the decision in *Betts* v *Stevens*. Therefore the rationale behind such decisions is left much in doubt.

In a recent case of *Rosato* v *Wilson*[32] two plan-clothes policemen saw D accompanying a coloured man at Heathrow Airport. The officers suspected that D was touting to give taxi service contrary to the Airport Byelaws 1972 and after D had given a short and suspicious account of his presence in the airport they wished to interview the coloured man. The coloured man, as it transpired, did not speak or understand English. D began to speak to him in the coloured man's own language, which was French. One of the constable told D not to speak in French as he did not understand. D disregarded this instruction and despite further warnings that he was obstructing the officer, spoke in French to the coloured man on three further ocassions, on two of which he stepped between the officers and the coloured man in order to speak in French. D was convicted of obstructing the police. Murphy[33], a writer, suggested that the words uttered must be proved in fact to have obstructed the police. This is proved by evidence of the actual words spoken or at least be inferred from some immediate and obvious result which they produced: for example the coloured man in this case started to run away. This submission is much to be preferred as speaking in a foreign language has never been recognised as an offence in law.

4. Other statutes concerning obstruction

Among the twenty-eight statutes which makes obstructing police officers in the execution of their duties an offence in relation to a particular crime, various words with the same or similar meanings are used either together with or independent of the word 'obstruct', see appendix I. Words like hinder,[34] impede,[35] delay,[36] molest,[37] disobey,[38] failing to comply with requirement,[39] furnish false information,[40] etc. are used. These words have never been authoritatively interpreted and the courts have a free hand when faced with them.

In *PANG Wing-luk*[41] where D in refusing to show his driving licence a second time to a police officer was convicted of obstruction of a police officer in the execution of his duty under section31 (4) of the Road Traffic Ordinance (Cap 220), which provides it an offence for 'obstructing' or 'refusing to answer' or 'answer falsely' any enquiry made by a police officer. On appeal Huggins J stated, 'Though mere inaction may in certain circumstances amount to obstruction, the question of obstruction in this case was narrowed down to and by the meaning of the words "obstructs" in Cap 220, section 31(4). Having regarded the principle that the legislation must be presumed not to waste words and particularly to the fact that the subsection itself distinguishes obstruction from refusal to answer an authorized enquiry, obstruction under section31(4) must refer to conduct other than a refusal or failure to give information. Accordingly the conviction was wrong.' Applying this formula, 'obstruct' in the statutes in Appendix I will have different meanings according to the other words used together with it. For example, in section16(a) of the Dutiable Commodities Ordinance (Cap 109), it is an offence to 'delay, obstruct, hinder or molest' a police officer in performance of any duty under this Ordinance. According to *PANG Wing-luk*, obstruction must refer to conducts other than delay, hinder or molest under this section. The same applies to section 25 of the Arms and Ammunition Ord., Cap 238, where the words 'obstructs, hinders or resists' are used.

5. A short summary of what amounts to obstruction

From what we have discussed it can be seen that there is no precise definition for 'obstruction' and the decision by Huggins J in *PANG Wing-luk* has thrown more uncertainty on it. Moreover the fundamental right of a citizen to remain silent or to speak may in certain situations amount to obstructing a police officer. In addition a citizen is sometimes under a duty to co-operate even if in doing so he may bring evidence to prove his guilt (or his innocence). If a statute is to take away the basic rights of a citizen, it is desirable that the law be clear and certain

31 Op cit at 412.
32 [1978] Crim LR 474.
33 Ibid at 476.
34 1, 3 & 20 of Appendix I.
35 1 & 11 of Appendix I.
36 3 & 9 of Appendix I.
37 3 of Appendix I.
38 11 of Appendix I.
39 2, 6, 9, 14 & 15 of Appendix I.
40 7 & 26 of Appendix I.
41 [1968] HKLR 382.

but from what we have discussed above, this does not appear to be so.

B. Who is a police officer

The second element constituting the captioned offence is that the victim must be a police officer or a public officer. The terms 'police officer' and 'public officer' are used in different statutes and will be dealt with separately. One thing which is settled is that the officer's appointment need not be proved[42] and it is up to the defence to disprove that the person assaulted is not a police officer, if he so alleges.

1. A police officer

Section 3 of the Interpretation and General Clauses Ordinance[43] defines that a 'police officer' shall bear the meaning assigned to it by the Police Force Ordinance.[44] Section3 of the Police Force Ordinance defines 'police officer' as any member of the police force but does not include a police cadet.[45] A police officer who has been dismissed,[46] terminated,[47] interdicted,[48] discharged or who has resigned[49] shall cease to be a police officer. However an officer who is convicted of a criminal offence is still a police officer[50] unless he is dismissed subsequently. An officer who is absent from duty remains a police officer[51] until he is declared a deserter by a Board held under section29 of the Police Force Ordinance (Cap 232).

The Commissioner of Police may appoint any person as a temporary police officer on monthly basis,[52] and the Governor may impose upon any village representative, his deputy or assistant the duties of a police officer.[53] The above persons while so appointed shall have the power and privillege of a police officer. It is submitted that if they are obstructed in the execution of their duties as a police officer, a charge can be brought against the wrongdoer either under section36(b) of the Offences Against the Person Ordinance or section 23 of the Summary Offences Ordinance.

2. A public officer

The Summary Offences Ordinance and twelve other statutes in Appendix I provide obstructing a public officer an offence and therefore we now proceed to see if a police officer is within the meaning of a public officer. In the Interpretation and General Clause Ordinance, a 'public officer' means 'any person holding an office of emolument under the Crown in right of the Government of Hong Kong, whether such officer be permenant or temporary.'[54] Section2 of the Summary Offences Ordinance (Cap 228) defines 'public officer' as 'extends to and includes the Governor and every officer invested with or performing duties of a public nature, whether under the immediate control of the Governor or not.' Obvious enough a police officer is a public officer.

3. An auxiliary police officer

The Royal Hong Kong Auxiliary Police Force is made up of about 4,000 part-time men and women police. Throughout 1977 a daily average of 834 auxiliary officers carried out a wide variety of constabulary duties alongside the regular police. Under section17 of the Hong Kong Auxiliary Police Force Ordinance an auxiliary police officer when called out for duty 'shall have the same power as are conferred by sections 50 to 59 inclusive of the Police Force Ordinance . . . and shall have the same protection conferred by section60 of the said Ordinance upon such police officer.'[55] The protection in section60 of the Police Force Ordinance is only the protection given while in the execution of warrants. An auxiliary police officer is not a 'member of the Police Force' as defined in section3 of the Police Force Ordinance and it is submitted that he is not a police officer within the meaning of section36(b) of the Offences Against the Person Ordinance (Cap 212). This argument is strengthened on the ground that section25 of the Hong Kong Auxiliary Police Force Ordinance provides an offence of assaulting or resisting an auxiliary police officer in the execution of his duty in

42 *Berryman* v *Wise* (1791) 4 Term Rep 366.
43 Cap 1 (1975 ed).
44 Cap 232 (1977 ed).
45 s3 of Cap I, Interpretation and General Clauses Ordinance (1975 ed). 'police cadet' – a person undergoing at the Royal H.K. Police Cadet School.
46 s15 of the Police Force Ordinance (Cap 232, 1977 ed).
47 s16 of the Police Force Ordinance (Cap 232, 1977 ed).
48 s17 of the Police Force Ordinance (Cap 232, 1977 ed). see also 6-07 (Interdiction) of Police General Order.
49 s25 of the Police Force Ordinance (Cap 232, 1977 ed).
50 s37 (5) of the Police Force Ordinance (Cap 232, 1977 ed).
51 6-06 Police General Order – 'Absence without leave and desertation'.
52 s24 of the Police Force Ordinance (Cap 232, 1977 ed).
53 s20 of the Police Force Ordinance (Cap 232, 1977 ed).
54 s3 of Cap 1 (1975 ed).
55 s17 of the H.K. Auxiliary Police Force Ordinance (Cap 233, 1967 ed).

similar wordings as that of section63 of the Police Force Ordinance indicating that the Police Force Ordinance extends to his auxiliary counterpart so far as they are specified in section17 of the Hong Kong Auxiliary Police Force Ordinance (Cap 233). However such officer is definitely a public officer within the meaning of section23 of the Summary Offences Ordinance but the penalty and mens rea are different which will be discussed later.

C. When is an officer in the execution of his duty

We now come to consider the third element of this offence of obstruction, i.e. the officer being obstructed must be in the execution of his duty. The cardinal principle is that which is officially done must be done in accordance with the law and within the power given by law. Moreover every police officer shall 'be deemed to be always on duty when exercising his power under the Police Force Ordinance.'[57]

1. Section10 of the Police Force Ordinance (Cap 232, LHK, 1977 ed).

Hogan CJ in *AG* v *CHOW Sau-sing*[58] said, 'I think the law comtemplates a general duty or responsibility of the police, which finds expression in section10 of the Police Force Ordinance.'

Section10 of the Police Force Ordinance reads as follows: –

'10. The duties of the police force shall be lawful measures for

(a) preserving the public peace;
(b) preventing and detecting crimes and offences;
(c) preventing injury to life and property;
(d) apprehending all persons whom it is lawful to apprehend and for whose apprehension sufficient grounds exists;
(e) regulating processions and assemblies in public places or places of public resort;
(f) controlling traffic upon public thoroughfares and removing obstructions therefrom;
(g) preserving order in public places and places of public resort, at public meetings and in assemblies for public amusements, for which purpose any police officer on duty shall have free admission to all such places and meetings and assemblies while open to any of the public;
(h) assisting in carrying out any revenue, excise, sanitary, conservancy, quarantine, immigration and alien registration laws;
(i) assisting in preserving order in the waters of the Colony and in enforcing port and maritime regulation therein;
(j) executing summonses, subpoenas, warrants, commitments and other process issued by the courts;
(k) exhibiting informations and conducting prosecutions;
(l) protecting unclaimed and lost property and finding the owners thereof;
(m) taking charge of and impounding stray animals;
(n) assisting in the protection of life and property at fires;
(o) protecting public property from loss or injury;
(p) attending the criminal courts and, if specially ordered, the civil courts and keeping order therein;
(q) escorting and guarding prisoners;
(r) executing such other duties as may by law be imposed on a police officer.'

At least we are at an advantage over England where there is no precise definition in the duties of a police officer.[59] Having a definition is not the end of the story because it is still subject to judicial interpretations. It must also be noted that the duty defined in section10 is very wide especially subsection (r) which provides a door for additional duties.

2. The difference between a lawful act and an act done in the execution of duty

An act which is done lawfully does not necessarily mean that it is done in the execution of duty. Thus in *Prebble*[60] a constable at the request of the landlord turned some persons out of a public house and was assaulted. The court held that the constable was not in the execution of his duty though he was doing something he may lawfully do while on duty.

57 s21 of the Police Force Ordinance (Cap 232, 1977 ed).
58 [1966] HKLR 220, 233.
59 Though the duties of a police officer has been outlined in the Final Report of the Royal Commission on the Police but it has never been implemented as law. The report at Appendix II.
60 (1958) 1 F & F 325.

This decision has in no way handicapped law enforcement or discouraged police action as the defendant was convicted of an alternative charge of common assault.

3. Interference with citizen's liberty or property

In most cases in executing their duties, police officers often infringe a citizen's liberty or property. In *R* v *Waterfield*[61] a police constable had been informed that a car had been involved in a serious offence. Evidently acting on the instructions of a superior officer he attempted to prevent D, the owner of the car, from removing it from the place on the road where it was parked. D drove the car at the constable, thus assaulting him in order to remove it. The Court held that the constable was not 'entitled' to prevent removal of the car and therefore was not acting in the execution of his duty. This decision is subjected to much criticism[62] but the test for whether a constable is acting in the execution of his duty, profounded by Ashworth J in this case is much to be preferred. As Ashworth J put it:

> 'In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was prima facie an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of power associated with the duty.'[63]

The 'power associated with the duty' will be the power of arrest, search, seizure, entry of premises, etc. However in Hong Kong it was decided in *AG* v *CHOW Sau-sing*[64] where a power of arrest was considered, the court held that the arrest would be justifiable in the sense that it was lawful[65] and there was no duty on the police to show that it was necessary or that its purpose could not have been achieved by other means. Unless it is argued that this decision only applies to power of arrest and should not be extended to other powers mentioned above, it will nullify the second part of the test profounded by Ashworth J.

a. interference with citizen's liberty – the power of detention without arrest

With the exception of statutory provision, a constable has no power, short of arrest, of detaining a person for questioning[66] and a constable who detains a person against his will without arresting him is acting outside the course of his duty.[67] However 'it is not every trivial interference with a citizen's liberty that amounts to a course of conduct sufficient to take the officer out of the course of his duties,' as stated in *Donnolly* v *Jackman.*[68] In that case a police officer who tapped D on the shoulder, not intending to detain him but in order to speak to him for the purposes of making enquiries about an offence which the officer had cause to believe D had committed or might have committed, was assaulted. It was held that the police officer was acting in execution of his duty though it was clear that D did not consent to this contact. This appears to be quite settled until the case of *R* v *Brown* in 1977.

In *R* v *Brown*[69] two police constables on mobile patrol saw a vehicle driven by D speeding out of a side street. One of the constables decided to stop the driver and speak to him about his speed though not thinking the driver had committed an offence. The police vehicle followed D's car and signalled him to stop, which he did, but he ran out of the car down the street. One of the constable brought D down on the pavement and brought him back to the police vehicle where for the first time the constable noticed

61 [1963] 3 WLR 946.

62 The actual decision in this case in much criticised by academic writers, see Hawke 'A Policeman's Duty' (1971) 121 NLJ 957 and comment in *Ghani* v *Jones* [1969] 3 All ER 1700.

63 [1963] 3 WLR 946, 950.

64 Op cit.

65 This definition is in no conflict with III C2 where the act even though done lawfully is not part of his duty to do while in the present situation the act certainly falls within the capacity of his duty but he may have done it in some other way, e.g. by summons.

66 *Rice* v *Connolly* [1966] 2 QB 414.

67 *Ludlow* v *Bergess* [1977] Crim LR 238 D started to walk away having (i) kicked a constable on the shin and (ii) used foul language. The constable put his hand on D's shoulder, not with the intention of arresting him but to detain fim for further conversation and inquiries. D then struggled and kicked the constable. Held:
detention against a man's will was unlawful without arrest. Accordingly, at the time of the subsequent assault (which alone was the subject of complaint) the constable was not acting in the execution of his duty. cf *Donnelly* v *Jackman.*

68 [1970] 1 All ER 987.

69 [1977] RTR 160.

that D's breath smelt of alcohol and asked him to take a breath test. D was arrested upon refusal to provide a specimen of breath under section8 of the Road Traffic Act 1972. The question turned on as to whether D was arrested on the pavement or in the police vehicle and if it was the former, the subsequent procedure was nugatory and ineffective and D would not be guilty of the offence charged. Shaw LJ delivering the judgement for the Court of Appeal quoted the direction to the jury of the trial judge:

> 'Conversely even though a person may be restrained and forcibly restrained, it does not necessarily follows he is under arrest. The officers have drawn a distinction in this case, it is up to you to say whether you think it is a valid distinction or not between detaining and arresting. They told you that Mr. Brown was not arrested until after the question of the breath test arose. They were *detaining* him because they wanted to ask him about his driving, and the implication is that, if he had given a proper explanation and there had been no offence for which he could be arrested, then they would have let him go.'

The decision of the jury was D was only detained and not arrested.

> Shaw LJ went on:
> 'In the light of what has been said earlier in this judgment, it appears to this court [Court of Appeal] that this direction was entirely correct.'[70]

Thus a settled principle is being shakened and now there may be a power of detention without arrest and in so doing will not bring a police officer outside the course of his duty. However the decision in *Brown* has been subjected to much criticism by academic writers[71] and is generally considered to be wrong.

In Hong Kong section54 of the Police Force Ordinance (Cap 232) confers a power to the police 'to stop and search and if necessary to arrest *and detain* for further inquiries any person' found in a public place and acting in a suspicious manner. With reference to this statute the full court has held that 'the police have power to detain persons on suspicion without charging them.'[72] However Rear argued that the legislature is not attempting to draw a distinction between arrest and detain and they in fact means arrest.[73] Wesley-Smith supports this argument and said, 'on the one hand, it could be argued that detention must involve both apprehension and compulsion and is therefore indistinguishable from arrest . . . On the other hand, arrest might be considered the initial act of placing a person under restraint, detention being the process of maintaining that person's loss of freedom.'[74]

The arguments though sound and welcomed are not dominating as both learned authors were left in doubt when faced with section8 of the Preventive Service Ordinance (Cap 342) and section10(1) of the Independent Commission Against Corruption (Cap 204), which gives a power to 'arrest *or* detain for further enquiries without warrant.' section3 of the Interpretation and General Clause Ordinance (Cap 1), defines that *or* should be construed disjunctively and not as implying similarity unless the word 'similar' or some other word of like meaning is added. It is interesting to note that the Preventive Service Ordinance was replaced by the Customs and Excise Ordinance (Cap 342) in 1977 and section17(A)(1) of the new ordinance only confers a power without warrant to 'stop and search and arrest'.[75] At the same time section10(1) of Cap 204 was amended in 1976[76] to read as an officer 'may without warrant arrest a person.'[77] In both cases the word 'detain' is omitted and this may be an indication of the intention of the legislature. However the Pawnbroker Ordinance still grants the pawnbroker a power to

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70 Ibid, at 166.

71 See [1977] Crim LR 291 & commentaries.

72 *LEUNG Lai-por* (1975) F Ct, Crim App No 657 of 1974.

73 Rear, 'The Power of Arrest in Hong Kong' (1971) 1 HKLJ 142.

74 Wesley-Smith, 'Arrest, Detention and Disjunctive' (1976) 6 HKLJ 89.

75 s17A(1) Customs & Excise Ordinance (Cap 342, 1977 ed) – 'A member may, without warrant, stop and search and arrest any person whom he may reasonably suspect of having committed an offence against an Ordinance specified in the Second Schedule.'

76 Ordinance No 14 of 1976, s2.

77 s10 (1) of the ICAC Ordinance (Cap 204, 1974 ed) – 'Any officer authorized in that behalf by the Governor may without warrant arrest a person if he reasonably suspects that such person is guilty of an offence under this Ordinance or the Prevention of Bribery Ordinance or the Corrupt and Illegal Practice Ordinance.

'detain' the 'applicant' under certain circumstances[78] and so does the Quarantine and Prevention of Disease Ordinance which grants a power to a police officer to 'stop and detain' a suspect and 'if his name and address are not known may arrest him.' Though Rear argued a fundamental right cannot be taken away without clear words, it cannot be said that the words used in the above ordinances are not clear enough for this purpose.[79] Thus in Hong Kong it is far from clear whether a detention by police without arrest will bring the police act outside his duty.

It is submitted that to harmonise the interests of efficient law enforcement and personal liberty the American law is much to be preferred. Section 2.02(2) of the American Law Institute's Model Code of Pre-Arraignment Procedure enables a peace officer to stop a person who is observed in circumstances which are suspicious; specifically where the circumstances suggest that the person has committed or is about to commit an offence, and such action is reasonably necessary to enable the officer to determine the lawfulness of the person's conduct. By section 2.02(3) during the period in which the person is stopped, his identity and purposes may be verified. The period of stopping is limited to twenty minutes after which time the person must either be arrested or released.[80]

b. interference with citizen's property

A constable who becomes a trespasser is no longer acting in the execution of his duty and even if he had a right to enter, he becomes a trespasser when told to leave,[81] but an officer when so ordered must be given a reasonable time to leave.[82] Thus in *WONG Choi-fung* v *R*[83] where the police suspected that A (appellant) was engaged in prostitution and was utterly mistaken that she in so doing rendered the premises a disorderly house. A police officer disguised as a customer went in, revealed his identity. 'A' being a large woman and the constable a small man, the constable was put out of the flat and left him 'alone and palely loitering half undressed in the corridor.' Leonard J held that his license to remain was revoked and he was a trespasser and was not acting in the course of his duty.

However if a police officer enters a premises on reasonable suspicion of a breach of the peace inside or to protect life and property[84] or suspects that a person to be arrested is there-in[85] or in entering a public house on hearing a noise inside at one o'clock in the night[86] or on reliance of any statutory power, he is not a trespasser. Therefore much depends upon the purpose of entry of the premises.

4. A direction by police to contravene traffic regulation

Any person when driving a vehicle on a road must obey the traffic signals of a police officer in uniform engaged in directing traffic[87] but the problem is if the performance in accordance with such direction amounts to a breach of traffic regulation, is the police officer in giving such direction still acting inside his duties? In *Johnson* v *Phillips*[88] a constable in an attempt to keep pace and to deal with the volume and complexity of road traffic directed D's vehicle to go the wrong way along a one-way street in contravention of traffic regulation was held acting in the execution of his duty, the disobedience of which will lead to an offence of obstruction. It left much in doubt as to whether such principle can be extended to the disobedience of other regulations or statutes! However such power is not unlimited and in *Hoffman* v *Thomas*[89] the court held that a constable would be both entitled and under a duty to give such an instruction if it were reasonably necessary for the protection of life property but one wonders whether to ease a traffic congestion is protecting life and property.

5. Is an execution of power distinct from an execution of duty?

78 s24 of the Pawnbroker Ordinance (Cap 166, 1970 ed).
79 The Power of Arrest in Hong Kong op cit at 174.
80 see Leigh, 'Self-Defence Against a Constable' (1967) 30 MLR 340.
81 *Davis* v *Lisle* [1936] 2 KB 434.
82 *Robson* v *Hallett* [1967] 2 QB 939.
83 Supreme Ct (App Jurisdiction) Crim App No 61 of 1977.
84 *McGowan* v *Chief Constable of Kingston-upon-Hull* [1968] Crim LR 33.
85 s50(3) of the Police Force Ordinance (Cap 232, 1977 ed).
86 *R* v *Smith* (1833) 6 C & P 136.
87 s10 of the Road Traffic Ordinance (Cap 220 1977 ed).
88 [1975] 3 All ER 682.
89 [1974] 2 All ER 233.

In *CHAN Siu-keung* v *R*[90] the counsel argued that a police officer when exercising a power should be distinct from executing a duty by relying on the judgement of Ashworth J in *R* v *Waterfield* that:

> '[Section 223 of the Road Traffic Act 1960][91] is merely giving a power as opposed to laying down a duty. *It seems to the court that it would be an invalid exercise of the power given by the section, if, as here, the object of its exercise was to do something, namely; to detain a vehicle, which as already stated the constable had in the circumstances no right to do.*'[92]

Since sections50 to 59 of the Police Force Ordinance which provides the main power of arrest, search, seizure, entry of premises, use of force and taking of finger prints, etc had been recognised as power and not duty[94] and if the submission by the counsel is accepted the protection to the police is largely deprived of. Fortunately Mills-Owens J got around this by saying that the words in italics were showing the sense in which the judgement was to be understood, i,e. because prima facie the constable has no right to do so and 'the case can hardly be authority for saying that a constable exercising a lawful power of arrest is not acting in the execution of his duty.' This is much to be preferred as the legislature has been quite inconsistent in using the words 'duty' and 'power' in obstruction offences.[95]

IV. THE MENS REA

R v *Forbes and Webb*[96] laid down the principle that the only mens rea required is an intention to assault (a fortiori, for obstruct because the word wilful is used) and 'it is not necessary that the defendant should know that he was a constable then in the execution of his duty.'[97] Smith and Hogan is of the opinion that 'the present English law is that laid down in *Forbes*.'[98] With due respect, I submit that the law both in the UK and HK are not that settled.

A. Mens rea as to the act of obstruction

In the Police Act 1964, the expression 'resists or wilfully obstructs' is used where a similar expression of 'assaults, resists or wilfully obstructs' is found in the Offences Against the Person Ordinance. Surprisingly the words 'resists or obstructs' are used in the Summary Offences Ordinance with a deliberate omission of the word 'wilfully'. This makes the law rather confusing in Hong Kong and is worth close examination. Moreover the statutes listed at appendix I also shows an inconsistency of the legislature in incorporating the mens rea of 'wilfully' in the statutes.

1. Section 36(b) of the Offences Against the Person Ordinance – Wilful obstruction

Lord Russell of Killowen in *R* v *Senior*[99] said, 'Wilfully means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of one person who does the act goes with it.' Thus in the case of *Willmott* v *Atack*[99a] a police officer acting in the execution of his duty arrested a motorist who began to struggle. D, who knew the motorist, intervened between the officer and motorist with the intention of assisting the officer by persuading the motorist not to resist. In doing so he obstructed the officer and was convicted of wilfully obstructing the police in the execution of their duties. On appeal, Croom-Johnson J with whom Lord Widgercy CJ and May J agreed, stated:

> ' "Wilful obstructs" . . . must be something in the nature of a criminal intent of the kind which means that it is done with the idea of some form of hostility to the police with the intention of seeing that what is done is to obstruct, and that it is not enough merely to show that he intended to do what he did and that it did, in fact, have the result of the

90 Supreme Court (App Jurisdiction) (1970) Crim App 304 of 1970.

91 s223 of Road Traffic Act 1960 provides that 'a person driving a motor vehicle on a road . . . shall stop . . . on being so required by a police constable in uniform.'

92 Op cit at 951.

94 s17 of the HK Auxiliary Police Force Ordinance (Cap 233) also recognises s10 of the Police Force Ordinance as duty and s50 to 59 of the Police Force Ordinance as power.

95 As it can be seen in Appendix I, words 'in the exercise of any power', 'in the execution of duty' and 'in the performance of his duties or exercise of his powers' are used.

96 (1865) 10 Cox CC 362.

97 Ibid, quoted the headnote.

98 Smith & Hogan, *The Criminal Law* (1978, 4th ed), 364.

99 [1898] 1 QB 283, 290-1.

99a [1976] 3 All ER 794.

police being obstructed.'[1]

The requirement of a mens rea to obstruct is of course much to be preferred but the implement of an element of 'hostility' is, with due respect, going a bit too far. A person may wilfully obstruct a police officer with the only intention to afford a suspect ample chance of escape and at the same time has no 'hostility' towards the police officer. Unless we adopt a wide interpretation that 'hostility' may be directed towards the authority as a whole as opposed to the officer being obstructed and also that in preventing an arrest, a person is to be considered as hostile towards the authority. Otherwise the implement of an element of 'hostility' must be re-considered.

In *Duncan* v *Jones*[2] the Divisional Court seemed to be unanimously of the opinion that the lawful or unlawful character of the act which constituted the wilful obstruction was irrelevant in determining whether the offence had been made out. However in *Rice* v *Connolly* Lord Parker CJ, with whom Marshall and James JJ agreed, stated that:

> ' "Wilful" in this context not only in my judgement means "intentional" but something which is done without lawful excuse . . ."[3]

From the point of civil right, the decision in *Rice* v *Connolly* is to be preferred.

2. Section23 of the Summary Offences Ordinance – Obstruct

The fact that the words 'resists or obstructs' are used without 'wilfully' does not necessarily mean that no mens rea is required. In Hong Kong as pointed out in *Halim Sulman Sharifudin* v *R*,[4] per curiam:

> 'It is for the courts to apply the law giving full recognition to such encroachment upon the ordinary requirement of mens rea but it is equally for the courts to repel any invasion of their historic and elementary requirement of a crime unless it be entirely clear that an offence of strict liability has been in fact created.'

Therefore there is a presumption against strict liability when interpreting a statutory provision in a criminal offence[5] and mens rea as the essence for crime has been long established.[6] This presumption is only rebutted by clear intention of the legislature reflected in the plain words of the statute.

Unfortunately the only case directly on this issue held to be the contrary. In *SUN Yue-yen* v *R* where a sweeping statement was made by Mills-Owens J[7]:

> 'In my view the offence created by section23 of Cap 228 must be construed as one of strict liability. Where, therefore, the essential facts are known to the defendant on a charge under this section, it is in my view no defence, as the authorities stand, that he thought he had a right to resist as a matter of civil law. A belief in a legal right may well be a defence in the case of some other offences, although the belief is unfounded, it is so, for example in larceny and crimes involving fraud.'

However one can still argue that the general statement that an offence was one of strict liability was meant to be read in the light of the subsequent qualification that a belief of lawful excuse is no defence. If that were not the law, it would mean that an innocent bystander who assisted the police in making an arrest might find himself charged with obstructing the police if the person to be arrested got away – a *Willmott* v *Atack*[8] situation. This is even worse where within the same jurisdiction, there exists two pieces of legislation creating the same offence with one requiring mens rea and not the other.

B. Mens rea as to the status of the police officer

1. The English decisions

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1 Ibid, at 800.
2 [1936] 1 KB 218.
3 Op cit at 419.
4 CA Crim App No 17 of 1977 (Briggs CJ, Huggins and Pickering JJA).
5 See Wesley-Smith, 'Notes of case – *Halim Sulman Sharifudin* v *R*' (1977) 7 HKLJ 378.
6 *State* v *Blue* (1898) 17 Utah 175, 181 per Bartch J: 'To prevent the punishment of the innocent, there has been ingrafted into our system of jurisprudence, as presumably in every other, the principle that the wrongful or criminal interest is the essence of crime, without which it cannot exist.'
7 [1964] HKLR 139, 142.
8 Op cit.

It has been recognised by standard practitioner's books that the mens rea as to the status of the police officer is one of strict liability but I submit that this is not that settled. This concept started off on the case of *Forbes*[9] when the Recorder, Gurney Esq stated:

> 'The offence was, not assaulting them knowing them to be in execution of their duty, but assaulting them being in the execution of their duty.'

As Dr. Granville Williams said, 'It is a mere direction to the jury by a recorder and is unsound.'[10]

Smith and Hogan went on to say, 'In *Prince* six of the judges seem to have accepted it as correct, . . .'[11] The word 'seem' is used because, I submit, the direction of the Recorder in *Forbes* was never mentioned in the judgement in *R* v *Prince*[12] The case was heard in the Court of Criminal Appeal constituted by sixteen judges. Bramwell B who delivered a judgement on behalf of five other judges said:

> 'A man was held liable for assaulting a police officer in the execution of his duty, though he did not know he was a police officer *(R* v *Forbes,* 10 Cox CC 362). Why? Because the act was wrong itself.'[13]

In fact it is observed that Bramwell B arrived at the conclusion on a different reasoning from the Recorder. Following this reasoning, if the act of obstruction is not wrong in itself, for example, in an honest belief that the police officers are committing a robbery instead of a gambling raid, D prevents the officers from entering a premises, then knowledge that the persons are police officer in the execution of their duties is relevant! Moreover Blackburn J who delivered the majority judgement of eight judges never mentioned *R* v *Forbes.* In fact Brett J, a dissenting judge, said, 'In *R* v *Forbes and Webb* (10 Cox CC 362), although the policeman was in plainclothes, the prisoner certainly had strong ground to suspect, if not to believe, that he was a policeman; . .' Even if we accept the statement of Smith and Hogan, this case is a decision on the offence of 'Carnal knowledge of a girl under sixteen' and what was said in relation to police officers acting in the execution of their duties was merely obiter.

R v *Forbes* was mentioned again in ***Maxwell and Clanchy***[14] but, with due respect, the judgement was self-contradicting. It reads:

> *'Forbes and Webb . . . . .* laid it down that knowledge that the person assaulted was a police officer was not necessary to sustain an indictment for assaulting a constable in the execution of his duty. That decision has never been doubted, and we throw no doubt on it. *Here the jury have found that appellant did know that the man who challenged them was a constable. Any rate, it must be established that the person charged did not know. Otherwise, even if the the constable announced that he was one, it would always be open for prisoner to say, "I don't believe it".'*

Though the Court of Criminal Appeal expressly approved *R* v *Forbes,* there is a clear conflict in its later qualification implying that it is not for the prosecution to prove knowledge in D but this does not prevent him from relying on a positive mistake. Since it is such a confusing statement, this case cannot be said as authority in support of *R* v *Forbes.*

A more recent mention of *R* v *Forbes* is in *R* v *Mark* where it was held that:

> 'Although knowledge that the person assaulted was a peace officer is not an ingredient of the offence under section 38 of the Offences Against the Person Act, 1861, an unlawful assault is one of the ingredients and so if the jury believe that the defendant acted under a genuine belief, honestly and reasonably held, that the person assaulted was in the act of committing a felony or breach of the peace, they should find the defendant not guilty.'[15]

Though the defence of 'genuine belief, honestly and reasonably held, that the person is committing a

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9 Op cit.
10 Criminal Law, the General Part, 2nd ed, 194.
11 Smith & Hogan, *The Criminal Law* (1977, 4th ed), 364.
12 (1875) 13 Cox 138.
13 Ibid, at 142-3.
14 (1909) 2 Cr App R 26.
15 [1961] Crim LR 173.

felony or breach of the peace' refers to assault, there is no logical reason why it does not apply to 'wilful obstruction'. Back to my previous example of a mistake that the police officers are committing a robbery instead of a gambling raid, suppose the above defence is raised, let us consider the following situations:-

(i) Evidence shows that D knew that the persons were police officers conducting a gambling raid (i.e. in execution of their duties), the above defence will not stand.
(ii) Evidence only shows D knew that the persons were police officers but honestly and reasonably believed that they were committing a robbery (i.e. no mens rea as to the circumstance that the police were in the execution of their duties), the above defence will stand.
(iii) Evidence shows that D honestly and reasonably believed that the persons were not police officers and were in fact committing a robbery; the above defence will stand.

The above argument illustrates that by affording such a defence is another way of saying mens rea as to the fact that the victims are police officers acting in the execution of duty a relevant ingredient. In fact the above defence is in line with the implication from the judgement of *Maxwell and Clanchy.*[16]

Judging from the angle of civil liberty, the above conclusion is also to be preferred. If not it will 'comprehend the case alike of the citizen who fear that a constable or purported constable is engaged in a criminal course of conduct, a person with a criminal record who fears brutality or considerable inconvenience flowing from official vindictiveness; and, at the extreme the citizen who simply insists on a right to cause inconvenience by refusing co-operation.'[17]

2. Commonwealth approaches

a. Australian cases

In *R* v *Galvin (No 1)*[18] the Victorian Full Court held that to establish the offence of assaulting a police officer in the execution of his duty, it was sufficient if the prosecution proved an assault upon a person who turned out to be a police officer acting in the execution of his duty. The decision conceded, however, that it was open to the accused to defend himself by proving on the balance of probabilities that he acted under a reasonable but mistaken belief that the person assaulted was not a police officer acting in the execution of his duty.

In *R* v *Galvin (No 2)*[19] a larger Victorian Full Court consisting of five judges was specially assembled to review the decision in *R* v *Galvin (No 1).* The court overruled *R* v *Galvin (No 1)* and held that mens rea is required for all elements of the offence but it may be sufficient in some cases to prove that the accused knew he was assaulting a policeman and supposed that he was acting in the execution of his duty.

Then came the decision in *R* v *Reynhoudt.*[20] The High Court of Australia approved and restored *R* v *Galvin (No 1)* and overruled *R* v *Galvin (No 2).*

Therefore it has never been recognised in Australia that the mens rea as to the status of a person being a police officer in the execution of his duty is strict because even the narrow view of *R* v *Galvin (No 1)* and *R* v *Reynhoudt* has always allowed a defence of a reasonable but mistaken belief.

b. Canadian case

The case of *R* v *Mcleod*[21] was decided by the British Columbia Court of Appeal. O'Halloran JA was of the opinion that prima facie mens rea was required for all elements of a criminal offence but the fact that the word 'knowingly' or other equivalent words were missing relieved the prosecution of the burden of proving mens rea but allowed D to rebut the presumption of knowledge by proving mistake. However the other two members of the Court insisted that mens rea was required for all ingredients of the offence.

3. Possible approaches by courts in Hong Kong

SUN Yue-yen v *R*[22] is the only case directly

16 Op cit.
17 Leigh, 'Self-Defence Against a Constable' (1967) 30 MLR 340, 341.
18 [1961] VR 733.
19 [1961] VR 740.
20 (1962) 107 CLR 381.
21 (1954) 111 CCC 106.
22 Op cit.

on the interpretation of section23 of the Summary Offences Ordinance but if my previous argument stands, the statement of Mills-Owens J throws no light as to the mens rea concerning the status of the victim. If my argument fails, what was said concerning such status was merely obiter[23] and is not binding. All the English decisions on this issue are, in accordance with the doctrine of stare decisis, not binding in Hong Kong. Section36(b) of the Offences Against the Person Ordinance has never been authoritatively interpreted. It is submitted therefore the courts in Hong Kong are still left with a free hand. There are the possible approaches:–

a. knowledge is completely irrelevant

This is the decision in *R* v *Forbes*[24] and the so called 'settled' principle. This principle is quite objectionable from the penological point of view. Under the Offences Against the Person Ordinance, assaulting a police officer in the execution of his duty is punishable with two years imprisonment. It is also classifield as an 'excepted offence' within the third schedule of the Criminal Procedure Ordinance (Cap 221) which means the special consideration for young offenders between 16-21 years of age is inapplicable[25] and the discretion of the court to impose a supended sentence is unavailable.[26] Whereas common assault is punishable under the same Ordinance with one year imprisonment,[27] and is not an 'excepted offence'. The punishment is aggravated by the fact that the person assaulted is a police officer in the execution of his duty. To incur the heavier punishment it is proper that the accused must have acted with knowledge of the aggravating circumstances or at least he must have been negligent with regard to it. To punish him for the aggravated assault when he has only the mens rea of common assault offends every sense of justice. Standing in the way of the argument is the fact that under the Summary Offences Ordinance, this offence is punishable with a fine of $1,000 and an imprisonment of six months only. However since this is a different ordinance and it is not unreasonable that in enacting this ordinance, the legislature did not have each and every other ordinances in consideration.

It is increasingly recognised that strict liability has no place whatever in the criminal law; indeed, it is barbarism to punish people despite the fact that there is no reason for blaming them at all. This judicial attitudes prevails in England where Lord Goddard CJ repeatedly said:

> 'It is of the utmost importance for the protection of the liberty of a subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.'[28]

Similar attitude is expressed in the case of *LIM Chin Aik*[29] in the Judicial Committee of the Privy Council, approved in the House of Lords in *Sweet* v *Parsley*[30] and cited in the High Court of Australia in *Iannella* v *French*.[31] The Court of Appeal in Hong Kong also follows this trend in *Halim Sulman Sharifudin* v *R*.[32] It is therefore submitted that in view of civil liberty and the prevailing judicial attitude, strict liability is not to be preferred.

b. knowledge must be proved by the prosecution

Generally, the burden of proving all the essential ingredients of the offence charged is on the prosecution. This is the method adopted by the majority in *R* v *Galvin (No 2)*.[33]

This approach takes good care of the civil liberty of a person but has off-set the balance of law enforcement. It also places on the prosecution the difficult task of proving a fact which might be known

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23 The point that the bailiff was not a public officer acting in the execution of his duty was never in issue. The only defence raised was that the resistance was based on a misunderstanding of 'lawful excuse'.

24 Op cit.

25 s109A(1) & (1A) of the Criminal Procedure Ordinance (Cap 221).

26 s109B(1) of the Criminal Procedure Ordinance (Cap 221).

27 s40 of the Offences Against the Person Ordinance (Cap 212, 1971 ed).

28 per Lord Goddard CJ in *Brend* v *Wood* (1946) 62 TLR 462, 463 and repeated in *Harding* v *Price* 1948 1 KB 695, 700.

29 [1963] AC 160.

30 [1970] AC 132.

31 (1968) 41 ALJR 389.

32 op cit.

33 Op cit.

only to the accused and which he is in a better position to disprove. Of course one can infer from the facts in clear-cut cases like where the police officer is dressed in full uniform and the warrant card is produced before action is taken. However there remains many other situations where the officer is in plain clothes with no ample opportunity of indentifying himself. It is submitted, therefore, this approach again should not be adopted.

c. a reasonable mistake of fact, if proved by the accused is a defence

This is the decision in *R* v *Reynhoudt*[34] and my interpretation of *Maxwell and Clanchy*[35] and *R* v *Mark*.[36] The effect of proving such a mistaken belief is to show that the accused did not intend to do the prohibited act. It does not detract from any protection to which the police are entitled in the execution of their duties and it places the burden of proof where it rightly ought to be. Indeed this approach looks after the two conflicting interest of citizen's right and effectiveness of law enforcement. This approach is much to be favoured.

V. CONCLUSION

It is the prime duty of the legislature to enact law for maintaining peace and order and to allow the law enforcement unit ample power and protection to achieve such; it is equally important that civil liberty of individual should be safeguarded. To achieve a correct balance, the law must be clear, certain and just – such depends a lot on the judges in interpreting statutes. 'Obstruction of police officers in the execution of their duties' is a legislative creation: the intention of which is to afford protection of such officer while pursuing his duty and not to victimise those for obstructing a person who just happens to be a police officer.

Lengthy discussions have been made in relation to the difficulties arising from the interpretations of the statutes. Obstruction, as we have seen, has been given a most generous meaning and that has been summarized. We have also seen that the interpretation of 'in the execution of duties' arises controversy, and the most important of which is a power of detention without arrest. It is regrettably that such grave problem is left in a confusing state in Hong Kong.

The offence is said to be one of strict liability but the doctrine is built on an unstable foundation. Moreover strict responsibility at the present day is an unjust anachronism standing against the main stream of development of the cirminal law.

It is hoped that in future when the issues come before the court, due considerations will be given to the outstanding problems so there will be no undue infringement of citizen right and liberty and at the same time the integrity of our legal system in criminal law is duly observed.

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34 Op cit.
35 At p29, above.
36 At p30, above.

APPENDIX I

(This is the result of a research of all statutes in Hong Kong. The Ordinances concerning obstructing a police officer or a public officer in the execution of his duty are extracted as follows.)

	Cap	Sect	Ordinance	Particulars				Penalty	
				Obstruct	MR(obstruct)	In the execution of duty	Officer	Imprison	Fine
1	57	59(3)	Employment	hinder or impede	–	in the performance of his duties or exercise of his powers	public off. or police	–	$5,000
2	60	26(1a)	Import and Export	obstructs	–	in the exercise of any power or the performance of any duty	Custom & Excise Off. or public off.	6 m.	$10,000
		26(1b)		fails to comply with requirement	–	in the exercise or performance of any such power or duty	appointed by D. of C & E Dept.	6 m.	$10,000
		26(2)		Makes a false report	Knowingly	–		6 m.	$10,000
3	109	16(a)	Dutiable Commodities	delay, obstruct, hinder or molest	–	duly engaged in the performance of any duty or in the exercise of any power	Police or Custom & Excise off.	2 yr.	$100,000
4	132	139	Public Health & Urban Service	obstructs, resists or uses abusive language	wilfully	acting in the execution of his duties	Health off. or police	–	$500
5	133	17(3)	Agricultural Pesticides	obstructs	wilfully	in the exercise of any power	public off.	6 m.	$10,000
6	134	53(a)	Dangerous Drugs	failing to comply with a requirement	–	in the exercise of any power conferred by S52	public off.	6 m.	$1,000
		(b)		obstructs	–	– ditto –		6 m.	$1,000
7	135	91	Merchant Shipping	furnish false information	knows or reasonably ought to know	–	public off.	6 m.	$5,000
8	137	9(3)	Antibiotics	resists or obstructs	wilfully	in exercise of his power under this section	public off.	–	$1,000
				fails to give information	without reasonable excuse	duly required under this section		–	$1,000

	Cap	Sect	Ordinance	Particulars				Penalty	
				Obstruct	MR(obstruct)	In the execution of duty	Officer	Imprison	Fine
9	138	35(3)	Pharmacy & Poisons	delays or obstructs fails to give information	wilfully without reasonable excuse	in the exercise of any power under this section which he is duly required under this section	public off.	12 m.	$10,000
10	140	9	Lion Rock Tunnel	obstructs	–	in the exercise of the power on him by this Ord. or otherwise in the performance of his duties	public off.	6 m.	$1,000
11	141	9	Quarantine & Prevention of Disease	obstructs or impedes disobey	without lawful authority –	in the execution of his duty any lawful order	health off. police & off. appointed under this Ord.	–	$500
12	145	15(3b)	Acetylating Substances	obstructs	–	in the exercise of any power	public off.	6 m.	$5,000
13	148	27	Gambling	obstructs	–	in the exercise of the power	police	3 m.	$10,000
14	150	8(a) (b)	Objectionable Publication	obstructs fails to comply with	– reasonable	in the exercise of any power in the execution of the warrant	police or Custom & Excise off.	6 m.	$10,000
15	170	18(b) (c)	Wild Animals Protection	fails to comply with resists or obstruct	without lawful excuse wilfully	acting under S17(1) in the exercising of any power under S17(2)	police, JP, Game Warden, Forest Off., Fisheries Inspector.	–	$5,000
16	187	12	Animals & Plants	obstructs	–	exercising any power under S11	Customs & Excise Off., Public off.	6 m.	$2,000
17	207	24	Plant	obstructs	–	in the exercise of any power or the performance of any duty	police off.	6 m.	$10,000
18	208	28(2)	Country Park	obstructs	wilfully	lawfully exercising his power under this section	police off.	1 yr.	$5,000

	Cap	Sect	Ordinance	Particulars				Penalty	
				Obstruct	MR(obstruct)	In the execution of duty	Officer	Imprison	Fine
19	220	31(4)	Road Traffic	obstructs, refuses to answer or answers falsely	–	in the exercise of any power conferred under this Ord.	police off.	–	$500
20	238	25	Arms & Ammo.	obstructs, hinders or resists	–	any search or arrest authorized by this Ord.	police off.	3 yrs.	$2,000
21	245	50A	Public Order	obstructs	–	exercising any powers or performing any duties conferred or imposed on him by this Ord.	police off., HM Forces, RHK Reg., RHKA Air F.	6 m.	$1,000
22	250	108(a)	Commodities Trading	obstructs	–	in the exercise or performance of any power, authority, duty or function under this Ord.	public off.	6 m.	$20,000
23	260	8(b)	Protected Place	resists or obstructs	–	in discharge of the duties imposed upon him by this Ord. or in exercise of the power hereby conferred	authorized guard	6 m.	$250
24	277	11(3)	Agricultural Products	resists or obstructs	–	exercise of any power conferred by this section	police off.	3 m.	$500
25	291	7(2)	Marine Fishing	resists or obstructs	–	search, seizure, detention or arrest	police off., public off.	3 m.	$500
26	295	14(3)(a) (3)(b)	Dangerous Goods	obstructs or delays gives false information or withholds information	– wilfully or recklessly	in the exercise of any of the persons conferred upon him by this Ord. as to sources of dangerous goods	police off., off. of Fire Service Dept. Off. of Cus. & Ex. Dept.	6 m.	$2,500
27	299	13(b)	Watchmen	obstructs	–	in the exercise of his powers under prov. of S9	police off. or Sr. Manager of Marketing	6 m.	$1,000
28	310	15(1)(j)	Business Registration	resists or obstructs	–	in the performance of his duties	police off.	1 yr.	$2,000

Appendix II

Final Report of the Royal Commission on the Police
1962, Cmnd. 1728, para. 57

57. The police in this country are the instrument for enforcing the rule of law; they are the means by which civilised society maintains order, that people may live safely in their homes and go freely about their lawful business. Basically their task is the maintenance of the Queen's Peace – that is, the preservation of law and order. Without this there would be anarchy. Policemen, like everybody else, are accountable to the law. They are also the law's agents: and the uniformed policeman has for many years been recognised and accepted as the embodiment of the law's authority. In a general sense it can be said that the purpose of the police is unchanging. The constable is, as Wordsworth described the peace officer of his day, a –

"Staid guardian of the public peace"

58. This, however, is only a very general description and neither English statute law nor the declaration which constables are required to make carries matters very much further. Scottish police law, consolidated in 1956, is somewhat more helpful, but still by no means comprehensive. Section 4 of the Police (Scotland) Act 1956, prescribed the duties of constables, under the direction of a chief constable, as follows:

"to guard, patrol and watch so as –
(i) to prevent the commission of offences against the law,
(ii) to preserve order, and
(iii) to protect life and property;"

and the section goes on to prescribe further specific duties such as to make available reports to prosecuting authorities, to serve and execute warrants, to give evidence at courts of law, and other matters.

59. The policeman works in a changing society, and there is nothing constant about the range and variety of police duties, just as there is nothing constant about the pattern of crime, the behaviour of criminals, the state of public order or, at deeper levels, the hidden trends in society that dispose men to crime, to civil and industrial unrest, or to political demonstration. The emphasis on particular duties varies from one generation to another. At present, however, the main functions of the police may be summarised as follows:

First, the police have a duty to maintain law and order and to protect persons and property.

Secondly, they have a duty to prevent crime.

Thirdly, they are responsible for the detection of criminals and, in the course of interrogating suspected persons, they have a part to play in the early stages of the judical process, acting under judicial restraint.

Fourthly, the police in England and Wales (but not in Scotland) have the responsibility of deciding whether or not to prosecute persons suspected of criminal offences.

Fifthly, in England and Wales (but not in Scotland) the police themselves conduct many prosecutions for the less serious offences.

Sixthly, the police have the duty of controlling road traffic and advising local authorities on traffic questions.

Seventhly, the police carry out certain duties on behalf of Government Departments – for example, they conduct enquiries into applications made by persons who wish to be granted British nationality.

Eighthly, they have by long tradition a duty to befriend anyone who needs their help, and they may at any time be called upon to cope with minor or major emergencies.

CONDITIONAL INTENTION: THEFT AND RELATED INCHOATE CRIMES

by Christine Zahovskis

INTRODUCTION

A would-be thief sees a handbag belonging to a woman. He reaches for it, opens it and rummages in it. He finds nothing that catches his eyes which he considers worth taking. He then abandons the handbag. In such a situation, it is now clear from decided cases[1] that the court will not convict the man for the full offence of theft. While this may be justified because of the specific requirements contained in the statutory definition of theft[2], it seems to be against common sense that this man is to go off scot free. But this is indeed what happens in such cases because the courts also hold that the man cannot be convicted of an attempt to steal either.[3]

A number of issues arise from such a decision. The object of this article is to critically examine conditional intention – is it really true to say that it does not amount to intention for legal purposes? Why was the accused not guilty of attempted theft on the particular facts? Is there any way to get around the court's decision so that such an accused is at least guilty of attempted theft? And what if the facts are such that another inchoate crime is charged, namely, conspiracy or incitement, would the accused be found guilty if his mental state amounted to condition intention only?

DEFINITION OF THEFT

There is now a statutory definition of theft. In Hong Kong, it is contained in the Theft Ordinance, Cap 210[4]. Theft is defined in section 2 (1)[5].

> 'A person commits theft if he dishonestly appropriates property belonging to another

1 *Reg* v *Easom* [1971] 3 WLR 82; *Reg* v *Au Lai Yung* [1976] HKLR 249; *R* v *Hussein* [1978] Crim LR 219; *R* v *Hector* The Times January 19, 1978.
2 s2(1) of the Theft Ordinance (Cap 210, LHK, 1970 ed).
3 *R* v *Hussein* [1978] Crim LR 219.
4 Theft Ordinance (Cap 210, LHK, 1970 ed).
5 Identical to s1(1) Theft Act 1968.

> with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly.'

It is traditional for writers[6] to divide the elements of theft into the actus reus elements and mens rea elements. The actus reus elements consist simply of the 'appropriation of property belonging to another'.[7] The mens rea elements are 'dishonestly' and 'with the intention of permanently depriving the other of it'. While it is useful to break down the elements in a crime, it is evident that sometimes an actus reus element cannot be considered independently of the mens rea element. The primary actus reus element is 'appropriation'[8] but sometimes it is not possible to establish it without taking into consideration the mens rea requirement of 'intention permanently to deprive'.

> '. . . but the traditional [and useful] analysis of the crime into actus reus and mens rea must not be allowed to obscure the fact that, in many if not all cases, it is impossible to determine whether there has been an appropriation without having regard to the intention with which the act was done. Even if there had been no express provision requiring an intent permanently to deprive, such an intent would probably have been implicit in the notion of appropriation'[9]

This serves to emphasize the rule that appropriation must be accompanied by the specific mens rea requirement of intention permanently to deprive. Smith and Hogan describe this as 'different sides of the same coin'.[10] Although by definition, appropriation is a wide ranging concept since section 4(1) refers to 'any assumption by a person of the rights of an owner', it is limited in terms of criminal liability by the requirement of intention permanently to deprive.

Another view on the meaning of appropriation is that it implies absence of authority or some other taint of illegality on the part of the accused. Glanville Williams says that it means 'anything done in relation to property by a non-owner that only the owner could lawfully do or authorise'.[11] The learned author also says that 'illegally taking possession of an article is certainly capable of being an appropriation'.[12] Because of the notion that the appropriation must be in some way illegal, he distinguishes the hypothetical example advanced by the Court of Appeal in *Easom* concerning the dishonest postal sorter. It involves the example of a postal sorter who goes through some letters, intending to steal any that is registered. If he was acting within his authority, there is a strong argument for saying there was no appropriation because the handling was not illegal.

Therefore, there are two notions which may apply to appropriation. One requires appropriation to be considered in relation to whether it was accompanied by an intention permanently to deprive. The other says that appropriation simply involves absence of authority or some other sort of illegality. If the former is adopted, it may very well be said that in *Easom* there was no appropriation. But if the latter approach is used, the taking was illegal and thus it was an appropriation. It is submitted that for the purposes of the present discussion, it is not fatal whichever view is taken because the Court did not even consider the possibility of saying there was no appropriation. The whole question in *Easom* turned on the question of the intent permanently to deprive. It seems, however, that it would be better to say that appropriation involves some sort of illegality. The intent permanently to deprive is only relevant for considering the accused's mental state at the time of the appropriation. If appropriation can only be established by considering if it was accompanied by the intent permanently to deprive, then it would mean that if such mental state was absent, there would be neither mens rea nor actus reus for the offence of theft. It would also mean that there is a

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6 Smith and Hogan, *Criminal Law* (4th ed, 1978); J.C. Smith, *The Law of Theft* (2nd ed, 1972).

7 J.C. Smith, *The Law of Theft* (2nd ed, 1972) para 19.

8 s4(1) of the Theft Ordinance (Cap 210, LHK, 1970 ed). s3(1) of the Theft Act 1968.

9 J.C. Smith, *The Law of Theft* (2nd ed, 1972) para 46. The author then cites the case of *Holloway* (1849) 1 Den 370 where an employee broke into the warehouse of his employer and took a number of dressed skins with the intention to present it to the employer's foreman that he had dressed them and thereby get paid for the work. It was held that he was not guilty of larcency because he had no intention to permanently deprive his employer of the skins.

10 Smith and Hogan, *Criminal Law* (3rd ed, 1973), 398.

11 Glanville Williams, *Textbook of Criminal Law* (1978), 734.

12 Ibid, 652.

further obstacle to overcome in order to convict. It is, nevertheless, important to consider the intent permanently to deprive because this must be the mental state necessary for the offence.

NATURE OF CONDITIONAL INTENTION

Where an appropriator postpones his decision to usurp the owner's right on some contingency, he is said to have merely conditional intention. The contingency is usually whether the property is worth taking. It is the state of mind of a person who says 'if it proves worth taking then I'll take it'. Glanville Williams puts the case[13] of a burglar who breaks into a house intending to steal a certain paper if it is there. Another example[14] is of a gambler who bets on a horse and takes V's valuable necklace as an insurance against losing, intending to return the necklace if he wins. D loses his bet and keeps the necklace. Other examples have been suggested by other authors.[15] If D takes a shirt from a shop intending to keep it only if it is a good fit or D takes a ring intending to keep it if it is a diamond but to return it if it is stone. The question is when did the theft take place; alternatively, was there any theft at all? A more difficult problem arises if D, on examination decides the thing is not worth stealing and therefore discards it or returns it. Is he nevertheless guilty of theft?

THE DECIDED CASES

A number of cases have consistently held that conditional intention is not enough on a charge of theft. The leading case is *Reg* v *Easom.*[16]

The Facts

The appellant sat behind a woman in a cinema. When the lights went out, he picked up her handbag from the floor and searched through its contents. The woman whose handbag had been taken heard the sound of the russle of tissues and the sound of her handbag being closed. The appellant left his seat and later sat in another seat in the cinema. The woman examined her handbag and found the contents intact. The appellant was arrested and charged with theft of the handbag and its detailed contents.

On appeal, the Court of Appeal, in a judgment read by Edmund Davies LJ, expressly said the jury were misdirected.[17] The judge proceeded with a statement which becomes the ratio decidendi of the case.[18] This statement clearly established the insufficiency of conditional intention as a mental element for the full offence of theft.

> 'In every case of theft, the appropriation must be accompanied by the intention of permanently depriving the owner of his property. What may be loosely described as a "conditional" appropriation will not do. If the appropriator has it in mind merely to deprive the owner of such of his property as, on examination, proves worth taking and then, finding that the body is valueless to the appropriator, leaves it ready to hand to be repossessed by the owner, the appropriator has not stolen . . . In the present case the jury were never invited to consider the possibility that such was the appellant's state of mind[19] or the legal consequences flowing therefrom. Yet

13 *Criminal Law: The General Part* (2nd ed, 1961), 52.
14 Ibid, 77.
15 e.g. Smith and Hogan, *Criminal Law* (4th ed, 1978), 526.
16 [1971] 3 WLR 82.
17 *Reg* v *Easom* [1971] 3 WLR 82, 85. 'In the respectful view of this court, the jury were misdirected.'
18 It was followed in *Reg* v *Au Lai Yung* [1976] HKLR 249 where a similar situation arose. A woman in a department store unzipped the handbag of one of the customers and took from the bag what appears now to have been two receipts for school fees. She took a quick look at them and immediately replaced them in the bag. Then she walked out of the store, and was arrested by detectives who had been watching her. On appeal against conviction, the Court found her intention conditional and by relying on *Reg* v *Easom*, allowed her appeal. The recent case of *Hector* (The Times, January 19, 1978) with similar facts also followed *Reg* v *Easom.* The case of *Hussein* [1978] Crim LR 219 also followed *Easom* (but it is questionable if that was correct as will be shown later).
19 At the trial the jury were directed by the deputy chairman in the following way: 'Whoever it was behind was intending permanently to deprive [Sergeant Crooks] of the things in her bag. He did not know what was inside the bag and in fact....really the contents of the bag do not matter specifically for what they are. You may come to the conclusion – of course it is a matter for you – that whoever it was who did this, was stealing these things – although afterwards he abandoned them. But the stealing would have taken place, would it not, and that is a matter for you to decide.'

> the facts strongly indicate that this was exactly how his mind was working, for he left the handbag and its contents entirely intact and to hand, once he had carried out his exploration. For this reason we hold that the conviction for the full offence of theft cannot stand.'[20]

The judge found support from Archbold[21] and this he considers is the'true approach'.

> 'Returning the goods . . . can be considered merely as evidence of the defendant's intention when he took them; for if it appears that he took them originally with the intent of depriving the owner of them, and of appropriating them to his own use, his afterwards returning them will not purge the offence.'[22]

A brief point to note here is that even before the Theft Act in England, the courts have held that conditional intention is not sufficient in a charge of larceny.[23] Although the Act makes new law in many respects, it has not changed the basic requirement that at the time of appropriation, the appropriator must intend to permanently deprive the owner of his property.[24] This consistent view expressed by the Court of Appeal firmly establishes that conditional intention is not sufficient mens rea for a charge of the full offence of theft.

CONDITIONAL INTENTION – NOT INTENTION AS REQUIRED BY THE LAW?

A number of writers take the view contrary to that held by the Court of Appeal. These writers express opinions which amount to saying conditional intention should amount to intention as required by the law. Howard[25] explains that conditional intention is sufficient to satisfy a requirement of intention in the criminal law with the following argument: –[26]

> 'The argument is simply that since certainty in an absolute sense is impossible, every intention to accomplish something is of necessity conditional.
>
> An assassin's intention to attempt to kill his victim necessarily depends on a large variety of precedent conditions of fact, such as that V is still alive at the time when D proposes to kill him and at the place where D expects him to be, and may well depend also on many others, such as that a policeman does not appear at his elbow immediately before he fires the shot.'

Furthermore,

> 'Since parallel reasoning applies to every other intention to commit a criminal offence, . . . [sometimes][27] the conditions in question are formulated by D with unusual consciousness and precision. The inevitable element of condition is more commonly tacit, likely to come to D's notice only if the facts concerned either eventuate or fail to eventuate as the case may be.'

In a commentary on *Easom*,[28] one writer expressed a similar argument, with particular reference to theft[29].

> '. . . all intention is conditional, even though the conditions may be unexpressed and not present to the mind of the person acting at

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20 [1971]3 WLR 82, 85.

21 *Archbold Pleading, Evidence and Practice in Criminal Cases* (37th ed, 1969).

22 Ibid, 558, para 1469.

23 *Reg* v *Stark* decided in 1967 (unreported, October 5, 1967) A man was caught in the act of lifting a tool-kit from the boot of a car. The judge directed the jury by telling them: 'Was Stark intending, if he could get away with it, and if it was worthwhile, to take that tool-kit when he lifted it out? If he picked up something, saying "I am sticking to this – if it is worthwhile", then he would be guilty.' The Court of Appeal quashed the conviction because of the judge's misdirection.

24 s1(1), Theft Act 1968, requiring the appropriation to be done with intent permanently to deprive is the same as the definition of larcency in S1(1) of the Larcency Act 1916.

25 Howard, *Criminal Law* (3rd ed, 1977).

26 Ibid, 363.

27 My own word.

28 [1971]Crim LR 488.

29 Ibid, 489.

that time. It will invariably be the case that if the question were put, "But what if so-and-so happens?" the answer would be, "Then I shall not carry out my intention." Even where the condition is present to the accused mind, it is thought that there should be sufficient intent if the accused has appropriated the thing, intending to keep it if a certain condition is fulfilled but to return it if that condition is not fulfilled.'[30]

Smith and Hogan[31] also offer an argument to the effect that notwithstanding the accused's intention is "conditional", there is the requisite intent for the offence of theft. Referring to the ratio decidendi of *Easom*, the learned authors say,

'The statement in *Easom* can be accepted in that case because there was no intention conditional or otherwise, to appropriate the things he was charged with stealing.[32] But to go further has its dangers since whether D keeps the property is always conditional upon its proving worth his while to do so. No doubt D would always be willing to return the property if someone were to offer a reward in excess of its value, but it would not fairly be said that his intent to deprive is conditional upon such a reward not being offered. No more should it be said that the shirt and ring takers[33] have no intent to deprive.

Borrowing is not theft, of course, but it would seem unrealistic to say that they had borrowed the shirt and ring. Both intend to deprive the owner of his property (to treat the property as their own to dispose of) at the time of taking possession, even though, upon the happening of a particular contingency, they will return the property . . . Common sense tells us that they do have an intention notwithstanding that the consummation of their intent is conditional on their finding what they are looking for. They may not find what they are looking for but this does not affect the fact that they intend to steal – and they have made up their minds – to steal.'[34]

Author J.C. Smith shares a similar view.[35]

'It is submitted that the better view is that an assumption of ownership which is conditional because there is an intent to deprive only in a certain event, is theft. For example, D takes P's ring to keep it if the stone is a diamond, but otherwise to return it. He takes it to a jeweller who says the stone is paste. D returns the ring to P. It is submitted that he committed theft when he took the ring. The fact that he returned it is relevant only to sentence.'

Yet another author expresses similar views. Glanville Williams[36] has drawn attention to a type of intention which he calls conditional. It is defined as an intention to commit an offence provided that a precedent condition of fact, without which the offence in question would be impossible, is fulfilled. He gives the example mentioned earlier, of the burglar who breaks into a house intending to steal a certain paper if it is there and says: –[37]

'A conditional intention is capable of ranking as intention for legal purposes. Thus, it is no

30 The writer gives the example where D takes P's ring resolving to keep it if the stone is a diamond but otherwise to return it. He takes it to a jeweller who says the stone is paste. D returns the ring to P. The writer submits that D is guilty of theft. But it is arguable that in *Easom*, there was no appropriation. Glanville Williams, *Textbook of Criminal Law* (1978), 652.

31 Smith and Hogan, *Criminal Law* (3rd ed, 1973), 431.

32 The point is of much significance because it raises other issues arising from the case. These issues will be examined later in this article.

33 Previous examples cited, i.e. the shirt taker who keeps the shirt if it proves a good fit, the ring taker who keeps it if it is diamond.

34 Smith and Hogan, *Criminal Law* (4th ed), 526.

35 J.C. Smith, *The Law of Theft* (2nd ed), para 137.

36 *Criminal Law, The General Part* (2nd ed, 1961).

37 Ibid, 53, para 23. Glanville Williams calls this a subjective criterion because whether a thing is worth stealing is often a subjective question. In his latest work, *Textbook of Criminal Law* (1978), he holds the view that this type of subjective conditional intention might well have been held to be an intention permanently to deprive, even without the assistance of s6(1) of the Theft Act, 1968. This subjective criterion is contrasted with the objective criterion e.g. the case of the postal sorter who resolves only to steal registered letters. The condition of them being registered, is, therefore, objective.

> defence to an apparent burglar that his intention was merely to steal a certain paper if it should happen to be there.'[38]

The above arguments by various learned authors strive to explain why conditional intention should be held to be sufficient intention for theft. It is possible to imagine a situation which would lead to rather odd results if the view of the Court of Appeal is followed. Suppose A and B were on a widget[39] stealing expedition. They took P's widget and then discovered that the widget was one of the new plastic widgets and put it back on P's wall. It had not occurred to A that widgets could be made of anything other than solid ivory, but B knew of the prevalence of plastic widgets and resolved beforehand and if it was not ivory, he was not keeping it.[40] It would appear that A's and B's position in law is different. For both A and B, there is an appropriation. By section 4(1) of the Theft Ordinance 'any assumption by a persons of the rights of an owner amounts to an appropriation . . .'. Also there is clearly an appropriation of 'property belonging to another' which is required by section 2(1) of the Theft Ordinance. It seems that the mens rea requirement of dishonesty is also satisfied. The only doubtful area is in the element of intent permanently to deprive. A, at the time of appropriation, intended to deprive P permanently of the widget. It was only after the appropriation that A discovered it was made of plastic. The fact that A returns it does not alter the fact that A has stolen. But different considerations apply in relation to B. At the time of appropriation, he *resolved beforehand* to keep it only if it is ivory. His intention is therefore conditional. If on discovering that the widget is not worth stealing, he returns it, he has not stolen, according to the Court of Appeal in *Easom*. Nevertheless, this example illustrates what was said earlier that all intention is conditional, the only difference being in some cases it is active in the mind of the person and sometimes it is not formed consciously. It is also observed that A, too, returned the property. This fact points out that whether a person keeps the property is always conditional upon his finding it worthwhile to do so. From this, it is clear that one who actively decides to keep the property if it is of value to him, may be in a better position than one who does not have this condition active in his mind. And yet, at the end, it appears that both had the same intention.

Although the Court of Appeal is emphatic that conditional intention is not enough for theft, it seems that there is ground for argument that it may suffice. The arguments against the Court's views are convincing. If one takes the view that appropriation implies absence of authority or some other taint of illegality on the accused's part, it seems to be arguable that it should be sufficient if the accused has appropriated the thing intending to keep it if a certain condition is fulfilled but to return it if that condition is not fulfilled. This is also supported by the view that an assumption of ownership which is conditional because there is an intent to deprive only a certain event, is theft. There is, furthermore, the argument that there is a distinction between conditional intent relating to an objective criterion (e.g. are the letters registered or not?) and that relating to a subjective criterion (e.g. do I think these things are worth stealing or not?). The latter conditional intent might well be said to be an intention to deprive permanently because the law should not give the accused the opportunity to escape liability just because the goods are not to his fancy. But it is submitted that the most persuasive argument is that advanced in Archbold.[41] The argument is that decided cases have clearly established that an intent laid down as part of the definition of a statutory offence may be satisfied by proof of a conditional intent. These cases, *R* v *Bentham*,[42] *R* v *Bucking-*

38 He then adds a statement taken from the American Model Penal Code, s2.02(6) (Tentative Draft No 4, 14, 129): 'When a particular purpose is an element of an offence, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offence.'

39 The authors D.W. Elliot and Wood use an example involving a 'widget'. What is a 'widget' is uncertain. It is not listed in the Shorter Oxford nor the Webster!

40 Example taken from D.W. Elliot and Wood, *Casebook on Criminal Law*, 431.

41 *Archbold Pleading, Evidence and Practice in Criminal Cases* (19th ed, para 1441f).

42 *R* v *Bentham and others* (1972) 56 Cr App R 618. The Court of Appeal held that on a charge of possessing a firearm with intent to endanger life contrary to s16 of the Firearms Act 1968, the prosecution are not required to prove an immediate or unconditional intention to endanger life. The mischief at which the section was aimed must be that of a person possessing a firearm ready to use if and when the occasion arises, in a manner which endangers life.

ham[43] and *R* v *Becerra and Cooper*[44] were not mentioned in the judgment of the Court of Appeal in *R* v *Hussein.*[45] In each of these cases, the intent was conditional in the sense that it rested on a contingency, for example, if the need arose to use the firearm or to cause grievous bodily harm. In spite of this, the courts held that it was enough to secure a conviction.

In view of these arguments, it is submitted that there are convincing arguments against the Court's view that conditional intention is not enough. Perhaps the Court can reconsider its approach on the basis of the reasoning in cases where conditional intention was sufficient.

OTHER ISSUES

The Courts have consistently held in decided cases that a person who postpones his decision to usurp the owner's rights on some contingency does not have sufficient mens rea for the full offence of theft. Granted that this reasoning is correct because of the statutory definition of theft, should it follow that this person is to go scot-free? Or is it possible to secure a conviction for attempted theft? The Court of Appeal in *Easom* did consider whether the accused could be convicted of attempted theft. Edmund Davies LJ said: –

> 'Even though the contents of the handbag, when examined, held no allure for him, why was he not as guilty of attempted theft as would be the pickpocket who finds his victim's pocket empty (*Ring*)? Does a conditional intention to steal count for nothing?'[46]

It should also be noted that in cases of *Hussein,*[47] *Hector,*[48] *Lee Shek,*[49] the charges in all the cases was one of attempted theft although the exact frame of the charges differed, and this, as will be shown later, had important significance. Yet in every case except *Lee Shek* the accused was not convicted for different reasons.

In *Easom,* the Court cited passages which point out that conditional intention can amount to intention for legal purposes but immediately went on say,

> 'But as to this, all or at least much depends on the manner in which the charge is framed.'[50]

It seems that the court *did not deny* that conditional intention is enough to satisfy the mens rea necessary for attempted theft. The passages quoted acknowledge that conditional intention is intention for legal purposes. Indirectly, therefore, the Court of Appeal also acknowledges this. The qualification added concerning the framing of the charge, however, had the effect of saying although conditional intention to steal should not count for nothing, the framing of the charge for an attempt has important significance and consequences.

Besides holding that conditional intention is insufficient mens rea for the full offence of theft, the courts also talked about the possibility of a conviction for attempted theft. However, it was in the courts' opinion that the mens rea of attempt is that of the main offence and as such, there could be no conviction of attempted theft either. In *Easom,* the court cited Smith and Hogan[51] and said that 'the mens rea of an attempt is esstentially that of the complete crime.'[52] This was followed in *Hector.* The Court of Appeal in *Hussein* similarly applied *Ea-*

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43 *R* v *Buckingham* (1976) 63 Cr App R 159. The same principle was applied to a charge of having in one's custody an article intending to use it to damage property.

44 *R* v *Becerra and Cooper* (1976) 62 Cr App R 159. A conditional intent to do grievous bodily harm i.e. if it became necessary for the success of the joint enterprise of burglary, was held to be sufficient for the crime of murder.

45 [1978] Crim LR 219.

46 [1971] 3 WLR 82, 86.

47 [1978] Crim LR 219.

48 The Times, January 19, 1978.

49 [1976] HKLR 636.

50 [1971] 3 WLR 82, 86.

51 Smith and Hogan, *Criminal Law* (2nd ed, 1969).

52 Ibid, 163.

som[53] and said that there was no 'present intention' to steal. This is more complicated than it appears at first sight. By saying that the mens rea of attempt is that of the full offence, the Court had tied its hands for convicting the accused of attempted theft.

The Court draws analogy to the 'empty-pocket' case of *Ring*[54] and says that the accused in these cases may be as guilty of attempted theft as the pick-pocket who finds his victim's pocket empty. Depending on the indictment, this at once raises the issue of impossibility in attempts. Would there have been a valid conviction at the time *Easom* was decided? What would be the position after *Haughton* v *Smith?*[55]

The following discussion will examine each of these aspects in detail in relation to attempts.

THE MENS REA OF ATTEMPT

Smith and Hogan say, 'It is implicit in the concept of an attempt that the person acting intends to do the act attempted, so that the mens rea of an attempt is essentially that of the completed crime.'[56] The Court of Appeal in *Easom,* after citing the above statement then said,

> 'That being so, there could be no valid conviction of the appellant of attempted theft on the present indictment unless it were established that he was animated by the same intention permanently to deprive Sergeant Crooks of the goods enumerated in the particulars of the charge as would be necessary to establish the full offence.'[57]

The question is whether it is correct to say that the mens rea element in attempt is not established unless it can be shown that it is the mens rea of the full offence. Is conditional intention insufficient for the mens rea element in attempt?

When the charge is one of attempted theft and the charge does not specify the precise articles there may be different considerations. It must be remembered that one is now concerned with the attempt and not the full offence. For an act to constitute an attempt, several elements must be satisfied. The actus reus element is the proximate act. A proximate act is one which is not remotely connected to the commission of the full offence but one which is immediately connected with it.[58] It would seem that by picking up the handbag, opening it and rummaging in it, there is a proximate act. The mens rea requirement, however, raises some problems. It is clear that the person must intend to perform the proximate act and the person surely intended to pick up the handbag, open it and rummage in it. It is, however, also necessary that at the time of performing the proximate act, the person fully intended to bring about the consequences which form part of the actus reus of the full offence.[59] It is this requirement that complicates the law of attempted theft. If full intention to commit the full offence is required for the attempt, then conditional intention to commit the full offence will be insufficient. The full offence of

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53 It is questionable if the court was right in following *Easom* since the frame of the charges were different. In *Easom,* the defendant was charged with theft of the specific articles which he rejected as worthless to him. In *Hussein,* the charge was one of attempting to steal anything which the defendants found to be of value in the holdall. Since the frame of the charge may have crucial consequences, it is highly doubtful if the court was correct in applying the dicta of Edmund-Davies LJ who expressly said: 'But to this, all, or, at least, much, depends upon the manner in which the charge is framed.'

54 (1892) 61 LJMC 116.

55 [1973] 3 All ER 1109.

56 Smith and Hogan, *Criminal Law* (4th ed, 1978), 247.

57 [1971] 3 WLR 82, 86.

58 Per Parke B in *Eagleton* (1855) 169 ER 826, 835, 'The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected as with it are .....'

59 *Mohan* [1975] 2 All ER 193. This case illustrates the element that attempt requires an intention to commit the crime in question. The case deals with attempted murder. Murder can be committed by a person who intends only to do grievous bodily harm; but for attempted murder, the prosecution must prove an attempt to kill: an intent to do grievous bodily harm is not enough. It was held by the Court of Appeal in this case that attempt requires intention in the true sense, and mere knowledge of the probability or high probability or likelihoold of the consequence is not sufficient. See also *Whybrow* (1951) 35 Cr App R 141.

theft requires an intention to permanently deprive at the time of appropriation. If the same is required for the attempt, then it seems that a person who is not guilty of the full offence is also not guilty of the attempt.

This seems to be wrong because it would have the result that the law of attempts would never work. There is the view held that such a person is guilty of attempt. JC Smith says[60]

> 'One instance of attempted theft which will certainly continue to exist, however, is the celebrated empty pocket case.[61] D puts his hand into P's pocket with intent to steal the contents. The pocket is empty. It cannot now be established that D actually assumed the rights of an owner over any property, since there was no property – but he certainly attempted to do so. The attempt was complete [at the latest] when D's hand entered the pocket and groped for its contents.'

This extract brings out the point that for attempted theft, the proximate act should be looked at. It is arguable that an intention is conditional in the sense that it rests on a certain contingency. The passages quoted earlier explain why all intention is conditional. But it seems to be correct to say that as long as the act was proximate and when doing the act, D intended to produce the actus reus of the full offence, notwithstanding, his intention is conditional, there is an attempt. For example, a man inserts a key, and is about to open a drawer, containing, he thinks, various items. He resolves at this time to take only the valuable items. Before he succeeds in opening the drawer, he is apprehended. He will not be guilty of the full offence of theft because there is no appropriation of property belonging to another. But if he is charged with attempted theft, there is clearly a proximate act and there is intention to commit the full offence even though his intention to bring about the full offence is conditional upon finding items worth stealing.

If courts take the view that such conditional intention is insufficient for attempt, then this produces consequences in relation to burglary and loitering with intent to steal. Two cases will illustrate offences of this. In *Hussein*[62] the Court of Appeal held that conditional intention is not a 'present intention'. The effect of this decision is that 'a very serious limitation is imposed on the law of burglary'. It is clear that burglary requires what the court calls "present" intention because by definition[63] the entry must be 'with intent to steal anything in the building'. Some burglars may have in mind something specific (eg a particular document, etc) but most burglars enter the building to steal whatever they find valuable therein. If *Hussein* is right, then the defendant in such a case has no present intention to steal when he enters the building and there would be no conviction. *Hussein* would certainly 'be the burglar's charter'.

The decision in *Hussein* produces relevant consequences for yet another offence, namely, loitering with intent to commit an arrestable offence. This arises out of the recent case of *Hector*.[64] The facts were that the appellant had used his own key to enter a parked car and was examining its contents when arrested. He was charged with attempting to steal *specified* items in the car. There was ample evidence of loitering with intent or going equipped for theft. It was unfortunate, the court said, that he had not been charged with those offences. Attempted theft was not proved if there was no intention to steal the specified items according to *Easom*. If the appellant had been looking at the property to see if there was anything worthwhile to steal the jury would not be entitled to convict him of the offence charged. The judge had not directed the jury that the absence of an intention to steal the specified items was a defence to the charge. The failure to direct on that offence meant that the jury had not been given the opportunity to consider it and, in those circumstances, the verdict was unsatisfactory. Accordingly the conviction was quashed.

It may be noted that this case is indistinguishable from *Easom*. The court said that the defendant ought to have been charged with loitering with intent

60 J.C. Smith, *The Law of Theft* (2nd ed, 1972), para 50.

61 The person who searches for something valuable in a handbag, in a car, or in a pocket, but finds that there is nothing worth stealing is like the person who puts his hand into an empty pocket.

62 [1978] Crim LR 219.

63 The definition of burglary is contained in s9 of the Theft Act 1968. In Hong Kong, it is found in s11 of the Theft Ordinance (Cap 210, LHK, 1970 ed).

64 *Hector*, The Times, January 19, 1978.

or going equipped for theft. But loitering with intent requires proof of an intention to commit an arrestable offence, namely, theft and the case of *Hussein* holds that there is no intention to steal until the defendant has ascertained that there is something there which he wishes to steal.[65]

The unsatisfactory state of the law arising from the case of *Hussein* is that the Court of Appeal applied cases dealing with the full offence of theft when it was a case of attempted theft. In this way the Court overlooked the fact that there may be a distinction between the full offence and the attempt. Its implications on the law of burglary and loitering with intent are also unsatisfactory. It has been submitted that[66]

> '*Hussein* . . . should not be followed where it conflicts with other authorities of equal standing. In particular it is submitted that there is ample authority in *Bentham, Buckingham* and *Becerra and Cooper* for the proposition that a conditional intent to steal anything worth stealing is sufficient both for burglary and for loitering with intent to steal. Both are in a sense preparatory offences, as of course, is an attempt. So far as attempts to steal are concerned, however, it would seem that the Court must follow *R* v *Hussein* until it is overruled.'

It seems, therefore, that by holding that attempt is not proved if there is only conditional intention or when there is no present intention, the law of attempts is unworkable to this extent. The attempt should be considered separately from the full offence. The condition is projected into the full offence but is does not mean that an attempt has not been proved if there is a proximate act and an intention to perform the proximate act.

THE FRAMING OF THE CHARGE[67]

For a charge of attempted theft, Edmund Davies LJ. feels that 'all, or, at least, much depends upon the manner in which the charge is framed'. The general rule is taken from *Reg* v *M'Pherson*[68] where Cockburn CJ said[69]

> '. . . if you charge a man for stealing certain specified goods, he may be convicted of an attempted to commit "the felony or misdemeanor charged"; but can you convict him of stealing other goods than those specified? If you indict a man for stealing your watch, you cannot convict him of attempting to steal your umbrella.'

This is similar to *Easom* where the indictment charged the defendant with theft of 'one handbag, one purse, one notebook, a quantity of tissues, a quantity of cosmetics and one pen, the property of Joyce Crooks'.[70] The defendant never had any intention of stealing these specific items and the court failed to convict him of the full offence of theft. There was, in fact, no charge of attempt[71] but the court did say obiter that even if the charge was that of attempted theft, there would still be no conviction on the charge as framed. This is because the mens rea of attempt is that of the full offence and in this case the full offence would be theft of 'one handbag, one purse, one notebook, a quantity of tissues, a quantity of cosmetics and one pen . . .' and there was no evidence that the defendant intended to steal these items, it followed that he had no intention to attempt to steal these items.[72]

In *Easom*, therefore, it seems to be correct to say that even attempted theft would not have been a valid charge thus framed. But there is indication that there may be a way out in such a situation. This

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65 See [1978] Crim LR 219, 220.

66 *Archbold Pleading, Evidence and Practice in Criminal Cases* (39th ed, para 1441f).

67 This will also have important consequences when considering the issue of impossibility of attempts.

68 (1857) Dears & B 197.

69 Ibid, at 200.

70 (1971) 3 WLR 82, 84. Note that *Hector* is indistinguishable from *Easom* in, this respect because both indictments listed specified articles.

71 By s81(2) of the Interpretation and General Clauses Ordinance (Cap 1 LHK, 1970 ed): 'Where a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt.'

72 Per Edmund Davies LJ: '.....that being so, there could be no valid conviction of the appellant of attempted theft on the present indictment unless it were established that he was animated by the same intention permanently to deprive Sergeant Crooks of the goods enumerated in the particulars of the charge as would be necessary to establish the full offence.'

would be achieved by amendment of the indictment,

> '. . . unless, of course, the court of trial has duly exercised the wide powers of amendment conferred by section 5 of the Indictment Act 1915.'[73]

But since no amendment was sought in that case, the attempt, therefore, had to be considered in relation to the articles enumerated in the theft charge and nothing else. Thus, it resulted in an acquittal of the defendant. It has been suggested[74] that there is nothing in the judgment in *Easom* inconsistent with the proposition that Easom would have been properly convicted if he had been found guilty on an amended indictment of attempting to steal anything worth stealing which he found in the handbag. This appears to be the view taken of this case by Lord Diplock in *DPP* v *Nock* in his remarks, which although obiter were concurred in by Lord Keith of Kinkel.

What then would be a proper indictment for attempted theft which would secure a conviction? It must be borne in mind that the defendant's intention is conditional, that is, he will only steal those valuables worth stealing and the charge of the full offence of theft fails because he does not find anything worth stealing; consequently an indictment particularising the items will not result in the conviction even of an attempt. Would it have been possible to charge the defendant of attempting to steal from the handbag without specifying what was to be stolen? Or in *Hector,* would it have been possible to charge the defendant with attempt to steal from the car? There is authority for the proposition that on a charge of attempted theft, it is not necessary to specify the exact articles that the accused attempted to steal. In *Johnson*[75] Pollock CB said,

> 'Where an indictment charges an actual stealing in a dwelling house, the goods must be specified; but where an attempt to steal only is charged, it is not necessary to specify the goods in the house, for it cannot be said beforehand what the prisoner intended to steal. It would be necessary to prove that there were goods in the house which could be stolen.'

There is also the local case of *Lee Shek.*[76] It was held in this case that there was a valid conviction for attempted theft because the indictment did not specify any property in respect of the attempt to steal. Therefore, it seems that if the indictment is drafted in suitably broad terms, then there may be a valid conviction.[77] It must not be thought that it is always possible to frame a broad charge. In every case, the evidence must support the charge. All this means that conviction for attempted theft is possible, provided that the indictment is not drafted narrowly. At the time of the attempt, the accused does not know whether it contains any articles. In fact he does not even know specifically what articles are in the handbag. And it is at this time that one must consider his mens rea. By charging him with attempted theft of specific articles, it will not be sufficient to convict because the evidence at that stage just cannot support the charge.

'EMPTY POCKETS' AND IMPOSSIBILITY

It is appropriate to consider the framing of the charge in relation to the issue of impossibility in attempts since the former has important consequences on the liability of the defendant in cases of impossibility. Before proceeding, it must be pointed out that, situations like *Easom, Hector, Hussein* where the defendant finds nothing worth stealing after examination, are like the empty-pocket cases.[78] This may be explained on two grounds. One is that

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73 [1973] 3 WLR 82, 86.

74 *Archbold Pleading, Evidence and Practice in Criminal Cases* (39th ed, para 1441f).

75 (1864) 10 Cox CC 13. See also *Reg* v *Collins* (1864) Le & Ca 471; *Reg* v *M'Pherson* (1857) Dears & B 197.

76 [1976] HKLR 636.

77 In *Hussein,* the charge was suitably broad. The indictment charged the defendant of attempted theft and no specific items were enumerated. The Court, nevertheless, failed to convict because there was no 'present' intention to steal.

78 Glanville Williams, *Textbook of Criminal Law* (1978) at 652-3, 'It is a case of the "empty pocket" type..... The result of this reasoning is that the empty pocket rule applies also to full pockets, if they are full of things that the thief does not want to steal. The "dip" can, therefore, get off a charge both of theft and of attempted theft by saying [so as to raise a reasonable doubt in his favour] that the things in the pocket were not on his shopping list, and that he either left them behind or would have done so if he had got as far as seeing what they are.'

the empty pocket rule applies also to full pockets, if they are full of things that the thief does not want to steal. The other is that a handbag containing no valuables points to an impossibility situation so that the empty-pocket cases apply. And when dealing with empty pocket cases, the law must be examined as it stood before *Haughton* v *Smith,*[79] and after this turning point case. The question to be discussed is this: if the indictment charges the accused with attempting to steal from a particular place (eg a car, a pocket, a handbag etc) without specifying what was to be stolen, would it have resulted in a conviction before *Haughton* v *Smith;* and since *Haughton* v *Smith*?

Before Haughton v Smith

Prior to the decision in *Haughton v Smith* it was clear that one who puts his hand into a pocket with intent to steal is guilty of attempted theft even though the pocket turns out to be empty.[80] Two early cases may be contrasted here. In *Collins* it was held that a person who put his hand into a pocket of another with the intent to steal could not be convicted of an attempt to steal unless it appeared that there was something in the pocket capable of being stolen. But in a later case of *Ring*[81] a pick-pocket was convicted of attempted theft although the pocket turned out to be empty. The court in that case expressly denied the proposition that there would be no liability if the attempt is impossible. Even before *Ring* was decided, *Collins* was challenged as 'no longer law' in the case of *Reg* v *Brown*[82] although no reason was given.[83] Therefore, the position of the pickpocket who puts his hand into an empty pocket before the decision in *Haughton* v *Smith* was that he would be guilty of attempted theft. It must logically also be attempted theft if the pocket contains something which, on examination, the accused discards. It is impossible to suppose that Ring would have taken anything he found in the pocket, whatever it might be – eg a piece of string or a cancelled bus ticket. Such a person becomes guilty of the attempt to steal before he has any chattel within his grasp and before he knows what is it. His crime is not undone by the fact that he subsequently decides that he does not like what he has taken, any more than it is undone by the fact that he finds there is nothing in the pocket.[84]

Since Haughton v Smith

But since *Haughton* v *Smith,* the position of such an accused in England[85] is now changed. The speeches in the House of Lords case appear to disapprove of *Ring* and to hold that *Collins* was right after all. Briefly the facts were as follows.

Police officers stopped a van and found it to contain stolen goods. In order to catch the potential receiver of the stolen goods, the police officers permitted the driver to continue the journey with two policemen in the van and others following. When the van reached the rendezvous, it was met by some men, one of whom was Smith. The latter took a leading part in unloading the goods. He was arrested and convicted of attempting to handle stolen goods. While Smith had actually handled the goods, it was thought that the charge of attempt was more appropriate because the Crown conceded that the goods ceased to be stolen by virtue of section 24(3) of the Theft Act[86] during the interlude between the time of intercepting the vehicle and delivering the goods to the rendezvous. The Court of Appeal allowed the appeal. The Crown then appealed to the House of Lords but this appeal was dismissed on the ground that

'. . . it is plain that, in order to constitute the

79 [1973] 3 All ER 1109.
80 (1864) 9 Cox CC 497.
81 (1892) 62 LJMC 116.
82 (1889) 24 QBD 357.
83 [1974] HKLJ 118 'Lord Coleridge CJ unceremoniously overruled *Collins* and upheld D's conviction, but it remains unclear why he thought this necessary. It seems that the argument, must, at some stage have been advanced that buggery with ducks is impossible.'
84 [1971] Crim LR 488.
85 Hong Kong Courts take a different view. In 1976, one of the grounds for the decision in *Lee Shek* [1976] HKLR 636 was that it was on all fours with *Ring* and the decision in *Ring* was followed.
86 s24(3): 'But no goods shall be regarded as having continued to be stolen goods after they have been restored to the person from whom they were stolen or to other lawful possession or custody, or after that person and any other person claiming through him have otherwise ceased as regards those goods to have any right to restitution in respect of the theft.' The Hong Kong equivalent is s26(3) of the Theft Ordinance (Cap 210, LHK, 1970 ed).

> offence of handling, the goods specified in the particulars of offence must not only be believed to be stolen, but actually continue to be stolen goods at the moment of handling. Once this is accepted as the true construction of the section,[87] I do not think it is possible to convert a completed act of handling, which is not itself criminal because it was not the handling of stolen goods, into a criminal act by the simple device of alleging that it was an attempt to handle stolen goods on the ground that at the time of handling, the accused falsely believed them still to be stolen.'

However, the decision did not stop here although the above speech 'would be enough to decide the result of this appeal'.[88] Their lordships went on to consider other 'obligations' since 'the result of our decision is to overrule a number of decided cases.[89] The rest of the judgment dealt with the issue of impossibility in attempts.

In order to focus precisely on the end result of the long discussion by the House of Lords, it may be said that the law since *Haughton* v *Smith* is that a person can be guilty of attempting the impossible if the impossibility resides only in the *means* used to commit the crime, but apart from this, he will not be guilty of attempt if there is impossibility of *the end in view.*[90] The particular fact situation in the case fell within the latter catagory.[91] The House of Lords adopted the six-fold classification of Turner J in the New Zealand case of *R* v *Donnelly.*[92] The classifications that are relevant for our purposes concern the fourth, fifth and sixth classes. We will consider these in turn.

The fourth class occurs where a man falls short of completing the commission of the crime because of ineptitude, inefficiency or insufficient means. For this type of failure, there is authority for the proposition that as long as the proximity test[93] is passed, a criminal attempt is committed. Examples given of this class are: a would-be burglar found that his jemmy was not good enough to force a window; a would-be murderer fired a shot at an intended victim who was just out of range; a would-be murderer administered a dose of poison that was in fact insufficient to kill. The underlying idea behind these examples is that the crime *can* be committed – the building *can* be entered; the victim *can* be killed; but the means used for the job are insufficient. Nevertheless, there is an attempt in each case.

The fifth case is where the accused finds that what he is proposing to do is after all impossiable because for some reason it is physically not possible. This type of situation would be the *Collins* situation. But the House did not agree with the previous author-authorities which held that *Collins* was no longer good law. This is directly relevant for our discussion since it concerns the empty pocket case. There had conflicting decisions on liability for attempt in these circumstances, but the most recent holding that it was an attempt (*Ring*), but Lord Reid and Viscount Dilhorne preferred the earlier authority (*Collins*) holding that there was no attempt. This situation may give rise to problems in two forms – D may have been after something specific in the pocket, say, a purse or something else of value or he may have intend to steal anything he might find. Lord Hailsham was the only member of the House to leave the question open, but it seems that the inclination of the House would be to hold that there is no attempt in these circumstances. All of their lordships agree that if D entered a house intending to steal and the goods he expected to find were not there, D would be not guilty of attempt and this is analogous to the empty pocket case.

The sixth class is where a man efficiently does without interruption every act which he set out to

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87 s22(1) of the Theft Act 1968: 'A person handles stolen goods if (otherwise than in the course of stealing) knowing or believing them to be stolen goods he dishonestly receives the goods, or he dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so.' The Hong Kong equivalent is s24(1) of the Theft Ordinance (Cap 210, LHK, 1970 ed).

88 Per Lord Hailsham [1973] 3 All ER 1109, 1112.

89 Ibid, 1113.

90 The phrase is used by Glanville Williams, *Textbook of Criminal Law* (1978), 392.

91 If goods are returned to lawful custody and thus cease to be stolen goods by virtue of s24(3) of the Theft Act 1968, can a person who subsequently dishonestly handles goods believing them to be stolen be guilty of the offence of attempting to handle stolen goods? Lord Hailsham answers: 'I have already given a negative answer to this question.....'

92 [1970] NZLR 980.

93 See footnote 58.

do, but may be saved from criminal liability by the fact that what he has done, contrary to his own belief at the time, does not after all amount to a crime. The situation falling within this calss is the umbrella case – D intended to steal an umbrella but the one he selected happened to be his own. He is not guilty of attempted theft of the umbrella, since theft can only be of the property of another. This class of situations will not attract liability because the act are not part of a series 'which would constitute the actual commission of the offence if it were not interrupted'.[94]

Any way out?

Now the important and often difficult distinction lies in determining whether a situation falls within the mere lack of success catagory or the end result impossible catagory. It is, however, clear that the position of the pickpocket is changed if *Ring* is indeed overruled. It has been commented that this is the 'most unfortunate result' of the decision.[95] What is exactly the ratio decidendi of that case has been the subject of much discussion.

Ring not overruled

It is felt that the case of *Ring* had not been expressly overruled and that what was said about these cases was merely obiter dicta.

> 'If *Ring* is indeed overruled, the law of attempts has been unfortunately and unnecessarily narrowed in an important respect and the sooner action is taken to restore the situation by legislation the better. But it is perhaps worth considering, in the meantime, whether the case goes quite so far. Lord Hailsham, with whom Lord Salmon agreed, said that he expressed no concluded opinion on whether *Collins* was bad law – which is the same as saying that he was expressing no concluded opinion on *Ring*. Lord Morris, though he plainly approved of *Collins* also said that he agreed with Lord Hailsham . . .'[96]

In the local case of *Lee Shek*, Pickering JA also considered if *Ring* was overruled.[97] His concluding opinion was that 'none of their Lordships declared specifically that the case of *Ring* was wrongly decided'.[98] He, therefore, felt himself free to apply the case of *Ring* to *Lee Shek* and held that there was an attempt from an empty pocket. He says,

> 'In my view, if a case which has stood the test of time for eighty years and which embodies an eminently commonsense proposition is to be regarded as overruled, it must be overruled in clear and unambigous terms.'[99]

Merely obiter dicta of general principles

There is also the opinion that all that was said about *Ring*, and about *Collins*, was merely obiter dicta.[1] The view is that their Lordships' discussion of the general principles involved was at any rate not strictly necessary for the decision in that case. Lord Hailsham LC dealt with the interpretation of sections 22 and 24 of the Theft Act 1968 and asserted that that would be enough to decide the result of the appeal.[2] Therefore, there is ground for saying that the rest of the judgment expressed was only obiter.[3]

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94 This is taken from the case of *R* v *Percy Dalton (London) Ltd* [1949] LJR 1626 where Birkett J at 1630 said, 'Steps on the way to the commission of what would be a crime, if the acts were completed, may amount to attempts to commit that crime, to which, unless interrupted, they would have led; but steps on the way to the doing of something which is thereafter done, and which is no crime, cannot be regarded as attempts to commit a crime.' To this Lord Hailsham adds that 'equally steps on the way to do something which is thereafter *not* completed, but which if done would not constitute a crime cannot be indicted as attempts to commit that crime'.

95 Glanville Williams, 'Compounding the Confusion in Inchoate Offences' [1978] NLJ, July 27, 724: 'The most unfortunate result of the decision in *Roger Smith* was that it seems to preclude the conviction of attempt of a pickpocket who tries to steal a valuable from a pocket or wallet that is in fact empty.'

96 [1974] Crim LR 307.

97 [1976] HKLR 636, 653.

98 Ibid.

99 [1976] HKLR 636, 653-4.

1 See [1974] Crim LR 307, *Lee Shek* [1976] HKLR 636, 652.

2 See footnote 78.

3 As was said by Talbot J in *Flower v Ebbw Vale Steel Iron and Coal Co Ltd* [1934] 2 KB 132, 154: 'if a judge thinks it desirable to give his opinion on some point which is not....necessary for the decision of the case, that, of course, has not the binding weight of the decision of the case, and the reasons for the decision.'

However, the opposite view has also been taken. The Divisional Court in *Partington* v *Williams.*[4] declared itself satisfied that the speeches in *Haughton* v *Smith* were not obiter. The Hong Kong courts get around this by distinguishing *Partington* v *Williams* in the case of *Lee Shek* on the frame of the indictment.

Framing of the charge

Alternatively, even if the speeches in *Haughton* v *Smith* were not obiter, the courts in Hong Kong as well as in England have found another way of securing a conviction that will by-pass the issue of impossibility altogether (if it can be done). This is to frame the charge in such a way so that the defence of impossibility will not arise. This means that the evidence against the accused often shows that he had a broader objective than the specifically unsuccessful efforts made. In such a case, if the terms of the charge are drafted narrowly, the issue of impossibility may arise unnecessarily. So it is possible to draft a charge in a way so as to avoid this issue. This was, in fact, the way the defendant in *Lee Shek* was convicted. He was a pickpocket at a race meeting. He was seen on three occasions to put his hand into the pockets of three men. On the third occasion he was arrested and charged with attempted theft. There was no evidence whether there was anything in the pocket of the left trouser of the man into whose pocket the defendant put his hand. The indictment against him charged him with attempting to steal from an unknown person. It was, therefore, distinguishable from the other pickpocket cases where the indictment contained the specific articles the accused allegedly attempted to steal and the exact place from where he attempted to steal – e.g. the left trouser pocket.[5] Where the charge is framed narrowly, the issue of impossibility may very well arise since it may be that there was nothing at all in the left trouser pocket and he would then not be guilty of attempt.

The recent case of *Nock* also supports this view. The judges in that case said that a broad charge should be framed where the accused is a pickpocket either working alone or with a confederate. This is because it is hardly likely for the pickpocket to stop his course of action just because in his first attempt, he failed to find anything. In other words, evidence against him may well justify a charge drafted in broad terms. In the words of Lord Diplock:

> 'The crime which the pickpocket sets out to commit is not confined to stealing from a particular person or *a fortiori* from a particular pocket in a particular person's clothes or from a particular article carried by a particular person. When he converts intention into attempt by the proximate act of extending his hand to a particular pocket or article, failure at this point to effect his intention of stealing, because where he first puts his hand there is nothing to steal, does not mean that the course of conduct he intended to pursue would have ended with this initial failure and would not have continued until he had found something to steal in some similar place and stolen it. Under an indictment drafted in suitably broad terms I see no reason why . . . the pickpocket should not be convicted . . .'[6]

From the remarks of Lord Diplock and Lord Scarman[7] one can deduce two propositions. Firstly, if the pickpocket is charged with attempting to steal from a pocket, wallet, etc that is in fact empty, he cannot be convicted by reason of the decision in *Haughton* v *Smith.* Secondly, if the pickpocket is charged, on identical facts, with attempting to steal generally, then he can be convicted if the jury find a general intent to steal. In other words, whether a person is guilty of an attempt-in-law depends on whether the prosecution can prove that, having failed in one attempt-in-fact, he would have continued, had

4 (1975) 62 Cr App R 220.

5 In *Partington* v *Williams,* ibid, the charge was of an attempt to steal something specific, that is, money, from a wallet. And in *Collins,* it was a charge where again a specific was given, that is, 'the property of the said woman, in the said gown pocket then being'. In *Hector,* the charge was that of attempted theft of, inter alia, a spirometer and a clothes airer.

6 *Nock* [1978] 3 WLR at 64-65.

7 Ibid, at 71: '.....in my opinion, *Reg* v *Smith* provides no escape route for such villains..... As Bramwell B commented in *M'Pherson's* case (at 285), such cases depend upon the nature of the offence charged; and I would add, upon the particular facts established or conceded It is certainly not possible to deduce from these cases a rule that he who, with intent to steal, picks a pocket but finds nothing to steal, must be acquitted of attempted theft; nor do I think did any of their Lordships in *Reg* v *Smith* commit themselves to so sweeping a proposition.'

he not been interrupted, until he succeeded in stealing something.[8] This proposition is dubious and has been subject to much criticisms,[9] the general criticism being the defendant is to be convicted, not because of what he has done, but because of what he might do in the future.[10] And even if it is accepted, it hardly ever can be inferred that the accused in *Easom* or *Partington* v *Williams* had this general intent to steal – for all that appeared, both were subject to a sudden and momentary temptation.[11] It seems, therefore, that a broader charge will not secure conviction merely because there is a 'general intent to steal'. The more likely reason is that the evidence would then suggest that there was something to steal so as to override the impossibility argument. But this is not to say that it can always be avoided. Where the evidence shows that there is an impossibility situation, the Crown cannot simply succeed merely by drafting the indictment in broad terms. The evidence must always support the charge.

There is further criticism relating, in particular, to the framing of the indictment.[12] The argument is that the court relied heavily on the framing of the indictment and pointed out the contrasting cases of *Collins* and *Ring*. The House of Lords in *Nock* said that both *Ring* and *Collins* were correct.[13] The facts of the two cases were not dissimilar but the indictments were in different terms. And this, according to Lord Diplock, decided their fate. The argument is that the distinction fails to convince because the decisions of these two cases did not rest on the wording of their respective indictments. In particular, in *Ring*, the broad indictment did not charge a crime in relation to persons generally. Moreover, there was nothing in that case to suggest that the conviction of attempt proceeded upon the basis of some possible future attempt to pick the pockets of future victims. And it is emphasized again that even if Lord Diplock's proposition is accepted, there could be no reasonable inference of the general intent to steal in *Easom* and *Partington* v *Williams*.

Conclusion

The question is now what can be concluded from all this? In England, it seems to be settled that *Haughton* v *Smith* has laid down what is the law in these empty pocket cases. And English courts have considered themselves bound by this House of Lords decision. In Hong Kong, there is room for argument that the House expressed only obiter views on general principle and the decision of the Divisional Court in *Partington* v *Williams* is not binding on us. The English courts, however, have suggested a way out of this in *Nock*. But as criticisms show, the propositions are remarkable and, with respect, dubious.

An indictment which charges the accused in *Easom* to steal from the handbag without specifying

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8 This terminology was used in [1978] Crim LR 486. It seems to mean that there will be a liability for attempt (attempt-in-law) if the prosecution can show that from the particular attempt that was committed (attempt-in-fact) it could be said that the accused had a general intent to steal.

9 See [1978] NLJ, July 27, 724, 725 similar argument is found in [1978] Crim LR 483, 486. 'Moreover, the nature of the attempt is most obscure. Since [it seems] there is no attempt to steal from the empty pocket, the theft attempted in from some unascertainable pocket containing money carried by some unascertainable person at some unascertainable place and time in the future. What has become of the doctrine of proximity?'

10 [1978] Crim LR 483, 486.

11 [1978] NLJ, July 27, 724, 726.

12 Ibid, 725.

13 The House of Lords quite clearly intended to hold that a pickpocket who picks an empty pocket is not guilty of attempt. 'But Lord Diplock suggests an ingenious way out. He says that it was the purported overruling of *Collins* that was repudiated by the House and that none of the Lords expressed the view that the actual decision in *Ring* was wrong. It would be surprising if everyone agreed with this interpretation of the speeches but it seems to be accepted by Lord Keith and Lord Scarman. The suggestion is that *Collins* is right and *Ring* is right as well.' See [1978] Crim LR 483, 485. Also, there is a suggestion by Pickering JA in *Lee Shek* that this may be called a mere lack of success situation which by *Haughton* v *Smith*, attracts liability.
He says at 650, 'Lord Reid in *Haughton* v *Smith* instances the would-be thief who cannot break in because the door is too strong for him and says that he is certainly guilty of attempt because "with better equipment or greater skill he could have committed the full crime". It is tempting to ask if the lack of skill does not exonerate him from the attempt, why should the lack of luck? Looked at in another way the lack might well be said to have been one of skill rather than luck for a competent pickpocket would first make certain by observation before dipping into a pocket, that the pocket did contain something rather than risk the chance of detection in attempting to pick what might prove to be an empty pocket.'

its contents will not result in conviction for attempt after *Haughton* v *Smith*. If the handbag contains nothing worth stealing, then it is a case of impossibility and by the authority of *Haughton* v *Smith*, there is, therefore, no attempt. The charge may be framed broadly but this proceeds on the assumption that the accused will continue in his course of conduct, and as pointed out, this will not be the case of the opportunist like *Easom*. In Hong Kong, it may be possible to argue *Ring* still applies; or alternatively, this is a case of mere lack of success and therefore, there is liability.

It seems that many writers feel *Haughton* v *Smith* is unjust and brings in much more confusion when it need not do so. It has been said that 'Lord Diplock's attempt to avert those results of *Haughton* v *Smith* which are so offensive to common sense and common justice is understandable, but, with respect, nothing less than a complete repudiation of this aspect of that decision can be adequate to do so'.[14] It has also been said that 'that the law should have involved itself in such pedantries of pleading, as the only way of convicting pickpockets in these circumstances, is sufficient condemnation of the decision in *Roger Smith*'.[15] It has also been suggested that the law should be reformed so as to rid the law of the uncertainties and unfairness created by the decision.[16]

OTHER INCHOATE CRIMES: CONSPIRACY

The crime of conspiracy consists of an agreement between two or more parties to perform an unlawful object with the requisite mens rea. The basic offence in this crime is the agreement. If agreement has been reached, it is immaterial that the parties do not take steps to perform the unlawful object.[17] The question to be discussed is whether conditional intention is sufficient for the offence of conspiracy of theft. This turns on the question of whether agreement has been reached.

It is clear that the law will not punish persons who merely talk about the possibility of committing some wrongful or unlawful act. The important distinction lies in whether or not the parties have reached agreement or whether they are merely negotiating. In the latter case, the law does not punish.[18] But it is also clear that as long as agreement is reached, it is immaterial that it is subject to express or implied reservations.[19] The test suggested for determining if parties have reached agreement is the 'form of the reservation' test suggested by Lord Parker CJ.[20] If that test is applied to a situation where two or more parties come together and say 'we will steal if there is something valuable to be stolen' it is hard to say that agreement has not been reached. But the agreement is subject to a condition, namely, the theft will take place only if there is something valuable to steal. This express reservation, by the authority of *Mills*, will not negative the agreement, 'otherwise nobody would ever be convicted of conspiracy.'

After Nock

Prior to the decision in *Nock*, it was the law that the crime was complete as soon as agreement is reached. It did not matter if the agreement was never carried out. But the case of *Nock* held that the decision of *Haughton* v *Smith* applies equally to conspiracy. In other words, although the agreement is reached but not carried out, there will be no liability if the conspired end result would be impossible. Once again this means that if there is to be a conviction, it must be shown that the failure was due only to lack of skill.

The facts of that case were the defendants conspired to produce a controlled drug contrary to

14 [1974] HKLJ 109; [1971] Crim LR 307; another solution proposed is found in [1978] NLJ, July 20, 716.
15 [1978] NLJ, July 27, 724, 725.
16 [1974] Crim LR 307.
17 Unlawful object is a broad term but it clearly includes a crime. For our purposes, the unlawful object is the crime of theft.
18 *O'Brien* (1974) 59 Cr App R 222.
19 *Mills* [1963] Crim LR 181.
20 *Mills*, ibid, 'No doubt in many cases it may be a very fine line whether the parties at the particular moment under consideration are merely negotiating or whether they have reached agreement to do something if it is possible or propitious to do it, and it may be that these cases will be decided largely on the form of the reservation. If the reservation is no more than if a policeman is not there, it would be impossible to say that there had not been an agreement. On the other hand, if the matters left outstanding and reserved are of a sufficiently substantial nature, it may well be that the case will fall on the other side of the fence and it will be said that the matter is merely a matter of negotiation.'

section 4 of the Misuse of Drugs Act, 1971. The agreement was to produce cocaine by a particular course of conduct. But the facts showed that cocaine could not be produced by that course of conduct and the defendants were mistaken that they could produce cocaine in that way. The House of Lords held that the charge of conspiracy failed. Lord Scarman delivered the judgment and the reasons given for the failure of conviction were analogous to those given for the crime of attempt in *Haughton* v *Smith*.

> 'If their agreement, limited as it was to a specific course of conduct which could not result in the commission of the statutory offence, constituted a criminal conspiracy, the strange consequence ensues, that by agreeing upon a course of conduct which was not criminal [or unlawful] the appellants were guilty of conspiring to comit a crime . . . No man should be punished criminally for the intention with which he enters into an agreement unless it can also be shown that what he has agreed to do is unlawful.'[21]

The effect of this decision seems to be that an agreement in general terms to produce cocaine, if and when a suitable raw material could be found, would be an offence. Similarly an agreement to pick a particular pocket and no other would not be a conspiracy at common law if there was in fact nothing in that particular pocket but an agreement to pick-pocket generally would be a conspiracy, notwithstanding that the first pockets of the parties attempted to pick all happened to be empty.[22] It is open to doubt why the House of Lords did not feel the defendants could have been convicted because surely the situation could be regarded as mere lack of success.[23] The court could have said the defendants had agreed to produce cocaine which was certainly an offence. The impossibility arose because cocaine could not be produced in those procedures taken by the defendants. If they had used other material, surely, cocaine can be produced.

Therefore, it is quite clear that conditional intention to steal only what is worth stealing can be sufficient to establish the offence of conspiracy as long as an agreement is reached. But it is now not possible just to stop at this point. It must also be necessary to consider if the conspiracy would be impossible if the agreement was performed. Once again it may be necessary to frame a charge broadly providing the evidence supports the broad charge, if there is to be a conviction in the empty-pocket cases and this is subject to the same criticism mentioned earlier in relation to attempts. The decision in *Nock* brings in new complications into the law of conspiracy but 'it does confirm the present bias of the courts against extending the inchoate offences to situations of impossibility except in certain well-recognized cases of impossibility of means'.[24]

OTHER INCHOATE CRIMES: INCITEMENT

Conditional intention in incitement will involve a hypothetical case where A says to B 'Why don't you steal from that handbag if there are valuables worth stealing?' Is A guilty of incitement? For the offence of incitement, the elements of the offence are A's act must be an act of incitement; A's mens rea is that he intends or hopes that B will perform the act incited; at the time of performing the act, B will be performing in the relevant circumstances; B's act must be unlawful. If all these elements are satisfied, A is guilty although the act is never actually performed or capable of performance.[25]

It is clear that an act of incitement may takes various forms: advice, encouragement, persuasion, request, proposal, gesture, goading or even threats and pressure.[26] Therefore, if A incites B in any of these forms, A's act will be an act of incitement. A's mens rea is that he hopes or intends that B will perform the act incited. Clearly in this case A hopes or intends that B will steal the valuables worth stealing. A must also foresee, believe or is reckless that B will perform in the relevant circumstances. Therefore, A's mens rea as to B's mens rea is also important.

Since the decision in *Nock*[27] it has been suggested that this inchoate offence is also subject to the rules of impossibility because 'the law having

21 [1978] 3 WLR 57, 68.
22 [1978] Crim LR 483, 484.
23 [1978] NLJ, July 27, 724.
24 Ibid.
25 *McDonough* (1963) 47 Cr App R 37.
26 *Race Relations Board* v *Applin* [1973] QB 815.
27 [1978] 3 WLR 57.

been settled for attempt, it is inconceivable that incitement should be different'.[28] This means that the earlier case of *McDonough*[29] is no longer law. The facts of that case were that the defendant offered stolen lamb carcasses for sale. He believed they were in a cold storage. In fact, unknown to him, there were no carcasses for sale. Nevertheless he was convicted for incitement to handle stolen goods. Since the decision of *Haughton* v *Smith* this case would be decided the other way since there were in fact no stolen goods as contemplated.

The effect of applying the rules of impossibility to incitement is that there is a dichotomy between liability at the time of incitement and the time when the incited act is performed. In *McDonough,* he believed he was inciting a crime and if the facts had been as he believed he would have been. He certainly incited and intended to incite the crime. But when the butchers accepted the offer, they and McDonough did not become guilty of conspiracy to handle if *Nock* is applied because it was impossible for anything illegal to be done by carrying out the agreement on the facts. Nor did the butchers become guilty of an attempt when they tried to get the carcasses on the authority of *Haughton* v *Smith.* As a result, the court would now hold that there is no liability.

Turning back to the example given, it would follow that A will not be guilty of incitement if there were in fact no valuables worth stealing in the handbag. It has been said that A's liability should be considered at the time of incitement. A certainly intended to incite and A also hopes or foresees that B will perform in the relevant circumstances. If liability is considered at this point in time, A will be guilty of incitement. But it is now necessary to take a further step to see if liability would be prevented by a situation of *Nock* or *Haughton* v *Smith* arising.

It seems contrary to principle that liability should differ so much depending on when it is considered. In incitement, A's liability should be determined at the time of incitement, especially since A's liability need not require that B perform the incited act.[30] However, by implication, the state of the law dealing with incitement is subject to the rules of impossibility, and it is yet to be seen from decided cases the exact effect of this state of the law.

SUMMARY

A summary of the main points of this article can be made.

1. Decided cases consistently hold that conditional intention is not sufficient for the full offence of theft. There are, however, persuasive arguments that it should be sufficient.

2. Such intention is also held to be insufficient for attempted theft in the particular cases. It is possible to say that the court did not deny that conditional intention is sufficient but it held that the mens rea of attempt as that of the full offence, and as a result there could be no conviction. It is pointed out that the analysis for an attempt is not the same as that of the full offence. The attempt is complete when a proximate act is done and there is intention to perform the proximate act.

3. If mens rea for attempt is that of the full offence, it produces much restriction on conviction for the offences of burglary and loitering with intent to steal.

4. If a charge is framed broadly, without specifying the particular items an accused is charged with stealing, it may be possible to convict him of attempted theft (subject to the doctorine of conditional intention). But evidence must always support the broad charge.

5. The empty-pocket cases are relevant. The reasoning is that the empty-pocket rule also applies to full pockets, if they are full of things that the thief does not want to steal. It may also be explained on the basis that if a handbag contains no valuable items worth stealing, it leads to an impossibility situation, so that the rule relating to empty-pocket arises.

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28 [1978] NLJ, July 27, 724, 726.
29 (1963) 47 Cr App R 37.
30 *Race Relations Board* v *Applin* [1973] QB 815.

6. Before *Haughton* v *Smith* a person who puts his hand into a pocket with intent to steal is guilty of attempted theft even though the pocket turns out to be empty. But after *Haughton* v *Smith* there would be no liability if the end result is impossible. However, there would still be liability if the impossibility rests only on the means used.

7. It is still possible to argue that *Ring* is not overruled so that there is still liability. There was no express overruling of this case by the House of Lords. Hong Kong courts have still applied *Ring* since *Haughton* v *Smith*. Another argument is that all that was said about *Ring* was obiter dicta.

8. Sometimes a charge can be framed so as to avoid the issue of impossibility. This is based on the theory suggested in *Nock* that a pickpocket does not confine his activities to a single pocket. It is, however, difficult to apply this to a situation where the evidence does not support a broad charge of attempting to steal generally. In a case like *Easom*, it would seem that a charge of attempting to steal without specifying particular items would result in an impossibility situation if the handbag contains no valuable items.

9. Since *Nock*, the empty-pocket rules apply also to conspiracy. Conditional intention may be sufficient for the offence of conspiracy but it is now necessary to see if the end result would be impossible. If it would be, there would be no liability.

10. By implication, incitement is also subject to these rules and so the same analysis applies.

CONCLUSION

The present state of the law is that conditional intention is insufficient for the full offence of theft. Although it has been argued that conditional intention should amount to intention, it seems that this will only be acceptable if there had been an appropriation. But at least a person should be found guilty of attempted theft in this situation. The courts have introduced many complications for securing a conviction for attempted theft by saying that the mens rea for attempt is that of the full offence. Since the decision in *Haughton* v *Smith*, there is a further bar to conviction if the accused finds nothing valuable worth stealing. There have been suggestions of ways to avoid this decision, but they, in turn, have been subject to much criticism. This is indication of the unfairness resulting from the decision – the courts find ways which may offend other principles, just to find a way out of the 'impossible' situation. It is submitted that the law in this area should be reconsidered by the House of Lords, particularly, now that it has been held that the principles apply also to the crime of conspiracy and thus, indirectly, to incitement. The law as it now stands is extremely obscure and unjust. If no solution can be found out of this, perhaps only a complete repudiation of this aspect of the decision in *Haughton* v *Smith* will do.

ADDENDUM

Since this article was written, there have been English decisions which clarify some of the confusion caused by the state of the law as it stood. The Court of Appeal decision in *Re Attorney-General's References* (Nos 1 and 2 of 1979)[1] has the merit of doing away with what was sometimes known as the 'burglars' charter'. But there still remain certain rules of law relating to theft and attempted theft that fully deserve such a title.

The Court of Appeal in a judgment delivered by Roskill LJ held in *Re Attorney-General's References* that a charge of burglary 'with intent to steal' or of attempted burglary 'with intent to steal' is good; there is no need to specify what it was that the defendant hoped to steal.[2] In fact, the Court felt that the reference relating to the full offence of burglary was correctly settled in *R* v *Walkington*[3]. In that case the indictment was for burglary and there was no averment in the particulars of the charge of any intention to steal any specific or identified objects. Geoffrey Lane LJ distinguished *R* v *Hussein*[4] on this gound and further held that on such a charge it is no defence to show that the property that the defendant hoped to steal was not in the building. All that is necessary is for the jury to feel sure that the defendant has entered any building or part of a building as a trespasser, and that at the moment of entering he intended to steal anything in the building; the fact that there was nothing in the building worth stealing is immaterial. This clearly recognises the fact that

almost every prospective burglar only intends to steal if he finds something in the building worth stealing. Hence conditional intention on the burglar's part will not prevent a conviction, nor will the fact that there is nothing in the building worth stealing. There is, thus, no longer a 'burglars' charter'. The same approach is to be used for an attempted burglary, as Roskill LJ and in *Re Attorney-General's References* '[it would] be very strange if a different answer had to be given in the second reference, which is concerned with attempted burglary, from that given in the first reference.'[5]

It must be noted that *R* v *Hussein* has not been overruled. The Court's solution lies in the framing of the charge. A more imprecise method of criminal pleading is acceptable if the justice of the case requires it. An indictment in general terms will be good if it correctly reflects that which it is alleged that the accused did and that the accused should know with adequate detail what he is alleged to have done. Notwithstanding that the questions addressed to the Court related to burglary and attempted burglary the Court pronounced also on the subjects of attempted theft. While a charge in general terms in a case of attempted theft is workable in some instances, it is still subject to the impossibility rule in *Haughton* v *Smith*[6] and *Partington* v *Williams*[7], and the ensuing difficulties previously mentioned. No question of impossibility arose in *Re Attorney-General's References* as both case brought before the Court were carefully chosen as ones in which there was property in the place where the thief was attempting to steal. Therefore English courts may still have difficulty in securing a conviction where the charge is broadly framed if the attempted theft was impossible to commit.

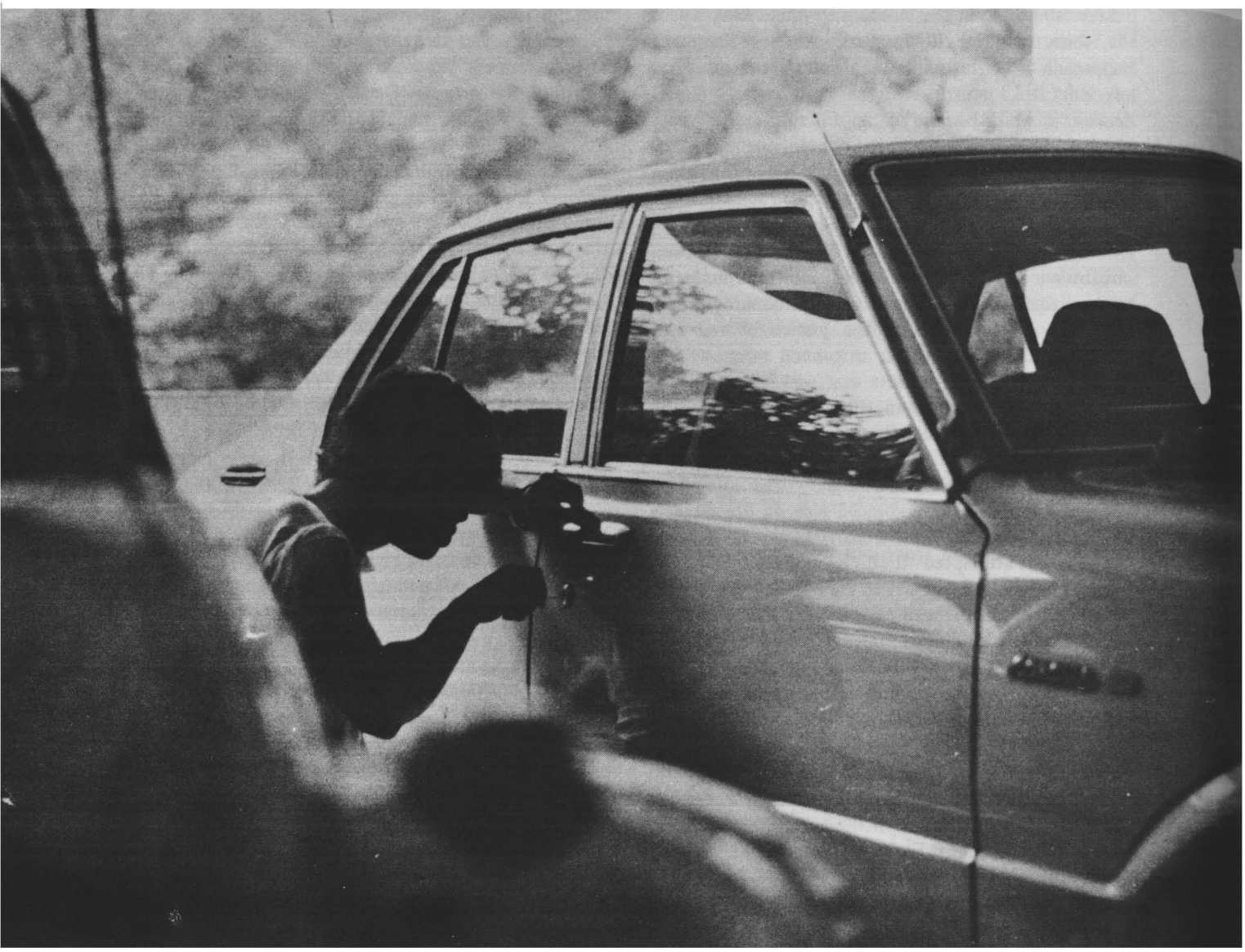
It appears from *Re Attorney-General's References* and a later Divisional Court decision in *Miles* v *Clovis*[8] that on a charge of loitering with intent to commit an arrestable offence, it is not necessary to prove that the defendant had formed the intent to steal a specific thing. The indictment may be worded in general terms as long as it is supported by evidence that the defendant had a general intent to steal. Again the impossibility rule was not resolved in this case. It could be argued that since it has been held not to apply to burglary, it should not apply to loitering with intent. In other words it is confined to the inchoate offences of attempt, conspiracy and incitement and does not apply to crimes of doing something 'with intent to' something else.

The principle is now recognised that one can attempt to steal a thing even though its precise nature is unknown. But the charge must in those cases be broadly framed. The clarification on these points as a result of *Re Attorney-General's References* is satisfactory. There still remain the problems of whether the broad charge is supportable and there may still be an escape route based on the impossibility rule. *Easom*[9] is still with us and when combined with the impossibility rule can work to box the prosecutor up completely. The path to reform in this area of the law is not yet complete but it is encouraging to know that the empty pocket rule is now under consideration by the Law Commission in England with a view to legislative amendment and restatement.

(For further discussion, see [1980] Crim LR 263)

Footnotes

1 [1979] 3 All ER 143
2 For the exact wording of the references, see [1979] 3 All ER 143 at 144 g to j.
3 [1979] 2 All ER 716.
4 [1978] Crim LR 219.
5 [1979] 3 All ER 143 at 153.
6 [1973] 3 All ER 1109.
7 [1975] 62 Cr App R 220.
8 [1979] 3 WLR 592.
9 [1971] 3 WLR 82.



INDUSTRIAL ACCIDENTS IN HONG KONG: PREVENTION, COMPENSATION AND REHABILITATION

written on behalf of the Editorial Board by Albert Hung-yee Chen (Parts I to V) and Ankana Livasiri (Part VI)

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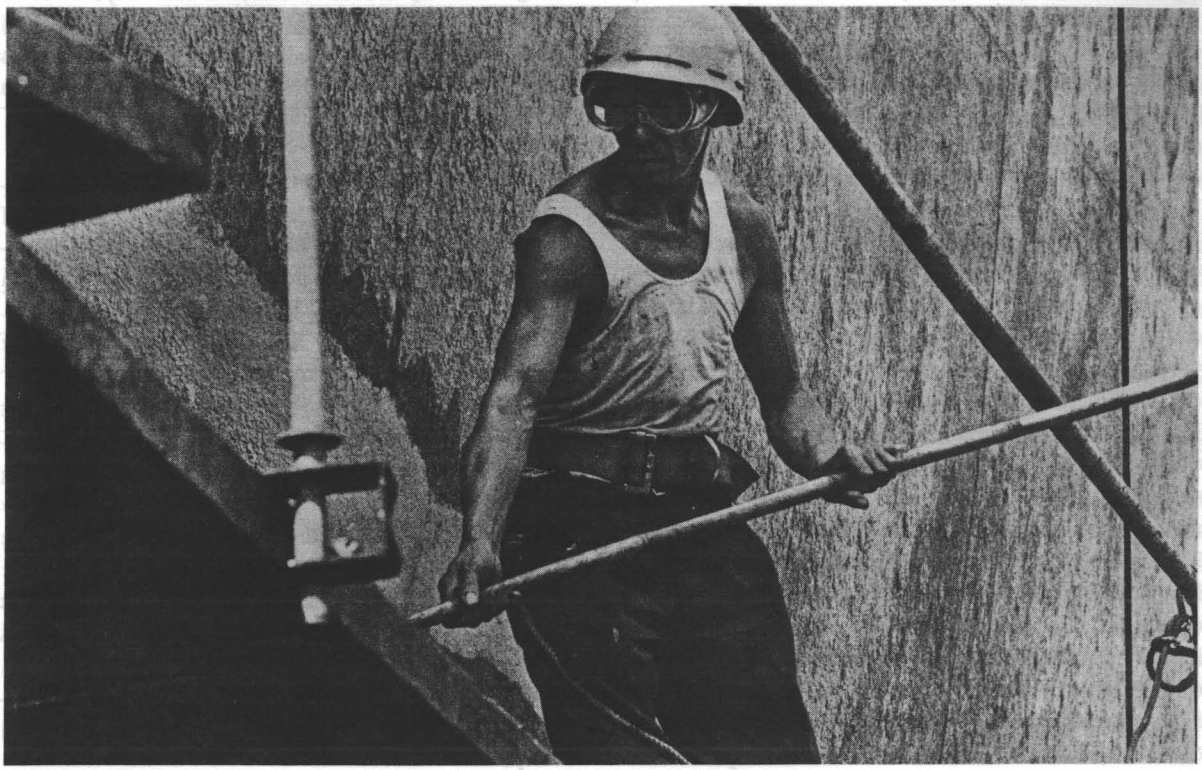

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I. INTRODUCTION

The problem defined

The problem of industrial accidents has been attracting increasing public attention in Hong Kong, especially when headline-making accidental injuries and deaths occur at places of work and when annual statistics of the rising accident tool in industry are published. Government has been charged with neglect in dealing with industrial safety.[1] At the same time, Government officials stress that Government action alone is inadequate to reduce the rate of industrial accidents and emphasize the importance of the participation of employers and employees themselves.[2] And the victims of industrial accidents are often discontented with the compensation system and its operation.[3]

In order that the problem be analysed in detail, the term 'industrial accident' is here defined for convenience as an unplanned or unintended occurrence at an industrial establishment (in the case of Hong Kong, an 'industrial undertaking' as defined in section 2 of the Factories and Industrial Undertakings Ordinance[4]) which causes to the victim death or an injury which incapacitates him for a period exceeding 3 days immediately following the accident for any employment which he was capable of undertaking at the time of the accident

1 e.g. letter to the editor by Dr L.K. Ding, Chairman of the Hongkong Christian Industrial Committee, South China Morning Post (hereafter abbreviated as SCMP), Jan 17, 1980; statement by the Federation of Trade Unions, SCMP, May 19, 1980.

2 e.g. the response of the Acting Assistant Commissioner for Labour to claims that Government failed to take practicable steps to prevent industrial accidents, SCMP, May 7, 1980.

3 e.g. conference on workmen's compensation law organised by the Christian Industrial Committee and 5 other labour organisations, Ming Pao (hereafter abbreviated as MP), Aug 6, 1979. See also Barry Choi, 'Getting Across Industrial Safety Message', SCMP, June 5, 1980, for a good summary of these various views.

4 Cap 59, LHK, 1977ed.

(so that in Hong Kong, report of the occurrence by the proprietor of the industrial undertaking is required by section 17(2) of the Factories and Industrial Undertakings Ordinance[5]), or an industrial disease. There is no generally accepted terminology in this area[6] but for the purpose of consistency, the above definition will be adhered to throughout this essay.

Industrial accidents are hazards inherent in the complex modes of production in modern industrial economy. Apart from the human pain and suffering caused to victims and their dependants, society as a whole also incurs economic loss in both the direct costs of medical treatment and compensation and the indirect costs, averaging 4 times the former, in lost output, lost wages or damage to property.[7] The severity of the problem as well as the consequent necessity of action have been recognised worldwide both on the national and international levels.[8] In Hong Kong, 39,242 industrial accidents were reported in 1978 (a 5.6% increase over the 1977 figure), including 141 deaths (a 3.7% increase). The number of industrial accident victims is thus more than twice that of traffic accident victims. In fact the number of industrial accidents has been steadily on the increase for the last 10 years,[9] and the incidence rate of industrial accidents per 1000 manual workers engaged in industry has increased from 37.1 in 1975 to 45.7 in 1978.[10] In 1978 industrial accidents accounted for 73.1% of all occupational accidents in Hong Kong, i.e. accidents connected with work resulting in death or more than 3 days of incapacity occurring in industrial undertakings or otherwise. Occupational accidents as a whole caused to the Hong Kong economy a loss of 624,792 man-days in 1978 (an 8.6% increase over the 1977 figure) and the total amount of compensation paid under the Workmen's Compensation Ordinance[10a] was $26,160,673 (a 11.0% increase).[11]

It is difficult to compare Hong Kong's occupational or industrial accident figures with those of other countries. There exists no international compilation of the incidence of work injuries, and comparisons from countries' own records are hindered by the use of widely differing definitions, both of accident or injury and of the numbers employed.[12] Moreover, comparison of overall incidence rates is bound to ignore the differences in industrial structures. It has nevertheless been pointed out that in proportion to the total working population, nearly twice as many workers are killed in Hong Kong as in Singapore, which has an industrial history similar to that of Hong Kong, and 6 times as many as in the United Kingdom.[13] As Government itself noted as early as in 1974, the rapid post-war industrial growth in Hong Kong has not been matched with a correspondingly high pace of development in industrial safety.[13a]

The problem analysed

The response of a society to such a social problem as industrial accidents depends on a complex of political, economic and social conditions and philosophies as well as their mutual interplay. In the context of Hong Kong, one important political fact is the predominance of business interests among the appointed Unofficial Members in the Legislative and

5 ibid.

6 For a good alternative terminology, see R.P. Blake (ed), *Industrial Safety* (New Jersey: Prentice-Hall, 3rd ed, 1963), 55-6.

7 International Labour Office (abbrev ILO), *Accident Prevention* (Geneva: ILO, 1961), 2. See also p 1 for the magnitude of the problem.

8 ibid, 8-14, 154-161.

9 See the annual reports of the Labour Department or John Miller, 'Accident Compensation in Hong Kong' (1979) 9HKLJ 4, 26, Table 6.

10 Calculated from the statistics on the number of industrial accidents and the number of manual workers engaged in all industries provided at the industrial safety exhibition organised by the Labour Department in July 27 - Aug 6, 1979.

10a Cap 282, LHK, 1974ed.

11 Figures in this paragraph are or are calculated from statistics released by the Labour Department in the press unless otherwise specified.

12 See Pearson Commission, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd 7054), vol 2, 50-51.

13 Martin Palmer, *Industrial Health and Safety in Hong Kong* (London: Hong Kong Research Project, Pamphlet Series No 3, 1977), 26-28. Although the Hong Kong Government alledged (SCMP, Jan 28, 1978) that this pamphlet was based on out-dated information and biased in its arguments, the accuracy of the statistics used cannot be disputed. The quote ratios of industrial accident rates in HK, Singapore and the UK have also been adopted by Dr Ho Kam-fai, Unofficial Legislative Councillor, in his speech in the Legco: MP, Mar 28, 1980.

13a SCMP, June 8, 1974.

Executive Councils.[14] The profit of business enterprises and the welfare of workers are not always compatible objectives in the formulation of policy and the making of legislation; the argument can always be made against increased protection and security for workers that the resultant increased cost of production will diminish the competitive power of Hong Kong products which, in view of the growing competition from similar economies like Taiwan and South Korea, will be fatal to the economic survival of Hong Kong as a whole. Thus labour legislation initiated by the Labour Department sometimes needs to be defended by Government and pushed through the Legislative Council despite opposition from some Unofficials.[15] In the absence of strong trade unionism, which in Hong Kong is is numerically weak,[15a] politically divided, structurally fragmented, more interested in the provision of recreation and welfare for members outside the workplace than in the regulation of the conditions of employment and suffering from a general lack of interest in participation among workers, the Government is all the more important as an activating agency in legislative and other developments in relation to labour conditions and relations.[16] Governmental action in this respect has been stimulated by the 1967 riots[16a] and influenced by public opinion, pressure groups in Hong Kong itself[17] as well as in the United Kingdom,[18] and international organisations.[19] As far as legislation on conditions of work is concerned, it has been suggested that the Government's approach is also attributable to its ideology of providing the minimum necessary framework for the successful operation of market forces and a concept of social justice deriving from its sense of responsibility.[20]

The purpose of this essay, however, is not to attempt a politico-economic explanation of what Hong Kong has done in dealing with industrial accidents. It is concerned rather with the law and practice in relation to industrial accidents here up to the time of the completion of its writing (June 13, 1980) and with the possible improvements that may be made; it seeks to state analytically and objectively the present situation and then to open up future possibilities. Insofar as it does not directly deal with politico-economic factors which explain the present and decide the future, it is only a *partial* account of the story of industrial accidents in Hong Kong, and it purports to be no more than such.

This account will begin by a look at the theoretical basis of accident law, its general aims and methods. The substantive law in relation to industrial accidents and their victims in Hong Kong will then be researched into; first, the criminal law for the promotion of industrial safety, and then the common law and legislation by which industrial accident victims may receive monetary compensation. The non-legal means for the control of industrial accidents will also be discussed alongside the industrial safety legislation. The next section of the essay is an evaluation of the present system by which industrial accidents are sought to be prevented and victims are sought to be compensated, followed by a summary of recommendations for changes that can be made in the future. The last section is a review of the rehabilitation services available to accident victims in Hong Kong. This part of the essay can

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14 For the political situation in HK, see generally Keith Hopkins (ed), *Hong Kong: The Industrial Colony* (HK: OUP, 1971), ch 3, 8; N.J. Miners, *The Government and Politics of Hong Kong* (HK: OUP, 1975); Peter B. Harris, *Hong Kong, A Study in Bureaucratic Politics* (HK: Heinemann, 1978); S.N.G. Davies, 'Our Brand of Politics Rekindled' (1977) 7HKLJ 44.

15 Keith Hopkins (ed), op cit, 88.

15a It has been estimated that there are approximately 400,000 trade union members in HK, representing one-fifth of the total labour population: SCMP, May 2, 1980.

16 For labour conditions and relations in HK, and the inter-related social, political and economic factors, see generally Keith Hopkins (ed), op cit, ch 5; Joe England and John Rear, *Chinese Labour Under British Rule* (HK: OUP, 1975), ch 1-5; and a recent article by Professor H.A. Turner, SCMP. April 5, 1980 (entitled 'Hongkong in Choppy waters').

16a England and Rear, op cit, 5-9.

17 Examples are the Christian Industrial Committee, the Industrial Relations Institute and the Young Workers Centre.

18 Examples are the National Union of Tailors and Garment Workers. (see its publications, *Hong Kong – Towards Effective Trade Unionism*, 1977; *Hong Kong: The Problem Colony*), the Hong Kong Research Project (see its publications, *Hong Kong: A Case to Answer* (Nottingham, 1974) and Martin Palmer, op cit). Trade protectionist forces overseas often point to the unsatisfactory labour conditions in HK in arguing their case.

19 Examples are the ILO and the International Confederation of Free Trade Unions.

20 Keith Hopkins (ed), op cit, 220.

stand separately on its own, independent of the preceding parts.

II. THE THEORETICAL FOUNDATION OF ACCIDENT LAW

Total absence of State intervention

Let us imagine a world of free private enterprise where entrepreneurs seek to maximize their profits and where capitalist economic theory in its classical form fully applies. Suppose that the State abstains totally from intervening in the phenomenon of industrial accidents. Factory owners are free to run their factories on any conditions however dangerous. Then the level of industrial accidents is determined by market incentives: Employers spend money on accident prevention and hence reduce the incidence of industrial accidents so long as it is profitable for them to do so, i e it helps to bring the sum total of accident prevention cost and accident cost to the employers (due to interruption of production, loss of skilled labour, damage to machinery, etc) to a minimum. Victims of industrial accidents are left on their own with no help whatsoever from the State, whether in the form of free or subsidized medical and rehabilitation services or of a subsistence income paid to them by the State. Poverty and disease with the associated human suffering are allowed to abound. The distribution of wealth in society becomes more unequal, insofar as accident victims usually come from the lower income levels.

At first sight, such a situation might seem morally intolerable to any modern society. It can be argued, however, that if certain conditions are satisfied so that there is an ideal world for the operation of classical capitalist economics, such behaviour on the part of the State is in fact economically the best for society. The theory runs as follows.[21]

The basic economic goal of society is the 'optimum allocation of resources'. This state exists when society produces precisely those goods and services which the consumers went in the proportions in which they want them and at the social costs they are willing to pay, or, in economic jargon, the supply of and demand for goods and services are brought into equilibrium at a price which equals the lowest average costs of production. This is attainable by the free market in conditions of 'perfect competition' through the use of the price mechanism. If demand for one product exceeds supply, the price will rise, and producers will find it profitable to produce more of the product. The price will then fall as more is produced, until a state of equilibrium is reached at which the consumer gets what he wants at the price he is prepared to pay.

The theory presupposes certain postulates, the most important of which is that no one knows what is best for individuals better than they themselves do. And as long as the prices of various products correctly reflect the relative costs to society of producing them, the consumer will cast an informed vote in making his purchases; the resources of society will be allocated in the best possible way.

Since consumer choices depend on the relative prices of products, insofar as the latter do not accurately indicate the relative social costs of production, the correlation between consumer choices and the production costs of goods and services chosen breaks down. Suppose that the price of a product is lower than its production cost because certain charges which properly belong to that product have not been taken into account. (An example is Government subsidization of the petroleum industry in the United States.) The product would be more costly for society to produce than it may appear to the consumer. Consumer demand for it would be higher than it would have been in an equilibrium situation where the price coincides with the lowest cost of production. To meet the increased demand, the supply will be increased as more resources are devoted to the production of the product. The diversion of resources which ought to have been employed elsewhere results in a misallocation of resources.

In a modified form, this theory of the 'optimum allocation of resources' can be argued to apply to accident-causing activities, and it becomes

21 Guido Calabresi, *The Costs of Accidents* (New Haven and London: Yale University Press, 1970), 69-70; P.S. Ariyah, *Accident, Compensation and the Law* (London: Weidenfeld and Nicolson, 2nd ed, 1975), 522-3.

what is known as the theory of general deterrence.[22] The latter asserts that the accident cost of an accident-causing activity (e.g. motoring, manufacturing), or the cost of the harm or damage done by it, should be treated as the price of engaging in that activity and charged to it just as the cost of, say, the raw materials used in the production of a production of a product is included as part of the price of the product. If all activities reflect the accident costs they cause, each individual will be able to choose for himself whether an activity is worth the accident costs it causes. The market mechanism will thus by culmulative individual choices determine the degree to which accident-prone activities are engaged in (if at all), how they are engaged in and who will engage in them. The optimum level of accidents will therefore be arrived at.

This approach would raise two difficult questions. First, what do we mean when we say that a particular activity causes a particular accident cost?[23] The market approach would require that the activity which could avoid an accident cost most cheaply, or, in other words, has most readily available a substitute activity that is substantially safer, be regarded as the cause of the accident cost, so that the cost is allocated to the activity. In practice this is a difficult determination to make, especially where several activities are jointly involved in one type of accident cost. The second question concerns the ascertainment of accident costs.[24] The ideal solution would be to have a 'market in accident victims', with people willing to take a risk for a price forming a supply of victims, and people willing to pay the price in order to undertake activities which injure (instead of introducing more expensive safety measures or reducing the extent of the activity) forming a demand for victims. A price representing the market value of the injury risk would be established, and risky activities would be undertaken so long as they could 'pay' that price. Such a market does not, however, exist in practice, because the potential injurer and victim may not be in a bargaining relationship with each other before the accident, and even if they are, the necessary freedom of choice and perfect knowlege of the risk involved on the part of the potential victim do not usually exist. Moreover, the statistical willingness to take a risk for a price does not necessarily give an adequate value of what an accident costs if it actually occurs.[25] In view of these factors, the best that can be done is to value the accident cost of an activity by approximating the amount that the actual injured party, had he been properly aware of the risk that people in his risk category bore, would have received in open market in exchange for bearing that risk. This would give the value of the actual injury (the accident cost) when multiplied by the odds against the injury occurring. And it has been suggested[26] that the best system to give the general deterrence theory full application is one that assesses liability to categories of accident-causing activities on the basis of broad cost statistics derived from individual cases. Contributions from the activities in accordance with the assessment will be paid into compensation funds from which victims in the corresponding categories of victims will be compensated.

The theory of general deterrence is therefore one which not only describes an ideal situation but also prescribes how it may be achieved. In addition to the practical difficulties in operating the theory, there are limitation arising from the dependence of the theory on the resource allocation theory.[27] There are other things that may count more in a society than allocation of resources, such as a fair income distribution or full employment. Charging its full accident cost to a product may be best from the resource allocation point of view, but this may price the product out of the reach of the poor, or result in unemployment as factories manufacturing it close down for lack of profit. Moreover, the existence of monopoly power already causes certain misallocations of resources, and it may seem worthwhile to depart from the strict general deterrence approach in order to correct such misallocations.[28] A final blow to the general deterrence theory is dealt by the 'theory of the second best'. This, in its broadest terms, takes the position that if some of the condi-

22 Calabresi, op cit, 70-3; Atiyah, op cit, 523-6; *Report of the National Commission of Inquiry on Compensation and Rehabilitation in Australia* (Australian Government Publishing Service, 1974), vol 2, 125-6.

22a For hypothetical situations illustrating the theory, see Calabresi, op cit, 70-1; Atiyah, op cit, 523-4, 545.

23 Calabresi, op cit, ch 7; Atiyah, op cit, 528-9.

24 Calabresi, op cit, ch 9; Atiyah, op cit, 527-8.

25 Calabresi, op cit, 91.

26 ibid, 255-9.

27 ibid, 78-88.

28 ibid, 81-85.

tions needed for optimal resource allocation are not being met – for example, because of monopoly or taxation, other apparent steps towards better resource allocation may bring about even greater misallocations. It is therefore doubtful whether any action in an imperfect market economy will in fact promote economic efficiency.

Let us accept, however, the resource allocation and general deterrence theories for the moment and consider how they apply to the field of industrial accidents. Ideally, if a 'market of industrial accident victims' exists, the rate of industrial accidents will automatically finds its 'optimum' level. This would be the case where workers freely enter into employment with full awareness of the risk of injury to themselves. Since they are free to bargain with employers, the latter would be paying the market-determined price for the supply of accident victims. This the employers would do so long as it is cheaper to employ potential victims than to make the conditions safer or to shift to a safer activity.

Yet it has already been partly explained that such a perfect 'accident victim market' does not exist. Apart from informational problems and the limited choice of alternative work available, there are other social, cultural, psychological and environmental factors influencing workers' decisions regarding the assumption of job-related risks. An inability to assess or relate to low-probability, large-harm contingencies is a behavioural trait common to many, if not most, individuals. Many workers are socialized to accept the hazardous nature of certain jobs and are convinced of the necessity of performing them in order to earn their livelihood.[29] Since the market will not work perfectly, it would be necessary, if the general deterrence approach is followed, to ascertain the cost of industrial accidents and to decide whom to allocate it to. The latter question has sparked off some controversies.[30] Prior to the establishment of workmen's compensation in England in 1897, economists thought that the introduction of such a system would have no effect on the relative financial position of the parties or on the accident rate. It has been said that where two parties stand in a bargaining relationship with each other, it does not matter which one is initially charged with accident losses arising out of that relationship because the market will allocate the losses in the best possible way regardless of initial allocations. In the context of industrial accidents in a factory, suppose first that the cheapest way to reduce accidents is to install safety devices. If the workers have to bear the loss of accidents, they will tend to minimize their losses by going to substantially safer activities with slightly lower wages until the owner of the unsafe factory has installed sufficient safety devices to make the wage and safety combination at his factory as attractive as at other factories. If, on the other hand, the factory owner initially bears the loss, he will minimize it by installing safety devices until it becomes cheaper to pay for the accidents than to install more safety devices, and he will pass the costs of accidents and safety devices to the workers in the form of lower wages until the wages are so low that it becomes more financially attractive for workers to work at other factories. Thus the levels of accidents and of wages in both cases will be the same, being determined by market forces. The same analysis will apply in reverse if the cheapest way to avoid the loss is for workers to work in a safer manner. (If the loss is initially placed on the workers, they will work in the safer manner to minimize it. If it is on the employer, he will pass it on in the form of lower wages, and the workers are induced to work in the safer manner in order to get the wages raised.) In each case, the extent to which each party ultimately bears the loss depends essentially on how easily or cheaply the other party can avoid or reduce the loss.

It was found, however, that the initial introduction of workmen's compensation laws placing the risk of work accidents on employers had a dramatic effect in reducing the number of factory accidents in many countries. Why does the analysis above fail to explain this fact? The answer lies nowhere other than in the implicit assumption in the analysis of the existence of a perfect 'accident victim market'. Since employers are generally better informed of the accident risk than employees, the former can easily compare the cost of accidents with that of accident

29 Ashford, *Crisis in the Workplace: Occupational Disease and Injury* (1976), cited in Neil Cunningham, 'The Industrial Safety Health and Welfare Act 1977 – A New Approach?' (1978) 6 University of Tasmania Law Review 1, 15.

30 Atiyah, op cit, 529-31; Calabresi, op cit, 161-73, 245.

prevention and are more likely to take steps to reduce the loss once it has been allocated to them, while workers are unlikely to take or demand safety precautions consonant with the risk even if it is borne by them. Secondly, buying insurance against the same risk is often cheaper for the employer than for the worker,[31] and if the worker does not insure, the risk he bears is not converted into the proper money terms. Lastly, leaving accident loss on workers themselves usually means that it would be transferred to the community at large when the workers receive welfare assistance, so that the accident cost is 'externalized' from the employers or workers directly responsible for it.

Let us now return to the beginning of this section on the 'total abstention of State intervention'. It can now be said that even in the light of the theories of the 'optimum allocation of resources' and 'general deterrence', a laissez-faire policy in regard of industrial accidents cannot by any means be justified, because of the non-existence of a perfect 'market of industrial accident victims'. On the contrary, State intervention in shifting the loss from injured workers to employers is demanded by the 'general deterrence' approach, although practical difficulties in the ascertainment of the loss are many. It must also be remembered, however, that the validity of the theories is not without doubts and uncertainties, and in any case they may have little application to Hong Kong, which is an export-orientated economy in competition with others, and whose allocation of resources should perhaps be better determined by overseas rather than internal demand.

Total State control: Accident level

The preceding part of this section has dealt with the theoretical possibility of allowing the free market to determine the level of accidents in society, which would also be the desirable level from the resource allocation point of view. The first basic objection to the approach is, as mentioned above, that the market mechanism operating under the existing imperfect conditions will not bring about the desirable resource allocation. The second and even more basic objection is the rejection of resource allocation itself as the goal to be achieved. In other words, society may not want its accidents to facilitate economic efficiency from the viewpoint of capitalism. Instead of treating labour-power as a commodity and letting market forces operating on individuals to decide how many accidents society is to have, the State should collectively decide the issue for society and prohibit or limit accident-causing activities by criminal penalties or noninsurable tort fines. This approach of direct State regulation of specific activities has been termed 'specific deterrence'.[32] It may also be based on the recognition of the inherent limitations of the resource allocation theory or of the practical limitations of general deterrence in dealing with some categories of activities,[33] or on doubts as to the individual's capacity to judge what is best for himself, especially regarding the cost and benefit items that are not readily monetizable and the comparative moral desirability of alternatives. The inherent limitations of the specific deterrence approach include the impossibility of making detailed rules and regulations for every potentially accident-causing activity and the inability of individuals to control all their acts in accordance with the rules and regulations.

The use of specific deterrence does not mean the total elimination of the operation of market forces. For even if a certain activity is prohibited outright, it may still be engaged in by some people who decide that the risk of getting caught and paying the penalty is worth taking. And even if the doers of the proscribed activity were always caught, the prohibition would still not be fully effective if the penalty for violation is not severe enough. The activity will then be reduced in extent only rather than be eliminated, the extent depending on the probability of the detection of contravention and the type and size of the penalty. Market considerations operate similarly where an activity is not prohibited but is limited in amount by, for example, the imposition of a tax. Individuals will decide for themselves whether the benefit to them of engaging in the activity outweighs the cost of paying the tax.[34]

Compensation of accident victims

The preceding discussion has been directed at

31 Calabresi, ibid, 60.
32 ibid, ch 6.
33 ibid, 103-7, 145-7.
34 ibid, 113-129.

the amount of accidents and hence of accident-causing behaviour that society ought to have, and the means of determining and controlling this amount. The compensation payable to accident victims has only been touched at in the 'general deterrence' discussion. Here we shall focus on this compensation aspect, which, for the purposes of this essay, is defined as[35] the provision of something to the injured person (or to his dependants if he has been killed) in consequence of the injury and for the purpose of removing or alleviating its ill effects. What is provided may be money or services such as medical and rehabilitation services, goods such as wheel-chairs, walking aids and special equipment, or real property such as a suitable dwelling or adaptation of existing dwelling, all of which can also be expressed in monetary terms.

From the economic point of view, compensation involves the shifting of losses away from accident victims to others. This is of course subject to the qualification that not all losses suffered by the victim can be shifted. Things like the loss of a relative or pain and suffering are not measurable in money terms. It may be possible to minimize pain and suffering, for example, by medical treatment, and it may be possible to make someone else pay for this medical treatment. This may perhaps be regarded as 'shifting a loss', but when all has been done to minimize the pain and suffering by medical means, any residual pain and suffering cannot be shifted at all. It remains with the victim no matter what compensation is paid to him by other parties.[36] After losses are shifted away from one person, they can be distributed or spread among a group of people (interpersonal loss spreading) by the mechanism of insurance, whether private (first-party or third-party) or social, which also achieves some loss spreading over time (intertemporal loss spreading).[37] Accident risks are pooled and spread among members of the same actuarial group, whose payments of insurance premiums form a fund from which compensation is paid to those for whom the risk materialises.[38]

It can be seen therefore that the question of compensation does not merely concern the amount of compensation payable for a particular degree of loss. Since that amount must be raised from some sources so that the loss is shifted and spread, the questions arise as to the justification and the proper method of doing so. The former will first be considered.[39] Accidents are a source of some of the most tragic scenes and most dramatic concentrations of loss in modern society. Some of the direst example of poverty stem from accident situations. Only compensation can help to alleviate the suffering and destitution involved. And even if poverty were eliminated by a guaranteed minimum income provided by the State, the change in social and economic status accompanying the sudden fall in the standard of living of accident victims and their dependants due to the deprivation of earning power or life itself may be considered socially undesirable. There are also economic arguments such as the theory of the diminishing marginal utility of money, which implies that a monetary loss divided among several people necessarily hurts less than the same less placed on one person.[40] All these support the propostition that it is better to spread accident losses than to leave them concentrated on accident victims.

There are three main methods of loss spreading, and which is preferable depends on the philosophy adopted towards the optimum degree of loss spreading. The first is first-party insurance (loss or personal accident insurance) by which the insurer agrees, in consideration of a premium, to indemnify the insured in respect of particular losses. In other words, potential accident victims are left to protect themselves against accident risks by buying insurance. Whether loss spreading will at all be achieved depends on whether potential victims do insure, for if they do not (and there are many reasons for this, such as the inability to evaluate the risk), they will have to bear the total loss themselves. And the degree to which loss spreading is achieved is a function more of what it costs insurance companies to differentiate among categories of insured than of any clearly defined collective choice of what degree of spreading is most desirable from a societal point of view.[42] The greater

35 Pearson Commission, op cit, vol 1, 8.
36 Atiyah, op cit, 487.
37 Calabresi, op cit, 42, 47-8.
38 For insurance, see Hepple and Matthews, *Tort, Cases and Materials* (1st ed, 1974) ch 20.
39 Calabresi, op cit, ch 4.
40 But see Milton Friedman and L.J. Savage, 'The Unility Analysis of Choices Involving Risk', (1948) 56 J Pol Econ 279.
41 Calabresi, op cit, 55-60.
42 ibid, 47, 60-63.

the differentiation into actuarial groups (whose members pay the same premium for the same average risk due to the same average accident-proneness), that is, the smaller the risk categories, the less will be the degree of spreading and high risk groups may face the choice of paying a very high insurance burden, taking the risk of engaging in the activity without insurance or giving up the activity altogether.

The second method is to make use of third-party insurance (liability insurance) by shifting in appropriate cases accident losses to parties in some way responsible for them or in a better position to bear them because they are most likely to insure or able to self-insure adequately (such as in the case of manufacturers who can pass part of the loss to purchasers of their products or to factors of production like labour and capital). In third-party insurance, the insurer agrees, in consideration of a premium, to cover specified types of legal liability which the insured may incur. The degree to which losses are spread depends on differentiation into risk categories as in first-party insurance, and this method suffers the same limitations as first-party insurance when there is failure to insure, unless insurance is made compulsory. Arguments for the superiority of the imposition of liability in this method can nevertheless be based either on justice or general deterrence to accident-causing activities.

The third main method is social security by means of social insurance supplemented by assistance schemes.[43] (Social insurance differs from social assistance in that the right to benefit or compensation in schemes of the former type is dependent on the payment of contributions, which is not so in schemes of the latter type.) Perfect loss spreading can be brought about by this method if every member of society is required to pay an equal amount, although such perfect loss spreading will eliminate all financial incentives to avoid accidents. If some income re-distribution is deemed desirable, the contributions and taxes feeding the fund can be geared to whatever progressive or regressive income re-distribution it is desired to accomplish. Deterrent effects on accident-prone activities can also be created by requiring highrisk activities to pay higher premium rates.[44]

These three methods are by no means mutually exclusive, and in practice a mixed system is always used. Professor Atiyah has summarised the situation as follows: 'Although there are any number of permutations and combination of methods of loss distribution, most, if not all of them, appear to be variations on two principal themes. The first theme is that of the free market. People should pay for what they use; they should pay for the damage they cause; and if they cannot do that, they should pay for insurance (at rates fixed by market principles) to cover the cost of the damage they cause. The second theme is the socialist theme. People should share burdens equally, or if not, at least they should contribute to them according to their abilities rather than according to market principles.'[45] In the final analysis, therefore, accident compensation law is a matter of political philosophy.

Conflicts of philosophies and objectives

At this stage it will be clear that a comprehensive and consistent theory of the ends and means of accident law cannot be developed unless and until certain basic tensions or contradictions are resolved or compromised. First, there is the free market – collective tension, which arises both in the questions of the level of accidents and of the form of accident loss spreading that society ought to have. Are they to be decided by the operation of market forces within a basic framework established by the State, or directly by the State itself by means of all-pervasive legal control? Secondly, there is a fundamental conflict between accident prevention by deterrence and loss spreading. Deterrent effects on accident-causing activities are created by nothing other than higher concentration of financial loss on particular people (whether in the form of high insurance premiums or of penalties) and are therefore achieved at the expense of loss spreading.[46] Any

43 See generally Charles E. Clarke, *Social Insurance in Britain* (Cambridge: Cambridge University Press, 1950); Sir William Beveridge, *Report on Social Insurance and Allied Services* (1942, cmd 6404); for the meaning, objectives and English history of the law of social security, see A.I. Ogus and E.M. Barendt, *The Law of Social Security* (London: Butterworths, 1978); Harry Calvert, *Social Security Law* (London: Sweet and Maxwell, 1978); A. Harding Boulton, *The Law and Practice of Social Security* (Bristol: Jordan, 1972).

44 Atiyah, op cit, 544-5.

45 ibid, 493.

46 Calabresi, op cit, 112; Atiyah, op cit, 547-8.

system of accident law must necessarily be a mixture of different approaches realising each of the several conflicting objectives partially instead of any one of them wholly.[47] And one last criterion which any system must also seek to satisfy is that of administrative efficiency, for any merits of a system in terms of efficient and sufficient accident prevention or fair and adequate compensation have to be weighed against the administrative cost of the process of achieving all these.[48]

III. THE PREVENTION OF INDUSTRIAL ACCIDENTS

Means to promote industrial safety

Accidents are caused by something; they do not just happen by themselves. Otherwise no effort to reduce the incidence of industrial accidents can be fruitfully made. It is generally accepted that all industrial accidents are either directly or indirectly attributable to human error made by some of those involved in the design, construction, installation, management, supervision and use of industrial establishments and of things in them.[49] The indirect human errors lead to the creation of unsafe conditions or environmental hazards, which form the technological, mechanical or physical causes of accidents. Examples are defective equipment, unguarded machines, damaged electric cables and worn-out hoisting ropes. Direct human errors mean the unsafe or faulty behaviour on the part of accident victims themselves which immediately lead to their being injured. Examples are absent-mindedness, negligence, foolhardiness or ignorance of risk.[50]

Many studies have been made in the industrial world to determine the proportion of industrial accidents mainly due to environmental causes as against those mainly due to behaviouristic causes.[51] The result suggests that the former type of accidents comprise 15% of all industrial accidents, and the latter 85%.[52] The conclusion is accordingly drawn that the best method to reduce industrial accidents is to change workers' attitudes and behaviour at work, which is often emphasized to the exclusion of efforts to improve plant and machinery. The theory has also been used to oppose the extension of government regulation by industrial safety legislation: 'Reliable estimates place the proportion of accidents due to human error as 85% of the total. It is difficult to visualise legislation which can have a salutory effect on human behaviour in this context. We must therefore place considerable reliance on voluntary effort by employees and employers to contain and try to reduce the number of accidents.'[53]

It has been pointed out that the 15-85% ratio idea is fallacious because it rests on a false assumption that industrial accidents are, in almost all cases, the result of either unsafe conditions or unsafe acts. The findings of thorough accident investigations show, however, that most accidents result from a combination of both types of causes. For example, if the hazard does not exist in the first place, faulty behaviour would not lead to an accident. Such multiple causation obviously requires maximum efforts to be used to minimize each type of causes, given that the total elimination of each is practically impossible.[54] The best approach in accident prevention seems therefore to be what has been termed 'the strategic approach'.[55] This starts from the proposition that accidents represent an absence of or a failure in the appropriate accident precautions or strategies. There are three classes of strategies. Pre-accident strategies include all classes of action directed towards preventing the accident from happening, and can be sub-divided into two sub-classes, safe-place (environmental) strategies tackling danger at the source and safe-person (behaviouristic) strategies protecting people against danger. The former include safe premises, plant, processes, equip-

47 Calabresi, op cit, 94.
48 Atiyah, op cit, 494-5.
49 ILO, *Accident Prevention* (Geneva, ILO, 1961) 2.
50 ILO, ibid, 23-4.
51 e.g. H.W. Heinrich, *Industrial Accidents Prevention* (New York: McGraw-Hill, 4th ed, 1959).
52 ILO, op cit, 23; R.P. Blake (ed), *Industrial Safety* (New Jersey: Prentice-Hall, 3rd ed, 1963), 60.
53 Evidence given in 1972 to the Robens Committee on Safety and Health at Work (in UK) by the British Chemical Industry Safety Council of the Chemical Industries Association, cited in William Handley (ed), *Industrial Safety Handbook* (London: McGraw-Hill, 2nd ed, 1977), 3.
54 R.P. Blake (ed), op cit, 61.
55 William Handley (ed), op cit, 6-8.

ment, materials, systems of work, access, transport, storage, disposal of materials, adequate supervision and well-informed and competent workers. The latter include the provision and use of personal protection devices, the care of vulnerable workers such as women and young persons, personal hygiene and cautious and obedient behaviour in the face of danger. Post-accident strategies, which are concerned with actions to be taken after the accident has happened, include contingency planning for disasters, first-aid training, and the feedback of information which can be used in the future for preventing or coping with similar patterns of accidents. The last class is collateral strategies the principal objectives of which are only remotely concerned with preventing accidents. Examples are accident compensation, routine medical examinations and industrial discipline. Under such a comprehensive strategic framework, accident investigations can be directed to explore the extent of strategic failure, and various means can be used to avoid strategic weaknesses or improve strategic strength in safety and health at work.

Efforts taken by modern States to combat the problem of industrial accidents can be generalised into three major areas.[56] The first is the use of the force of law. Safety laws and regulations are enacted involving mandatory prescriptions concerning such matters as general working conditions, the design, construction, maintenance, inspection, testing and operation of industrial equipment, the duties of employers and workers, training, supervision, first aid, medical examination and any other safety measures. A State inspection service is set up to secure the enforcement of such laws and to give advice on them. Workmen's compensation or social security laws may also provide financial incentives to promote accident prevention on the part of employers.

The second field is education and promotional activities. Industrial safety is taught as a subject in vocational schools or apprenticeship courses, and training courses for safety personnel are organised. The interest of workers in accident prevention is awakened and maintained by means of lectures, publications, posters, films and exhibitions. Employers are encouraged to give practical instruction to workers, especially new workers, in safety matters. Consultation services on occupational hazards are provided.

The third field is research. This includes statistical research to ascertain what kinds of accidents occur, in what manner, to what types of people, in what operations and from what causes; technical research such as the investigation of the properties and characteristics of harmful materials, the study of machine guards, the testing of respiratory masks, the search for the most suitable materials and designs for hoisting ropes; medical research including, in particular, investigation of the physiological and pathological effects of environmental and technological factors and the physical circumstances conducive to accidents, usually carried out by industrial hygiene and diagnostic laboratory services; and psychological research to investigate the psychological patterns conducive to accidents and accident prevention.[57]

In Hong Kong, industrial safety efforts have mainly been made in the first two fields. Here we shall focus on the factory legislation and its enforcement, but industrial safety training and industrial health will also be briefly surveyed. Although laws as to compensation of accident victims also arguably have an important bearing on accident prevention, the discussion of this matter will be postponed to Section V of this essay.

The Factories and Industrial Undertakings Ordinance and Regulations[58]

Although this essay is concerned with industrial accidents only and not occupational accidents in general, it is noteworthy that in Hong Kong it is only in industry that special legislation exists to protect the employee's safety and health and to regulate the physical conditions of employment. This

56 See ILO, op cit, 4-5, 136-152; ILO, *Organisation of Occupational Health Services in Developing Countries* (Geneva: ILO, 1967), 98-9, 103-4.

57 See e.g. Bruce L. Margolis and William H. Kroes, *The Human Side of Accident Prevention* (Illinois: Charles C. Thomas, 1975).

58 Cap 59, LHK, 1977ed; see generally England and Rear, *Chinese Labour Under British Rule* (HK: OUP, 1975), 184-94.

is contained in the Factories and Industrial Undertakings Ordinance (hereafter abbreviated as the FIUO) and the Regulations made under it, which are to some extent based on the English Factories Act 1861. But there is, for example, no legislation corresponding to the English Offices, Shops and Railway Premises Act 1963 or the Agriculture (Safety, Health and Welfare Provisions) Act 1956.[59]

The history of industrial safety legislation in Hong Kong[60] can be traced back to the Factory (Accidents) Ordinance 1927,[61] which introduced a few basic provisions regarding the fencing of dangerous machinery and provided for the appointment of factory inspectors. The laws relating to safety in factories as well as the employment of women, young persons and children were amended by and consolidated into the Factories and Workshops Ordinance 1932,[62] the forerunner of the FIUO passed in 1955.[63] Since 1932 the registration of factories has also been required. The greater part of the subsidiary legislation made under the FIUO has been made in the 1970's. At present there are altogether 22 sets of regulations made under section 7 of the Ordinance. Nearly all are concerned with safety and health at work in industrial establishments.[63a] In the following the more important industrial safety provisions in the Ordinance and the Regulations will be outlined and where necessary briefly examined. It should first be noted, however, that there are almost no Hong Kong cases on the interpretation of the Ordinance and Regulations. English case law on similar provisions, most of which arising from civil litigation over damages for breach of statutory duties, may often be helpful.[64]

1. Industrial undertakings and registrable workplaces

The FIUO appplies to all 'industrial undertakings' as defined in section 2(1) of the Ordinance, which include, inter alia, any factory and any construction work. 'Factory' is also defined in the same section. The concept of the industrial undertaking is derived from the ILO (International Labour Office) Conventions of 1919 and 1920 fixing hours of employment for women, children and young persons.[65] In employing this concept the Ordinance differs from the English Factories Act 1961, which does not use the term 'industrial undertaking' and only covers factories as defined in its section 175. The latter definition differs slightly from that in Hong Kong, but the definitions are sufficiently similar for English case law to be relevant. Thus it would be considered that manual labour is exercised only if the work is done 'primarily' or 'substantially' with the body rather than with the mind. Manual labour is not limited to unskilled manual labour. The courts have tried to draw the line between manual and non-manual labour by working out a ratio of physical to mental exertion which will typify one or the other.[66] In view of the absence in Hong Kong of provisions similar to subsections (6) and (7) of section 175 of the Factories Act, it is doubtful whether a place within the curtilage of a factory would not be considered part of the factory merely because the place is used for some purpose

59 For a summary of all existing English legislation relevant to health and safety at work, see Schedule 1 of the Health and Safety at Work Act 1974.

60 England and Rear, op cit, ch 7. For a brief history of occupational safety and health legislation in Britain, see Robens Committee, *Report on Safety and Health at Work* (1972, cmnd 5034), Appendix 5. For a more interesting account, see K.W. Wedderburn, *The Worker and the Law* (Penguin, 2nd ed, 1971), 245-50.

61 No 3 of 1927.

62 No 27 of 1932.

63 No 34 of 1955.

63a The effect of the recently passed Employment (Amendment) Ordinance 1980 (No 10 of 1980) and Factories and Industrial Undertakings (Amendment) Ordinance 1980 (No 11 of 1980) is that regulations on the employment of women, young persons and children originally in the Factories and Industrial Undertakings Regulations are transferred to the Employment Ordinance, so that the Factories and Industrial Undertakings Ordinance and Regulations deal with safety at work only and the Employment Ordinance deals with other general conditions relating to employment.

64 See generally the *Encyclopaedia of Factories, Shops and Offices* (London, 1962, as updated): *Redgrave's Factories Acts* (London, 22nd ed, 1972); Samuels, *Factory Law* (8th ed, 1969); Olga Aikin and Judith Reid, *Employment, Welfare and Safety at Work* (Penguin, 1971), ch 17; Michael Whincup, *Modern Employment Law* (London: Heinemann, 1976), ch 15; Rogers, *Winfield and Jolowicz on Tort* (10th ed, 1975), 156-160.

65 England and Rear, op cit, 187.

66 *J & F Stone Lighting* v *Haygarth* [1946] 3 All ER 539 (radio and television engineer in manual labour); *Joyce* v *Boots Cash Chemists* [1951] 1 All ER 682 (dispenser in chemist's shop not in manual labour).

other than that carried out in the factory.[67] Moreover, since in Hong Kong a factory is not necessarily 'any premises in which, or within the close or curtilage or precincts of which, persons are employed in manual labour in any process for or incidental to any of '[68] certain specified purposes, it may be that the existence of a contract of employment is not necessary for a premise to be held a factory.[69]

Section 2(3) exempts any undertaking not carried on by way of trade or for purposes of gain, any argicultural operation and the preparation of food for consumption and sale on the premises wherever it is prepared from the provisions of the Ordinance. The first exception is implied also by the English definition of 'factory', and it operates to exclude places like workshops at Government technical colleges and prisons from the Ordinance. The scope of the second exception has been elaborated in the Hong Kong case of *R* v *The Proprietor of the Toong Foong Rice Factory,*[70] which decided that an operation on an argicultural product, such as the milling and refining of rice, carried out by persons who are in no way connected with the growing or production of such product will not constitute an 'agricultural operation' so as to exclude the provisions of the Ordinance. The third exception covers restaurants, which are regulated by separate by-laws.

By section 9(1) of the Ordinance, all factories, mines, quarries and premises in which a 'dangerous trade' or 'scheduled trade' (as defined in section 2(1)) is carried on have to be registered or provisionally registered and are known as 'registrable workplaces'.[71] Such a registration requirement does not exist in Britain. A peculiar feature of industry in Hong Kong is that most industrial establishments operate on small scales with limited capital in domestic tenement premises so that their whereabouts are easily concealed. Registration is therefore used as the basis of efforts on the part of Government to secure minimum standards of safety and hygiene and to procure information about industry. When the proprietor of a registrable workplace applies to the Commissioner for Labour for registration,[72] the latter can issue in respect of the workplace either a certificate of registration (if he is satisfied that the location of the place is suitable for use as a factory, mine or quarry or for the carrying on of a dangerous or scheduled trade, as the case may be, and that the place is capable of being used as such in accordance with the Ordinance or the Regulations made under it[73]) or a certificate of provisional registration (if he is satisfied that the place may be used as a factory etc with due regard to the safety, health and welfare of employees and other persons[74]), with or without any conditions attached,[75] or refuse to issue any certificate. A certificate of registration is effective for at most 2 years, and one of provisional registration for at most 1 year.[76] Any such certificate may be cancelled in the event of the breach of any condition attached or for any other reason which the Commissioner for Labour may deem sufficient.[77] However, any person aggrieved by the attachment of a condition to a certificate, a refusal to issue a certificate or a cancellation of a certificate may appeal to the Governor in Council.[78] Special provisions are made for new non-industrial buildings.[79] The operation of a registrable but unregistered workplace and the contravention of a condition contained in a certificate are criminal offences by the proprietor punishable by a $5000 fine[80] with a further continuing fine of $1000 per day.[81] Moreover, an order may be made by the magistrate that any machinery in the registrable workplace shall be sealed or locked to prevent its operation,[82]

67 See *Street* v *British Electricity Authority* [1952] 1 All ER 679.
68 s 175, Factories Act 1961.
69 'For the Factory Act to apply there must be found to exist the relationship of master and servant and employment for wages.' per Goddard CJ, *Pullen* v *Prison Commissioners* [1957] 3 All ER 470. See also *Weston* v *London County Council* [1941] 1 KB 608.
70 (1954) 38 HKLR 100; England and Rear, op cit, 186.
71 s 2(1), Factories and Industrial Undertakings Ordinance (Cap 59, LHK, 1977ed).
72 s 9(2), Cap 59.
73 s 9(5)(a), Cap 59.
74 s 9(5)(b), Cap 59.
75 9(7), Cap 59.
76 s 9(4), (6).
77 s 9(7A).
78 s 9(8).
79 s 9(5A), (5B), Cap 59. 'New non-industrial building' is defined in s 2(1), Cap 59.
80 s 10(1), Cap 59. s 10(1A) provides a defence.
81 s 12.
82 s 10(5).

non-compliance with which may attract a $10,000 fine.[83]

It should be noted that the registration requirement is a wide one because of the wide definition of 'factory', which covers, say, a family unit which owns a motorised sewing machine for making clothes, or an optical shop where electric blowers are used in adjusting spectacle frames (i.e. article being altered or adapted for sale and machinery other than machines worked entirely by hand used).[84]

2. Health and welfare at work

Regulations 32 to 38 of the Factories and Industrial Undertakings Regulations (hereafter abbreviated as FIUR) lay down general conditions of work in registrable workplaces in respect of cleanliness, ventilation, lighting, drainage of floors, overcrowding, sanitary conveniences, supply of drinking water, repair and maintenance. The first 6 regulations are based on sections 1, 4, 5, 6, 2 and 7 of the Factories Act respectively, though there are some differences between the British and Hong Kong legislation. For example, regulation 36(2) provides that each employee must have at least 250 cubic feet in which to work, as contrasted with 400 cubic feet required by section 2(2) of the Factories Act. The difference is presumably due to the shortage of industrial space in Hong Kong.[85]

While regulation 34(1) requires effective provisions to be made for securing and maintaining 'sufficient and suitable lighting', there is nothing in Hong Kong corresponding to the Factories (Standards of Lighting) Regulations 1941 which specify that the minimum standard of illumination at any place of work is that provided by 6 foot candles. And although regulation 37(1) requires the provision of 'sufficient and suitable' latrine and washing conveniences', there is nothing corresponding to the English Sanitary Accomodation Regulations 1938 which lay down the minimum standards appropriate to the number of employees (generally, one water closet for every 25 employees, but fewer if more than 100 are employed). There is also no provision similar to section 3 of the Factories Act, which requires a 'reasonable temperature' to be maintained in each work-room.

Regulation 38 is similar to section 57 of the Factories Act, but it is not required that cups be provided unless the water comes from an upward jet. Moreover, sections 58 to 60 of the English Act, which lay down requirements for adequate and suitable washing facilities, suitable accomodation for clothing and seats for employees, find no parallels in Hong Kong. Section 61 is paralleled by the FIU (First Aid in Registrable Workplaces) Regulations, which provide that a first aid box must be kept for every 100 employees with a team in charge which must include a person trained in first aid.

Health and welfare at work in construction sites is not covered by the FIUR but is dealt with under the Construction Sites (Safety) Regulations.[85a]

A proprietor of an industrial undertaking is required by sections 17 and 18 of the FIUO to report accidents and 'dangerous occurrences' to the Labour Department. The former section overlaps with section 15 of the Workmen's Compensation Ordinance[86] (hereafter abbreviated as the WCO). The combined effect of the two is as follows. Any accident resulting in 'total or partial incapacity' of a workman[87] for more than 3 days or in his death within 3 days must be reported to the Labour Department by the employer in accordance with section 15 of the WCO within 7 days after the accident if the employer knew of it within 7 days after the accident, or within 7 days after he knew of it if he only did so more than 7 days after the accident. The death of a workman resulting from an accident more than 3 days before must be reported in accordance with section 15(2) of the WCO in the prescribed form within 7 days after the death if the employer knew of the death within 7 days after the death, or within 7 days after he knew of it if he only did so more than 7 days after the death. Even if section 15 of the WCO does not apply[88] (for example, because the

83 s 10(6).
84 Calvin Kam-wing Chung, 'Factory Inspectorate and Law-related Problems' (unpublished dissertation, 1977, HKU School of Law), 5.
85 England and Rear, op cit, 204, note 18.
85a Cap 59, LHK, 1978ed.
86 Cap 282, LHK, 1974ed.
87 The terms are defined in s 3 and s 2(1), Cap 282.
88 See reg 17(4), FIUR, Cap 59.

accident victim is not a 'workman' within section 2(1) of the WCO), the accident must be reported by the proprietor of the industrial undertaking to the Labour Department in accordance with regulation 17(2) and (4) of the FIUR within 7 days after the accident, if it occurred in an industrial undertaking and results in the death of a person 'at the time of the accident or immediately thereafter', 'serious bodily injury'[89] to a person or 'the incapacity, for a period exceeding 3 days immediately following the accident, of a person for any employment which he was capable of undertaking at the time of the accident'. (It seems that there is no allowance here for the delay in the accident coming to the proprietor's knowledge.) The reports required above are written and of a fairly detailed nature. Brief reports by the proprietor to the Labour Department and the police which may be oral are in addition required by regulation 17(1) of the FIUR in respect of an industrial accident resulting in immediate death or 'serious bodily injury', the report to be made within 24 hours after the accident, and by regulation 17(3) in respect of death following injury in accident, the report to be made within 24 hours after the death came to his notice. Failure to comply with any of the above requirements renders the employer or proprietor liable to a fine of $1000.[90] As far as occupational diseases are concerned, it should also be noted that the FIU (Notification of Occupational Diseases) Regulations impose a duty on medical practitioners to report occupational diseases specified in a Schedule to the Director of Medical and Health Services.

3. Safe in factories

The prevention of and escape from fire is dealt with in regulations 26 to 31 of the FIUR, which correspond to some of the provisions in sections 40 to 52 of the Factories Act. The first 3 regulations concern the doors leading out of a registrable workplace. Regulation 30 provides for the maintenance of fire-escapes and fire-fighting appliances. According to *the Commissioner of Labour* v *Yeung Mai,*[90a] the duty imposed by regulation 30(1) in respect of the means of escape is limited to those within the registrable workplace, so that the obstruction of a common corridor of a tenement building may not attract the operation of the regulation (though other legal remedies are available).[91] Regulations 29 and 31 empower the Commissioner for Labour to prohibit smoking and to require safety precautions for fire prevention and escape.

There are 3 regulations in the FIUR dealing directly with the prevention of industrial accidents at registrable workplaces. Regulation 39 seeks to prevent accidents by having floors, walls, ceilings and windows maintained in a good state of repair, having floors rendered and maintained in an even and non-slippery condition and free from tumble-causing obstructions, and having goods and materials stored or stacked safely. This regulation has no English equivalent, and partly fulfils the function of sections 28 (e.g. 'All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained and shall, so far as is reasonably practicable, be kept from any obstruction and from any substance likely to cause person to slip;' and other rules on handrails and ladders) and 29 (requiring, so far as is reasonably practicable, a safe means of access to every workplace and a safe place of work) of the Factories Act. It is therefore doubtful whether the English cases on the interpretation of 'floors'[92] and 'obstruction'[93] in section 28 apply. Although the scope of regulation 39 is narrower than sections 28 and 29, the duty it imposes seems to be stricter, not being qualified by the phrase 'so far as is reasonably practicable'.

Regulation 24 requires that 'all platforms, pits and openings in floors and every other place liable to be dangerous to persons and all vessels containing any scalding, corrosive or poisonous

89 As defined in reg 17(6), FLUR, Cap 59.

90 s 15(6), Cap 282; reg 47(c), FIUR, Cap 59.

90a

91 e.g. reg 31(1)(a), FIUR, Cap 59; see Calvin K.W. Chung, op cit, 11-2.

92 e.g. *Thornton* v *Fisher and Ludlow* [1968] 2 All ER 241; *Newberry* v *J. Westwood and Co* [1960] 2 Lloyd's Rep 37; *Tate* v *Swan, Hunter and Wigham Richardson* [1958] 1 All ER 150; *Taylor* v *R.H. Green and Silley Weir* [1951] 1 Lloyd's Rep 345; *Harrison* v *Metropolitan-Vickers Electrical Co* [1954] 1 All ER 404.

93 *Marshall* v *Ericsson Telephones* [1964] 3 All ER 609; *Churchill* v *L. Marx & Co Ltd* (1964) 108 SJ 334; *Pengelley* v *Bell Punch Co* [1964] 2 All ER 945; *Drummond* v *Harland Engineering Co* [1963] SLT 115.

liquid' in registrable workplaces to be 'securely fenced to a height of not less than 3 feet or otherwise protected to the satisfaction of the Commissioner'. It has been said that this regulation is so vague in its terms that it is difficult to enforce and does not provide a useful guide to employers, because of the uncertainty introduced by the phrase 'every other place liable to be dangerous' and because the requirement that such places be otherwise protected to the satisfaction of the Commissioner presupposes the proprietor calling in an inspector to approve some form of protection, which is 'hopelessly unrealistic given the uncertainty as to when some protection is required, and very unfair given the strict character of the requirement – it is no defence that the proprietor acted reasonably or did everything which it was practicable to do'.[94]

Regulation 25 makes it an offence to permit a woman or young person to clean 'any dangerous part of the machinery in a registrable workplace while the machinery is in motion by the aid of any mechanical power' and 'any mill-gearing while such mill-gearing is in motion for the purpose of propelling any part of the machinery in a registrable workplace'.[95] Although it is provided that 'such parts of the machinery shall be presumed to be dangerous as are notified by an inspector to the proprietor of the registrable workplace', the vaqueness of the phrases 'dangerous part of the machinery' and 'in motion by the aid of any mechanical power' makes it difficult for the proprietor to comply with the regulation without inspection by an advice from the inspector. Some aid to their interpretation is provided by English case law and the FIU (Guarding and Operation of Machinery) Regulations (hereafter abbreviated as the FIU (GOM)R), which are discussed below.

The latter set of Regulations has wide and important application to safety in the use of machinery in industries. Apart from some exceptions[96] it applies to 'machinery or plant in a registrable workplace'.[97] The principal regulation is regulation 4. A 'dangerous part' (which is defined in regulation 2 to mean any part of machinery or plant specified in the First Schedule and any combination of such parts) 'shall be effectively guarded in accordance with and in the manner provided by regulation 5', unless the dangerous part 'does not give rise to any reasonably forceseeable hazard to the safety of any person present at a registrable workplace' by reason of its position, construction or the nature of the work being performed. The guard or device must be 'of substantial construction', 'maintained in an efficient condition' and 'kept in its proper position while the machinery or plant is in motion',[98] although the guard or device may be removed or rendered inoperative while the machinery is in motion for the purposes of any examination or lubrication or adjustment necessitating motion of the machinery.[99]

These provisions in the FIU(GOM)R can be compared with sections 12 to 16 of the Factories Act which cover the fencing of machinery. The main difference is between regulation 4 and the more complex sections 12 to 14, by which flywheels and moving parts of prime movers,[1] transmission machinery,[2] and 'every dangerous part' of other machinery[3] shall be securely fenced. Regulation 5 and sections 15 and 16 have similar effects. A complex body of case law has developed from these sections over the following main areas.

(a) What is 'machinery'? The cases suggest that the term does not cover machinery constructed in the factory and not part of the equipment used in the processes of the factory, but covers machinery which, though not yet being used in the manufacturing process, has been installed in the factory where it is to be so used.[4] The main test is therefore whether the machinery is part of the productive process. The same functional test is applied to mobile equipment in distinguishing between 'machinery' and vehicle.[5] The case law in this area seems applicable to Hong Kong on the question what is 'machinery'

94 England and Rear, op cit, 191.
95 See s 20, Factories Act.
96 reg 3(2), FIU(GOM)R (Cap 59, LHK, 1976ed).
97 reg 3(1), ibid.
98 reg 5(2), ibid.
99 reg 5(3), ibid.
1 s 12(1), Factories Act. For the definition of 'prime mover', see s 176(1).
2 s 13(1), ibid. For the definition of transmission machinery, see s 176(1).
3 s 14(1), ibid
4 *Pavin* v *Morton Machine Co* [1952] AC 515; *Irwin* v *White, Tompkins & Courage Ltd* [1964] 1 WLR 387.
5 *Cherry* v *International Alloys* [1960] 3 All ER 264; *Biddle* v *Truvox Engineering Co* [1952] 1 KB 101; *Lovelidge* v *Anselm Olding* [1967] 2 QB 351; *British Railways Board* v *Liptrot* [1967] 2 All ER 1072.

in the definition of 'dangerous part' in the FIU(GOM) R and in regulation 25(1) of the FIUR.

(b) What is a 'dangerous part' of machinery? The solution worked out by the English cases on the breach of statutory duty is one similar to but wider than the test of reasonable foresight in the law of negligence. 'A part of machinery is dangerous if it is a reasonably foreseeable cause of injury to anybody acting in a way a human being may reasonably be expected to act in circumstances which may reasonably be expected to occur.'[6] The English legisaltion does not list out all 'dangerous parts' of machinery as it is done in the First Schedule of the FIU(GOM)R, but the Schedule does not remove the problem of interpretation in Hong Kong since regulation 4(2) of the above Regulations exempts a dangerous part which 'does not give rise to any reasonably foreseeable hazard to the safety of any person present' from the guarding requirement. Insofar as Hong Kong courts have to decide what is a 'reasonably foreseeable hazard' to safety, English cases on what is a 'dangerous part' is arguably relevant. Incidentally, there is a possibility that the Schedule and English case law may also be used to define the phrase 'dangerous part of the machinery' in regulation 25(1) of the FIUR, which does not specify what it means.[6a]

(c) What is the purpose of fencing? It has been firmly established in Britain that 'the fence is intended to keep the worker out, not to keep the machine or its products in'.[7] Thus it need not protect the worker from being struck by something ejected from the machine, whether a part of the material on which the machine is working or part of the machine itself.[8] It follows also that the duty to fence does not extend to material or components upon which the machine is performing some operation,[9] though it may exist where danger arises through the proximity or juxtaposition of a workpiece and a part of machinery.[10] Since the Hong Kong legislation on guarding of dangerous parts does not use the word 'fence' and is by no means in pari materia with that in England, it seems that these unnecessarily technical and fine distinctions will not be adopted in Hong Kong.

(d) When is the machinery 'in motion'? This is a problem posed by section 15 and 16 of the Factories Act, and similarly by regulation 5(2)(c) of the FIU(GOM)R and regulation 25 of the FIUR. There are several English cases on this area and they are probably applicable to Hong Kong.[11]

(e) Is the duty to fence absolute? It is frequently said that the duty to fence is absolute once it has been found to exist in the sense that difficulty or even impossibility of complying and at the same time leaving the machine in a usable condition affords no defence.[12] The strictness of this general obligation is modified in Britain by regulations in particular cases, such as abrasive wheels. It seems that the duty to guard dangerous parts effectively in Hong Kong is as absolute as the duty to fence in Britain, in the absence of qualifying words like 'so far as reasonably practicable', but as in the English situation exceptions are made for which other regulations set lower standards.[13] These include the FIU (Woodworking Machinery) Regulations and the FIU

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6 See Du Parcq J in *Walker* v *Bletchley Flettons* [1937] 1 All ER 170 and Lord Reid in *Summers* v *Frost* [1955] AC 740. See also Lord Cooper's formulation in the Scottish case of *Mitchell* v *North British Rubber Co Ltd* [1945] SC(J) 69.

6a See also reg 46, Construction Sites (Safety) Regulations (Cap 59, LHK, 1978ed).

7 per Lord Simonds, *Nicholls* v *Austin (Leyton) Ltd* [1946] AC 493. See also *Sparrow* v *Fairey Aviation Co Ltd* [1964] AC 1019.

8 *Nicholls* v *Austin (Leyton) Ltd* [1946] AC 493; *Carroll* v *Andrew Barclay & Sons* [1948] AC 477; *Close* v *Steel Co of Wales* [1962] AC 367.

9 *Bullock* v *G. John Power (Agencies)* [1956] 1 WLR 171; *Kilgollan* v *William Cooke Ltd* [1956] 1 WLR 527; *Eaves* v *Morris Motors* [1961] 2 QB 385.

10 *Midland & Low Moor Iron & Steel Co Ltd* v *Cross* [1965] AC 343; *F.E. Callow (Engineers) Ltd* v *Johnson* [1971] AC 335.

11 *Richard Thomas & Baldwin Ltd* v *Cummings* [1955] AC 321; *Knight* v *Leamington Spa Courier* [1961] 2 All ER 666; *Stanbrook* v *Waterlow & Sons* [1964] 2 All ER 506; *Mitchell* v *Westin* [1965] 1 All ER 657; *Joy* v *News of the World* (1972) 13 KIR 57. Note that reg 25(1) of the FIUR refers to machinery 'in motion by the aid of any mechanical power', while the other 3 provisions merely refer to machinery 'in motion'.

12 *Davies* v *Thomas Owen & Co* [1919] 2 KB 39; *John Summers & Sons Ltd* v *Frost* [1955] AC 740.

13 reg 3(2)(c) and Second Schedule, FIU(GOM)R.

(Abrasive Wheels) Regulations.

Besides providing for the guarding of machinery, the FIU(GOM)R also contain provisions for the guarding of stock-bars for young persons working at machines and for starting and stopping devices, belts and pulleys in machinery. The proprietor of any registrable workplace in respect of which any of the 4 accident-prevention provisions (regulations 39, 24, 25 of the FIUR and regulation 4 of the FIU(GOM)R) is contravened is liable to fines of $2000, $5000, $5000 and $5000 respectively.[14]

4. Safety in construction sites

Construction sites are not registrable workplaces and safety in these industrial undertakings is almost exclusively regulated by the Construction Sites (Safety) Regulations. Obligations are imposed on the 'contractor responsible for a construction site' (as defined in regulation 2(2) and section 2(1) of the FIUO) to ensure various safety measures to be taken. The offences created by the Regulations mostly relate to the contractor responsible for the construction site, rather than the proprietor of an industrial undertaking or a registrable workplace who is the main party liable under the other Regulations. The maximum penalty for offences committed by contractors is $10,000, which is double that imposed on proprietors by the FIUR. To facilitate enforcement, various requirements are made regarding the notification of the commencement and termination of construction works to the Labour Department[15] and the keeping of registers and other records.[16]

It has been noted that the definition of 'contractor' as 'any person or firm engaged in carrying out construction work by way of trade or business, either on his own account or pursuant to a contract or arrangement entered into with another person' in section 2(1) of the FIUO may result in no 'contractor' being liable under the Construction Sites (Safety) Regulations where a firm is engaged in the construction of its own factory building, an hypothetical example being an electric power company building its own power sub-station. The construction work would probably not be 'carried on by way of trade or for purposes of gain', so that section 2(3) of the Ordinance would exempt it from the Ordinance and its Regulations altogether. However, such a situation will rarely arise in practice because in most cases the construction work is assigned to a building contractor.[17]

The Construction Sites (Safety) Regulations were criticised in 1975 for not including provisions comparable to those of the Construction (Working Places) Regulations 1966 in the United Kingdom, which deal in detail with the special dangers of scaffolding, openings, high platforms, roofs and ladders.[18] The situation has been slightly improved by the introduction of regulation 45, which requires 'every working platform from which a workman or other person lawfully on the platform is liable to fall a distance of more than 6 feet 6 inches', 'every opening in floors' and 'every other place liable to be dangerous to persons' to be 'securely fenced to a height of not less than 3 feet or otherwise protected to the satisfaction of the Commissioner'. It can be seen that this is quite similar to section 24 of the FIUR (which has been discussed above) and therefore open to the same criticism.

5. Other regulations on industrial safety

They are all contained in the subsidiary legislation made under section 7 of the FIUO, and some set out in great detail the standards required in relation to particular processes or industries.[18a] It is not proposed to discuss them here. It is worth mentioning, however, that even where some areas are not directly governed by any regulations, section 7(4) of the FIUO empowers 'the Commissioner for Labour or any officer authorised in writing by him' to 'order the adoption of special precautions in addition to any precautions required by any regulation made under this Ordinance', subject to a right of appeal

14 reg 46(b), 45(c), 45(b), FIUR; reg 13(1), FIU(GOM)R.

15 Part VIII, Construction Sites (Safety) Regulations, Cap 59, LHK, 1978ed.,

16 reg 67, Construction Sites (Safety) Regulations (hereafter abbreviated as CS(S)R).

17 The point raised in this paragraph was made by Calvin K.W. Chung, op cit, 7.

18 England and Rear, op cit, 193.

18a The Labour Department has disclosed that more Bills are at present being prepared for electrical and fire safety: SCMP, Mar 26, 1980.

to the Governor in Council, whose decision shall be final. This is therefore a great and important power, which cannot be challenged in the courts as being ultra vires. Conversely, the same subsection authorises the Commissioner for Labour 'in such cases as he shall think fit', 'for such period and subject to such conditions as he may specify', to 'exempt any industrial undertaking from any regulation made under this Ordinance'.

6. Enforcement powers

Section 4 of the FIUO gives extensive powers to factory inspectors in connection with the inspection of industrial undertakings. An additional power to take samples of materials is provided by regulation 20 of the FIUR. Where a visit to an industrial undertaking is made in consequence of the receipt of a complaint alleging a contravention of the Ordinance, section 5(2) of the Ordinance forbids the inspector to disclose this fact or the identity of the complainant.

7. Criminal sanction

Criminal liability is often specifically imposed by provisions in the Ordinance or the Regulations on a proprietor of an industrial undertaking or registrable workplace or a contractor responsible for a construction site who contravenes a specific provision or in respect of which a specific provision is contravened, and the maximum penalty in the form of a fine is prescribed.[19] The highest fine possible under the Ordinance and the Regulations is $10,000.[20] Where criminal liability is not specifically imposed on any person, section 13(1) of the Ordinance provides that 'the proprietor of every industrial undertaking in or in respect of which any offence against this Ordinance has been committed shall be guilty of a like offence, and shall be liable to the penalty prescribed for such offence. Section 14 governs the case where the person convicted is a company or a firm and makes special provision for the concurrent liability of the company or firm and its management. The liability is strict and does not depend on ordinary mens rea in criminal law, for section 13(2) provides that 'it shall be no defence to a prosecution of the proprietor of an industrial undertaking for an offence against this Ordinance that the offence was committed without his knowledge or consent or that the actual offender has not been convicted of the offence'. For example, the proprietor is liable under regulation 13(1) of the FIU(GOM)R if a 'machine which should be guarded is unguarded even though an employee has removed the guard without the knowledge of the proprietor and in contravention of the latter's order, thus also rendering himself liable under regulation 13(2).

It should be noted that in Britain an occupier of a factory is liable for a contravention of the Factories Act, subject to any provision as to reasonable practicability or the like, which is discovered on his premises except where he can prove both that he used all due diligence to secure compliance and that either some other identifiable person or firm was the actual offender in respect of that particular contravention (the statutory defence under section 161 of the Act), or that some employee, whether identifiable or not, had wilfully or unreasonably acted in such a way as to cause the contravention (a defence from *Wright* v *Ford Motor Co Ltd*[21]).[22] Since neither defence is available in Hong Kong, the Hong Kong employer is under a stricter criminal liability.

Section 12 of the FIUO provides that 'any person guilty of an offence against this Ordinance shall, in addition to any other penalty prescribed for such offence, be liable to a fine of $1000, for every day during the whole or any part of which such offence is knowingly and wilfully continued'. It seems that 'any offence against this Ordinance' includes any offence against the Regulations made under this Ordinance, for otherwise section 13(1) of the Ordinance which contains the same phrase is emptied of content. The problem with section 12 is that it is usually difficult to prove that the offence is continued unless frequent inspections are carried out. In the local case of *Fair Garment Factory Ltd* v *R*,[23]

19 e.g. s 10, FIUO; reg 45-47, FIUR reg 13(1), FIU(GOM)R; reg 68, CS(S)R.

20 See s 7(5), 10, 11, 14, FIUO.

21 [1967] 1 QB 230.

22 See Law Commission Working Paper No 30, *Codification of the Criminal Law: Strict Liability and the Enforcement of the Factories Act 1961* (1970), 11-16.

23 (1976) 6HKLJ 377, H Ct Crim App No 383 of 1976.

which was on a similar continuing offence section of the Fire Service Ordinance, the Crown failed to prove that the offence had continued for 75 days with 3 inspections made during the period. It has been suggested that the legislature should consider lessening or transferring the normal burden of proof cast on the prosecution of establishing continuation of the offence by resorting to a statutory presumption that the offence is continued, provided that the interval between actual inspections of the place in question is reasonable.[24] No change in the law in this respect has yet been made.

Criminal liability is also sometimes imposed on employees. Regulation 21 of the FIUR states that 'no person employed in an industrial undertaking shall wilfully interfere with or misuse' any safety means provided in pursuance of the Ordinance or 'wilfully and without reasonable cause do anything likely to endanger himself or others', and where any safety means is provided for the use of any such person under the Ordinance, 'he shall use' it. Similarly, regulation 30(2) of the same Regulations provides that 'no person shall wilfully alter, damage, obstruct or otherwise impair' means of fire-escape or fire-fighting appliance'. Examples of more specific provisions are regulation 12 of the FIU (GOM)R and regulation 69 of the Construction Sites (Safety) Regulations. The level of maximum fines is generally lower than that for proprietors or employers, and is in the region of $1000 to $2000.[25]

No criminal sanction by way of imprisonment is provided by the Ordinance and the Regulations.

8. Administrative sanction

According to section 11 of the FIUO, if on complaint by an inspector a magistrate is satisfied that 'any part of the ways, works, machinery or plant used in an industrial undertaking' or 'any process or work' carried on in it is so dangerous that there is 'risk of bodily injury', he shall by order 'require the proprietor to take such steps as may be specified in the order for remedying the danger complained of', 'prohibit the use of ' the dangerous part 'until it is duly repaired or altered', prohibit its use altogether or direct that the machinery or plant 'be secured by a seal, lock or other device' to prevent its operation 'for such period as the magistrate may specify in such order'. On application *ex parte* by an inspector, the magistrate may make an interim order if there is evidence that there is 'imminent risk of serious bodily injury'. Contravention of or failure to comply with any such orders renders the proprietor liable to a fine of $10,000.

9. Civil liability

The FIUO and Regulations made under it may confer on an injured employee a right to use his employer for breach of statutory duty. This is discussed in section IV of this essay.

Another Ordinance relating to industrial safety is the Boilers and Pressure Receivers Ordinance,[26] which deals with the testing and operation of boilers, steam receivers, containers and air-receivers, but this will not be discussed here.

The Factory Inspectorate:[27] *Enforcing the law*

The Factory Inspectorate of the Industrial Division of the Labour Department[28] is responsible for enforcing the FIUO and Regulations and it also shares responsibility with the Principal Surveyor of

24 Bernard Downey, 'Case Commentary' (1976) 6HKLJ 377.

25 See s 44(a), FIUO; reg 13(2), (3), FIU(GOM)R; reg 69, CS(S)R.

26 Cap 56, LHK, 1978ed.

27 Some of the information contained in the following section has been obtained in Sept 1979 from Mr Chan Siu-lap, Chief Factory Inspector of the Labour Department, whose assistance has proved invaluable. Very helpful also is the advice of Mr Lao Mou-chi, Assistant Commissioner for Labour.

28 For the history of the Labour Department and the Factory Inspectorate in HK, see England and Rear, op cit, 122-3, 356-363. For a more detailed account of the development of the Factory Inspectorate in recent years, see Barry Choi, 'Getting Across Industrial Safety Message', SCMP, June 5, 1980. His main point is that 'the Government must accept responsibility for not meeting adequately or promptly enough the staffing needs of the . . . factory inspectorate'. For the history and work of the factory inspectorate in the UK, see William Handley (ed), *Industrial Safety Handbook* (London: McGraw-Hill, 2nd ed, 1977), 415-426; Law Commission Working Paper No 30, op cit, 17-57. For labour inspection in general, see ILO, *Labour Inspection, Purposes and Practice* (Geneva: ILO, 1973).

the Pressure Equipment Unit in enforcing the Boilers and Pressure Receivers Ordinance. In September 1979, it had an approved establishment of 140 officers and operated 20 divisional offices throughout Hong Kong, Kowloon and the New Territories. It was however 20% understrength, consisting of only 112 officers. 64 of them were on field operations in the inspection of factories and other industrial establishments, 18 in construction sites and 4 on prosecution duties, 4 were engaged in the Industrial Safety Training Centre as lecturers, 4 in administration, and 18 were new recruits undergoing their initial training. It is planned that the size of the Inspectorate would be increased to 250 by 1984.[28a]

There are approximately 40,000 industrial establishments in Hong Kong, with about 2000 construction sites.[28b] Some are required to be registered under the FIUO, but it is thought that the registration requirement is widely flouted.[29] In 1977, there were 380 prosecutions for operating unregistered yet registrable industrial undertakings,[30] which is a high number when compared with the numbers of prosecutions for other offences relating to safety and health at work. The existence of unregistered industrial establishments is often discovered in the course of the work of the factory inspectors themselves, or of officers of the Urban Services Department and Fire Services Department, or as a result of complaints from neighbour residents.

The target aim of the Inspectorate is to have at least one inspection per year per industrial establishment, which is in fact also the standard recommended by the ILO.[31] Since this cannot be achieved in practice due to shortage of manpower, the frequency of inspections is now based on a formula whereby factories are rated according to a points-system, taking into account the accident and prosecution rate, the degree of hazard, the complexity of the plant and the size of the workforce of each factory. Factories with higher points are visited more frequently. The construction industry, however, is particularly hazardous, resulting in 37.6% of all industrial accidents while only engaging 8.0% of all manual workers engaged in industry in 1978.[32] Thus 25% (18 out of 82) of the factory inspectors engaged in operational work are deployed in the inspection of construction sites (the figures in September 1979), so that on the average 3 to 4 visits are made to each site a year.[33] Very few inspections are made as a result of complaints by workers about safety conditions in their own places of work, though complaints by next-door residents against factories operating in residential buildings who are affected by the noise or vibration are more frequent. The lack of initiative from workers themselves may be partly explained by the fact that people in Hong Kong do not want trouble for themselves (which also accounts for the similar reluctance to report crimes) and partly by the tight labour market in which a worker can easily get an alternative job elsewhere if he does not like to work in a particular factory.

In 1978 the Inspectorate made 39,015 inspections of industrial establishments. As is the case elsewhere outside Hong Kong, it is extremely rare for an inspection not to reveal some breaches of the law. It is widely recognised in fact that it is virtually impossible to run a business without at some time infringing the strict letter of the law,[34] and, like its counterparts in the United Kingdom and most countries of the world, normally the inspectorate regards a breach of the safety legislation initially at least as a matter for advice and persuasion rather than for formal legal action. Nevertheless, there are at present 3 types of cases where the Inspectorate will immediately prosecute without warning being given first. They are contraventions relating to unguarded sewing needles of sewing machines (which result in a high number of accidents, although the injuries caused are not severe), plastic injection moulding

28a Statement by the Labour Department, SCMP, May 7, 1980.

28b According to a survey conducted by the Census and Statistics Department, there were 41,498 manufacturing establishments in operation in June 1979; the 5 largest manufacturing industries were wearing apparel, electrical machinery, appliances and supplies, textiles, plastic products and fabricated metal products. See SCMP, Sept 26, 1979.

29 England and Rear, op cit, 187-8.

30 Commissioner for Labour, *1977 Departmental Report*, 78.

31 ILO, *Labour Inspection, Purposes and Practice* (Geneva: ILO, 1973), 142.

32 Figures from industrial safety exhibition organised by the Labour Department in July 27-Aug 6, 1979.

33 Speech of Mr John Chambers, Secretary for Social Services, in Legco, SCMP, Aug 2, 1979.

34 Law Commission Working Paper No 30, op cit, 21.

machines and power presses (both of which involve a relatively low number of accidents but with severe injuries). In other cases, a first warning is given after an inspection when the inspector will fill in a form (an improvement notice) listing out all the improvements required and give it right on the spot to the proprietor of the industrial establishment or his representative. It is to be noted in this respect that frequent use is made of the power to order the adoption of special precautions under section 7(4) of the FIUO. Follow-up visits are then made to see if the matters raised are attended to, and if not, the reason why. Legal action may be taken after one or two further warnings, depending on the type of offence involved.

Besides the routine inspection of industrial establishments, the Inspectorate also makes accident investigations. 3,478 such investigations were made in 1978, while the total number of reported accidents in industrial undertakings was 39,242. It can be seen therefore that not all industrial accidents are investigated. The policy of the Inspectorate in this respects is to investigate all fatal and serious accidents, and as many as possible accidents in connection with power-driven machinery and generally where it appears from the employer's report of the accident that it could have been prevented. Fatal cases may also become the subject-matter of a public inquest by the Coroner's Court. The Commissioner for Labour has recently expressed his support for the introduction of more coroners to speed up inquest procedures in cases of accidents, commenting that 'much more can in the future be achieved by the Factory Inspectorate with the open inquiry that is the coroner's prerogative in exposing causes of industrial accidents.'[34a]

Prosecutions are sometimes brought for past failures to comply with the law in circumstances which have given rise to accidents. This type of cases (which can be called 'accident cases') can therefore be distinguished from those discussed above in which the aim of the Inspectorate is to induce a firm to take action to improve its standards of compliance (which can be called 'improvement cases').[35] In accident cases, a difficulty often encountered by the prosecuting inspector in court is the reluctance of workers to give evidence about circumstances at the time of the accident. The problem does not exist in improvement cases where evidence given by the inspector on his actual experience during inspection suffices. The situation is however improving with workers becoming more broad-minded nowadays.

Statistical information collected by the Labour Department shows that for the five-year period 1972-77, the main causes of industrial accidents are, in order of descending importance, (1) power-driven machinery (27.7% of the total number), (2) stepping on or striking against objects (19.54%), (3) handling without machinery (13.97%). Fall of persons from height is another important cause, accounting for the highest number of fatalities (31.78% of the total number of fatalities). And as far as accidents caused by power-driven machinery are concerned, power presses account for a high percentage (14.26%).[36] A study of 105 fatal accidents investigated during 1977 revealed that 55% could have been prevented if appropriate measures had been taken by management, 20% by the deceased workers, 7% by management and deceased workers jointly, 3% by management and fellow workers of the deceased, and 15% by management, the deceased and fellow workers.[37]

A total of 3,741 prosecutions concerning infringement of safety and health legislation were taken out in 1978, 2,581 (77%) of them being connected with unguarded machinery. The cases are tried in the magistracies. The fines vary from magistrate to magistrate. The magistrate is normally informed of previous warnings or advice given to the offender and any previous convictions before he gives the sentence. The magistracy has been charged with 'social irresponsibility in this field' for imposing too low a level of fines.[38] But it seems that the level of fines has been rising: The average fine for operating

34a Speech of Mr Neil Henderson, Commissioner for Labour, at a Rotary Club meeting, SCMP, May 21, 1980. The inquest which prompted the remark was that into the death of 6 workers in an accident at the Telford Gardens construction site in Kowloon Bay on July 22, 1979. For a detailed coverage of the inquest, see SCMP, May 21-31, 1980.

35 The distinction is made in Law Commission Working Paper No 30, op cit. No statistics is available in HK on the relative proportion of the 2 types of cases.

36 Commissioner for Labour, *1977 Department Report*, 20.

37 For methods of analysis and classification of accidents, see ILO, op cit, 18-20.

38 England and Rear, op cit, 194.

unfenced machinery is $290 in 1971 but rises to $766 in 1977,[39] though this is still far from the statutory maximum of $5000.

The mere fact of prosecution and conviction does not in itself secure compliance with the safety legislation. However, it seems that in practice the Inspectorate does not go any further than persuasion, advice and prosecution. Section 12 of the FIUO relating to continuing offences is seldom used because of the difficulty of proof. Neither is a magistrate's order under section 11 of the Ordinance important in practice, which is presumably because of the magistrates' reluctance to grant such a drastic order.

The duty of the Inspectorate is not confined to explaining what the law says, warning about and prosecuting for breaches. It also advises on how the aims of the law can be best achieved. A dialogue is started when any workplace is inspected. Apart from such communication through the normal inspection schedule, the assistance of the Inspectorate is also sometimes actively sought by large factories on specific problems.

Over 60% of the industrial establishments in Hong Kong employ less than 10 workers. Many of these small factories do not have any formal safety personnel. Nor do the operators possess knowledge and expertise in industrial safety. On top of this, the piece-rate wage and incentive schemes in Hong Kong encourage workers to sacrifice safety for productivity. The prevalence of the practice of sub-contracting in the construction industry renders difficult the implementation of safety measures.[39a] Pressure to get the job done quickly is passed down the line from the contractor to the sub-contractor, and finally to the worker. A sub-contractor far down the line may not even know about the existence of safety equipment provided by the main contractor. Many workers have only low educational standards and fail to understand the value of taking safety measures, disregarding them when they cause only slight inconvenience to their work. 'Hong Kong workers are virtually all afflicted with the same disease: It can't happen to me.'[39b] Some regard the use of safety equipment as a sign of cowardice. Some are superstitious to the extent of refusing to be educated about the danger and the reduction of it in their work.

Thus factors in the environment, in the system and in workers themselves all contribute to the problem of industrial accidents in Hong Kong. The steady increase in the number of industrial accidents in recent years can further be explained by better reporting, the use of more sophisticated machinery, the introduction of more complex trade processes and more untrained workers in the workforce due to the tight labour market. In particular, the recent upsurge in accidents at construction sites has been attributed to the influx into the construction industry of immigrants from mainland China who are unfamiliar with local working conditions and safety standards.[39c] Not all of these factors can be directly dealt with by the Factory Inspectorate or the Government. But as far as safety consciousness and safety know-how are concerned, the Inspectorate is also engaged in educational and promotional activities in accident prevention.

Industrial safety training and education

The Industrial Safety Training Centre of the Factory Inspectorate conducts in-service training courses for members of the Inspectorate as well as safety courses for industrial employees and students in technical schools and vocational training centres. In 1978, the Centre offered a total of 195 safety training courses free of charge for 5,719 employees and apprentices and gave 112 talks to 7,815 students in vocational training schools. Most of the safety courses are basic courses on various aspects of industrial safety lasting for one to three days and are recommended for the middle management such as works supervisors, foremen or technicians and those who may from time to time be required to perform supervisory duties. The courses are advertised in

39 Calculated from figures in Commissioner for Labour, *1977 Departmental Report*, 78.

39a This point has been made by a representatives of the construction industry (SCMP, Mar 26, 1980), a spokeman of the Labour Department (MP, May 15, 1980) and a representative of the Christian Industrial Committee (SCMP, June 5, 1980).

39b Editorial, SCMP, May 17, 1980.

39c MP, Mar 8, 1980. It has been estimated that about 30% of the 80,000 construction site workers in HK are recent immigrants from China.

newspapers and letters are also sent to the larger firms inviting them to send employees to attend, but the response has not been overwhelming.[40] A high proportion of those who attend the courses are civil servants from other Government Departments, and most of the rest are from other large organisations. One reason why the private sector is less enthusiastic in sending its employees may be the high turnover rate in the labour market, for an employer is unlikely to train an employee in safety at the former's expense unless he has reasonable assurance that his firm will benefit from it. It has also been pointed out that these courses do not involve grassroot workers, and at the same time it has been suggested that evening courses be run for the latter and legal provisions be made providing for paid leave so that workers can attend safety courses.[41]

Publicity and promotion work on industrial safety is also done by means of large scale and small scale exhibitions, films, posters, pamphlets, TV and newspaper advertisements and even puppet shows in the street theatre. Publications including guides to safety legislation and booklets on safe working practices are available to members of the public free of charge, though it has been complained that these are often out of stock when workers ask for them at Government offices.[42]

Industrial health[43]

The work of the Factory Inspectorate is supplemented by the Industrial Health Division of the Labour Department. This consists of 4 industrial health officers and 3 industrial hygienists, some health visitors and industrial health nurses (figures for September 1979). Industrial health officers are medically qualified while industrial hygienists are trained basically in science or engineering. When factory inspectors come across materials or processes which pose occupational health hazards in the course of their inspection work, the matter is referred to the industrial hygienists, who specialise in investigating how the working environment affects workers by atmospheric contamination, skin absorption, radiation, noise, etc. The industrial hygienists will investigate the matter, for example, by conducting surveys, analysing and interpreting the surveys and related laboratory results, and then make recommendations on the elimination or reduction of industrial health hazards. The Unit also carries out factory visits and conducts environmental and biological monitoring. It makes investigations into occuptional diseases and advises generally on their prevention, as well as on industrial processes in use or in the planning stage and on the adoption of hygiene standards or codes of practice.[44]

The number of occupational diseases reported under the FIU (Notification of Occupational Diseases) Regulations is quite small. In 1977 the total number is 693, and 447 of them are cases of decompression sickness. One possible reason for the low figure is that local medical practitioners seldom go so far as relating a desease to its occupational cause, or are in any case reluctant to report. A related factor may be that local people do not consistently consult the same doctor. Another possible explanation is that there are actually few occupational deseases in Hong Kong, because most industries here (such as textile and garment) do not involve occupational health hazards and potentially dangerous materials and processes have been tried out in the advanced industrial nations first.

As far as occupational health services are concerned,[45] some large factories in Hong Kong have their own clinics and some group together in using a common occupational health service, but even such services do not involve any occupational health research department. Such research as there is on occupational health is carried on by the Government.

IV. THE COMPENSATION OF ACCIDENT VICTIMS[46]

40 See England and Rear, op cit, 185.
41 See letters to the editor by Apo Leung and S.L. Chan, SCMP, Aug 20 and Aug 7 respectively.
42 SCMP, Sept 12, 1979.
43 Some of the information contained in this section was obtained in Sept 1979 from the Industrial Hygiene Unit of the Labour Department.
44 See Commissioner for Labour, *1977 Departmental Report*.
45 See generally ILO, *Organisation of Occupational Health Services in Developing Countries* (Geneva: ILO, 1967).
46 See also John Miller, 'Accident Compensation in Hong Kong' (1979) 9HKLJ 4.

Multiplicity of channels

There are a number of sources from which a victim of an industrial accident in Hong Kong may receive cash compensation. First, there is private insurance, whereby the injured person has taken out and paid for his own policy, and payment is in effect made from a fund into which others running a risk of injury have also contributed. In practice the Hong Kong worker almost never takes out such an insurance policy. The second source of compensation is the employer. He may be liable in negligence for breach of the general duty of care, of his personal duty as an employer to his employee, or of statutory duty, or as an occupier under the Occupiers' Liability Ordinance.[47] He may be vicariously liable for the negligence of his other employees which caused the injury or death. Apart from such civil liability he may be liable under the Workmen's Compensation Ordinance,[48] which determines liability on an entirely different basis. In all these cases, payment may be made from the employer's own resources or, more usually, by his insurer. He may further be able to compensate his employee through sick pay, through some form of private insurance policy taken out for the employee or through an occupational disability pension, though this is rare in Hong Kong. The third source of compensation is the social security system, which is financed by general taxation. Social security payments are usually made irrespective of the way the injury or death occurred to meet a particular need or other circumstance, such as severe disability. Fourthly, there are trust funds and charity with their own criteria for deciding eligibility for benefit.

The law of tort

The law of negligence, employers' liability, vicarious liability and occupiers' liability are fully discussed by standard English textbooks on the law of tort and on labour law. Since these areas of English law are applicable in Hong Kong without any significant modifications,[49] it is unnecessary to deal with them here. It might be worthwhile, however, to look at the Hong Kong employer's liability for breach of statutory duty in more detail.

As may be seen above, the FIUO[50] and Regulations impose many duties on the proprietor of an industrial undertaking, some of which are similar to those imposed by the English Factories Act 1961 on the occupier of a factory. Like the English Act, the Ordinance and Regulations provide criminal sanctions but are silent on the question of civil liability. The difficult question therefore arises as to whether a breach of statutory duty under the Ordinance and Regulations would in any case give rise to a civil claim by a person injured in consequence of it. There are no reported Hong Kong cases on this question. However, the English courts have given an affirmative answer for the duties under the Factories Acts. As was said in one case, the Acts 'were passed quite plainly for the benefit of persons employed in the factories, and consequently an action for damages lies at the suit of an injured workman for a breach of the occupier's statutory duty'.[51] There seems therefore to be no reason why industrial safety legislation in Hong Kong will not similarly give rise to a right of action in tort for breach of statutory duty, so that a plaintiff will succeed on proving that he belongs to the class of persons whom the relevant legislative provision is designed to protect, that the defendant was in breach of the duty and that the breach caused the damage, subject to the general defences such as volenti non fit injuria and contributory negligence.[52]

In theory therefore the Hong Kong worker is no worse off than his UK counterpart as far as the channel of tort compensation is concerned. In practice however this is by no means the case. From

47 Cap 314, LHK, 1964ed.

48 Cap 282, LHK, 1974ed.

49 Application of English Law Ordinance (Cap 88, LHK, 1971ed). English legislative provisions for the effect of contributory negligence, for the abolition of the defence of common employment, for the survival of a cause of action after death and for the creation of a cause of action in the dependants of a deceased have their equivalents in s,21, LARCO (Cap 23, LHK, 1971ed); s 22, LARCO; s 20, LARCO and the Fatal Accidents Ordinance (Cap 22, LHK, 1970ed) respectively. The Occupiers' Liability Ordinance is similar to the Occupiers' Liability Act 1957 in the UK.

50 Cap 59, LHK, 1977ed.

51 per Finnemore J, *Biddle* v *Truvox Engineering Co* [1952] 1 KB 101.

52 See generally Rogers, *Winfield and Jolowicz on Tort* (10th ed, 1975), ch 8,9; Hepple and Matthews, *Tort, Cases and Materials* (1974); Glanville Williams, 'The Effect of Penal Legislation in the Law of Tort' (1960) 23 MLR 233.

1953 to 1975, no common law action was brought by any injured Hong Kong worker.[52a] Out of the 116 cases contained in the Supreme Court personal injury files for the period 1975 to 1977, only one[53] was an action by an employee against his employer. This is about 0.8% of the total of 116 personal injury cases. In England, it was estimated in 1967[54] that 48% of the personal injury cases tried in the English High Court were claims by employees against employers. The Hong Kong figure is surely absurd, especially in view of the facts that in 1977 there were over 80,210 industrial injuries treated at Government and Government-assisted hospitals,[55] over 5000 of which resulting in permanent disability and 265 being fatal,[56] and that there were some 1400 prosecutions[57] against employers for breaches of industrial health and safety legislation.[58]

It follows that there must exist many cases in Hong Kong where the employer would have incurred tortious liability had the injured employee sued but which do not reach the courts. It is possible that some potential actions of this nature are settled out of court, but they must also be small in number, for the number of cases spilling over into the courtroom would be proportional to the number of those privately settled. The virtual absence of such civil suits in Hong Kong calls for an explanation.

Many reasons have been put forward[59] and they can be summarised as follows. (1) Although Labour Department officials advise injured workers of the possibility of a civil claim in tort in addition to the normal statutory workmen's compensation in cases where it seems to them appropriate, workers often fail to understand the possible advantages of such a claim unless they see a lawyer. Labour Department officials do not give legal advice themselves. (2) Most Hong Kong workers are unfamiliar with the enforcement of legal rights by court action and have no confidence in the legal system. They are generally reluctant to become involved in court proceedings. (3) There is an absence of effective trade unions in Hong Kong. Thus whereas in the UK it is generally the employee's trade union which will assist and refer cases to the union's solicitors for action, this assistance is not available to the Hong Kong worker.[60] (4) When an award of workmen's compensation is made, it may seem large to unsophisticated workers, who do not expect and are therefore reluctant to fight for further damages. (5) There is a natural reluctance among injured workers to sue a paternalistic employer who may have taken them back into employment. (6) Litigation is expensive. Legal aid is available to those with a disposable income of less than $1000 per month and a disposable capital of less than $10,000,[61] but an award of workmen's compensation usually puts a worker outside these limits. And the commencement of an action by the worker himself would involve at least $30,000 in advance payments to a solicitors' firm to cover costs. (7) The delay, uncertainty and difficulty of proof in tort actions make their pursuit discouraging. Witnesses willing to testify are hard to find. An injured worker back to work again can hardly afford the time to instruct lawyers and attend court during the protracted proceedings. Damages, if any, will only be forthcoming in several years' time. (8) Until 1967 no legal aid was available at all in civil cases. And until 1969, there were procedural problems arising from the Workmen's Compensation Ordinance which meant that the right to sue for damages could easily be lost if compensation was sought under the Ordinance. These two factors, of course, no longer apply now.

The Workmen's Compensation Ordinance[63]

The WCO was first introduced in Hong Kong in 1953, and has undergone numerous amendments

52a England and Rear, op cit, 194.

53 *Wong Tak-hing* v *Tai Sang Industrial Co Ltd* (1975), OJA No 1489 of 1973. There is also a recent case by an employee against an employer, *Fung Lai-yin* v *Lai Kam-chiu*, which is noted in (1978) 8HKLJ 254.

54 Report of the Committee on Personal Injuries Litigation (1968, cmnd 3691), para 42.

55 *Medical and Health Department Annual Report 1977*, Table 49.

56 Commissioner for Labour, *1977 Departmental Report*, 83, Table 9D.

57 op cit, 78-9, Table 8.

58 The information contained in this paragraph was first set out in John Miller, op cit, 6-7. See also 52-3, suggesting that negligence claims settled out of court have been growing steadily.

59 England and Rear, op cit, 194-5; John Miller, op cit, 7-8.

60 See also England and Rear, op cit, 201.

61 See s 7, Legal Aid Ordinance (Cap 91, LHK, 1972ed).

62 John Miller, op cit, 7, note 24.

63 cap 282, LHK, 1974ed.

since then, extending the range of workers covered, increasing the types of and raising the level of compensation benefits.[64] The system of workmen's compensation had begun its development in Britain in 1897 with the passing of the first Workmen's Compensation Act in that year. The Act broke away entirely from the basic common law principle that liability must be based on fault, and conferred on a workmen (or his dependants) a right to compensation for any accident 'arising out of and in the course of his employment'. Thus a form of strict civil liability was imposed on the employer. The fault principle was replaced by the insurance principle of covering workmen for all work-connected accidents, for in effect the Act treated workmen as insured against such risks, although employers were not themselves compelled to insure against their new statutory liability.[65] The concept of workmen's compensation was based partly on the moral responsibility of the employer for his employee's welfare, and partly on the felling that the risks of accidents faced by workmen were the risks of the business which the employer should therefore share – but not bear completely, so that the common law notion of providing 'full compensation' for the injury required to be compensated was abandoned.[66]

Although the Workmen's Compensation Act 1897 can be considered the origin of the modern social security system or the oldest form of social insurance to appear in modern societies, the workmen's compensation it introduced was still much nearer to the tort system in many of its concepts than modern social welfare.[67] It has therefore been pointed out in Britain that workmen's compensation may be taken as a convenient bridge between the tort system and the general social security system operating today.[68] Firstly, although the system was more like an insurance system than the traditional fault-based system, it was (like the modern law or tort with liability insurance behind it) a system under which the workman was insured by and at the expense of the employer. The cost therefore fell entirely on the employer instead of being shared between the employer and employee as in contributory insurance. Secondly, the cause of the injury or death was relevant as in tort, though from a different angle, since the formula that the accident must arise 'out of and in the course of the employment' meant that some kind of factual and legal causal link must exist between the employment and the accident. But social security payments are normally made irrespective of the cause of the injury. Thirdly, something very like contributory negligence remained a defence to the employer under the Act, in that compensation was denied if the accident was due to the workman's 'serious and wilful default'. Although this defence was subsequently excluded in cases of serious and permanent disablement and in fatal cases by the amending Act of 1906, it was will possible in some circumstances for the employer to escape liability on the ground that the workman's conduct took him out of the 'sphere of employment' so that the resulting accident did not arise 'out of and in the course of his employment'. Fourthly, workmen's compensation followed the law of tort in that complete freedom was given to the parties to settle the claim by the award of a lump sum. Although the Act did envisage and provide for the award of compensation by periodic weekly payments to take the place of lost wages, it did not prevent the employer or his insurer and the employee from agreeing to settle the case by the payment of a lump sum. Lastly, the administrative process of workmen's compensation was almost identical with that of the tort system, in that the adversary procedure and court proceedings were used unless a case was settled.

A tremendous quantity of litigation arose out of the Workmen's Compensation Acts. Workers backed by trade unions or employers supported by insurance companies often took their cases from the county courts all the way up to the House of Lords.[69] This continued until the workmen's compensation system was replaced in Britain by a

64 For the history of the Ordinance, see England and Rear, op cit, 195-6; John Miller, op cit, 22-3.

65 P.S. Atiyah, *Accidents, Compensation and the Law* (London: Weidenfeld and Nicolson, 1975), 317.

66 loc cit.

67 ibid, 318-320, from which the main points in this paragraph were derived. For an interesting discussion of the implications of the introduction of the workmen's compensation system on fault-based liability in tort, see Robert L. Rabin, *Perspectives on Tort Law* (Boston: Brown, 1976) 126.

68 ibid, 316.

69 K.W. Wedderburn, *The Worker and the Law* (Penguin, 2nd ed, 1971), 287. For English case law on the Workmen's Compensation Acts, see Willis and Everett, *Willis's Workmen's Compensation* (36th ed, 1944).

national insurance scheme for industrial injuries in 1946,[70] which formed part of the comprehensive social insurance and assistance scheme established following Lord Beveridge's Report on Social Insurance and Allied Services.[71] The principle of automatic compensation for accidents arising out of and in the course of employment without proof of negligence was to remain, but no longer was the scheme to be one of employers' insurance. Contributions are payable by employers and employees in respect of industrial injury insurance, the former deducting the latter's sums from wages at source, and the State also contributes. All persons in 'insurable employment' are covered, including most workers, the main category being 'persons employed under any contract of service or apprenticeship'. Apart from certain matters which are decided by the Minister, disputes are decided under the scheme by tribunals specially set up for it. The more important questions are heard by the Commissioners on appeal from local tribunals. A Commissioner's decisions are not open to appeal to the ordinary courts, though the latter can review his decisions for the purpose of ensuring that he has kept within his jurisdiction.

There are not many reported Hong Kong cases on the WCO.[72] Much of the pre-1946 English case law on the Workmen's Compensation Acts is therefore relevant on the interpretation of the Ordinance. It is also submitted that insofar as the National Insurance (Industrial Injuries) Act (which set up the national insurance scheme for industrial injuries in Britain in 1946) and the WCO have structural similarities, which are most prominent as between the provisions for eligibility for benefit under the Act and those for liability to pay compensation under the Ordinance, post-1946 English decisions, mainly by tribunals and Commissioners, have high persuasive value in Hong Kong.

1. The workman's right to compensation[73]

The rang of accident victims within the scope of the Ordinance is prescribed in the definition of 'workman' in section 2(1) of the Ordinance. Most persons working under a contract of service or apprenticeship are covered.[73a] Section 4 specially governs the case of workmen employed by the Crown, and sections 29 and 30 that of persons employed on ships. According to section 12, the persons entitled to compensation are the workman or his 'dependants', which is defined in section 3.

By section 5(1), an employer is generally liable to pay workmen's compensation to his workman where 'personal injury by accident arising out of and in the course of the employment is caused' to the workman, and the injury incapacitates the workman for a period of more than 3 days from earning full wages at the work at which he was employed or results in some degree of permanent incapacity or death. There are in addition three deeming provisions. First, 'an accident arising in the course of a workman's employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment'.[74] Second, 'an accident to a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instruction from his employer, if such act was done by the workman for the purposes of and in connexion with his employer's trade or business'.[75] The third deeming provision applies where a workman meets with an accident while being trained or engaged in first aid or rescue work.[76] There are four excep-

70 National Insurance (Industrial Injuries) Act 1946, later supplanted by the Act of 1965, amended and enlarged in 1966 and 1967. The law is now stated in the Social Security Act 1975.

71 Sir William Beveridge, *Social Insurance and Allied Services* (1942, cmd 6404).

72 See generally Albert Hung-yee Chen, 'Workmen's Compensation in Hong Kong – A survey of Hong Kong cases on the Workmen's Compensation Ordinance', p 6 above.

73 This aspect of the Ordinance is more fully discussed in Albert H.Y. Chen, ibid. See also England and Rear, op cit, 197; John Miller, op cit, 30-32.

73a See section V of this essay for the proposal in a recent Bill that the coverage be extended to all employees.

74 s 5(6), Cap 282, LHK, 1974ed; c.f. s 6, National Insurance (Industrial Injuries) Act 1965, now s 51, Social Security Act 1975.

75 s 5(1), Cap 282; c.f. s 7, National Insurance (Industrial Injuries) Act 1965 (hereafter abbreviated as NI(II)A), now s 52, Social Security Act 1975 (hereafter abbreviated as SSA), which is better drafted than the similar provision in the Hong Kong Ordinance.

76 s 5(5), Cap 282; c.f. s 9, NI(II)A, now s 54, SSA.

tions where the employer is not liable to pay compensation: (1) 'if it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman', or that the injury 'is deliberately aggravated by the workman', unless 'the injury results in death or serious incapacity', in which case 'the Court on consideration of all the circumstances may award the compensation provided by this Ordinance or such part thereof as it shall think fit';[77] (2) if the incapacity or death results 'from a deliberate self-injury';[78] (3) if the injury is 'caused by an accident which is directly attributable to the workman's addiction to drugs or his having been at the time of the accident under the influence of alcohols;[79] (4) 'if the workman has at any time represented to the employer that he was not suffering or had not previously suffered from 'the injury resulting in the incapacity or death concerned or a similar injury, 'knowing that the representation was false'.[80]

Two useful provisions in the English National Insurance (Industrial Injuries) Act 1965 do not have any parallels in Hong Kong. One is section 8 of the Act[81] providing that an accident is covered if it happens while an insured person is, with the express or implied permission of his employer, travelling as a passenger to or from his place of work in any vehicle which is being operated by or on behalf of his employer, or by some other person in pursuance of arrangements made with his employer. The accident is deemed to have arisen out of and in the course of his employment even though the insured person is not obliged to travel by that vehicle, if it would have been deemed so to have arisen if he had been under an obligation to travel by it, provided that the vehicle is not being operated in the ordinary course of a public transport service. The other section is section 10,[82] which provides that where an accident arising in the course of a claimant's employment is caused 'by any other person's misconduct, skylarking or negligence', and where the claimant himself 'did not directly or indirectly induce or contribute to the happening of the accident by his conduct outside the employment or by any act not incidental to the employment', it will be deemed also to have arisen out of the employment.

By section 31 of the Ordinance an employer cannot contract out of his liability to pay compensation for 'personal injury arising out of and in the course of' his workman's employment, although the Commissioner for Labour may authorise the making of an agreement to this effect 'in respect of any accident which is caused by the old age serious physical defect or infirmity' of a person if the Commissioner is satisfied that the person 'is specially liable to meet with an accident' or 'specially liable to sustain injury' if he meets with an accident 'by reason of old age or serious physical defect or infirmity'. The object here is presumably to overcome resistance to the employment of the handicapped.[83]

Two sections are particularly important for the construction industry because of its prevalent work practices.[84] According to the definition of 'employer' in section 3 of the Ordinance, 'where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Ordinance, be deemed to continue to be the employer of the workman whilst he is working for that other person'. Moreover, by section 24, where a person (a principal), 'in the course of or for the purposes of his trade or business, contracts with' another (a contractor) 'for the execution by or under the contractor of the whole or any part of any work undertaken by the principal', the principal is liable to pay workmen's compensation to the workmen employed by the contractor as if the principal were their immediate employer, the amount of compensation being calculated with reference to the workmen's earning under the contractor.[85] Thus a workman can pursue his workmen's compensation claim against either the contractor or the principal.[86] If a claim is

77 s 5(1)(b), Cap 282. There is no equivalent provision in the NI(II)A or SSA.
78 s 5(2), Cap 282.
79 s 5(4).
80 s 5(3).
81 s 53, SSA.
82 s 55, SSA.
83 England and Rear, op cit, 200.
84 ibid, 197; John Rear, 'Self-employment in the Building Industry' (1972) 2HKLJ 150; R.A. Riberio, 'Workmen's Compensation and Informal Work Practices' (1974) 4HKLJ 65, especially at 70-1.
85 s 24(1), Cap 282.
86 s 24(4).

made against the latter, he must 'give notice thereof to the contractor who shall thereupon be entitled to intervene in any application made against the principal'.[87] If the principal becomes liable to pay compensation under the section, he is entitled to be indemnified by the contractor.[88] The application of section 24 is, however, limited by its subsection (5), which confines its relevance to accidents occuring 'on, or in, or about premises on which the principal has undertaken to execute the work or which are otherwise under his control or management'.

A workman or his dependants can further sue the employer in tort even if a workmen's compensation claim has been made or succeeded.[89] However, the amount of the workmen's compensation award is to be deducted from any common law damages granted.[90] Under some circumstances the Court is empowered to award workmen's compensation in a common law action.[91] It is also possible both to claim compensation under the WCO and to proceed against a negligent third party (one other than the employer) for damages in respect of the same accident,[92] though the workman must first lodge a workmen's compensation claim and notify the employer of his intention to institute proceedings against the third party before doing so.[93] (If notice is given to the principal in a case where section 24 applies, the principal must also give notice to the contractor.[94]) A special provision governs the limitation of actions.[95] The employer (or the contractor who may be called on to indemnify the principal under section 24) has a right of action against the third party for the recovery of the compensation (or indemnity) he is obliged to pay as a result of the accident.[96] If the workman is guilty of contributory negligence, however, this right 'to be indemnified by the third party shall be limited to a right to be indemnified in respect of such part only of the compensation or indemnity paid or payable as bears to the total compensation or indemnity so paid or payable the same proportion as' the reduced damages (reduced because of contributory negligence) recoverable from the third party 'bear to the total damages which would have been recoverable if the workman had not been at fault'.[97]

The employer's liability is extended from accidents to occupational diseases not amounting to 'personal injury by accident' within the meaning of section 5 by Part VII of the Ordinance.[98] An 'occupational disease' means any of the diseases specified in the Second Schedule.[99] The right to compensation arises in a case of incapacity or death caused by an occupational disease 'as if such incapacity or death had been caused by an accident arising out of and in the course of employment' (the incapacity or death being treated as the happening of the accident) where the disease 'is due to the nature of any employment in which the workman was employed at any time within the prescribed period (in the Second Schedule) immediately preceding such incapacity or death, whether under one or more employers'.[1] A scheduled or occupational disease is presumed, until the contrary is proved, to be due to the nature of the employment if the resulting incapacity or death follows the employment in the relevant trade, industry or process for the prescribed period.[2] Notice of incapacity or death is to be given to 'the employer who last employed the workman during the prescribed period immediately preceding the incapacity or death in the employment to the nature of which the disease was due',[3] and basically it is from this employer that compensation is recoverable.[4] This employer can require the workman or his dependants to furnish information about previous employers in the prescribed period, and can escape liability 'upon proving that the disease was not contracted whilst the workman was in his employment'.[5] To do this he may join the other employers as parties to the proceedings and prove that the disease was in fact contracted whilst the workman was in the employ-

87 s 24(3).
88 s 24(2).
89 s 26(1).
90 s 26(1).
91 s 26(2), (3).
92 s 25(1)(a).
93 s 25(2).
94 s 25(4).
95 s 25(3).
96 s 25(1)(b).
97 s 27.
98 See s 36.
99 s 3.
1 s 32(1).
2 s 34.
3 s 32(1)(e).
4 s 32(1)(c).
5 s 32(2).

ment of one or more of them, so that the latter would become liable instead.[6] It seems that the workman or his dependants can also proceed directly against them where the last employer escapes liability without bringing them in.[7] 'If the occupational disease is of such a nature as to be contracted by a gradual process', any employer liable to pay compensation can recover from 'other employers who during the prescribed period immediately preceding the incapacity or death employed the workman in the employment to the nature of which the disease was due' 'such contribution as, in default of agreement, may be determined by a Court'.[8] An employer is not liable if 'it is proved that the workman, at the time of entering into the employment, wilfully and with intent to deceive represented in writing that he had not previously suffered from the disease'[9] or if there is evidence in writing under the hand of the workman of his refusal to undergo a medical examination at the cost of the employer required of him by the employer before employing him.[10]

It is an offence for the employer to make any deduction from his workman's earnings 'for the purpose of defraying or partly defraying the cost of insurance in respect of his liability to pay compensation under the provisions of this Ordinance',[11] or to dismiss an injured workman eligible for workmen's compensation without the consent of the Commissioner for Labour either before 'the workman has been certified by a medical practitioner' as fit to resume the work for which he was employed at the time of the accident' or compensation becomes payable under the Ordinance.[11a] It may be noted that in 1977 there were no prosecutions for the former offence and there was only one for the latter.[12]

A special provision governs the event of an employer who has insured his liability under the Ordinance becoming bankrupt.[13]

Mention may also be made of the Workmen's Compensation (Amendment) (No 2) Ordinance 1978. This 'amends the WCO so as to provide for the payment of compensation to workmen or dependants for permanent total or partial incapacity or death resulting from pneumoconiosis arising out of and in the course of employment in any specified trade, industry or process, to establish a pneumoconiosis compensation fund and to require compulsory insurance in respect of such employment'.[14] The Ordinance has not yet been brought into operation, and it seems that it never will. The Commissioner for Labour has disclosed that some unforeseen practical difficulties had been encountered in implementing the scheme. A new Bill providing for a pneumoconiosis compensation fund financed by a levy on employers in the industries concerned instead of the compulsory insurance scheme contemplated by the 1978 Ordinance will probably be introduced into the Legislative Council before the end of its current session.[14a]

2. The amount of compensation[14b]

There are 6 main types of compensation payments. The determination of the amount payable to some of them depends on the concepts of 'incapacity' and 'earnings', which must therefore be considered first.

'Incapacity' can be either temporary or permanent, and either partial or total.[15] Temporary partial incapacity 'reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident' for a limited period of time. Temporary total incapacity 'incapacitates a workman for any employment which he was

6 s 32(3).
7 s 32(5).
8 s 32(4).
9 s 32(1)(b).
10 s 33.
11 s 47.
11a s 48; see *Wong Ying* v *Lee Shiu Kai* [1958] DCLR 63, cited in England and Rear, op cit, 206, note 67.
12 Commissioner for Labour, *1977 Departmental Report*, 79.
13 s 28, Cap 282.
14 Quoted from the explanatory memorandum of the Bill.
14a Speech of Mr Neil Henderson, Commissioner for Labour, in the Legco, SCMP, Dec 13, 1979.
14b See section V of this essay for the recommended increases in the amounts of compensation in a Bill published in June 1980.
15 See the definitions of 'partial incapacity' and 'total incapacity' in s 2, Cap 282.

capable of undertaking at the time of the accident' for a limited period of time. For most purposes 'a period of absence from duty certified to be necessary by a medical practitioner' (the sick leave granted) is deemed to be a period of total temporary incapacity. Permanent partial incapacity reduces permanently the workman's 'earning capacity in any employment which he was capable of undertaking' at the time of the accident, and 'every injury specified in the First Schedule, except such injury or combination of injuries in respect of which the percentage or aggregate percentage of the loss of earning capacity as specified in that Schedule against such injury or injuries amounts to 100 per cent or more, shall be deemed to result in permanent partial incapacity'. Permanent total incapacity 'incapacitates a workman for any employment which he was capable of undertaking at the time of the accident', and it is also 'deemed to result from any injury or from any combination of injuries specified in the First Schedule where the percentage or aggregate percentage of the loss of earning capacity as specified in that Schedule against such injury or injuries amounts to 100 per cent or more'.

'Earnings' is also precisely defined in section 3. The method of calculating earnings is described in detail in section 11. Normally the monthly earnings is averaged from those in the previous twelve months[17] in 'employment by the same employer on the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause'.[18] Special provisions are made for workmen who have been in the employer's employment for a short time,[19] those under the age of eighteen[20] or under a contract of apprenticeship,[21] those earning less than $100 per month[22] and those who have entered into concurrent contracts of service with two or more employers.[23]

Section 10 governs the payment of compensation for temporary incapacity. 'Where temporary incapacity whether total or partial results from the injury', the compensation is normally a periodic payment which is equal to or at a rate proportional to a monthly payment of two-thirds of the difference between the monthly earnings which the workman was earning at the time of the accident and the monthly earnings which he is earning, or is capable of earning, in some suitable employment or business after the accident',[24] (though 'in fixing the amount of the periodic payment, the Court shall have regard to any payment, allowance or benefit which the workman may receive from the employer during the incapacity'[25]) 'payable at least monthly, and generally on the same days as wages would have been payable to the workman if he had continued' in the original employment, or at shorter intervals by agreement or by order of the Court,[26] until the ceasing of the incapacity; and if the latter event 'occurs before the date on which any periodic payment falls due, there shall be payable in respect of that period a sum proportionate to the duration of the incapacity in that period'.[27] The alternative form of compensation is a lump sum calculated accordingly.[28] Special provisions apply where a workman in receipt of periodic payments intends to leave or leaves Hong Kong.[29]

Periodic or lump sum payments paid or payable under section 10 will not be deducted from other compensation amounts payable for 'death or permanent incapacity following a period of temporary incapacity'.[30] In practice the workman will be treated as temporarily incapacitated until the degree of permanent incapacity is assessed by the Medical Assessment Board of the Labour Department's Industrial Health Division.[31] And 'a workman who has received periodical payments under this section for a period of 24 months from the date of the commencement of the temporary incapacity shall no

16 s 10(2), Cap 282.
17 s 11(1).
18 s 11(6).
19 s 11(2); *Yeung Hung* v *Yee Fat Transportation Co* [1962] DCLR 67, cited in England and Rear, op cit, 206, note 60.
20 s 11(3).
21 s 11(4).
22 s 11(5).
23 s 11(7).
24 s 10(1).
25 s 10(6).
26 s 10(3).
27 s 10(7).
28 s 10(1).
29 s 10(8), (9).
30 s 10(4).
31 The information here and subsequently in this section of the essay relating to the procedure in practice of workmen's compensation was obtained from the Workmen's Compensation Unit of the Labour Department in Sept 1979. See also s 36I, Cap 282.

longer be entitled to periodical payments under this section but shall be deemed to have suffered permanent incapacity' and the provisions relevant to the latter shall apply.[32]

Section 10A provides that the employer is in addition liable to pay the medical expenses incurred by the workman[33] in the period during which he receives medical treatment until it is certified that he is cured, or until he 'becomes entitled to receive compensation for permanent incapacity, whether total or partial, under this Ordinance', or until 'the expiration of 24 months from the date of the accident', whichever is the earliest.[34] The maximum amount payable is $20 per day for hospitalization and $10 per day for out-patient treatment.[35] Special provisions govern the case where the employer provides free medical treatment to his workmen.[36]

Sections 7 and 9 apply to the compensation for permanent total and partial incapacity. That for permanent total incapacity is a sum equal to 48 months' earnings, subject to a minimum of $12,800 and a maximum of $80,000.[37] That for permanent partial incapacity is a percentage of the sum payable for permanent total incapacity based on the scale of percentage loss of earning capacity for the injuries in the First Schedule.[38]

Section 8 applies where permanent total incapacity resulting from the injury 'is of such a nature that the workman is unable to perform the essential actions of life without the constant attention of another person'. Compensation to meet the cost[39] of such constant attention is then payable in addition to any compensation payable under other provisions of the Ordinance,[40] subject to a maximum amount of $32,000.[41] This may either be in the form of a lump sum[42] or of periodic payments for a period not exceeding 2 years after the workman becomes entitled to receive compensation for permanent incapacity plus a possible lump sum at the end of the period.[43]

Part IIIA of the Ordinance concerns payment for prosthesis (any artificial item which replaces a part of the body removed or amputated as a result of an injury) and surgical appliances (any artificial item which supports directly or indirectly the structure or function or a part of the body impaired as a result of an injury).[44] The employer[45] is liable to pay 'the cost of supplying and fitting' such to the workman in addition to other compensation payments,[46] subject to a maximum of $10,000,[47] provided that a Medical Assessment Board certifies the prosthesis or surgical appliance as necessary in the particular case and is of the opinion that it is reasonable in cost and that either it is manufactured or on sale in Hong Kong or the Director of Medical and Health Services gives his approval.[48] However, it seems that the employer's liability only extends to the initial cost of such appliances, and the costs of necessary replacements have to be borne by the workman himself.[48a]

Section 6 governs compensation 'where death results from the injury'. 'If the workman leaves any dependants wholly dependent on his earnings', the amount of compensation is a sum equal to 36 months' earnings, subject to a minimum of $9600 and a maximum of $60,000; but any compensation sum for permanent total or partial incapacity or for the cost of constant attention is to be deducted from this amount.[49] If the workman only leaves dependants partially dependent on his earnings, the amount is a sum not exceeding that in the former

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32 s 10(5).
33 s 10A(1).
34 s 10A(3).
35 s 10A(3), Third Schedule.
36 s 10A(4), (5).
37 s 7(c).
38 s 9; see Statute Note (1978) 8HKLJ 250; John Miller, 'Accident Compensation in Hong Kong' (1979) 9HKLJ 4, 29-30; *Chung Chik* v *Hip Fung* (1973) Vict D Ct., WCC No 90 of 1972, cited in England and Rear, op cit, 206, note 57.
39 See s 8(3).
40 s 8(1).
41 s 8(4)(b).
42 s 8(2)(a).
43 s 8(2)(b).
44 s 36A.
45 See also s 36J.
46 s 36B(1).
47 s 36C.
48 s 36B(2), (3). See England and Rear, op cit, 199-200, for the degree of compliance with ILO standards in this respect.
48a England and Rear, loc cit.
49 s 6(a).

case and 'reasonable and proportionate to the injury to' the dependants.[50] In both cases the amount of compensation will 'be apportioned among the dependants of the deceased workman or any of them in such proportion as the Court thinks fit, or in the discretion of the Court' 'allotted to any one such dependant'.[51] If no dependants are left, the compensation is the reasonable expenses of burial and medical treatment up to a limit of $800.[52]

3. The procedure of compensation

The Workmen's Compensation Unit of the Labour Department is responsible for administering the WCO. When an accident happens to a workman, notice of the accident must be given to the employer[53] 'by or on behalf of the workman' 'as soon as practicable' and 'before the workman has voluntarily left the employment in which he was injured'.[54] Otherwise no compensation can be claimed.[54a] However, the want of or defect or irregularity in a notice will not have such an effect if the accident 'occurred on the premises of the employer, or at any place where the workman at the time of the accident was working under the control of the employer or of any person employed by him, and the workman died on such premises or at such place, or on any premises belonging to the employer, or died without having left the vicinity of the premises or place where the accident occurred',[55] or if the employer already knew of the accident or is not prejudiced in his defence by the want of notice, or if the want of notice was due to 'mistake, absence from the Colony, or other reasonable cause',[56] or if 'there was reasonable excuse' for it.[57] The employer must in turn give notice of the accident in a prescribed form to the Labour Department,[58] and failure to do so is a criminal offence.[59] In 1977, one prosecution was brought for such a failure, but it was subsequently withdrawn.[60]

In practice the Workmen's Compensation Unit does not depend solely upon the employers for its knowledge about the occurrence of accidents. For example, there are nurses from the Industrial Health Division of the Labour Department stationed in the casualty wards of major Government hospitals to register victims of work-connected accidents. Sometimes accidents come to the knowledge of the Unit when injured workers or their relatives or friends come to inquire about their legal rights.

Special provisions are made in the Ordinance for the case of free medical examination or treatment offered by the employer and especially for the suspension or loss of the workman's right to compensation on his failure to submit himself to examination or treatment or his disregard of the doctor's instructions under certain circumstances.[61] The common practice, however, is for the injured worker to be examined and treated by doctors of the Industrial Health Division, who will grant a period of sick leave. After the period the worker has to come before the Medical Assessment Board of the Division which will assess the degree of permanent incapacity, if any, of the worker in accordance with the provisions of the Ordinance.[62] And then the Workmen's Compensation Unit will assist the parties involved to settle by agreement the amount of compensation, except in fatal cases which will invariably be referred to the District Court.

The precise legal provisions governing the steps leading to the payment of compensation are as

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50 s 6(b).
51 s 13(1). See also s 15(4).
52 s 6(c).
53 See s 14(2), (3).
54 s 14(1).
54a See also s 10A(2)(b) regarding the payment of medical expenses.
55 s 14(1)(a).
56 s 14(1)(b).
57 s 14(4). See also *Yeung Ying* v *Ching Hing Construction Co Ltd* [1960] DCLR 129, criticising *Wong Man Tak* v *Shaws & Sons Ltd* [1957] DCLR 85, cited in England and Rear, op cit, 206, note 49.
58 s 15 (1), (2). This has already been fully discussed above in conjunction with the duty to report accidents laid down by 17 of the FIU.
59 s 15(6).
60 Commissioner for Labour, *1977 Departmental Report*, 79.
61 s 16.
62 See s 9, First Schedule. But any assessment of incapacity made by the Board has no legal effect and is therefore not binding on a court. See *The Textile Corpn of Hong Kong Ltd* v *Wong Fook Yin* [1959] DCLR 178; *Chung Chik* v *Hip Fung* (1973) Vic D Ct, WCC No 90 of 1972, both cited in England and Rear, op cit, 206, note 52.

follows. On receipt of the employer's notice of the accident, the Labour Department may make a claim of compensation on behalf of the workman or his dependants if the latter so wish.[63] Under section 17 the employer and the workman may 'agree in writing as to the compensation to be paid by the employer'.[64] The sum agreed must not be less than the amount payable under the provisions of the Ordinance, and the agreement only becomes binding when the Commissioner for Labour signifies his approval in writing.[65] If the employer fails to pay the agreed and approved sum within 21 days after the date stipulated in the agreement for the payment, 'the employer shall be liable to pay to the workman a surcharge of 5% of such sum or $50, whichever is the greater, in addition to the compensation payable under the agreement'.[66] An approved agreement 'may, on application to the Court by any party thereto or by the Commissioner, be made an order of the Court'.[67] This provision is used when the employer fails to pay the agreed compensation, for only an order of the Court can be directly enforced against the employer.[68] The Court, however, has the power to cancel an approved agreement or even one made an order of the Court in certain circumstances.[69]

If the parties are unable to reach agreement within 21 days after the employer receives notice of the accident, the workman may make an application for enforcing his claim to compensation to the District Court.[70] However, this is subject to the rule that proceedings are not maintainable unless the application is made within 12 months from the occurrence of the accident,[71] or, in case of failure to do so, unless there is 'reasonable excuse'.[72] Similarly, in a fatal case, application for compensation to the Court must be made within 12 months from the date of death, unless there is 'reasonable excuse'.[73] The District Court has original jurisdiction over all workmen's compensation cases not settled by agreement, whatever may be the amount claimed.[74] The District Court may submit any question of law for the decision of the Court of Appeal,[75] and appeal also lies to the Court of Appeal subject to some restrictions.[76]

Compensation payable in the case of death must be paid into the District Court, which will then make the appropriate order concerning the distribution of the sum among the dependants, subject to its power of subsequent variation of the order on change of circumstances.[77] Periodic payments payable for temporary incapacity or the cost of constant attention may be paid directly to the workman, and so may compensation agreed and approved in accordance with the provisions of section 17, but in other cases the compensation shall be paid to the Court.[78]

Periodic payments payable under the Ordinance 'either under agreement between the parties or under an order of the Court may be received by the Court on the application either of the employer or of the workman'[79] and the employer is also entitled under certain conditions to decrease or end periodic payments without an order of the Court authorising him to do so.[80]

Slightly different procedures apply to the payment of the costs of medical treatment and of prosthesis and surgical appliances. Medical expenses are claimed by serving on the employer a request in writing for the payment of the medical expenses together with a receipt for the payment for the medical treatment.[81] If the employer fails to pay within 21 days, the amount may be recovered as a civil debt in the Small Claims Tribunal, and where the amount exceeds the Tribunal's jurisdiction, as a civil debt in the District Court.[82] In the event of dispute as to the liability to pay medical expenses or the amount of such, the workman or the employer may apply to the Commissioner for Labour for the

63 s 15(3).
64 s 17(1).
65 s 17(1). See also s 17(2), (3).
66 s 17(2A).
67 s 17(4).
68 See s 21.
69 s 17(5).
70 s 18(1).
71 s 14(1).
72 s 14(4).
73 s 14(1), (4).
74 s 18(2), s 21.
75 s 22.
76 s 23.
77 s 13(1).
78 s 13(2). See also s 13(3), (5).
79 s 19.
80 s 20.
81 s 10A(6).
82 s 10A(7), (8).

determination of the dispute. The Commissioner will issue a certificate stating the amount payable if any,[83] and if the employer fails to pay such amount within 21 days after the determination of the dispute, it may be recovered in the Small Claims Tribunal or the District Court.[84]

A claim for the cost of supplying and fitting any prosthesis or surgical appliance to a workman must be made within 5 years from the accident[85] and may be made by serving on the employer a request in writing.[86] If the employer 'disputes his liability to pay or the necessity or costs of the prosthesis or surgical appliance', he must within 14 days serve on the workman a notice setting out the grounds of dispute and deposit the amount of the cost claimed with the Director of Medical and Health Services.[87] Otherwise he is 'deemed to have agreed to pay the amount of the cost claimed in the request for payment',[88] and the workman can apply to the District Court for enforcing his claim.[89] A dispute shall be determined by the District Court.[90]

In practice almost all non-fatal workmen's compensation cases are settled out of court.[91] Most of them are settled by agreements approved by the Commissioner for Labour in accordance with section 17 of the Ordinance, but some are privately settled. In 1977, for example, 2,230 cases out of the 33,675 cases settled (6.6%) were settled privately. This is possible because there is nothing in the Ordinance to prevent the employer and the workman from settling the matter between themselves without involving Labour Department officials. The Commissioner for Labour only makes a claim for compensation on behalf of the workman 'if the workman so requests'.[92] It is probable that some waiving of workmen's rights under the Ordinance occurs in these cases settled by private agreement. In the case of periodic payments for temporary incapacity, it has been said that 'although there are no accurate statistics it is thought that there are many employers who do not make these interim payments at all'.[93]

Although compulsory insurance is not required by the Ordinance,[94] the Labour Department estimates that 88% of employers in Hong Kong take out liability insurance for workmen's compensation.[95] Thus in practice the workmen's compensation system, like the tort system,[96] is operated by private insurance. It has been pointed out that the insurance industry in Hong Kong is relatively uncontrolled[97] and estimated that at least $70 million to $80 million are paid in premiums every year while the compensation paid out is only about $36 million[98] (so that about half of the money going into the system is absorbed by its administrative or operating expenses, such as the costs of insurers in handling claims and on general administration, the commissions paid by insurers to brokers and agents, claimants' legal fees and profit).

Research carried out by the Labour Department revealed that few injured workmen or dependants of deceased workmen were unable to obtain compensation simply because the employers failed to insure.[99] Injured workmen who did fail to obtain workmen's compensation as a result of default by their employers have often been recommended for and received some relief in the form of a lump sum from a charitable fund known as the Brewin Trust Fund. The policy of the Brewin Trust Fund Committee is to limit each grant to 50% of the legal entitlement of the injured employee, subject to a

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83 s 10B.
84 s 10A(7), (8).
85 s 36H.
86 s 36D.
87 s 36E(2).
88 s 36E(3).
89 s 36G.
90 s 36F(1), (2); s 36G.
91 John Miller, 'Accident Compensation in Hong Kong' (1979) 9HKLJ 4, 25.
92 s 15(3)(b).
93 John Miller, op cit, 28..
94 Compulsory insurance has however been recommended by a working party on the Ordinance. This is discussed in section V of this essay.
95 John Miller, op cit, 27.
96 For the cost of administration of the tort system in HK, see John Miller, op cit, 16-7.
97 John Miller, op cit, 19-21.
98 ibid, 32. For the practical operation of the system of workmen's compensation, see also Ng Shu-sing, 'Workmen's Compensation – A Study on Selected Industries in Hong Kong' (unpublished MBA thesis, 1972, Chinese University); Ng Poon-sek, 'A Study of Workmen's Compensation Insurance in Hong Kong' (unpublished MBA thesis, 1975, CU).
99 John Miller, op cit, 33-4.

maximum of $10,000.[1]

Social security[2]

The social security system in Hong Kong is basically a subsistence and not an income replacement scheme as far as accident compensation is concerned. There are 3 main types of benefits in the form of cash payments.

Firstly, there is the Public Assistance scheme which helps on a means-tested but non-contributory basis those whose income falls below a prescribed level. Monthly payments are made to single persons and families. Annual long term supplements to replace essential household items and monthly Old Age Supplements and Disability Supplements are also payable. There are also rent allowances and discretionary payments for school expenses, special diets and other essential expenses.

Secondly, the Special Needs Allowance scheme provides a flat rate allowance on a non-means-tested and non-contributory basis to 2 vulnerable groups, the severely disabled and elderly persons aged 70 and over (Disability Allowance and Old Age Allowance respectively). It is thus based on need established by reference to the circumstances of the individual and not by reference to low income.

Lastly, accident compensation and emergency relief are provided by the Emergency Relief Fund scheme, the Traffic Accident Victims Assistance scheme and the Criminal and Law Enforcement Injuries Compensation scheme. The first of these provides immediate relief in both cash and material aid to disaster victims. The second provides cash assistance to victims of traffic accidents, irrespective of whether the victim was at fault or not. The third assists victims of crimes of violence and those accidentally injured or disabled by law enforcement action. In all 3 schemes compensation is paid on a lump sum basis without any means test. The schemes are 'designed to tide a family over a serious and unforeseen setback which will strain its resources because of reduced or lost earnings or because of additional outgoings' and are 'not intended to provide long term support, since that is the function of other social security schemes'.[3]

In addition to the social security schemes mentioned above the Government also administers various funds which give financial help to those in need.[4]

The Green Paper on Social Security Development (1977) contains a tentative proposal for a voluntary contributory sickness, injury and death benefit insurance scheme by employers and employees. 'Whilst the Government accepts the desirability of the coverage, it has not yet reached a conclusion on what the best method of proceeding would be – given the wide measure of cover for the lower income groups already provided by the Public Assistance and Special Needs Allowance schemes and by statutory occupational benefits'.[5] In a White Paper in April 1979 it was said that 'the Government intends to make a further announcement as soon as proposals are finalized',[6] but so far no announcement has yet been made. Meanwhile, the introduction of a comprehensive social insurance system has been repeatedly called for by various bodies.[7]

V. AN EVALUATION OF THE PREVENTION– COMPENSATION SYSTEM

Questions to be answered

We now return to the points raised in the discussion of 'the theoretical foundation of accident law' near the beginning of this essay. It may be recalled that in practice any system of accident law is almost certainly a mixed system achieving different and sometimes conflicting objectives in varying degrees, and that there is, for example, a basic

1 ibid, 34-5; Commissioner for Labour, *1977 Departmental Report*, 23.
2 See generally *Social Welfare into the 1980's*, White Paper, April 1979; John Miller, op cit, 36-45, 47-8, 49-53.
3 *Social Welfare into the 1980's*, op cit, 13, para 3.17.
4 ibid, 6, para 2.2; John Miller, op cit, 47.
5 ibid, 13, para 3.17.
6 ibid, 4.
7 By 6 labour organisations in a conference on workmen's compensation law (MP, Aug 6, 1979); by the Christian Industrial Committee (MP, Aug 11, 1979; SCMP, Jan 17, 1980) and by 8 student organisations (MP, Mar 16, 1980).

tension between the aims of deterring accidents and spreading the loss caused by accidents. The two major questions that arise in an evaluation of the system of accident prevention and compensation as a whole are the following: To what extent does the existing system with its present combination of approaches prevent accidents and to what extent does it spread accident loss? How can this system be modified, and a new combination of approaches arrived at, so as to fulfil better the dual purposes of accident prevention and accident compensation? And as industrial accidents form the scope of this essay, these will be our primary concern.

The system that now exists consists of two main components which have been discussed above. The first is industrial safety legislation, which seeks to control the incidence of industrial accidents by creating regulatory offences in criminal law. It is complemented by the civil law component, which is partly common law (tort) and partly statutory (workmen's compensation and social security), compensating accident victims or their dependants by creating rights to or imposing liabilities for compensation. The main complicating factor in an overall analysis is that the two components of the system do not have separate and distinct functions with respect to accident prevention and compensation. In particular, the civil law component may deter accidents as well as compensate victims. Thus the first question set out in the last paragraph involves three issues; namely, the effect of the criminal law component of the system on accident prevention, the effect of the civil component on accident prevention, and that of the civil law component on loss spreading.

Industrial accident prevention: Present and future

We shall now consider first the effect of the civil law of accident compensation on accident prevention, which is not only indirect but, as will be shown below, also of relatively minor importance. Then the effect of the criminal law component will be discussed, and it will be suggested that certain modifications of this latter component will promote industrial safety in Hong Kong.

The employer's tortious liability in negligence and in breach of statutory duty and his statutory liability for 'personal injury by accident arising out of and in the course of the employment' occuring to his employee can both be said to have deterrent effects on industrial accidents. Seen two-dimensionally from a theoretical point of view, the deterrent effect is great for the employer who may have to pay a large amount of compensation for each accident which gives rise to liability. To avoid incurring these high costs employers would be induced to do their utmost to promote industrial safety, for example, by using safety equipment, having better maintenance, introducing safety organisation and urging employees to work safely. However, when seen three-dimensionally in the light of the device of insurance, the cost of compensation for any single accident is not borne by the employer responsible but shared among a large group of employers. The actual operation of insurance must be looked at more closely so that the extent to which the compensation system deters accidents can be ascertained.

Insurance can contribute to accident prevention in two distinct ways.[8] Firstly, insurers may attempt themselves to take direct steps to minimize the losses or accidents against which they insure. In some countries insurers maintain inspectors to survey plant, equipment and premises and advise the insured how to minimize risks and avoid accidents. Threats of higher premiums or total refusal of cover may be used to bring about the recommended improvements. Such a practice does not exist in Hong Kong. In a speech to the Hongkong Insurers Club in 1979, the Chief Factory Inspector of the Labour Department called on its members to 'supplement the effort of the Factory Inspectorate by offering services by way of safety inspection of plant before accepting a cover'.[9] The prospects of developments in this direction are not however encouraging. It has been pointed out that the incentive on insurers to engage in accident-preventing activities is generally small.[10]

8 P.S. Atiyah, *Accidents, Compensation and the Law* (London: Weidenfeld & Nicolson, 2nd, 1975), 514-521; *Report of the National Commission of Inquiry on Compensation and Rehabilitation in Australia* (Australian Government Publishing Service, 1974) (hereafter referred to as the Australian Report), vol 2, 126-8.

9 See SCMP, Aug 21, 1979, p 14.

10 Atiyah, op cit, 516.

The second way by which insurers can help to promote safety is by offering financial incentive in the form of reduction in insurance premiums for industrial establishments which have better safety performance. In other words, the premium rating structure can be devised in such a way that establishments which have higher accident records are charged higher premiums. This is known as experience rating, and has also been advocated by the Chief Factory Inspector in the speech mentioned above. But it is also doubtful whether this is practicable in Hong Kong, since the employer's own past experience (as contrasted with the average experience of employers in that class of business) is not a sufficiently certain indication of his likely future experience unless he employs a substantial number of workmen,[11] whereas most industrial establishments in Hong Kong are small-sized. Besides, there are other problems about experience rating which tend to reduce its value for accident prevention purposes. The position has been thus summarised: 'It seems fair to say that experience rating for employers' liability insurance is unlikely to be having a very significant effect in reducing or minimizing accident costs.'[12]

So far only the deterrent effect of the tortious and statutory liability imposed on the individual employer specifically has been considered. The question remains as to the general deterrence effect in accordance with the resource allocation theory discussed earlier in this essay. Can it be said that although the compensation laws do not deter accidents in respect of any specific factory owner, especially one who is insured, they do regulate the amount of accident-causing activities to an optimum level? It has been argued in this respect that the practical working of insurance does not facilitate general deterrence, even if the conflicting objectives of general deterrence and loss spreading by insurance can be reconciled at the theoretical level.[13] Moreover, as far as the tort system is concerned, it has been shown that it does not conform to the general principles of the general deterrence technique.[14]

Pessimism about the deterrent effect of compensation laws on accidents can also be justified by some empirical research which has been done overseas. Although the introduction of workmen's compensation for the first time in the UK and elsewhere brought about a reduction in the number of industrial accidents,[15] more recent research has cast doubts on the correlation between workmen's compensation or tort insurance premiums and industrial safety. It has been alleged in the United States that in the construction industry in Ohio and Michigan little account was taken by contractors of the fact that fewer injuries mean lower workmen's compensation charges.[16] The American National Commission on State Workmen's Compensation Laws, after a study of the industrial accident levels in States with very different levels of workmen's compensation benefits, discovered no systematic relationship between accident levels and benefit levels, and thus concluded that 'workmen's compensation insurance rates are not the strongest force affecting the frequency of accidents'.[17] Grave doubts have been expressed in Australia 'as to whether in fact our present workers' compensation insurance arrangements do not contribute to our poor performance in industrial accident prevention',[18] and in any case, 'the contribution of the workers' compensation system to the total safety picture is virtually nil'.[19] An examination of experience ratings in the workmen's compensation system in Ontario has ended in the conclusion that 'it is to be regretted that no adequate statistics have been kept which could justify a conclusion that the system has made a significant contribution to safety'.[20] And as for the tort system, the contribution which the financial

11 ibid, 519.
12 ibid, 529.
13 ibid, 548-550.
14 Guido Calabresi, *The Costs of Accidents* (New Haven and London: Yale University Press, 1970), ch 10.
15 Atiyah, op cit, 531; Calabresi, op cit, 164-5, 245.
16 Paul E. Sands, 'How Effective is Safety Legislation?' (1968) 11 LJ & Econ 165, 177-8, discussed in Calabresi, op cit, 245, note 2.
17 Atiyah, op cit, 550-1.
18 Sir Henry Bland, 'Industrial Safety in Australia', paper given in 1971 at the National Conference on Industrial Safety in Canberra, p 16, quoted in the Australian Report, vol 1, 89.
19 The Australian Report, vol 1, 89.
20 The Australian Report, vol 2, 127-8. See also *Personal Injury: A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (New Zealand Government Printer, 1969), 84-88.

incentives it generates could make to industrial safety was considered to be insignificant on at least three separate occasions in the UK,[21] before the Robens Committee in its Report on Safety and Health at Work in 1972 went even further by pointing out that the system of civil actions for damages for industrial accidents 'has an inhibiting and distorting effect on the work of making and enforcing effective regulations to prevent accidents, and indeed on the accident prevention effort generally'.[22] Employers and others who were involved in preparing and interpreting those regulations were likely to be concerned with the implications not only for accident prevention but also for compensation. The Committee also referred to the effect of possible compensation litigation on accident investigation. The need for each side to present its own case in the best possible light might well hinder an objective investigation of the circumstances of any particular accident, and might result in a deterioration in industrial relations.[23] Moreover, tort claims may also delay remedial measures before the claim is settled for fear that this may be taken as an admission of negligence or breach of statutory duty.[24]

In the light of all the above, it is unlikely that the civil law component of our accident law, which is primarily directed at accident compensation, can make a significant and positive contribution to accident prevention unless it is revolutionised to become a totally new system. But what about the criminal component – the industrial safety legislation? If it can be shown that this component is or can be made effective in preventing accidents, it would be unnecessary to depend on the compensation laws for industrial safety. The compensation system can then be modified to facilitate loss spreading better, without having to compromise the latter objective with that of accident prevention. It will be submitted that this is indeed so, that is, the future of industrial safety in Hong Kong lies in the improvement of regulatory safety legislation and the framework in which it operates.

While the compensation system may operate to deter accidents by way of general deterrence, industrial safety legislation is a method of specific deterrence. Various safety precautions are prescribed, and the failure to observe them is made a criminal offence. As pointed out near the beginning of this essay, even a specific deterrence approach depends for its effectiveness on normal market incentives. The higher the chance of a violation of safety regulations being detected and the more severe the consequent punishment, the greater is the inducement to comply with the regulations. This of course ignores the possibility of humanitarian considerations for life and limb overriding market considerations for profit, but it is probably safe to assume that in Hong Kong at least, industrial undertakings are run in accordance with economic rather than moral principles. The assumption is also justified in view of the findings in the UK that the determining factors in the introduction of safety policy and equipment by firms are profits and costs.[25]

Thus there seems to be much sense in the common sense reaction to the problem of industrial accidents that the answer lies in more stringent

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21 See *Compensation for Personal Injury in New Zealand, Report of the Royal Commission of Inquiry* (New Zealand Government Printer, 1967) (hereafter referred to as the New Zealand Report), 51, note 24.

22 Robens Committee, *Report on Safety and Health at Work* (1972, cmnd 5034) (hereafter referred to as the Robens Report), 142. See 144-146 for the reasons.

23 The points raised by the Robens Committee were considered by the Pearson Commission: Pearson Commission, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd 7054) (hereafter referred to as Pearson Report), vol 1, 193-7, paras 906-922.

24 The Pearson Report, 193, para 908; 203, para 950.

25 Grayson and Goddard, *Studies for Trade Unionists*, vol 1, No 4 (1976), containing a survey of the safety performance of British employers, quoted in Neil Cunningham, 'The Industrial Safety Health and Welfare Act 1977 – A New Approach?' (1978) 6 University of Tasmania Law Review 1, 12-3. But see also Atiyah, op cit, 553-555.

enforcement of safety laws by more inspections, more prosecutions and heavier punishment.[25a] However, the conventional approach of factory inspectorates in many countries, including the UK, Australia and Hong Kong, has been to place the emphasis on persuasion, advice and assistance rather than rigid enforcement of the letter of the law by prosecutions. Thus the 'pusillanimous' approach of the Inspectorate and the 'pathetic' number of prosecutions in Britain have been criticised,[26] and it has been said that the Factory Inspectorate in Hong Kong is open to the same criticism.[27] In Australia a writer has stated: 'Fines will not act as a deterrent until employers have more to lose by infringing the regulations than by complying with them. Only when the whole philosophy of the Inspectorate has been changed from one of co-operation and persuasion of industry, to one of industrial police force, can this be achieved. This will require not only allocation of substantially increased resources, supported by court action and stiffer fines, but also the breakdown of the cultural tradition on which the Inspectorate operates.'[28]

One question therefore is whether society can afford the resources that this coercive instead of persuasive approach necessitates. The same author from whom the passage above is quoted admits 'the political unlikelihood of sufficient resources being allocated to the Inspectorate'.[29] In reply to letters in the press urging for stricter enforcement of safety laws by the Factory Inspectorate in Hong Kong, the Labour Department has pointed out that 'no society can afford a large inspectorate to police all the workplaces all the time'.[30] Another important point was raised by the Robens Committee in Britain in its Report on Safety and Health at Work in 1972. 'In the submissions made to us there was a very considerable body of opinion to the effect that the sanctions of the criminal law have only a very limited role to play in improving standards of safety and health at work.... The real need is for a constructive means of ensuring that practical improvements are made and preventive measures adopted. Whatever the value of the threat of prosecution, the actual process of prosecution makes little direct contribution towards this end. On the contrary, the laborious work of preparing prosecutions – and in the case of the Factory Inspectorate, of actually conducting them – consumes much valuable time which the inspectorates are naturally reluctant to devote to such little purpose. On the other side of the coin – and this is equally important – in those relatively rare cases where deterrent punishment is clearly called for, the penalties available fall far short of what might be expected to make any real impact, particularly on the larger firms.'[31] As to the view 'that inspectors should pursue a policy of rigorous enforcement, utilising the sanctions of the law widely and to the full', the Committee wrote: 'This is an argument which seems to us misconceived. Even if it were feasible, it would be generally inappropriate and undesirable, for the reasons [discussed just above]. But in any case it is not feasible. There are far too many workplaces, and far too many regulations applying to them, for anyone to contemplate anything in the nature of continuous official supervision and rigorous enforcement.'[32]

There are therefore two separate but related questions here. Firstly, should sanctions of some sort be more widely used against suspected offenders

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25a These have been called for by, for example, the Christian Industrial Committee (SCMP, Jan 17, 1980), 10 labour organisations (MP, Mar 17, 1980), 8 student organisations (Mp, Mar 16, 1980), newspaper editorials (e.g. SCMP, April 17, 1980), Dr Ho Kam-fai in the Legislative Council (SCMP, April 17, 1980) and Mr Barry Choi in 'Getting Across Industrial Safety Message', SCMP, June 5, 1980: 'Of the many improvements, the need to raise the currently ridiculously low penalties for offending employers . . . to a realistic punitive level must rank the highest in any list of priorities and should be introduced henceforth.' The Christian Industrial Committee also recommended the inclusion of imprisonment and the cancellation of licences in sanctions against defaulting employers. The Labour Department has since disclosed that the maximum penalties for employers who broke industrial safety laws were under review, and the results of the review would be ready later in 1980 (SCMP, May 17, 1980).

26 K.W. Wedderburn, *The Worker and the Law* (Penguin, 2nd ed, 1971), 258, quoting a letter to The Times.

27 England and Rear, *Chinese Labour Under British Rule* (Hong Kong: OUP, 1975), 194.

28 Neil Cunningham, op cit, 18.

29 ibid, 19.

30 SCMP, Aug 7, 1979.

31 The Robens Report, op cit, 80-82.

32 ibid, 64.

of safety regulations? And secondly, what type of sanction should be used? It is submitted that the answer to the first question is 'yes'. The fact that it is practically impossible to supervise each workplace continuously and to enforce the regulations strictly in all workplaces does not mean that no good can flow from strict enforcement of the law by immediate prosecution and heavy penalty in respect of the workplaces (although small in number) that are actually visited by inspectors. This at least would have a deterrent effect on other workplaces not so inspected. However, as to the second question, the Robens Committee's recommendation about the discriminating use of criminal and administrative sanctions deserves support.[33] This is to the effect that criminal proceedings should, as a matter of policy, be instituted only for infringements of a type where the imposition of exemplary punishment would be generally expected and supported by the public, i.e. offences of a flagrant, wilful or reckless nature which either have or could have resulted in serious injury. In other cases greater reliance should be placed on non-judicial administrative techniques exerting pressure in a form that is positive, constructive, quick and effective for ensuring compliance with safety regulations.[34]

It will be recalled that the administrative sanction provided by section 11 of the FIUO is seldom invoked in Hong Kong. Similar powers under the Factories Act 1961 in the UK are also rarely used, although there does not appear to be any evidence that the procedure is ineffective.[36] The Robens Committee attributed this reluctance to use the powers 'largely to the fact that the powers are too narrowly circumscribed, and often too drastic to meet the needs of particular cases. Even where their application would be clearly appropriate, it would seem that lack of familiarity with these techniques has made inspectors very chary of using them.'[37] Such an explanation probably also applies in Hong Kong. Following the recommendations of the Robens Committee,[38] two new administrative sanctions were introduced by sections 21 and 22 of the Health and Safety at Work Act 1974. They take the forms of Improvement Notices and Conditional Prohibition Notices issued by inspectors and subject to appeal before industrial tribunals.

Inspectors in the UK now have the power, without reference to the courts, to issue a formal Improvement Notice to an employer requiring him to remedy particular faults or to institute a specified programme of work within a stated time limit. The justification for, and merits of, the directions included in the Notice would be open to discussion and argument only on appeal, which lies to an industrial tribunal.[39] 'Inspectors themselves – who naturally attach importance to the preservation of good working relationships with employers – would be less likely to feel inhibited about issuing Improvement Notices in appropriate circumstances if any challenge to them had to be discussed in the atmosphere of an expert administrative tribunal rather than in the atmosphere of a criminal court.'[40] The tribunals are not concerned with enforcing compliance with Notices, nor with imposing penalties. Their sole task is to consider the reasons and circumstances leading to the issue of the Notice and to confirm, reject or vary it. If the employer neither appeals successfully nor complies with the requirements of the Notice within the time limit provided for remedial action, the case is brought before the court. The issue before the court at this stage is confined to the question of whether or not the directions given in the Notice have been complied with. Unless compliance with the directions can be shown, the prescribed penalty in the form of a fine follows automatically.[41] There is also a continuing daily fine for each day of non-compliance beyond the terminal date of the Notice.[42]

An alternative and stronger power is available to the inspector for use where he considers the case

33 See also the Law Commission's similar recommendations, Law Commission Working Paper No 30, *Codification of the Criminal Law: Strict Liability and the Enforcement of the Factories Act 1961* (1970), 53-65.
34 The Robens Report, op cit, 82-3.
35 ss 54, 55, 157, Factories Act 1961; the Robens Report, op cit, 83; Law Commission Working Paper No 30, op cit, para 49.
36 Law Commission Working Paper No 30, op cit, para 64.
37 The Robens Report, op cit, 83, para 267.
38 ibid, 84-6.
39 See s 24, Health and Safety at Work Act 1974.
40 The Robens Report, op cit, 85, para 272.
41 See s 33(1)(g), (2), Health and Safety at Work Act 1974.
42 See s 33(5), Health and Safety at Work Act 1974.

for remedial action to be particulary serious. This is the Prohibition Notice. The procedure is the same as for Improvement Notices, with the important variation that the Notice itself contains a direction that, in the event on non-compliance within the stated time limit, the use of specified plant, machinery, processes or premises must be discontinued, or continued only under specified conditions. Again, the merits of the directions in the Notice are open to argument only on appeal, the procedure for which is the same as in the case of Improvement Notices. Where there is neither a successful appeal nor compliance with the Prohibition Notice, the employer is liable not only to pay a fine but also to imprisonment as well.[43] Cases where there might be justification for an immediate prohibition is also provided for. Where, in the judgement of the inspector, 'the risk of serious personal injury is, or, as the case may be, will imminent',[44] the inspector has the power to issue a Prohibition Notice specifying that the prohibition is effective forthwith. The employer can then make immediate application for revocation or variation of the Notice.

It is submitted that these new and improved enforcement mechanisms are, in the words of the Robens Committee, 'both more effective and more constructive than present procedures'[45] and should be introduced in Hong Kong. To quote again from the Report of the Committee, 'What we recommend would not be so very different in practice from the way inspectors tend to operate at present when faced with an unsatisfactory situation. They warn, indicate what should be done, follow up, and may eventually prosecute if remedial action is not taken. The trouble at present is that the stages of this ad hoc procedure are insufficiently clear to those concerned. The steps leading eventually to prosecution are not sufficiently distinguishable at the outset from what happens in less serious cases, and are unlikely to be widely perceived within industry as part of a process which will inevitably culminate in the imposition of a substantial penalty unless something is done. Under the procedure that we recommend, an offending employer would be left in no doubt. He would have the choice of doing what was required of him, or of challenging the inspector's judgement before a tribunal. Simply to do nothing would not be an attractive alternative.'[46]

The Robens Committee has come up with many other sensible recommendations after its review of the law and practice of industrial safety in the UK in 1972. Its main recommendations were implemented by the introduction of the Health and Safety at Work Act 1974.[47] It is not feasible to discuss the whole Act here. Indeed not every part of it is relevant to Hong Kong, since one of its objective is to bring the existing piecemeal safety legislation administered by agencies with overlapping jurisdictions in the UK into an integrated, coherent and comprehensive whole. But many aspects of the Act do afford excellent guidance in the shaping of Hong Kong's future industrial safety legislation. While these aspects will not be discussed in detail here, it is proposed to outline the major theme underlying the Robens approach and how it is illustrated in the new Act.

According to the analysis of the Robens Committee, the existing system of arrangements and activities seeking to protect and promote the safety and health of people at work can be seen as comprising two very broad elements: regulation and supervision by the State, and industrial self-regulation and self-help. 'The most fundamental issues before us are concerned with the relationship, balance and interaction between these two broad elements.'[48] The Committee believed that the most important single reason for accidents at work is apathy.[49] 'This attitude will not be cured so long as people are encouraged to think that safety and health at work can be ensured by an ever-expanding body of legal regulations enforced by an ever-increasing army of inspectors. The primary responsibility for doing something about the present levels of occupational accidents and disease lies with those who create the risks and those who work with them.'[50] 'The

43 See s 33(3), (4)(d) of above Act.
44 s 22(4) of above Act.
45 The Robens Report, op cit, 86, para 278.
46 ibid, 86-7, para 279.
47 See Richard Howells and Brenda Barrett, *The Health and Safety at Work Act, A Guide for Managers* (London: Institute of Personal Management, 1975); Michael Whincup, *Modern Employment Law* (London: Heinemann, 1976).
48 The Robens Report, op cit, 2, para 15.
49 ibid, 1, para 13.
50 ibid, 7, para 28.

most fundamental conclusion to which our investigations have led us is this. There are severe practical limits on the extent to which progressively better standards of safety and health at work can be brought about through negative regulation by external agencies. We need a more effectively self-regulating system. This calls for the acceptable and exercise of appropriate responsibilities at all levels within industry and commerce. It calls for better systems of safety organisation, for more management initiatives, and for more involvement of workpeople themselves. The objectives of future policy must therefore include not only increasing the effectiveness of the State's contribution to safety and health at work but also, and more importantly, creating the conditions for more effective self-regulation.'[51]

Hence the Health and Safety at Work Act 1974 tries to create the 'conditions for more effective self-regulation' by, for example, requiring an employer to 'prepare and as often as may be appropriate revise a written statement of his general policy with respect to the health and safety at work of his employees and the organisation and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision of it to the notice of all of his employees',[52] and to provide 'such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees'.[53] The Secretary of State is empowered to make regulations providing 'for the appointment in prescribed cases by recognised trade unions [within the meaning of the regulations] of safety representatives from amongst the employees',[54] and for 'the election in prescribed cases by employees of safety representatives from amongst the employees'.[55] 'It shall be the duty of every employer to consult any such representatives with a view to the making and maintenance of arrangements which will enable him and his employees to co-operate effectively in promoting and developing measures to ensure the health and safety at work of the employees, and in checking the effectiveness of such measures.'[56] The safety representatives represent the employees in consultations with the employers.[57] 'In such cases as may be prescribed it shall be the duty of every employer, if requested to do so by the safety representatives, to establish, in accordance with regulations made by the Secretary of State, a safety committee having the function of keeping under review the measures taken to ensure the health and safety at work of his employees and such other functions as may be prescribed.'[58]

Another important innovation of the Act is that employers can now be prosecuted for breach of a general duty to 'ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees'.[59] Such a duty has previously existed at common law, rendering employers subject to civil liability in common law damages for breach of the duty. But this latter liability only arises when injury is caused as a result of a breach. The creation of a new criminal offence in this area means that the employer may be criminally liable even though no accident or injury has occurred.

It is high time that Hong Kong gave serious consideration to the adoption of the Robens approach. No one would suggest that the English legislation should be wholly imported without taking into account local conditions. But since Hong Kong law is basically derived from English law, any new developments in the British system do merit consideration. Hong Kong may decide to follow an English development or decide not to, but should not ignore it altogether. For example, it may not be practicable to require every industrial employer in Hong Kong to set out written statements of their safety policies. On the other hand, the compulsory establishment of safety committees and appointment of safety personnel in factories and construction sites deserve more serious thoughts. These have in fact been repeatedly called for in letters to the editors and editorials in the local press,[59a] by the Christian

51 ibid, 12, para 41.
52 s 2(3), Health and Safety Act 1974.
53 s 2(2)(c).
54 s 2(4).
55 s 2(5).
56 s 2(6).
57 s 2(4), (5).
58 s 2(7).
59 s 2(1). See also s 2(2)(a), (b), (d), (e), s 33(1)(a).
59a 'The setting up of committees, or the appointment of industrial safety officers (whose work could also include fire prevention) is a compelling need if the rate of accident is to be reduced and Hong Kong's bad image corrected.' Editorial, SCMP, April 17, 1980.

Industrial Committee,[59b] the Industrial Relations Institute,[59c] a number of labour organisations[59d] and also by a Legislative Councillor.[59e] Safety committees are not only envisaged by the English Health and Safety at Work Act 1974 but also legally required in prescribed circumstances in nearby countries like Japan and Singapore. They enable representatives of both labour and management to meet periodically to discuss safety and health problems and measures and to formulate and implement safety policy. The high turnover rate in the industrial labour market in Hong Kong may present an obstacle to the effective functioning of safety committees in Hong Kong, but it is by no means certain that the difficulty is insurmountable. It may therefore be worthwhile to experiment with such committees in Hong Kong. Despite the public pressure, Government has not yet taken any positive legislative steps in this direction, although the Labour Department has pointed out that Government encourages the setting up of industrial safety committees at plant level and that inspectors will help in setting them up and advise them.[59f] As for safety officers, it has recently been disclosed that legislation requiring large companies engaged on hazardous projects to employ full-time safety officers for the supervision of the overall maintenance and enforcement of safety regulations is being considered by the Labour Department. Similar laws have already been in existence in countries like Britain, Japan and Singapore.[59g]

It is not only submitted that the Robens approach should be thoroughly studied in Hong Kong. We also need to look beyond it, to see its weaknesses and deficiencies and to investigate into the possibilities that the Robens Committee overlooked. For example, it may be doubted whether the Committee's proposals as implemented in the Act go far enough to establish an effective framework for self-regulation for safety on the level of employers and employees. One basic assumption of the Robens approach is that safety is a matter of joint concern to management and labour. In the words of the Robens Report, 'there is a greater natural identity of interest between "the two sides" in relation to safety and health problems than in most other matters. There is no legitimate scope for "bargaining" on safety and health issues, but much scope for constructive discussion, joint inspection, and participation in working out solutions.'[60] Since the Committee perceived no basic conflict of interests between management and labour as far as safety is concerned, it did not provide for a legal machinery for the enforcement of the worker's right to a safe and healthy working environment by the workers themselves. This may be considered the greatest defect in the Robens approach.

To quote an Australian author, 'perhaps because the Robens Committee did not consider the relationship between costs and safety, their approach is substantially misconceived. By assuming a community of interest between employers and employees in reducing accidents, by relying almost entirely on voluntary self-reliance, they fail to deal adequately with the very substantial range of circumstances in which industry does not have an economic incentive to reduce accidents.'[61] The same author points to the Occupational Safety and Health Act 1970 in the USA for an example of industrial safety legislation based on coercion rather

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59b Ming Pao, Aug 11, 1979; SCMP, Jan 17, 1980.

59c SCMP, Feb 25, 1980. The Institute proposed that factories or construction companies with a workforce in excess of 50 should have a supervisor in charge of industrial safety.

59d MP, March 17, 1980: 43 organisations recommended the establishment in large factories of safety committees and in small factories of safety supervising groups for the trade or the region. SCMP, May 26, 1980: The Joint Committee of Labour Organisations on Industrial Safety, which comprises 41 organisations, proposed to the Umelco's Standing Group on Industrial Safety Relations that safety committees be formed with representatives from Government, labour and management.

59e Dr Ho Kam-fai, MP, March 28, 1980.

59f SCMP, May 17, 1980; see also the speech of Mr J.C. Hammond, acting Commissioner for Labour, at a seminar on industrial safety organised by the Hong Kong Industrial Relations Association, reported in SCMP, April 16, 1980, in which he also recommended the setting up of joint safety committees of management and workers at plant level. The same point has been made by Mr Neil Henderson, Commissioner for Labour in a Focus discussion on TV: SCMP, June 5, 1980.

59g Speech of Mr Henderson, Commissioner for Labour, at a Rotary Club meeting, SCMP, May 21, 1980.

60 The Robens Report, op cit, 21, para 66.

61 Neil Cunningham, op cit, 21-2.

than co-operation, with enforceable rights given to workers enabling action to be taken to prevent accidents.[62] These rights include an employee's rights to require an inspection, to accompany the inspector on his inspection of the workplace, to observe the monitoring of harmful substances and to have access to records of monitoring, to have all citations posted so that employees will know of any violation found by an inspector, to obtain review with the Department of Labour if an inspector fails to issue a citation after employees have provided a written statement of alleged violations, to appeal if the time allowed for abatement of a violation seems unreasonably long, to participate in the standard-setting process by offering evidence and comments on proposed standards, to request the Department of Health to determine whether substances found in the workplace are toxic and to have the Secretary of Labour seek redress for discrimination resulting from the exercise of rights under the Act. The Act has been described as a 'worker's environmental bill of rights'.

It has been said in the local press that 'as long as the Labour Department is working alone and disregards workers' participation, the real problem of industrial safety cannot be solved'.[63] More specifically, it has been advocated that workers should be encouraged to complain to the Labour Department about unsafe working conditions and that such complaints should be facilitated by the setting up of a special working unit which workers can visit or write to and which would take effective actions to deal with the complaints.[63a] A related point concerning the role of workers in industrial safety that has recently been made is that workers who ignore safety precautions should be prosecuted where their employers have already fulfilled their duty of providing safety equipment and educating their workers about safety.[63b] Such prosecutions are at present extremely rare.[63c] One main reason is the difficulty of proof; another is the reluctance of employers to inform against and hence alienate their employees; and workers who suffer injury in consequence of their own neglect to observe safety rules are of course seldom prosecuted. It has also been suggested in this context that 'the onus must be on employers to make sure their workers follow regulations. And when they don't the punishment must be severe, either by docking their pay or by suspending them.'[63d] It is doubtful, however, whether such an approach is fair or practicable. For example, should an employer be strictly liable criminally and prosecuted for his employee's default in compliance with safety regulations which endangers only the latter himself, when the former has done all that he could reasonably have done to facilitate, encourage and ensure compliance with the law? Surely there should come a point where, morally speaking, the employer's responsibility can be regard as having been discharged and the employee has only himself to blame if he carelessly gets himself injured.

The emphasis on workers' participation holds the key to both the recently developed milder British approach and more vigorous American approach to industrial safety, which have been outlined above. Thus if industrial safety in Hong Kong is to be improved, there must first be a legislative framework conducive to workers' participation in the promotion of safety and health at work. This is absolutely necessary, though this would not in itself be sufficient However sound is the structural design of a system no good will come out of it if the people in it do not play their part in the system. Thus the presence of workers' representatives in joint safety committees is useless if the workers themselves remain indifferent towards the question of safety. And it is a sad fact that usually workers themselves are not

62 ibid, 16-23. For the US system, see also Willie Hammer, *Occupational Safety Management and Engineering* (New Jersey: Prentice-Hall, 1976), ch 2, 4; the Robens Report, op cit, 178-9. Appendix 3 of the Report also contains a brief outline of the systems in Canada and West Germany.

63 SCMP, Aug 20, 1979, p 18, letter to the editor.

63a MP, Sept 15, 1979 (letter to the editor); MP, April 9, 1980 (recommendations of 6 trade unions), SCMP, May 17, 1980 (recommendations of the Labour Relations Institute).

63b This has been recommended by the Christian Association for Executives: SCMP, May 26, 1980. Dr Ho Kam-fai in the Legco has called for sterner penalties for workers who defy safety rules: SCMP, April 17, 1980.

63c Among the 3397 prosecutions brought by the Labour Department over neglect in industrial safety in 1979, not one was against a worker: SCMP, May 26, 1980.

63d Editorial, SCMP, May 17, 1980.

the driving force in accident prevention activities throughout the world and are seldom spontaneously interested in safety, even though their lives may be at stake.[64] Even in technically advanced countries, where workers are relatively well off, tremendous efforts are required to make workers safety-minded. It seems that workers are generally more interested in questions of wages, hours of work, holidays, compensation, the closed shop, etc, than in questions of safety. Being accustomed to the working environment and its risks, underestimation of these risks and a false feeling of immunity from them also contribute to the apathy of workers.

Then there is the traditional reluctance of Hong Kong or Chinese people to get themselves in trouble. In the employment stituation, the fear of victimization is probably an important factor. In a visit to Hong Kong of three Labour MP's in 1979, complaints were voiced to them that some workers in Hong Kong are sacked for pressing for rights guaranteed under labour legislation and are also liable to get sacked even if they do nothing more than inquiring about labour laws.[65] Moreover, there is no legislation in Hong Kong as to unfair dismissal similar to that in the UK.

Hence safety legislation however well-drafted will not alone provide a complete solution to industrial accidents in Hong Kong. The problem must be attacked on several fronts. Educational efforts to arouse and intensify interest in industrial safety, especially among workers, are needed. A general improvement in the latter's educational standards will also help. Research has to be done as to the nature and structure of the problem and the effectiveness of various means of control. Safety laws have to be more efficiently and strictly enforced. The security of employment has to be more adequately protected. It is impossible to list everything here. But a primary step that Government should take is fairly obvious – to set up a commission to look in depth into how industrial safety can be promoted in Hong Kong, as the Christian Industrial Committee proposed in 1979.[66]

Accident compensation: Present and future[67]

Since the tort system is seldom used by workers in Hong Kong and workmen's compensation is in practice the most important source of compensation for the Hong Kong worker, our evaluation of accident compensation in Hong Kong will start with the workmen's compensation system.

An obvious weakness in workmen's compensation in Hong Kong lies in the amount of compensation payable. Not only are the maximum amounts payable for death and permanent incapacity – $60,000 and $80,000 respectively – inadequate lump sums; the method of calculating compensation does not take into account factors such as the age and working life expectancy of the accident victim, the nature of his original job and the effect of the injury on his performance in it, or the number of surviving dependants in the case of the victim's death. To put it in another way, the system seeks to compensate the victim's loss but only up to a limited maximum, and its concept of loss is also narrow and rigid, focusing on the extent of the physical injury rather than the economic effect produced by the injury on earning ability. Since the compensation is limited to the maximum lump sum however disastrous is the consequence of the accident, short-term or minor incapacities are better provided for than protracted or serious ones. The employer's financial burden is limited and a simple method of determining the amount of compensation (as compared with that in the tort system) is secured at the expense of the worker's economic security and of justice.

To illustrate this by a somewhat extreme example, suppose that a technician and a clerk were both injured in an explosion in a factory. The technician's right arm and the clerk's right leg were so seriously injured that they had to be amputated, the arm at the shoulder and the leg at the knee. The technician is 25 years old and earning $2500 a month. He has just been married and also has to support his parents, who have just retired. After the

64 International Labour Office, *Accident Prevention* (Geneva: ILO, 1961), 166.
65 SCMP, Sept 12, 1979, p 6.
66 SCMP, Oct 1, 1979, p 16.
67 See also John Miller, op cit.

accident, he received medical treatment and an artificial arm was fitted to him. He can no longer work in his original job, and is only able to find employment in a workshop for handicapped people. He is now earning $700 a month. The accident has thus cost him a loss of earnings of $1800 a month, which will continue for 30 years until he reaches retirement age. Assuming that he is healthy enough to live to that age and disregarding his chances of promotion, which were very bright indeed, the total loss of future earnings he has sustained would be $1800x12x30=$648,000. And not only is his own standard of living affected, but that of his wife and parents is also drastically reduced, and the latter may have to live on social welfare payments.

Let us see how much workmen's compensation this person would receive. The employer would probably have to pay for the costs of the medical treatment and the artificial arm in accordance with the provisions of the WCO. But what would be the compensation for the loss of the arm? The first figure needed is the compensation amount if the permanent incapacity were total. This is the lower of two figures – $80,000 or 48 months' earnings, i.e. $2500x48=$120,000. Hence the figure should be $80,000. Now according to the First Schedule of the Ordinance, the loss of an arm at the shoulder amounts to a loss of earning capacity of 65%. Thus the compensation that the technician would receive is $80,000x65%=$52,000. If we disregard the possible advantage of the amount being paid in a lump sum so that it can be invested for the future, it only compensates for his actual earnings loss for about 2½ years.

Now consider the case of the clerk. He is 50 years old, single, with no dependants to support, and earning $1500 per month. After the accident he was also given medical treatment and fitted with an artificial leg. He is now re-employed at the same job and at the same salary. In accordance with the WCO, the costs of medical treatment and replacement limb were paid by the employer. During his period of absence from work, which lasted for 3 months, compensation for temporary incapacity was paid at two-thirds of his salary. Thus the only economic loss he sustained was $1500x ⅔x3=$1500. Yet he received in addition compensation for permanent partial incapacity for the loss of his leg, which was assessed at $1500x48x70%=$50,400 (48 months' earnings times the scheduled percentage of loss of earning capacity, the figure $1500x48=$72,000 being less than the maximum of $80,000). Since the clerk would in any case be retiring in 5 years' time, and had not originally contemplated moving to another job which would necessitate the use of his right leg, the amount would more than adequately compensate him for the financial burden arising from the inconvenience of having an artificial leg, if we for the moment ignore the pain, suffering and loss of amenities of life involved. Compared with the injured technician and his family, this clerk is obviously in a far better position.

Another common complaint against the system is directed to its practical operation rather than the purely legal provisions. It is that sometimes there is much delay in the payment of compensation by employers, often under the pretext that they have not yet been indemnified by the insurance companies. It seems that the introduction of section 17(2A) of the WCO imposing a surcharge of 5% or $50, whichever is the greater, if payment is not made within 21 days after the agreement as to compensation is approved by the Commissioner for Labour, still does not provide an effective deterrent to delayed payments. If an agreement as to compensation has been made, it can of course be made an order of the Court[68] whereupon it will be enforced by the District Court, but there is the usual problem of delay in court proceedings. The simpler route of the Small Claims Tribunal cannot be used since workmen's compensation awards often exceed $3000. The consequences of delay may be serious since it means that an injured worker or a deceased's family will be left with no income for an uncertain period of time during which their financial needs may be most pressing.

To meet this problem of delay, it has been repeatedly suggested that an emergency fund should be established from which victims of industrial accidents, especially the dependants of a deceased

68 s 17(4), WCO.

worker, can get immediate relief before workmen's compensation is paid.[68a] The Labour Department has since replied that it is not convinced that there is sufficient justification for a separate emergency fund for workers injured at work, since any case of financial hardship that comes to the notice of the Department will be referred to the Social Welfare Department for assistance.[68b]

A further criticism is that no complete security is afforded for the payment of compensation since insurance of the employer against his liability is not compulsory. Although, as has been pointed out before, there were not many cases in the past of failure by employers to pay compensation due to the lack of insurance, it has been pointed out that 'the position regarding failure to pay compensation will probably worsen as compensation rates increase, as hopefully they will, in the future.'[69] The payment of compensation in all deserving cases would only be ensured by a system of compulsory insurance backed up by a central fund equivalent to a Motor Insurers' Bureau to provide compensation in cases where there is no insurance or where the insurance company is able to avoid liability on the grounds of misrepresentation, non-disclosure or breach of condition.

Some of these defects or problems in the existing system can be remedied by reforming the system without changing its basis framework. Since the WCO was introduced in 1953, there has been a fairly regular programme of reviewing the Ordinance on the part of the Government. Amendments have been introduced from time to time. The latest development was the appointment by the Commissioner for Labour of a working party to review the legislation in February 1978.[70] Its terms of reference are: 'To examine the various systems for assessing workmen's compensation including "earning loss" and "physical disability by percentage" and recommend that most suitable for present application in Hong Kong. To examine the various provisions of the Workmen's Compensation Ordinance with a view to identifying those areas which are deficient; and, in particular, to consider whether Workmen's Compensation insurance should be compulsory and whether insurance companies should be required to pay compensation within a given period of the date of judgment. On the basis of what these examinations reveal, to suggest to the Commissioner for Labour what improvements might be made to the Workmen's Compensation Ordinance and what administrative or other measures might be adopted to speed up the processing and the settlement of such cases.'

The report of the working party was submitted to the Commissioner for Labour in December 1978. Some significant changes were recommended by the report, including the extension of the coverage of the Ordinance to all employees, the general introduction of compulsory insurance, improvements in the method of assessing compensation, taking into account relevant factors such as age in the assessment of the loss of earning capacity, substantial increases in the maximum limits of compensation payable and practical measures to speed up the payment of compensation.[71] Although the full details of the report have not been made public, it seems probable that the implementation of all its recommendations would go a long way towards improving the workmen's compensation system to the greatest possible extent while retaining its basic structure.

At the time of writing of this essay, no change in the law has yet been made. However, the Workmen's Compensation (Amendment) Bill 1980 has just been approved by the Executive Council and published in the Government Gazette. It will be

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68a This has been recommended by 6 labour organisations (MP, Aug 6, 1979), 6 trade unions (MP, April 9, 1980), the Industrial Relations Institute (SCMP, May 17, 1980), the Christian Industrial Committee (SCMP, May 30, 1980) and 10 student organisations (SCMP, May 2, 1980). The Christian Industrial Committee has additionally recommended that the family of a deceased worker should be entitled to two-thirds of his normal wages before assessment and payment of workmen's compensation are finally completed (SCMP, Feb 7, 1980), but this is harder to support since the basic principle in workmen's compensation is that compensation is only available on proof of incapacity or death as a result of personal injury arising out of and in the course of employment.

68b Reply of Mr Yiu Yan-nang, acting Assistant Commissioner for Labour, to suggestions made by 10 student organisations on workmen's compensation and industrial safety: SCMP, May 2, 1980.

69 John Miller, op cit, 33.

70 ibid, 52.

71 SCMP, Nov 17, 1978, p 12.

introduced in the Legislative Council on June 25, 1980, and is expected to become law by the end of 1980.[71a] The main proposals in the Bill comprise the following:

1. The Workmen's Compensation Ordinance will apply to all employees irrespective of their earnings levels, and the Ordinance will be retitled the Employees' Compensation Ordinance.

2. The maximum and minimum levels of compensation in fatal cases, cases of permanent incapacity and for the constant attention required as a result of an injury will be raised to reflect the increases in wages, salaries and the cost of living. The age factor will be taken into account by basing compensation on a three-tier scale for the age of the employee at the time of the accident, i.e. employees under 40, between 40 and 56, and over 56 years of age.

3. Any compensation paid to an employee for the cost of constant attention will no longer be deductible from any sum subsequently payable for death following the accidental injury.

4. The Legislative Council will be empowered to vary by resolution the maximum and minimum compensation amounts specified in various sections of the Ordinance.

5. The First Schedule will be repealed and replaced, expanding the categories of injury and raising the percentage figures for the loss of earning capacity in certain cases.

6. Part IIIA of the Ordinance, which deals with the liability of an employer to pay for the cost of supplying and fitting to an injured workman a prosthesis or surgical appliance required by the workman as a result of his injury, will be amended to a large extent. The claim for the cost of the supply and fitting of the appliance required will be made by the Director of Medical and Health Services instead of by the workman himself. Money paid by the employer to the Director will be paid into the general revenue, and from the general revenue the cost of the supplying and fitting of the required appliance will be paid to the employee concerned by the Director. The employer will also be liable to pay for the probable cost of the normal repair and renewal of the prosthesis or surgical appliance during a period of 10 years after the date on which the appliance is originally fitted, subject to a maximum limit in amount. After the 10 year period the cost of repair and replacement will be borne by the Government. A Prostheses and Surgical Appliances Board will be established to deal with some administrative aspects.

Government has also recently disclosed that a second Bill will be introduced later in 1980 to impose penalties on lawyers and insurance companies responsible for delays in making workmen's compensation payments.[71b] The fate of the recommendation on compulsory insurance remains as yet uncertain, although it has been said that it is being actively considered by Government.[71c]

There will remain certain problems inherent in the workmen's compensation system which are difficult to remove without fundamental changes affecting the system. First of all, demarcation problems concerning the classification of contracts and the causes of accidents are inevitable so long as the system seeks only to compensate employees to whom 'personal injury by accident arising out of and in the course of the employment' is caused.[72] Secondly, it is difficult to apply general workmen's compensation concepts to industrial diseases, where the fixing of liability on individual employers is

71a SCMP, June 3, 1980; June 5, 1980; June 14, 1980.

71b SCMP, June 5, 1980, reporting a TV Focus discussion in which Mr Neil Henderson, Commissioner for Labour, disclosed this.

71c Speech of Mr J.C.A. Hammond, acting Commissioner for Labour, at an industrial safety conference organised by the Labour Department's Accident Prevention Bureau and the Committee on Industrial Safety, SCMP, March 26, 1980; letter of Mr Yiu Yan-nang, acting Assistant Commissioner for Labour, to the Hong Kong Federation of Catholic Students, SCMP, May 2, 1980.

72 See Albert H.Y. Chen, op cit; John Miller, op cit, 30-2; the New Zealand Report, op cit, 81-3; see also the section of this essay on the WCO.

particularly inappropriate. In the words of the Beveridge Report,[73] 'the onset of disease is often gradual. If a workman has been engaged by a number of employers in succession, it may be difficult or impossible to decide with any certainty in which particular employment his disease began. There is risk, moreover, that an employee showing symptoms of an industrial disease may be discharged. Difficulties are experienced also, when an employee affected by disease of a recurrent nature changes or seeks to change his employment between successive attacks.'[74]

Thirdly, if compulsory insurance is introduced, it will be questionable whether the present system of administration by private insurance companies should be allowed to continue its existence. The Beveridge Report is of the opinion that 'the costs of administration are higher in relation to workmen's compensation than they need be or than they are in compulsory social insurance'.[75] Its recommendation for the replacement of the workmen's compensation scheme by a national insurance scheme administered by the State was subsequently implemented in the UK. The Woodhouse Report in New Zealand[76] argues on three levels against the continuation of the private enterprise in the administration of the workmen's compensation system and for its central administration by the State as a social service. The first argument is related to the first of the nine criticisms of the workmen's compensation system in the Beveridge Report. 'The present system rests in the last resort upon the threat or the practice of litigation: a misfortune which is often not in any sense the fault of the employer and which he could not have prevented, is treated by methods applicable to fault. This method imports the risk of contention between employer and employee and of legal expenses on a scale exceeding that of the other forms of social security in this country or of compensation for industrial accident or disease in other countries.'[78] The Woodhouse Report points out that 'today nobody would argue that the regular administrative decisions required in any new social programme should be resolved by the techniques of private litigation. But the compensation scheme in New Zealand still has to accomodate itself to adversary procedures and attitudes. It retains the employer as a notional defendant, and refers to claims and to plaintiffs, and still clings to common law ideas of establishing liability when it would be more accurate and less contentious to talk of the statutory rights of injured workers and the acceptance of statutory responsibilities in respect of them. . . . It is true that long experience has enabled those who handle the claims to arrange settlements out of Court in the great majority of cases. However compromises cannot always be in the best interests of the injured workman, nor can they always avoid contention or friction with the employer. For both reasons the system cannot be desirable. . . . But even if employers are excluded from compensation proceedings the adversary atmosphere will remain for so long as private enterprise has a stake in the outcome of each of the claims. Private organisations cannot reasonably be expected to disburse their stock-in-trade (in this case their funds) on the basis that the injured man should be treated generously or given the benefit of most reasonable doubts.'[79]

The second argument relates to the cost of handling workmen's compensation by private enterprise. The Report refers to the Canadian experience of setting up ad hoc bodies, the sole responsibility of which was to give attention to the prevention of accidents, the rehabilitation of injured work people, the collection of appropriate levies from employers, and disbursement of the fund so set up by non-contentious administrative procedures to those entitled.[80] 'The evidence is conclusive that they need no more than 10% of levies made upon employers to cover all the costs of administration; and this includes a significant annual amount for education in the prevention of accidents.'[81] On

73 Sir William Beveridge, *Social Insurance and Allied Services* (1942, cmd 6404) (hereafter referred to as the Beveridge Report). For the significance of the Beveridge Report, see the section of this essay on the WCO.

74 The Beveridge Report, ibid, 37, para 79(viii).

75 ibid, 37, para 79(vii).

76 i.e. the New Zealand Report.

77 For a consideration of all of the criticisms (the Beveridge Report, op cit, 36-38, paras 79-80) and their application to the Hong Kong workmen's compensation system, see England and Rear, op cit, 201-204.

78 The Beveridge Report, op cit, 36, para 79(i).

79 The New Zealand Report, 85-6, paras 202-5.

80 The New Zealand Report, ibid, 87, paras 207-8.

81 ibid, 89, para 213.

the other hand, in New Zealand the administrative cost of the system was about 4 times as much. 'The New Zealand method of handling the whole problem by 62 individual insurance companies results in much inevitable duplication of organisation up and down the country. This diversion of energy, time and money together with the normal process of competition makes it inevitable that the ratio of expenses to compensation must be high.'[82] Similar complaints about the expensive operation of the similar workmen's compensation system in Australia have also been voiced.[83] There seems no doubt that the Hong Kong system shares the same disadvantage of a high administrative cost, for, as has been noted earlier in this essay, about half of the total amount of insurance premiums paid is absorbed by management expenses. This can be contrasted with the Traffic Accident Victims Assistance scheme administered by the Social Welfare Department and financed from levies on vehicles and driving licences and from General Revenue, where the administrative cost is estimated at about 3% of the money coming in,[84] and with the system of national insurance for industrial injuries in the UK, where the administrative cost is about 11% of the money flowing into the system.[85]

The third argument stems from the existence of compulsory insurance. 'It is said that the State should hesitate before interfering with private enterprise in what is claimed to be a legitimate field of operation. However, we think there is much confusion of thought about this matter. It is our opinion that private enterprise can have no claim to handle a fund such as the compulsory fund in New Zealand which has arisen not because employers have been persuaded to provide the business, but because Parliament has ordained that employers must do so.'[86] As the Woodhouse Report in Australia[87] puts it, 'the whole basis of private enterprise competition is that there is something to compete about. Yet the employer (with few exceptions) is compelled to purchase workers' compensation insurance. The law demands it and the business is thus handed to the insurers automatically. . . . "I argue that money which is legally required to be paid is public money. . . " We are convinced that private enterprise has no claim at all to handle and disburse the funds so aptly described by Mr Batt as "public money"; and we think that what is really a general scheme of social insurance for work-connected injuries is an inappropriate field of activity for private insurers. In saying so we do not criticize the insurance industry as such. It has an essential function in the economic life of the community: but social welfare insurance is certainly not a part of that function.'[88]

One last weakness inherent in the basic framework of the workmen's compensation system in Hong Kong is that it does not provide for and contributes nothing to rehabilitation – the restoration of the injured employee to the greatest possible degree of production and earning as soon as possible, which can be said to be the most important purpose of all. In the words of the Beveridge Report, 'this failure was a natural, perhaps an inevitable, consequence of the principle adopted, of fixing liability for compensation on the individual employer'.[89] It may be noted that it is both possible and feasible to combine the functions of accident prevention, compensation and rehabilitation in one institution, as the Canadian scheme mentioned above illustrates.

Having completed this rough evaluation of the workmen's compensation system, we shall now turn to the other two channels of compensation, the tort system and social security. Each of these is an important area in a modern legal system and deserves detailed research and debate as a subject in its own right. This essay is not an appropriate place for such a full discussion. In what follows, therefore, only a few major themes in modern evaluative analyses of these systems will be outlined.

Every student of the law of tort would know about how its whole edifice has been attacked in this

82 ibid, 89, para 214.
83 The Australian Report, op cit, vol 1, 86-7, paras 200-203.
84 John Miller, op cit, 51.
85 Calculated from the figures in P.S. Atiyah, *Accidents, Compensation and the Law* (London: Weidenfeld and Nicolson, 2nd ed, 1975), 465.
86 The New Zealand Report, op cit, para 209; see also para 210.
87 i.e. the Australian Report, op cit.
88 The Australian Report, vol 1, 85-6, paras 198-9.
89 The Beveridge Report, op cit, 37, para 79(ix).

century and how its underlying basis in the law of negligence has been challenged.[90] The many substantial, procedural and administrative defects or drawbacks in fault-based liability have been well-documented in modern legal literature. They may be briefly outlined as follows. First, whatever the original merits of the fault principle might have been, it can no longer be justified in a situation where the mechanism of third-party insurance is freely available and widely used. This is because compensation is no longer paid out of the pocket of a negligent 'wrongdoer' but paid instead out of an insurance fund which pools the resources of a class of persons in a certain risk category, so that liability is distributed and shared between all such insurance policy holders, whether negligent or accident-causing or not. 'Against this background the search for negligent defendants who might deserve to pay is really a search to control the aggregate sum that will become payable.'[91] The following ridiculous state of affairs therefore ensues. 10,000 people contribute equally to an insurance fund. They pay a premium of, say, $100 a year. The fund thus amounts to $1,000,000. Out of this, the insurance company takes $400,000, being administrative costs, legal fees and profits. It is estimated that the $600,000 left will be paid out as tort damages. During the year a total of 10 people are injured as a result of the activities of the 10,000 insurance policy holders. Among these 10 persons, only one, a Mr Lucky, is able to identify the person responsible, who is Mr Negligent, prove in court that the latter has been negligent (while the latter cannot show that Mr Lucky is contributorily negligent) and hence recover his full losses of $600,000. The other 9 fail to get anything by way of compensation from the tort system. This is of course a highly simplified illustration of how the system works, but it does serve to make the point: Why should Mr Lucky be entitled to $600,000 and the other 9 people not a single cent? Is it because he has been injured by Mr Negligent? But the $600,000 has not come from Mr Negligent alone. The truth is that Mr Lucky has been allowed to exact $60 from each of the 10,000 insurance policy holders. Just because he has been 'lucky' enough to be injured by Mr Negligent, instead of, as it happens to some of the other 9 victims, by a Mr Non-Negligent or Mr Anonymous. Mr Lucky is no doubt the winner of the 'forensic lottery',[92] but is this justice? The position has been thus summarised: 'The fault principle cannot logically be used to justify the common law remedy and is erratic and capricious in operation. The remedy itself produces a complete indemnity for a relatively tiny group of injured persons; something less (often greatly less) for a small group of injured persons; for the rest it can do nothing.'[93]

Apart from the inequality of treatment received by accident victims, the difficulty of succeeding in a tort action, and the wasteful absorption of resources in insurance administration and court work, the tort system contains numerous other hidden defects. The award of damages presents a major problem. Judges are called upon to perform the impossible task of forecasting the future when estimating future loss of earnings. Formal justice and consistency are obviously hardly attainable in this area. The lump sum award, moreover, is final and hence inflexible, and from the point of view of the victims' interest, is sometimes unwisely expended in a short time. Court action is always a slow process. The delay, uncertainty and suspense involved is not only financially disadvantageous for a potential or actual plaintiff but may even give rise to a disease known as anxiety neurosis. Finally, a portracted court action usually has an adverse effect on rehabilitation, since the worker fears that return to normal work would reduce the amount of damages to be awarded. These are all defects from the perspectives of compensation and rehabilitation. And if, as has been suggested earlier in this essay, the contribution of the tort system to the deterrence of accidents is minimal, the justification for the continual existence of the system is questionable indeed.

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90 See, for example, Hepple and Matthews, *Tort, Cases and Materials* (London: Butterworths, 1974), 11-24, 667-729; Rogers, *Winfield and Jolowicz on Tort* (10th ed, 1975), ch 1; Fleming, *The Law of Torts* (5th ed, 1977), ch 1, 19; the New Zealand Report, op cit, Part 3; K.W. Wedderburn, op cit, 294-301; John Miller, op cit, 4-22; Jeffrey O'Connell and Roger C. Henderson, *Tort Law, No-Fault and Beyond* (New York: Matthew Bender, 1975); Calabresi, op cit, Parts IV, V.

91 The New Zealand Report, op cit, 50.

92 The title of a book on the tort system: T.G. Ison, *The Forensic Lottery* (London: Staples Press, 1967).

93 The New Zealand Report, op cit, 77.

Finally, a few words must be said about social security. This is still in a primitive stage of development in Hong Kong, aiming at subsistence rather than loss or income replacement. As such there is not much to 'evaluate', and it suffices to point out that the question for the future is whether it may be developed into a system which overlaps with or ultimately replaces the present systems of workmen's compensation and tort. The latter course has been the development in the sphere of 'personal injury by accident' in New Zealand.[94] In the United Kingdom, a less radical course has been charted by the Pearson Commission on Civil Liability and Compensation for Personal Injury.[95] It recommended that the two systems of tort and social security should continue side by side, and that the relationship between them should be significantly altered so that social security is recognised as the principal means of compensation. Thus the injured English worker would be entitled to no-fault compensation from the industrial injuries contributory insurance scheme as well as to claim damages in tort against his employer, although double compensation would be avoided by offsetting social security benefits in the assessment of tort damages. In Hong Kong, an academic lawyer has pointed out that 'the only rational solution is the complete abolition of the negligence and workmen's compensation systems and their replacement by one co-ordinated scheme whereby accident victims are compensated regardless of fault'. He has recommended that Government should follow the steps of the UK, Australia and New Zealand and appoint a commission 'to formulate a modern, realistic approach to the compensation of all accident victims in Hong Kong'.[96]

As far as the lawyer's technical considerations of formal justice, fair compensation and administrative efficiency are concerned, the social insurance approach seems far superior to workmen's compensation or tort. However, it must be remembered that the question 'how much social security' is in the final analysis a socio-policital question. The following passage by an English author is also clearly applicable to Hong Kong: 'The choice for the future lies between the basically individualistic approach of the common law (whether reformed or not) and the collective approach of social security or some similar method for providing all injured persons with a right to compensation from some central fund. Looked at solely from the point of view of the most efficient distribution of the money available for compensation, the arguments are all in favour of the social security approach. But in the end the question is one of social policy and even of politics: of deciding what proportion of its wealth society can, and should, spend on the assistance of the victims of misfortune.'[97]

Guidelines for the future

The major purpose of this essay has been stated at the outset to be 'to state analytically and objectively the present situation and then to open up future possibilities' in respect of 'the law and practice in relation to industrial accidents here'. This is a convenient place to recall what has been covered so far. Up to this point, the emphasis all along has been descriptive rather than prescriptive; even suggestions or recommendations have not been precisely formulated and definitely directed to specific areas. It is therefore proposed now to state summarily in a point-by-point fashion the major implications for future legislative action that have been directly or indirectly touched upon so far. As this essay is written primarily for the lawyer, the following points will be mainly addressed to the lawyer interested in the role played by the law in relation to industrial accidents and the role he himself can play in participating in the making of law.

1. Law is to be understood or interpreted as a means by which society seeks to achieve certain ends. Before a piece of law can be evaluated, the relevant ends that society wants to realise must first be discovered. Unless this is done, any criticism or

94 See the New Zealand Report, op cit; Fleming, op cit, 390; Rogers, op cit, 9.

95 *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (Pearson Commission) (1978, cmnd 7054). See especially vol 1, Part VII, for the summary of conclusions and recommendations. Volume 3 contains a valuable collection of information about systems of compensation in various parts of the world.

96 John Miller, op cit, 55.

97 Rogers, op cit, 11.

defence of any piece of law can only be vague and muddled thinking. The determination of ends is not a legal problem; it usually raises complex political, economic and social issues. The lawyer cannot in his capacity as a lawyer find out the solutions to problems surrounding the proper ends for the law to pursue. It is in fact doubtful whether 'solutions' as such exist in relation to such problems. What are required seem rather to be value judgements as to the relative priority of different and often conflicting interests that co-exist in a complex and highly differentiated modern society.

2. After the postulation of certain ends that are to be achieved, the lawyer's task begins. This is to evaluate the extent to which the existing law fulfils the objectives associated with those postulated ends, and, if the existing law is found to be functionally deficient in this respect, to suggest possible reforms and to design new legal techniques to make the law more efficiently functionally.

3. In carrying out the above task the lawyer must not forget that the law may not be the only available means to achieve the desired ends and that other non-legal means may also be effective.

4. So much for the jurisprudential background to this discussion of industrial accidents. Applying the theory to this problem, the first step is to determine or clarify what exactly are the social goals that industrial accident laws should seek to achieve. It can be seen that there are two major goals: First, the control of the amount of industrial accidents that occur in society. Second, the compensation of victims of industrial accidents. There are two associated political or economic questions: To what extent is the number and severity of industrial accidents to be reduced? To what extent are industrial accident victims to be compensated?

5. As to the first question, two alternative approaches are possible. The first has been termed 'general deterrence', which proposes that a certain 'optimum' level of accidents can be reached by appropriate allocation of the accident costs of various activities according to some economic considerations. However, the better view seems to be that the theory encounters too many theoretical and practical difficulties to be workable. Thus we are left with the second approach, that of 'specific deterrence'. According to this, society must decide collectively the morally tolerable level of accidents, and then use penal or similar methods to achieve this goal. The main method in the area of industrial accidents is regulatory safety legislation.

6. The second question is more directly one of political philosophy or social policy. Since accidents, or industrial accidents for that matter, can never be totally eliminated, society must decide how to distribute the accident costs – that is, to what extent accident costs should be transferred from the accident victims to other members of society. Accident compensation law is the means to effect this re-distribution or sharing of losses.

7. Although it is theoretically arguable that accident compensation law may have a deterrent effect on industrial accidents, empirical evidence in countries with employers' liability in tort or workmen's compensation does not afford support to this proposition. Thus the lawyer is liberated from the problem of conflicting objectives in a mixed system of legal control and left free to design accident compensation law with the sole objective of achieving the desirable distribution of losses and to engineer safety regulations with the sole aim of controlling industrial accidents.

8. Assuming that the level of industrial accidents in Hong Kong is much too high and needs to be reduced, the following basic steps are recommended. Firstly, more stringent enforcement of safety legislation, which should be constantly revised to improve its comprehensiveness and technical effectiveness in promoting safety, coupled with higher statutory penalties, is indispensable. This can produce a quick and strong deterrent effect by way of exemplary punishment. However, the morally acceptable extent to which penalties can be increased is quite limited, since principles of retributivism, justice or fairness would not permit draconian punishment for offences which are not particularly grave form the moral point of view however great is the potential deterrent effect in utilitarian terms. The second recommended step is the consideration of the recommendations of the Robens Committee on Health and Safety at Work, which have already been adopted in the English Health and Safety at Work Act 1974. In particular, the new administrative sanctions of the Improvement Notice and the Conditional Prohibition Notice may be quite useful, and the legislative steps for the creation of conditions for industrial self-

regulation in safety (such as those concerning the safety representative and the safety committee) are worth following in Hong Kong. Thirdly, it is necessary to go beyond the Robens approach and consider the creation of a legal machinery by which the worker's right to a safe working environment can be enforced. This should of course be accompanied by the fostering of interest in their own safety on the part of workers by means of education and promotion.

9. Until it is thought that the time has come for embarking upon a revolution in accident compensation law in Hong Kong, there is still much scope for the improvement and reform of the present workmen's compensation system, both in respect of its substantive provisions on legal entitlement (especially the maximum amount of compensation payable and the method of assessment of compensation) and procedural efficiency (including the issue of compulsory insurance). If compulsory insurance is finally introduced, it must next be considered whether the system should continue to be administered by private insurance companies or be State-administered. Experience in other countries suggests that the latter course may be administratively and economically more efficient as well as more appropriate in view of the nature of the right to workmen's compensation. The next possible development can be the integration[98] of the three major channels of compensation – workmen's compensation, tort and social security – into a comprehensive and unified scheme of social insurance, with the possible modification or extinction of the tort system. Such a development is, however, both unlikely and undesirable unless and until the social security system in Hong Kong has matured from a subsistence scheme into one of income-replacement.

10. In the final analysis, the question of industrial accidents in Hong Kong, as it is elsewhere, is a function of politico-economic factors. It is difficult to imagine that industrial safety will not be substantially improved when more than abundant financial resources are poured into the Factory Inspectorate of the Labour Department for the enforcement of safety laws, educational and promotional activities and research, when draconian punishment is meted out to offenders of safety legislation and when huge compensations around the level of tort damages are payable by way of workmen's compensation. Such a state of affairs would not of course be politically and economically feasible. As in all major social issues society has to strike a balance between different interests, conflicting on the surface and yet possibly converging at some higher level. For no single goal can be absolutely pursued in complete disregard of other goals, and any social institution must represent in the final analysis a compromise between competing or diverging objectives. Industrial accidents provide an illustration of such a social dilemma. On the one hand, there are the physical integrity of the worker's life and limb, and the financial security of a decent livelihood of accident vicitims and their families. On the other hand, there are the costs of production, profits of industry and the competitive powers of Hong Kong products abroad. On these the vitality of industry in Hong Kong depends, and in turn, the economic prosperity and social stability of Hong Kong as a whole, which are also in the interest of the average Hong Kong worker. It is fair to say that at present too much of life and limb is being sacrificed to costs and profits. This does not, however, mean that it is always right to pursue the interest of the employees at the expense of their employers, or that remarks such as the following are mere rhetorics that can always be safely ignored: 'Labour legislation must be introduced with care, or economic development may be harmed, for small enterprises are less able to provide the same benefits as large ones.'[99] The very survival and ultimate success of a society depends on the maintenance of delicate balances of interests and equilibria of powers. And a free and just society seeks a balance that is fair and equitable in the light of the interests of all its members, individually and as a whole.

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98 For an American discussion of the integration of workmen's compensation with other programs, see O'Connell and Henderson, Tort Law, No-Fault and Beyond (New York: Matthew Bender 1975), 795-804.

99 Statement by Mr Ngai Shiu-kit, President of the Hong Kong Manufacturers' Association, reported in SCMP, May 7, 1980.

VI. THE REHABILITATION OF ACCIDENT VICTIMS IN HONG KONG

What is rehabilitation

This part of the article gives a rudimentary account of the rehabilitation services available to the injured workers in Hong Kong. Rehabilitation aims to restore a disabled person to his fullest physical, mental and social capabilities. Its ultimate aim is economic independence and full integration of the disabled into the community. Rehabilitation prepares the victims of industrial accidents for their re-entry into a normal working life in remunerative work suited to his capacities and available skill.

The Government policy and objective towards rehabilitation are set out in the 1977 White Paper entitled 'Integrating the Disabled into the Community: A United Effort'.[1] The Paper drew both positive and negative opinions. Some of the reforms have already been undertaken. This part of the article will try to give a critical analysis of the existing or planned rehabilitation services.

Victims of industrial accidents like most of the other disabled persons go through mainly four stages of rehabilitation. The first stage requires medical and therapeutic services. The second stage is the convalescence stage involving consultation and treatment with increasing independence of the victim to look after himself. Then comes the developmental stage which involves out-patient care, counselling, vocational evaluation, training and educational programmes. Lastly, in the stage of social renewal, a disabled will be required to assume complete or partial support of himself, but even more important is that the community accept, involve and employ him in their midst. In short, medical, vocational and social services would be available to an injured worker at the appropriate stage.

In Chapter 5, section 2 of the 1977 White Paper, the objectives for development and rehabilitation services for the disabled (relevant to our discussion) will be:

(a) to provide practical and comprehensive treatment and rehabilitation service in hospitals, day-centres and out-patient clinics.

(b) to provide additional intensive in-patient, day-patient and out-patient[2] rehabilitation programmes in rehabilitation centres.

(c) to improve the training of medical and paramedical staff in rehabilitation.[3]

Medical rehabilitation and assessment

In section 5, it is laid down that the principle adopted for the provision of medical rehabilitation centres is that one fully-equipped centre should be attached to each of the regional hospital. The centre will be specifically designed to provide an intensive in-patient rehabilitation programme. Out-patient service will also be provided. Three additional rehabilitation centres will have to be established basing on this principle. These will be located in West Kowloon, Sha Tin and Tuen Mun.

The running of the additional facilities required considerable expansion in the staff training programmes. Staff who will have to be trained include doctors, nurses, clinical psychologists, physiotherapists, occupational therapists, speech therapists, prosthetists, and medical social workers.

For an injured worker, medical rehabilitation calls for treatment at hospitals, rehabilitation centres and clinics and medical assessment. Industrial accidents may lead to blindness, deafness or physical disabilities. Different types of disablement calls for different medical treatment.

A multi-disciplinary approach will be adopted in the assessment of the disabled at all institutions where assessment services are provided. The various types of assessment may be grouped into the following broad categories:

(a) Medical

(i) to assess the functional or organic limita-

1 October 1977.

2 Patients may progress from in-patient to out-patient area.

3 There should be a specific mentioning about the future need and training of medical and paramedical staff in the White Paper.

tions caused by the injury or disability.

(ii) to evaluate the general health status of the individual.

(iii) to determine to what exent physical restoration services can remove or minimize the disabling condition.

(iv) to provide a realistic basis for the selection of an employment objective that is commensurate with the disabled individual's capacities and limitations.

(b) *Psychological*

to assess the intelligence, personality, constructional aptitudes and interests.

(c) *Vocational (Occupational)*

to evaluate the level of skill, aptitude, occupational abilities, work habits, interests, goals, task performance and adjustment to a given situation. By means of medical, psychological and social data, it is possible to form a realistic appraisal of the client's present capacities. Such information will lead to the person's vocational rehabilitation.

(d) *Social*

to evaluate the social and cultural influences on the individual's rehabilitation. Not all types of assessment are taken but these aspects will be considered so as to give the most appropriate rehabilitation treatment to the disabled person.

The White Paper planned to establish within 5 years two multi-disciplinary assessment centres,[4] one in Kowloon and the other in Hong Kong. The centres will provide a comprehensive assessment for anyone suffering or suspected to be suffering from any disability who is referred to the centre by a doctor, a teacher, a social worker or a rehabilitation worker. The assessment team will draw up a tentative plan for the disabled's rehabilitation. A disabled person who needs further assessment or observation will be referred to an appropriate specialist assessment centre. The progress will be monitored at the multi-disciplinary assessment centres.

In addition to these centres, the Government has planned further expansion to the specialist facilities located in the various general and psychiatric hospitals, specialist clinics and rehabilitation centres.

Mr F.C. Tang, General Secretary of the Hong Kong Association for the Mentally Handicapped Children and Young Persons Ltd, suggested that by the nature of the multi-disciplinary assessment centres, they could be a most appropriate and convenient place for the location of the Central Registry for easy reference.

Central Registry

The Central Registry is another feature of the 1977 White Paper. The individual records of the disabled persons will be kept there.[5] The general statistical information kept will be used for long-term projections of demand and supply of services; such projections will be of value in the annual review of the Rehabilitation Programme Plan.

Medical rehabilitation services for the blind

Very little could be said on the medical treatment for the blind or the partially sighted. For the latter category, their eye defects might be cured or their effect mitigated by specialist attention at eye-clinics or in hospitals. There is little, if any, medical follow-up. According to the Rehabilitation Programme Plan 1978, by 1981 there will be a shortage of 6 consultation rooms, doctors and 7 nurses.

Medical rehabilitation services for the deaf

Specialist services for the deaf of those with

4 In the *Report on the Seminar on the White Paper on Rehabilitation*, December 1977 organised by the Hong Kong Council of Social Service and the Joint Council for the Physically and Mentally Disabled, it has been commented that 2 multi-disciplinary assessment centres are anticipated to be unable to cope with heavy assessment work.

5 Concerning the Central Registry, the *1977 White Paper* seems to have overlooked the disabled who have not yet registered with an Government Department or voluntary agency – *Report on the Seminar on the White Paper on the Rehabilitation*, December 1977 (Hong Kong Council of Social Service and Joint Council for the Physically and Mentally Disabled).

their hearing impaired are available through the Ear, Nose and Throat (E.N.T.) Service of the Medical and Health Department, which is available at the following places:

Queen Mary Hospital
Queen Elizabeth Hospital
Robert Black Health Centre
Sai Ying Pun Polyclinic
Shau Kei Wan Clinic
South Kwai Chung Polyclinic
Yau Ma Tei Polyclinic
Pok Oi Hospital[6]

According to the Rehabilitation Programme Plan, 3 more E.N.T. clinics are planned, namely, Tuen Mun Polyclinic, Sha Tin Polyclinic and East Kowloon Polyclinic.

The Medical and Health Department provides free or partially free hearing aids, through the Samaritan Fund, to adult patients of Government hospitals or clinics. A similar service is provided by the Social Welfare Department. The Hong Kong Society for the Deaf also provides free ear moulds. A new hearing aid repair centre has been set up at the Arran Street Clinic of the Medical and Health Department.

Medical rehabilitation services for the physically disabled

Medical rehabilitation of the physically disabled is more complicated. Injured workers may require physiotherapy, occupational therapy, prosthesis or services rendered by clinical psychologists. Those who need prosthetic appliances, especially the amputees, would need to learn to use the appliances before they are discharged from the rehabilitation centre. In 1978, there were 8 existing medical rehabilitation centres. They are:

Queen Mary Hospital
David Trench Rehabilitation Centre
Wanchai Polyclinic
Kwong Wah Hospital
Kowloon Hospital
Kowloon Hospital Rehabilitation Centre
Queen Elizabeth Hospital
Margaret Trench Medical Rehabilitation Centre

Community para-medical care, which includes community nursing service,[7] occupational therapy service and physiotherapy service is available to patients discharged from hospital.

In 1978, there are 124 physiotherapists[8] in Hong Kong. It is estimated that at 1980 there will be a shortfall of 171 physiotherapists. By 1981, the School of Physiotherapy run by the Medical and Health Department and the Polytechnic will be able to inject 40 trained physiotherapists each year into the work force. There are 96 staff in the 11 units of occupational therapists[9] in Hong Kong. By 1981, it is predicted that there will be a shortfall of 146 occupational therapists. There are 20 prosthetists in 1978 in Hong Kong.[10] They are mainly recruited from a 3-year training programme for student prosthetists run by the Medical and Health Department. By 1981, 37 prosthetists will be required to meet the volume of work.[11] There was a shortfall of 3 clinical psychologists in 1978.[12] Like the other professional personnel above, there is a shortage pr community para-medical care. A 3-year pilot scheme on community service is being evaluated by the Medical and Health Department before submission to the Medical Development Advisory Committee.

Medical treatment and rehabilitation services are mainly provided by the Medical and Health Department which at the same time provides medical social services. There are now 125 medical social worker.[13] Their service aims to help patients understand the medical care they are receiving and to assist them in coping with the social, psy-

6 Information based on 1978 data.
7 Community nursing service enables patients to be discharged early from hospital, facilitates patients' adjustment to the home and promote rapid recovery and independence through supportive case and health education to patients and their families.
8 Information based on *Medical and Health Departmental Annual Report 1977-78.*
9 ibid.
10 Information on 1978 Rehabilitation Programme Plan.
11 ibid.
12 ibid.
13 Information as at May, 1980 from Medical and Health Department.

chological, emotional, environmental and other problems involved in illness or disability as a result of any accident. That is, it provides the disabled or his family social services in a medical setting. The patients or their family might demand their services at hospitals, through their selection process or referrals from nurses or doctors, or through their own initiative.

There are 3 main areas of work of a medical social worker, namely practical and environmental help (e.g. financial help, housing, employment etc) counselling service and rehabilitation service. Wherever appropriate, the medical social worker will refer their patients to other Government Departments (e.g. where a patient who has his limbs removed as a result of industrial accident seeks to receive vocational training, the medical social worker will refer his case to the Social Welfare Department. Or if his patient is the sole breadwinner of the family, the medical social worker may help his family obtain public assistance from the Social Welfare Department. If he has not claimed any compensation from his employer, the medical social worker will refer his case to the Labour Department.

In 1978, there are totally 68,651 cases, a 36% increase from the previous year.[14] There is also a shortage of about 100 medical social worker.

It could be seen from the above that there is a serious shortage of staff in nearly every possible area of medical rehabilitation, especially physiotherapy and occupational therapy. Only about 50% and 20% of the demand are met respectively. This would be a major hindrance to the planned rehabilitation services in Hong Kong.

The Personnel Sub-committee of the Rehabilitation Development Co-ordinating Committee[15] is examining alternative options which may increase the number of persons employed locally. These include parttime work, improved conditions of service and further overseas recruitment. However, the most relevant factor in meeting shortfalls is the establishment in the Hong Kong Polytechnic of training courses for physiotherapy and occupational therapy. This has been undertaken and the two departments were set up in 1978 in the Polytechnic.

The Director of Medical and Health Service in 1978 proposed to establish 2 Rehabilitation Units by 1980.[16] Two doctors will be sent overseas annually for specialised rehabilitation courses. There is a shortage of doctors in the medical rehabilitation due to the fact that the subject has not been taught in department in the past at the undergraduate level in the Medical School. In fact, rehabilitation is not, as yet, regarded as a medical specialty in Hong Kong. Furthermore doctors are unlikely to enter into a field which offers little prospect of advancement.

Vocational training and re-entry into employment

One of the professed aims of rehabilitation is to prepare the disabled for their eventual re-entry into a normal working life. In an 1974 article by Mr Cheng Chung-Keung[17] it was stated that about 2/3 of the workers interviewed had to change their jobs because of their disability. Though this data might not hold true in the light of the present situation, yet it might serve to illustrate the importance of vocational training.

Adults during the period of medical rehabilitation should receive vocational guidance so that they can be assisted for their eventual return to employment after having been fully medically rehabilitated. Vocational guidance is now very limited and it should be organised and developed in close relation with education, vocational training and placement services. Before a disabled person can be properly prepared for employment or placed in open employment, he must be assessed as regards his capacities, abilities, potentialities etc. The success of vocational rehabilitation depends heavily on adequate assessment which should be done through a team comprising the medical doctor, social worker, psychologist and

14 Information based on *Medical and Health Department Annual Report 1978.*

15 The function and composition of the Rehabilitation Development Co-ordinating Committee will be discussed later in the article.

16 So far there is no information available on these two rehabilitation units.

17 *An Exploratory Study of Occupationally Injured Workers* (Research Department, Hong Kong Council of Social Service 1974).

vocational evaluator. These have been discussed earlier when dealing with the multi-disciplinary approach towards assessment of the disabled and the multi-disciplinary assessment centre. Vocational training courses aim to provide a skill for trainees so that they can compete for employment.

In 1978 there were 6 vocational training centres run by the Social Welfare Department and voluntary organisations. They are:

Aberdeen Rehabilitation Centre
World Rehabilitation Fund Day Centre
Kai Nang Vocational Training Centre
Kwun Tong Vocational Training Centre
Pine Hill Advanced Training Centre
Society for the Blind Rehabilitation and Training Centre

Courses provided include woodwork, electronics, mechanics, printing, tailoring and sewing, telephoning, commercial design, hotel services and industrial assembly work. Although the total capacity of trainees is 413, there are still vacancies for further trainees as assessed at March 31, 1978. In 1977-78 299 persons received training.[18]

According to the 1977 White Paper, Government will provide service to enable as many disabled persons as possible to find employment in the Civil Service and in commercial and industrial undertakings. Disabled persons applying for Government posts are considered on equal terms with other applicants and their disability is not a bar to their employment. To enable as many persons as possible to be employed in the commercial and industrial sector, Government will improve the placement services.

Previously the Job Placement Unit of the Social Welfare Department was responsible for assisting disabled people seeking local employment. It helped to find employment for 386 persons in the year 1977-78.[18a] An unknown number of disabled person found jobs for themselves either on their own initiative or through the assistance of their families and friends. From June 1980, the Selective Placement Unit of the Labour Department takes over the work of the Job Placement Unit. It is believed that such an arrangement is more efficient and appropriate.

It has been argued that legislation should be enacted to enforce employment of the disabled. The Government objected, believing that it is undesirable to introduce compulsory legislation and that similar legislation introduced in some parts of the world has not been implemented successfully. Although compulsory legislation to enforce employment seems undesirable in the meantime, it has been suggested that Government should try to encourage the employers through incentives, such as the reduction of taxation on their products.[19]

Some disabled persons may not be able to enter open employment because of the nature of their disability, and sheltered work are provided to enable them to carry on a useful working life. There are 2 types of sheltered work. The first is in workshops which are planned to provide permanent employment for persons unable to find employment. Secondly, there are home-work schemes which offer industrial work or craftwork for those who cannot travel or where there is no vacancy in sheltered workshop. The White Paper proposes development on both types of sheltered work. The number of places in sheltered workshop will be increased from 960 to a minimum of 2600. The new workshops will be located at district level, as close as possible to the homes of the disabled.[20]

Sheltered workshops are run by both the Social Welfare Department and other voluntary agencies. As at April 1, 1978 14 sheltered workshops with a total capacity of 1155 persons. There is however a shortfall of 2805 places.[21] The sheltered workshops are:

Aberdeen Rehabilitation Centre
World Rehabilitation Fund Day Centre
Lek Yuen Sheltered Workshop
Kwun Tong Settlement Workshop

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18 Information based on *Annual Departmental Report of the Social Welfare Department 1978.*
18a ibid.
19 One of the recommendations in the *Report on the Seminar on the White Paper on Rehabilitation.*
20 ch 6, *White Paper on Rehabilitation 1977.*
21 Information based on 1977 Rehabilitation Programme Plan.

Tai Ping Shan Sheltered Workshop
Ko Chiu Road Sheltered Workshop
Wing Hong Sheltered Workshop
New Life Farm
St James' Settlement Sheltered Workshop
Western Blind Welfare Centre
Wong Tai Sin Blind Welfare Centre
To Kwa Wan Workshop
Yuen Long Workshop

Integration back into the community

Most of the disabled adult population can live independently. Proper housing for the disabled is one of the most important factors in successful rehabilitation. Ideally homes for the disabled should be located near their place or work, shopping centres, social and recreational facilities and should be assessable by public transport. The Housing Authority and the Medical and Health Department have made special arrangements for them in the public housing estates under the Compassionate Re-housing Scheme. There is an annual quota of domestic units in various housing estate for compassionate cases in need of housing. It is the Housing Authority's policy that wherever possible it would modify flats, provide easier access and special toilet facilities, allocate accomodation near to the place of work or provide accomodation or floors with a lift stop. The Authority already provides accomodation for the Social Welfare Department and voluntary organisations for the running of services for persons with a disability.

Residential services provided by voluntary agencies include the following:

(i) The Hong Kong Society for the Blind provides inexpensive temporary accomodation for up to 70 blind adults in a hostel.

(ii) The Hong Kong Society for Rehabilitation provides half-way house for female and male patients discharged from the Margaret Tench Medical Rehabilitation Centre in Pak Ling House and Jasmine House.

(iii) The Hong Kong Cheshire Home in Chung Hom Kok provides residential accomodation for the incurable and homeless sick.

The Social Welfare Department also provides accomodation for both male and female trainees in the Aberdeen Rehabilitation Centre. The Kwun Tong Settlement for the Severely Disabled run by the Social Welfare Department also provides accomodation for paraplegic or severely disabled persons. Further facilities planned are: in 1980, 150 places will be provided for both adult and children who are physically handicapped without family and requiring intensive care at Shek Wu Hui. 70 more places will also be provided by the Hong Kong Cheshire Home for the physically disabled adults without family at Shatin.

In 1974, a report on the Design Requirement for Handicapped People was prepared by the Government working group. The Report recommended that a Code of Practice for the design of buildings to encourage architects to cater for the needs of disabled persons should be introduced. This Code is being applied by the Public Works Department, where possible in Government building projects. The Public Works Department has published a voluntary 'Code of Practice On Access for Handicapped Persons to Building' which contains specifications for steps, kerbs, ramps etc. The Housing Authority is considering the possibility of applying it to the design of public housing projects. The Director of Public Works has issued copies of it to private architects and social welfare organisations for guidance. It is hoped that the Code is taken seriously into consideration. It was observed by Dr Harry Fong[22] that over 90% of all buildings and public facilities in Hong Kong are not accessible to the disabled. It is interesting to note that the MTR is also inaccessible to the disabled. They have therefore one less means of public transport. The Access Committee of the Hong Kong Council of Social Service has conducted surveys of major public buildings and has made recommendations to the respective managements for appropriate improvements. So far the results have been mixed.

22 *New Trends and Ideas in Rehabilitation* (Hong Kong Council of Social Service, Joint Council for the Physically and Mentally disabled, 1976).

23 To qualify for cash grant there must be a recommendation from a Government doctor and a social worker's report on the applicant's inability to pay full and partial costs.

Transport and access are of particular relevance to the blind and the physically disabled. The Hong Kong Society for the Blind and the Social Welfare Department at the Western District Welfare Centre both provide mobility and orientation training for the Blind. There are grants from the Li Po Chun Charitable Trust Fund, Tang Shiu Kin and Ho Tim Charitable Fund to enable handicapped persons to purchase wheelchairs and surgical applicances. For public assistance recipients, the cost of wheelchairs and appliances is borne by the Public Assistance Scheme.[23] For persons who are waiting for their wheelchairs to be repaired, an immediate remedy is to apply to the World Rehabilitation Fund Day Centre for a loan of the spare wheelchairs kept at the Centre. It was suggested in the 1978 Programme Plan that a technical aids resource centre be set up providing services such as wheelchairs and repair workshops.

The disabled may also learn to drive and become car owners. Concessions are made to them in amendments to road traffic regulations, exemption from written and road test fees and fees for provisional and fianal driving licences. However, it is thought that the more appropriate measure is the expansion of the mini-bus service. The Hong Kong Society for Rehabilitation is now responsible for expanding the scheme with support from the Community Chest and the Royal Hong Kong Jockey Club.

Recreation is essential to a balanced life and is of particular importance to the disabled. The Social Welfare Department runs club activities for the disabled or subvent voluntary agencies which are prepared to provide social and recreational services for the disabled. Club activities are run by the Social Welfare Department for the deaf at the following clubs:[24]

Sau Mau Ping
Tai Hang Tung
Western
Wong Tai Sin
Yuen Long

In the voluntary sector, the Lutheran Church and School for the Deaf operate clubs for the deaf. Recreational activities are also provided by the Hong Kong Recreational Club for the Deaf, the Hong Kong Deaf and Dumb Association, the Hong Kong Chinese Overseas Deaf Association, the Hong Kong Mutual Assistance Society for the Deaf, and the Young Men's Clubs of Victoria. The Hong Kong Society for the Deaf at Sai Ying Pun also provides cultural and recreational activities for the deaf. The same organisation operates a recreational centre at Oi Man Estate. The Social Welfare Department operates 3 social centres for the blind in Western, Eastern and Wong Tai Sin District. The voluntary agencies operates 4 other social centres. The Hong Kong Association of the Blind at Oi Man Estate, the Hong Kong Federation of the Blind at Mei Tung Estate, the Lutheran Centre for the Blind at Upper Pak Tin Estate, and the Pentecostal Holiness Church-C.N. Bostic Centre for the Blind at Tse Wan Shan Estate, run activities such as camping, chess club, sports club, handwork, Cantonese music, singing groups, communion and provide library services.[25]

The voluntary sector and the Social Welfare Department run a variety of clubs and recreational facilities for the physically disabled. The nature of the activities and the location are referred to in Appendix I.[26]

Government and the voluntary sector

The voluntary sector operates many essential basic services outlined above. By their very nature, voluntary agencies enjoy a degree of flexibility which Government does not have. They are therefore better placed to carry out certain functions such as new and experimental projects. In the circumstances of Hong Kong, there remains an important role for a vigorous, progressive and responsible voluntary sector to play, working in mutual understanding and close co-operation with the Government. There should however be a clear delineation of the division of responsibility between the Government and the voluntary sector. The present division is largely a historical one but with

24 1978 Rehabilitation Programme Plan.
25 ibid.
26 ibid.

planned expansion in various programmes, it is necessary to re-examine the division against the relative capabilities of the Government and the voluntary sector.

By virtue of the White Paper, a Rehabilitation Development Co-ordinating Committee (R.D.C.C.) is set up within the Social Services Branch of the Government Secretariat with the following terms of reference:

a. to advise on the development and phased implementation of rehabilitation services in Hong Kong;

b. to advise on the principles of subvention application to such services;

c. to co-ordinate rehabilitation services in Government Departments and voluntary organisations and to ensure the available resources are put to the best use;

d. to advise on the respective roles of Government, voluntary organisations and other bodies providing rehabilitation services; and

e. to make recommendations on the training of rehabilitation workers.[27]

The Committee comprises of twelve members, including representatives from the Government Secretariat and major Government Departments involved in the provision of different rehabilitation services and members of the public with knowledge and experience of rehabilitation.

Because the scope of rehabilitation services is wide the Rehabilitation Development Co-ordinating Committee has established 7 specialist sub-committees:

Personnel
Employment
Access and Transport
Education
Housing
Public Relation
Sports and Recreation

The composition of the Rehabilitation Development Co-ordinating Committee is

Chairman: Dr the Hon S.Y. Fang, OBE JP
Vice-Chairman: Secretary for Social Service
Members: Mrs J. Brewridge
Dr George Choa, JP
Prof M.J. Colbrurne
Fr John Collins, SJ
Mr H.C. Tang
Director of Education or his representative
Director of Medical and Health Services or his representative
Director of Social Welfare or his representative
Deputy Financial Secretary or his representative

It was believed[28] that since the Rehabilitation Development Co-ordinating Committee is of an advisory nature, there is a potential danger of frustration of excellent recommendations which in the absence of legal backings may end up in poor implementation. The Rehabilitation Development Co-ordinating Committee needs an increase of personnel of high calibre not only in the development of plans but also in seeing the smoothe implementation of them. It was suggested that the disabled should be invited to sit at each sub-committee in order to make representation more comprehensive.[29]

Furthermore, there is no reference made in the White Paper whether voluntary agencies are being represented, although the members will include 'members of the public with knowledge and experience of rehabilitation'.[30] A final comment is that although sub-committees of the Rehabilitation Development Co-ordinating Committee will not deal with individual complaints, they could help detect policy inadequacy. Therefore it is advisable not to neglect individual complaints.[31]

27 *1977 White Paper on Rehabilitation.*
28 Mr. F.C. Tang's comment in *Report on the Seminar on the White Paper on Rehabilitation*, December 1977 (Hong Kong Council of Social Service, Joint Council of the Physically and Mentally Disabled).
29 Comment in the above report.
30 ibid.
31 ibid.

What has been outlined above so far is a brief appraisal of the existing rehabilitation services in Hong Kong. Some space has also been devoted towards future plans on rehabilitation. Unfortunately, there are a few constraints on these recommendations and plans.

Some of the recommendations lie within the purview of other Programme Plans or Development Plans, for example, the proposed accomodation for disabled persons to be located within public housing estates. This will be considered under the Housing Plan in the context of the Housing Authority's policy. That is, recommendations in the Rehabilitation Programme Plan will of necessity depend on the relative priorities and other considerations in the Programme Plan of the Housing Authority.

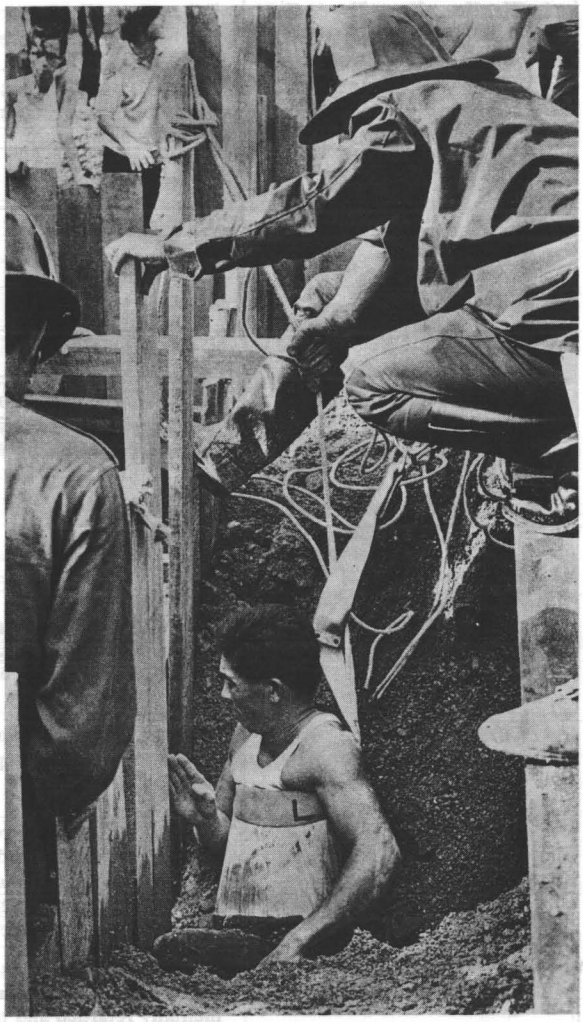
With the competing demands for limited land resources suitable sites may not be available, particularly in densely-populated areas. Sufficient sites have already been ear-marked for the medical buildings. For most of the social welfare needs, centres can be made available on housing estates or other Government buildings.

The growth in demand on the building industry means a similar increase in the demand of architects, engineers etc. The buildings to be constructed are relatively of straight-forward designs so there should not be insuperable problems. The Code of Building Practice for the Disabled should be followed at the design stage.

Planning and construction of Government capital projects usually involve a lead time of between 3 and 4 years from the inclusion of the projects into category B of the Public Works Programme. In the voluntary sector, lead times are usually shorter. Nevertheless, with the proposed expansion in the voluntary sector, finding enough sponsors to finance the projects would be a difficulty.

Another problem facing the expansion of rehabilitation services would be staff recruitment and training. For example, doctors specializing in rehabilitation would require 12 years' training. In other words, it would be difficult to find enough manpower to meet the vacancies created by the expansion, not to mention that there is already a shortage in professional personnel.

In view of these constraints, it would be advisable to set up an order of priority so that where resources are inadequate, more efforts should be devoted towards implementing those plans which are considered to be of primary importance to the disabled.



photograph by courtesy of South China Morning Post Ltd

APPENDIX I

Clubs/Recreational Facilities Future Physically Disabled

Name of Organization	Nature of Activities	Membership	Location
1. The Hong Kong Physically Handicapped and Able-Bodies Association	Educational: English course handicraft and design courses Recreational: interest groups sports activities, camping etc.	(February 1978) 523 Subsidiary Club members 61 Individual members 250 Affiliated members	PHAB Centres:– Chaiwan Pokfulam Shamshuipo East Kowloon PHAB clubs:– Aberdeen North Point Kwun Tong Ngau Tau Kok Shamshuipo Tze Wan Shan Tsuen Wan
2. The Sports Association for the Physically Handicapped	Sports programmes, sports training sessions, participation in international events.	400	Head office: Sau Mau Ping Activity Centre: Choi Hung Ebenezer school activity centre Pokfulam
3. The Hong Kong Federation of Handicapped Youth	library service Recreational: interests groups such as guitar playing, choir singing, photography, outdoor activities.	540	Activity Centre: Lam Tin Estate
4. Lok Heep Club – Mother of Good Counsel Church	Educational: courses on librarianship, Book-keeping, English Conversation. Recreation: interest groups such as fold dancing, first aid, guitar playing, picnics, visits to places of interests. Group attendance to concerts, cinema, lecture.	135	Activity Centre: San Po Kong
5. Riding for the Disabled Association	Arrangements on riding sessions for the disabled including blind, mentally retarded and physically handicapped persons.	All members/ trainees students of Associations or Rehabilitation Centres/schools for the handicapped are invited	Activity Centre: Royal H. K. Jockey Clubs Riding Ground in Fanling, N. T.
6. Social Welfare Department	Recreational: interest groups such as wheel-chair dance, guitar playing, art & craft. Picnic, Camping, sports activities such as archery, bowling.	Physically disabled trainees of its rehabilitation centres amounting to about 300	
7. Recreation and Sports Service, Urban Services Department and Music Administration Office.	Arrangements on Sports training, swimming sessions, music appreciation, music training and variety show.		

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