

suffered by reason of the breach, and finally awards damages to compensate the plaintiff for that loss.

The benefits of this more flexible approach to damages for mental distress are the adherence to the cardinal principle of full compensation in contract law and the protection of the plaintiff's consumer surplus, particularly in consumer contracts which are entered into without a view to profit.

This, in essence, was the approach adopted by Cons J in *Hardwick v Spence Robinson*, wherein the contract to design the plaintiffs' home was described as 'not a purely commercial contract' but rather 'a contract with a very personal flavour.' It is submitted that, for the reasons set out above, the development of the law of contract in Hong Kong would be better served by a refusal to follow the paradigm currently adopted by the English Court of Appeal and the maintenance of the liberal approach to the award of damages for mental distress.

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Amending Charges in Hong Kong's Criminal Courts: Complex or Non-existent Powers? A Case for Legislative Amendment

Amendment of charges, informations, and indictments in Hong Kong criminal courts is more complicated than it seems, and various legal principles and practices apply in different courts. In practice, applications for amendment are often resolved with the consent of the defendant and counsel may not always be very familiar with the details of applicable laws. This tends to camouflage not only an array of unanswered questions but also considerable conflict of legal principles.

This note is mainly concerned with the possibly minimal amendment powers the District Court, though problems involving amendment powers exist in other jurisdictions. There is no question that amendment powers do exist in magistracies and in the High Court, even though their precise nature and scope are far from certain. The problems are more clearly understood if seen against the backdrop of the amendment powers existing in the three Hong Kong criminal court jurisdictions.

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Jurisdictional context of amendment powers

An unnecessary and confusing distinction exists between the legal principles and procedures governing amendment of charges in magistracies and the provisions that appear to be applicable in both the District and High Courts.

Magistracies

In magistracies, the amendment of charges and informations (which terms are treated as equivalent here), both for summary offences and indictable offences being tried summarily,¹ is governed primarily by s 27 of the Magistrates Ordinance. This section is worded in a rather complex manner, but provides essentially that when there is either a defect of form or substance in the charge, or a variance between the details of the charge and evidence adduced to prove the charge, the magistrate must amend² the charge or dismiss it. There is no middle course open. The magistrate cannot convict without amendment.³ Thus, a charge which is defective in either of these ways, but which is for some reason not amendable under s 27, must be dismissed.

There are three scenarios in which these issues arise. First,⁴ the magistrate is obliged to amend a charge if the defect is not *material*, which must be taken to mean a trivial defect, or a defect not going to the essential ingredients of the offence, such as a misdescription of the legislation. Included in this category are variances of time or place within the scope of s 23 MO. Second, more serious (material) defects which might include the omission of essential ingredients of an offence,⁵ must also be amended if the amendment would cause no injustice at all to the accused, or cause no injustice which cannot be cured either by an adjournment, an order for costs (provided they are minimal),⁶ or leave to call

¹ By s 93(a) Magistrates Ordinance ('MO'), once the magistrate has assumed the power to deal with an indictable offence summarily under ss 91, 92 and 94A MO, the provisions of the ordinance dealing with summary offences apply to indictable offences being tried summarily.

² Amendment even includes 'substituting another offence in place of that alleged in the complaint, information or summons' under s 27(4) MO. However, it should be noted that this power exists only for defects within the scope of s 27 and not for defects which are so serious that they are not mere defects of 'substance or form.' This is discussed briefly below. See also Gary N Heilbronn, *Criminal Procedure in Hong Kong* (Hong Kong: Longmans, 2nd rev ed 1995), pp 120-3.

³ *R v Hamilton* [1988] 1 HKLR 138 as commented upon by Stock J in *AG v Wong Lau* [1993] 1 HKCLR 257, 262-3 (discussed below).

⁴ Section 27 MO refers to the 'adjudicating magistrate' though nowhere is there a definition of this concept. It may be argued that the insertion of the word 'adjudicating' must mean that the power of amendment under s 27 is limited to a magistrate who is actually adjudicating something, but it is unclear what this needs to be. It would seem that this word should be excised from the section, unless it means that magistrates in non-adjudicatory roles, such as when supervising a committal, cannot exercise s 27 MO amendment powers (see below).

⁵ By s 10(4) MO, the Indictment Rules (subsidiary to cap 221, LHK) apply *mutatis mutandis* to charges, informations, and complaints, so under rule 4(b), the omission of an essential element of the charge (other than for an offence against the common law) would be tolerated if it did not prejudice or embarrass the defence.

⁶ It was held in *R v Wong Kei-lung and Low Shieu-wai* (1993) Mag App No 576 of 1993 (Kaplan J) that the injustice was incurable because a costs order could not be made since the magistrate was limited to ordering costs of \$5,000 and the actual costs to the accused were many times that amount.

or recall and examine witnesses. Thus, what could be referred to as an incurable injustice⁷ cannot be amended. In this context, the amendment of amendable defects within the scope of s 27 MO may even include the substitution of a new charge for the defective one, but not, on the clear wording of the subsection, the addition of a new charge.⁸

Naturally, the more serious the defect, or the later in the proceedings that the application for amendment is made, the more likely it is that an incurable injustice will be suffered by the accused if the amendment is effected. For example, by the time of the trial, costs will have increased substantially beyond the \$5,000 maximum that a magistrate is empowered to order. Furthermore, if the amendment is sought after the prosecution case has closed, for example at the time of a submission that there is no case to answer, or during the opening stages of the defence case, the only further prosecution evidence which is admissible is that which could in any event have been called in rebuttal.⁹

Although, in the past, defective charges had even been amended under s 119(1)(d) MO by High Court judges considering appeals from the decision of a magistrate, more recently Barnes J in *R v Lo Chiu*,¹⁰ took a less flexible approach and cited with approval the decision of the Court of Appeal in *Wong Man Shun v R*,¹¹ that material defects of substance should not normally be amended on appeal from a magistracy.¹²

The third scenario is that the defect in the charge is fundamental or very serious, rendering the charges a nullity. As there is no discretion to refuse to amend under s 27 MO, this would seem to raise an issue as to the actual scope and application of the s 27 MO amendment powers, notably the extent to which the words 'defect in the substance or form' in s 27(1)(a) MO limit the application of the magistrate's power to amend, effectively restricting it so that it does not extend to defects which make the charge fundamentally invalid or a nullity. This possibility has been mooted for some time and was most recently recognised to exist in *Attorney General v Wong Lau (trading as King Keung Construction and Engineering Co)*.¹³ Examples of such defects in a charge, given by Stock J in *Wong Lau's case*, were '(i) the statutory provision creating the offence has been repealed and not re-enacted; (ii) the statement and particulars of offence cannot be seen fairly to relate to or be intended to charge, a known and subsisting criminal offence; or (iii) in some other way, it is so defective that

⁷ See discussion in Heilbronn (note 2 above), pp 120-3.

⁸ s 27(4) MO.

⁹ Proviso to s 27(3) MO.

¹⁰ (1991) Mag App No 32 of 1991 (Barnes J).

¹¹ [1980] HKLR 257.

¹² There it was said (at p 271): 'Save in exceptional cases we regard it as undesirable to amend the charge on appeal except in minor particulars, since this would deprive an accused person of the protection of Section 27 of the Magistrates Ordinance, unless the matter will be referred back to the magistrate's court for re-hearing.'

¹³ [1993] 1 HKCLR 257 (Stock J).

it cannot be cured¹⁴ (though precisely which specific kinds of defects this last category encompasses is less clear). However, Stock J did not explain why the s 27 MO obligation to amend was excluded when the charge is a nullity. He simply said: 'The obligation imposed ... by s 27 to amend an information, summons or complaint in certain circumstances, can only arise if that information, summons or complaint is not a nullity.' The basis for this exception to the application of s27 MO must be either the common law or the wording of s 27 itself. Though the common law may operate to provide such an exception to the amendment power in the District Court and High Court (discussed below) where there is effectively a discretion, but no statutory obligation, to amend, it is difficult to see how the common law could override the clear statutory obligation to amend under s 27 MO. Thus, the existence of this exception in magistracy matters must be based on the wording of s 27 itself. The only way in which this may occur is by the words 'defect in the substance or form' in s 27(1) MO limiting the obligation to amend to cases where the defect is not fundamental or the charge is not a nullity.

Further complications as regards amendments to charges in the magistracies arise from s 75(2) MO, which, leaving aside any controversies over its wording, essentially provides that no objection shall be raised to any defect of substance or form in a charge, or variance between the charge and the evidence adduced on behalf of the prosecution, 'at the committal proceedings.'¹⁵ This provision applies only to indictable offences which are proceeding through the stages of committal in the magistracy (which of course begins with the accused's first appearance before the magistrate on a charge for an indictable offence¹⁶ and ends either with the magistrate assuming jurisdiction to deal with the offence in a summary manner under ss 92–94A MO; transferring the charge to the District Court under s 88 MO; dismissing the charge for insufficient evidence; or committing the accused to the High Court for trial or sentence in the ordinary manner under ss 81B and 85 MO). Yet, it does not seem to prevent amendment under s 27 MO, if it is applied for by the prosecution, providing that the words 'adjudicating magistrate' in s 27 do not exclude magistrates presiding over committals. Section 75(2) merely precludes the defence (or anyone else) objecting to the charge on the basis of defects or variances *during the committal stages*.

Clearly, the power to amend charges exists in magistracies, though there are many arguments that could be raised over the meaning, scope, and application of provisions in the MO governing amendment of defects in charges. The

¹⁴ *Ibid*, p 268.

¹⁵ Though it is not absolutely clear from the wording of this subsection, it would appear sensible and logical that the final words 'at the committal proceedings' apply to both defects and variances, and not just the latter.

¹⁶ See *AG v P H O'Donnell* (1984) HCt, Mag App No 198 of 1984.

interesting thing is that not all of the restrictions on the power to amend under s 27 MO are found to exist in the other levels of criminal jurisdiction in Hong Kong.

District Court and High Court

Essentially, the legal principles and procedures governing the amendment of defects in counts (indictments) in the High Court and charges in the District Court are found in ss 23 and 53 of the Criminal Procedure Ordinance (CPO), though, in reality, this general proposition is open to considerable criticism. The CPO applies only to High Court proceedings unless the relevant CPO provisions are expressly applied to other courts either in the CPO itself, or in other legislation, such as occurs in the District Courts Ordinance (DCO).

As far as the High Court is concerned, s 53 CPO sets out the procedures for objecting to specific defects in an indictment, which term can, by definition in the case of the CPO,¹⁷ be understood to mean or include 'count.' Nonetheless, imprecise usage of the word 'indictment,' to mean 'count' on some occasions and not others in the CPO and judicial decisions, does cause considerable uncertainty. As regards s 53, the specific defects in the indictment are that it 'does not state in substance an indictable offence or states an offence not triable by the court' which would seem to encompass only defects of a more serious and substantive nature, or offences which the court has no jurisdiction to try, for whatever reason. Section 53 has no application to trivial or non-material defects. Essentially, the section goes on to provide that, for these substantial kinds of defects, the court must either amend or quash the indictment.¹⁸ Clearly, therefore, other less serious kinds of defects are not necessarily required to be dealt with in either of these ways. Be that as it may, if amendment is required under s 53 CPO, or just considered by the judge to be desirable, then it must be had under s 23 CPO.

Section 23(1) CPO allows the High Court a broad discretion — not an obligation as in the magistracies under s 27 MO or as is, rather confusingly, sometimes the case under s 53 CPO — to amend a defective indictment 'as the court thinks necessary to meet the circumstances of the case, unless having regard to the merits of the case, the required amendments cannot be made without injustice'.¹⁹ Further, there are no words in this subsection restricting or limiting this amendment power to defects of 'substance or form' as are found in the relevant MO provisions. However, in the absence of clear words there is no reason why the common law itself may not impose a restriction on the

¹⁷ Defined in s 2 CPO to include any criminal information triable by jury.

¹⁸ Strictly speaking, the court may leave the matter to be dealt with in arrest of judgment (a motion made in such cases after the verdict but before sentencing), if the defect is objected to in the course of the trial.

¹⁹ It is somewhat difficult to reconcile the discretion to amend under s 23 CPO with the cases in which there is an obligation to amend or quash a defective charge under s 53 CPO.

amendment of indictments where the defects are very serious, such as to render the indictment a nullity, analogous to the cases mentioned by Stock J in *Wong Lau's case* (above). Though possibly important, the uncertain application of the principle in *Wong Lau's case* to s 23 CPO is not an issue that is sought to be addressed here. Suffice it to say that, since the amendment power under s 23(1) CPO is discretionary, the court could either take the view that indictments which are potentially a nullity or are fundamentally defective are outside the scope of the s 23(1) CPO amendment power, or that the indictment's potential nullity is a fact which would justify the court not exercising its power to amend. Either should suffice.

The next question is whether, and if so to what extent, do these CPO amendment provisions apply to criminal proceedings in the District Court. There are no express statements in the CPO which apply ss 23 and 53 to criminal proceedings in the District Court, but there are several provisions in the DCO, notably s 79, which appear to be intended to have that effect. However, the composite effect of the provisions dealing with defects and amendment in the DCO may, on close examination, not extend to the District Court judge any or all of the amendment powers which are available to the High Court judge under the CPO.

Problems with District Court amendment powers

Offences being tried in the District Court are set out on a charge sheet under s 75(2) DCO. In general terms, under s 75(2) DCO, the District Court has:

jurisdiction and powers over all proceedings in relation to the offence therein alleged similar to the jurisdiction and powers the High Court would have had if the accused person had been committed to that court for trial on indictment, save that nothing in this section shall be deemed to give jurisdiction to hear or determine such charge or complaint.

Even this general arrogation of jurisdiction and powers to the District Court does not extend so far as to give the court jurisdiction to hear offences that it does not otherwise have by virtue of some other legislation establishing jurisdiction.

No objections to the charge sheet

There are also a number of provisions which deal with the powers of the District Court more specifically as regards defects in charges and charge sheets as well as their amendment. It seems clear that the charge sheet should resemble the indictment in form and structure by s 77 DCO. Under s 77(3), 'a charge sheet shall not be open to objection in respect of its form or contents, if it is framed

in such manner as may be prescribed.' Taken in the context of s 77, this provision would seem to be concerned with defects of form and structure and not with actual defects of substance in the charges themselves. However, the subsequent proviso that the court may direct further and better particulars to be delivered may suggest that the words 'form or contents' in s 77(3) do extend to some substantive aspects of the charge itself, namely its particulars. However, no express mention is made of the omission of ingredients of the offence being charged or whether or not the charge specifies an offence known to law.

More specific treatment of defects and amendment seems to occur in s 79 DCO though the meaning of its provisions similarly lacks clarity and certainty. Section 79(1) begins by re-enforcing the general notion that the District Court shall have reasonably similar powers to the High Court. It provides that 'the practice and procedure for the time being in force in the High Court in relation to criminal proceedings therein shall, so far as the same may be applicable, be followed as nearly as may be in criminal proceedings' in the District Court. The use of the qualifying words 'so far as may be applicable' and 'as nearly as may be' make it clear that the absolute importation of High Court powers under ss 23 and 53 CPO into the District Court has not occurred.

Section 53 CPO

There is an express exclusion in s 79(2) of certain provisions in the CPO, including s 53, but a set of provision very similar to s 53, which are spelled out in clause 3 of Part II of the Second Schedule to the DCO, is expressed by s 79(3) to be applied to criminal proceedings in the District Court, though again subject to a qualification that they apply only when 'the circumstances of such proceedings require their application.' The inclusion of this last-mentioned qualification to the application of these provisions in Part II of the Second Schedule may be of no significance, but it does raise doubts as to if and when the 's 53 CPO-equivalent' provisions do actually apply.

Section 23 CPO

As s 23 CPO is not expressly excluded from application to District Court criminal proceedings by s 79(2), then it would appear — though it is far from unarguable — that it applies by virtue of s 79(1) which applies the 'practice and procedure for the time being in force in the High Court' to District Court proceedings.²⁰ At best, there is merely an implicit application of s 23 CPO to District Court proceedings by the combined operation of s 79(1) and (2). At worst, it may be that, just as the power to award costs was held not to be a matter of practice and procedure in *R v Chu Kwan-kong*,²¹ so would the power to amend

²⁰ On the meaning of 'practice and procedure,' see generally Peter Wesley-Smith, *The Sources of Hong Kong Law* (Hong Kong: Hong Kong University Press, 1994), ch 10.

²¹ [1977] HKLR 371, 373-4.

charges be considered to be a matter of jurisdiction rather than of 'practice and procedure' and thus unable to be imported by s 79(1) DCO from the High Court into the District Court. Indeed, s 77(5) DCO expressly states that 'Nothing in this section or in section 79 or 87 or in any rules made under section 87 shall affect the law or practice relating to the jurisdiction of the Court ... nor otherwise affect the law of evidence in criminal cases.' This provision underlines the qualification in s 75(1) DCO already mentioned above, which provides that nothing in that section — which gives the District Court the jurisdiction and powers similar to those of the High Court in relation to offences being heard there — shall be deemed to give jurisdiction to hear and determine any charge or complaint.

Whatever was intended to be done by the legislature in this respect, it is far from clear.

Limits on s 23 CPO in the District Court

Even assuming that the combined effect of ss 75 and 89 DCO are adequate to import the amendment powers of s 23 CPO to criminal proceedings in the District Court, the precise terms of the relevant subsection are:

- (1) Where, before trial or at any stage of the trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice.

After importing into the District Court the practice and procedure of the High Court, the last few lines in s 79(1) DCO provide that 'where it is necessary for the purpose of rendering such procedure and practice conveniently applicable, "indictment" and "count" shall be understood to refer to "charge sheet" and "charge" respectively.' Thus, for the purposes of practice and procedure, a clear distinction is drawn between charge sheets and charges — indeed, a distinction already established in s 77 DCO — and translating s 23 CPO, for the purposes of any application which it may have in the District Court, means that the District Court has discretion to amend defective charge sheets — that is, the form or piece of paper on which the charge is written. But does this extend to a discretion to amend substantive defects in the charges themselves?

Of course, it may be argued that s 2 CPO which defines an indictment as a criminal information and thus effectively a charge, makes it clear that an 'indictment' is the same as a 'charge.' But if this is so, how does it fit with the express provision in s 79(1) that 'indictment' means 'charge sheet' and 'count' means 'charge'? While it may always be said that s 79(1) and similar provisions are merely there to aid courts in interpreting legislative enactments, surely there must be an easier and less contentious way of doing it.

Conclusion

This note does not attempt to resolve the true meaning of s 27 MO and the interacting provisions of the DCO and CPO concerning amendment of charges. The whole of that effort could be negated by one stroke of the legislative drafter's pen. Nor has the aim been to show that every amendment of a charge made by a District Court judge in the history of Hong Kong has been *ultra vires*, though some of them may have been. I merely wish to show that there are a number of serious and unnecessary difficulties with the law relating to amendment of charges and indictments in Hong Kong in all jurisdictions, certainly in magistracies, but especially in the District Court: the two jurisdictions where by far the bulk of amendments to charges occur.

Thus, there seems to be a clear case for a uniform and simplified set of rules governing amendment of charges and indictments throughout Hong Kong's criminal court jurisdictions and it is hoped that this will be attended to as soon as possible.

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Protecting Trade Marks in Hong Kong: *Re Omega*

The protection of trade marks and trade names has a century-long history in Hong Kong,¹ yet attempts to pass off one's goods or services as those of another still occur — sometimes successfully. Trading individuals or corporations whose reputations have been undermined may obtain an injunction to halt these activities, and may be awarded damages or loss of profits. These remedial measures provide the plaintiff with some comfort after irreparable harm has been done, but a more effective way of preserving one's goodwill is to prevent it from being attacked.

This strategy is recognised in the Trade Marks Ordinance which stipulates certain restrictions on the registration of trade marks, the most powerful of which is s 12(1) which provides that deceptive, scandalous, or immoral marks² can never be registered, and an application to register such marks may be opposed by the Registrar of Trade Marks or any other person.³

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¹ The first Trade Marks Ordinance was enacted in 1873.

² The actual wording of the subsection is much more elaborate:

It shall not be lawful to register as a trade mark or part of a trade mark any matter the use of which would be likely to deceive or would be disentitled to protection in a court of justice or would be contrary to law or morality, or any scandalous design.

³ s 15(1), Trade Marks Ordinance.