JUSTITIA

HONG KONG UNIVERSITY LAW ASSOCIATION REVIEW

1972-1973

Cover:

The Department of Law,
University of Hong Kong,
at its former site, 152-158,
Caine Road, Hong Kong.

Photograph: Mr. Chan Chi Hung

JUSTITIA

HONG KONG UNIVERSITY LAW ASSOCIATION REVIEW

1972-1973

CONTENTS

---

* The views expressed by our contributors do not necessary represent those of the Editorial Board.

EDITORIAL BOARD

PATRON

Professor D.M.E. Evans
Head
Department of Law, H.K.U.

ADVISERS

Judge T.L. Yang

Mr. Martin C.M. Lee
Barrister-at-Law

Mr. R.A.V. Ribeiro
Lecturer in Law, H.K.U.

EDITOR–IN–CHIEF

Peter Cheung

ARTICLES EDITOR

Thomas Sharr

ASSOCIATE EDITORS

Lucile Au
Helena-Maria Ho-Shing
Robert Lynn
Audrey Eu
Macy Kwan
A.R. Suffiad

BUSINESS MANAGERS

Michael Chan
Macy Kwan

FOREWORD FOR JUSTITIA

PROFESSOR DAFYDD EVANS

The Department of Law in the University of Hong Kong is but four years old. Its first graduates emerged from their chrysales in 1972 and those graduates are now entering into articles and pupillage after the completion of their Post-graduate Certificate in Laws. The Department and its students have thus now had time to build up their ethos, their image, their aspirations. Though the burden of work cast upon them pressed them hard, the students established, without pressure from their academic mentors, their own periodical, *Justitia,* to serve as a vehicle for their own expression of opinion about the law. But somehow the format was not quite right and the students looked for a more effective way of conveying, not ephemerata, but their own thoughts, the results of their own research in a form which would command attention and respect. So, the new *Justitia* was born to carry on the good work started by the old and, with all the imperfections one conventionally expects of youth, it demonstrates amply the extent to which the Law students of HKU have taken seriously the mammoth task of getting to grips with the laws of Hong Kong and of setting out the result of their researches in a form which aids the understanding of those laws. Imperfections there may be but they carry us far along the road to understanding. A long life to *Justitia*!

EDITORIAL

Many inquiries have been made of the law students since the formation of the Department of Law in the Hong Kong University in 1969. Questions asked include those regarding the contemplated role of the law students, the curricula of their courses and the usefulness of these academic studies to their future careers.

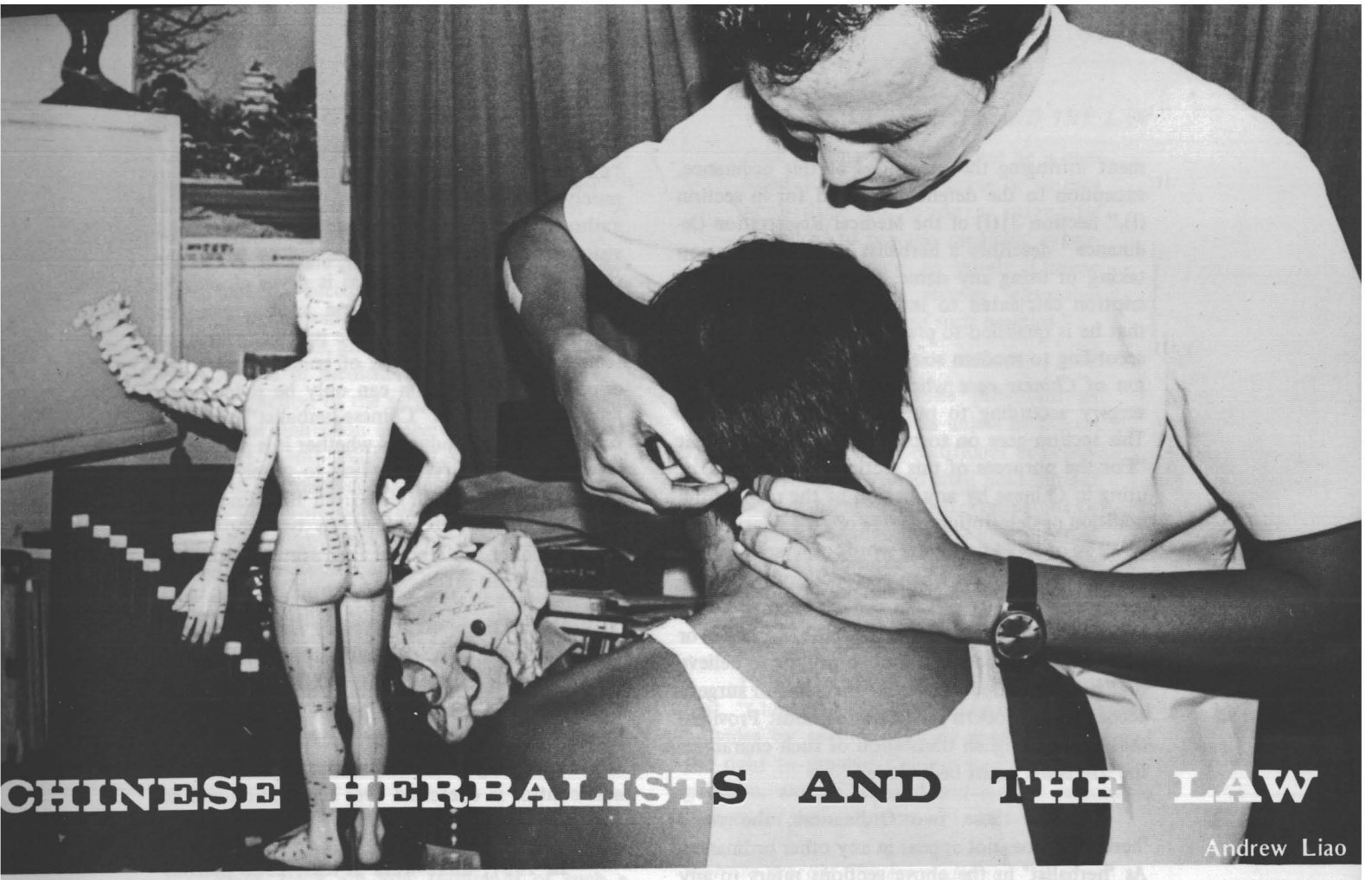
While these and many other queries can only be answered as the graduates come into practice, the aim of this review is to provide a forum in which legal aspects of our daily lives can be discussed thereby enabling a picture of the law students and their views to emerge.

The articles we have published in this issue are the fruits of research carried out by students in areas of law of particular local interest which so far have not had the benefit of extensive treatment. The fields covered include public and administrative law, labour law, the law of tort, and mercantile law. They represent an attempt to present the law as it exists and to suggest improvements where necessary.

It is the first time that the Law Association has undertaken such an ambitious venture and we would be the first to acknowledge our inexperience in such matters. It is our hope that readers will treat this publication as an experiment – an experiment which hopefully will bring happy results.

To conclude, I would like to thank Professor D.M.E. Evans of the Department of Law for the kind assistance which he has lent us; our advisers Judge T.L. Yang, Mr. Martin Lee and Mr. Ribeiro; and all the hard-working people whose enduring efforts have brought this review to print.

Peter Cheung
Editor-in-Chief



CHINESE HERBALISTS AND THE LAW

Andrew Liao

By courtesy of S.C.M.P.

Introduction

It has often been said that Hong Kong is a society of conflict for it often experiences a sharp confrontation between the native Eastern culture and the newly introduced Western culture. On the legal level this is well reflected in the preservation of certain customary law and practices by the legislature. But as has been noted, most of these customs or practices are of an extinquishing species and the Legislature seems to let them die a natural death. This approach of the Legislature is unquestionable in all possible areas of conflict except possibly one – the field of medical practice.

The traditional school of medicine in China has survived a history of over two thousand years and it has developed in a completely different direction from modern Western medicine. This medical culture of China is based completely on the philosophical framework of ancient China and this is completely different from modern medicine which is based on the progress of modern science. One can easily appreciate that this is basically a conflict between the 'philosophical' culture of the East and 'scientific' culture of the West.

But this confrontation is by no means new, for it has occurred in Taiwan and Communist China. The legislatures of these places, whether for medical reasons or for cultural reasons, preserve Chinese medicine. In these places the practitioner enjoys the same recognition under the law as the Western doctor.

This is not the situation in Hong Kong. The present work intends to look at the legal position and condition of the "Chinese herbalists", as they were known to the place, in Hong Kong and to ascertain the nature of their professional liability at the law.

Definition of "Chinese Herbalists"

Origin of the term

The term 'herbalist' appears in section 5(2) of the Undersirable Medical Advertisements Ordinance[1] which provides that "Nothing in the provision of section 31 of the Medical Registration Ordinance shall be taken to permit any *native herbalist* or other person to take part in an advertise-

1 Cap. 231 Hong Kong Ordinances

ment infringing the provisions of this ordinance, exception to the defence provided for in section (l)." Section 31(l) of the Medical Registration Ordinance [2] describes a herbalist as "..not a person taking or using any name, title, addition or description calculated to induce anyone to believe that he is qualified to practise medicine or surgery according to modern scientific methods; (any *person of Chinese race* who practises) .. medicine or surgery according to purely Chinese methods .." This section goes on to provide in section (2) that "For the purposes of this section (a) the taking or using in Chinese by any person of the name, title, addition or description of 中醫or中醫生or中醫師 or 唐醫 or 國醫 or of any words or characters implying specialization when preceded by the aforementioned characters shall not be deemed to be the taking or using of a name, title, addition or description calculated to induce anyone to believe that he is qualified to practise medicine or surgery according to modern scientific methods: Provided that in any English translation of such characters the *'Herbalist'* must be included."

Besides these two Ordinances, the word 'herbalist" does not appear in any other ordinance. As 'herbalist' in the above sections refers to any Chinese person practising medicine or surgery according to purely Chinese methods, and they are 'natives' in the sense that they are local inhabitants, that is Chinese, they can thus be properly called "Chinese herbalists".

Who are within the class

For the purpose of the present work, it is essential that the class of persons under discussion should be defined as clearly as possible. No matter what they are properly called, it is sufficiently clear from section 3l(l) of the Medical Registration Ordinance that they must be persons of Chinese race who must practise medicine or surgery according to purely Chinese methods. Two points worth noticing: First, there is no explanation of "practice of medicine or surgery according to purely Chinese methods" and there is no judicial authority on this point. Secondly, there is no provision for registration, discipline and control of the class. It seems that the class is never closed. So long as a person of Chinese race comes forward and claims himself to be practising such, he then falls within the class of persons under description. Thus a person can only be judged *post facto* whether he is a "Chinese herbalist" or not by reference to his conduct – whether it is practice of medicine or surgery according to purely Chinese methods. This is different from the situation of qualified doctors who have to be properly registered under the Medical Registration Ordinance before they can practise.

Under these unsatisfactory and vague statutory provisions, it is impossible to define the class precisely with certainty. The same difficulty has not been experienced in Taiwan where "Chinese herbalists" are expressly recognised by the Legislature as having the same status as Wertern doctors and control is exercised over registration and admission to the profession.

In 1957, there were at least 2500 persons[3] claiming themselves to be and practising as "Chinese herbalists", and there were probably more around corners of the streets. According to information provided by the only reliable publication in Hong Kong on "Chinese herbalists" – *'Annual Review of Chinese medicine'* (中醫葯年鑑) publised in 1957, the class of persons included practitioners of Acupuncture, bone-setters, practitioners of internal and external medicine. All of them were members of either one of the five Herbalists Associations in Hong Kong.[4] Today in Hong Kong, the total membership of these five Associations is reported to be 4,000.[5] But this certainly is not exhaustive for membership of these Associations is not compulsory for the practising "Chinese herbalists."[6] Indeed to define "Chinese herbalists" as members of the five Associations is to put too strict an

---

2 Cap. 161 Hong Kong Ordinances

3 reported in the *'Annual Review of Chinese Medicine'*

4 They are only business associations. c.f. Medical Council which is a statutory body controlling the medical profession

5 by the five associations

6 see (4)

7 like osteopathy

8 see legal status

9 the view of the five associations

interpretation on section 31(1) of the Medical Registration Ordinance. The section does not require compulsory registration of membership of any body. The person described by the Ordinance is simply a Chinese person who practises Chinese medicine. The section thus excludes unregistered medical practitioners and "quacks" who practise Western medicine, and indeed practitioners of any other school of medicine.[7] Notwithstanding this, the construction of the section is too wide to put any proper limitation to the class of persons described. It seems that the Legislature does not intend to delimit the class of persons and to reinforce it as a professional group.[8] In view of this, it appears to be quite impossible to restrict the class to any more confined extent. But practically speaking, the difficulty is not so impossible to solve. For in fact nearly all "Chinese herbalists" are registered as members of the local Herbalists Associations.[9] The membership of these Associations thus reasonably serves as a guide to the limit of the class of persons to whom this piece of work refers.

Legal Status of Chinese Herbalists in Hong Kong[10]

While there are now thousands of such a class of practitioners in every sector of the community, the precise legal position and condition of them have not been much questioned in the past. This class of traditional Chinese medical men exists and practises side by side with the class of registered medical practitioners and yet no *quaere* has been raised as to whether their practice amounts to a contravention of the law or not. It is the purpose of the present work to ascertain their position and condition at law.

The only relevant section referring to the practice of Chinese medicine is found in section 31 of the Medical Registration Ordinance[11] section. 31(1) of the Ordinance provides that:

> "nothing in this Ordinance shall be deemed to affect the right of any person of Chinese race, not being a person taking or using any name, title, addition or description calculated to induce anyone to believe that he is qualified to practise medicine or surgery accordine to modern scientific methods, to practise medicine or surgery according to purely Chinese methods and to recover reasonable charges in respect of such practice."

section 32 provides that:

> "Notwithstanding the provisions of section 31, no person unless he is a registered medical practitioner or is provisionally registered shall hold himself out as being qualified, competent or willing to undertake the treatment of diseases of the human eye or the prescription of remedies therefor, to the giving of advice in connection with the treatment therefor:"

From the above provisions, it is apparent that "Chinese herbalists", except to the extent provides by section 32[12] are expressly preserved the right to practise Chinese medicine by the Legislature, and to demand and recover reasonable charges for their practice.

Right to practise Chinese medicine

Looking exclusively at section 31(1), it might appear that the Legislature expressly provides for the class of "Chinese herbalists", giving them the right to practise Chinese medicine. One might think that this is the legal basis of the traditional Chinese medical man's right to carry on his profession. In fact this is not. His right to practise in fact lies in no particular statutory provisions but exists as a result of the particular course adopted by the Legislature here.

The Legislature here, with respect to the practice of medicine, has adopted the same course as that of England. The law does not in any way forbid the practice of medicine by unqualified or unregistered person, but, by forbidding an unqualified or unregistered person to use any title or represent himself in a way implying that he is a qualified or registered person, ensures that the public should be able to recognise by the law who have such qualification and those who have not.[13]

---

10 In Taiwan and Communist China, Chinese medicine is expressly recognised by the Legislature. Practitioners of such have the same professional status as doctors. There are proper qualifying examinations and registration is compulsory for the practitioner. See Taiwan Laws六法全書and *Ming Po Monthly*.

11 Cap. 161.

12 Treatment. advice on and prescription for eye diseases

13 Nathan, *Medical Negligence*, p. 31
This is different from the course adopted in America and Canada where not only the orthodox system of medicine, *viz*. Western or modern medicine, receives statutory recognition, other unorthodox systems of medicine like osteopathy, chiropractic and naturopathy receive recognition in some parts of these countries in the sense that practitioners of such have to be licensed and the law forbids unqualified persons to practise such, see Nathan op. cit.

Thus in the English legislation,[14] there is no provision forbidding the practice of medicine by unqualified or unregistered persons unless they pretend to be registered under the law or recognised by law as qualified medical men[15] In Hong Kong, the Medical Registration Ordinance adopts the same course. Except as to the provisions of section 32[16], the law does not make the practice of medicine by unqualified or unregistered persons an offence[17] unless they contravene section 28 of the Ordinance which provides that:

> "A person who wilfully and falsely pretends to be qualified, or takes or uses any name or title implying that he is qualified, to practise medicine and surgery or to be registered of, not being registered or provisionally registered or exempted from registration, practises or professes to practise or publishes his name as practising medicine or surgery shall be guilty of an offence."

Thus an unregistered medical practitioner who wilfully and falsely pretends to the qualified or registered to practise medicine and surgery will be held liable under section 28. But he, or indeed any unqualified layman, will certainly not be made liable for practising medicine if he does not contravene the section.[18] Upon all these, it means that the "Chinese herbalist", subject to the same setbacks as the ordinary layman or unqualified or unregistered person, always has the right to practise medicine, no matter according to purely Chinese methods or modern scientific methods: Section 31(1) thus does no more than assuring and clarifying the right to practise Chinese medicine which is already existing under the law in express terms. Thus the "Chinese herbalist" has now a statutory right to practise medicine, according to purely Chinese methods. Section 31(2) allows him to use certain names and titles and at the same time forbids him to use some others which would imply that he is qualified to practise medicine or surgery according to modern scientific methods.

Right to demand and recover reasonable charges for practice

In case there exists a contract between the medical man and the patient, the medical man can always recover his fees or charges for professional service rendered in contract. But in most instances there does not exist any agreement between the doctor and the patient. In such cases, the registered medical practitioner is expressly in the written law given a right to sue for his fees or charges. In the Medical Registration Ordinance, this right is seen to be given to the "Chinese herbalist" too. Section 16 of the Ordinance provides that:

> "(1) Every registered medical practitioner shall be entitled to practise medicine, surgery and midwifery and to recover in due course of law reasonable charges for professional aid, advice and visits and the value of any medicine or any medical or surgical appliances used, made or supplied by him to his patients.
>
> (2) Subject to the provision of Sections 30 and 31, no person shall be entitled to recover in any court any charges as are referred to in subsection (1) unless at the date when such charges accrued he was a registered medical practitioner."

Section 31(1) of the Ordinance provides that they ("Chinese herbalists") can "demand and recover reasonable charges in respect of such practice" (i.e. practice of medicine or surgery according to purely Chinese methods). But the extent of this right is uncertain for in the Ordinance there is no defini-

---

14 – Medicial Acts.

15 –s. 31, Medical Act, 1956.

16 – eye diseases

17 – The unregistered medical practitioner or anyone who is not registered may inevitably find himself liable under several ordinances like Dangerous Drugs Ordinance, Antibiotic Ordinance Pharmacy, and Poisons Ordinance, etc.

18 – subject of course to Section 32.

19 – Union and South West Africa

tion of 'practice of medicine'. What then should amount to 'practice of medicine or surgery' according to purely Chinese methods and for which the "Chinese herbalists" is entitled to recover fees? There is no Hong Kong authority on this point.

In the African Courts,[19] a test has been suggested in several cases[20] in determining whether certain acts amount to acts pertaining to the practice of medicine. The general test suggested is: "diagnosis, advice and prescription or treatment". This really suggests that 'practice of medicine' means diagnosis, advice and prescription or treatment', or at least is consisted mainly of these. Section 16(l) of the Ordinance also seems to suggest that 'practice of medicine' includes progressional aid, advice and visits and the prescription of medicine and also treatment. This is consistent with the test suggested by the African Courts. In the absence of any authority, this seems to be the most satisfactory definition of 'practice of medicine'. Should that be so, it would mean that the "Chinese herbalist" can demand and recover fees or charges for any professional aid, diagnosis, advice and prescription of medicine or treatment and this is indeed consistent with the construction of section 16(2) of the Ordinance.

This indeed confers a right, which is only enjoyed by the registered doctors, on the "Chinese herbalist". In fact the "Chinese herbalist" is at a much better position, for the registered doctor can recover any charges only if at the date when such charges accrued he was a registered practitioner. In the Ordinance, the "Chinese herbalists" is thus the only class of unregistered medical men who are given express right to sue for their fees or charges. In the corresponding legislation in England,[21] the law, except for registered medical practitioners, does not provide for unregistered practitioners the right to sue for the fees for professional service rendered. Thus section 32 of the Medical Act, 1858 which subsequently comes under section 27 of the Medical Act, 1956, provides that:

> "No person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall both prescribed and supplied, unless he shall prove upon the trial that he is (registered under the Act)."

There does not appear any corresponding saving of rights to unregistered persons to practise and to recover fees for professional service. But the Court in England has held that this section does not affect the class of persons known as osteopath, so as to prevent him from recovering at law fees charged for treatment as distinct from diagnosis or advice.[22] This is the only class of persons reported in law to have the right to sue for fees for treatment. This, as is apparent, can hardly be compared to the full statutory right of the "Chinese herbalist" to recover charges for nearly every sort of professional service rendered.

But, as provided by the section, the charge must be reasonable.[23] And the "Chinese herbalist" or the registered practitioner, cannot recover charges for work which is substantially useless owing to negligence[24]

In the case of registered medical practitioners, it has been held that there is a presumption that they render their services for reward[25]. The onus is then on the patient to show that a particular service is rendered gratuitously.[26] Whether this presumption extends to the "Chinese herbalist" is doubtful. For though the Law expressly allows them the right to recover payment they are not properly registered practitioners.

It can thus be concluded that the "Chinese herbalist" has a statutory right to demand and recover reasonable charges for practice of medicine according to Chinese methods. This includes charges for professional aid, diagnosis, advice, prescription and treatment and probably visits.

---

20 – *Green* v. *Rex*, 1905 T.S. 595
Rex. v. *Smith*, 1917 T.P.D. 206, see Gordon Turner & Price, 3rd edn., *Medical Jurisprudence*, p. 214

21 – Medical Acts

22 – *Hall* v. *Trotter* (1921), 38 T.L.R. 30 (osteopath able to recover fee for treatment)
Macnaghten v. *Douglas*, [1927] 2K.B. 292
(osteopath able to recover at law, not being prevented by the Medical Act, 1858, s.32 which subsequently comes under s.27 (1), Medical Act, 1956, fees charged for treatment as distinct from diagnosis or advice.

23 – *Tuson* v. *Batting* (1800), 3Esp. 192
(a medical practitioner can recover a reasonable sum in the absence of contract.)

24 – *Kannen* v. *M'Mullen* (1791), Peake, 59

25 – see *Gibbon* v. *Budd* (1863), 2H. & C.92 and *Corbin* v. *Stewart* (1911), 28 T.L.R. 99 at p.101

26 – see *Gibbon* v. *Budd*

Legal Liabilities of Chinese Herbalists

The present heading proposes an examination of the liabilities of the traditional Chinese medical man, the phrase is employed in its widest sense, so as to include every person of Chinese race who practises the art of medicine and surgery according to purely Chinese methods.

It cannot be too strongly emphasized that it is quite impossible to discuss every liability to which the "Chinese herbalist" may find himself subjected. These occasions may be infinite. The "Chinese herbalist" may find himself liable under the criminal law for abortion, manslaughter, or he may be liable under several ordinances.[27] These instances are well beyond the present scope of discussion for every one living under the law may find himself liable in the same circumstances. The nature of the liabilies in these examples is thus not affected by the medical man's status as such. So the present discussion will be centred around the liability for professional negligence.

In *Lockgelly Iron & Coal Co.* v. *M'Mullan*[28] Lord Wright said:

> "In strict legal analysis" – "negligence means more than heedless or careless conduct, whether in ommission or commission; it properly connotes the complex of duty, breach and damage thereby suffered by the person to whom the duty was owing."

The legal wrong of negligence thus involves that there must be a duty owing by one person to another, that there must have been a failure to comply with that duty of care, and that damage must have resulted therefrom to the person to whom the duty was owing. So three separate things have to be considered: the manner in which such a duty to take care arises between the Chinese medical man and his patients, the extent of this duty and the standard of care required of him.

The duty of care

The well-known general principle which the judge employs in determining whether there exists a duty to take care in law[29] or not is the generalization of Lord Atkin in *Donoghue* v. *Stevenson*.[30]

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissons which are called in question."

It can be seen that the existence of a duty on the part of the medical man towards the patient is well in accord with the test, for the patient is a person who is so closely and directly affected by the medical man's act by virtue of their close and special relationship that he is a 'neighbour' of the medical man within the Neighbour Test.[31] It can thus be concluded that the duty to take care on the part of the medical man and his liability for the breach of which is only a particular instance of the general liability for the tort of negligence.

The foregoing discussions have been centred around the origin of the duty to take care on the part of the medical man; the same principles apply to the "Chinese herbalist" who is within the meaning of the medical man in the present context. For the duty of care owes its origin to the assumption of responsibility of the medical care of another and is not dependent on the status of the medical man as such. Therefore the existence of the duty in relation to medical treatment is not limited to cases where the medical service is rendered by a registered or qualified person, or even by one who pretends to qualifications which he in truth lacks. These matters only affect the

---

27 s. 32 Medical Registration Ordinance, forbidding treatment of and advice on eye diseases by unqualified persons. Dangerous Drugs Ordinance and Antibiotics Ordinance. Notice s.37 of Pharmacy and Poisons Ordinance which says that the ordinance does not apply to the "sale, manufacturing, dispensing or compounding of traditional Chinese medicines as listed in *the Chinese Herbal Materia Medica* (本草綱目) which is relied on heavily by the "Chinese herbalist." In all these instances only registered doctors are privileged.

28 [1934] A.C. 1 at P. 25

29 In *Winfield on Tort*, this is termed "notional duty" – the circumstances give rise to a duty to take as a matter of law as distinquished from duty in fact.

30 [1932] A.C. 562

31 It has been criticized that the Nieghbour Test is not the true test as the Court is in fact guided by policy reasons. Even then, there is every reason to find a duty of care on the medical man.

32 Nathan

standard of care to be expected of the defendant. Indeed it has long been recognised that layman or unregistered or unqualified person who practises medicine is as much liable to an action for negligence as the qualified person.

Scope of the duty of care

Where, in accordance with the principles discussed above, a person has, by assuming responsibility for the medical treatment of another, come under a duty to exercise care and skill towards him, the duty extends not only to wrongful acts but also to failure to act[32]. The duty extends further in the case of a medical man to diagnosis, prescription and advice, even the service is gratuitous. [33] All these principles apply to the traditional Chinese medical man.

The standard of care

The next question is by what standards the professional conduct of the "Chinese herbalist" is to be judged. For it is only when these criteria are known that it is at all possible to determine whether the "Chinese herbalist" has complied with the duty of care towards the patient with respect to the particular conduct complained of. The present discussions set put to ascertain this standard of care and the possible difficulties which would be encountered.

In the general law of negligence the standard has been laid down as that of the "reasonable man." This is a test laid in the *dictum* of Alderson B., in *Blyth* v. *Birmingham Waterworks Co:*[34]

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do."

But this is not so for a person who holds himself out as possessing special skill or knowledge in the conduct of a profession or calling. In this case the rule *Imperitia culpae adnumeratur* demands that he in fact has such skill and knowledge; and the fact that a person carries on a profession or calling, the practice of which requires special skill or knowledge, constitutes a representation on his part that he possesses the requisite qualifications.

The law in this situation expects him to show average competence associated with the proper the charge of the duties of his profession, trade or calling. And it follows that where negligence in the exercise of a profession or calling is in question the standard applied is not the conduct of the reasonable man but that of the reasonable member of that profession or calling. [36]

There is thus imposed on the medical man, and in this context, the "Chinese herbalist", a duty to use proper care as well as a duty to possess and exercise skill.[37] In *R.* v. *Bateman*[38] Lord Hewart said:

> "If the patient's death has been caused by the defendant's indolence or carelessness, it will not avail to show that he had sufficient knowledge; nor will it avail to prove that he was diligent in attendance if the patient has been killed by his gross ignorance and unskilfulness."

Thus a reasonable standard of care and competence is expected of the medical man, by virtue of the fact that he possesses special skill and knowledge. There is thus no reason why such a principle should not be applicable to a "Chinese herbalist", for he is a person who carries on a profession and the practice of such requires special skill and knowledge. Indeed the statement in *R.* v. *Bateman* is but a particular instance of the general rule that every person professing of special skill or knowledge has to answer to the law a duty of care as well as a duty of skill.[39] This is so, in the present context, no matter the medical man is a qualified medical man or an unqualified medical practitioner, or else he be a medical scholar of orthodox persuasion [40] or traditional Chinese medicine. So long as the medical man represents himself to be skilful and learned the law requires him to be careful as well as skilful, though the standards may not be the same in the two cases.

---

33 See *Banbury* v. *Bank of Montreal*, 1918 A.C. 626, *per* Lord Finlay, L.G., at p.657, and *per* Lord Atkinson, at pp. 689-90 see Nathan p. 36.

34 (1856), 11 Exch. 781 at p. 784.

35 *Shiells* v. *Blackburne* (1789), 1 Hy. Bl. 158, *per* Heath, J. , at p. 162; *Harmen* v. *Cornelius* (1858), 5 C.B.N.S. 236, *per* Willes, J., at 246

36 See *Winfiedl on Tort* p. 56

37 *Seare* v. *Prentice* (1807), 8 East 347 (medical man has a duty to possess and exercise proper skill).

38 (1925), 94 L.J.K.B. 791 at p. 794, reasonable standard of care and competence required

39 *The Lady Gwendolen* [1965] p. 294, a brewing company which owned a ship and used it regularly is expected to use the same degree of care and skill in the management of the ship as would any other shipowner.

40 *i.e.* the only system of medicine recognised by the law (modern or Western medicine)

The qualified medical practitioners will thus be liable in an action for negligence if he fails to exercise that degree of care and skill which is to be expected of the average practitioner of the class to which he belongs. A jeweller who pierces customer's ears for the wearing of earrings is bound to conform to the standard of skill and care which might be expected from a jeweller and cannot be held liable if he fails to make use of all the precautions which a doctor would employ.[41] A "Chinese herbalist" will thus only be made answerable in a negligence suit if the fails to come up to the standard of care and skill expected of the average Chinese herbalist". As we see in the case *R.* v. *Bateman,* the qualified medical practitioner will not be judged by the standards of the least qualified member of his class, nor by those of the most highly qualified, but by the standard of the ordinarily careful and skilful practitioner of that class. Thus in this case Lord Heward said:

> "The jury should not exact the highest, or a very high, standard, nor should they be content with a very low standard. The law requires a fair and reasonable standard of care and competence."

In still another case *Hunter* v. *Hanley*[42], Lord President Clyde said:

> "The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of it if acting with reasonable care."

These tests are well in accord with the broader principle of "reasonableness" in the tort of negligence. For the "reasonable man" in the ordinary tort of negligence has not "the courage of Achilles, the wisdom of Ulysses or the strength of Hercules."[43] But when a person holds himself out as skilful and learned in certain respects the law requires him to exercise the skill and care of a reasonable member of that class but not that of the layman,[44] and not the ablest nor the weakest of that class. Logically it follows that the "Chinese herbalist" has to exercise the skill and care of the "average Chinese herbalist", not the best nor the worst[45] of the class. This proposition seems to be consistent with the principles of law propounded above[46] but there is no direct authority on this point and it seems to beg the question that the "Chinese herbalist" should be judged according to tenets of his own school of thought, *viz,* Chinese medicine. Should he not be judged according to the tenets of other schools? This question is not unimportant for it is well realized that the tenets of the two schools of medicine in Hong Kong, *viz,* Chinese medicine and Western or modern medicine are completely different in their principles of practice,[47] with regard to the same problem they have different ways of diagnosis, treatment or prescription.[48] Can negligence on the part of the "Chinese herbalist" be established merely by showing that Western medicine or practitioners of Western medicine or some other schools of medicine disapprove of the particular practice complained of? This question, in broader principle, really raises the quaere whether a practice complained of should be judged according to the tenets of its own school of thought, or should it be judged by that of the others where there exist several different schools of thought with regard to the same problem.

There is little English authority on the point. One prominent writer[49] on medical negligence takes the view that where there exist two or more **recognised** schools of thought with regard to a particular problem, the practitioner who adopts a particular practice should be judged according to the tenets of that school but not that of the others. But he qualifies his proposition by adding that the particular practice complained of must be an approved practice. In such a case, what is required then to establish negligence is to prove a

---

41 – *Phillips* v. *William Whiteley, Ltd.*, [1938] 1 All E.R. 566

42 [1955] S.L.T. 213

43 *Hawkins* v. *Coulsdon & Purley U.D.C.* [1954] 1Q.B. 319, 341, *per* Romer L.J.

44 – see above

45 see 41

46 see 36

47 The basic difference in principle is that Western medicine grounds on modern science but traditional Chinese medicine bases itself an a philosophical framework. Thus Western medicine may explain diseases by employing the theories of bacteriology, physiology or heredity. But Chinese medicine would explain the same incidence in terms of an old school of Chinese philosophy called in Chinese 陰陽五行學說

lack of care or skill in the performance of the particular practice adopted. But as the writer says, the above is merely an inference from the legal conception of professional negligence and there is no legal basis for it. But in America and Canada such a matter has received much attention from the Legislature. In America the result has been stated as follows: [50]

> "While the law recognises that there are different schools of medicine, it does not favour, or give exclusive recognition to any particular school or systems of medicine as against the others. When a patient selects a practioner of a *recognised* school of treatment he adopts the kind of treatment common to that school or, as otherwise stated, he is presumed to elect that the treatment shall be according to the system or school of medicine to which such practitioner belongs. The question whether or not a practitioner in his treatment of the case exercised the requisite degree of care, skill and diligence is to be tested by the general rules of the particular school of medicine which he follows and not by those of other schools, since he is only under the duty of exercising the degree of skill and care ordinarily exercised by practitioners of his school. A school of medicine, in order to be entitled to recognition under this rule, must have rules and principles of practice for the guidance of all its members, with respect to principles, diagnosis and remedies which each member is supposed to observe in any given case."

Thus in some parts of Canada and America, where systems of medicine other than the orthodox system[51] like osteopathy, chiropractic and naturopathy, have received statutory recognition, the conduct of the practitioner of a particular school will be judged by the tenets of his own school. But the Legislature of Hong Kong and that of England too, have adopted a rather different course. The Legisiature, besides providing for the orthodox system of medicine or modern medicine,[52] has not made provisions for licensing other unorthodox systems of medicine like osteopathy and naturopathy and forbidding their practice by unqualified persons. But the law does not in any way forbid the practice of medicine by unqualified or unregistered persons, but, by forbidding them to use any title, name or description which would induce the public to think that they are qualified or registered practitioners, ensures that the public should be able to distinquish between practitioners who have qualifications recognised by the law and those who have not. But despite the differences of approach it seems logical to apply the rule adopted by the American and Canadian Courts. A person who resorts to an unregistered practitioner of an unorthodox school must be held to have done so with his eyes open and should have no right to claim that the practitioner's conduct should be judged by any other than the principles and practice of the school to which the practitioner belongs. Thus, a patient should not be allowed to establish negligence on the part of an osteopath from whom he has received treatment and who is not a registered practitioner by showing that orthodox registered practitioners disapprove of that mode of treatment or even they consider it harmful, for treatment in accordance with the principle of ostepathy is the very thing a patient when he resorts to an osteopath. On the one hand the osteopath would be liable for negligence if he fails to carry out treatment according to the principles of osteopathy. It seems that, as contended by the same writer mentioned before, there should not be any objection in England, and a *fortiori* in Hong Kong, to adopt the rule as adopted by the American Courts, *viz*, the conduct of a practitioner should be judged by the tenets of his own school, provided that the school to which the defendant belonged must have been a recognised school of medicine as pronounced by the

---

48 for example, in diagnosis, in Western medicine, advanced scientific apparatus and methods are used like radiology, electrocardiogram, blood test, urine test and the use of stethoscope *etc.*
In Chinese medicine, diagnosis is extremely simple and does not resort to any kind of instrument. Diagnosis means but four words, in Chinese,望聞問切 In strict translation they mean observation, (visual), Listening and questioning (auditory), and feeling of pulse (pulse-rate).

49 – Nathan

50 – 70 *Corpus Jevis Secundum,* p. 953 (Physicians & Surgeons, s.44 in *Nathan's Medical Negligence* p. 29

51 – *i.e.* modern or Western medicine

52 Medicial Registration Ordinance, Cap. 161 In England, Medical Act, 1956

American Courts and the rule should also be made subject to the several qualifications made by the American Courts. But is Chinese medicine a recognised school of medicine in Hong Kong and what is meant by "recognised school of medicine"?

> ". . A school of medicine, in order to be entitled to recognition under this rule, must have rules and principles of practice for the guidance of all its members, with respect to principles, diagnosis and remedies which each member is supposed to observe in any given case."

In this sense, it is clear that in Taiwan and China where Chinese medicine is given complete statutory recognition in the sense that there are licensed schools of Chinese medicine, Chinese medicine is a recognised school of medicine like Western medicine. For the Chinese medicine there are clearly principles and rules with respect to diagnosis, remedies and principles for the guidance of the "Chinese herbalist". And it is clearly a widely recognised school of medicine in Hong Kong, Taiwan and in China. But this question whether Chinese medicine is a "recognised school of medicine" is highly medical in nature and is beyond the competence or people other than learned persons of the field and finally this is a question for the Court or the Legislature to decide. But in view of the fact that it has survived the Chinese history by over two thousand years and that it receives proper recognition in Taiwan and Communist China, there is every logical reason to presume that it is a proper school of medical thought which has its own principles and rules with respect to principles, diagnosis and remedies, for the observance of its followers. Should that be the true position which most probably is, the "Chinese herbalist" in a negligence claim for professional negligence will thus be judged according to the tenets of Chinese medicine but not Western medicine or any other school of thought.

PUBLIC ASSEMBLY — RIGHTS AND LIABILITIES

Patrick Chan

By courtesy of S.C.M.P.

If the law is so uncertain or is so framed that people may be liable to prosecution one way or the other, will they respect the law? If they are punished for doing something which people in other countries consider as their fundamental human right, will they obey the law?

Public opinion is the key to the efficient running of government. Whenever a policy is made or an administrative action taken, it is necessary to know how the citizens will react to it. A community which turns a blind eye to or fails to respond effectively to its members' needs will sooner or later face anarchy. Ill-informed and unjustified attacks on Government policies are undesirable. They should be refuted. But it does not follow that all criticisms are groundless and should be prohibited. Fair comments and constructive suggestions should be welcomed and encouraged. Unfortunately, the channels available for peaceful expression of opinion are inadequate.

When these channels have been exhausted and yet the aims have not been achieved, it may be necessary to take the grievances to the streets. Thus meetings and assemblies have become more important in civilized society.

The right of assembly

Public assembly is an indispensable means of expression in a free state. But do we have any right of assembly?

In some countries, the right of assembly is looked upon as sacred as other human rights such as the right to live, the right of freedom *etc*. It is incorporated in and guaranteed by the Constitution.

Under the unwritten constitution of Britain, "there are no guaranteed or absolute rights".[1] Every right is sacred; every right is fundamental provided it exists. A right exists when the Courts sanction it and give remedies for any infringement of it. Any rights of person, of speech or of public meeting (if they exist) are derived from the decisions of the Courts. "The law of the constitution is not the source but the consequence of the rights of the individuals as defined and enforced by the Courts."[2] If there is a right of assembly, it is the law which recognises it, not the Executive or the Police. If people are punished for holding an assembly in Hong Kong, it should be because they are contravening the law and not because the Governor or the Commissioner of Police forbids it. A person may be punished by the law and the law alone. To maintain the Rule of Law, the law should be certain and leave no room for the exercise of arbitrary power.

1 *Liversidge* v. *Anderson* [1942] A.C. 206, *per* Lord Wright.

2 A.V. Dicey, *The Law of the Constitution,* (10th ed.) p. 203.

Does the law enforce the right of assembly? One has a right to do something provided it is not against the law. Anything which is not unlawful is lawful. Rights are in fact liberties, *i.e. freedom* from legal restrictions. There are some rights such as the right of property and the right to personal freedom, which the law explicitly recognises. The law gives remedies for an infringement of them. There are some rights which the law doesnot recognise. Remedies are not provided for interference with such rights but are available for infringement of other legally recognised rights. Thus if the law recognises the right of assembly and if A prevents B from holding a meeting, B can bring an action against A for an infringement of his right of assembly. If, however, B has no such right, A is liable only for false imprisonment or assault. But this is merely the result of B's right of personal freedom which is recognised by the law. A is not liable for an infringement of B's right of assembly – there being no such right to be infringed.

There was no provision concerning the right of assembly in the Magna Carta 1215 and the Bill of Right 1688. However, a right to petition the King was expressly provided for.[3] This seems to make Holdsworth think that a right of assembly exists.

"It was the growth of this habit of petitioning Parliament and of other forms of Political agitation ... that made public meetings common. It was in the cases to which these practices gave rise that the right of public meeting began to be envisaged as a constitutional right and its limits began to be defined. The constant agitation – political, religious, social and economic -- has been the cause which has made the right of public meeting an important topic of constitutional law."[4]

However, in *R.* v. *Graham & Burns*[5] Charles J. unequivocally refused to recognise such a right:

> "... I can find no warrant for telling you (the jury) that there is a right of public meeting either in Trafalgar Square or any other public thorough fare ... the public have no right to hold there any meetings for discussion upon any questions, be they social, political or religious."

This is supported by Dicey. "Just as it cannot with strict accuracy be asserted that English Law recognises the liberty of the press, so it can hardly be said that our constitution knows of such a thing as any specific right of public meeting."[6] Subsequent cases[7] and academic writers[8] share the same view. However it is argued[9] that the authorities cited only dealt with meetings at Trafagar Square, Whitehall etc. where such occurrences were expressly prohibited by statutes. "The law of trespass is not a solvent of other rights." The fact that one is liable for trespass or other offences does not mean that one has no right to assemble, so the argument goes. However attractive it may be, this argument fails to establish a right of assembly. Besides, Charles J's words were unambiguous. Not only was there no right to hold meetings in Trafalgar Square, but also anywhere in the public thoroughfare.

On the other hand, there is no authority prohibiting the holding of a meeting. This is so because public meeting is closely related to the freedom of person and speech, which has been so firmly established in the British Constitution. What people usually refer to as the right of assembly is "nothing more than a result of the view taken by the Courts as to the individual liberty of person and individual liberty of speech."[10] "The attitude of the Law may be described as neutral. Just as it recognises no right of meeting, so it enforces no duty to allow a meeting any more than it recognises the right to forbid a meeting."[11]

Recently, there is a tendency to recognise a right of assembly. The fact that there are statutes regulating public meetings implies such existence. In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights, of which Article 20 states that:

> "Everyone has the right to freedom of peaceful assembly and association."

Since 1953, the United Kingdom has been a member of the European Convention on Human Rights and Fundamental Freedoms. Article 11 of section 1 of the Convention has similar provisions.[12] Be that as it may, until implemented

---

3 13 Car II S.I.C. 5 (1662), not repealed by the Bill of Rights 1688.

4 *History of English Law,* Vol. X., p. 701.

5 (1888) 16 Cox, C.C. 420.

6 *The Law of the Constitution,* (10th ed.)pp. 270-271.

7 *Ex parte Lewis,* (1888) 21 Q.B.D. 191
Duncan v. *Jones,* [1936] 1 K.B. 218.

8 Wade & Philips, *Constitution Law,* p. 551
Lawson & Bentley, *Constitutional & Administrative Law,* p. 305

by legislation, a right of assembly is not recognised by the law in the United Kingdom.

Legal restrictions

As the right of assembly is a residuary right which is not legally recognised, it is necessary to know the restrictions imposed by the law. It must always be kept in mind that the principle underlying these restrictions is the maintenance of peace and order. The Courts and the Legislature have always tried to balance public interests with private rights. A citizen's rights should always give way to public interests and be subject to the rights of others.

At Common Law, the restrictions take the form of a number of civil wrongs and offences *i.e.* trespass, nuisance, unlawful assembly, riot and rout. People are free to hold an assembly either in private premises or in the open space provided that they do not constitute an obstruction, commit trespass, cause or tend to cause a breach of the peace or use violence.

In Hong Kong, the present Public Order Ordinance which has replaced the former 1948 Ordinance was passed in 1967. It is a highly oppressive Ordinance "containing extensive limitations on freedom of speech and association and conferring sweeping powers on junior police officers, so drafted as to exclude, in many cases, redress in the Courts for abuses."[13] Many of the offences created do not require mens rea.[14] If strictly enforced, this Ordinance would, in some cases, lead to defiance of the Rule of Law.

The statutory provisions have replaced most of the Common Law rules and added new restrictions. The Commissioner of Police may, if it appears to him to be necessary or expedient in the interests of public order, prohibit the holding of public gatherings in any particular place or on any particular day. (Public Order Ordinance, section 15(1).) The Governor in Council may also prohibit all public gatherings for a period of not more than three months, if he is satisfied that it is necessary for the prevention of serious public disorder to do so. (Section 16(1).) Wide powers are also given to the Police to control or even "conduct" a public meeting. The Common Law concepts of unlawful assembly and riot have been expanded (section 18 & 19), *i.e.* a common purpose is no longer required. The Ordinance with other statutory provisions virtually remove the residuary rights of assembly.

Types of assemblies

For the present purposes, a public assembly can be either a public meeting or a procession. The importance of defining the different types of public assembly lies in the fact that under the Ordinance, no public meetings and processions can take place without a licence. (section 7(1).)

There seems to be no legal definition of assembly. It is usually regarded as a synonym of meeting. But apparently it is much wider. From the definition of unlawful assembly it can be deduced that "an assembly is constituted by the congregation of three or more persons for the accomplishment of some common purpose."[15]

There is no Common Law definition of meeting. But section 2 of the Public Order Ordinance defines it as any gathering or assembly of persons which is convened or organised for any purpose or at which any person assumes or attempts to assume control or leadership. Exceptions are meetings held by any public body or held for the purpose of carrying out any duty or exercising any power imposed or conferred by any Ordinance. "Public body" includes the Executive Council, Legislative Council, Urban Council or any Government bodies or Departments.[16] The number of persons is not defined, but it seems that three are required to form a "gathering or assembly". The purpose of the meeting is immaterial. What is important is that there must be some degree of organisation either prior to or at the time of the meeting. A public meeting is one held in any place to which the public or any section of the public are entitled or permitted to have access, either paid or unpaid. "Any section of the public" may mean either any members of the public or

---

9 Brownlie, *The Law relating to Public Order*, pp. 137-144.

10 A.V. Dicey, *The Law of the Constitution*, 10th Ed., p. 271.

11 Wade & Phillips, *Constitutional Law*, p. 551

12 "(1) Everyone has the right to freedom of peaceful assembly . . . ."

13 J. Rear, *Hongkong: the Industrial Colony*, pp. 90-91.

14 *e.g.* s.4: Wearing a uniform signifying any association with political organisation;
s. 12: taking part in an unlicensed meeting.
s. 15: taking part in the promotion of a prohibited meeting.

15 Lawson & Bentley, *Constitutional & Administrative Law*, p. 306.

16 Interpretation & General Clauses Ordinance, s. 3.

any specific group, e.g. members of a particular society. The first meaning is preferred as adoption of the second would render a public meeting indistinguishable from a private meeting. A public meeting may take place in private premises or in open space. It also includes a stationary demonstration. This takes the form of a silent sit-in protest, a strike or a parade in which people stand evenly spaced in the street holding out posters. No speeches or discussions are involved. The definition of public meeting is wide enough to cover meetings such as trade union meetings, funeral meetings, university seminars or even dinner parties.

Presumably a public meeting does not include a public procession which is "any procession in, to or from a public place" (section 2). Procession is not specifically defined in the Ordinance, but Lord Goddard C.J. in *Flockhart* v. *Robertson*[17] thought that "it is not merely a body of persons; it is a body of persons who are moving along a route."

From its nature, some degree of organisation is required. Dicey seems to treat a public meeting as the same thing as a procession when he said,

"A has a right to *walk* down the High Street or *to go* to a Common. B has the same right. C, D and all their friends have the same right to go there also. In other words, A, B, C and D and ten thousand such have a right to hold a *public meeting* . . . . " [18]

But Professor Goodhart emphatically makes a distinction between the two.[19] Besides, the right *to walk* down a street and *to go* to a certain place is different from the right to hold a *meeting*. A public meeting is usually stationary and involves the delivery of speeches, while a procession is a moving gathering protesting with posters. The former *prima facie* constitutes a trespass but the latter does not, though both may be a nuisance. It is usually said that there is "no right of public meeting" but that public processions are *prima facie* lawful.[20] A procession has a flattening effect in that only placards or boards are used. The slogans and signs tend to oversimplify or even obscure the main issues.

A public meeting or a procession requires a licence from the Police: (section 7(1).) An application for such a licence is to be made 7 days in advance (or 24 hours in the case of a funeral procession) to the Commissioner of Police (or a Police Inspector or anyone with a higher rank to whom he has delegated this power under section 52(1)), who shall issue a licence if he is satisfied that the public assembly is not likely to affect the maintenance of public order or be used for any unlawful or immoral purpose (section 7(2)). A number of exceptions is included in the section. No licence is required for entertaining purposes, social or business purposes in a licensed restaurant, or for the purpose of a funeral, and also for meetings held in a licensed place of public entertainment (such as a cinema): (section 7 (5)). Conditions may be attached to the licence, which may be withdrawn if it appears to the Commissioner to be necessary or expedient in the interests of public order or prevention of crime. These conditions can also be amended at any time. There may be an appeal to the Governor against a refusal or withdrawal of a licence. However, can it be of any use if an appeal against the Executive is to go to the Executive?

The requirement of a licence may be justified on the ground that without it, the meeting will constitute a trespass against the Crown. But in the case of a public meeting in private premises or a procession this can only be explained on the ground that, for the sake of public order, the Police should be informed of any such occasions so that they can be prepared to prevent the commission of crimes or breach of the peace.

Since public meeting is loosely defined, the distinction between a public and private meeting is not clear. As a result, some meetings which are usually considered as private may require licences. Thus "a meeting of workers to discuss conditions of work, which takes place outside the factory

17 [1950] 1 All E.R. 1091.

18 *The Law of the Constitution*, (10th ed.) p.271.

19 *Public Meetings and Processions*, (1937) 6 C.L.J. 161.

20 S.A. de Smith, *Constitutional and administrative law*, p. 483.

gates and which is not called by registered trade union"[21] would require a licence. This would greatly hinder the labour activities. For such meetings no reasonable labourer can ever dream of getting a licence, let alone applying for it 7 days in advance.

A public meeting in a restaurant can be held without a licence only if it is exclusively for social or business purposes. But what if during the meeting, someone raises an issue uncounnected with such purposes? Would it automatically be an unlawful assembly? Moreover, it is not infrequent for a procession to stop at some place to discuss the matter in issue or for the participants in a public meeting to move to another place. Do the organisers have to obtain two separate licences – one for the procession and one for the public meeting?

It is suggested that the definition of public meeting should be confined to meetings held for discussing matters of public interest so that ordinary people know when they should have a licence for their meeting.[22] There should also be a board for granting licences. Such board should consist of members of the Police Force and the Urban Councillors. Appeal against refusal should lie to the court.

The holding of public assembly

Preparatory stage

The organisation sponsoring the public assembly must not be an unlawful or unregistered society (Societies Ordinance, section 18 (l)) or a quasi-military organisation for usurping the Government (Public Order Ordinance, section 5). The officials and members of such organisations will be liable under these provisions. If the assembly is to be held for an unlawful purpose with intent to use force or violence, then it will be an unlawful assembly.[23] Besides, the Commissioner of Police (or his delegate) will not grant a licence for such meetings (section 7 (4) of the Public Order Ordinance).

An application for a licence must be made 7 days in advance, informing the Police of the date, time, place, purpose and route of the meeting. Until a licence has been issued, the public assembly shall not be advertised or publicized (section 7 (1)). For a public meeting to be held in private premises the consent of the owner or occupier of the premises is also required.[24] It appears that no special permission is necessary for charging admission fees. Since 1972, as a result of clashes between the Police and demonstrators, several places have been named for holding public demonstrations:–

(i) two football fields and the small knoll in Victoria Park,
(ii) The football fields in Happy Valley Horse Racing ground,
(iii) Hongkong Stadium, and
(iv) Homantin Playground (formerly the open space opposite Hunghom Public Ferry Pier).

It is clear, from the nature of these places, that apart from applying for a licence from the Police, special permission has to be obtained from the Urban Council.[25] These places have been specified so that no obstruction is caused to the public. However, it is not at all clear whether a public meeting held in some other public place will be allowed or not. The mere fact that an open space (such as the Statue Square or Morse Park) is dedicated to the public use does not apparently entitle persons to use it for holding a public meeting.[26] Repeated refusals by the Police to allow public meetings to be held elsewhere suggest that they can only be held in the above places. Processions cannot be effectively held in these places or in the streets because of the traffic. Then where can we have a procession?

In preparing handbills, posters and placards, it must be remembered that these must not be defamatory, seditious, abusive, insulting or threatening and with intent to provoke a breach of the peace (section 13 (2)). or to incite others to use violence (section 26 (1)) or to make other persons

---

21 J. Rear, *We Run Them In*, F.E.E.R., 1967, No. 8 p. 382.

22 This was the law prior to 1967, (Public Order Ordinance, 1948, S.2) and is the same as the Public Meeting Act., 1936, s.9.

23 *R.* v. *Graham & Burns*, (1888) 16 Cox, C.C. 420.

24 *Hampstead Garden Suburb Trust Ltd.* v. *Denbow*, (1913) 77 J.P. 318.

25 It is noted that the "July 7th Victoria Park Incident" in 1971 was partly caused by the Urban Council's refusal to allow a meeting in the Victoria Park as a result of which the Poilce refused to grant a licence.

26 *De Morgan* v. *Metropolitan Board of Works*, (1880) 5 Q.B.D. 155.

apprehensive of injury to their and person property. (section 27 (1)).

Even if the organisers know that an opposition will be present, they will not be guilty of unlawful assembly [27] unless they provoke the opposition to cause a breach of the peace.

To achieve the aims of a protest, the assembly must be a peaceful and orderly one. It is advisable to exclude, from the very start, members who are likely to cause trouble.[28] If a large crowd attends, it should be divided into small and controllable groups. Stewards or ringleaders are necessary, especially in a procession, to regulate the assembly so as to maintain peace and order and to minimise any obstruction or inconvenience caused to the public. It should be remembered that a licensed assembly can still be a nuisance.

During the public assembly

All conditions attached to the licence must be complied with, otherwise it will be an offence under section 12 (1). Presumably the organisers have an obligation to inform the participants of any such conditions or at least to see to it that they do not contravene any conditions. Section 12 (1)(*b*) makes the leaders (in fact any participants) liable if they suffer or permit any such contravention. In a large meeting, it is sometimes difficult even to know that someone is contravening a conditon, let alone to stop him. Will lack of knowledge be implied permission and hence a ground of laibility? If so, it will be a case of strict liability. The licensee must be present during the whole assembly unless he is prevented from being so by reason of illness or other unavoidable cause: section 9. What is unavoidable may depend on the circumstances and the personal judgment of the licencee. But will the Court accept a reasonable excuse if his personal judgment turns out to be wrong?

The Commissioner of Police may, in exercising his absolute discretion, prohibit the holding or continuance of the public gathering if it appears to him to be necessary or expedient in the interest of public order. Notice of the prohibition may be given to any one of the promoters. If a public gathering continues to be held, any person who takes part in the *promotion* will be liable (section 15). Thus the person who receives the notice and his informed the others not to go, may still be liable though he abstains from the gathering. This is manifestly unfair as no mens rea is required for this offence.

The organisers have a Common Law right to exclude any person from the meeting.[29], However they cannot exclude the Police who are entitled to enter and remain on private premises if they have reasonable grounds for believing that if they are not present an offence or breach of the peace will be committed.[30], (It will be seen that the power of entry by the Police has been considerably widened by the Public Order Ordinance). An invitation can always be withdrawn. But once a person has been admitted upon payment, he cannot arbitrarily and for no good reasons be ejected.[31] However, the organisers have the right to turn out any person who behaves in a disorderly manner.

Even with a licence which exempts the demonstrators from liability for trespass on the highway against the Crown, a public assembly may still be a nuisance. Thus it should be peaceful and orderly. The less inconvenience it causes the public, the better. Since a public meeting is of a temporary nature, it is arguable that under the rule in *Lowdens* v. *Keaveney* [32], it is not an obstruction of the highway through unreasonable use. However, this will depend on the circumstances.

A participant who wears any uniform signifying his association with any political organisation or with the promotion of any political object shall be guilty of an offence (section 4). But what amounts to a uniform? When will a uniform be regarded as signifying an association with a political organisation? The Ordinance offers no answers. It appears that these are questions of fact. If a person wears a green shirt and if members of some political group wear green shirts to indicate

27 *Beatty* v. *Gillbanks*, (1882) 9 Q.B.D. 308

28 Their conduct may render the whole assembly unlawful.

29 *Doyle* v. *Falconer*, (1866) L.R. 1 P.C. 328.

30 *Thomas* v. *Sawkins*, [1935] 2 K.B. 249.

31 *Hurst* v. *Picture Theatres Ltd*, [1915] 1 K.B. 1.

32 [1903] 2 I.R. 82.

their views, it seems that the Courts may regard green shirts as a uniform. If so, there is a risk of punishing an innocent person who wears a particular shirt without knowing that it is a uniform of a political organisation. The purpose of this section is not clear. If the political organisation is not unlawful, why is it an offence to wear its uniform?

A person who has with him an offensive weapon at a public meeting is guilty of an offence under section 14 (1). (and also section 33) It is noted that an offensive weapon is defined in section 2 to cover an article "suitable" for causing injury to the person. A pencil is capable of causing injury. Is it an offensive weapon?

All participants are obliged to comply with the conditions specified in the licence and any orders issued by the Police for the sake of public order in matters such as the displaying of flags and banners (section 3) and the playing of music (section 6). Non-compliance will ground liabilities under the relevant sections. Moreover, any person who deliberately refuses to comply with Police orders may be guilty of obstructing the Police in the execution of their duties (section 23 of the Summary Offences Ordinance.)

The assembly is a riot if any person in it uses violence or commits a breach of the peace. All those who take part in the riot will be liable even though only one behaves in this manner (section 19). It is not necessary that the breach of the peace is committed by them. They may still be liable if they behave in a noisy or disorderly manner or uses threatening, abusive or insulting words *with intent* to provoke a breach of the peace, or where by a breach of the peace is *likely* to be caused (section 13 (2)). If it can be shown that they have an intention to provoke a breach of the peace, it is immaterial that they do not or fail to do so. Proof of such intention is, however, not always necessary. Nor need there be an actual breach. If, in the circumstances, it is probable that there will be a breach of the peace, they are liable. But who is to decide this question, a policeman, a reasonable man or a reasonable policeman? It is dangerous to leave this important question to any individual policeman as this will involve a subjective test. A reasonable man is different from a reasonable policeman. The latter has received a special training and is more alert and sensitive to any change of circumstances. What appears probable to a reasonable policeman may not so appear to a reasonable man. It is submitted that the "reasonable man" test is more desirable.

Even if the original assembly is lawful, it can become an unlawful assembly if the participants conduct themselves in a disorderly, intimidating, insulting or provocative manner intended or likely to cause any person to fear reasonably that they will commit a breach of the peace or will by such conduct provoke others to commit a breach of the peace (section 18 (1)). Any person taking part in it is liable. Again proof of intention is not essential. It is not necessary that any person is actually put into fear of a breach of the peace. If it appears to a reasonable man that the assembly will probably cause any reasonable person to have such fear, the offence is completed.

Any person who, without lawful authority, at any public gathering makes any statement or behaves in a manner which is intended or which he knows or ought to know is likely to incite or induce any person to use violence is guilty of an offence under section 26. Moreover if he, without lawful authority or reasonable excuse, says anything or behaves in a manner which intimidates others he will be guilty under section 27.[33]

It can be seen that the foregoing discussion applies to speeches as well as conduct. Thus it is an offence to utter provocative, threatening, insulting or abusive words. It was held in *Jordan* v. *Burgoyne*[34] that to "insult" is to "hit by words" and that the speaker must take his audience as he finds them. It is immaterial that the audience happen to be easily irritated. Besides, it is slander to utter a false statement which tends to lower a person in the estimation of right-thinking members of society generally, or which tends to make them shun or avoid him,[35] unless a defence is available.

If speeches are made with an intention to (a)

33 s. 48, which casts the burden of proof of lawful authority or reasonable excuse on the accused, has been replaced.

34 [1963] 2 Q.B. 744.

35 *Youssoupoff* v. *M.G.M. Pictures Ltd.*, (1934) 50 T.L.R. 581.

bring into hatred or contempt or to excite disaffection against the Queen or the Government or the administration of justice, (b) persuade others to use violence or to disobey the law or to seek an alteration of the law by unlawful means, or (c) arouse discontent and ill feelings among the population, then the speakers will be liable for sedition under the Sedition Ordinance, sections 3 and 4 as well as the Public Order Ordinance.

At a public meeting held in private premises, the participants can use reasonable force to defend themselves and to prevent persons from unlawfully entering their premises.[36] In the case of a procession, it is advisable to keep to the left side of the road so as not to obstruct traffic. Anway, the Police will require the demonstractors to do so.[37] At Common Law, the mere presence of a person at the scene of an offence does not make him an aider or abettor.[38] Whether a spectator is liable for unlawful assembly or not will depend on his knowledge of the character of the meeting. If steps have been taken to bring to the attention of bystanders that the meeting is unlawful, it would seem to be no defence to plead ignorance of the fact that it has become so.[39] "If a meeting is illegal, a person, who attends it, knowing it to be so, is guilty of an offence."[40] Under the Ordinance, any person "who takes part" in an unlawful assembly or riot is guilty of the offence. Thus a person who bona fide attends a public assembly in order to express his dissent can be arrested simply because someone turns the originally peaceful and lawful assembly into an unlawful one. He will also be liable if he goes there with the mistaken but honest belief that the promoters have got a licence. A person may, on discovering that the assembly has been changed to an unlawful one, wish to leave the scene, but is unable to do so because of the crowd. Will he be liable? It is noted with regret that on several occasions, demonstrators gathering in front of the Queen's Pier in Central District were unable to disperse, though warned by the Police, as they were surrounded by the Police and onlookers who outnumbered them.

Student participants must also note that the Director of Education may, in his absolute discretion, require the supervisor of a school to expel those pupils who participate in a procession or a disorderly assembly.[41] There seems to be no justification for this power.

In some cases, the disturbance of the peace was caused not by the original assembly but by an opposing party. This in *Beaty* v. *Glenister*[42] 15 members of the Salvation Army who marched along the streets singing were not guilty of the offence charged. The breach of the peace was only caused by a hostile crowd of 400–500 following them. The mere presence of the opposition does not make a lawful assembly unlawful.[43] The Police usually favour the original assembly more than the opposing party. There seems to be no authority dealing with the heckling of an assembly. However, under the Public Order Ordinance, any person who at any public gathering acts in a disorderly manner for the purpose of preventing the transaction of the business for which the public gathering was called together or incites others so to act shall be guilty of an offence (section 13 (1)). To enter, in a violent manner, any premises where a meeting is being held will also constitute an offence under section 23 (1). In Hongkong, there is seldom any opposing party to a public assembly. Probably such party will also need a licence without which it will be an unlawful assembly. In any case, it is most unlikely that the Commissioner of Police will allow two public meetings to be held in the same place at the same time.

Control and dispersal

The Police are not only justified but bound to prevent a breach of the peace even without a warrant.[44] It is the duty of the Police to take law-

36 *Doyle* v. *Falconer*, (1866) L.R. 1 P.C. 328.

37 Police General Orders, Chap. 26, Para. 986.

38 R. V. Fursey, (1833) 6 C. & P. 81.

39 *Ibid.*, *per* Gaselee J. at p. 88.

40 *R.* v. *Fursey*, (1833) 6 C. & P. 81.

41 Education Ordinance, Cap. 279, L. H.K. (1971 Ed.) Subsidiary Legislation Cl. 96 (1).

42 (1884) 51 L.T. 304. Cf. other Salvation Army cases, e.g. *Beatty* v. *Gillbanks*, (1882) 9 Q.B.D. 308. *R.* v. *Justices of Londonderry*, (1891) 28 L.R. Ir. 440.

43 *Beatty* v. *Gillbanks*, (1882) 9 Q.B.D. 308.

44 *R.* v. *Brown*, (1841) Car. & M. 314.

Dobson v. *Fussey*, 131. E.R. 117.

ful measures for regulating processions and assemblies in public places[45] and preserving order in public places and places of public resort, for which purpose any police officer on duty shall have free admission to all such meetings.[46]

The Police can enter and remain on private premises if they reasonably believe that an offence or a breach of the peace will be committed. This principle has been criticised as an unjustified extension of police power.[47] However, *Davis* v. *Lisle*[48] has limited this power to the extent that the Police cannot enter or remain on private premises if only a summary offence is likely to be committed.

A police inspector (or above) can prohibit the display of flags, banners or emblems at a public gathering or in any premises if he reasonably believes that such a display is likely to cause a breach of the peace. For this purpose, he is also entitled to enter any premises, if reasonably necessary, using such force as may be necessary (section 3).

The Commissioner of Police has power under section 6 to control and direct the conduct of all public gatherings and specify the route of a public procession. He can do so if it appears to him to be necessary or expedient in the interests of public order. There seems to be no judicial review on the exercise of his discretion.

Formerly under section 5 of the Public Order Ordinance, 1948, a police officer can only require a person to give his name and addresses (a) upon the request of the chairman of the meeting and (b) if he reasonably believes that that person is trying to interfere with a public assembly. Now, he can do so without any request and for the purpose of preventing or detecting any offence (section 49 of the 1967 Ordinance).

It has been held[49] that it is the Police's duty to prevent or disperse a meeting if they reasonably apprehend a breach of the peace. But this is subject to two limitations:– (a) a mere statement by a constable that he anticipates such breach is insufficient,[50] and (b) there can be no other way of protecting the participants of the meeting or preventing a breach.[51]

It seems that the second limitation is no longer valid. Section 11 of the 1967 Ordinance confers a much wider power on the Police. Any Police officer can prevent, stop or disperse an unlicensed public assembly or one at which there is a breach of the conditions attached to the licence. An inspector can prevent or disperse or vary the place or route of any public gathering if he reasonably believes a breach of the peace is likely to be caused. Moreover, a police inspector can cause a closure of a place and its vicinity to prevent a meeting from taking place there if he reasonably believes that an unlicensed meeting is likely to be held there. (section 11 (4)). He can also enter into any premises to remove any seditious publication.[52] Such a sweeping power is an unjustified restriction on the freedom of person.

A police officer can demand help from any person in preserving peace only if (a) he actually sees a breach of the peace committed by two or more persons and (b) there is a reasonable necessity to call for help.[53]

The law of public assembly does not concern the protestors alone. It concerns every citizen. It is not so much a question of public expression of opinion, but one of human dignity. It is not only a branch of law, it involves some fundamental principles.

People obey the law because they know it is a thing they ought to do.[54] They obey the law because they know that the law will protect them and that if they behave themselves they will not be punished. If the law is so uncertain or is so framed that people may be liable one way or the other,

---

45 Police Force Ordinance, s. 10 (*e*).
46 *Ibid.*, s. 10 (g).
47 Professor Goodhart, *Thomas* v. *Sawkins: a Constitutional Innovation,* (1936) 6 C.L.J. 22.
48 (1936) 2 K.B. 434.
49 *Duncan* v. *Jones,* (1936) 1 K.B. 218.
50 *Piddington* v. *Bates,* (1960) 3 All E.R. 660.
51 *O'Kelly* v. *Harvey*, (1883) 14 L.R. Ir. 105.
52 Sedition Ordinance, s. 8 (1).
53 *R.* v. *Brown,* (1841) Car. & M. 314.
54 Lord Denning, *The Road to Justice,* p. 2.

will they respect the law? If they are punished for doing something which people in other countries consider as their fundamental human right, will they obey the law? [55]

The formulation of the law is one thing; the administration of it is another. "The more typical denial of individual freedom by Parliament does not, however, result from a dramatic constitutional crisis, but from the careless delegation to the Executive of absolute and arbitrary powers"[56] In a modern state, it is essential that some powers should be given to the Executive for the smooth running of Government and the welfare of the Community. But there must be some control either judicially or by the Legislature. The law of public assembly, as it now stands, leaves the Courts helpless in many cases. Thus the citizens will be left to the mercy of the powerful Executive. This is a denial of the Rule of Law. It is no longer a law of public assembly, but more like a set of rules formulated by the Police. "The result is that there is now no assurance, unless police permission is secured in advance, that a meeting can be held anywhere in a public place."[57] A protest against the authorities requires Police permission and "supervision". But does a protest against the Police require the same permission and "supervision"? Will the Police allow a protest against themselves? That the law will not be strictly enforced and that the Police will not abuse their powers are no guarantees. Even if we have a loyal and efficient Police Force (most people have doubts about this) and the law is seldom strictly enforced, the threat of a rule by the Executive is still there. Civil liberties are secured by the law and removable only by the law and not the Executive. It is better to have an Ordinace prohibiting all public gatherings than to impliedly recognise a right of assembly and then punish those who exercise this right.

The present state of the law of public assembly is the result of the defects in the constitutional machinery and the lack of means of communication. However, it is this very Ordinance which obstructs the way to a better government and better laws. Some restrictions upon the freedom of assembly are obviously essential in the interests of public order. "The shape which those restrictions must take must equally obviously depend on the state of society in different countries."[58] The risk of violence varies in different societies, the greater the risk, the more the restrictions. But should the law of public assembly in Hong Kong be so restrictive? Should the law of public assembly be completely left in the hands of the Police? Looking at the law, one cannot but ask: is it a relic of the dying 20th Century Colonialism or is the Government over-enthusiastic in maintaining peace and order?

---

55 Thus develops the doctrine of civil disobedience. See E.A. Smith, *Is it ever right to break a law* for a detailed discussion on this subject.

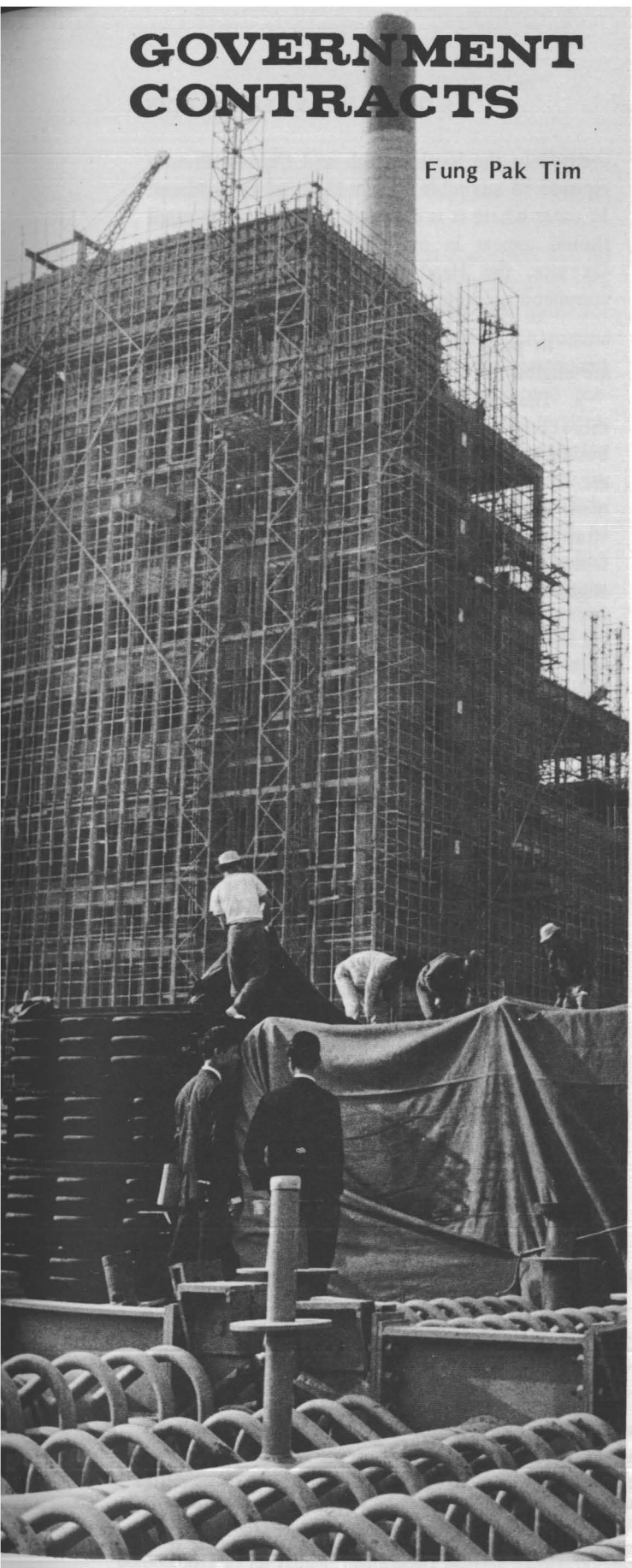
56 A. Lester, *Democracy and Individual Rights*, p. 5.

57 Wade, *Police Powers and Public Meetings*, (1936-8) 6 C.L.J. 175 at p. 179

58 D.C. Holland, *Freedom of Assembly in the Commonwealth*, (1959) 12 C.L.P. 95.

GOVERNMENT CONTRACTS

Fung Pak Tim



By courtesy of H.K.G.I.S.

This article is concerned with government contracts for the procurement of goods and services in Hong Kong. The range of these goods and services is very wide from a pencil for the office clerk to the various services needed in connection with huge projects such as the High Island Water Scheme and the Mass Transit System. The writer focuses his attention on two particular aspects of government contracts, namely the selection of the contractor and the performance of the contract. The general practices of Hong Kong Government departments in these two areas are used as examples.

Selection of the Contractor

One of the largest spending departments of the Hong Kong Government is the Public Works Department. At the beginning of the financial year 1971-1972, there were 315 capital works contracts in force and a further 357 worth $634. 898 million were awarded during the year[1]. These figures show that the P.W.D. is the top contracting department in terms of the monetary value of the contracts concluded. The Public Works Department keeps approved lists of three groups of contractors who may, depending on their financial background, experience and capabilities, respectively tender for projects costing under $500,000.00, those of a value up to $2,500,000.00, and those of any size[2]. The lists of contractors are kept under review in the light of the performance of the approved firms in contracts awarded to them and changes in the firm's financial standing.

After the probation period, a contractor may apply for up-grading. The normal procedure is for him to submit his firm's latest audited accounts in order to show that the firm has sufficient financial resources to be up-graded. It is felt that the system of inspecting audited accounts has been an effective instrument in determining the financial capability and stability of the contractors.

The selection of the most desirable contractor may be done in either of two ways, by competitive tender and/or by the process of negotiation.

1 See Director of Public Works, Annual Departmental Report, 1971-72. Para. 2. 38.

2 See Director of Public Work Annual Departmental Report 1970-71, para. 2.40

Competitive Tender It is well settled that an invitation of tenders does not amount to an offer [3] and the tender itself is the offer. Before the tender (*i.e.* the offer) is accepted, both parties are free to reject or withdraw the tender. If the tender is accepted, a binding contract is concluded, except when the invitation or the acceptance itself stipulates that the acceptance is "subject to a formal contract"[4] or except when the tender itself is a standing offer[5]. In the latter case, there is a separate acceptance each time an order is placed with the tenderer and a distinct contract is made on each occasion.

There are two kinds of competitive tender, *viz.*, open or selective tender.

The method of open competitive tender is used when the project to be undertaken is itself unique or when no single contractor within the approved lists is capable of handling the project. Examples of such projects are the Mass Transit System, the Lion Rock cable car and the new television stations. The normal procedure is for Government to publish in the Government Gazette and where appropriate in both local and overseas newspapers a general invitation to tender. Stores Regulation 225[6] provides that:–

"Public tenders may be advertised for only with the approval of the Deputy Financial Secretary. A department wishing to call for public tenders will prepare a draft notification for the Gazette and forward it to the Deputy Financial Secretary, giving the references to any Secretariat files bearing on the matter. He will arrange for its insertion in the Gazette after approval."

Furthermore Stores Regulation 233 provides that:–

"Normally the notification will appear in two issues of the Gazette, and the closing time for receipt of tenders will be noon on a subsequent Friday (or if Friday should be a holiday, then on Thursday). Such notification may also be advertised in the local English and Chinese Press if considered advisable by the Head of Department. In cases where it is desirable that the notification should appear in more than two issues of the Gazette, the Head of Department should recommend accordingly."

In principle all interested firms or persons are eligible to tender.

The method of selective tender is used when more conventional types of projects *e.g.* government buildings, road and drainage works and flyovers *etc.* are in contemplation. In these cases, Government publishes in the Government Gazette an invitation to tender and only those contractors within the P.W.D. approved lists of contractors are eligible to tender.

All tenders with certain exceptions, are considered by the Central Tender Board [7] of the Colonial Secretariat. The functions of the Board are (1) To make recommendation to the Deputy Financial Secretary on the acceptance of all tenders, whether public or private, exceeding $25,000.00 in value, submitted by the departments in accordance with Stores Regulation 222 [8] with the exception of those tenders dealt with by the five subsidiary Tender Boards under the provisions of Stores Regulation 224[9]; (2) to recommend appointment of subsidiary Tender Boards where appropriate and to regulate their procedures if and when necessary; (3) To consider any matters referred by such subsidiary Tender Boards and tender and contract matters generally.

The Board, comprising the Deputy Financial Secretary (*ex officio* Chairman), the Director of Public Works or his representative (*ex officio* member) and the Director of Government Supplies (*ex officio* member), normally acts on the recommendation of the Director of Public Works in awarding contracts relating to projects within the functions of the P.W.D., and in relation to

---

3 Unless the invitation contains a promise to conclude a contract with the lowest tender.

4 *Chillingworth* v. *Esche [1924] 1 Ch. 97.*

5 *Great Northern Railway* v. *Witham* (1873) L.R. 9 C.P. 16.

6 See Regulations of the Hong Kong Government, Volume 4, Stores Regulations, Section V – Tender Procedure

7 See Civil and Miscellaneous Lists, Hong Kong Government, 1973 Edition

8 Stores Regulation 222:– "All tenders whether public or private, exceeding $25,000.00 in value will be submitted to the Central Tender Board for their recommendations unless the Deputy Financial Secretary decides otherwise."

9 Stores Regulations 224:– "There are five subsidiary TenderBoards which are authorized, under certain conditions, to deal with Government Supplies Department tenders up to $250,000.00, Architectural Office tenders up to $250,000.00, Marine Department tenders up to $100,000.00, Urban Services Department tenders up to $100,000.00 and London Office tenders up to £10,000.00.

government purchases, on the recommendation of the Director of Government Supplies.[10] Stores Regulation 237 provides that:–

"The Head of Department concerned will (a) provide an analysis of the tenders in the form of a comparative statement showing the rates quote for each item by the respective tenderer; (b) unless inappropriate prepare a comparative statement showing the amount of tenders accepted previously for the same or similar goods or services; and (c) state whether the approved estimate for the project is greater or less than the tender recommended for acceptance, specify the Head and Subhead of the Expenditure from which the cost is to be met, and certify that funds are available. The tenders will then be returned with the analysis, statements, *etc.* under a covering memorandum containing the recommendation of the Head of Department (or an officer not lower in status than the Assistant Head) as to the tender to be accepted. Any special circumstances governing the recommendation will be mentioned."

It is only in very exceptional circumstances and with very good reasons that their recommendations are rejected.

Other things being equal, the general principle is to accept the lowest *satisfactory* tender. But this is not a hard and fast rule, and increasing regard is being paid to government policies and other considerations such as the capability and the past good record of the contractor.

Maintenance of Competition The purpose of having the system of competitive tender is to ensure that Government gets the most satisfactory offer, but this purpose may be defeated if the tendering firms join together in a collusive tendering agreement and use various devices with the aim of eliminating competition among themselves, so that, in effect, the government is deprived of the opportunity of choosing the best offer.

In England the Restrictive Trade Practices Acts 1956 and 1968 eliminate the possibility of such collusion. For example, section 20 of the 1956 Act enables the court to make an order to restrain the parties from giving effect to the restrictions or from making any agreement to the like effect, and sections 7 (1), 7 (2) of the 1968 Act gives the contracting department a right to sue for damages if it has suffered financial prejudice as a result of the operation of a non-disclosed collusive tendering agreement.

It is noted that there is no equivalent statutory provision in Hong Kong, though it must be stressed that there is no evidence to indicate the existence of any such collusive agreement.

Procurement by Negotiated Contract It is sometimes very difficult to distinguish between the processes of competitive tender and negotiated procurement. In the Mass Transit System case, for example, the Government invited tenderers to submit preliminary tenders and then it resorted to the process of simultaneous negotiation with the competing consortia, with the aim of awarding a contract or contracts to a competing contractor or contractors.

Although the process of competitive tender is usually resorted to as a general principle in contract procurement, there are contracts which are concluded as a result of negotiation with the contractor. Such procedure is governed by the Stores Regulations.

Stores Regulation 211[11] governs local purchase of stores. It provides that:–

> Stores which are not held in unallocated stock by the Government Supplies Department or for the supply of which a Government Supplies Department contract does not exist may be purchased locally only as provided for below, except where otherwise authorized by the Deputy Financial Secretary:–
>
> (a) Single purchases not exceeding $250.00 in value may be made by departments direct without either authority from the Director of Government Supplies or recourse to tender, provided that the prices quoted are reasonable . . . . .

---

10 The Government Supplies Department is the central organization for the procurement of goods and services and the distribution of supplies required by Government.

11 See Regulations of the Hong Kong Government, Volume 4, Section IV–Procurement of Stores.

(b) (i) Single purchases costing over $250.00 but not exceeding $25,000.00 may be made locally only through the Government Supplies Department .... For such purchases the Government Supplies Department will obtain quotations by private tender, subject to a minimum of five suppliers being approached and the lowest quotation to specification being accepted, except where tender procedure is dispensed with on the authority of the Director of Government Supplies or officers delegated by him.

(ii) In urgent cases the Director of Government Supplies, his deputy .... may verbally authorize departments to purchase stores costing over $250.00 but not exceeding $25,000.00 direct, with or without tender, in accordance with the above rules where applicable.

(c) Single purchases exceeding $25,000.00 in value must be obtained through the Government Supplies Department when the tender procedure laid down in Stores Regulations 221–250 will be followed."

Similar provisions are made in Stores Regulation 214 for the procurement of services.

Performance of the Contract

Because most government contracts are concluded with established contractors, a tacit understanding is gradually evolved out of a continuing relationship and well-understood procedures so that each party knows and usually conforms to the expectation of the other. Therefore when any dispute arises between the parties, it is normally settled by negotiation rather than legal proceedings.

Generally speaking, the performance of the contract must be in strict accordance with the express or implied terms of the contract.

Clause 3 (a) of the General Conditions of Contract of the Government Supplies Department provides that:–

> "Scheduled goods shall be of the qualities and sorts described and equal in all respects to any specifications or drawings mentioned in the schedule hereto or to any specifications, drawings or samples supplied by the Contractor before acceptance of this Tender."[12]

and clause 7 (a) provides for the possible rejection of

> "..... any scheduled goods which do not strictly conform with the conditions of sub-clause (a) of clause 3 ....."[13]

Variation There is no provision in the General Conditions of Contract of the Government Supplies Department for any variation of specifications of the scheduled goods to be procured after the signing of the contract and Government is bound to accept what it contracts for.[14]

However, Government can vary the quantity, within certain limits, of the goods it contracts to buy. Clause 6 of the Terms of Tender[15], which also forms part of the contract, provides that:–

> The quantity shown against each item in the Schedule is an estimate of probable requirements and such estimate must be regarded as being given for the assistance of the Contractor on the best evidence available and not as being a figure to which Government binds itself to adhere. Government guarantees under this contract to accept up to 80% of the estimated quantity given against each item in the Schedule and reserves the right to require the Contractor to supply up to 20% more than the number of any item in the Schedule and within such limits the Con-

12 S.F. 121 (Revised) (9/72), clause 3 – Scheduled goods, Specifications and Proof Notes.

13 Supra, clause 7 – Rejections.

14 Assuming, of course, that all other requirements are met by the contractor.

15 S.F. 121 (Revised) (9/72) Part I – Terms of Tenders

tractor must be prepared to supply all the requirements of Government at the rates stated during the contractual period if called upon to do so."

It is undeniable that variations upset estimates and cause delays in completion, but variations are almost unavoidable in certain sectors of procurement *e.g.* in architectural works. Accordingly, standard clauses in the General Conditions of Contract for Architectural Works empower the government to make orders for variations. Clause 73 (1) [16] provides that:–

"The Architect [17] shall make any variation of the form, quality or quantity of the Works or any part thereof that may in his opinion be necessary and for that purpose or if for any other reason it shall in his opinion be desirable shall have power to order the Contractor to do and the Contractor shall do any of the following:–

(a) increase or decrease the quantity of any work included in the Contract;
(b) omit any such work;
(c) change the character or quality or kind of any such work;
(d) change the levels, lines, position and dimensions of any part of the Works:
(e) execute extra works of any kind,

and no such variation shall in any way vitiate or invalidate the Contract but the value (if any) of all such variations shall be taken into account in ascertaining the amount of the Final Contract Sum."

Performance Incentives In the General Conditions of Contract of the P.W.D. or the Government Supplies Department, there is no standard clause providing for "performance incentives" in the form of bonus incentive for the early completion of work or early delivery of goods.

On the contrary, there is a seemingly punitive provision for liquidated damages due to delay. Clause 67 (1)[18] of the General Conditions of Contract for Architectural Works provides that:–

"If the Contractor shall fail to complete the Works within the time prescribed by clause 62 (governing time for completion) or extended time, then the Contractor shall pay to Government the sum stated in the Tender as liquidated damages for such default and not as a penalty for every day or part of a day which shall elapse between the time prescribed by clause 62 or extended time as the case may be and the date of completion of the Works."

Performance Bonds A contracting department will require from the successful tenderer or contractor a performance bond to safeguard the department against bad workmanship or breach of contract if it is thought that such risks exist. The third party providing the bond assumes the responsibility of a guarantor, but his liability ceases upon the due performance of the contract by the contractor.

Clause 14 of the P.W.D. General Conditions of Contract for Architectural Works provides that:–

"The Contractor shall either –

(a) at his own expense obtain the guarantee of an insurance company or bank, in either case to be approved in writing by Government, to be jointly and severally bound together with him to Government in the sum provided in the Tender for the due performance of the Contract; or
(b) deposit with the Accountant General, Hong Kong, as security for the due performance of the Contract the sum provided in the Tender:

Provided always that, when the certificate of completion with respect to the Works is issued, the said guarantee or deposit shall be released or repaid to the Contractor ....."

---

16 P.W.D. Articles of Agreement and Conditions of Contract for Architectural Works, 1971 Edition, p. 20

17 Defined in clause 1 (1) as "the person named in the Articles of Agreement as Architect or such other person as may be authorized from time to time by the Director and notified in writing to the Contractor to act as Architect for the purposes of the Contract and the person so named or authorized may be described either by name or as the holder for the time being of a public office."

18 Supra, p. 18 of the Articles

Inspection Clause 6 of the General Conditions of Contract of the Government Supplies Department provides that:–

> "All deliveries of scheduled goods will be subjects to inspection and accordingly shall not be deemed to have been accepted unless either:–
>
> (a) the Director of Government Supplies . . . shall furnish the Contractor with an Acceptance Note; or
>
> (b) the goods are not rejected within 28 days of delivery."

It is further provided that the contractor remains liable to deliver satisfactory scheduled goods in place of those rejected, unless the Director of Government Supplies notifies the Contractor that he does not require replacement of such goods.[19]

In the case of the Printing Department, since a substantial portion of the Department's work is handled by private firms and there is a wide and varied interpretation of standards which in the main differ vastly from those set within the Department, a high degree of inspection of contracted work is necessary. In many cases rejection of the products is the final outcome, with attendant wastage of time.[20]

Technical and Financial Control of Performance Technical control during the progress of the contract is necessary to ensure that the contractor complies with all the specifications in the course of executing the contracted work. The process of technical control is often applied to the construction works where such task is undertaken by the Architect of the particular contract, and also spot-checked by the Technical Audit Unit of the P.W.D.

The function of the Unit is to keep a surveillance of all contractual aspects of the Department's construction tenders and contracts, with continuing emphasis on checking site records and remeasurement books. The inspection is carried out to ensure that all work and materials are properly tendered for, contract agreements properly entered into, work carried out and materials supplied in accordance with the contract documents and bills properly finalized[21]. The Architect and the Technical Examiners of this Unit are empowered by a number of standard clauses in the General Conditions of Contract to carry out such necessary inspection, test, or examination.

Clause 15, for example, deals with the inspection of site, clause 53 deals with inspection or testing of materials and workmanship and clause 55 deals with the inspection of foundations.[22]

Normally, the contract price is agreed upon before the commencement of the contract, but where a contracting department orders variations [23] after the commencement of the contract, financial control is necessary to ascertain the Final Contract Sum in the light of the Contractor's performance of the variations. There are provisions in the standard clauses in the General Conditions of Contract of the P.W.D. which deal with such situation, *e.g.* clause 74 governing the ascertainment of prices for variations and clause 75 dealing with the adjustment of Final Contract Sum if variations exceed 25% of the Contract sum. [24]

Personal Performance and Sub-contracting If it is a reasonable inference from the terms and all the surrounding circumstances of the contract that special reliance is placed on the special skill of the contractor, the contractor cannot assign the responsibility of performing the contract to another person.

Clause 2 of the General Conditions of Contract of the Government Supplies Department expressly provides that:–

> "The Contractor shall not, without the consent of the Director of Government Supplies, assign or otherwise transfer this contract or any part, share, or interest

---

19 Clause 7 (c) of the General Conditions of Contract of the Government Supplies Department.

20 See Government Printer, Annual Departmental Report, 1971-72, para. 29

21 See Director of Public Works. Annual Departmental Report, 1971-72 para. 2.40 and 1970-71 para. 2.45

22 P.W.D. Articles of Agreement and Conditions of Contract for Architectural Works, 1971 Edition, P. 6 and P. 14.

23 See the part of this article dealing with "variation of contract".

24 P.W.D. General Conditions of Contract for the Architectural Works P.20-21

therein and the performance of this contract by the Contractors shall be deemed to be personal to him."

There is no definition of what is a "sub-contract" in the P.W.D. General Conditions of Contract and the issue whether any contract, which the contractor subsequently enters into in order to enable him to perform his obligations under the principal contract, is a "sub-contract" must be resolved by reference to the terms of the main contract that defines the contractor's obligations.

Where sub-contracting is thought necessary or where it is a normal practice in that trade, clause 4 of the General Conditions of Contract of the P.W.D. is incorporated into the main contract. Clause 4 provides that:—

"The Contractor shall be permitted unless expressly prohibited by the Architect to sub-let the whole or any portion of the Works either on the basis of the provision by the sub-contractor of labour and materials or by the provision of labour only on a piece-work basis. Notwithstanding that where the Architect has not prohibited sub-letting the Architect shall be entitled to prohibit any sub-contractor and shall have full powers to remove any sub-contractor from the Works."

Since the sub-contract is entered into between the contractor and the sub-contractor, there is no privity of contract between the Department and the sub-contractor. In order to protect the Department against the default in performance by the sub-contractor, Clause 4(2) goes on to provide that:-

". . . . (The Contractor) shall be responsible for the acts, defaults and neglects of any sub-contractor, his agents, servants or workmen."

In other words, the Contractor is held vicariously liable for any default of the sub-contractor. In practice, the contracting department usually directs the contractor to incorporate particular terms in the sub-contract with the object of protecting the interests of the department or of the contractor himself. This is governed by clause 86 of the P.W.D. General Conditions of Contract.[25]

Financing of Government Contracts The system adopted by Government in the procurement of goods is normally that of "deliver now, pay later" *i.e.* payment is to be made only after delivery and acceptance of the goods by the contracting department. Clause 9 of the General Conditions of Contract of the Government Supplies Department provides that—

". . . Unless otherwise agreed by the Director of Government Supplies, no payment for supplies will be made until the same are deemed to have been accepted within the meaning of clause 6[26] of this Part. Invoices in respect of deliveries will be included in the next available pay-list after the date of acceptance and an advice of payment will be forwarded within 20 days thereafter."

The contractor is expected to provide his own means of finance during the progress of the contract. But there may be cases where both parties expressly agree that interim payments are to be made by the contracting department after the completion or partial completion of certain works or after the end of a certain period. Provision for interim payments is a regular feature in construction contracts.[27]

---

25 P.W.D. Articles of Agreement and Conditions of Contract for Architectural Works, 1971 Edition, P. 24.

26 See the part of this article dealing with "inspection of scheduled goods."

27 See Clauses 98–100 of P.W.D. General Conditions of Contract for Architectural Works, 1971 Edition, p. 27–28.

INTERVIEW: MR. M.H. JACKSON - LIPKIN

Date: 7th August, 1973

Mr. M.H. Jackson-Lipkin, Barrister-at-law, was first called to the Bar in 1951, and has been practising in Hong Kong since 1969. In this interview, he expressed his opinions on the local Judiciary, corruption, crime, law reform, and the future prospects of the law students of the Hong Kong University.

Q. In what way do you think the Judiciary in Hong Kong is inadequate as compared to that of England?

J-L. That is an enormous question. Let us start from the beginning. First of all, there is no requirement at all that people on the Bench should have been in practice, that is to say, people who have appeared in courts on instructions of solicitors and who have met clients and who are not constantly prosecuting in the employment of the Crown. The beauty of the British system is that those appointed are men who, after years of practice have acquired an immense knowledge of people and experience in work of all kinds. They are men of absolute integrity and good practice, and are "selected" to go to the Bench. There is no question of "promotion". In Hong Kong, that is just not so. Here are professional judges like those on the Continent. But on the Continent you have a different system: you choose what profession you want to go to, either the legal profession or the judiciary. And they have professional training of judges. We in Hong Kong fall in between. We have neither the British system where practitioners are made judges, nor the European Continental system where judges are trained as judges.

The second thing is that there is an extraordinary division between the Attorney-General's chambers on the one hand, and the Bar and Solicitors on the other. On one side you have Crown counsel in the Attorney-General's chambers who are not allowed to do anything other than the Crown's work. On the other side, you have the Bar and solicitors who are rarely allowed to do the Crown's work. Of course, in England, there are legal officers doing prosecution work in committal proceedings in the magistracy. But when it comes to trial or civil work they instruct members of the Bar. So by the time a man has some years of

practice in England he has experience in both prosecution work and defence work. But in Hong Kong, counsel who appear for the defence have rarely had any experience in prosecution. Equally, a man who confines himself to the prosecution, is definitely affected by his work. It certainly colours the approach, and it clouds the judgement of the prosecutor. The Crown's case is as important to the community as to the defence case. A man with a clouded judgement is not going to be a good prosecutor any more than a deprived defence counsel, who never prosecutes, can ever be a good defence counsel. So the evil casts both ways. Here, these prosecutors are often made magistrates, many of whom are made District Court judges, and ultimately become Supreme Court Judges.

Another appalling aspect is that when a magistrate is promoted to the District Court there is no requirement at all that he should have done any civil work. He may be a prosecutor from the day he was called to the Bar in England until he becomes a magistrate. He may do criminal cases for twenty years and then suddenly he is asked to try tax cases, landlord and tenant cases, divorce, contract, tort, etc. It is unbelievable.

Fourthly, we have this ridiculously out-moded system of applying to the Judiciary the age regulations of the Civil Service. The regulations demand that all magistrates and District Court judges. retire at fifty-five, and that Supreme Court judges retire at sixty-two. But at fifty-five a man is just reaching maturity in thought and action. He is just beginning to acquire sufficient knowledge to be a good judge. At sixty-two, he is still learning. In England, the age of retirement of the judges is seventy-five. Most of the judges at seventy-five are at their peak, because being a judge requires wisdom and you do not learn wisdom from books.

Finally, we have no appellate court: There is no jury in the District Court: There are no shorthand writers or mechanical recording in the District Court: There are no clerks in magistracies to take notes. As a result, the magistrates and District Court judges have to scribble down every single word without having the chance of observing the demeanour of the witnesses.

Q. What about the Legal Aid System in Hong Kong?

J-L. Legal aid, which is far in advance than anywhere else in Asia, is nevertheless far short of the British standard. There is no legal aid available in the magistrates' courts where it is desperately needed, because the people down there are hardly capable of speaking for themselves and they are in the main ignorant people who need assistance. In the District Court, it is restricted, for the moment, to criminal cases carrying sentences of fourteen years or more. But most of the cases of the District Court involve sentences of fourteen years or less. Thus, cases which are covered by the legal aid system is a very small proportion indeed.

Q. What is the net result of these defects?

J-L. The result is that the system is grossly inefficient. An inexperienced judge does not know how to deal with witnesses and the arguments. Nor can he give good judgments at the end of the case. Take, for example, a simple running down case, two motor-cars collided, or a motor-car ran somebody over. The judge sees and hears the witnesses, the case is over in a day and a half, and judgment ought to be given on the spot – there and then. That is what British justice does. In England a reserved judgment is a rarity; it only occurs when some obscure point of law is debated and grave difficulty is involved. But in Hong Kong it is a miracle if you get a judgment at the end of the case.

Q. Apart from such defects, do you think the local Judiciary is an independent branch of the Government?

J-L. In theory, the answer is yes; in reality, the answer is no; in practice, it depends on the individual.

We subscribe to the theory that the Judiciary is independent. But is it truely independent? First of all, it has not a separate Vote. It is voted out of the ordinary Exchequer. As the British system demands, judges' salaries are laid down by Statute and paid out of the Consolidated Fund, and not out of the budget in any particular year.

The second thing is, judges here are treated as civil servants by the administrative branch.

The third thing is that the judges here are subject to the Establishment Regulations. They have to fill up an annual report at the end of the year. Those in the Judiciary below the rank of the Supreme Court judges can be removed for misconduct. They can be fined, they can suffer stoppages of pay.

What happens in practice is that you may have people with independent minds. Our present Chief Justice is one of those. He is not dictated to by any administrative officer anywhere in any department. It requires immense courage or eccentricity. We have seen certain judges in the last few years in Hong Kong at different levels and certain magistrates who are absolutely terrified of the Civil Service system to the extent that they are totally incapable of independent thought, frightened to take any decision or do anything that could possibly be controversial. It is difficult to compare judges and I am not prepared to do so. It depends entirely on the the individual judge. Li, J., in a judgment pointed out that, in this part of the world, i.e., Hong Kong, the Executive treated the Judiciary with contempt. That was in the context of shorthand writers, but it nevertheless is a very telling remark.

Q. Would you wish members of the Bar be appointed to the local Bench?

J-L. In theory, yes, but in fact, it will not be possible for a long time to come, because the Bar here is far too small and there are too few experienced or sufficiently experienced people to fill the posts.

The first faltering step has been taken at the moment at the Governor's acceptance of the Secretary of State's recommendation that two members of the Bar be appointed at the District Court. But the troble is that, if a barrister is appointed to the District Court and if he is a local man, he is ruined, because he is forbidden to practice in Hong Kong ever again. He is retired at fifty-five and he gets a miserable pittance instead of a pension. In England, the pension of the judges is laid down in s.19 of the Courts Act 1971. A judge would receive a full pension at his retirement after 15 years. In Hong Kong, the District Court is regarded as part of the Civil Service, and Civil Service pensions are based on thirty-three years of service, and if he is appointed at forty-five and retires after ten years, he will receive so small a pension that it may not even be called a pension at all. So the only person who can accept the appointment at the moment under the present system is a person with immense wealth in the sense of public responsibility, or a person whose practice is failing or whose health is failing.

Q. Corruptions has become a very popular topic nowadays, perhaps you would tell us your views on Blair-Kerr, J.'s report about the Godber affair?

J-L. On the whole, it is an extremely good report. It cleared up once and for all the question of collusion, placed the blame squarely on those responsible, left disciplinary proceedings to be taken if so advised, and provided solutions for the loop-holes he pointed out. Godber got out principally because the Ordinance as originally drafted was emasculated in the name of freedom when it went to London. But what London forgot was that corruption, being an offence *sui generis*, must be treated differently from others – even if it means shifting the burden of proof.

Q. Do you think corruption is a very serious problem in Hong Kong?

J-L. Yes, I do. It is very very widespread indeed. In this respect I must add that the Police Force is by no means the worst department. There are, for example, the Immigration Department and the Resettlement Department. The Building Office is probably the worst, because the quantum of corrupt payment to the Building Office is far in excess of anything paid for a British passport to the Immigration Department, or for an Identity Card or certificate of registration, or for stopping the fireman pointing a hose through a wrong window.

Corruption is just like cancer which can destroy the very society we live in. Take, for example, the recently published business of the magistrate and a police inspector. The worst aspect of that is not a police inspector offering the magistrate a bribe; that is bad enough. But the terrifying aspect of

it is how a police inspector actually thought it possible to bribe a magistrate. To believe that he could with impunity approach a magistrate, and that there was a chance of succeeding, is a terrifying reflection on Hong Kong.

Q. Do you think that the Anti-Corruption Branch is at the moment adequate? Do you think it should be made independent?

J-L. The answer to the first part of your question is no, and that to the second part is yes. The Anti-Corruption Branch should be made independent for a number of reasons and the least of them is this: any officer or ranker in the Anti-Corruption Branch, being a policeman, is liable to find himself transferred at any time into the ordinary part of the Force and find himself subordinate to the very man he has been investigating. This will certainly place some sort of psychological block on members of the Anti-Corruption Branch while conducting an investigation on the police.

Secondly, to be effective, the Anti-Corruption Branch must be rather like the Fraud Squad in the Scotland Yard, which is not composed merely of policemen, but also accountants, auditors, and so on. It has people of very wide experience, because tracing and proving corruption is like tracing and proving a vast company fraud. The ordinary policeman just is not qualified for that.

Thirdly, it must be independent, with its own head of Department, its own pay-structure, and its own promotion system, so that its men will not be tempted by the people they are investigating.

Q. Do you think the Prevention of Bribery (Amendment) Ordinance is adequate to cure the state of affairs in Hong Kong?

J-L. I think the Attorney-General has made it clear to the Bar and to Justice, if not to the public, that the amendments are only intended to be an interim measure pending the final report of Blair-Kerr, J., when, no doubt, wholesale amendments of the Ordinance will be recommended. Objections were raised by the Bar and acceded to by the Crown even before Blair-Kerr, J.'s interim report; and reconsideration of the Ordinance is likely after the final report is out. But one must not forget Ordinances like this must be approved in London, which might not understand the extent of corruption in Hong Kong. It starts in the smallest possible way – from giving petty sums to a ward amah in a hospital to paying a quarter of a million dollars to get the plans of a high-rise building approved in a low-rise area.

Q. The Anti-Crime Campaign is coming to an end. Do you consider it to have been a success?

J-L. I suppose to a degree it is a success because it seems to have cured the traditional fear of some of the local population of saying anything to the authorities. Hues and cries have been raised to the extent which, I am told, is greater than in the past. Reporting to the police has gone up. If that is what this campaign has done, it is a lot. But it was not a real anti-crime campaign, it was a gimmick. What we need in Hong Kong is to change the attitude of the public to the police. The police force here is detested and despised by ninety per cent of the population. When you get under-sized and under-paid men running around looking like boy-scouts in the summer and postmen in the winter, carrying guns and yet not knowing how to address an ordinary citizen, you are not going to get much respect from the population.

Q. What do you think of the new legislation that was introduced in the light of the Anti-Crime Campaign?

J-L. You cannot fight crime with legislation. Legislation is for punishment. The role of the Police is two-fold. The first role is to prevent crime and you prevent crime by being seen, by being on the spot: You prevent crime by putting fear into the minds of criminals, fear that they may be caught. The one solution is to have more policemen, better trained policemen, policemen on the beat, visibly on the beat. When I say "visibly", I think the way to make policemen visible, is to put them into some special uniform, which will make them stand out both in appearance and in height: It puts would-be criminals in fear of apprehension. Those are the ways to prevent crime.

The second thing is that we must have a specialist force and that means more pay, and to do this, you must take the Police out of the Civil Service and give it its own pay-structure. Specialists must be acquired. It is pathetic to see cases being presented in the courts of Hong Kong. There is no detective or police work being done at all. They rely on confessions and informers, who are notoriously unreliable. There are plenty of teeth in the law, it just requires a decent police force to give the law its intended effect.

Q. As a lawyer, do you think there is any area or areas of law which should be changed or overhauled?

J-L. As a Hong Kong citizen as well as a lawyer, I think we must have proper and effective Town-Planning laws which would enable Public Authorities to override private interests.

The law controlling stock-exchanges has been fiddled around with at the moment. Legislation must be introduced, for example, to forbid any form of inside trading, and that is essential.

One of the worst aspects is, I think, in the Landlord and Tenant Laws. For example, we have this preposterous system where every mortgage is made by way of legal assignment: We left that behind seventy years ago in England. Everything here is still held in tenancy in common: That is all right if you are living in a multi-storey block, but you cannot continue that for business premises. Another thing is that we are drifting into the same era that England entered into in the 1930's in security of tenure. What we really need in Hong Kong is not security of tenure, but the fixation of fair rents in rem. Security of tenure works appalling hardships on landlords who are not always mean and grasping. A lot of them are small people who have bought a roof for investment with an idea of living there in the future. If you just leave an unpleasant tenant in for ever and ever, it is not going to do the community any good at all. If you fix the the rent, it will discourage the landlord from throwing out the tenant unless he really requires the premises for himself and this in itself provides for security of tenure.

It is perfectly ridiculous in this day and age, to have the age of consent for sexual intercourse at sixteen. You have this extraordinary situation: girls reach puberty at about twelve or thirteen, but the law says you cannot have sexual intercourse with girl under sixteen (unless you are both Chinese and married to her; and then that is not an offence if the Secretary of Home Affairs declines to prosecute.) Clearly, sexual intercourse with a girl under the age of puberty must remain a serious crime: And it must remain a criminal offence to force any girl to have sexual intercourse if she does not want to. But if she does and she is capable of it, why should that be a criminal offence? And why should it be an offence for the man and not for the woman?

We have no satisfactory or tough "factory" legislation covering all employed manual labour. All over the Colony there are maimed or crippled workmen, not knowing of their remedy in tort, or having none in breach of statutory duty.

Q. What is your advice to the law graduates coming out from the Hong Kong University?

J-L. It depends on what you want to do. There are three branches in the legal profession. The first is the academic lawyer, that is, a person who looks on the law as it ought to be. He pays scant regards to what people are like, he pays scant regard to human failings, he thinks of the law as a pure, unsullied thing that can be looked at away from the rather nasty mess that people made of it. If you are the type of person who likes to look at things in isolation and indeed looks at things in isolation and who likes teaching, imparting and sharing knowledge, then you could be an academic lawyer.

Then you have the two professionals of the law, the solicitor and the barrister. A solicitor is like a family doctor. He is the person to whom the client goes and goes as much for sympathy as for advice. He is expected to a degree to be emotionally involved in each case he handles. His interest is in the client. On the other hand, if he is to be a good barrister, he has no interest in his client whatsoever. His only interest is in his client's case. He has no feelings or ought to have no feelings – if he is a good barrister, he does not have them. If he is a mediocre barrister, he has

and suppresses them. If he is a bad barrister, he ought not to be in practice. It is very difficult not to feel anything in a case at all and only to consider the case. But if a client is to be properly advised, then what better system can you envisage than the family doctor, i.e. the solicitor, holding the patient's hands, i.e., the client, encouraging him, collecting all the evidence, and then going to see the surgeon, i.e. the barrister, who is merely concerned with curing the disease.

Q. Is there any difficulty for girls who wish to become barristers?

J-L. For girls, it is exceptionally difficult. They have two very great handicaps. First of all, the way women are brought up, even in this modern world, is that they are more emotional in their approach than men, particularly when it comes to criticism. Girls are very much inclined to take any form of criticism as a personal attack.

The second thing is a physical handicap which is the voice. Many of the courts are quite large and in addressing judges and the jury in a distance you have to throw your voice quite a long way. In order to achieve that, the average woman raises the pitch of her voice. But if you do that with a jury or with a judge, it grates on their ears. So unless you can train to throw your voice without pitching it high you are going to infuriate those judge and jury in a criminal trial or the judge alone in a civil trial.

A lot of women have made good but I would myself have thought that the solicitors' profession is better for girls than the barristers' profession. It is much less exacting. If you are a solicitor you can work office hours. If you are a barrister, that is totally impossible because, if you are on your feet from ten to four-thirty, sometimes from nine-thirty to four-thirty, and in conferences, as in busy periods you are, from the time you get back from court till seven or seven-fifteen, when are you going to do your advices, statements of claim, particulars, pleadings and all your other paper work? At night after dinner, another four hours of work! May be also Saturdays and Sundays! The solicitors do not have to do that. But it is a very exacting profession because each and everyone of us has to do night work and weekend work.

Q. A final question: Are the local legal practitioners doing enough for the prospective young lawyers?

J-L. No, certainly not. Insufficient thought has been given to the future. The Bar has secured no premises as chambers for them. It lets them all run off into small "offices" of their own, where they learn absolutely nothing. The essential thing for a barrister is a set of chambers. I tried last year to secure accommodation to be held in trust for the graduates coming out from the University, but I failed miserably, having had no support. I do not know what the solicitors have done, maybe unknown to me, they have made all sorts of preparations for them.

– END –

THE INSANE TORTFEASOR

Thomas Sharr

How the law of tort applies and adapts its principles to a category of persons different from the ordinary man in the street is a relatively unexplored problem, both judicially and academically.

Essentially it is a question of the defendant's responsibility. But the legal question of responsibility, as this essay will show, is inextricably linked with the moral question of what criteria one should use to judge the mentally abnormal defendant and the social question of how to deal with such a defendant and protect the public.

The General Rule

This are few direct English authorities on the tortious liability of mentally abnormal persons but there seems to be little doubt that the law takes a stricter view than in criminal cases.

Ancient references to such liability are not lacking. In *Weaver* v. *Ward,*[1] for example, where there was an action of trespass for assault and battery, it was held *obiter* that trespass tended only to give damages for hurt or loss and "therefore if a lunatick hurt a man, he shall be answerable in trespass: and therefore no man shall be excused of a trespass .... except it may be judged entirely without his fault." And the example given of the total absence of fault was one's hand being forcibly taken by another to commit a battery.

Similarly, Hale[2] when discussing several kinds of incapacities including *dementia* wrote,

> "Ordinarily none of those do excuse those persons, that are under them, from civil actions to have a pecuniary recompense for injuries done, as trespasses, batteries, woundings."[3]

To the same effect was a *dictum* by Kelly C.B. who, dissenting in *Mordaunt* v. *Mordaunt,*[4] a divorce case, remarked that in civil actions, insanity was "no defence and no bar to the suit and no ground for a stay of proceedings." And in *Emmens* v. *Pottle,*[5] a libel case, Lord Esher, during counsel's argument in which Kelly C.B.'s *dictum* was cited, agreed that the liability for libel of lunatics depended upon whether he was sane enough to know what he was doing.[6] This requirement of knowledge of what one was doing effected a modification of Kelly C.B.'s unqualified statement. In a sense, Lord Esher's remark foreshadowed the controversy over the question what act by a lunatic is sufficient to found tortious liability, which will be discussed later.

It was against this background, where there were many oblique, but few direct, authorities on the tortious liability of those mentally abnormal, that the leading case *Morriss* v. Marsden[7] came to be decided. The defendant, sued for assualt and battery, was a catatomic schiphreniac and a certifiable lunatic who had been found unfit to plead in earlier criminal proceedings. At the time of committing the act, he was aware of its nature and quality but did not know that it was wrong. In accordance with the general tenor of earlier judicial observations on this subject, Stable J. held the defendant liable and agreed that "an intention – *i.e.* a voluntary act, the mind prompting and directing the act which is relied on ... as the tortious act – must

---

1 1616 Hob. 134.

2 In *History of the Pleas of the Crown,* Vol. I.

3 *Ibid.*, at p. 15. See also Bacon, *Abridgement,* Title "Trespass" G. – "An action of trespass may be brought against a lunatic notwithstanding he is incapable of design ... "

4 (1870) 2 P. & D. 109 at p. 142 .

5 (1885) 16 Q.B. 354.

6 *Ibid.*, at p. 356. See also a *dictum* by the same judge in *Hanbury* v. *Hanbury,* a divorce case, (1892) 8 T.L.R. 559, at p. 560.

7 [1952] 1 All E.R. 925.

be averred and proved,"[8] but "knowledge of wrongdoing is an immaterial averment,"[9] knowledge of the nature and quality of the act being enough. As examples of unactionable injury done to other people, he cited acts done during automatism and inadvertent sleep-walking, which in law could not amount to acts at all for lack of volition.[10]

The rule that an insane person is liable in tort unless owing to the severity of his mental abnormality he has done no voluntary act at all has thus been firmly established in English law and in other Common Law jurisdictions. In New Zealand, *Donaghy* v. *Brennan,*[11] decided earlier than *Morriss* v. *Marsden,* is to the same effect and the later case *Beals* v. *Hayward*[12] followed *Morriss* v. *Marsden.* The principle was applied in the Canadian case *Taggard* v. *Innes*, an assault case,[13] and *Slattery* v. *Haley.*[14] *Phillips* v. *Soloway*[15] also followed *Morriss* v. *Marsden.* And in Australia, the defendant in *Adamson* v. *Motor Vehicle Insurance Trust,*[16] though he was suffering from insane delusions, was held liable for negligence. The *Restatement of the Law of Torts* also states that "unless the actor is a child, his insanity or other mental deficiency does not release the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances."[17]

It is therefore submitted that a case of this kind, if it comes before Hong Kong courts, will be governed by the same principle.

The Act – Intention, Volition And Cognition

Though the general principle seems clear enough, both academic writers and judges recognise the possibility of a mentally abnormal person being excused from tortious liability.

It has been mentioned above that the *dictum* of Kelly C.B. in *Mordaunt* v. *Mordaunt* needs modification in the light of later judicial remarks. Lord Esher's observations in both *Emmens* v. *Pottle* and *Hanbury* v. *Hanbury* seem to suggest that a lunatic may escape liability if he does not know the nature and quality of his act. Thus in *Hanbury's* case, he held:

> "If the disease in the mind of the person doing the act was not so great as to make him unable to understand the nature and quality of the act which he was doing, that was an act for which he would be civilly or criminally responsible to the law."[18]

But the learned judge did not explain what precisely he meant by "nature and quality of an act" – whether it referred to the physical character of muscular movements or included the surrounding circumstances and consequences of the muscular movements as well. A further weakness in his *dictum* is that it savours too much of the M'Naghten Rules in criminal law, which have been rejected in *Morriss* v. *Marsden* as the exclusive test in the law of tort.[19] Furthermore, so far as *Emmen's* case is concerned, the necessity of the knowledge of the defendant in libel has been put in doubt by *Hulton* v. *Jones.*[20]

But the major flaw in Lord Esher's *dictum* lies in the fact that the test he used was one concerning the defendant's cognitive ability, his power of perception. Subsequent cases accepted with modification or simply did not adopt this test. Thus in *Morriss* v. *Marsden* Stable J. was concerned with the presence or absence of what he called "intention". The capacity to know the nature and quality of his act is no doubt relevant as evidence of "intention" but it is not adopted as the sole criterion of legal responsibility.[21] Therefore

---

8 *Ibid.*, at p. 927.

9 *Ibid.*, at p. 928.

10 In this respect, Stable J. was echoing the *dictum* in *Weaver* v. *Ward,* where the words "entirely without his fault" seem to refer to this kind of situation. This seems equally true of *White* v. *White,* [1950] P. 39, a divorce case where Asquith L.J. held that "I cannot believe that a man whose acts are completely automatic *e.g.* an epileptic in convulsion, can be guilty of cruelty in respect of such acts."

11 (1901) 19 N.Z.L.R. 289.

12 [1960] N.Z.L.R. 131.

13 (1862) 12 Upp. Can. 77.

14 [1923] 3 D.L.R. 156.

15 (1957) 6 D.L.R. (2d) 570

16 (1957) 58 W.A.L.R. 56.

17 2nd Ed., §283B.

18 (1892) 8 T.L.R. 559 at p. 560.

19 The headnote to *Phillips* v. *Soloway* is to the same effect.

20 [1910] A.C. 20. There the proprietors of a newspaper were held liable for defamation of a named person whom they believed to be purely fictitious.

21 See also *Phillips* v. *Soloway*, where it was held that the defendant, though insane, would be liable if he (i) formed an intention to do the act and (ii) knew its nature and quality.

Lord Esher's *dictum*, which weakened the authority of Kelly C.B.'s, have been in turn weakened by later cases.

On the authority of *Morriss* v. *Marsden* the main question is whether the insane defendant has committed a voluntary act, for without volition, there is no act in the eyes of the law.[22] Based on this principle, there are situations in which there is general agreement that the defendant should not be liable in tort, as where he does the tortious act as an epileptic in paroxysm, an automaton, a somnambulist or when he is moved by the overwhelming force of a third party.[23]

The state of the law is, however, made complicated by some confusion in terminology. The judgement of Stable J. in *Morriss* v. *Marsden* quoted above has been subject to the criticism that he confused two different mental elements – intention and volition – by defining one in terms of the other.[24] It was pointed out by Mr. Todd in his article that volition was always necessary in forming a juridical act while intention was necessary in most but not all cases. One could act intentionally but still involuntarily, and the definition of intention in Winfield and Jolowicz, *Tort* was adopted: "full advertence in the mind of the defendant as to his conduct, which is in question, and to its consequences, together with a desire for those consequences." To decide whether the defendant was capable of forming such an intention, both Lord Esher's "cognitive ability" test and the defendant's knowledge of wrongness had to be considered. To decide whether there was volition, Lord Esher's "cognitive ability" test was not necessarily sufficient.

However, the distinction between volition and intention seems to have been recognised long time ago. Thus Bacon wrote, "Whenever one person receives an injury from the voluntary act of another, this is a trespass, though there were no design to injure."[25] In this context the somewhat vague word "design" seems to mean intention. If so the distinction between intentional and voluntary act is quite obvious.

One the other hand, it is arguable, from the actual words of his judgment, that "intention" was loosely used by Stable J. in a narrow sense merely with regard to the muscular movements but not the consequences. This seems to be equally true of *Slattery* v. *Haley*[26] where it was held that if the mental abnormality was so severe as to preclude any genuine intention to do the act, there was no voluntary act at all. It seems "intention" in such contex is almost synonymous with "volition".

If the above submission is correct, it follows that the real problem is not, as Mr. Todd suggested, the failure to distinguish between volition and intention but the loose way in which the terms are used and the resultant terminological confusion. Viewed in this light, Stable J.'s judgement, in laying down the principle that a lunatic's volunatry act is sufficient to found liability for assault and battery, is perfectly sound.

But the clearest distinction among the various mental elements is perhaps to be found in a New Zealand case, *Beals* v. *Hayward*[27] where Gregor J. held that:

> "It might well be that while a person had the mental faculties to appreciate the nature and quality of an act of discharging a firearm, nevertheless the act of discharge might not arise from the exercise of the will."

---

22 This point seems to be beyond dispute among writers on jurisprudence. Paton, *Jurisprudence*, 4th Ed., includes intention and volition – "a certain psychic awareness" – among the elements of an act. Dias, *Jurisprudence*, 3rd Ed., says, at p. 276, that "voluntariness is a criterion of responsibility and connotes controllability of the action in question" and that "no action is an 'act' in the eyes of law unless it is voluntary." In Pollock's *Jurisprudence and Legal Essays*, it is stated that "generally speaking the law has regard only to such acts as are voluntary and manifest." § 2 of the American *Restatement of the Law of Torts* defines "act" as "an external manifestation of the actor's will," stating that in such cases the will is in abeyance.

23 These examples are cited in *Morriss* v. *Marsden* and Comment on § 2 of the *Restatement of the Law of Torts.*

24 Todd, *Insanity as a Defence in a Civil Action of Assault and Battery*, (1952) 15 M.L.R. 486.

25 See Bacon, *Abridgement* .

26 [1923] 3 D.L.R. 156.

27 [1960] N.Z.L.R. 131.

28 *Ibid.*, at p. 144.

These words show that the learned judge clearly recognised that it was possible for one to know the nature and quality of one's act and yet be not responsible because there was no volition in the act – thus implying that cognitive ability alone is not, as Lord Esher suggested in *Hanbury* v. *Hanbury*, sufficient to found tortious liability. Then he went on:

> "In some cases, while the nature and quality of an act might well be appreciated, physical or mental disability might be such as to negative any intention on the part of the actor."

According to him, "perception and volition are entirely different mental processes. And even if the finding was a volitional act, there might have been no intention to fire . . . . ."[28]

By dealing with the three mental elements separately, Gregor J. has clarified the distinction among them: volition, intention and perception of the nature and quality of an act. It is submitted that the presence of volition is essential in determining liability for all torts, intention is important for some torts and perception serves not as a test of responsibility *per se*, but as strong evidence of volition and, perhaps, intention.[29]

One point, however, has remained ambiguous *i.e.* the exact meaning of "the nature and quality of an act" in tort. Its meaning in the M'Naghten Rules is settled[30] and whether the English law of tort should adopt the same meaning awaits judicial decision.

Finally, it should be mentioned that in the light of *Morriss* v. *Marsden*, knowledge of the wrongness of an act seems to be of little relevance, except perhaps as evidence of culpable intention.[31]

The Mental State – Torts Classified

While mental abnormality affects the existence or non-existence of a juridical act, it is also significant with regard to the requisite mental state of the particular tort alleged.

It has been agreed, despite the absence of direct English authority on this point, that where the tort contains an ingredient of malice or specific intent, mental abnormality may make the defendant incapable of forming such an intent or serve as evidence of its absence. Examples are malicious prosecution, libel on privileged occasions and deceit.[32]

Torts involving no such specific intent and merely requiring voluntary physical acts or conduct interfering with the person, property or other rights of a person are obviously governed by *Morriss* v. *Marsden*. In defamation, for instance, the defendant's voluntary publication of matter defamatory of the plaintiff is sufficient to make him liable even though he may, because of his mental disorder believe it to be true. The result should probably be the same with conversion,[33] trespass,[34] assault *etc.*

In cases of strict liability, the problem can scarcely arise but it is submitted that the lack of voluntary act or conduct should negative liability.

Opinions do not agree with regard to negligence. Reasonable foresight being an important factor, the question arises as to whether an insane person should be treated as having an ordinary mental state and required to maintain an ordinary man's standard of care. Such a question is largely one of policy.

Salmond, *Torts* submits that the defendant should be judged according to his own knowledge or means of knowledge.[35] Clerk and Lindsell, *Torts*, with some reservation, states that the defendant's liability should be on the same footing as a young child, the question being one of fact as to "whether he is sufficiently self-possessed to be capable of taking care."[36]

Winfield and Jolowicz, *Torts*, on the other hand, submits that "the defendant's unsoundness of mind, at least if unknown to the plaintiff, is irrelevant unless it is so severe as to make him a

---

29 In *Morriss* v. *Marsden* the insane defendant knew the nature and quality of his act and perhaps from this it was inferred that he had the requisite volition. At a certain point in his judgement, Stable J. mentioned knowledge of nature and quality of an act as being enough – enough, it is submitted, as evidence of volition. Frequent reference to this element of knowledge by judges and academics indicates its importance but unfortunately they do not often make clear the distinction between this and volition.

30 *Codere*, (1916) 12 Crim. App. Rep. 21.

31 See Todd, (1952) 15 M.L.R. 486.

32 See Clerk and Lindsell, *Torts*, 13th Ed., p. 101. Salmond, *Torts*, 15th Ed., p. 583. *White* v. *White*, [1950] P. 39 at pp. 58–5, *per* Denning L.J. The judge's remark was *obiter* in that divorce case.

33 With reference to conversion, Stable J. said, "I cannot think that if a person of unsound mind under the delusion that he is entitled to do it or that it was no property at all, that affords a defence." [1952] 1 All E.R. 925 at p. 927.

34 *White* v. *White*, [1950] P. 39 at pp. 58–59, *per* Denning L.J.

35 At p. 583.

36 At p. 102.

virtual automation."[37] This seems to be the better view and is in accordance with the indirect authorities, for Denning L.J. in *White* v. *White* believed that insanity would not be a defence to negligence and in an Australian case, *Adamson* v. *Motor Vehicle Insurance Trust,*[38] the defendant with perception of what he was doing but under an insane, delusive fear for his own life, was held liable for negligent driving. Nor is this case in conflict with the Canadian case of *Buckley and Toronto Transport Co.* v. *Smith Transport Ltd.,*[39] because there, unlike *Adamson's* case, the defendant had lost his mental power to control the car and was thus not liable for negligence.

Rationale – The Pros And Cons

The fundamental justification for holding an insane tortfeasor liable is that the damages awarded are, as Hale pointed out, "not by way of penalty, but a satisfaction for damage done to the party."[40] This view is shared by Denning L.J. in *White* v. *White* who remarked *obiter*, "Recent legislation and judicial developments show that the criterion of liability in tort is not so much culpability, but on whom should the risk fall."[41] And it seems reasonable, albeit somewhat like a necessary evil, that of two innocent persons, the risk should fall on the one causing the damage or injury, rather than the one suffering from it, subject, of course, to one limitation, namely, that punitive damages should not be awarded and the defendant's insanity should, to a certain extent, mitigate compensatory damages.[42]

There are further reasons for supporting this view. Commenting favourably on *Morriss* v. *Marsden* on the ground of "practical convenience", R.E. Megarry believed that those responsible for the insane person's care and maintenance would be stimulated to take greater care.[43] The present state of the law also discourages tortfeasors feigning mental abnormality, which would not be difficult.[44]

Furthermore, as pointed out in the *Restatement of Torts*[45] and applicable to English law as well, it is difficult to make a satisfactory distinction between mental abnormality on the one hand and on the other, those "variations of temperament, intellect and emotional balance" which cannot as a practical matter be taken into account. As a question of fact, determination of the "existence, nature, degree and effect" of the mental disorder is not without difficulties, and it is submitted that if the defence of insanity in tort were to be widened, the difficulties connected with this defence in criminal law would be the attendant consequences.

Contrary to the above submissions, it has been pursuasively argued by Mr. G.H.L. Fridman that as a matter of logicality and in accordance with the view that liability should be based on fault, the law should make no distinction between insane tortfeasors who have committed no willed act at all and those who, though they have done so, are nevertheless not masters of themselves.[46] The mentally incompetent, it was argued, should be completely exempt from tortious liability for acts caused by their mental disease, and the M'Naghten Rules rather than the "volition" test should be the test of responsibility.

Controversy over this matter boils down to the familiar question of logic versus expediency. But it must be realized that the mental abnormality defence in criminal law is most often raised in homicide cases and its wider ambit is justified by the wide range of possible consequences facing the accused – imprisonment, detention in a mental hospital and (in Hong Kong) death. The gravity of such consequences can hardly be matched by the award of damages in a civil action. The stricter position in tort is therefore not unreasonable; nor is the drawing of the line based on the "volition" test. On the other hand, the M'Naghten Rules in their own criminal context have already been the subject of thorough criticism and if adopted, would introduce into the law of tort fresh difficulties as well as the revival, to a certain extent, of the "cognitive ability" test of Lord Esher.

---

37 It is interesting to note that Mr. Jolowicz is also the writer of that chapter in *Clerk and Lindsell* from which the preceding sentence is quoted.

38 (1957) 58 W.A.L.R. 56.

39 [1946] 4 D.L.R. 721.

40 *History of the Pleas of the Crown,* Vol. I.

41 (1950) P. 39 at p. 59.

42 This point was also made by Mr. Todd in his article *The Liability of Lunatics in the Law of Tort,* 26 Aust. L.J. 299 at p. 303.

43 See (1952) 68 L.Q.R. 300.

44 Ibid., see also *Restatement of Torts* § 283B, Comment (b) (2).

45 § 283, Comment (b) (1) and (2).

46 Fridman, *Mental Incompetency,* (1964) 80 L.Q.R. 84 at pp. 93–95.

LEGAL IMPLICATIONS OF CONTAINERISATION

Philip Lee

By courtesy of H.K.G.I.S.

Containerisation; a Through Transport System; a flexible system with one aim which is to move goods between producer/manufacturer and the end user as economically and as quickly as possible and, at the same time to do all one can to ensure that the goods arrive at the destination in a marketable condition. To describe it in another way it is a Through Transport System designed to serve International and Domestic trade in the broadest sense in the most efficient and economical way possible." [1]

Very briefly, the system is as follows. The shipper takes the goods to the terminal, to a part called the Container Freight Station (CFS). It is simply a large shed, on one side of which are parked containers while the other side is made for shippers' trucks. Usually cargo is either discharged from a container across the floor to a waiting truck or alternatively, cargo is unloaded from a truck (break bulk) and moved across the floor to a waiting container. Packed and sealed containers are then taken to a marshalling yard for sorting out according to their size, destination, *etc.*, in preparation for loading. When the ship is ready, the containers are transported to the quay and loaded. When the voyage is completed, the containers are unloaded and taken to the CFS. The goods are discharged from the containers, loaded on to trucks, and dispatched by the most suitable mode of transport, usually either by road or by rail, to the consignee's factory or warehouse. In the case of the full-container-load, the process is even simpler. Full-container-load (FCL) means that the goods of the shipper can fill up the whole container. A container is sent by the carrier to the shipper's warehouse, where the shipper packs the goods into the container. The carrier then takes the container by truck to the marshalling yard and later loads it on the ship. After the voyage, the container is unloaded and taken direct to the consignee's warehouse.

As regards the issuing of shipping documents, several systems are used. The one discussed below is the most commonly used. When goods or loaded containers are taken by a shipper to the terminal, a dock receipt is issued by the CFS. This is called a Received-for-shipment Bill of Lading. Later, when the goods are loaded on board, the receipt will be exchanged for a "Shipped" Bill of Lading. An alternative method is to endorse the original Bill "On Board".

1 Mr. J.C. Corkill, in his address in the Conference on "Hongkong & Containerisation", September 10, 1970.

It can be seen that it is the use of containers that has made this Through Transport System possible, but what is a container? What are the essential characteristics required to qualify a container as the container of the "container revolution"? The following definitions have been advanced:-

(1) It is a closed receptacle of standard dimensions and rigid metal frame, designed:
   (a) to be lifted by mechanical means;
   (b) for the transport, security, protection and preservation of cargo contained therein;
   (c) for repeated use; and
   (d) for the through transit of cargo by different forms of transport with clear identification markings.[2]

(2) A freight container is a container of rectangular configuration either rigid or collapsible for holding bulk material or a number of packages for handling in transit as a unit. [3]

(3) A container is a closed but not necessarily a locked package of varying form, size and construction repeatedly used for transport of bulk cargo in units or quantities too large for manual handling or for transport of general cargo consolidated into such units as to make mechanical handling necessary.[4]

It is not intended to discuss the merits of these definitions. The essential point is that container transport is intermodal, *i.e.*, by two or more stages, at least one of which is by sea or water, and the person or company making all the arrangements for transportation in differents parts of the journey is called the Combined Transport Operator (CTO).

In the following, some special problems relating to container transport will be discussed, *i.e.*, on-deck stowage of containers, unit limitation of the carrier's laibility, and when the Combined Transport Operator (CTO) is liable for lost or damaged goods.

On Deck v. Under Deck

In the tradition bill of lading, under deck stowage of goods is implied. In order to allow the carrier to place the cargo on deck, there must either be a custom to stow such cargo on deck, or an explicit stipulation in the Bill so that there is in fact an agreement.[5] Otherwise, the carrier commits a fundamental breach of the contract of carriage.[6] In container transport, however, about one-third of the containers carried on a ship is on deck. Carriers, therefore, try to protect themselves by such clauses as "the carriers, shall be entitled to carry the goods on deck in containers", and "such Rules (Hague Rules) and Act (Carriage of Goods by Sea Act, 1924) should also apply to deck cargo". Are such clauses sufficient to protect carriers?

In *Armour & Co.* v. *Leopold Walford Ltd.*[7] a clause in the bill provided "The Company has the right to carry . . . . .below and/or on deck . . . .and shall not be liable for . . . loss damage or injury within the exceptions . . ." Before the bill was issued a booking slip was sent to the plaintiff containing the following terms: "All engagements are made subject to . . . conditions and/or exceptions of our bills . . ." Goods carried on deck were damaged and it was held:

(i) that the plaintiffs had accepted the booking slip and were bound by the clause in the bill and,

(ii) that the defendants were under no contractual obligation to notify the plaintiffs of their intention to ship goods on deck.

In *Svenka Traktor Aktiebolaget* v. *Maritime Agencies*,[8] the bill was expressed to be subject to the Carriage of Goods by Sea Act, 1924 (COGSA) and provided *inter alia:* "Steamer has liberty to carry goods on deck and shipowners will not be responsible for any loss, damage or any claim

2 The definition arrived at by the Joint Container Committee formed in 1966 in Britain by Lloyds marine underwriters and underwriters of private insurance companies.

3 International Organisation For Standardization (I.S.O.)

4 The definition arrived at by the International Maritime Committee (C.M.I.) Working Group established in 1965 to prepare a draft International Convention on Combined Transport.

5 *The Delaware*, 81 U.S. (14 Wall.) 579, 604 (1872); *Royal Exchange Shipping Co.* v. *Dixon.* (1886) 12 App.Cas.11.

6 *Royal Exchange Shipping Co.* v. *Dixon, supra.*

7 (1921) 3 K.B. 473.

8 (1953) 2 Ll. L. Rep. 131.

arising therefrom." Of the 50 tractors loaded on board, 16 were stowed on deck and one was lost overboard. It was held that though the second part ("and . . . therefrom.") offended against the Act, the first part did not. The shipowners had liberty to ship cargo on deck.

Very recently, however, a case on containerised cargo went before the United States Court of Appeal, under the name of "Hong Kong Producer"[9]. The bill provided: "The shipper represents . . . the goods covered by this bill . . . need not be stowed under deck . . . and it is agreed . . .that they may be stowed on deck unless the shipper informs the carrier before the delivery of the goods that under-deck stowage is required." It was held that in order to benefit from the provision in the COGSA (Carriage of Goods by Sea Act, 1924) that the Hague Rules should not apply to deck cargoes[10], it must be stated specifically on the face of the bill that the goods would actually be carried on deck and were in fact so carried, while here, it was only stated that it "may" be carried on deck. It was ruled that on-deck stowage amounted to an unreasonable deviation because defendant was estopped from invoking the liberty clause, for by accepting goods without notifying plaintiff that they would be subject to option to stow them on deck, defendant had waived any right it might otherwise have had to exercise such option. The carrier was therefore liable for the full damage.

It is submitted that this decision may not be followed in future because it is subject to the qualifications that:

(1) no booking slip stating deck carriage was issued in advance,
(2) there was insufficient time available for the shipper to notify the carrier requiring underdeck stowage, and,
(3) the ship *"Hong Kong Producer"* was a general ship and not a container vessel.

The last point is most important because the tendency seems to be indicative of a ruling in favour of the carrier, i.e., the existence of a custom of deck-carriage in container vessels. This is revealed in the discussions in the *"Hong Kong Producer"* itself and in the recent case of the *"Mormacvega"*[11].

The present commercial practice is, however, that insurance companies still draw a distinction between "on-deck" and "under-deck" stowage and "the present view of the Banks is that, in spite of the fact that container ships have no decks, insurance cover for "on-deck" shipment will be required. It is realised that this attitude is somewhat contradictory and (the Banks) propose to consult the insurance association on this point."[12]

Package Or Unit Limitation Of Liability

In case of damage to or loss of goods shipped, the carrier's liability is limited by COGSA, 1924, Art IV(5), which states: "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 l. *per* package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." So, we have to ascertain the meaning of "package or unit". Say, 1,000 boxes are packed into one container, shipped, and lost at sea. Is each box a package or the whole container considered as one package?

In the American case of *Standard Electrica* v. *Hamburg, Etc. Lines*,[13] Chief Judge Lumbard said, "Only certain general observations can be made as to the reason why 'package' was selected as an appropriate unit upon which the limitation of liability was placed in our 1936 Act, and in the English Act of 1924, which is similar. No doubt the drafters had in mind a unit that would be fairly uniform and predictable in size, and one that would provide a common sense standard so that the parties could easily ascertain at the time of contract when additional coverage was needed, place the risk of additional loss upon one or the

9 *Encyclopaedia Britannica Inc.* v. *The "HongKong Producer"*, (1969) 2 Ll. L. Rep. 536.
10 COGSA, 1924, Art. 1 (c).
11 *Du Pont de Nemours* v. *S.S. Mormacvega.*
12 Mr. N. A. Keith, in the Symposium on Through Transportation, 3rd and 4th August, 1972.
13 1967 A.M.C. 881.

other and thus avoid the pains of litigation."[14]

This explanation does not, however, make the application of the package concept any easier, as the cases showed. In *Standard Electrica* itself, the shipper placed nine pallets on board, each containing six cartons. The Court decided that each pallet, and not each carton, was a package. The decision was based on the following points:

> The dock receipt, bill of lading, and claim letter indicated that the parties considered each pallet to be a package; the shipper rather than the carrier chose to make up the cartons into a pallet, so the shipper should suffer the consequences; COGSA specifically provides that the shipper has an option to obtain full coverage by declaring the nature and value of the goods in the bill of lading.

In *Inter-American Foods, Inc.* v. *Co-ordinated Caribbean Transport*[15], however, it was held that the cartons stowed within a container rather than the container itself were the packages. The bill of lading described the cargo as "One Trailer Load said to contain . . . Shrimp Product of Nicaragua, shrimper's weight load and count." No mention of the 620 cartons was made in the shipping documents, but the Court insisted that the carrier did not receive a trailer but accepted delivery of, and gave receipts for, specific numbers of cartons. The Judge refused to place responsibility for the mode of packaging. Though the shipper loaded the carrier's trailer, the Judge indicated that even if the shipper presented a sealed container to the carrier, he would have decided the same way.

The most recent case of the *"Mormaclynx"* [16] seems to have settled the problem for the mement. 99 bales of leather were loaded into individual cartons and stowed by the shipper into a container owned by the carrier. The bill of lading described the goods as "1 container said to contain 99 bales of leather". It was ruled at first instance that characterising a loaded container as a "package" would be "illogical" and would be "basically inconsistent" with the language of the package limitation of COGSA. Any discussion of the shipper's declaration option described in section 1304(5) of COGSA (equivalent of Art. IV(5) of English Act) was immaterial because "the shipper should not be required to pay an extra charge for protection that COGSA said the Carrier must provide"[17], This part of the judgment concerning package limitation was upheld in the U.S. Court of Appeal. The *Standard Electrica*[18] case was distinguished on the grounds that the pallets were nothing like the size of the container here; that they had been made up by the shipper, and that the dock receipt, bill of lading and claim letter all indicated that the parties regarded each pallet as a package. Though recognising this distinction as unsatisfactory, the Court said, "Still we cannot escape the belief that the purpose of (Art IV(5) of COGSA, 1924) was to set a reasonable figure below which the carrier should not be permitted to limit his liability and that 'package' is thus more sensibly related to the unit in which the shipper packed the goods and described them than to a large metal object, functionally a part of the ship, in which the carrier caused them to be 'contained'.[19]"It therefore seems that the present tendency is in favour of shippers.

This problem, however, will soon disappear because it has been solved by legislation. COGSA, 1971,[20] enacting into law the Visby amendments of the Hague Rules, provides in Art. IV(5) (dealing with limitation of liability) sub-section (c):

> "Where a container, pallet, or similar article of transport is used to consolidate goods, the number of packages or units enumberated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages

14 1967 A.M.C. at p. 883.

15 1970 A.M.C. 1303.

16 (1970) 1 Ll. L. Rep. 527.

17 (1970) 1 Ll. L. Rep. at p. 535.

18 *supra*, footnote 13.

19 (1971) 2 Ll. L. Rep. 476, at p. 486.

20 The International Convention which was signed at Brussels in 1924 was amended by a Protocol signed there on February 23, 1968. The U.K. was a signatory to this Protocol, and the COGSA, 1971, was passed in order to give effect to it. The Act does not come into effect immediately, but only on such date as Her Majesty may by Order in Council appoint.

or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit."

This clause is commented on in Professor Schmitthoff's *"Export Trade"* [21] as follows:

"In other words, the wording of the bill of lading issued by the carrier by sea is decisive. If the bill only refers to 'one container said to contain general merchandise, then the container itself is the package or unit, but if it enumerates any cargoes included in the container separately, each of those cargoes constitutes a separate package or unit. If the bill mentions specifically one or two cargoes but not the other contents of the container, the separately mentioned items are separate packages for the purpose of maximum limitations of liability, and the rest of the container contents falls under the weight limitation."

Several criticisms can, however, be levied against this clause. Firstly, when a container is delivered sealed for shipment and the carrier has no means of checking its content, Art. III(3) of the Hague Rules would seem to nullify the effect of the new clause, for it states that the carrier shall not be bound to state ... in the bill of lading ... any quantity or weight ... which he has no reasonable means of checking". Secondly, in the absence of standard practice, this new provision can be quite arbitrary. Are such packages to be enumerated to be based on value, size or some distinct form of packing within the container itself? It may be anticipated that carriers will substantially raise the freight where the goods shipped are enumerated, and this will be followed by a corresponding premium-increase by marine insurers. Thirdly, it has been pointed out that if there is only one bill of lading referring to the whole container, but setting out its contents separately, the character of the bill of lading as a document of title is considerably reduced.

In Professor Schmitthoff's words:

"The seller of one of the packages included in the container cannot tender the buyer a bill of lading relating to that package, and, if the contract is a c.i.f. contract, thereby perform his contract. Moreover, the seller cannot retain his property in the package by retaining the bill of lading. For that reason, it may be more favourable to the seller to insist on a separate bill of lading for a package included in one container." [22]

Liability of Combined Transport Operator (CTO) For Goods Lost, Damaged or Delayed

An international seminar on intermodel transport was held in May, 1972, at the University of Genoa, and was chaired by the Rt. Hon. The Lord Diplock. The object of the seminar was to examine the possibility of making recommendations for the preparation of a standard transport document which could be adopted by the parties to a contract of intermodal transport. The seminar concluded that this was practicable and made Recommendations for a contractual document. The clauses in this proposed document relating to the CTO's liability for lost, damaged or delayed goods will be discussed below.

(a) *The CTO to be responsible for the acts and omissions of any persons of whose services he makes use for the performance of his obligations under the contract evidenced by the contractual document to the same extent as he is responsible for his own acts and omissions.*

This is necessary in order to give effect to next clause (b). The consignee, in case of damage, is relieved from the difficult task of establishing during which stage of the journey the damage occurred, but the exemptions and limitations of liability enjoyed by the CTO are extended to the agents, servants, and sub-contractors.

This type of clause has been widely used in recent years, especially after the famous case of *Adler* v. *Dixon* [23], which gives this type of clause the name of the "Himalaya Clause". In that case, the plaintiff, Mrs. Adler, was injured on board a ship, of which she was a passenger. The accident was due to the neligence of the crew. She was barred from suing the owners of the ship because her ticket of passage contained an exemption clause. She sued the master of the ship in negligence and succeeded. Of course, the damages awarded

21 Schmitthoff, *Export Trade* (1969), Chap. 24, p. 321

22 Quoted in *"Revision of the Hague Rules"*, *Fairplay International Shipping Journal*, April 18, 1968, p. 23 at p. 24.

23 [1955] 1 Q.B. 158

were in fact paid by the shipping company, and the exemption clause in the ticket was evaded. The "Himalaya clause" thus became necessary. The validity of such clauses has been upheld by the courts to extend the $500.00 per package limitation in favour of stevedoring contractors.

However, the cases also make it clear that

(i) The parties to a contract of carriage may extend a contractual benefit to a third party only by clearly expressing intent to do so.[24]

(ii) The benefits may be extended to agents and sub-contractors only with respect to their actions in the performance and fulfilment of the principal contract.

It seems that the clause under discussion also achieves these two points and so is effective.

The validity of the "Himalaya clause" has been sanctified by COGSA, 1971, Art. IV bio. (2), saying,

> "If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules."

This section has, however, two important qualifications:—

(i) Only agents and servants are covered, not sub-contractors.

(ii) It applies only in an action in respect of loss or damage to goods covered by a contract of carriage, which, as defined in COGSA Art. I(*b*), relates only to carriage by sea.[25]

(b) *The CTO to be liable to the Merchant for all loss or damage occurring between the time when he takes the goods into his charge and the time when the Merchant takes or ought to have taken delivery, subject however to the monetary limit of liability in (c) below and to the exemptions form liability in (d) below.*

This is in accordance with the common law rule that a common carrier is virtually the insurer of the goods, and also with COGSA, Art. VII, which says that "Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea."

This clause effectively simplifies the procedure of claims for damage to goods because the consignee need only approach the CTO in case of damage.

(c) *The CTO not to be liable in any circumstances in excess of an amount to be specified in the Combined Transport Document and measured by the weight of the goods. Preferably this amount should be the same as the highest amount by weight specified as the maximum liability of the carrier in any of the international conventions on the carriage of goods by rail, road, sea or air.*

This clause represents an attempt to solve the difficult question of which monetary limit is to be applied in case of the goods being damaged. The various limits are as follows:

Hague Rules	£100 *per* package, though where shipowners and insurers are signatories to the Gold Clause Agreement, this limit is raised in practice to £200.
Warsaw Air Convention	£6900 *per* ton.
CMR (Road Transport in Europe)	£3500 *per* ton.
CIM (Railways)	£14,000 *per* ton.
RHA (Road Transport in UK)	£800. *per* ton.

---

24 See *Scrutton* v. *Midland Silicones* [1962] A.C. 446; *Carle & Montanari* v. *American Export* (1967) A.M.C. 1637; *Virgin Islands Corp.* v. *Merwin Lighterage* (1959) A.M.C. 2133.

25 "'Contract of Carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea . . . . . '

26 "A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under these Rules, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper. . . . . "

The Genoa Seminar therefore recommended the limit be fixed according to the weight of goods at the highest figure provided for in any of the international conventions on unimodal transport. This would reduce to a minimum the risk of conflict with any such convention because no convention forbids a carrier to accept a higher liability for loss or damage than the compulsory minimum. (*e.g.*, see Art. V, COGSA, 1924[26]).

(d) *The CTO to be exempted from liability if he proves that the loss or damage or delay in delivery was due to inherent vice or insufficient packing of the goods by the Merchant or to any cause or event which could not have been avoided and the consequences of which could not have been prevented by the exercise of reasonable diligence on the part of the CTO or of any person for whose acts or omissions he is responsible under (a) above. It would not seem necessary to set out a catalogue of specific instances of causes or events falling within this general description, though this has been the practice followed in the existing international convention on carriage by rail, road, sea and air.*

This clause lays down the situations in which the CTO will be exempted from liability for the damage, loss, or delay of goods. It embodies the provisions of COGSA Art. IV(2) (*m*), (*n*), (*p*) and (*q*).[27] In accordance with Art. IV(2) (*q*), COGSA, the onus is on the CTO to prove that the damage could not have been prevented by the exercise of reasonable diligence on the part of the CTO "or of any person for whose acts or omissions he is responsible under (*a*) above". This phrase apparently includes sub-contractors, who are not included in COGSA, Art. IV(2) (*q*). This follows logically from the Recommendations in (*a*) and (*b*) discussed above.[28]

It is not proposed to list out all possibilities that may lead to the goods being damaged, but three of the more interesting cases arising directly out of the use of containers will be mentioned and the liability of the CTO briefly discussed.

The first concerns the stowage of containers on ship. Even if containers are stowed under deck, serious problems of stowage are encountered, particularly when the containers being carried are not of equal size. Damage might easily result at sea when containers of varying sizes are placed together and on top of each other. This is particularly true in older vessels whose cargo spaces are awkward and not designed for receiving such large units. Thus, a consignee who receives his containerised goods in bad order should not rule out the possibility of a successful recovery action against the ocean carrier based on breach of the stowage obligation of COGSA Art. III (2).[29]

Secondly, problems may arise from the defective condition of containers. Where the container is provided by the shipper, can it be correctly described as part of the "goods" so that the CTO is responsible for any physical damage of the container itself? The answer is probably affirmative and it has been suggested that the CTO should protect himself by clausing the contractual document "Container used and damaged by wear and tear".

What is the position where damage is caused to the goods by the unsuitability of the container, *e.g.*, a defect in the refrigerating machinery of a refrigerated container?

This depends on the ownership of the container. If the shipper owns the container, the CTO is probably not liable because the defect is inherent and so covered by COGSA Art. IV(2) (*m*), (*q*), unless the CTO can discover the defect by using reasonable diligence. Where the CTO provides the container, the container may be considered as part of the ship's equipment[30], and so the defect may constitute uncargoworthiness within Art. III(I) (*c*) of COGSA[31] unless it is not reasonably discoverable.

If the defect or failure of the container machinery occurs in the course of transit and its contents are damaged, the CTO would also appear to be liable under COGSA Art. III(2), which says that "Subject to . . . the carrier shall properly and

---

27 "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from –
(*m*) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods:
(*n*) Insufficiency of packing:
(*p*) Latent defects not discoverable by due diligence:
(*q*) Any other cause arising without the actual fault or privity of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

28 *supra.*, p. 5

29 "Subject to the provision of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

30 COGSA, Art. III r.1 (*b*) & (*c*): "The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to – .....
(*b*) Properly man, equip and supply the ship.
(*c*) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

31 Unseaworthiness: see *Reed* v. *Page* (1927) 1 K.B. 743, *per* Scrutton; *Elder, Dempster* v. *Patterson, Zochonis* (1924) A.C. 522, 539. COGSA, Art III r. 1 (*c*), *supra.* footnote *(30).*

carefully load, handle, stow, carry, keep, care for and discharge the goods carried". The CTO will probably not be protected by Art. IV(2) (*a*) of COGSA[32] as the damage is probably not due to the "Act, neglect or default ... in navigation or ... management of the ship". In *Gossee Millard* v. *Canadian Merchant Marine*[33] , the House of Lords distinguished between want of care of cargo and want of care of vessel indirectly affecting the cargo; carrier is liable for damage or loss due to the former but not the latter. In *Foreman* v. *Federal S. N. Co.*[34] , Wright J. stated that management of the ship did not include management of refrigerating machinery.

But what will be the position if a self-refrigerating container marked "A.C.110-120 v." loaded on board is plugged into the ship's electric supply marked "220-240 volts D. C. only" or *vice versa* and the machinery is burnt resulting in damage to the cargo?

The relevant principle is that seaworthiness includes cargo-worthiness which implies that the ship must be fit to receive the cargo when loaded. So, in this example, COGSA Art. III(I) (*b*) and (*c*) [35] seems to make it quite clear that the carrier would be liable. But on the whole, what is meant by the "due diligence" that the carrier must exercise in order to escape liability? How could the standard of care applicable to cargo carried in a general ship be of any relevance in a container ship? Could it be argued that a container ship is unseaworthy within COGSA Art. III(1) unless it carries on board special apparatus for testing and detecting leaks in containers, spare containers to replace faulty ones, and a crew of trained container-technicians to carry out repairs on board? This is one area where the court has to rely on the information and findings of shipping and container experts.

Thirdly, the packing of containers is also very important because errors committed furing the process of packing cargo into a container could affect the very stability of the ocean vessel, to say nothing of the security of the goods and container while in transit and subjected to a multiplicity of handlings.

Where goods are packed by the carrier, it usually means that they are under his charge and so he is liable for any damage due to bad packing because he can avoid it by exercising due diligence. An exception might occur where the CTO packs into one container two substances which he cannot reasonably be expected to know will react to produce an explosion or other damage (see *Ohrloff* v. *Briscal*[36] .)

Where the goods are entirely packed by the shipper, the CTO is protected by COGSA Art. IV(2) (*n*). This might also be considered as "inherent vice" in the goods which occurs without any fault or neglect on the CTO's part and the CTO is exempted by Art. IV(2) (*m*) and (*q*), COGSA.

So far, the clause under discussion seems in this respect of packing to have followed the existing law and is sufficient, but what about the case where the CTO packs a container supervised by the shipper? Also, can it be argued that where the container is supplied by the carrier and so can be considered as part of the ship's equipment, the packing is actually "stowage" which a carrier is under a duty to do properly and carefully under Art. III(2), COGSA?

Though the mere fact that the shipper knew how the goods were being shipped, and assented to what was done, will not necessarily excuse the carrier [37] , the shipper will be estopped from complaining of a method of stowage which has been directed by him [38] , and he may be so estopped by merely assenting to it [39] . The authorities have been said "to carry the law at least far enough to show that a shipper who takes an active interest in the stowage, and complains of some defects but makes no complaint of others which are apparent to him, cannot be heard to complain of that to which he has made no objection." [40] However, the shipper's acts will not estop an indorsee of the CTD to whom the goods have passed, if the indorsee has not had notice of such acts. [41]

---

32 "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from –
(*a*) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship ..... "

33 (1929) A.C. 233

34 (1928) 2 K.B. 424

35 *supra*. footnote *(30)*

36 (1866) L.R. 1 P.C. 231

37 *Cf. Hutchison* v. *Guion* (1858)5 C.B. (N.S.) 149; *Hovill* v. *Stephenson* (1830) 4 C. & P. 469.

38 See *Larrinaga SS. Co.* v. *Green* (1916) 2 Ir. R. 126.

39 *Hovill* v. *Stephenson* (1830) 4 C. & P. 469, *Crow* v. *Armstrong, Stevens on Stowage,* 5th Edn., p. 607

40 *The Santamana*, (1923) 14 Ll. L.R. 159 at p. 163, *per* Hill, J.

41 See *per* Dr. Lushington, *Ohrloff* v. *Briscal,* (1866) L.R. 1 P.C. 231, at p. 235.

INTERVIEW:

MR. PETER C. WONG

Mr. Peter C. Wong is a graduate of the Hong Kong University, having majored in Economics and Political Science. He took a very active role in student activities and was President of the Student's Union in 1950. He has been practising as a solicitor in Hong Kong since 1955. He is a Justice of the Peace, leader of the local Buddhist Community, and is at present the President of the Hong Kong Law Society.

The Demand for Lawyers

In an informal interview, we first asked Mr. Wong whether the legal profession, as it now exists in the colony, is adequate for an economically advanced society like Hong Kong. Mr. Wong answered that there is, at present, a shortage of lawyers in both branches of the profession. There are now about 300 practising solicitors, serving a population of 4 million people and there is undoubtedly a demand for more lawyers. One contributory factor for the increase in demand is the fact that the local population is more conscious of its legal rights and liabilities, Moreover, our advanced economy results in a greater need for people with legal knowledge to give their expert advice and to legalize the business transactions of their lay clients, such as transfer of shares, mortgages, etc. This increasing demand is not confined to solicitor's firms. Most of the large public corporations are in need of legal consultants and the Hong Kong Government, in its effort to expand its legal service, is also ready to employ people with legal qualifications.

Functions of a Solicitor's Firm

When we asked him the kind of work a solicitor's firm usually does, Mr. Wong answered that it depends on the size of the firm and the work it specializes in. For a start, most of the new firms normally deal with criminal and legal aid cases, and there are plenty of these cases as long as they are willing to take them. For a medium-sized firm, the practice is more varied, such as conveyancing, registration and the formation of companies. As for the big established firms, specialization of work is quite common. They have different solicitors for different cases. Thus, one solicitor may be in charge of divorce, another may be responsible for the probate or admiralty section, and another may specialize in company law. But generally speaking, we are told that conveyancing constitutes the backbone of a firm's business because of the development in building industry in the post-war period and more people are buying flats for their own occupation.

New Solicitors

In reply to our question as to the kind of work a new solicitor is expected to do when he or she first enters into practice, Mr. Wong said that a new solicitor will mainly be responsible for litigation work. He will be handling a lot of court cases, such as traffic offences in the magistrates' courts. Mr. Wong did not think that this is a handicap because court work is very good training. It helps him to build up his confidence, eloquence and technique of quick-responses. Furthermore, a new man will probably be bored if he is asked to sit in the office and to bury himself in paperwork. Usually, it is only after one or two years of court-work that a solicitor is entrusted with the handling of conveyancing or matters of a more serious nature. Because of the nature of the work, which may involve huge monetary sums or legal complexities, a lay client will only confide in a solicitor with these responsibilities if he has confidence in him. Needless to say, one can only command trust and confidence if one is self-confident and that is something one has to learn by experience.

Qualities of a Solicitor

We then asked Mr. Wong the qualities a solicitor should possess in order to be a good lawyer. His reply was that apart from knowing the law and knowing it well, a solicitor must also maintain a high degree of personal and professional integrity because the relationship between himself and his clients is based on trust. If his clients are to disclose to him matters of a highly personal and confidential nature, then the person they would look to is one of integrity upon whom they can rely entirely.

Mr. Wong continued to say that a solicitor must have an interest in his practice because like any other profession, the work is extremely demanding, and is not always as glamorous as it is portrayed in the cinema or on televions. Apart from keeping the law up to date, one must keep abreast of the latest developments in world and local affairs. Some aspects of the work are quite exhausting and yet sometimes seemingly trivial. So unless a solicitor has a certain amount of interest and pride in his work, both he and his clients will suffer.

Finally, Mr. Wong said that one must have a good physique. The solicitor's work is extremely strenuous. Most of the matters require one's closest attention. Thus, good health is absolutely essential to be able to endure the mental and physical strain.

Professional Etiquette

Turning to a different topic, we asked Mr. Wong's opinion on the importance of professional etiquette. Mr. Wong believed that professional etiquette is very important for a practitioner because unprofessional conduct or misconduct is likely to ruin one's career and reputation. He noted that professional etiquette is not taught as a subject at the Hong Kong University, but in some Commonwealth countries, it is a basic requirement for a law graduate. For example, in Toronto, Canada, a person holding a law degree, which is a post-graduate degree, must attend a six-month course on practice and etiquette at Osgoode Hall before he is allowed to practise.

We asked him whether one could learn these matters in practice Mr. Wong's reply was that it is possible, but there is always a possibility that one will have to learn it the hard way. He expressed the view that training on this particular topic would be of immense value to the law students who intend to join the solicitors' profession.[1]

Mr. Wong added that most of the rules concerning solicitors are laid down in the Legal Practitioners Ordinance and the subsidiary legislation supplemented by rulings of the Law Society. Breach of professional ethics may be the subject of disciplinary proceedings by the Law Society, which are, however, not normally publicised.

Mr. Wong mentioned that there is a book entitled, 'A Guide to the Professional Conduct and Etiquette of Solicitors' by Sir Thomas Lund which may be used as a guideline for intending solicitors.

On Law Students

To conclude the interview, we asked Mr. Wong to give his advice to the law graduates. He said that it would be superfluous for him to advise a graduate who must have formulated his goal and aspirations, but from personal experience, he expressed the view that there is no short-cut to success. Most of the solicitors now in practice achieved their status through diligence and involvement in their work. He felt that the intending lawyers should not be too concerned, for the moment, over monetary remuneration. Instead, they should place priority on their work and on learning as much as they can. Monetary rewards will come as a natural consequence of their achievements.

---

1 See Mr. Peter G. Willoughby, 'Legal Education: The Nigerian Experiment – II.' May 1966, *The Solicitors' Journal.*
Mr. Peter G. Willoughby is at present Senior Lecturer in Law in the Hong Kong University – Ed.

REMUNERATION UNDER CONTRACTS OF EMPLOYMENT

Mabel M. Fung

By courtesy of H.K.G.I.S.

AS the title suggests, discussion in this work will be centred mainly on rights and liabilities in relation to remuneration under contracts of employment. The law here initially includes: one major Ordinances, *viz.* the Employment Ordinance; the relevant English common law principles; and established customs and practices. Contracts of employment, as defined in the Employment Ordinance are "any agreement, whether in writing or oral, express or implied, whereby one person agrees to serve his employer as an employee . . ." [1] This definition cannot be of any indicative meaning without first defining the meaning of "employer" and "employee" which are again terms in want of comprehensive definitions. For the present purpose, contracts of employment are contracts of service (as distinct from contracts for services) which still involve to a certain extent the out-dated concept of master and servant [2].

The term "remuneration" may also invoke some difficulties in interpretation. If unqualified in any way, it would include more than just the cash payment in the form of wages or salary. For the purpose of defining the scope of this work, Blackburn J.'s definition of the term is adopted: " . . . I think the word "remuneration" means a

---

1 s. 2 – The definition includes also the contract of apprenticeship, but since the subject matter concerned in this work is remuneration, it is not intended to include in the discussion contracts of apprenticeship which do not base their consideration solely on the exchange of service with remuneration, but involve a distinct object of teaching and learning –
R. v. *Laindon (Inhabitants)* (1799) 8 Term Rep. 379
R. v. *Crediton (Inhabitants)* (1831) 2 B & Ad. 493

2 For discussion on some general features of contracts of employment, see: *Short* v. *J. & W. Henderson Ltd.* [1946] S. C. (H.L.) 24 at pp. 33, 34; *Gould* v. *Minister of National Insurance* [1951] 1 K.B. 731 at p. 734; *Pauley* v. *Kenaldo Ltd.* [1953] 1 All E.R. 226 C.A., at p. 288.

quid pro quo. If a man gives his services, whatever consideration he gets for giving his services seems to me a remuneration for them . . . "[3] This term has received more restricted definitions elsewhere[4] and it is deemed to bear a qualified meaning when taken in context. This will be discussed in greater detail when it is considered in terms of rights and liabilities at the creation of the contract of employment.

Contractual Agreement

Generally speaking, the common law principles in contract[5] still remain as the source of legal regulations in employment relationships. Terms respecting remuneration and other conditions of employment are binding on the parties only if they form part of the contract agreement set up between the parties before employment begins. Any subsequent variations are effective only with the consent of both parties.

Express Agreement

Agreement is reached by offer and acceptance. An offer is an expression of willingness to contract on certain terms made with the intention (actual or apparent) that it shall become binding as soon as it is accepted by the person to whom it is addressed. Once there is an unqualified acceptance of such an offer by the offeree, then there is a contract with such terms as embodied in the offer binding on both parties. Until this moment of coincidence of offer and acceptance, all preliminary communications impose no liability on either party. Ambiguities in the terms respecting remuneration can nevertheless arise since it is not always possible to easily identify which party is the offeror and which is the offeree or to fix the exact point in time at which the preliminary negotiation is over so that the actual agreement of the contract comes into being.

Employment contracts usually result from advertisements in newspapers or through employment agencies and questions can arise concerning the extent to which statements in advertisement are legally binding. Strictly speaking, advertisements for bilateral contracts are only invitations to treat and none of the terms stated therein are binding[6]. So when the interested party comes forward, he is taken to be the offeror rather than the offeree and there is no contract created until the party inviting offers accepts his offer and both agree on the terms. Clearly, where the final agreement contains a term which expressly conflict with the words of the advertisement, the latter will be of no effect since nothing in advertisements can override the effect of express agreement.

Uncertainty can occur where the ultimate agreement is merely silent as to some benefit promised by the advertisement, particularly where the promise is in very definite terms and is not too vague to be enforced. Can the advertiser-offeree-employer insist that the advertisement, being only an invitation to treat, has absolutely no effect on the actual contract? It is submitted that in such a case, the legal effect of the advertisement should not be construed as other kinds of advertisement so as to exclude it altogether as outside the realm of offer and acceptance[7]. Instead, as stated in *Reigate* v. *Union Manufacturing Co. Ltd.*[8], the general test for the effective incorporation of unexpressed terms based on the intention of the parties inferrable from the circumstances will here include the

---

3 In *R.* v. *Postmaster-General* (1876) 1 Q.B.D. 658 at 663 (on appeal (1878) 3 Q.B.D. 428 C.A.

4 *e.g.* It has been held that for the purpose of calculating a redundancy payment under the Redundancy Payment Act of England, "remuneration" is restricted to cash payment. – *Lyford* v. *Turquand* (1966) 1 T.R. 554. In the Employment Ordinance, remuneration is used as part of the wider term "wages" which in itself is restricted only to that "capable of being expressed in terms of money".

5 For the general principles of law of contract – see *"Chitty on Contracts"* (vol. 1 General Principles) 23rd Edition 1968; Treitel *"The Law of Contract"* 3rd Edition 1970; Cheshire & Fifoot *"The Law of Contract"*. For the common law principle of contract of employment generally, see R.W. Rideout *"Principles of Labour Law"* 1972 Chap. 4; *"Chitty on Contracts"* (vol. 2 Specific Contracts) 23rd Edition 1968 Suppl. '71., *Halsbury's Laws of England* Vol 25 p. 447 *et seq.*

6 *Partidge* v. *Crittenden* [1968] 1 W.L.R. 1204 – newspaper advertisement that goods are for sale, not an offer.

7 In *McClelland* v. *Northern Ireland General Health Services* [1957] 1 W.L.R. 594, an undertaking in an advertisement that the post was "permanent and pensionable" was taken into account when assessing the parties' rights and liabilities.

8 [1918] 1 K.B. 592 where the generally expressed rule of contract was held to apply to contract of employment and a term can only be implied where it " . . . is something so obvious that it goes without saying . . ." See also *Shirlaw* v. *Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206.

construction of the advertisement and the onus of proving such a term will be on the employee[9].

This is even more true where the advertisement is worded in the form of invitation of "candidates for selection". This kind of advertisement is usually found where there is a vacancy in a specific post in big commercial organizations, universities and Government Departments. The general characteristics of these advertisement are the listing out of precise terms on amount of remuneration, range and the rate of increments, availability of benefits like accommodation, pension or bonuses and other facilities. These advertisements cannot by any means be regarded as binding offers to the candidate who satisfies the stipulated requirements best. But by way of analogy with the advertisement of auction without reserve [10], since the language used imports such definite intention, once the purported employer accepts the offer of one of the candidates by selecting him, the contract should be in such terms as set out in the advertisement unless either the advertisement contains an explicit condition that all terms are subject to variation or there is an express agreement in the contract varying the stipulated terms[11]. But since there is no direct judicial statement on this point, the preamble is only proceeded on basis of principles and logic rather than on authority.

Implied Terms

Generally speaking, there are some terms which are so basic to an effective employment that they are almost always expressly agreed upon, if not, they will be either implied or stipulated by the law. Depending on how sophisticated the employment relation is, these include terms relating to rate of wages and the method of calculation (by piece-work or time-work or specific jobs); period of notice to be given on termination; rate of pay for overtime work; shift work; night work; work in stand-by and typhoon conditions. All these are without dispute recognised as part of the enforceable contractual terms. As regards entitlement to holidays and rest days, with or without pay, "additional remuneration" like bonuses, double-pay, or tips, extra allowances like travelling expenses, meals, medical expenses; accomodation; provisions as to pension rights or retirement payment, the general rule is that these terms are enforceable only if they are proved to be part of the expressed agreement between the parties. However, this rule is modified in that sums due under such terms are still recoverable if the proved intention of the parties[12] or the existing custom in the trade or even the nature of the work itself are in favour of identifying such terms as part of the remuneration clauses under the contract.

Apart from statue, whether remuneration is to be paid during temporary illness is decided on the terms of the contract, which may entitle the employee to full remuneration and/or a bonus[13], or there may be provision as to a deduction of wages, which must be proportional to be length of absence. Where there is no express agreement, resort has to be the nature of the service: whether the consideration for the payment of wages is the actual performance of the work, or whether mere readiness and willingness without ability to do so, is the consideration[14]. Thus, piece-workers and those employed by the hour or the day cannot

9 *Orman* v. *Saville Sportswear Ltd.* [1960] 1 W.L.R. 1055 – it is for the party who alleged the existence of an implied term to make it out.

10 Although a mere advertisement of an auction without reserve is not an offer to hold it (*Harris* v. *Nickerson* (1873) L.R. 8 Q.B. 286), the acutal commencement of bidding seems to be an offer by the auctioneer that he will on the owner's behalf accept the highest bid and he will be liable to the highest bidder if he does not. *Warlow* v. *Harrison* (1859) 1 E.&E. 309. Similarly, while an advertisement inviting application for a vacancy imposes no liability on the purported employer so long as he has not accepted any offer, but once he does accept an offer, the binding effect of terms of the advertisement, as conveyed by the determined language used, starts to operate.

11 This proposition can be supported by similar argument that there is more or less a separate contract which stipulates that the terms in the advertisement are binding, consideration being that the applicant, on reliance of such attractive terms, take the trouble to make the offer while the employer obtains the benefits of applicants of better quality.

12 Contrast *Lyford* v. *Turquand* (1966) 1 T.R. 554 with *Pierce* v. *Bathes Ltd.* (1966) 1 T.R. 263. In *Juno Revolving Restaurant* v. *Petty Kwok* (Action No. 2383 of 1970 at the Victoria District Court) in assessing the "value" of the employee to the employer, the cost of free meals was also taken into consideration. There was no express agreement that this was to be considered as part of the contractual remuneration, therefore this decision was clearly based on the intention of the parties.

13 *Orman* v. *Saville Sportswears Ltd. ante.* (Production Manager).

14 But where the contract provides the payment of an *ex gratia* payment in *lieu* of full wages, the employee cannot have claim to both. *Petrie* v. *MacFisheries Ltd.* [1940] 1 K.B. 258 C.A.; *Marrison* v. *Bell* [1939] 2 K.B. 187 C.A.; *O'Grady* v. *M. Saper Ltd.* [1940] 2 K.B. 469 C.A.

claim sickness pay [15]. All and all, where the illness is so severe or of such long duration as seriously to interfere with or frustrate the purpose of the contract, then the contract is terminated without either party incurring any liability[16].

There is no duty on an employer, apart from statute, to allow his employees holiday, with or without pay, unless the contract contains a term, express or implied, to that effect. Unless clearly defined, this may sometimes create misunderstanding even if there is no dispute as to its contractual force. For the right to such a leave may sometimes be confined only to the taking of the holiday itself and cannot be transformed into monetary terms in the absence of a separate agreement. Whether a holiday accrues from day to day or requires a completed minimum of work before the employee is entitled a holiday with pay needs also to be clarified [17].

It is sometimes necessary to answer the difficult question of whether the provision of such benefits as board, lodging, commissions, tips, etc., outside the basic salary is gratuitous or obligatory when the Court has to decide what compensation it is to award to an employee claiming for arrears of "wages" or for damages for wrongful dismissal. Generally, their loss will be taken into account only if they are capable of being expressed to monetary terms and their provision is proved to form part of the periodic wages under the contract [18]. Where there is a basic salary and the job is merely made more attractive by the opportunity to earn an additional commission, this is normally not taken into account in the assessment.

The general rule applies also to bonus and pension scheme. Once it is proved that its provision is backed up by contractual agreement, the employee's claim will be upheld despite the sum he is entitled to is not readily assessable.

One subsidiary point that needs to be considered here is that the above discussion is only based on authorities dealing with the value of fringe benefits in situations where upon the termination of the employment, the employee seeks to recover damages for loss of his chance of enjoying them. There is no judicial statement as to what are the rights and liabilities of parties when during the subsistence of the contract there is a stoppage of the benefit scheme. If the scheme is admittedly part of the contractual consideration, then, is the foregoing principle also to be applied and the employee automatically given a right of action against the employer? It is

---

15 *Hancock* v. *B.S.A. Tools Ltd.* [1939] 4 All E.R. 538 – no sickness pay for workers who work on hourly basis. *Hanley* v. *Pease & Partners* [1915] 1 K.B. 698.

16 *Poussard* v. *Spiers and Pond* (1876) 1 Q.B.D. 410. Where it is due to injury sustained in the course of employment then termination has to be in accordance with s. 48 of the Workman's Compensation Ordinance Cap. 282.

17 This is all a matter of facts in individual cases. e.g. in *Hurt* v. *Sheffield Corporation* (1916) 85 L.J.K.B. 1684, on the wording of the resolution providing for one week's holiday with pay for every twelve months service, a workman who was lawfully dismissed before the end of twelve months was held not to be entitled to a week's wages in *lieu* of the unclaimed holiday.

18 *Addis* v. *Gramophone Co., Ltd.* [1909] A.C. 488; see also *Manubens* v. *Leon* [1919] 1 K.B. 208 where both loss of commission and tips was taken into account.

submitted that it will not. It may be that the terms of the agreement are such that the employer has a contractual right to discontinue the benefit within his control. Or the agreement like the one in *Powell* v. *Braun*[19] could be arrived at, in which case this would be analogous to a variation of the original agreement. It is unlikely that the employee could insist on its continuation as of right.

Statutory Regulations

Employment Ordinance Cap.57

The principle legislation in Hong Kong is the Employment Ordinance[20]. This Ordinance has quite a limited scope of application because excepted from its scope of application are employees who are not employed by way of manual labour and whose wages exceed HK$1,500 a month, members of a proprietor's family employed in his business, and employees who are to work outside of Hong Kong as manual workers are protected under the Contracts of Overseas Employment Ordinance and merchant seamen are protected in their employment by the Merchant Shipping Ordinance. Employees excluded from the scope of the Ordinance are protected by the Common Law principles as set out elsewhere in this work. On the topic of remuneration, the Ordinance was originally concerned only with the regulation and protection of "wages" which is given quite a restricted meaning [21], but by the enactment of Employment (Amendment) (No. 2) Ordinance in May 1973, the Ordinance now governs also the regulations on holiday pay and sickness allowance.[21a] In areas where no stipulation is laid down in the Ordinance, the rights and liabilities of parties are regulated also by the Common Law.

The objective of the Ordinance is "to provide for the protection of the wages of employees, to regulate conditions of employment ...." [22] by laying down prohibitions against certain agreements and conduct and by fixing some mandatory standards and terms for general observance.

On the formation of the contract of employment no particular formality is laid down by the Ordinance and the contract can still be either "in writing or oral, express or implied". However, employers are required to explain to the employee "before he enters employment" particulars of conditions with regard to wages[23], which include rate of wages, the overtime rate and any allowances, whether calculated by the piece, job, hour, day, week or in some other way [24]. These conditions, so the Ordinance set down, must be explained in an intelligible manner which may be written or oral [25]. The same procedure is required if during the course of employment, there is any change in the conditions with regard to the wages.

However, in point of fact, these provisions do not have any outstanding significance at all since the Ordinance requires the employer to furnish written particulars only if a written re-

---

19 *Powell* v. *Braun* [1954] 1 All E.R. 484 – where the employer had offered a bonus instead of a pay rise and this had been accepted by the employee who had received such a bonus until 1952, the C.A. allowed an action for *quantum meruit*. *Ma Mou-Leung* v. *Dollar Motors Ltd.* [1969] – District Court Law report p. 21 where the contract provides that the taxi-driver was to be paid daily wages of HK$10 and would expect to receive an annual bonus of HK$300, it was held that in assessing his claim of payment in *lieu* of notice, one third of his expected bonus should be taken into account since he has worked four months out of the calendar year. Whereas in *Lavarack* v. *Woods of Colchester Ltd.* [1967] 1. Q.B. 278 where the bonus expected was such as the directors might determine from time to time, it was disregarded when assessing the employee's claim to wrongful dismissal.

20 Chapter 57 of the Revised Edition 1970 of the Laws of Hong Kong. This edition incorporates the following amending Ordinances enacted in 1970 and 1971: (1) Employment (Amendment) Ordinance 1970; (2) Employment (Amendment) (No. 2) Ordinance 1970; (3) Employment (Amendment) (No. 3) Ordinance 1970; and (4) Employment (Amendment) Ordinance 1971. It now includes also the Employment (Amendment) (No. 2) Ordinance 1973.

21 It excludes the value of accommodation, education, food etc., contribution by employer to pension fund or provident fund, travelling allowances, gratuity and bonuses.

21a The law in this area was formerly governed by the Industrial Undertaking (Holidays with Pay and Sickness Allowance) Ordinance which was repealed by the same amendment (No. 39/1973).

22 Preamble to the long title of the Ordinance.

23 s.22 (1), s.24 (1).

24 If a written request for such information is sent in by the employee, then the employer must furnish him with written details in reply. s.22. (2), 23 (2).

25 s.23 (1).

quest from the employee is received at the ambiguous point of time of "before he enters employment". It is peculiar the way the legislation relies on the employee to provide the initiative. In view of the fact that a considerable portion of the workers affected by the Ordinance are illiterate and generally ignorant of legal procedure and formalities, it is within expectation that this statutory provision does not add anything new to the existing practice.

So far as the conditions relating remuneration are concerned, the Ordinance leaves it to the parties to agree on the particulars. There is nothing to prevent an employer from giving to an employee food, accommodation, or other allowances or privileges in addition to wages. No stipulation as to standard of rate of wages is set down. However an employer is prohibited from making it a term of the contract that intoxication liquor, dangerous drug or a cash sweep or betting ticket will form part of the service remuneration[26]. This is an enactment of the common law rule of invalidating any terms that might violate public policy. Any wilful contravention of the prohibition amounts to an offence and may make the employer liable to a fine of five thousand dollars[27]. It is unlikely that any employee would be interested in bringing the matter to the attention of a Labour officer so as to bring his employer to justice. But when the employer does endeavour to substitute cash payment with the prohibited commodities, it would be open to the employee to refuse acceptance and treat his wages due as still outstanding because such payment is rendered void under the Ordinance [28].

Under section 19, no employer may make any condition in the employment contract or in an agreement in consideration of a contract of employment as to where, how or with whom an employee is to spend his wages. It is not clear as to what exactly is prohibited under the section. Section 20 prohibits the employer from in any way binding his employees to buy from any shop, store or other place which he is permitted to establish for the sale of commodities to his employees. For both these sections, it would seem that the exempting factor is the voluntary nature of the condition or the agreement. Any condition in contravention of these sections are regarded as void.

A further protection afforded by the Ordinance is the general prohibition against deduction from wages[29]. Following the provisions in the English Truck Acts 1831-1940, the Employment Ordinance restricted permissible deduction to only a few situations[30], the object being to ensure that the employees to whom the Ordinance applies receive the full amount of their wages without deduction other than the permitted ones. Deduction for absence from work is permissible, but the amount deducted must not exceed the due proportion. Where remuneration is by piece-work, no question of deduction for absence from work will arise.

Deductions for damages to or loss of goods, equipment or property to or in the possession or control of the employer or for loss of money can be made provided the deducted sum is the true equivalent to the value of the loss, and if the damage or loss is due to the neglect or default of the employee. In any case, the maximum amount deductable in any one case is $300. The total of such deductions under this heading for any one wage period cannot exceed one-quarter of the wage payable for that period. From the wording of this section, this limitation as to one-quarter of the wage value only applies to the amount deductable from one wage payment so that where the cost of the damage recoverable is higher than one-quarter of the employee's salary, the employer can deduct one-quarter at the first wage period and recover the rest at the next wage period. The sum of $300 is the maximum for "any one case", so presumably, if in one wage period, the

26 s.18 (1); s.18 (2).
27 s.31 (2) (4).
28 s.35A
29 s.21 (1).
30 s.21 (2) (*a*) – (*i*)

employee has caused several incidents involving loss or damage, the value of such loss or damage is still recoverable even if the total exceeds $300, and if the amount exceeds one-quarter of the employee's salary, it should be recovered by instalments. It should be noted that these limitations on deduction from wages do not prevent an employer, who has suffered a loss exceeding $300 through the neglect or default of his employee, from recovering, by way of a civil claim in the Courts, the balance of his loss.

Deductions for meals supplied by the employer is permissible[31], but here, the supply and the deduction must be at the request of the employee. However, since the request could probably be implied by actual acceptance, the requirement for request may merely mean mere acquiescence so that the supply will not be a compulsion.

Where the employee requests for an advance or overpayment of wages, the employer can duly deduct the sum from his wages, the amount so deducted not exceeding one-quarter of the wages payable at any one wage period [32]. So where there is an advance exceeding a quarter of the wages payable at one wage period, deduction has to be made by instalments. A personal loan from the employer to the employee is quite different from an advance of wages and any arrangement to recover it by deduction from wages is illegal unless a written consent is given by the employee.

Deduction for contributions to be paid through the employer towards any medical benefit scheme, superannuation scheme, provident fund, or thrift scheme which has been lawfully established for the benefit of the employee is permitted. Unlike matters like supply of meals, the request from the employee here must be written. However, this does not mean that the project or the arrangement for deduction has to be initiated by the employee, for there is nothing to prevent the employer from drafting a request and arrange to have the employee to sign it. The essential factor here is the voluntary consent of the employee evidenced in writting.

Finally, deduction may be required or authorised by any enactment to be made from wages. An example of this is the payment of income taxes. Section 21 (2) *(i)* provided deduction for any other purposes agreed between the parties evidenced by the written request of the employee. However, in order to assure that the purpose is reasonable and legitimate, it has to go through the scrutiny of the Labour Department and the written approval of the Commissioner of Labour has to be obtained. A further proviso to this section is that no such deduction shall be made for the purpose of defraying or partly defraying the cost of holiday pay or sickness allowance which the employer has paid or may become liable to pay to the employee.[32a]

Where the parties sought to include in their contract of employment a term providing for the deduction of wages which is not within one of the permitted sections, (although it is not easy to readily imagine such a deduction in view of the wide scope of provision,) then applying the operation of section 35A, such term will be void and cannot have any binding effect on the employee. Where the employer endeavours to make such unlawful deduction, he may be liable to be convicted of an offence and the employee has due right to recover the so deducted sum from him as outstanding wages.

---

31 s.21 (2) (*c*); s.21 (2) (*b*) permits deduction for accommodation provided by the employer and occupied by the employee or his family.

32 s.21 (2) (*e*) If the employer purports to include any amount on account of interest or any similar charge on the deduction the written approval of the Commissioner of Labour has to be obtained. In general, the practice of charging any interest on the advance of wages is highly discouraged.

32a s21 (2) *(ii)*

As mentioned earlier, an employer has no obligation to provide holidays to an employee in common law. In Hong Kong, apart from a number of statutory holidays (which are to be discussed later), the employees are not automatically entitled to cease work on Sunday or any other holidays, except by agreement with the employer. Under the Employment Ordinance, the employers are compelled to reach such an "agreement" with the employees. In other words, it would not be open to the employer to say at the outset of the employment that no rest days are to be allowed. The term that not less than four rest days are to be granted in each calendar month is automatically incorporated in a continuous contract [33]. The employer is only left with the choice of appointing when the rest days of each month are to be allocated [34]. This provision is clearly directed to put a curb on the once notorious and almost inhuman treatment of the workers by the Hong Kong industrialists who would do anything to keep their factories in production every day of the year.

However, this prohibition is far from absolute and by section 11 (H), an employee is permitted, either at his own request or at the request of his employer to work for his employer on a rest day. The term used is "request" so there can be no compulsion on either party [35]. This relaxation of the general requirement is quite realistic in that while prohibiting any compulsory work on rest days, it allows the employer who wants the job done quickly and the employee who wants to earn more to have their way. However, popular arrangement now in operation in many trades and business [36] is that in calculating the salary for each month, an item of "overtime payment" is automatically included in addition to the basic salary. Automatically, the employer has requested and the employee has consented or vice versa, that the employee is to give up his rest days in consideration of the payment of a set sum. Very often, an employee may find himself "insisting" on working on the rest days he is lawfully entitled to and yet has to take leave of absence (which makes his wages liable to deduction) when he needs a day off, and he is given to understand that should he find the arrangement set down by the employer unsatisfactory, he is always free to leave by giving due notice. In this way, many have made use of the Section to defeat the whole purpose of the statutory regulation. Employees within the protection of the Ordinance are entitled to statutory sickness allowance and holidays with pay in accordance with the provisions of Part IV of the Ordinance, the only initial qualification required being that he has to be employed by his employer under a continuous contract for a period of 3 months immediately preceding a sickness day [37] or a statutory holiday [38].

Sickness allowance, the daily rate of which is a sum equivalent to one half of the employee's usual daily earnings other than overtime pay [39], is payable when the employee takes four or more consecutive days as sickness days [40], provided of course that he does not fall into one of the excluded classes [41] and has the sufficient medical evidence required [42]. Instances of exclusion are where the employee is found to have "without reasonable excuse" refused to submit to the treatment or disregarded advice thereunder offered by a recognised scheme of medical treatment operated by the employer [43], or where the unfitness of work has been caused by the "serious and wilful misconduct" of the employee himself [44]. What constitutes a "serious and wilful misconduct" is unclear, but no matter what

33 s.11 E (1) (2) – right to maternity leave has been given to pregnant employees under Part II A s, 11-11C.

34 s.11F (1) – (4) Procedure as to how the employee is to be notified of the arrangement of rest days where fixed at a regular basis or subject to monthly alteration, is also specified in the Section. s.11 F and s.11 G provide for situation where the employer is permitted to substitute other days as rest days and require the employee to work on appointed rest days, *viz*. with the consent of the employee or in the events of a breakdown of machinery or plant or in any other unforeseen emergency.

35 Compulsion by employer, however, is permitted in circumstances of a breakdown of machinery or plant or in any other unforeseen emergency – s.11 G (1). Compulsion is further prevented by s.11 I which renders any condition which makes payment of any annual bonus, including a Lunar New Year bonus, conditional on an employee agreeing to work for his employer on rest days, void.

36 e.g. catering industry, public transport and many of the industrial undertakings.

37 Section 21A(1). Under Section 2, "sickness day" is interpreted as "a day on which an employee is absent from his work by reason of his being unfit therefor on account of injury or sickness."

38 Section 21H

39 Section 21C

40 Section 21A(3)

41 Section 21A(5)

42 Section 21A (5) (*a*), (6) & (7)

43 Section 21A (5) (*b*), (c). Recognition of such a scheme of medical treatment is given by the Director of Medical and Health Services in accordance with Section 21B.

precise nature such a misconduct has to be of, there certainly is no requirement that the injury has to arise in the course of employment.

The number of days for which sickness allowance is payable would depend on the length of duration of the individual's contract of employment. The entitlement to sickness allowance accrues at the rate of one paid sickness day for each completed month of the employee's employment under the continuous contract with his employer[45] and an employee shall be entitled to be paid sickness allowance for the total number of sickness days taken by him to the extent that they do not exceed the number of paid sickness days so far accumulated by him. The number of sickness days in respect of which an employee has been paid sickness allowance shall be deducted from the paid sickness days accumulated by him as at the relevant time[46] and the maximum number of accumulated days is twenty-four at any one time[47].

As this method of computation can become quite complicated, the employers are made to keep a record which shall contain particulars of the entitlement to sickness allowance and sickness days of every employee employed by him. This record shall be available to the employees' inspection whether during the continuance or upon the termination of the contract of employment. If an employer should fail to maintain or should lose or destroy such a record in respect of all or any of his employees, then by way of punishment, the affected employees would be taken to be entitled to one paid sickness day for each completed month of their employment up to a maximum of 24 such days irrespective of whatever sickness allowance they might have hitherto been paid[48].

Under Section 21G, every employee shall be granted a number of statutory holidays which are all in fact Chineses customary festivals[49]. Should the employer wish to have the employee work for him on one of these holidays, allowance is made for substitution with another day, but the substituted day must be within sixty days preceding or after that statutory holiday and appropriate notice of the substitution must be given by the employer[50]. Special provision is made for female workers and young persons *(viz.* aged 14-17) who come under the control of the Factories and Industrial Undertakings Ordinance[51].

While all employees are automatically granted the six statutory holidays, only an employee who has been employed by his employer under a continuous contract for a period of three months immediately preceding a statutory holiday shall be paid by his employer holiday pay at a rate equivalent to the sum of his average daily earning[52].

To foster observance of the preamble, the statute has made the failure to grant any statutory holiday or to pay any sickness allowance or holiday pay due to the employee an offence punishable with a fine of five thousand dollars[53]. However, where the employees are remunerated on a monthly basis under a contract of substantial length of duration, the practice is usually to treat the holidays or sickness leave as ordinary working days remunerated at the usual rate without going into the details of computating the employee's qualification on each occasion. This practice is sanctioned by Section 21J which prohibits an employee from further claiming holidays pay or sickness allowance if the terms

---

44 Section 21A (5) (*d*). Also no sickness allowance is payable where the unfitness for work is on account of an injury or occupational disease in respect of which compensation is payable in accordance with the Workmen's Compensation Ordinance Cap. 282 – Section 21A (5) (e); or where holiday pay is payable in respect of the same day on which the employee is sick – Section 21A (5) (f).

45 Section 21A (2)

46 Section 21A (4)

47 Section 21A (2)

48 Section 21E

49 Viz. (a) Lunar New Year's Day (b) The Second day of Lunar New Year (c) Ching Ming (清明) Festival (d) Tuen Ng (端午Dragon Boat) Festival (e) The day following the Chinese Mid-Autumn (中秋) Festival and (f) the first day of January.

50 Section 21G (2)

51 Section 21G (3) (4)

52 Section 21H, Section 21I

53 Section 31 (1C)

of his contract have already provided for it.

In practice, the Ordinance as a whole lacks the mandatory force to effect a strict observance of its provisions. No special machinery has been set up to enforce its requirements and any contravention against its terms can hardly be brought to the Labour Department's attention except by way of complaint launched by an employee. But where stipulations as to written particulars of working terms, rest days, deductions, sickness allowance and holidays pay are disregarded, so long as the employee is still working under the employer and the loss he may thereby suffer is not too substantial, it is unlikely that he will want to expose his employer's offence and at the same time risk his own job[54]. Only upon the break-up of the employment relationship will the employee seek avail of the statutory provisions, for it is only then that he would confidently insist on the inclusion of the various items like holidays pay and sickness allowance in the computation of the remuneration due to him. Even on the part of the Labour Department, it is not too keen to press on charges to enforce strict observance of the statutory regulations. If in the course of investigation into an independent complaint or in the course of general factory inspection, it has noted an act or acts of contravention by a particular employer, the Department will only issue a warning to the employer.

Thus the general protection afforded by this piece of legislation is more in the form of informing the employees of some of their basic rights and of awaking in the employers the conscientiousness to give the employees a fair deal, rather than in the form of substantially interfering with the rights and obligations under the individual contracts.

Complications involved in the procedure of making claims under the Ordinance has been one of the difficulty in enforcement, but with the establishment of the Labour Tribunal which deals *inter alia* with claims arising out of failure to observe the Ordinance, it is anticipated that their protective effect will become more widespread.

Apart from this major Ordinance[55], there is no operative legislation in Hong Kong that bears direct reference to the area of remuneration. However, as far as the law in black and white goes, there is the Trade Boards Ordinance Cap. 63. Where a Trade Board respecting a particular trade or business is set up in accordance with the procedure as set down in the Ordinance, a minimum rate or remuneration may be set down, whether time-rate or piece-rate and including overtime rate, for that particular trade and any agreement on remuneration at a rate below the set standard will be void and the employer who sought to pay his employee wages less than the minimum rate clear of all deductions will be liable to conviction of an offence.

Though the procedure of setting up such a wage-regulation machinery is available, no avail has ever been made of it. In effect, despite the significant protection an effective application of this Ordinance may afford the workers, somehow the Ordinance has become a dead letter. It would be a mistake to assume the non-application of the Ordinance to be due to the total absence of unreasonably low wage standards in any trade. When compared with the general cost and standard of living now prevailing (setting aside the further question of what exactly is the standard of reasonableness to be applied), it is not difficult to point at one or many more outrageously low wage standards. Nevertheless, it

---

54 The Ordinance contains no prohibition against dismissal of employee by reason of his having given information against the employer under the Ordinance.

55 The Factories and Industrial Undertaking Regulations (subsidiary to the main Ordinance Cap. 59) may indirectly regulate the terms affecting remuneration in its provision on employment of women, young persons and children in that it laid down prohibition against the maximum working hours per day for the above mentioned people.

remains a fact that many people, workers and employers alike, still believe in fixing wages rates by free competition and by free competition alone. Perhaps the busy industrial activities going on in Hong Kong pushing up wage levels explains why the Ordinance proves superfluous. In any event, one doubts whether the existing legislation procedure can even keep up with the speed at which economic growth and consequently the living standard rise the Colony is heading towards. It will not be practicable to fix any Static Wage Standard that may quickly become obsolete.

The dislike towards Government interference in individual contracts may be another reason for the Ordinance's inapplication. Though it has been suggested[56] that the Ordinance should not be neglected altogether because it does have a virtue of being able to provide an opportunity of bringing together representatives of employers and workers for joint discussion of minimum wages and conditions of employment in an industry or trade. However, chance of its revival is slim.

Customs and Practices

Customs

Like in other branches of the law, the influence of customs is recognized in the legal relationship of employment. Custom here means a conventional trade or business usage well known and recognized in that trade or business. Thus by definition, a custom recognized in one occupation may never be heard of in another. Besides being "sufficiently notorious in the sense that people would make their contracts on the supposition that it exists"[57], an alleged custom must also be reasonable and certain[58]. A practice with these qualities must be proved to be a custom each time at first[59], but gradually it may reach the stage of being judicially noticed so that no further proof is required.

Custom in contract of employment operates as part of, and usually the strongest, evidence of the circumstances from which the interest of the parties in respect of a silent term, is to be inferred. For the general inference is that the parties contract on basis of what other people are known to be doing. Any evidence of frequent practice which falls short of a custom may be strong evidence of what is reasonable in the circumstances, .reasonable in the sense that it is what everybody else is doing[60].

A judicially noticed or proved custom, whether on the question of the duties of employee or employer or the hours of work, entitlement of holidays, payment of remuneration, manner of termination and so on, can be implied into an individual contract of employment if the contract is silent as to a particular point[61]. However, apart from the fact that the validity of the custom itself has first to be established, the implication can only arise if the rest of the contract is consistent with the existence of such a custom and there is nothing that goes to show that the parties could not have thought or intended to be bound by such a custom. Another factor that may diminish the importance of custom, particularly in respect of certain em-

---

56 *"Industrial Relation in Hong Kong"* by Mr. Joe England, extracted from p.255 of the *"Hong Kong: The Industrial Colony"*.

57 *Foxall* v. *International Land Credit* (1867) 16 L.T. 637, explaining the meaning of "notorious". *Devonald* v. *Rosser & Sons* [1906] 2. K.B. 728 – " . . . a custom cannot be read into a written contract unless . . . it is so universal that no workman could be supposed to have entered into the service without looking to it as part of the contract." – (*per* Lord Alverstone C.J.). *Lui Lim & Others* v. *Po Shek Restaurant Ltd.* [1966] Hong Kong District Court Law Report p. 78.

58 *Paxton* v. *Courtney* (1860) 2 F. & F. 131 – "reasonable" means "fair and proper and such as reasonable, homest and fair-minded men would adopt." It will be neither reasonable nor certain if it is precarious depending on the will of the master – *per* Farewell L.J. in *Devonald* v. *Rosser* [1906] 2 K.B. 728 C.A. at 743.

59 It must be proved in Court as a question of fact by witnesses who, from their knowledge and experience, can speak of the amount of notice habitually given and received in the particular occupation – *Paxton* v. *Courtney; Moult* v. *Haluday* [1898] 1 Q.B. 125, the alleged custom being on notice here.

60 *Mak Ping & Ors.* v. *New Style Knitting Factory Ltd.* [1968] Hong Kong District Court Report 51. *Cowey* v. *Liberian Operations Ltd.* [1966] 2 Lloyd's Report 45.

61 *R.* v. *Stoke-Upon-Trent (Inhabitants)* (1843) 5 Q.B. 303. (on holidays) *Hancock v. B.S.A. Tools Ltd.* [1939] 4 All E.R. 538 (Custom of trade on question of sickness pay).

ployment, is the overriding effect of the statute, *viz.* the Employment Ordinance.

Where the particular contract is within the application of the Employment Ordinance, no agreement between the parties or operative customs can be enforceable if it runs counter to the stipulation in the Statue [62].

Some English authorities[63] suggest that where the provision of custom does not fall below the relevant statutory standard, then the parties are allowed to establish it as part of their contractual terms[64].

Aspects of the employment (dealing directly or indirectly with remuneration) regulated by customs, are terms like the entitlement to holidays and right to remuneration extra to basic salary. However, in Hong Kong, these have to a large extent been assimulated by the statutes. This is in fact quite natural because statutes are, after all, sometimes the consolidation of common law and the custom inherent in the trade and business of the Chinese Community is in fact the "common law" of Hong Kong[65]. Thus the customary holidays for workers have now become statutory holidays under the Employment Ordinance [66]. But in this respect, some commonly known practices which are none the less customs are still being observed [67].

Of course, occupations which are not affected by legislation still keep their customs intact. Thus an editor may enter into a contract quite confident of his right to not less than three months notice of termination. On the other hand, customs regarding terms like double pay, provision of board and lodging are not affected by the legislation at all. Employees at a beauty salon would understand without express agreement that his pay for the week preceding Chinese New Year will double up both in basic salary and in the amount he gets for the "piecework" whereas with domestic servants, they would expect a full month's double pay – sometimes called by another name of "clothes making money". They are however well aware of the fact that leaving before the half year is through would not entitle them to even a portion of the double pay. They would expect meals and lodging extra to their remuneration and any deduction from the agreed salary for meals and lodging will be perfect .nonsense. All these come as a tacit understanding between the parties without any need for agreement.

It is earlier noted that after the introduction of the Employment Ordinance, the need to invoke custom has seemed to be less important. Moreover, where a particular practice is found in an individual institute, and the practice is adopted as part of the contract, then again custom will lose its binding effect to this practice. This is to be considered next.

Practices

An established practice at a particular factory may be incorporated into a workman's

---

62 e.g. in *Mak Ping & Ors.* v. *New Style Knitting Factory Ltd. ante,* a proven custom that employment is determinable by a period of notice equivalent to period of wage payment, was not taken into account by the Court because it departed from the statutory stipulations of one month. The same custom is recognized in *Cheung Man* v. *King's Textile Company* [1968] Hong Kong District Court L.R. 45, but again it was overridden by the statutory provision. Similarly, in *Lui Lim* v. *Po Shek Restaurant Ltd. ante fn.* (57), it was held that the alleged custom cannot have any binding effect because it is manifestly at variance with the object of the Ordinance "which the legislature plainly desires to make obligatory on all and everywhere." (*per* Judge Wylie at p. 81).

63 e.g. *Moult* v. *Halliday* [1898] 1 Q.B. 125.
George v. *Davies* [1911] 2 K.B. 445.

64 However, in *Lui Lim & Ors.'* case, Judge Wylie emphatically said that the Ordinance admits of no exceptions, no custom can have any role of play. He seems to think that once a relevant term has become the subject matter of legislature then unless the legislature clearly makes exception of certain kinds of contract like those contracted by customs and usage in a particular trade, the effect of custom is impliedly excluded. However, though the discussion has not been expressly confined as such the learned judge was here concerned only with custom which was at variance with the object of the Ordinance. So despite the strong wording used, one would think that custom still has its place in the contract of employment so long as it stands up to the minimum standard as set down by the Ordinance.

65 An old saying is "common usage is common law". Y.B. 30 Edw 3ff 25, 26.

66 *ante fn.* 49

67 e.g. an employer in house-construction business would not dream of requesting his employees to take a substitute holiday for the Solstice Festival which was a customary holiday in their trade. And it would be taken for granted that domestic servant would be given a substitute holiday for the same reason.

contract of service [68]. A practice, as distinct from custom, is operative only by reference to an individual firm or institute and not to the whole trade. Any conditions proving to be part of the mode of employment peculiar to an employer company and within the common knowledge and acceptance of the general staff is a practice. Although there is judicial statement to the effect that the worker does not even have to know of the practice and that it must be presumed that he accepted employment on the same terms as applied to other workers in that factory[69], the Court would generally want to look for some evidence justifying an incorporation of an external condition into the individual contract. Sometimes incorporation is signified by the employer's acceptance of various internal rules for work posted up as printed rules[70]; or acceptance is signified by the employee's acquiescence in the practice regularly enforced or followed by other employees or by himself[71].

The content of the practices can be of infinite variety. They may include regulation on the employer's right of suspension and dismissal[72], employee's right to extra remuneration[73], the position during sickness or injury and many others. But again, they cannot in any way contravene the relevant statutory provisions.

Collective Agreement

Agreements which are negotiated between bodies or groups in their representative capacity are collective agreements. In the field of labour relation collective agreements can be reached between trade unions as workers' representative bodies and employers' associations, or they can be between trade unions and individual employers; or they can be confined to as between the workers and employer of an individual establishment. In other words the agreement may be more or less industry-wide, or it may be factory or company agreements. When incorporated into the individual worker's employment contract, terms contained in these agreement will bind the individual. What these agreements cater for can be of infinite variety too. Matters like the holidays wages rates, hours and overtime, or even day-to-day working details can be the subject matter of collective agreements.

The form of the agreements vary from carefully prepared documents to a "nod and wink" settlement and a lot depends on the mode the parties have chosen to reach their mutual understanding.

Roughly there are three types of collective communication or bargaining between the management and the workers.

(1) Workers pass on their grievances and requests to the employer usually the manager, through their representative or the middle-man. This form of communication is irregular and informal and usually it serves only to solve the

---

68 *Sagar* v. *Ridehalgh (H) & Son Ltd.* [1931] 1 Ch. 310; *Bird* v. *British Co. Ltd.* [1945] 1 All E.R. 488 (C.A.)

69 *Sagar* v. *Ridehalgh (H) & Son Ltd. ante fn* 68.

70 *Bird* v. *British Celanese Ltd. ante fn* 68 – a regularly followed and enforced practice that the Co. could temporarily suspend a workman from his employment, with a proportional deduction from the week's wages, for breaches of the factory rules, which were posted up, was held to be incorporated into the plaintiff's contract so as to bar him from suing for the wages of the two days suspended from work.

71 *Bird* v. *British Celanese Ltd. ante fn.* 68; *Sagar* v. *Ridehalgh (H) & Son Ltd. ante fn.*68. But see the dissenting judgment of Du Parcq L.J. in *Marshall* v. *The British Electric Co. Ltd.* [1945] 1 All E.R. 653 – he said that the willingness to submit to suspension (the alleged practice in this case) by the worker might either mean that there was such a rule compelling him to do so; or it might mean that he has so submitted out of his own choice lest a worse fate might befall him. It was only in the first case that it might well be that every man who takes employment in the factory impliedly bound himself to submit to the rule, but not quite so in the latter case. But the law in this area is too settled to be disturbed by a dissenting judgment. Nevertheless, it is true that if one is to judge from conduct alone, it can afford quite ambiguous inference. So existence of some documentary evidence might behelpful here.

72 *Bird* v.*British Celanese Ltd.; Marshall* v. *English Electric Co. Ltd.*

73 This is an aspect which one can see one of themost variant practices among firms even of the same trade, especially in regard to bonus shceme. Some go for double pay at the end of the year; some set down two or three extra months remuneration for one year, payable at different intervals; some have practice of calculating bonus (not commission) according to the production figure and payable monthly after certain period of accruement and others go as far as putting in the employee's bonuses into buying shares of the company for them to make them shareholders of the company.

prevailing differences without setting down any permanent arrangements. The conclusion of this type of bargaining can therefore hardly be called collective agreement in its proper sense.

(2) At a higher level is the joint consultation procedure in which discussion between management and employees on matters of joint concern is regularly held. Essentially this is not a negotiation procedure but only a channel for suggestions. But very often it may result in the reaching of a collective agreement[74].

(3) In a wider scale is collective bargaining headed by trade unions, either with employers' association or individual employers. This in itself is divided into two types. Some unions work for joint consultation that aims at achieving collective agreements concerning conditions of service of a more permanent nature, e.g. to set up procedual arrangement to enable negotiation to take place on a regular basis, or to agree on incremental period for wages. These are more formal collective agreements. Other unions prefer to launch demands from time to time as the need arises and agreements are usually drawn up only after a dispute has been settled[75].

In Hong Kong, all three types of negotiation are being practised. But generally speaking, labour relations in most trades are regulated by the first type of informal and irregular kind of communication which can do little to provide the worker with bargaining power. Joint consultation system is at the stage of promotion and still has quite a way to go. Formal collective agreements do exist, but mainly among the smaller and older trades, the docks and in public transport, but the system is far from being fully developed. This may be attributable to a number of reasons. On the one hand, traditional pattern of Chinese management, which still dominates in most of the industries, is too much concerned with fidelity and authoritarianism to be ready for joint consultation or collective agreements at all. And, in general, most employers remain conservative and suspicious towards intimate labour relation. On the other hand, there are workers who do not believe in collective bargaining especially when supply of labour exceeds demand. Trade unionism, a major motivation on the workers' side to promote collective agreements, lacks the vitality and organization[76] to make any outstanding contribution. All and all, it is estimated that less than five per cent of the labour force is covered by collective agreements and the effort is mainly centred around wage increases and other workers' benefits.

Legal Effect of Collective Agreement

Under the Trade Unions Ordinance[77], agreements between collective bodies, including workers' unions and employers' associations, are not directly enforceable in Court, nor can damages for its breach be recoverable[78]. But this prohibition does not apply to agreements made collectively between a workers' union with a single employer. Presumably the common law applies in such a case. Before 1969, judicial statements on this subject are subject are largely equivocal. But in *Ford Motor Co., Ltd. v. Amalgamated Union of Engineering*

---

74 The practice is gradually growing in popularity and a number of collective agreements have been reached this way recently between the management and staff of big commercial undertakings.

75 Most of the trade unions in Hong Kong adopt "the marketing concept" of bargaining which means that if there is no agreement on the price of labour, no sale will be made and strike is threatened or actually launched until demand is met.

76 Several reasons are said to be attributable to this unsatisfactory performance. One of them used to be the heavy political taint which the Hong Kong unionism carried. With the exception of a small neutral and independent segment, most workers' unions were either affiliated to, or associated with one or two local federations which bore allegiance to opposing political parties. (Hong Kong Federation of Trade Unions supports Republic of China and the Hong Kong and Kowloon Trades Union Council sympathises with Taiwan). The power struggle between the two is also an obstacle to union power. However, while this feature still subsists, it can be noted that a new trend has emerged. It has now arisen a middle faction surmised to be supported by religious young intellectuals and subscribed by the younger workers. This faction has less political overtone and is more concerned with the condition of employment. It is found in new industries such as electronics. Nevertheless, it still remains a fact that divided politically and further separated by differences in dialect, the number of unions has grown beyond practical needs and divergent loyalties have prevented those with common interests from amalgamating into effective organizations. For a fuller discussion on unionism in Hong Kong, see Mr. Joe England in *"Industrial Relations in Hong Kong" ante fn* 56.

77 Cap. 332 Laws of Hong Kong 1971 Edition.

78 s.44 (*d*) provides that no Court can entertain any proceeding for the purpose of enforcing or recovering damage for breach of agreements made between one trade union and another. "Trade union" is defined in s.2 to mean "any combination the object of which is the regulation of employment relation," this would include employer association as well.

and Foundry Workers[79], Geoffrey J. proposed that the ordinary contract principle of intention to create legal relationship should also apply in case of collective agreements. If sufficient intention can be inferred from surrounding circumstances then the agreement should be contractually enforecable.

Effect of Collective Agreement on Individual Contract of Employment

The legal relationship of employment has always been under a law of individual and not of collective, contractual obligation. Therefore collective agreement can secure its legal and binding effect only by implication of its terms into the individual contract.

The incorporation[80] may be effected either by express provision in the individual contract[81], or by the conduct of the parties [82].

The incorporation will seem to be of the whole agreement, including those which may be intended only as collective terms between the representative bodies to the agreement[83].

---

79 [1969] 2 Q.B. 303. This is a case on agreement made between two collective bodies, but probably it can also be applied here. Geoffrey J. also suggested ways of proving intention. There is no Hong Kong authority directly on this point. In *Lui Lim* v. *Po Shek Restaurants Ltd. supra*, an agreement between the employer association committee and workers' union committee, one of the terms of which specified that dismissal in December required no payment in *lieu* of notice, was put into evidence in proof of the alleged custom. The allegation failed on another ground. No comment or reference was made to this agreement in the judgment and one is not sure whether it is disregarded because of its lack of contractual enforceability or because of absence of proof of incorporation into individual contract.

80 There used to be a theory that incorporation is automatic because the unions or shop stewards are acting as agents for those whom they represent. But for the difficulty of definition and other side issues involved this theory is rejected in *Holland* v. *London Society of Compositors* (1924) 40 T.L.R. 440.

81 *National Coal Board* v. *Galley* [1958] 1 W.L.R. 16.

82 Where the parties acquiesce in the application of terms of the collective agreement to the individual employment relationship – *Maclea* v. *Essex Line Ltd.* [1933] 45 Ll. L.R. 254; *Sagar* v. *Ridehalgh supra.* Butagain, see Du Parcq L.J.'s argument in *Marshall* v. *The English Electric Co. Ltd. supra.*

83 *Rookes v. Barnard* [1964] A.C. 1129. It was conceded that the term restricting the right to strike was implied into the individual contract although it only restricted collective activities.

THE ROLE OF BANKS IN CHINA TRADE

Wong May Bo, Mabel

By courtesy of H.K.G.I.S.

"The Chinese people wish to have friendly co-operation with the people of all countries and to resume and expand international trade in order to develop production and promote economic prosperity."

Mao Tse Tung

Since the ping-pong diplomacy, the strong gate of the P.R.C. opens wider and wider for international trade; and, "Hong Kong is a very important outlet for Chinese goods and will continue to be so."[1] Indeed, according to a newspaper report on the 2nd April, 1973, it was said that China may even consider staging an industrial exhibition in Hong Kong to boost her foreign trade.

Banks usually play an active and important role in international trade. The trade with P.R.C. is of no exception. The part played by the Banks in financing trade transactions involving P.R.C. is both important and indispensable. In addition to making loans and advances to customers having contracts with the P.R.C., certain foreign Banks also finance the transaction by the operation of Commercial Letters of Credit. In Hong Kong, there is a number of banks having close relationship with P.R.C., the most important of these is the Bank of China whose head office is in Peking with branch offices in London and Singapore.

> The Bank of China acts as the People's Republic of China's representative abroad and is responsible for the settlement of all international payment in business transacted by the various state trade corporations."[2]

Following the common practice in international trade, payment for sale with P.R.C. is almost always by Letter of Credit.

Operation of Document Letter of Credit

The principle has been explained by Denning L.J. (as he then was) in *Pavis & Co. S.P.A.* v. *Thurmann-Neilsen* in the following words: –

> "The sale of goods across the world is now usually arranged by means of confirmed credits. The Buyer requests his Banker to open a credit in favour of the Seller and in Pursuance of that

1 *Per* Mr. Walker who attended the British Industrial and Technological Exhibition in Peking at "The end of March, 1973.

2 Pan Am: *Trade With China* P. 73.

request the Banker or his foreign agent issues a confirmed credit in favour of the Seller. This credit is a promise by the Banker to pay money to the Seller in return for the shipping documents. Then the Seller, when he presents the documents, gets paid the contract price. The conditions of the credit must be strictly fulfilled, otherwise, the Seller would not be entitled to draw on it." [3]

Such a transaction can be analytically divided into four district stages:–

Contract of Sale

The first stage is where the importer and exporter sign and complete a contract for the sale of particular goods, with a stipulation in the contract that payment should be by means of documentary credit. This imposes on the Buyer a duty to open a Letter of Credit in a reputable bank in favour of the Seller.

Application for Opening of Credit

Normally, the Buyer will apply to his own Bank to open a credit by completing a form – Letter of Request – in which the Bank agrees to honour, at maturity, all drafts drawn by the Seller in accordance with the terms of the credit. In return, the Buyer promises to reimburse the Bank on any amount incurred or sustained by the latter in relation to the credit, together with an agreed commission charge.

The legal effect of the transactions at this stage is that the Bank is put into the shoes of the Buyer as pay-master for the sale so that the Seller looks to the Bank for price instead of relying on the Buyer in whom he lacks confidence. In return, the Buyer allows the Bank to hold the documents of title as security for the sum paid to the Seller.

Establishing the Credit and Advising the Seller thereon.

If the Bank accepts the application, it becomes its duty to draft the Letter of Credit in accordance with the terms of the application and then transmits the same to the Seller. This Bank thus becomes the Issuing Bank. Very often, the Issuing Bank will not transmit the credit directly to the Seller itself, instead, it will employ the service of another Bank in the Seller's country to advise the Seller on the credit. This Bank in the Seller's country is known as the Advising Bank. What is more, the Seller who is in a different country may lack confidence in the Issuing Bank since it is chosen by the Buyer. This will lead to the result of the Seller requiring the credit to be "confirmed" by a local bank which he is in a better position to know. The advising Bank will, therefore, have to add his confirmation.

Realization of the Letter of Credit

In due course, the Seller presents drafts accompanied by documents in compliance with the credit to the intermediary bank (i.e. either the Advising or Confirming Bank) who transmits the same to the Issuing Bank. The Issuing Bank, after making sure that these documents are in strict compliance with the terms of the credit, will honour the drafts accordingly. The usual practice is for the Seller to discount or negotiate the draft with one of the local banks which may or may not be the intermediary bank. The latter bank, therefore, acts as a Negotiating Bank, who has a right of recourse against the Issuing Bank as a holder of a negotiating instrument.

Revocable And Irrevocable Credits

Credits may be revocable or irrevocable. A revocable one "may be modified or cancelled at any moment without notice to the beneficiary."[4] An irrevocable credit, on the other hand, is a definite undertaking on the part of an Issuing Bank and constitutes the engagement of that Bank to the beneficiary." "Such undertaking can neither be modified nor cancelled without agreement of all concerned." [5] Thus the latter gives certainty to the Seller. Therefore, if an irrevocable credit is confirmed by a local Bank, the Seller can be described as having obtained a "double insurance" since two banks of reputable standing have guaranteed payment provided the prescribed documents are duly presented before the date of expiry of the credit.

China Trade

Two points of significance need to be mentioned in relation to China's foreign trade. First, since P.R.C. is a communist country, all foreign trade (import and export) is under state-control. Second, P.R.C. is not a member of the International Chamber of Commerce. Several results flow from these two characteristics:–

3 [1952] 2 Q.B. 85 at P. 88.

4 Article 2 of the Uniform Customs & Practice.

5 Article 3 of the Uniform Customs & Practice.

Results of International Trade being under State Control.

Business transactions affected by Governmental Policy

This is especially important since the policy of P.R.C. is unpredictable: It began with the U.S.S.R. and other communist countries. At that time, they seemed to have got the monopoly. Then the gate was opened to Canada, England and some Western countries with a big EXCEPTION – the United States of America. Then came recently Japan and more recently, the States as well.

Indeed, one of the major distinction between Letter of Credit opened in relation to P.R.C. and that of others is that the period of validity for the former type is comparatively shorter:– usually it is for six months only.

Further, the influence of governmental policy on P.R.C.'s trade can be revealed from a sample of 'Export Contract for Sale to China', the title of which is already striking:

"*Friendly* Trade Export Contract".

The preamble states:

> "This Contract is . . . concluded after *friendly* negotiations. in accordance with the Three Principles of Sino-Japanese Trade declared by Prime Minister, Chou En-lai *for the promotion and strengthening of the friendship and economic relationship between the peoples of China and Japan.*" [6]

This is (as it is claimed) the purpose of their being willing to trade with a particular country. Nor is that all. Clause 15 (*i*) of the Contract also provides that the Seller shall not use any American vessel for transportation and 15 (*ii*) states that the boat shall not call at any port in the U.S. or call at any port in, or in the vicinity of, Taiwan.

Moreover, in every standard form contract, whether it is the contracts for sale or Letter of Credit, there must be a provision for Force Majeure. It is interesting to note that strikes which are generally recognised in the West as under the umbrella of Force Majeure are excluded by P.R.C. because as a Chinese insurance policy states, they are the "inherent vice" of the capitalist system.

What is more, in 1970, the Chinese Premier, Chou En-lai warned a number of Japanese firms which had trade links with both Taiwan and P.R.C. that unless they severed their relation with Taiwan, they would be black-listed and that existing contract between them and P.R.C. would be cancelled.[7]

This stretch of political influence into the Commercial field has particular bearing in the currency problem of the contract for sale and consequently the Letter of Credit.

Nominated Representatives as Contracting Party

As all trade transactions are handled by the States, the party representing P.R.C. in the contracts must be one of the few State Trading Corporations each of which has a head office in Peking and also branch offices scattering over the mainland in such centres as Shanghai, Tientsin, Canton, Dairen, Tsingtao and Foochow. Moreover, there are agents in Hong Kong such as the China Resources Company which is composed of eleven Chinese partners.

In cases where P.R.C. imports foreign products, it is one of these State Corporations that will negotiate with the Seller, sign the contract and subsequently open the Letter of Credit with the Bank of China or one of its branches. Similarly, in export trade, the foreign Buyer has to deal exclusively with that particular trading corporation. The preamble of an Export Contract for Exports from Japan to P.R.C. starts as follows:

> "This CONTRACT is made and executed by and between_____ Corporation of the People's Republic of China (hereinafter referred to as "Buyer") and_____Co. Ltd. of Japan. (hereinafter referred to as "Seller")"

Likewise, the Letter of Credit must be issued through a bank having a corresponding relationship with the Bank of China. At present, there are less than twenty such foreign banks.[8] The Bank of China, on the other hand, is almost always

---

6 The italics are that of the writer.

7 South China Morning Post: May 5, 8 and 30, 1970.

8 By way of illustration, two of such Banks are Royal Bank of Canada and Bank of Montreal.

involved in the transaction, namely, either as an Issuing Bank or as an Intermediary Bank.

Strict Compliance of Terms of Letter of Credit with the Contract for Sale

It is a characteristic of transactions with P.R.C. that the contract of sale is like a "passport". Its production is required whenever the foreigner wishes to open a Letter of Credit, to buy forward or sell forward currency or to proceed with other necessary transactions.

Unlike the Western countries where, often, contracts are concluded parolly, the Chinese insists on a formal written contract for each transaction. The contracts are longer and in greater details, so that, (as they said) unnecessary confusion and disputes may be avoided. This is perfectly true, especially in view of the long geographical distance between the parties and difference in trading customs. Moreover, it is said that the Chinese are 'religious' to their contracts. [9]

The sale and purchase with P.R.C. is often financed by the operation of the Letter of Credit which must be issued by the Bank of China in the former case and through a bank having corresponding relationship with the Bank of China in the latter. In order to open a Letter of Credit in favour of P.R.C. (the Seller), the foreign importer has to produce a signed contract in which there are detailed provisions for the type of credit required. A typical sales Contract usually provides that it must be a 'Confirmed, Irrevocable, Divisible, Assignable Letter of Credit Without Recourse for the full amount established through a first class Bank acceptable to the Sellers.' It should be noted here that while in the purchase of Chinese products, the foreign importer is usually required to open a confirmed Letter of Credit, in the case of foreign countries' sale to P.R.C., normally it is not possible to obtain a 'confirmed' credit. "Nevertheless, the Bank of China has a well-established reputation among businessmen for full and prompt payment and there is no long-term external debt". [10]

What is more, there is a striking difference between the type of Letter of Credit issued in relation to trade with China and that between Western countries themselves. In the latter case, it is always emphasized that the Letter of Credit should be completely independent of the Contract of Sale [11] whereas in cases where P.R.C. is a party to the transaction, strict compliance of the terms of the Letter of Credit with the Contract of Sale is required.

In ordinary cases, the legal relationship between the Issuing Bank and Buyer is contractual. The Bank agrees to issue a Letter of Credit in favour of the Seller in consideration of certain promises by the Buyer, such as, to put the Bank in fund to meet the Seller's draft or to arrange for reimbursement and to pay commissions. However, if the Buyer deposits cash or security to the Bank before the Bank is called upon to honour the draft of the Seller, the Bank becomes a debtor while the Buyer is the creditor.

In the case of China, since the transactions are handled by State Corporations, the legal relationship between the Issuing Bank and the Buyer in cases where P.R.C. imports foreign goods worths weighing: Will it still be contractual? Do all the rights and liabilities owed by the Bank towards the Buyer still subsist?

But, this characteristic of China's trade being under State Control at least helps to explain why China requires strict compliance of the terms of the Letter of Credit with the Contract of Sale signed by one of its State Corporations. It should be noted that the Bank of China is under state-control though its branches may be regarded as separate entitles in law. [12]

Sovereign Immunity

The P.R.C. Foreign Trade Organisations (*i.e.* the State Corporations) are directly under the control of the Ministry of Foreign Trade, while the governing body of the Bank of China is also under the control of the Ministry of Finance.

It can be realised from these facts that in case of disputes arising under the contract of sale signed by one of these State Corporations, it is always open to P.R.C. to certify that it is part of

9 Exact adjective used by Assistant Trade Commission for Canada to describe the Chinese.

10 *China Trade Guide* P. 9

11 General Provision c. of U.C.P.

12 NOTE: For this section, the writer derives much help form the Article by Mr. Alan Smith: Standard Form Contracts in Vol. 21 of International and Comparative Law Quarterly.

the Ministry and plead sovereign immunity as a defence to Court actions.

The case of the Bank of China and its branches is more doubtful. By its memorandum and Articles of Association, the Bank of China, Hong Kong, is a joint state/private enterprise in which private investors receive a fixed dividend of 5% per annum, and are supposed to enjoy various voting rights. In practice, it is controlled and directed by the Chinese People's Bank which is itself under the Ministry of Finance. In *Krajina* v. *The Tass Agency*,[13] the defendents were used for libel, but they were able to have the writ set aside on the ground that they were a department of the Soviet State. This was affirmed on appeal where Birkett J. held, *inter alia*, that even if the agency was a state department having a separate entity, it did not follow that the Soviet government by procuring its incorporation had deprived it of the right to assert the immunity normally attached to a department of a foreign state under international law. Similiar problem arose and was discussed in *Bacens P.R.I.* v. *Servicio Nacional Del Trifo.*[14] The defendants here even admitted that they possessed a legal personality, had power to make contracts on their own behalf and could sue and be sued in their own name, yet the Court of Appeal held that they were a department of the State of Spain and accordingly they were entitled to claim sovereign immunity. The effect of these two cases was summarised by J.G. Starke in the following words [15]:—

> "As to foreign semi-public corporations, in particular if they are not of the character of departments of state, but simply separate judicial entities, the priviledge of jurisdictional immunity does not attach. It would seem from (above two cases) that it is a question of degree whether separate judicial incorporation has proceeded so far as to deprive an agency of its character as a department of State, or whether notwithstanding its incorporation it still possesses that character. A separate, incorporated legal entity may by reason of the degree of governmental control over it, nonetheless be an organ of the State."

When this problem was put to a Canadian lawyer who has just returned from a Conference in P.R.C., the answer obtained is simply that: "it is unlikely that P.R.C. will plead sovereign immunity in these commercial matters." But still, one cannot deny that the risk that they may claim immunity remains.

Results of P.R.C. not being a Member of I.C.C.

Uniform Customs and Practice for Documentary Credits (U.C.P.)

The details of the practice relating to documentary credits vary from country to country and from bank to bank though basically they remain the same. The International Chamber of Commerce had tried to standardise the operation of Letter of Credit in 1933 by introducing a set of rules of practice, but the banks in U.K. and its Dominions did not adopt these rules till the 1962 Revision. This set of rules, known as the Uniform Customs and Practice for Documentary Credits (U.C.P.) is now adopted by U.S.A., the Commonwealth countries and European countries.

In documentary credits where U.C.P. is expressly incorporated, these rules govern the relationship between the Banker and the Buyer and that between the Banker and the Seller. U.C.P. also forms the basis of the contract between the Issuing Bank and the Intermediary Bank, provided both operate in countries that adhere to U.C.P.[16] However, nowhere in the whole world does the U.C.P. have the force of law. It is only a guide to a standard practice. It clears away latent ambiguity and uncertainty in terms and words used in banking forms[17] and lays down certain rebuttable presumptions for a number of situations.[18]

---

13 [1949] 2 All E.R. 274.

14 [1956] 1 Q.B. 438.

15 *An Introduction to International law* 6th ed.

16 General Provision a of U.C.P.

17 Article 13, 16, 32, 36, 40 and 44 of U.C.P.

18 Article 1, 5, 14, 15, 26 and 38 of U.C.P.

As P.R.C. is not a member of International Chamber of Commerce, it would seem that the U.C.P. should not be applicable to Letters of Credits in which P.R.C. is involved. However, one would certainly be surprised by the great resemblance of the terms used in the Banking forms issued by the Bank of China and those issued by other banks which adhere to the U.C.P. Indeed in the form: Application for Letter of Credit issued by the Bank of China, Hong Kong, the last paragraph provides that, "This credit is subject to the Uniform Customs and Practice for Documentary Credit. (1962 Revision) *International Chamber of Commerce Brochure No. 222.*"

Currency Problem

As the essence of the operation of Letter of Credit is for the finance of international trade, currency problem will certainly arise. What happens in case of fluctuation in the currency of either the Buyer's or the Seller's country? This risk is usually avoided by making forward exchange contracts between the local bank (i.e. the Issuing Bank) and the Buyer. Another problem may also arise: Can the Bank escape liability if foreign accounts are frozen by Government? Can the Buyer plead frustration of contract and claim back the money?

In the Hong Kong case, *China Mutual Trading Co. Ltd.* v. *Bangue Belge Pour L'Etranger (Extreme-Orient) S.A.*,[19] it was held by Reynolds J. that inspite of the fact that the account had been frozen by the American Government and that the credits were not realised, the Banker having transferred the advances paid by the customer to U.S.A., had completely performed the forward exchange contracts. He further held that the plaintiffs were entitled to be repaid in Hong Kong since both the Plaintiff and the defendants were Hong Kong firms and that the contract was formed in Hong Kong. Alternatively, the money could be reclaimable under Section 3 of the Law Reform (Frustrated Contracts) Ordinance of Hong Kong.[20]

This case should be contrasted with *Arab Bank Ltd.* v. *Barclays Bank D.C.O.*[21] where the Plaintiffs kept an account with a Jerusalem branch of the defendant. This account was attached by the Israeli Government and the House of Lords held that the Plaintiffs could not claim the money in London since the debt was situated in Jerusalem and became subject to Israeli law.

The devaluation of the sterling had led to disputes such as the 1972 case, *W.J. Alan Ltd.* v. *El. Nasr. Co.*[22], where the main question was whether a confirmed irrevocable Letter of Credit constitutes an absolute payment to the Seller so that the Buyer is no longer liable in respect of the difference in value between the old and new exchange rate between the sterling and the Kenya pound.

In trade with P.R.C., the currency problem is especially important. Prior to the devalation in 1967, the English sterling had achieved the status of a "semi-official unit of trade used by the Chinese in their dealings with non-communist countries."[23] An example of this is the sale of Canadian wheat, it was paid both in Sterling and gold.

After the devaluation, Swiss francs, French francs, German marks and Hong Kong dollars are used more often than before. Nowadays, the P.R.C. currency, renminbi (RMB)[24] is extensively used in commercial transactions. In addition, Japanese yen and most recently U.S. dollars have been added to the list as well.

In order to facilitate the increased use of RMB and to overcome the resistance of foreign businessmen who prefer to deal in Western currencies, P.R.C. set a firm new exchange rate for the R.M.B, pegging it to Swiss franc. Thus, recently banks with corresponding relationship with the Bank of China have been advised that the exchange rate for the RMB will be calculated at a cross-rate to Swiss francs of 100Y = 56.30Sw.fr.

---

19 (1954) 39 HKLR 29.

20 Chapter 23 of the Laws of Hong Kong.

21 [1954] A.C. 495.

22 [1972] 2 All E.R. 127.

23 Reghizzi: *Legal Aspect of Trade With China.*

24 Basic unit is Yuan (Y) which is divided into 10 jiao. One jiao is sub-divided into 10 fens.

P.R.C. is cautious to guard against currency speculation of RMB by permitting the sale or purchase of it only upon the presentation of a signed contract with a State Corporation. To insure the convertibility of a currency at a particular exchange rate, foreign businessmen usually buy "forward contracts", so that they can fix a rate of exchange at a future date. However, P.R.C. stipulates that the Buyer of Chinese products, in order to buy forward RMB must do so within a month after the signing of contract or before the opening of the relative Letter of Credit, while seller of contract of sale to China wishes to sell forward RMB, they may do so any time after the signing of the contract. Again, these transactions can only be done in one of the nominated corresponding Banks, all of which have RMB accounts with the Bank of China. Thus, it can be noted these corresponding banks must act both as the Confirming Bank and the Negotiating Bank.

Conflict Of Laws

The significance of the operation of commercial Letter of Credit is that the Bank can finance its customer in international trade, either by opening a Letter of Credit in favour of the Seller or by negotiating the drafts of its customers. Problems of conflict of laws arise in several respects.

There is no problem as between the Issuing Bank and the Buyer since usually they are in the same country, similarly for the Corresponding Bank and the Seller. But as between the Issuing Bank and the Seller or the Negotiating Bank, problem generally arises under the draft. These drafts are negotiable instruments so that they should be governed by the Bill of Exchange Ordinance Section 72 (i) which provides for the governing law for negotiable instruments under different circumstances, however, this section cannot be regarded as having exhaustively settled the law, problems such as that in *Guaranty Trust Co. of New York* v. *Hannay Co.*[25] (where the defendant contended that the meaning of the draft must be ascertained according to American law because it was issued in America while the plaintiff contended that on true construction of the above section, the meaning of the draft was to be ascertained according to English law) still remain for judicial decision.

With regard to the contractual relationship between the Seller and the Issuing Bank and that between the Banks, there is as yet no direct authority. It is thought that general principles of private international law applies.

Unlike the relationship between the Seller and the Issuing Bank where there is usually no written contract, that between the Issuing Bank and the Corresponding Bank is usually governed by an expressed contract so that it is possible to determine the governing law from the terms of the contract and circumstances under which it is made.

Problems of conflict of laws may also arise in relation to the use of the U.C.P. Its official text is English which is accompanied by a translation in French. Therefore, there may be different interpretations in different countries with different languages used.

In transactions involving P.R.C., this problem is not especially great as it is confirmed by the Canadian lawyer who has returned from a Conference in P.R.C. that Private International Law also applies.

It is interesting to note that this may negative the effect of some of the special provisions laid down by P.R.C. in their contracts. In *Jacobs Marcus & Co.* v. *The Credit Lyonnais*[26] the Court of Appeal held that since the contract in that case was in English, it should be construed in accordance with English law so that it was no answer to say that by the French law the defendants were excused from performing their contract if they were prevented from so doing by "force majeure". Similar situation may arise. As already noted above, P.R.C. does not recognise strikes as a defence under force majeure. Since private international law is said to apply there is a possibility that the Court or arbitrator may rule that the law of P.R.C. does not apply in that particular case so that strikes may become a good defence and P.R.C. is thus compelled to accept this "inherent vice of the capitalist system".

Moreover, it should be noticed that most of the forms and contracts are written in English. This is highly relevant in deciding the governing law.

---

25 [1918] 1 K.B. 43

26 (1884) 12 Q.B.D. 589.

Arbitration

P.R.C. often seeks to settle disputes through consultation or mutual agreement and if these fail, they prefer arbitration to litigation in Courts.[27] Every contract prepared by P.R.C. has provisions to this effect.

The China Council for the Promotion of International Trade (CCPIT) has established two Arbitration Commissioners, one of which is the Foreign Trade Arbitration Commission (FTAC) in Peking. The purpose of its establishment and its functions as set out in Rule I of the FTAC Rules is "to settle such disputes as may arise from contracts and transactions in foreign trade, particularly disputes between foreign firms, companies or other economic organisations on the one hand and Chinese firms, companies or other economic organisations on the other." The Commission exercises jurisdiction in accordance with the relevant contracts, agreements and/or other documents concluded between the disputing parties (Rule 2). It is composed of 15 to 21 members who are selected on basis of their special knowledge and experience in foreign trade, commerce, industry, agriculture, transportation, insurance and other related matter as well in law (Rule 3). Moreover experts may be consulted by F.T.A.C. on any technical or special matters including business practices. Decisions are by majority vote and awards are final with no appeals (Rule 10) and are executed by the parties themselves, enforceable by the People's Courts of P.R.C. in accordance with law (Rule 11). The rules of procedure are laid down by C.C.P.I.T., all of which are normal and reasonable. Furthermore, in recent years, P.R.C. have accepted arbitration in country of the other party or in some third countries such as Switzerland or Sweden.

Conclusion

A comparison of the way Bankers finance the trade with China and that with other countries shows that there is little significant difference. Though the Uniform Customs and Practice is in name not applied, the standard form contracts indicate that its effects have in fact been incorporated. However, since the attitude of P.R.C. is "passive" in the sense that the foreign countries are more enthusiastic in having trade with P.R.C., it seems that China is always the party setting down rules and conditions while the foreign merchants, due to their thirst for business, are often forced to accept. This also indicates that P.R.C. places little confidence in the foreign countries. Where P.R.C. exports goods, she only trusts a limited number of foreign banks which have corresponding relationship with the Bank of China. Moreover, she requires the production of a signed contract of sale before a letter of credit can be opened or a forward exchange contract can be obtained. On the other side of the balance, those foreign countries doing business with P.R.C. exercise a high degree of confidence in P.R.C. The trade is outside the protection of the International Chamber of Commerce. Futhermore, they are willing to run the risk of having P.R.C. plead sovereign immunity in case of disputes so that there is at least a possibility that they may be left without redress if they suffer loss due to the wrong of the Chinese. However it is important to note that the Chinese are not unreasonable. Due to their ancestral philosophy, they adhere very strictly to their promises: They are "religious"[28] to their contracts. Moreover, they are also willing to submit to arbitration. Indeed, their Chairman, Mao-Tse-tung has said,

> "The Chinese people wish to have friendly co-operation with the people of all countries and to resume and expand international trade in order to develop production and promote economic prosperity."

---

27 There is a Chinese saying, "Never enter a Court Room in life, never fall into hell on death".

28 Exact adjective used by a Canadian Trade Commissioner to describe the Chinese.

ACKNOWLEDGEMENTS

* The Editorial Board wishes to thank the following for their generous sponsorship of this review:

The Honourable Mr. Chief Justice G.G. Briggs
The Honourable Mr. Justice Simon F.S. Li
Mr. Oswald Cheung, Q.C.
Mr. A. Zimmern, Q.C.
Mr. M.H. Jackson-Lipkin
Mr. Martin C.M. Lee
Mr. Robert C. Tang
Mr. Samuel K.S. Leung
Mr. John H.C. Chau
Mr. John K.Y. Chan
Messrs. K.S. Ling & Co.
Messrs. H.A. Hoosenally & Co.
Messrs. Woo & Kwan
Messrs. Hon & Co.
Miss Fanny Fung
Miss Rosalind Lai
Mrs Chan Chi Man
Mr. Kwok Hin Kwan
Mr. Kwok Hok Ling
Miss Evelyn Hsu

* Photographs in this review are reproduced by the kind permission of the Hong Kong Government Information Service and South China Morning Post.

With the Compliments

of

HONG KONG UNIVERSITY LAW ASSOCIATION

HKUSU

With the Compliments

of

MR. EUGENE LYNN

Qualisell Industries

With the Compliments

of

UNIVERSITY BOOK STORE

THE UNIVERSITY OF HONG KONG

HONG KONG

TELEPHONE: H468412

The only cover-to-cover international newsmagazine.

Newsweek is the world's first *truly* international newsmagazine.

And the *only* one.

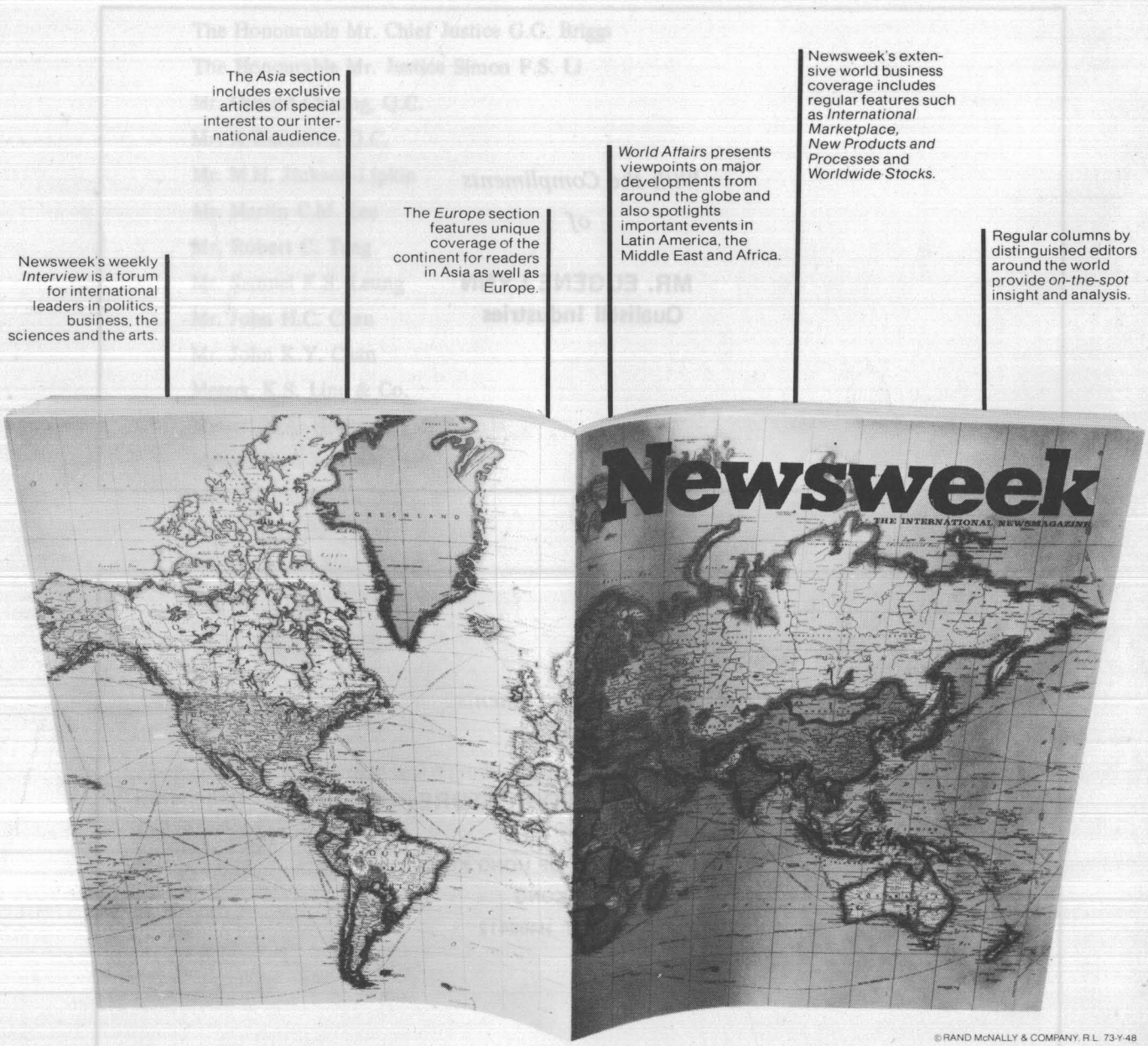
Only Newsweek writes every story—and every sentence in every story—for the reader in Penang as well as Paris, in Oslo as well as Osaka.

Only Newsweek is written for the *international* reader all the way through. From our contents page to our exclusive back page interview each week with a prominent world leader.

Newsweek
THE INTERNATIONAL NEWSMAGAZINE

When you read Newsweek, not only do you get the *facts* about what has happened around the world, you also get their *significance* for you. What they mean to your business. To your life.

And that, after all, is why you read a newsmagazine in the first place.



©RAND McNALLY & COMPANY. R.L. 73-Y-48

Publisher: QUALISELL INDUSTRIES
303, EDWARD MANSION,
141, PRINCE EDWARD ROAD,
KOWLOON, HONGKONG
TEL: 3-800196 3-812585

JUSTITIA

HONG KONG UNIVERSITY LAW ASSOCIATION REVIEW

1972–1973