# JUSTITIA

## HONG KONG UNIVERSITY LAW ASSOCIATION REVIEW

## 1976—1977

**COVER**:

Legislative Council in Hong Kong.
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# EDITORIAL BOARD




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# FOREWORD

Law students at Hong Kong University have always shown a lively interest in the way in which our legal system actually operates. In part this is encouraged by the requirement that all second year students write a dissertation. Although the choice of subject is left to each individual student, a large proportion of titles relate to contemporary issues in Hong Kong, where the research involves leaving the libraries behind and confronting the problem directly. Often this is a much more difficult task than the more traditional legal exercise but in the end it is likely to be more rewarding.

Concern for local problems also extends beyond the degree requirements. For some time students have been worried by the great ignorance of the law which exists in Hong Kong. Given the cultural and language problems this ignorance is, of course, only to be expected. But instead of adopting the elitist attitudes often found in professions, students in the law department have made a small but significant attempt to bridge the gap by providing pamphlets and lectures in Catonese for certain local schools.

Justitia is continuing proof of the quality of the research undertaken and of the desire to disseminate legal knowledge. This year's publication is particularly important since it contains the fruits of empirical research into the Small Claims Tribunal. This labour of love was undertaken purely voluntarily by the editors, with the co-operation of many students who gave up their free time to attend the tribunal and conduct interviews. The findings will be of great significance both locally and externally in the continuing struggle to bring justice within the reach of everyone.

I am sure I speak for all the teachers in the law department when I wish Justitia a bright future.

*RC Allcock*

# PREFACE

It does not take long for a law student to realise that law is not a subject of its own. The best evidence is to be found in the Hong Kong Legislative Council Proceedings. A glance through them will reveal the wide variety of matters that are considered in passing laws -- they are certainly not mere legal semantics. Since the law has to cope with the changing needs of society, students of law should always adopt a sense of social awareness. It is with this view in mind that we set out to conduct the survey on the newly established Small Claims Tribunal.

This social awareness is also manifest in the other articles in this review. Proposals for reform of the present bail system are made for the readers' consideration. The examination of vior dire in relation to confessions and the article on possession of offensive weapons in a public place present the legal problems apparent in our law of evidence and criminal law. The commentary on the case D v NSPCC draws attention to the impact on the local position, particularly, the ICAC. The article on overseas employment provides a practical perspective of the prominent problems in this area. We hope that this attitude of social awareness will be adopted also in other fields of legal study and research.

We are greatly indebted to the Judiciary for allowing us to conduct the survey on the Small Claims Tribunal in the precints of the Victoria District Court and to Mr Pang, the adjudicator, and Mr Hung in their unfailing assistance. We are most grateful to all those who participated in the survey and also to Mr R A V Ribeiro, Mr R C Allcock and Dr P Wesley-Smith for their inspiring advice on the survey.

We cannot conclude without thanking our patron Professor D M E Evans and our advisers Mr Justice T L Yang, Mr Martin C M Lee, Mr R A V Ribeiro and Mr R C Allcock for their encouraging assistance throughout the preparation of this issue of Justitia.

*Editorial Board*

# THE SMALL CLAIMS TRIBUNAL –

# AN EMPIRICAL RESEARCH

## THE SMALL CLAIMS TRIBUNAL – AN EMPIRICAL RESEARCH

'This bill seeks to establish a tribunal which will provide an informal forum, with a simple procedure, for the determination of limited monetary claims founded on contract or in tort.' – the Attorney General, in moving the second reading of the Small Claims Tribunal Bill 1975.[1]

'I do not like the proliferation of courts, and, as for the exclusion of lawyers from courts, I can only say others have trod that path; the first plush carpeted steps beckon them on, but they will find that the next steps are of bare concrete, below them will be flag stones set in crumbling mortar and in the end they will find a total shambles.' – one unofficial member, in debate on the second reading of the Small Claims Tribunal Bill.[2]

'It has been suggested that the Small Claims Tribunal could all too easily become, in the eyes of the small man, just another tool for Government agencies and business companies to extract every cent that is due from the lower income sections of the community. We shall therefore have to follow the manner in which the public accept this tribunal most carefully.' – one unofficial member, in debate on the second reading of the Small Claims Tribunal Bill.[3]

'. . . as yet, many Hong Kong people are not aware that this tribunal determines in an informal way, inexpensively, and in Cantonese, monetary claims not exceeding $3,000.' – the Solicitor General, in debate on the Sale of Goods (Amendment) Bill 1977.[4]

'There are now encouraging signs that the tribunal is generally working well and gaining public confidence and acceptance.' – the Solicitor General, three months later, in moving the second reading of the Small Claims Tribunal (Amendment) Bill 1977.[5]

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1 *Legco Proc 1975-76*, p 142 (Oct 23, 1975).
2 *Legco Proc 1975-76*, p 198 (Nov 5, 1975) Mr Oswald Cheung.
3 *Legco Proc 1975-76*, p 199 (Nov 5, 1975) Mr Hilton Cheong-Leen.
4 South China Morning Post (Jul 14, 1977).
5 Legco meeting (Oct 12, 1977).

This paper sets out to explore the veracity of the various propositions put forward in the above extracts. It is the result of an empirical research programme undertaken by the law students in the University of Hong Kong and financed by the Bank of America Scholarship. Information was collected from are two:– the public at large and claimants and defendants of the Small Claims Tribunal.

The scheme of this paper is as follows. We start with a summary of the setup and characteristics of the Small Claims Tribunal, then a description of the research method, and lastly presentation and analysis of the data obtained.

## SETUP AND CHARACTERISTICS OF THE SMALL CLAIMS TRIBUNAL

The Small Claims Tribunal was established by the Small Claims Tribunal Ordinance[6] which was passed on November 19, 1975 and came into operation on October 1, 1976.[7] The tribunal has a trial period of three years as the ordinance is to expire at the end of three years from the date of its commencement unless it is continued in force by a resolution of the Legislative Council.[8] At present there are three tribunals and they are situated at Victoria District Court, Kowloon District Court and Tsuen Wan District Court.

The principal features of the tribunal are summarised in the speech of the Attorney General in moving the second reading of the Small Claims Tribunal Bill.[9] It follows the concept pioneered by the Labour Tribunal and that embraces three main aspects. The first is that proceedings in the tribunal is on an inquisitorial rather than an adversarial basis, which means among other things that the tribunal must take a more positive role in the proceedings than is customary in the case of ordinary courts. Secondly, the procedure and practice are simple, and technical rules, especially the technical rules of evidence, are not to prevail. The third aspect is that representation by lawyers is not permitted.

The tribunal has exclusive jurisdiction for any monetary claim[9a] founded in contract, guasi-contract or tort where the amount claimed is not more than $3,000 unless there is included with the claim a claim for some other relief (other than a claim for costs).[10] The policy behind it is to make simple justice available to everyone equally. The tribunal may, at any stage of the proceedings in the tribunal, either of its own motion or upon the application of any party, transfer the proceedings to the District Court or the High Court.[11] As for appeals from the tribunal, they are to the Court of Appeal on questions of law alone or on the ground that the claim was outside the tribunal's jurisdiction.[12]

Proceedings are commenced by filing claims with the Registrar of the District Court.[13] Two types of forms are required to be completed – one setting out the title to claim with the names and addresses of claimant and defendant and the other stating the amount claimed, particulars of the ground of claim and the manner in which the amount was calculated.[14] The registrar shall then fix a place and date for hearing[15] and cause a copy of the written claim and a notice of the date and place of hearing to be served on the defendant.[16]

As for the procedure adopted in the tribunal, it is expressly provided that the hearing shall be conducted in an informal manner and that the tribunal shall inquire into any matter which it may

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6 No 79 of 1975 (Cap 338, LHK 1975 ed). For a note on the Ordinance, see Faulkner, Note (1977) 7 HKLJ 242.
7 LN 239 of 1976.
8 s 39. All references to sections hereafter are of the Small Claims Tribunal Ordinance unless stated otherwise.
9 Legco Proc 1975-76, p 142 (Oct 23, 1975).
9a Certain claims are excluded from the jurisdiction of the tribunal. See First Schedule to the Ordinance.
10 s 5.
11 s 7.
12 s 28.
13 s 12.
14 s 13.
15 The date for hearing shall be not earlier than ten days nor later than 60 days after the filing of the claim, unless the parties otherwise agree – s 14 (1) (a).
16 s 14(1)(b), s 14(2).

consider relevant, whether or not it has been raised by a party.[17] provision is made for representative claims,[18] joint defendants[19] and the joinder of claims.[20] A barrister or solicitor has no right of audience before the tribunal unless he is acting on his own behalf as a claimant or defendant.[21] The rules of common law relating to the admissibility of evidence shall not apply in proceedings whereas the Evidence Ordinance shall apply.[22]

The adjudicator keeps a summary of the evidence, submissions or statements made or given in proceedings and of any point of law and of his decision thereon.[23] He determines a claim and makes an award or order on it as soon as possible after the conclusion of the hearing.[24] This must be reduced to writing whereas reasons for an award or order may be given orally or in writing as he thinks fit.[25] The tribunal may award to a party costs and expenses[26] and may include interest in the amount of the award.[27]

## THE RESEARCH METHOD

Having given a brief description of the subject of our study, we come to the method by which information was collected from the public at large and claimants and defendants of the tribunal.

The interviewing method was adopted. Two set of questionaire were designed (Appendices I and II) for the two different objects we had in mind.[28]

In the interviews conducted with the public, four districts were chosen to represent four types of area. They are Central District (commercial area), Happy Valley (residential area; middle class and above), Kwun Tong (industrial area) and Wang Tau Hom (residential area; resettlement estate, lower class).[29] These interviews were conducted from the period of June 29 to July 9, 1977.[30] For each district, the interviewers were given a quota of the number of people they had to interview, according to sex and age group[31] (Tables 1 and 2). A total of 160 people were interviewed.

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17 s 16.
18 s 21.
19 s 22.
20 s 20.
21 s 19. For the problems arising from the prohibition of legal representation, see Faulkner, Note (1977) 7 HKLJ 242 at 255.
22 s 23.
23 s 15.
24 s 18(1).
25 s 18(2),(3).
26 s 24.
27 s 33.
28 These questionnaires, prepared in English, were translated into Chinese and administered to the respondents in punti dialect.
29 We planned to add the New Territories with either Shatin or Yuen Long as the choice district. However interviews carried out in those two areas met with a high refusal rate and this idea was subsequently abandoned.
30 As far as possible, interviewers worked in pairs. They are Jeff Tse, Christine Cheung and Karen Lau (Central District), Lawrence Cheung and Matilda Pe (Happy Valley), Joseph Lee and Anthony Poon (Kwun Tong), Chow Siu Hung and Chan Kin Sang (Wang Tau Hom).
31 The rough equivalent of a quota sampling as best as we could make it, owing to the limited time we had and the limited number of helpers we could find.

Table 1: The quota for each district

| | Male | Female |
|---|---|---|
| Age group | | |
| Under 20 | 5 | 5 |
| 20 – 40 | 10 | 10 |
| Over 40 | 5 | 5 |
| Totals | 20 | 20 |

Table 2: The interviews

| | Totals | Central District | Happy Valley | Kwun Tong | Wang Tau Hom |
|---|---|---|---|---|---|
| M < 20 | 21 | 6 | 5 | 5 | 5 |
| F < 20 | 20 | 6 | 5 | 5 | 4 |
| M 20 – 40 | 40 | 10 | 10 | 10 | 10 |
| F 20 – 40 | 38 | 8 | 10 | 10 | 10* |
| M > 40 | 20 | 5 | 5 | 5 | 5 |
| F > 40 | 21 | 5 | 5 | 5 | 6* |
| Totals | 160 | 40 | 40 | 40 | 40 |

* 1 each was not processed and analysed since wrong questions were administered. It is apparent from the above table that interviewers did not adhere strictly to the quota given.

As for interviews conducted with claimants and defendants of the tribunal, we divided our objects into two groups – those interviewed at filing stage and those interviewed at post-hearing stage. No quota was set for the number of people to be interviewed. Instead, we tried to interview as many as we could within a set period of time. The filing stage interviews were conducted form August 15 to September 2 1977 (3 weeks) and a total of 98 claimants were interviewed. The post-hearing interviews were conducted form August 15 to September 16 (5 weeks) and a total of 65 claimants and defendants were interviewed. That makes a total of 163 people in all.[32]

Only claimants are present and interviewable at the filing stage. We divided them into first-time claimants and second-time (ie those who had filed a claim more than once) claimants. The reason for this division is that questions aimed at testing the knowledge and confidence of a claimant who has no previous contact with the tribunal would be inappropriate in the case of second-time claimants. Hence, different questions are administered to these two groups. With second-time claimants, the emphasis is more on the claimant's appraisal of tribunal fairness and his perception of the proceedings in his previous case.

Within the division of first- and second-time claimants, there is the subdivision of companies and individuals[33] (Table 3). We group all those who are not claiming in their private capacity as 'companies'. Hence, this includes a sole proprietorship, a partnership and a corporate body.[34] The reason for this subdivision is that we want to find out if there is any difference between an individual claimant and a company claimant in terms of their knowledge of the tribunal, their perception of its proceedings and whether company claimants are in a more advantageous position as opposed to individual claimants.

Table 3: Filing stage claimants

| | Totals | First-time claimants | Second-time claimants |
|---|---|---|---|
| Individual | 40 (40.8) | 37 (60.7) | 3 ( 8.1) |
| Company | 58 (59.2) | 24 (39.3) | 34 (91.9) |
| Totals | 98 | 61 (62.2) | 37 (37.8) |

Bracketed figures are percentages

32 These interviews were conducted in the precincts of the Victoria District Court, with the kind permission of the Honourable Mr Justice Huggins, who was then Acting Chief Justice. Interviewers worked in turns during the five-week period. At least three to four people were required to be present at any one time. They split into two groups. One group would wait outside the District Court Registry and interview people who had gone in to file a claim. The other group would wait outside the court room of Small Claims Tribunal and interview claiuants and defendants after the hearing of a case. The interviewers are Joanna Yeung, Benjamin Yu, Lilian Chiang, Amy Yao, Teresa Cheung, Paul Wong, Carol Hui, Winnie Siu, Keith Cheung, Jessica Chan, Lisa Tung and Kenneth Yeung.

33 Claimants who represent the Crown were not interviewed, as we aim at finding out the acceptance of Small Claims Tribunal among the private sector.

34 We must acknowledge that this distinction may not be very meaningful in certain instances. A sole proprietor of a small business may have more affinity with an individual than with a big corporation, though he comes within 'company' in our sub-division.

As for the post-hearing interviews, both claimants and defendants, but only individuals claiming and defending in their own right, were interviewed. The reason why companies are excluded is that the emphasis here is more on questions concerning the claimant's or defendant's subjective appraisal of tribunal fairness. These are more appropriate in the case of individuals speaking for themselves. Furthermore, questions aimed at testing whether company claimants have superior knowledge in tribunal matters, and whether companies have a system when they deal with cases of the tribunal, have already been asked at filing stage with second-time company claimants.

Of the 65 claimants and defendants we interviewed at post-hearing stage, we sub-divided them into decided cases, adjourned hearings, and settled cases. Their distribution is shown in the table below (Table 4).

Table 4: Post-hearing claimants and defendants

| | Post-hearing claimants & defendants |
|---|---|
| Decided cases | 17 (26.6) |
| Adjourned hearing | 32 (49.2) |
| Settled case | 16 (24.6) |
| Totals | 65 |

## THE PUBLIC AT LARGE

There are three things we wanted to find out from the public at large. Firstly, how ready are they to pursue a claim when it involves $3,000 or less? Secondly, what is the effect of the publicity that has been given to the tribunal? Thirdly, what does the public know about the tribunal if they have heard of it?

The general characteristics of the respondents are set out in Table 5. Students, clerks and manual workers take up a large proportion of the people interviewed (61.1%). 26.8% of the respondents have no earnings, being students or housewives. 66.8% of the respondents have monthly earnings of $3,000 or less. These are the people who are most in need of a tribunal where they can bring their claims in an inexpensive, speedy and informal manner.

Table 5: General characteristics of respondents

| | Totals | Central District | Happy Valley | Kwun Tong | Wang Tsu Hom |
|---|---|---|---|---|---|
| Sex M | 81 | 21 | 20 | 20 | 20 |
| F | 77 | 19 | 20 | 20 | 18 |
| Age | | | | | |
| Under 20 | 42 | 12 | 10 | 10 | 10 |
| 20-40 | 77 | 18 | 20 | 20 | 19 |
| Over 40 | 39 | 10 | 10 | 10 | 9 |
| Occupation | | | | | |
| Accountant | 1 | | 1 | | |
| Apprentice | 1 | | 1 | | |
| Bank | 3 | 1 | 1 | 1 | |
| Clerk | 30(19.7) | 10 | 6 | 11 | 3 |
| Driver | 1 | | | | 1 |
| Electronics | 1 | 1 | | | |
| Engineer | 1 | | 1 | | |
| Furniture | 4 | | 4 | | |
| Garment | 3 | | 1 | 2 | |
| Health inspector | 1 | | | 1 | |
| Housewife | 9 (5.9) | 4 | 1 | | 4 |
| Import/export | 2 | 1 | 1 | | |
| Insurance | 2 | 1 | | 1 | |
| Interior design | 1 | | 1 | | |
| Merchant | 5 | 3 | 2 | | |
| Nurse | 1 | | | | 1 |
| Public service | 1 | 1 | | | |
| Prisons department | 1 | | | 1 | |
| Shop sales | 6 | | 4 | 2 | |
| Student | 33(19.7) | 2 | 8 | 9 | 7 |
| Tax assessor | 1 | 1 | | | |
| Teacher | 7 | 1 | 5 | | 1 |
| Technician | 1 | | | | 1 |
| Waiter | 4 | 1 | | 1 | 2 |
| Worker | 30(19.7) | 2 | 1 | 11 | 16 |
| Retired | 1 | | 1 | | |
| Refused | 1 | | 1 | | |
| | (6 Blanks) | (4 Blanks) | | | (2 Blanks) |

| Monthly earnings | | | | | |
|---|---|---|---|---|---|
| Under $1,000 | 44 (28) | 10 | 9 | 12 | 13 |
| $1,000 – $2,000 | 47 (29.9) | 8 | 12 | 14 | 13 |
| $2,001 – $3,000 | 14 ( 8.9) | 4 | 5 | 4 | 1 |
| $3,001 – $4,000 | 5 | 2 | 2 | 1 | |
| Over $4,000 | 4 | 3 | 1 | | |
| No earnings | 42 (26.8) | 13 | 10 | 9 | 10 |
| No fixed earnings | 1 | | 1 | | |
| | (1 Blank) | | | | (1 Blank) |

*Readiness to sue when the claim is for $3,000 or less*

Two hypothetical instances were put to the public, one is a contract case and the other is a tort case. The respondents were asked if they would sue in each instance (Table 6).

Table 6: Claim under $3,000 – whether would sue

(A) Contract example

Q: Suppose you had bought a TV set of less than $3,000.00. After 2 weeks, it stopped working. The dealer refused to fix it, replace it or give your money back. Would you think of suing the dealer?

| | Total | Central District | Happy Valley | Kwun Tong | Wang Tau Hom |
|---|---|---|---|---|---|
| Yes | 93 (60.4) | 27 (67.5) | 17 (42.5) | 26 (65) | 23 (60.5) |
| No | 41 (26.6) | 13 (32.5) | 10 (25) | 7 (17.5) | 11 (28.9) |
| Depends on the amount | 10 ( 6.5) | | 7 | 1 | 2 |
| Depends on other factors | 10 ( 6.5) | | 2 | 6 | 2 |
| | (4 Blanks) | | (4 Blanks) | | |

(B) Tort example

Q. Suppose you were involved in a traffic accident, and suffered a loss of less than $3,000 would you go to court to seek reparation?

| | Totals | Central District | Happy Valley | Kwun Tong | Wang Tau Hom |
|---|---|---|---|---|---|
| Yes | 80 (50.6) | 20 (50) | 13 (32.5) | 27 (67.5) | 20 (52.6) |
| No | 43 (27.2) | 11 (27.5) | 15 (37.5) | 5 (12.5) | 12 (31.6) |
| Depends on the amount | 23 (14.6) | 6 (15) | 10 (15) | 5 (12.5) | 2 |
| Depends on other factors | 12 ( 7.6) | 3 | 2 | 3 | 4 |

The majority of the respondents were in favour of suing in each of the instances – 60.4% in the contract case and 50.6% in the tort case. Those in favour of suing would most probably welcome the establishment of a court which is designed to facilitate the trial of small claims. Only 16.5% of the respondents would not sue in both instances and their reasons are given in Table 7. Of these, 61.5% have not heard of the Small Claims Tribunal (Table 8).

Table 7: Reason for not suing in both instances

Q: If you would not sue in both instances, why not?

| | |
|---|---|
| Troublesome | 13 (50) |
| Difficult procedure | 4 |
| Expensive procedure | 4 |
| Unkind to sue | 2 |
| Don't intend to sue | 2 |
| Don't know he has the right to sue | 1 |
| Totals | 26 (16.5) |

Table 8: Respondents who would not sue – whether heard of Small Claims Tribunal

| | Totals | Central District | Happy Valley | Kwun Tong | Wang Tau Hom |
|---|---|---|---|---|---|
| Yes | 10 (38.5) | 7 | 0 | 2 | 1 |
| No | 16 (61.5) | 7 | 3 | 2 | 4 |

In each of the hypothetical cases, certain respondents had indicated that the fact of their suing might depend on the amount involved in the claim or some other factors. They were then asked to specify the amount for which they would sue or other factors that would so influence their decision (Table 9). Those who indicated that the amount involved in a claim would influence their decision most certainly had in mind whether it was worth the trouble to sue. Indeed, this factor cropped up again when respondents were asked to state what other factors would affect their thinking one way or the other. Otherwise, most of the other factors stated are related to the merits of the case itself.

Table 9: Factors that might influence respondent's decision whether to sue or not

(A) Contract example

Q. Please specify the amount

| | |
|---|---|
| Around $1,500 | 1 |
| Over $2,000 | 3 |
| Around $3,000 | 3 |
| If sum large, would sue | 3 |
| Totals | 10 |

Q: Please specify what other factors

| | |
|---|---|
| Time available to bring suit | 1 |
| Money available to bring suit | 1 |
| Cause of damage of TV set | 4 |
| Terms of contract | 1 |
| If TV set is second hand, who is responsible for maintenance | 1 |
| Manner & attitude of TV dealer | 1 |
| Seek legal advice | 1 |
| Totals | 10 |

(B) Tort example

Q: Please specify the amount

| | |
|---|---|
| $200 | 1 |
| $1,000 | 1 |
| Over $1,000 | 3 |
| $1,500 | 1 |
| $2,000 | 2 |
| If sum large, would sue | 10 |
| Totals | 18 (5 Blanks) |

| | | |
|---|---|---|
| Q: | Please specify what other factors | 1 |
| | Time available to bring suit | 1 |
| | If can claim from insurance | 1 |
| | If other party can pay damages | 4 |
| | Cause of damage | 2 |
| | Degree of damage | 1 |
| | Manner of other party | 1 |
| | Seek legal advice | 1 |
| | Seek advice from insurer | |
| | Totals | 12 |

For respondents who said they would sue in both or either one of the instances, we asked them if they would want the help of a lawyer in enforcing their claims (Table 10). 39.8% replied in the negative. 11.9% were wavering and said 'depends'. The exclusion of lawyers from the tribunal would not affect these people very much. As for the 45.8% who answered in the affirmative, the most probable reason is the lack of confidence in those people to bring a claim themselves.

Table 10: Whether would want lawyer for a claim < $3,000

Q: Would you like to ask the help of a lawyer in enforcing your claim? (this question was not administered to those who do not intend to sue in both instances)

| | Totals | Central District | Happy Valley | Kwun Tong | Wang Tau Hom |
|---|---|---|---|---|---|
| Yes | 54 (45.8) | 12 (52.2) | 14 (37.8) | 14 (40) | 14 (42.4) |
| No | 47 (39.8) | 8 (34.8) | 9 (24.3) | 11 (31.4) | 19 (57.6) |
| Depends on amount of claim | 1 (both) | 1 (both) | 1 | 4 | |
| Depends on legal costs | 2 | | | 2 | |
| Depends on chance of success | 1 | | | 1 | |
| Depends (without stating on what) | 5 | 1 | 4 | | |
| If lawyer is a must | 1 | 1 | | | |
| Don't know | 2 (14 Blanks) | (3 Blanks) | 1 (8 Blanks) | 1 (3 Blanks) | |

*Effect of publicity given to the Small Claims Tribunal*

For respondents who intended to sue in either one of the instances, we asked them if they knew which court to go to. Only 3.3% gave 'Small Claims Tribunal' as the correct answer. 22.8% named a wrong court. 26% gave an answer which is not a court. 48% answered 'don't know'. (Table 11)

Table 11: Whether know the appropriate court for claim < $3,000.

Q: [if intend to sue in either one of the hypothetical instances,] Do you know which court to go to? (please name the court).

| | |
|---|---|
| Small Claims Tribunal | 4 (3.3) |
| District Court | 12 (9.8) |
| Magistracy | 5 (4.1) |
| Supreme Court | 1 |
| Civil court | 3 |
| Any court/nearest court | 7 (5.7) |
| Police | 20 (16.3) |
| Legal Aid Department | 3 |
| District Office | 2 |
| Transport Department | 3 |
| Consumer Council | 4 |
| Don't know | 59 (48) |
| Totals | 123 (9 Blanks) |

Apart from the four respondents who knew to bring their claims in the Small Claims Tribunal, all other respondents were asked if they had heard of the tribunal at all (Table 12). Although 45.8% had heard about it, the knowledge they had is such bare knowledge that none of them would name the Small Claims Tribunal as the appropriate court to which they would bring their claims.

For those who said they had heard of the tribunal, 68.7% learned about the existence of the tribunal from mass media (Table 13).

Table 12: Whether heard of the Small Claims Tribunal

Q: Have you heard of the Small Claims Tribunal?

| | Totals | Central District | Happy Valley | Kwung Tong | Tang Tau Hom |
|---|---|---|---|---|---|
| Yes | | 19 (51.4) | 18 (45) | 16 (42.1) | 17 (44.7) |
| No | | 18 (48.6) [1 Blank; 2 knew to bring suit in SCT and were not administered this question] | 22 (55) | 22 (57.9) [2 knew to bring suit in SCT and were not administered this question] | 21 (55.3) |

Table 13: How respondents find out about the Small Claims Tribunal

Q: How do you come to know about the Small Claims Tribunal?

| | Totals | Central District | Happy Valley | Kwun Tong | Wang Tau Hom |
|---|---|---|---|---|---|
| City District Office | 6 ( 7.2) | | 1 | 5 | |
| Friends/relatives | 9 (10.8) | 5 | 3 | 1 | |
| Judge | 5 | 3 | | 2 | |
| Newspaper | 41 (49.4) | 6 | 13 (59.1) | 10 (50) | 12 (60) |
| Radio | 10 (12) | 2 | 1 | 1 | 6 |
| Teacher | 5 | 2 | | 1 | 2 |
| Television | 6 ( 7.2) | | 3 | | |
| Don't know | 1 | 3 | 1 | | |
| Mass media | 57 (68.7) | | | | |

*Knowledge of the respondents on the Small Claims Tribunal*

Respondents who had heard of the tribunal were asked to state what they knew about it (Table 14). 36.8% knew nothing about it at all. Respondents were particularly vague when they spoke of the amount that the tribunal could award. 11.8% just said 'small claims' and avoided naming any figure. Another 11.8% named $3,000 as the correct figure. Three respondents named the wrong figure as the maximum the tribunal could award. 18.4% laboured under the wrong impression that the tribunal could hear debts or money claims only.

Table 14: What respondents knew about the Small Claims Tribunal

Q: Could you please tell me what you know about the Small Claims Tribunal?

| | Totals | Central District | Happy Valley | Kwun Tong | Wang Tau Hom |
|---|---|---|---|---|---|
| No legal representation | 4 | 1 | 2 | 1 | |
| Use Chinese language | 2 | | 1 | 1 | |
| An 'arbitrator' | 1 | | | 1 | |
| Simple procedure, no costs | 1 | | | 1 | |
| Informal procedure, can settle outside court | 1 | 1 | | | |
| Small claims | 9 (11.8) | 3 | | 3 | 3 |
| Debts/money claims only | 14 (18.4) | 3 | 9 (42.9) | 1 | 1 |
| Claim under certain amount | 2 | 1 | | | 1 |
| Claim < $2,000 | 1 | | 1 | | |
| Claim < $3,000 | 9 (11.8) | 1 | 6 (28.6) | | 2 |
| Claim < $5,000 | 2 | 2 | | | |
| Debts or claims for salary owed | 1 | 1 | | | |
| Help the poor | 1 | | 1 | | |
| Don't know | 28 (36.8) (5 Blanks) | 6 (31.6) (5 Blanks) | 1 | 11 (57.9) | 10 (58.8) |

Indeed, the meagre knowledge that respondents had of the tribunal is reflected in another part of the questionnaire where statements concerning the tribunal were read out to respondents who where required to state if the statements were right, wrong or that they did not know (Table 15). In five out of the seven statements read out, the percentage of respondents who got it wrong is higher than the percentage who got it right. These statements concern the nature of claims one can bring in the tribunal, the language in which the adjudicator speaks, the withdrawal of claim after filing, the exclusion of lawyers and the right to call witness to give evidence. Even with the statement that ' a person can make any kind of claim', those who said it was wrong (and thereby giving the correct answer) probably thought that claims were restricted to debts only. This is apparent from the high percentage of respondents who said 'right' (and thereby giving the wrong answer) to the statement that a person can only claim debts.

Table 15: Respondents' knowledge on the Small Claims Tribunal as tested in statements

Q: A person can only claim debts.

| | Right* | Wrong | Don't know | Responses |
|---|---|---|---|---|
| Central District | 14 (58.3) | 6 (25) | 4 (16.7) | 24 |
| Happy Valley | 17 (81) | 3 (14.3) | 1 ( 4.8) | 21 |
| Kwun Tong | 11 (57.9) | 5 (26.3) | 3 (15.8) | 19 |
| Wang Tau Hom | 6 (35.5) | 6 (35.3) | 5 (29.4) | 17 |
| Totals | 48 (59.3) | 20 (27.4) | 13 (16) | 81 |

* Incorrect

Q: A person can make any kind of claim.

| | Right* | Wrong | Don't know | Responses |
|---|---|---|---|---|
| Central District | 6 (25) | 11 (45.8) | 7 (29.2) | 24 |
| Happy Valley | 3 (14.3) | 15 (71.4) | 3 (14.3) | 21 |
| Kwun Tong | 4 (21.1) | 11 (57.9) | 4 (21.1) | 19 |
| Wang Tau Hom | 3 (17.6) | 8 (47.1) | 6 (35.3) | 17 |
| Totals | 16 (19.8) | 45 (55.6) | 20 (24.7) | 81 |

Q: The judge speaks to the parties in Chinese.

| | Right | Wrong* | Don't know | Responses |
|---|---|---|---|---|
| Central District | 6 (25) | 11 (45.8) | 7 (29.2) | 24 |
| Happy Valley | 7 (33.3) | 6 (28.6) | 8 (38.1) | 21 |
| Kwun Tong | 8 (42.1) | 3 (15.8) | 8 (42.1) | 19 |
| Wang Tau Hom | 1 ( 5.9) | 4 (23.5) | 12 (70.6) | 17 |
| Totals | 22 (27.2) | 24 (29.6) | 35 (43.2) | 81 |

Q: Claimants cannot withdraw their claims at any time.

| | Right* | Wrong | Don't know | Responses |
|---|---|---|---|---|
| Central District | 12 (50) | 4 (16.7) | 8 (33.3) | 24 |
| Happy Valley | 14 (66.7) | 4 (19) | 3 (14.3) | 21 |
| Kwun Tong | 4 (21.1) | 7 (36.8) | 8 (42.1) | 19 |
| Wang Tau Hom | 8 (47.1) | 0 | 9 (52.9) | 17 |
| Totals | 38 (46.9) | 15 (18.5) | 28 (34.6) | 81 |

Q: Parties can settle the case themselves even after filing.

| | Right | Wrong* | Don't know | Responses |
|---|---|---|---|---|
| Central District | 13 (54.2) | 1 ( 4.2) | 10 (41.7) | 24 |
| Happy Valley | 15 (71.4) | 3 (14.3) | 3 (14.3) | 21 |
| Kwun Tong | 18 (94.7) | 0 | 1 ( 5.3) | 19 |
| Wang Tau Hom | 10 (58.8) | 0 | 7 (41.2) | 17 |
| Totals | 56 (69.1) | 4 ( 4.9) | 21 (25.9) | 81 |

Q: Parties can ask a lawyer to argue their case.

| | Right* | Wrong | Don't know | Responses |
|---|---|---|---|---|
| Central District | 17 (70.8) | 1 ( 4.2) | 6 (25) | 24 |
| Happy Valley | 13 (61.9) | 5 (23.8) | 3 (14.3) | 21 |
| Kwun Tong | 12 (63.2) | 3 (15.8) | 4 (21.1) | 19 |
| Wang Tau Hom | 7 (41.2) | 2 (11.8) | 8 (47.1) | 17 |
| Totals | 49 (60.5) | 11 (13.6) | 21 (25.9) | 81 |

Q: Parties cannot call witnesses to give evidence

| | Right* | Wrong | Don't know | Responses |
|---|---|---|---|---|
| Central District | 10 (41.7) | 4 (16.7) | 10 (41.7) | 24 |
| Happy Valley | 8 (38.1) | 5 (23.8) | 8 (38.1) | 21 |
| Kwun Tong | 4 (21.1) | 7 (36.8) | 8 (42.1) | 19 |
| Wang Tau Hom | 3 (17.6) | 6 (35.3) | 8 (47.1) | 17 |
| Totals | 25 (30.9) | 22 (27.2) | 34 (42) | 81 |

## CLAIMANTS AND DEFENDANTS OF THE SMALL CLAIMS TRIBUNAL

The data we gathered from claimants and defendants of the tribunal at Victoria District Court can be grouped under the following heads:–

- general characteristics of individuals and companies
- how claimants find out about the Small Claims Tribunal
- legal advice sought by claimants and defendants
- tribunal assistance in the filing of claims
- preparation, performance and comprehension of proceedings
- claimants' and defendants' knowledge of the Small Claims Tribunal
- Claimants' and defendants' appraisal of the Small Claims Tribunal
- settlements

Forty individuals were interviewed at filing stage and sixty-five individuals were interviewed at post-hearing stage. Their general characteristics are shown in Table 16.

Fifty-eight companies were interviewed at filing stage. Companies were not interviewed at post-hearing stage. The size of these companies and the business they were doing could be seen from Table 17. One difficulty of gathering information from company claimants at filing stage is that companies may send minor staff to file claims and these people may not be in a position to answer for their companies. 15.8% of the respondents interviewed were messengers of these companies. One would have to make allowance for the high percentage of 'don't knows' to some of the questions asked (Table 16 and Table 17).

As for the cases themselves, the nature of claims and the amount involved are set out in Table 18. This can be compared with the figures released by the Small Claims Tribunal at Victoria District Court from the period of January to Auguest 1977 (Table 19, Table 20).

Table 16: Individuals (Claimants and Defendants) – General Characteristics

| | Totals | Filing Stage | Post-hearing |
|---|---|---|---|
| Sex | M74 (75.5)<br>F24 (24.5)<br>(7 Blanks) | M29 (76.3)<br>F 9 (23.7)<br>(2 Blanks) | M45 (75)<br>F15 (25)<br>(5 Blanks) |
| Age | | | |
| Under 20 | 3 ( 2.9) | 1 ( 2.6) | 2 ( 3.1) |
| 20 – 40 | 48 (47) | 14 (36.8) | 34 (53.1) |
| Over 40 | 51 (50) | 23 (60.5) | 28 (43.8) |
| | (3 Blanks) | (2 Blanks) | (1 Blank) |
| Occupation | | | |
| Accountant | 2 | 2 | |
| Advertising | 2 | | 2 |
| Amah | 1 | 1 | |
| British Armed Forces | 1 | 1 | |
| Business proprietor | 14 (14.1) | 8 | 6 |
| Business director | 1 | | 1 |
| Butler | 1 | 1 | |
| Carpenter | 1 | 1 | |
| Civil servant | 1 | | 1 |
| Clerk | 5 (5.1) | 4 | 1 |
| Cold Storage | 1 | 1 | |
| Constructor | 1 | 1 | |
| Driver | 3 | 1 | 2 |
| Electric appliances | 2 | 2 | |
| Export & Import | 4 | 1 | 3 |
| Factory worker | 2 | 2 | |
| Food seller | 1 | | 1 |
| Garment | 12 (12.1) | | 12 |
| Hairdresser | 2 | | 2 |
| Handbag/footwear | 2 | | 2 |
| Hawker | 1 | | 1 |
| Housewife | 10 (10.1) | 5 | 5 |
| Interior decoration | 1 | | 1 |
| Light bus owner | 1 | | 1 |
| Merchant | 7 (7.1) | | 7 |
| Photographer | 1 | 1 | |
| Policeman | 1 | | 1 |
| Publisher | 1 | | 1 |
| Repairer of machinery | 2 | | 2 |
| Retired | 2 | | 2 |
| Salesman/shop sales | 5 (5.1) | | 5 |
| Student | 3 | | 3 |
| Teacher | 2 | 2 | |
| Telex operator | 1 | 1 | |
| Unemployed | 2 | 1 | 1 |
| | (6 Blanks) | (2 Blanks) | (4 Blanks) |
| Totals | 99 (6 Blanks) | 38 (2 Blanks) | 61 (4 Blanks) |

Table 17: Companies (Claimants at filing stage) – General Characteristics

| | Totals | First time Claimant | Second time Claimant |
|---|---|---|---|
| Business | | | |
| Advertising | 1 | | 1 |
| Bank | 1 | | 1 |
| Cable & wireless | 2 | | 2 |
| Car repair | 1 | | 1 |
| Club | 1 | | 1 |
| Cold Storage | 2 | 1 | 1 |
| Electrical products | 4 | 1 | 3 |
| Electronics | 3 | 2 | 1 |
| Export/import | 4 | 3 | 1 |
| Finance Company | 4 | | 4 |
| Furniture | 1 | 1 | |
| Gasoline | 2 | 1 | 1 |
| Leather | 1 | 1 | |
| Machinery dealer | 2 | 2 | |
| Management Company | 6 | 4 | 2 |
| Money exchange | 1 | 1 | |
| Newspaper | 2 | | 2 |
| Painting | 1 | | 1 |
| Piece goods | 1 | | 1 |
| Printing/Paper manufacturing | 3 | 2 | 1 |
| Property management | 4 | | 4 |
| Real estate | 1 | 1 | |
| Sales | 4 | 1 | 3 |
| Toy manufacturing | 1 | 1 | |
| Trading Company | 2 | | 2 |
| Wallpaper | 1 | 1 | |
| Wine | 1 | 1 | |
| | (1 Blank) | | (1 Blank) |
| Totals | 57 (1 Blank) | 24 | 33 (1 Blank) |
| Legal status | | | |
| Sole proprietorship | 8 (14) | 6 | 2 |
| Partnership | 5 ( 8.8) | 3 | 2 |
| Limited Company | 41 (71.9) | 12 | 29 |
| Others | 3 ( 5.3) | 3 | (1 Blank) |
| | (1 Blank) | | |

| | Totals | First-time claimant | Second-time claimant |
|---|---|---|---|
| Staff employed | | | |
| Under 10 | 16 (28.6) | 10 | 6 |
| 11 – 30 | 15 (26.8) | 9 | 6 |
| 31 – 50 | 5 ( 8.9) | 2 | 3 |
| 51 – 100 | 2 ( 3.6) | 0 | 2 |
| 101 – 500 | 9 (16.1) | 2 | 7 |
| Over 500 | 9 (16.1) | 1 | 8 |
| | (2 Blanks) | | (2 Blanks) |
| Respondent's post in the company | | | |
| Accountant/accounting clerk | 7 (12.3) | 1 | 6 |
| Adviser | 1 | | 1 |
| Chairman/member of incorporation of owners of building | 3 | 3 | |
| Clerk | 14 (24.6) | 5 | 9 |
| Director | 1 | 1 | |
| Manager/assistant | 7 (12.3) | 2 | 5 |
| Messenger | 9 (15.8) | 2 | 7 |
| Partner | 1 | | 1 |
| Proprietor | 2 | 1 | 1 |
| Repairer | 1 | 1 | |
| Salesman | 6 | 4 | 2 |
| Superviser/assistant | 3 | 1 | 2 |
| Typist | 1 | 1 | |
| No office held | 1 | 1 | |
| | (1 Blank) | (1 Blank) | |

Table 18: The respondents' cases

| | Totals | Filing (first-time claimants) Individual | Company | Post-hearing claimants & Defendants |
|---|---|---|---|---|
| Nature of claims | | | | |
| Arrears of rent | 16 (13) | 10 | | 6 |
| Arrears of wages | 5 | 2 | | 3 |
| Breach of contract | 7 | | 1 | 6 |
| Charges – telephone, telegram & multi-storey maintenance service | 10 ( 8.1) | | 4 | 6 |
| Damages in traffic accident/other tort claims | 12 ( 9.8) | 2 | | 10 |
| Dishonoured cheque | 24 (19.5) | 14 | 3 | 7 |
| Goods sold & delivered | 23 (18.7) | | 12 | 11 |
| Hire-purchase | 2 | | | 2 |
| Insurance claims | 1 | | | 1 |
| Money lent | 14 (11.4) | 2 | 3 | 9 |
| Rates | 2 | 2 | | |
| Work done and material supplied | 4 | 1 | 1 | 2 |
| Workmen's compensation | 1 | | | 1 |
| Miscellaneous | 2 | 2 | | |
| | (3 Blanks) | (2 Blanks) | | (1 Blank) |
| Amount involved | | | | |
| Up to $500 | 22 (19.5) | 5 | 1 | 16 |
| $501 – $1,000 | 22 (19.5) | 8 | 4 | 10 |
| $1,001 – $2,000 | 38 (33.6) | 6 | 7 | 25 |
| $2,001 – $3,000 | 31 (27.4) | 7 | 10 | 14 |
| | (13 Blanks) | (11 Blanks) | (2 Blanks) | |

Table 19: Figures released by the Small Claims Tribunal at Victoria District Court covering the period of Jan - Aug 1977.

| | Jan | Feb | Mar | Apr | May | June | July | Aug |
|---|---|---|---|---|---|---|---|---|
| Number of Claimants | | | | | | | | |
| Private sector | 124 | 98 | 132 | 109 | 147 | 149 | 152 | 174 |
| Crown | 1 | 3 | 1 | / | / | 166 | 230 | 94 |
| Totals | 125 | 101 | 133 | 109 | 147 | 315 | 382 | 268 |
| Nature of Claims | | | | | | | | |
| Goods sold & delivered | 38 | 12 | 25 | 16 | 41 | 34 | 37 | 30 |
| Dishonoured cheque | 11 | 15 | 26 | 19 | 23 | 19 | 24 | 24 |
| Work done & material supplied | 12 | 3 | 4 | 5 | 6 | 14 | 6 | 7 |
| Bill of lading | 2 | 1 | 4 | 4 | 1 | 7 | 2 | 2 |
| Charges: telegram & telephone, multi-storey | 1 | 4 | 9 | 5 | 4 | 3 | 7 | 8 |
| maintenance service & others | 2 | 3 | 6 | 13 | 17 | 12 | 13 | 42 |
| Hire-purchase | 8 | 6 | 17 | 12 | 14 | 15 | 16 | 12 |
| Money lent | 38 | 18 | 27 | 15 | 12 | 25 | 20 | 21 |
| Arrears of rent | 3 | 28 | 1 | 2 | 2 | 2 | 3 | 6 |
| Stamp Duty | 1 | / | 3 | 4 | 16 | 6 | 4 | 4 |
| Damages in traffic accident | 1 | 3 | 1 | 7 | 1 | 3 | 2 | 7 |
| Miscellaneous | 6 | 4 | 2 | 7 | 3 | 7 | 5 | 7 |
| Totals | 2 | 4 | 8 | 7 | 7 | 9 | 13 | 11 |
| | 125 | 101 | 133 | 109 | 147 | 149 | 152 | 174 |
| | | | | | | excluding crown cases | | |
| Amount involved | | | | | | | | |
| Up to $500 | 24 | 12 | 14 | 33 | 37 | 129 | 149 | 94 |
| $501 – $1,000 | 31 | 20 | 33 | 20 | 26 | 60 | 91 | 62 |
| $1,001 – $1,500 | 34 | 26 | 23 | 18 | 19 | 44 | 47 | 29 |
| $1,501 – $2,000 | 19 | 17 | 25 | 11 | 21 | 36 | 39 | 30 |
| $2,001 – $2,500 | 8 | 19 | 19 | 13 | 20 | 19 | 20 | 24 |
| $2,501 – $3,000 | 9 | 7 | 19 | 14 | 24 | 27 | 36 | 29 |
| Totals | 125 | 101 | 133 | 109 | 147 | 315 | 382 | 268 |

Table 20: Nature of claims in comparison with Small Claims tribunal figures

| | Respondents Filing (first time claimant) and post-hearing claimant and defendant | SCT figures<br>Jan – Aug 1977 |
|---|---|---|
| Nature of claims | | |
| Arrears of rent | 16 (13) | 38 ( 3.5) |
| Charges-telegram & telephone, multi-storey maintenance service & others | 10 ( 8.1) | 249 (22.8) |
| Damages in traffic accident/other tort claims | 12 ( 9.8) | 41 ( 3.8) |
| Dishonoured cheque | 24 (19.5) | 161 (14.8) |
| Goods sold & delivered | 23 (18.7) | 233 (21.4) |
| Money lent | 14 (11.4) | 47 ( 4.3) |

*How claimants find out about the Small Claims Tribunal*

All first-time claimants were asked how they came to find out about the Small Claims Tribunal (Table 21). Mass media is not such an important source here as in the case of the public at large (Table 13). Both the City District Office and lawyers refer claimants to the tribunal in appropriate cases.

Table 21: How claimants find out about the Small Claims Tribunal

Q: How did you find out about the tribunal?

| | Totals | Individual | Company |
|---|---|---|---|
| CDO | 16 (25.8) | 13 (35.1) | 3 |
| Counsellors | 1 | 1 | |
| Friends/relatives | 12 (19.4) | 6 (16.2) | 6 (24) |
| Government Department | 1 | 1 | |
| Judge | 2 | 1 | 1 |
| Lawyer | 9 (14.5) | 5 (13.4) | 4 |
| Manager of Company | 3 | | 3 |
| Mass media | 14 (22.6) | 7 (18.9) | 7 (28) |
| Personal knowledge | 2 | 1 | 1 |
| Police | 2 | 2 | |
| | (1 overlap) | | (1 overlap) |

*Legal advice sought by claimants and defendants*

Individual respondents were asked if they had any legal knowledge (Table 22). 15.7% said yes and were asked to specify what sort of legal knowledge they had. It is apparent from the answers given that even with respondents who claimed they had legal knowledge, they did not know much law.

Table 22: Legal knowledge of claimants and dependants

Q: Do you have any legal knowledge?

| | | Filing – first-time claimants (individual) | Post-hearing claimants and defendants |
|---|---|---|---|
| Yes | 16 (15.7) | 6 (16.2) | 10 (15.4) |
| No | 86 (84.3) | 31 (83.8) | 55 (84.6) |

Q: If yes, please specify which field.

[Filing stage – first-time claimants (individual)]

| | | |
|---|---|---|
| Passed civil and criminal law exams | | 1 |
| Commercial law | | 2 |
| Chinese law | | 1 |
| General knowledge of law | | 2 |
| | Totals | 6 |

[Post-hearing claimants and defendants]

| | | |
|---|---|---|
| General knowledge of law | | 3 |
| Sale and purchase law | | 1 |
| Company law | | 1 |
| Refused | | 1 |
| | Totals | 6 (4 Blanks) |

As a follow-up to the above question, we asked first-time claimants if they had sought legal advice before they filed their claims. Second-time company claimants were asked whether they usually tried to ascertain their legal position before filing a claim (Table 23). In both instances, approximately half of the claimants sought legal advice and 60.5% consulted lawyers.

Table 23: Legal advice sought by claimants before filing of claims

Q: Did you/your company try to ascertain your/its legal position before filing this claim?

| | Total | Filing – first-time claimant (Individual) | Filing – first-time claimant (Company) |
|---|---|---|---|
| Yes | 29 (47.5) | 19 (51.4) | 10 (41.7) |
| No | 28 (45.9) | 18 (48.6) | 10 (41.7) |
| Don't know | 4 ( 6.6) | | 4 (16.7) |

Q: Does your company usually try to asscertain its legal position before filing a claim?

| | Filing | second-time claimant (company) |
|---|---|---|
| Yes | | 18 (52.9) |
| No | | 15 (44.1) |
| Don't know | | 1 ( 2.9) |

Q: If yes (to either of the above questions), from what kind of person?

| | Totals | first-time claimant (individual) | first-time claimant (company) | second-time claimant (company) |
|---|---|---|---|---|
| City District Office | 5 (11.6) | 4 | 1 | |
| Clerk in solicitor's firm | 1 | 1 | | |
| Friends | 3 | 1 | | 2 |
| Lawyer | 26 (60.5) | 8 | 8 | 10 |
| Legal adviser of Company | 5 (11.6) | | | 5 |
| Magistracy | 1 | 1 | | |
| Other Claimants | 1 | 1 | | |
| Don't know | 1 | | 1 | |
| | (4 Blanks) | (3 Blanks) | | (1 Blank) |

The percentage of claimants and defendants who actually sought or would seek legal advice in the course of hearing has dropped somewhat (Table 24). This is perhaps due to the fact that respondents were adequately advised before the hearing or that most cases were simple andd difficult legal problems would rarely arise. Again 68.4% of those who sought legal advice consulted lawyers.

Table 24: Legal advice sought by claimants and defendants in the course of hearing

Q: Would you/your company obtain legal advice in the course of hearing?

| | Totals | Filing – first-time claimant (individual) | Filing – first-time claimant (company) |
|---|---|---|---|
| Yes | 19 (32.2) | 8 (22.9) | 1 (45.8) |
| No | 33 (55.9) | 25 (71.4) | 8 (33.3) |
| Don't know | 7 (11.9) | 2 (5.7) | 5 (20.8) |
| | (2 Blanks) | (2 Blanks) | |

Q: In the course of the hearings does your company usually obtain legal advice?

| | Filing – second-time claimant (company) |
|---|---|
| Yes | 10 (29.4) |
| No | 21 (61.8) |
| Don't know | 3 ( 8.8) |

Q: Have you got any assistance in ascertaining your legal position?

| | Totals | Post-hearing Decided case | Post-hearing Adjourned hearing | Post-hearing Settled case |
|---|---|---|---|---|
| Yes | 17 (26.2) | 4 (23.5) | 8 (25) | 5 (31.3) |
| No | 48 (73.8) | 13 (76.5) | 24 (75) | 11 (68.7) |

Q: If yes, (to either of the above questions) from what kind of person?

| | Totals | Filing – first-time claimant (individual) | Filing – first-time claimant (company) | Filing – second-time claimant (company) | Post-hearing claimant & defendant |
|---|---|---|---|---|---|
| CDO | 2 | 1 | | | 1 |
| Friends | 2 | | | 2 | |
| Insurance Company | 1 | | | | 1 |
| Labour Tribuanl | 1 | | | | 1 |
| Lawyer | 26 (68.4) | 4 | 9 | 5 | 8 |
| Legal adviser of companies | 3 | | | 3 | |
| Legal Aid Department | 1 | | | | 1 |
| Sales agent | 1 | | 1 | | |
| Don't know | 1 | | 1 | | |
| | (8 Blanks) | (3 Blanks) | | | (5 Blanks) |

*Tribunal assistance in the filing of claims*

Claimants are required to complete two types of forms when they go to file their claims – one stating the names and addresses of the claimant and defendant and the other stating the grounds of claim, the amount claimed and the way it was calculated. These claim forms may be completed in English or Chinese.[35] They are relatively simple as compared with a formal writ and a statement of claim. Nevertheless 20% of the first time claimants required the assistance of the District Court Registry when they filed their claims. Company claimants appear to be in a better position in this respect (Table 25).

Table 25: Tribunal assistance in the filing of claims

Q: Did you need any assistance from the District Court Registry to help you file your claim?

| | Totals | Filing – first-time claimant (individual) | Filing – first-time claimant (company) |
|---|---|---|---|
| Yes | 12 (20) | 11 (30.6) | 1 ( 4.2) |
| No | 42 (70) | 23 (63.9) | 19 (79.2) |
| Don't know | 6 (10) | 2 ( 5.6) | 4 (16.7) |
| | (1 Blank) | (1 Blank) | |

35 s 12(2).

Q: Did you find them helpful?

| | Totals | Filing – first-time claimant (individual) | Filing – first-time claimant (company) |
|---|---|---|---|
| Yes | 5 | 5 | 1 |
| No | 6 | 5 | |
| | (1 Blank) | (1 Blank) | |

*Preparation, performance and comprehension of proceedings*

First time claimants were asked what kind of information the judge would require to decide the case. The information they supplied us is set against the nature of their claim as revealed. Claimants are then assessed as to whether they know what sort of evidence to adduce. Also on the question of evidence, post-hearing claimants and defendants were asked this direct question if they knew what witnesses and evidence to bring before the judge (Table 26). Though the percentage of the knowledgeable ones is higher, those who had no idea as to what evidence to call amounted to a substantial number in both instances.

Table 26: Preparation of the case – what evidence to adduce

Q: When your claim is heard, what kind of information do you think the judge would need in order to decide the case?

| | Totals | Fining – first-time claimant (individual) | Fining – first-time claimant (company) |
|---|---|---|---|
| Have knowledge | 37 (62.7) | 25 (67.6) | 12 (54.5) |
| No knowledge | 21 (35.6) | 12 (32.4) | 9 (40.9) |
| Refused | 1 | | 1 |
| | (2 Blanks) | | (2 Blanks) |

Q: Did you know what witnesses and evidence to bring before the judge?

| | Post-hearing claimant and defendant |
|---|---|
| Yes | 38 (58.5) |
| No | 27 (41.5) |

As lawyers are exchuded from the tribunal proceedings, claimants and defendants have to conduct their own cases. We asked claimants and defendants at post-hearing stage (decided cases and adjourned hearings) if they had any difficulty in arguing their cases. 71.4% found no difficulty (Table 27). It is interesting to compare the results of this question with another question where post-hearing claimants and defendants (decided case only) were asked would the result have been different if their case had been argued by a lawyer. 64.7% thought that legal representation would make a difference (Table 33).

Of the three second-time individual claimants that we interviewed at filing stage, we asked them if they encountered any difficulty in conducting their previous case. They all said no (Table 27). This probably accounts for the fact that they all went back a second time to file claims.

Table 27: Claimants' and Defendants' performance

Q: Did you find it difficult to argue your case before the judge?

| | Totals | Post-hearing (Decided cases) | Post-hearing (Adjourned hearing) |
|---|---|---|---|
| Yes | 14 (28.6) | 7 | 7 |
| No | 35 (71.4) | 10 | 25 |

Q: Did you find the previous proceeding difficult to conduct?

| | Filing – second-time claimant (individual) |
|---|---|
| Yes | 0 |
| No | 3 |

As for the comprehension of proceedings, the question was directed to second-time individual claimants and post-hearing claimants and defendants (decided cases only) (Table 28). The results appear to be quite satisfactory on the whole.

Table 28: Comprehension of proceedings

Q: Did you find the previous proceeding difficult to follow?

| | Filing – second-time claimant (Individual) |
|---|---|
| Yes | 0 |
| No | 3 |

Q: Do you think the judge has explained clearly why he reached this decision?

| | Post-hearing (Decided case) |
|---|---|
| Yes | 11 (64.7) |
| No | 5 (29.4) |
| Don't know | 1 |

*Claimants' and Defendants' knowledge of the Small Claims Tribunal*

As in the case of interviews with the public, statements concerning the tribunal were read out to claimants and defendants. They were then required to state if the statements were right, wrong, or that they did not know (Table 29).

The first three statements were administered only to first-time claimants as respondents would know the correct answer once they had gone through a hearing. These three statements plus another that 'claimants cannot withdraw their claims once started' have also been administered to respondents drawn from the public at large. A comparison of the answers we had is set out in Table 30. The percentage of respondents who got it wrong is higher in the case of the public at large in each of the four instances. One particularly stunning error concerns the exclusion of lawyers from tribunal proceedings: 45.9% of first-time claimants thought that parties could ask a lawyer to argue their case for them.

Six other statements were read out to claimants at filing stage and claimants and defendants at post-hearing stage. One would have thought that claimants and defendants at post-hearing stage would have scored better results. This is not so in fact. In each of the six instances, the percentage who gave the incorrect answer is even higher in the case of post-hearing respondents. One could probably say that the hearings did not help to clear up doubts or erase wrong impressions. The percentages of 'don't knows' range from 25.6% to 47.5%.

Two statements which describe the same fact but worded differently were read out to first-time claimants at filing stage. One reads 'the decision of the Small Claims Tribunal is final'. The other reads 'the party who loses has a right to appeal'. 21.3% got the first statement wrong but only 1.7% got the second statement wrong The apparent inconsistency reflected in these answers could be explained in no other way than that the respondents failed to understand the meaning of finality of a decision.

Table 29: Claimants' and defendants' knowledge of the Small Claims Tribunal

Q: Parties can hire legal representatives to argue their cases.

| | Right* | Wrong | Don't know | Responses |
|---|---|---|---|---|
| Filing – first-time claimant (individual) | 19 (51.4) | 10 (27) | 8 (21.6) | 37 |
| Filing – first-time claimant (company) | 9 (37.5) | 6 (25) | 9 (37.5) | 24 |
| Totals | 28 (45.9) | 16 (26.2) | 17 (27.9) | 61 |

* Incorrect

Q: The judge speaks to the parties in Chinese.

| | Right | Wrong* | Don't know | Responses |
|---|---|---|---|---|
| Filing – first-time claimant (individual) | 15 (40.5) | 5 (13.5) | 17 (45.9) | 37 |
| Filing – first-time claimant (company) | 11 (45.8) | 2 ( 8.3) | 11 (45.8) | 24 |
| Totals | 26 (42.6) | 7 (11.5) | 28 (45.9) | 61 |

Q: Parties cannot call witnesses to give evidence.

| | Right* | Wrong | Don't know | Responses |
|---|---|---|---|---|
| Filing – first-time claimant (company) | 6 (25) | 10 (41.7) | 8 (33.3) | 24 |

Q: Claimants cannot withdraw their claims once started.

| | Right* | Wrong | Don't know | Responses |
|---|---|---|---|---|
| Filing – first-time claimant (individual)] | 8 (22.2) | 15 (41.7) | 13 (36.1) | 36 (1 Blank) |
| Filing – first-time claimant (company) | 8 (33.3) | 12 (50) | 4 (16.7) | 24 |
| Total | 16 (26.7) | 27 (45) | 17 (28.3) | 60 (1 Blank) |

| | Right* | Wrong | Don't know | Responses |
|---|---|---|---|---|
| Filing stage | 16 (26.7) | 27 (45) | 17 (28.3) | 60 (1 Blank) |
| Post-hearing | 24 (36.9) | 23 (35.4) | 18 (27.7) | 65 |
| Totals | 40 (32) | 50 (40) | 35 (28) | 125 (1 Blank) |

Q: The party who wins can ask the adjudicator to award costs to him.

| | Right | Wrong* | Don't know | Responses |
|---|---|---|---|---|
| Filing – first-time claimant (individual) | 22 (61.1) | 1 (2.8) | 13 (36.1) | 36 (1 Blank) |
| Filing – first-time claimant (company) | 21 (87.5) | 0 | 3 (12.5) | 24 |
| Totals | 43 (71.7) | 1 (1.7) | 16 (26.7) | 60 (1 Blank) |

| | Right | Wrong* | Don't know | Responses |
|---|---|---|---|---|
| Filing stage | 43 (71.7) | 1 (1.7) | 16 (26.7) | 60 (1 Blank) |
| Post-hearing | 45 (69.2) | 4 (6.2) | 16 (24.6) | 65 |
| Totals | 88 (70.4) | 5 (4) | 32 (25.6) | 125 (1 Blank) |

Q: The decision of the Small Claims Tribunal is final.

| | Right* | Wrong | Don't know | Responses |
|---|---|---|---|---|
| Filing – first-time claimant (individual) | 8 (21.6) | 11 (29.7) | 18 (48.6) | 37 |
| Filing – first-time claimant (company) | 5 (20.8) | 8 (33.3) | 11 (45.8) | 24 |
| Totals | 13 (21.3) | 19 (31.1) | 29 (47.5) | 61 |

Q: The party who loses has a right to appeal.

| | Right | Wrong* | Don't know | Responses |
|---|---|---|---|---|
| Filing – first-time claimant (individual) | 29 (80.6) | 0 | 7 (19.4) | 36 (1 Blank) |
| Filing – first-time claimant (company) | 16 (69.6) | 1 (4.3) | 6 (26.1) | 23 (1 Blank) |
| Totals | 45 (76.3) | 1 (1.7) | 13 (22) | 59 (2 Blanks) |

| | Right | Wrong* | Don't know | Responses |
|---|---|---|---|---|
| Filing stage | 45 (76.3) | 1 (1.7) | 13 (22) | 59 (2 Blanks) |
| Post-hearing | 40 (61.5) | 6 (9.2) | 19 (29.2) | 65 |
| Totals | 85 (68.5) | 7 (5.6) | 32 (25.8) | 124 (2 Blanks) |

Q: If the witness refuses to come to the court, neither the parties nor the court can compel him to do so.

| | Right* | Wrong | Don't know | Responses |
|---|---|---|---|---|
| Filing – first-time claimant (individual) | 18 (51.4) | 7 (20) | 10 (28.6) | 35 (2 Blanks) |
| Filing – first-time claimant (company) | 10 (43.5) | 8 (34.8) | 5 (21.7) | 23 (1 Blank) |
| Totals | 28 (48.3) | 15 (25.9) | 15 (25.9) | 58 (3 Blanks) |

| | Right* | Wrong | Don't know | Responses |
|---|---|---|---|---|
| Filing stage | 28 (48.3) | 15 (25.9) | 15 (25.9) | 58 (3 Blanks) |
| Post-hearing | 34 (52.3) | 13 (20) | 18 (27.7) | 65 |
| Totals | 62 (50.4) | 28 (22.8) | 33 (26.8) | 123 (3 Blanks) |

Q: If the claim fails, the claimant must pay compensation to the defendant for wasting the defendant's time.

| | Right* | Wrong | Don't know | Responses |
|---|---|---|---|---|
| Filing – first-time claimant (individual) | 15 (41.7) | 8 (22.2) | 13 (36.1) | 36 (1 Blank) |
| Filing – first-time claimant (company) | 11 (50) | 5 (22.7) | 6 (27.3) | 22 (2 Blanks) |
| Totals | 26 (44.8) | 13 (22.4) | 19 (32.8) | 58 (3 Blanks) |

| | Right* | Wrong | Don't know | Responses |
|---|---|---|---|---|
| Filing stage | 26 (44.8) | 13 (22.4) | 19 (32.8) | 58 (3 Blanks) |
| Post-hearing | 29 (46) | 9 (14.3) | 25 (39.7) | 63 (2 Blanks) |
| Totals | 55 (45.5) | 22 (18.2) | 44 (36.4) | 121 (5 Blanks) |

Table 30: A comparison of the public's & claimants' knowledge of the Small Claims Tribunal.

Q: The judge speaks to the parties in Chinese.

| | Right | Wrong* | Don't know | Responses |
|---|---|---|---|---|
| The public | 22 (27.2) | 24 (29.6) | 35 (43.2) | 81 |
| Claimants at filing stage | 26 (42.6) | 7 (11.5) | 28 (45.9) | 61 |

* Incorrect

Q: Claimants cannot withdraw their claims at any time.

| | Right* | Wrong | Don't know | Responses |
|---|---|---|---|---|
| The public | 38 (46.9) | 15 (18.5) | 28 (34.6) | 81 |
| Claimants & defendants | 40 (32) | 50 (40) | 35 (28) | 125 (1 Blank) |

Q. Parties can ask a lawyer to argue their case.

| | Right* | Wrong | Don't know | Responses |
|---|---|---|---|---|
| The public | 49 (60.5) | 11 (13.6) | 21 (25.9) | 81 |
| Claimants at filing stage | 28 (45.9) | 16 (26.2) | 17 (27.9) | 61 |

Q: Parties cannot call witnesses to give evidence.

| | Right* | Wrong | Don't know | Responses |
|---|---|---|---|---|
| The public | 25 (30.9) | 22 (27.2) | 34 (42) | 81 |
| Filing – first-time claimant (Company) | 6 (25) | 10 (41.7) | 8 (33.3) | 24 |

*Claimants' and Defendants' appraisal of the Small Claims Tribunal*

We tried to guage the reactions of claimants and defendants on the procedural and substantive fairness of the proceedings. The distinction between procedural and substantive fairness may be somewhat difficult for a layman to grasp. One ought to bear this limitation in mind when interpreting some of the answers given.

Claimants and defendants at post-hearing (decided cases only) were asked two question. The first one was whether they thought the judge had explained clearly why he reached his decision (Table 28). The second one was whether they thought the trial was fair considering the procedure that had been adopted (Table 31). In both instances the percentage who gave a favourable answer was quite high – 64.7% for the first question and 70.6% for the second question. One would have thought that people might be affected by the outcome of the case on this question of procedural fairness. However five out of six losers thought that the trial was fair procedurally while only one thought otherwise. Also, one winner thought that the procedure adopted was not fair though it is a reasonable supposition that winners would be more inclined to speak in favour of the tribunal.

Table 31: Procedural fairness of the tribunal

Q: Considering the procedure that has been adopted, do you think the trial is

| | |
|---|---|
| VERY FAIR | 6 (35.3) |
| FAIR | 6 (35.3) |
| PARTIALLY FAIR | 1 ( 5.9) |
| UNFAIR | 2 (11.8) |
| VERY UNFAIR | |
| (DO NOT PROMPT) DON'T KNOW | 2 (11.8) |
| [post-hearing decided case] Totals | 17 |

Questions on the substantive fairness of the tribunal were administered only to second-time individual claimants at filing stage. Company claimants were not asked these questions as they touch on one's personal opinion. Claimants and defendants of decided cases were not asked these questions either. The reason is that they were very much involved in their cases at the moment they were interviewed and would not be able to look at the case from a detached angle in the way second time claimants might be able to do with their previous case. Unfortunately, during our five-week stay in the tribunal, we had been able to interview only three second-time individual claimants. The answers given by such a small number may not be very reliable. The comments are all favourable ones (Table 32). This is perhaps to be expected as those claimants who are dissatisfied with the way their previous case was handled may not be prepared to try again.

Table 32: Substantive fairness of the tribunal

Q: Were you

| | |
|---|---|
| VERY SATISFIED | 1 |
| SATISFIED | 2 |
| DISSATISFIED | |
| VERY DISSATISFIED | |
| with the way your last case was handled? | |
| [Filing – second-time claimant (individual)] Totals | 3 |

Q: In handling your last case, would you say that the tribunal was

| | |
|---|---|
| VERY FAIR | 2 |
| FAIR | 1 |
| UNFAIR | |
| VERY UNFAIR | |
| (DO NOT PROMPT) DON'T KNOW | |
| [Filing – second-time claimant (individual)] Totals | 3 |

Another way of sounding out how claimants and defendants reacted towards the whole set-up is to ask them if they think the result would be different if their case had been argued by a lawyer (Table 33). 68.8% answered in the affirmative. This high percentage could be due to a lack of confidence on the part of the respondents or they might simply say yes without giving any second thought. Indeed, a close analysis of the answers and the actual result of the cases themselves seemed to bear this out (Table 34). For the decided case respondents, of the six who won and yet said legal representation would make a difference

– 3 claimants got the full amount claimed.
– 2 defendants won and got away paying with nothing.
– the remaining claimant got part of the amount claimed and only he could reasonably say a lawyer would make all the difference in his case.

For the settled cases respondents, of the seven who thought they would win and said legal representation would make a difference

– 3 claimants got the full amount claimed out of the settlement and had no reason to suppose a lawyer would make a different result.

On balance, the exclusion of lawyers from tribunal proceedings does not seem to be a real handicap, particularly when one bears in mind the high percentage (71.4%) who said that they had no difficulty in arguing their case before the judge (Table 27).

Table 33: Whether legal representation would make a difference

Q: Do you think the judgment/result would be different if your case had been argued by a legal representative?

| | Totals | Post-hearing decided case | Post-hearing settled case |
|---|---|---|---|
| Yes | 22 (68.8) | 11 (64.7) | 11 (73.3) |
| No | 5 (15.6) | 4 (23.5) | 1 ( 6.7) |
| Don't know | 5 (15.6) | 2 (11.8) | 3 (20) |
| | (1 Blank) | | (1 Blank) |

Table 34: Respondents' opinion on legal representation set against the outcome of cases in actual event or according to surmise

Decided cases

| | Totals | Legal representation would make a difference | Legal representation would make no difference | Don't know |
|---|---|---|---|---|
| won | 11 | 6 | 4 | 1 |
| lost | 6 | 5 | | 1 |

Settled cases

| | Totals | Legal representation would make a difference | Legal representation would make no difference | Don't know |
|---|---|---|---|---|
| Thought would win | 7 | 7 | | |
| Thought would lose | 6 | 3 | 1 | 2 |
| Don't know | 2 | 1 | | 1 |

Claimants and defendants were asked to give suggestions as to how things could be improved (Table 35). 69.4% did not give any. This may be due to mental lethargy, or because they could not identify anything specific or they had no great complaints. Some of the suggestions concern the question of adducing evidence at the trial. Perhaps it is necessary for some responsible person to help the parties sort out issues and advise them on the preparation of their case as in the Labour Tribunal.

Table 35: Respondents' suggestions of improvement

Q: In what ways do you think things could be made easier for parties at a hearing? Please specify.

| | | |
|---|---|---|
| Should facilitate private settlement | | 1 |
| time | | |
| Parties should be punctual at the hearing. | | 1 |
| Too time consuming. | | 2 |
| evidence | | |
| Irrelevant evidence should not be pursued. | | 1 |
| Parties shall adduce adequate evidence. | | 1 |
| Claimants should have more information as to what evidence is needed when they filed their claims. | | 1 |
| procedure | | |
| Procedure is too simple, especially when giving evidence. | | 1 |
| A party must be given the right to answer. | | 1 |
| Confusion may arise if more than one party speaks. | | 1 |
| Claimant & defendant should contact each other before the trial. | | 1 |
| Satisfactory now. | | 4 |
| | Totals | 15 (30.6) |
| Don't know | | 34 (69.4) |
| [Post-hearing (Decided case & adjourned hearing)] Totals | | 49 |

Whether claimants would return to the tribunal to file a claim would give some indications as to how satified they were with the tribunal. One may perhaps account for the small number of second-time individuals[36] we had been able to interview in this way: the tribunal has been in existence for only over a year. Besides, people do not always have debts uncollected or rent unpaid within such a short period of time. With the 'second-time' company claimants, 35.3% had filed over twenty claims in the tribunal (Table 36). Indeed, figures released by the tribunal show that the number of claimants has been increasing steadily (Table 19).

Table 36: Number of times 'second-time' company claimants had filed claims in the tribunal

| | Filing – second-time claimant (company) |
|---|---|
| Under 5 times | 14 (41.2) |
| 5 – 10 | 2 |
| 11 – 20 | 5 |
| Over 20 | 12 (35.3) |
| Don't know | 1 |

All post-hearing claimants and defendants were asked if they would consider going to the tribunal to file a claim if they had a future dispute (Table 37). 69.2% thought they would. Of the 20% who thought they would not, the reasons they gave point to a reluctance to litigate rather than any specific discontent with the tribunal. However, one did say it was no use to bring a claim there, though no details were given.

Table 37: Whether would return to file a claim

Q: If you have a future dispute, would you consider coming here to file a claim?

| | Totals | Post-hearing Decided case | Post-hearing Adjourned hearing | Post-hearing Settled case |
|---|---|---|---|---|
| Yes | 45 (69.2) | 14 (82.4) | 21 (65.6) | 10 (62.5) |
| No | 13 (20) | 3 (17.6) | 8 (25) | 2 (12.5) |
| Don't know | 7 (10.8) | | 3 ( 9.4) | 4 (25) |

36 The tribunal records available at the District Court Registry do not indicate whether claimants are second-time claimants.

Q: If NO (to the above question), why not?

| | |
|---|---|
| No use | 1 |
| Prefer to settle | 4 |
| Time consuming | 1 |
| Too trivial | 1 |
| Troublesome | 3 |
| Totals | 10 (3 Blanks) |

*Settlements*

Unlike the Labour Tribunal[37], conciliation between the parties is not a necessary pre-condition before a case is set down for hearing. There is no responsible person assigned for the task of inquiring into a claim and helping the parties to reach a settlement. Hence, settled cases in the tribunal amount to quite a substantial figure.[38] Of the 65 post-hearing respondents, sixteen of them had their case settled.

No doubt, the installation of officers to screen off cases that could be settled would add to the efficiency of the tribunal. Of the post-hearing respondents (adjourned hearing only) that we interviewed, 56.3% were of the opinion they could have settled the case without coming before the judge (Table 38).

Table 38: Whether could have settled without coming before the judge

Q: Could you have settled the case without coming before the judge?

| | Post-hearing (Adjourned hearings) |
|---|---|
| Yes | 18 (56.3) |
| No | 12 (37.5) |
| Don't know | 2 |

37 s 15 of the Labour Tribunal Ordinance provides that the tribunal would not hear a claim until a conciliation certificate signed by the tribunal officer has been filed and produced. The tribunal officer is required to certify one of the following possibilities:– one or more of the parties refused conciliation, conciliation was attempted but no settlement was reached, conciliation is unlikely to result in settlement, conciliation may prejudice the interests of a party. There is no official record as to the number of settled cases in the tribunal.

38 We made a search in the records of the tribunal at Victoria District Court and compiled the following results:–

| Month | Number of settled cases |
|---|---|
| Jan 77 | 21 out of 125 cases |
| Feb | 19 out of 101 cases |
| Mar | 36 out of 133 cases |
| Apr | 20 out of 109 cases |
| May | 39 out of 147 cases |
| June | 40 out of 315 cases |

One would have thought that most people would prefer to have their case settled rather than litigate in court. To test how strong this preference is, a question was posed to company claimants at various stages whether they would favour a settlement even though they could not get what they claimed fully (Table 39). The percentage of respondents who would usually favour a settlement is much higher than the percentage who would favour a settlement in an actual case. This is quite understandable as people are less inclined to express a definite view on an actual case. This preference for a settlement is also reflected in another question where respondents of adjourned hearings were asked if they thought it better to have the case settled. An overwhelming majority opted for settlement. Those who did not think it better to have the case settled seemed to have valid reasons for it (Table 40).

Table 39: Whether would settle if did not get full amount claimed

Q: Even though you may not get what you claimed fully, would your company favour a settlement?

| | Filing – first-time claimant (company) |
|---|---|
| Yes | 7 (29.2) |
| No | 9 (37.5) |
| Don't know | 7 (29.2) |
| Refused | 1 |

Q: Even though you may not get what you claimed fully, would your company usually favour a settlement?

| | Filing – second-time claimant (company) |
|---|---|
| Yes | 17 (50) |
| No | 11 (32.4) |
| Don't know | 4 (11.8) |
| Refused | 2 |

Table 40: Whether would have been better to have the case settled

Q: Having seen something of the hearing, do you think it would have been better to have settled?

(This question is administered only to respondents who indicated they could have settled the case without coming before the judge.)

| | Post-hearing (Adjourned hearings) |
|---|---|
| Yes | 15 (83.3) |
| No | 2 |
| Don't know | 1 |

Q: Why do you think that?

– Of the fifteen who thought it better to have settled:-

| | |
|---|---|
| Admitted liability | 1 |
| To save time and trouble (3 Blanks) | 11 |

– Of the 2 who did not think it better to have settled:-

| | |
|---|---|
| Request on other side unreasonable | 1 |
| Believed he was in the right | 1 |

As for the settled cases we came across, we asked respondents at what stage they decided to settle, who initiated the settlement and why they agreed to settle (Table 41). The answers show the tribunal has considerable influence over these matters. The high percentage of respondents (56.3) who only decided to settle after or during the hearing in court adds weight to the suggestion that some responsible be appointed person to screen off cases that could be settled without a hearing.

Table 41: Settled cases

Q: When did you both decide to settle?

| | |
|---|---|
| Immediately after notice of claim was served on defendant | 2 |
| Before coming to court | 1 |
| Before hearing in court | 4 (25) |
| After (or during) hearing in court | 9 (56.3) |
| Totals | 16 |

| Q: Who initiated the settlement? | |
|---|---|
| Initiated by | 7 (43.8) |
| Assisted by tribunal | 8 (50) |
| Innitiated by defendant & assisted by tribunal | 1 |
| Totals | 16 |

| Q: Why do you both agree to settle? | |
|---|---|
| Defendant admits liability | 8 (61.5) |
| Judge explains situation to them | 3 (23) |
| To avoid further trouble | 1 |
| Does not want to bother the adjudicator who asks them to settle | 1 |
| Totals | 13 (3 Blanks) |

**AFTERMATH**

So far, we have tried to assess the workings of the Small Claims Tribunal as perceived by members of the public at large selected at random as well as claimants and defendants we interviewed at the tribunal. As a diversion from those interviews during our five-week stay in the tribunal, some of our interviewers made detailed notes of the cases heard there. We also had the opportunity to interview the adjudicator, Mr John Pang, and his clerk, Mr Hung, at the close of our survey.

The notes of proceedings that we made covered eighteen cases in all. They are too small in number, and some of them too sketchy, to allow for any useful generalisation. Although those eighteen cases cannot furnish objects for serious study, they are a rich source of diversion. Quarrel scenes are not infrequent and the adjudicator has to keep peace between the parties as well as to coach them on the line of argument they can pursue.

This is the same sort of feeling that Mr John Pang had about his role as adjudicator in the interview we had with him. Mr Pang stated categorically he had three capacities in all – judge, plaintiff counsel and defence counsel. He said that parties did not generally frame their issues and he had to find the issues for them and advise them on the evidence if necessary. He would suggest that the parties settle if that was best for them in the circumstances. He did not think the informal proceedings would affect the fairness of the trial. Neither party can be represented by a lawyer and they can give evidence and cross examine each other in Cantonese, very often guided by the adjudicator. However, informal proceedings suffer from one setback. Some parties tend to make a row in the court room and it would tax the patience of the adjudicator whilst trying to maintain the dignity of the court. He was of the opinion that company claimants had a slight advantage over individual claimants as companies usually sought legal advice beforehand and company representatives who had been to the tribunal several times knew their issues. The duty would rest on the adjudicator to keep a balance between the two.

Mr Hung, clerk to the adjudicator, expressed some dissatisfaction as to the mode of service of notices. The present practice is to serve a notice on the defendant by registered post and the defendant may or may not turn up for the hearing. Service by registered post is not good service. As a result, a case may be put on and off several times and claimants have to go back and forth Mr Hung thought it would be better to abolish the present mode of service.

## CONCLUSION

In this part, we set the findings we made in the foregoing analysis against the five propositions in the extracts at the beginning of this paper. It should be noted, however, that the small number of responses we had on some questions certainly undermines the reliability of the generalizations we are going to make.

*Informal forum, simple procedure*

In the filing of claims, 20% of the first-time claimants required the assistance of tribunal staff in the completion of claim forms. Company claimants appeared to be in a much better position.

In preparing for a case, a substantial number of claimants and defendants (35.6% of the first-time claimants and 41.5% of post-hearing claimants and defendants) had no idea as to what evidence to bring before the adjudicator.

In arguing a case, 71.4% of the respondents found no difficulty and 28.6% found difficulty in doing so. One noticeable feature is that the percentage of respondents who experienced difficulty is higher in decided cases (41.2%) than in adjourned hearings (21.9%).

The knowledge that respondents had of procedural matters as tested in statements read out to them is on the whole meagre. The percentage of respondents who gave the wrong answers and those who said 'don't know' amounted to more than half in five of the seven instances. When we compared the answers of filing stage and post-hearing respondents, the score of the latter is even poorer in each of the four instances.

In view of the above findings, we would recommend the installation of tribunal officers to advise parties on questions of evidence and procedure and also to help them to reach a settlement in appropriate cases without resorting to trial.

*Exclusion of lawyers from the tribunal*

A question was posed to respondents drawn from the public at large if they wanted the services of a lawyer for a claim under $3,000. 45.8% said 'yes'. 39.8% said 'no'. 11.9% said 'depends'.

We would break up a lawyer's services at various stages of a case and see if the exclusion of lawyers from tribunal proceedings would create any serious handicap.

According to our findings, a lawyer's help is most needed when it comes to advising parties as to their chances in an action and how to prepare a case for trial. A considerable number of respondents sought legal advise before the filing of a claim (47.5%) and a lesser number in the course of hearing (32.2% of filing stage claimants intended to do so and 26.2% of post-hearing respondents actually did so). The solution seems to lie in the installation of tribunal efficers who would be responsible for giving legal advice.

In arguing their case, 71.4% of the respondnts experienced no difficulty. This is perhaps due to the fact that they had guidance from the adjudicator as to what line of argument to take and what evidence they should adduce. Nevertheless, 68.8% of the respondents said legal representation would make a difference to the result in their case. As had been shown in the foregoing analysis where respondents' opinions were set against the outcome of their cases, the answers given are not altogether reliable.

Except for legal advice in the preparation of a case, we are of the opinion that the exclusion of lawyers from tribunal proceedings does not create any serious inconvenience.

*Any difference between company and individual claimants*

It was one of our objectives to find out if there is any difference between an individual claimant and a company claimant in terms of their knowledge of the tribunal, their perception of its proceedings and whether company claimants are in a more advantageous position. In this we have failed, for the following reasons.

Firstly, we did not find out the proportion of 'second-time' company claimants to individual claimants. Although we had interviewed 34 'second-time' company claimants, we did not ascertain the number of 'second-time' company claimants over a comparatively lengthy period of time. Since we do not know how numerous 'second-time' company claimants are, it is not very

meaningful to assess the advantages a 'second-time' company claimant may have over an individual defendant. It is still more difficult to draw any inference as to whether the tribunal has become, in the eyes of the small man, a debt-collecting agency for corporations.

Secondly, in planning questionaires, we did not set questions with the aim of comparing 'second-time' company claimants with first-time individual claimants. The comparison we did make was that of first-time individual claimants and first-time company claimants. No significant difference can be drawn. Table 26 (relating to respondents' preparation of a case) and Table 29 (relating to respondents' knowledge of the tribunal) both suffer from this drawback.

Thirdly, company representatives were interviewed only at filing stage and not at post-hearing stage. We tried to justify this at the beginning by saying that it is inappropriate for company representatives to answer questions relating to one's subjective appraisal of tribunal fairness. This may be so, but we overlooked other questions that may suitably be put to company representatives, for example, their knowledge of tribunal matters and their conduct of a case.

Fourthly, we did not adequately explore the question whether company claimants have any system when dealing with cases in the tribunal. Questions were only asked as to whether it was their practice to obtain legal advice beforehand and whether they would usually favour a settlement.

*Publicity given to the tribunal*

The publicity that has been given to the tribunal is far from satisfactory. Only 3.3% of the respondents drawn from the public at large knew to bring a claim for less than $3,000 in the tribunal. Of those who did not know they should bring their claims there, 45.8% had heard about the name. The ignorance of certain tribunal features (for example, the exclusion of lawyers and the use of Cantonese in tribunal proceedings) is particularly disconcerting.

The tribunal cannot be of great use to the community if people have not heard about it, do not know it is the appropriate court to bring their claims, or are largely ignorant of its basic features.

*Public confidence and acceptance*

The reactions of the 'public' that we did guage are limited to claimants and defendants of the tribunal. Questions on procedural and substantive fairness of the tribunal were put to the respondents. The answers are, on the whole, favourable to the tribunal. 69.2% said they would return to the tribunal to file claims in a future dispute.

Lastly, is it worthwhile to maintain the Small Claims Tribunal after it has run the trial period of three years? This would necessitate a reconsideration of the objectives of the tribunal, whether there is still a need for it, and whether the actual working of the tribunal has fulfilled its purpose. The tribunal has been in operation for only just over a year and the idea of inquisitorial tribunals is still a matter of some controversy. Nevertheless, one can say with fairness it has worked reasonably well so far. Looking at the trend in other jurisdictions where small claims courts have been in existence for quite some time, there is no reason why one should not be optimistic and anticipate more reforms to come.

**Appendix I**

**JUSTITIA – SURVEY ON THE SMALL CLAIMS TRIBUNAL**

Interviewer : _____

Time Begun : _____

Date : _____

**THE PUBLIC AT LARGE**

Interviewer Note :

i Interviewee who is
Uninterviewable (e.g. Deaf) ( )
Refused to be interviewed ( )

ii Place where the interview is conducted:
_____

iii Sex of the interviewee : M ( ) F ( )

iv Race of the interviewee : _____

v Language used by the interviewee :
_____

1 Suppose you had bought a TV set of less than $3,000. After two weeks, it stopped working. The dealer refused to fix it, replace it or give your money back. Would you think of suing the dealer?

NO ( )
YES ( )
DEPENDS ON THE AMOUNT ( )*
* Please specify the amount : _____
DEPENDS ON OTHER FACTORS ( )+
+ Please specify what factors (eg time, relationship of parties) _____

2 Suppose you were involved in a traffic accident, and suffered loss of less than $3,000, would you go to court to seek reparation?

NO ( )
YES ( )
DEPENDS ON THE AMOUNT ( )*
* Please specify the amount : _____
DEPENDS ON OTHER FACTORS ( )+
+ Please specify what factors (eg time, relationship of parties) _____

Continue questions 3 & 4 only if both the answers of questions 1 & 2 are 'NO'. Otherwise, continue questions 5 & 6.

3 (If would not sue in both instances) Why not?
_____
_____

4 Have you heard of the Small Claims Tribunal?
YES ( ) (CONT 7)
NO ( )

5 a Do you know which court to go to? (Please name the court)
_____
_____
(If answer 'Small Claims Tribunal', cont 6 & 7)
(If answer NOT 'Small Claims Tribunal', 5b)

b Have you heard of the Small Claims Tribunal?
YES ( ) (CONT 6 & 7)
NO ( ) (CONT 6)

6 Would you like to ask the help of a lawyer in enforcing your claim?
YES ( )
NO ( )

7 NB No 7 is relevant only if interviewee knows about the Small Claims Tribunal as indicated by the answers to Q 4 and 5 (a)/(b).

a How do you come to know about the Small Claims Tribunal? (Eg from friends, newspaper or fellow-workers etc.)
_____
_____
_____

b Could you please tell me what you know about the Small Claims Tribunal?
_____
_____
_____

c I shall now read to you some statements concerning the Small Claims Tribunal, please answer whether they are right or wrong or that you do not know.

i A person can only claim debts.
RIGHT ( ) WRONG ( )
DON'T KNOW ( )

ii The judge speaks to the parties in Chinese
RIGHT ( ) WRONG ( )
DON'T KNOW ( )

iii Claimants cannot withdraw their claims at any time
RIGHT ( ) WRONG ( )
DON'T KNOW ( )

iv Parties can settle the case themselves even after filing.
RIGHT ( ) WRONG ( )
DON'T KNOW ( )

v Parties can ask a lawyer to argue their case.
RIGHT ( ) WRONG ( )
DON'T KNOW ( )

vi A person can make any kind of claim.
RIGHT ( ) WRONG ( )
DON'T KNOW ( )

vii Parties cannot call witnesses to give evidence.
RIGHT ( ) WRONG ( )
DON'T KNOW ( )

**ALL INTERVIEWEES**

Note the age of the interviewee:
Under 20 ( ) 20-40 ( ) Over 40 ( )
If, in borderline cases, ask: (eg) Are you under 40?

1 What is your occupation? _____
_____

2 Could you please tell me what your income is?
BELOW $1,000 ( ) 2000-3000 ( )
1000-2000 ( ) 3000-4000 ( )
ABOVE $4,000 ( )

INTERVIEWER'S GENERAL REMARK:
_____
_____

## APPENDIX II

**JUSTITIA: SURVEY ON THE SMALL CLAIMS TRIBUNAL**

Interview : _____

Time Begun : _____

Date : _____

**CLAIMANTS AND DEFENDANTS OF THE SMALL CLAIMS TRIBUNAL:**

**FILING STAGE**

**All Claimants**

1 Is this claim that you filed a personal one or one on behalf of your company?
PERSONAL ( ) (CONT A)
COMPANY ( ) (CONT B)

**A Individual**

1 Is this the first time that you are involved in a proceeding in the Small Claim Tribunal as party?
YES ( ) (CONT III)
NO ( ) (CONT II)

*I Second Time Claimants ONLY*

1 In your last case, were you the claimant or the defendant?
CLAIMANT ( )
DEFENDANT ( )

2 As to the last time, what was the nature of your case? _____
_____

3 What was the amount claimed in your last case?
_____

4 As to the last time, did you have a hearing before a judge?
YES ( ) (CONT 5)
NO ( ) (CONT 6)

5 a Did you win or lose?
WON ( )
LOSE ( )

b If lost, Had you appealed?
YES ( )
NO ( )

c What was the amount awarded to the claimant by the judge in your last case?

_____

d Were you
VERY SATISFIED ( )
SATISFIED ( )
DISSATISFIED ( )
VERY DISSATISFIED ( )
with the way your last case was handled?

e If you were dissatisfied with your last case which you had lost, why don't you appeal?

_____

f Do you think it would have been better if you settled?
YES ( )
NO ( )
DON'T KNOW ( )

6 a If your last case did not go for a hearing, what eventually happened to the case?
(Ring appropriate number – do not prompt but use clarifying probes)
(i) Withdrew or did not pursue claim
(ii) Private settlement
(iii) Tribunal – assisted settement
(iv) Claimant/Defendant did not appear at hearing
(v) Defendant not accessible
(vi) Others (specify) _____

b Do you think it would have been better if your last case had continued all the way to a hearing?
NO ( )*
NO DIFFERENCE ( )*
DON'T KNOW ( )
* Please explain why you think that _____

_____

7 a Did you find the last proceeding difficult to conduct?
YES ( ) (CONT b)
NO ( )

b If yes, the reasons are: (DO NOT PROMPT FIRST)
(i) Inadequate opportunity in explaining your case
(ii) Not used to speaking in court
(iii) Not familiar enough with the law
(iv) Others (specify) _____

8 Did you know what withnesses and evidence to bring before the judge?
YES ( )
NO ( )

9 a Did you find the proceeding difficult to follow?
YES ( ) (CONT b)
NO ( )

b If yes, the reasons are: (DO NOT PROMPT FIRST)
(i) Inadequate opportunity in explaining your case
(ii) Not used to speaking in court
(iii) Not familiar enough with the law
(iv) Others (specify) _____

10 In handling your last case, would you say that the Tribunal was
VERY FAIR ( )
FAIR ( )
UNFAIR ( )
VERY UNFAIR ( )
(DO NOT PROMPT) DON'T KNOW ( )

*II First Time Claimants ONLY*

1 How did you find out about the Tribunal? (Eg from friends, fellow-workers, newspapers etc.)

_____

2 Could you please tell me briefly what is the nature of your claim? (Let interviewee try first, use exploratory and clarifying probes when necessary) _____

3 What is the purpose of your claim?

_____

4 When your claim is heard, what kind of information do you think the judge would need in order to decide the case?

_____

5 Would you say that you are more likely to win or to lose your claim?
WIN ( )
LOSE ( )
EQUAL CHANCES ( )
DON'T KNOW ( )

6 Did you need any assistance from the District Court Registry to help you file your claim?
YES ( )
NO ( )

7 Do you find them helpful?
YES ( )
NO ( )

8 Do you have any legal knowledge (prompt or explain if necessary)?
YES ( )
NO ( )
If yes, please specify which field._____

_____

9 According to your knowledge, can claimants hire legal representatives to argue their claims?
YES ( )
NO ( )
DON'T KNOW ( )

10 Did you try to ascertain your legal position before filing this claim?
YES ( )*
NO ( )
* From what kind of person? _____

_____

11 Would you try to obtain legal advice in the course of the hearing?
YES ( )*
NO ( )
DON'T KNOW ( )
* From what kind of person? _____

_____

12 Please answer Right or Wrong to the following questions or tell me if you do not know whether it is right or wrong.
RIGHT ( )
WRONG ( )
DON'T KNOW ( )

a The judge (adjudicator) speaks Chinese.
b Parties can hire legal representatives to argue their cases.
c The decision of the Small Claims Tribunal is final.
d The party who wins can ask the adjudicator to him.
e If the claim fails, the claimant must pay compensation to the defendant for wasting the defendant's time.
f Claimants cannot withdraw their claims once started.
g If a witness refuses to come to court, neither the parties nor the court can compel him to do so.
h The party who loses has a right to appeal.

**III All Claimants**

Interviewers note:
1 Sex of the interviewee: M( ) F( )
2 Age of the interviewee:
Under 20 ( )
20 – 40 ( )
Over 40 ( )
If in borderline cases, ask (eg): Are you under 40?

INTERVIEWER'S GENERAL REMARK:

_____

_____

**B Company**

1 What is the nature of your present claim?

_____

2 What is the amount claimed?_____

_____

3 Is this the first time that your company has filed a claim?
YES ( ) (CONT II)
NO ( ) (CONT I)

*I Second Time Claimants ONLY* (See back)
*II First Time Claimants ONLY*

1 How did you find out about the Tribunal? (Eg from friends, fellow-workers, newspapers, etc.)

_____

2 When your claim is heard, what kind of information do you think the judge would need in order to decide the case?

_____

_____

3 Did you need any assistance from the District Court Registry to help you file your claim?
YES ( )
NO ( )

4 Do you find them helpful?
YES ( )
NO ( )

5 Did your company try to ascertain its legal position before filing this present claim?
YES ( )
NO ( )
* From what kind of person? _____

_____

6 According to your knowledge, can claimants hire legal representatives to argue their claims?
YES ( )
NO ( )
DON'T KNOW ( )

7 Would your company obtain legal advice in the course of the hearing?
YES ( )
NO ( )
DON'T KNOW ( )
* From what kind of person? _____

_____

8 Even though you may not get what you claimed fully, would your company favour a settlement?
YES ( )
NO ( )
DON'T KNOW ( )

9 Please answer Right or Wrong to the following questions or tell me if you do not know whether it is right or wrong.
RIGHT ( )
WRONG ( )
DON'T KNOW ( )

a The judge speaks Chinese.
b Claimant cannot withdraw their claims once started.
c The party who wins can ask the adjudicator to award costs to him.
d The decision of the Small Claims Tribunal is final.
e Parties cannot call witnesses to give evidence.
f If the witness refuses to come to court, neither the parties nor the court can compel them to do so.
g The party who loses has a right to appeal.
h If the claim fails, the claimant must pay compensation to the defendant for wasting the defendant's time.

*I Second Time Claimants ONLY*

1 How many times apart from the present time have you tried filing a claim?

_____

2 Are your defendants mostly companies or individuals?
COMPANIES ( )
INDIVIDUALS ( )

3 Did your claims usually come before a judge for hearing (ie there is no withdrawal of claims or settlement outside court?
YES ( )
NO ( )
DON'T KNOW ( )

4 Does your company mostly try to ascertain its legal position before filing a claim?
YES ( )*
NO ( )
DON'T KNOW ( )
* From what kind of person? _____

_____

5 In the course of the hearings, does your company mostly obtain legal advice?
YES ( )*
NO ( )
DON'T KNOW ( )
* From what kind of person? _____

_____

6 Even though you may not get what you claimed fully, would your company usually favour a settlement?
YES ( )
NO ( )
DON'T KNOW ( )

The following questions are concerned with your last claim.

7 What is the nature of your last claim?_____

_____

8 What is the amount claimed?_____

_____

9 As to the last time, did you have a hearing before a judge?
YES ( ) (CONT 10)
NO ( ) (CONT 11)

10 a Did you win or lose?
WON ( )
LOSE ( )
i If lost, did your company appeal?
YES ( )
NO ( )
ii What was the amount awarded?_____

_____

11 a If your last claim did not go for a hearing, what eventually happened to the case? (Ring appropriate number, do not prompt but use clarifying probes)
i Withdrew or did not pursue claim
ii Private settlement
iii Tribunal-assisted settlement
iv Claimant/defendant did not appear at hearing
v Defendant not accessible
vi Others (specify)_____

**III All Claimants**

1 What business is your company carrying on?

_____

2 Is your company a
SOLE PROPRIETORSHIP ( )
PARTNERSHIP ( )
or LIMITED COMPANY ( )

3 How many people do your company employ?

_____

4 What is your post in your company? _____

_____

INTERVIEWER'S GENERAL REMARK: _____

_____

Interviewer : _____

Time begun : _____

Date : _____

**POST HEARING STAGE**

1 What is the nature of the claim in your case?

_____

2 What is the amount claimed in your case?

_____

3 Do you have any legal knowledge?
YES ( )
NO ( )
If yes, please specify which field _____

_____

4 Have you got any assistance in ascertaining your legal position?
YES ( )*
NO ( )
* From what kind of person? _____

_____

5 Did you find it difficult to argue your case before the judge?
YES ( )
NO ( )

6 Do you know what witnesses and evidence to bring before the judge?
YES ( )
NO ( )

7 In what ways do you think things could be made easier for parties at a hearing? Please specify _____

8 If a party is not satisfied with the judge's decision, do you think he can appeal against it?
YES ( )
NO ( )
DON'T KNOW ( )

9 If you have a future dispute, would you consider coming here to file a claim?
YES ( )
NO ( )*
DON'T KNOW ( )
* (If NO) Why not? _____

10 Please answer right or wrong to the following questions or that you do not know whether it is right or wrong?
RIGHT ( )
WRONG ( )
DON'T KNOW ( )
a Claimants cannot withdraw their claims once started
b The party who wins can ask the adjudicator to award costs to him
c If a witness refuses to come to the court, neither the parties nor the court can compel him to do so
d If the claim fails, the claimant must pay compensation to the defendant for wasting the defendant's time.

11 Has your case now been decided or will you have to return for the hearing to continue?
CASE DECIDED ( ) (CONT I)
CASE CONTINUES ( ) (CONT II)

**I Decided Cases**

1 Did you win or lose?
WON ( )
LOSE ( )
2 How much had the judge awarded the claimant? _____
3 Do you think the judge has explained clearly why he reached this decision?
YES ( )
NO ( )
DON'T KNOW ( )
4 Do you think the judgment would be different if your case had been argued by a legal representative?
YES ( )
NO ( )
DON'T KNOW ( )
5 Considering the procedure that has been adopted, do you think that the trial is
VERY FAIR ( )
FAIR ( )
UNFAIR ( )
VERY UNFAIR ( )
(DO NOT PROMPT) DON'T KNOW ( )

**II Adjourned Hearings**

1 So far, do you think you will probably win or lose?
WIN ( )
LOSE ( )
DON'T KNOW ( )
2 a Could you have settled the case without coming before the judge?
YES ( ) (CONT b & c)
NO ( )
(DO NOT PROMPT)
DON'T KNOW ( )
b (If yes) After having seen something of the hearing, do you think it would have been better to have settled the case?
YES ( )
NO ( )
c Why do you think that?

**III All Claimants**

Interviewer Note
1 Sex of interviewee M ( ) F ( )
2 Age of interviewee
Under 20 ( )
20 – 40 ( )
Over 40 ( )
If on boderline cases, ask: (eg) Are you over 40?
3 What is your occupation and what position are you in? _____

Interviewer's General Remarks: _____

_____

**POST HEARING STAGE**

**Setted Cases**

**All Claimants & Defendants – Individuals ONLY**

1 What is the nature of the claim in your cases?

_____

2 What is the amount claimed in your case?

_____

3 Do you have any legal knowledge?
YES ( )*
NO ( )
* If yes, please specify which field _____

_____

4 Have you go any assistance in ascertaining your legal position?
YES ( )*
NO ( )
* From what kind of person?
5 Do you know what witnesses and evidence to bring before the judge?
YES ( )
NO ( )
6 If a party is not satisfied with the judge's decision, do you think he can appeal against it?
YES ( )
NO ( )
DON'T KNOW ( )

7 If you have a future dispute, would you consider coming here to file a claim?
YES ( )
NO ( )*
DON'T KNOW ( )
* If no, why not? _____

8 Please answer right or wrong to the following questions or that you do not know whether it is right or wrong.
RIGHT ( )
WRONG ( )
DON'T KNOW ( )

a Claimants cannot withdraw their claims once started

b The party who wins can ask the adjudicator to award costs to him

c If a witness refuses to come to court neither the parties nor the court can compel him to do so

d If the claim fails, the claimant must pay compensation to the defendant for wasting the defendant's time.

9 Why do you both agree to settle?_____

_____

10 When did you both decide to settle?
Immediately after notice of the claim is served on the defendant ( )
Before coming to court ( )
Before hearing in the court ( )
After (or during) hearing in the court ( )

11 Who initiated the settlement?
Initiated by the defendant ( )
Initiated by the claimant ( )
Initiated by the Tribunal ( )

12 What is the result of the settlement?

_____

13 Before the settlement, did you think you would win or lose?
WIN ( )
LOSE ( )
DON'T KNOW ( )

14 Do you think the result would be different if your case had been argued by a legal representative?
YES ( )
NO ( )
DON'T KNOW ( )

Interviewer's note

1 Sex of interviewee M( ) F( )

2 Age of interviewee
Under 20 ( )
20 – 40 ( )
Over 40 ( )
If on borderline cases ask: (eg) Are you under 40?

3 What is your occupation and what position are you in? _____

INTERVIEWER'S GENERAL REMARKS:

_____

# D v NATIONAL SOCIETY FOR THE PREVENTION OF CRUETY TO CHILDREN

*Linda Siddall*

## INTRODUCTION

The argument in *D v NSPCC* concerns a short interlocutory point on discovery. The plaintiff requires the defendant society to make available for inspection a scrap of paper on which is written a name and address. Even if the plaintiff wins the point in the forthcoming appeal to the House of Lords, the information may not advance her suit in any material way. Yet ironically, her paperchase has raised points of constitutional importance and prompted a warning that the wrong decision could lead to a 'Star Chamber society' in England.

## THE FACTS

According to her consultant psychiatrist, D was a lady vulnerable to nervous upsets. D had a child. The NSPCC is an organisation incorporated by Royal Charter to protect children. It received information that D was mistreating her child. It despatched its inspector, Mr Jenkins, to D's house to investigate. The child was in perfect health. Mr Jenkins' visit allegedly caused D severe nervous shock and depression. She demanded to know the name of the informant, but Mr Jenkins and the society refused to divulge it. D's solicitors took out an originating summons to get the name in advance of bringing a action against the informant. The application was refused by Master Jacob. D's solicitors then issued a writ against the society claiming damages. The writ alleged Mr Jenkins had neglected to make proper enquiries about the informant's bona fides, and carried out his investigation at D's home improperly. The statement of claim also contained a paragraph stating that the identity of the informant was unknown to the plaintiff, who required discovery to enable her to initiate proceedings against the informant if so advised. The society delivered a defence claiming the informant's identity was expressly revealed to it in confidence and it was in the public interest that such confidentiality should be respected. This time Master Jacob ordered disclosure. Croom-Johnson J reversed his decision. D appealed to the Court of Appeal.

## A FISHING EXPEDITION?

Neither of the first two steps taken by D and her solicitors – a letter to the society and the originating summons – contained any allegation of liability by the society itself. Both were designed simply to elicit the informant's name in order to bring an action against her.[1] Only when both attempts failed did D allege negligence by Mr

1 For ease of reference I will follow Lord Denning and assume the informant is female.

Jenkins, and even then the statement of claim expressly indicated the intention, following discovery, to sue the informant.

The possibility that the action against the NSPCC was thus a mere 'fishing expedition' to get the informant's name clearly troubled Lord Denning.[2]

The general rule is that an action for discovery cannot be brought against a complete stranger to the main action contemplated – the proper procedure in such a situation is to call the stranger as a witness (the 'mere witness' rule).

But the right in some circumstances to bring an action against an innocent party for discovery of documents relating to an offending third party was established a full century ago in *Orr v Diaper*[3] and reaffirmed in the recent case of *Norwich Pharmacal Co v Commissioners of Customs and Excise.*[4] However, it required the innocent defendant to have, in the words of Lord Reid,[5] 'got mixed up in the tortious acts of others so as to facilitate their commission' before he would 'come under a duty to assist the person who had been wronged by giving full information and disclosing the identity of the wrongdoer.'

The difference between *Pharmacal* and *Orr v Diaper* on the one hand and *D v NSPCC* on the other, as Lord Denning points out,[6] is that in the former 'it was established that the wrongdoing had actually taken place.' Whereas in *D v NSPCC,* the informant might well prove to be blameless, having acted from a mistaken but genuine belief that the child was being battered.

The NSPCC's concession that D's allegations in her statement of claim would, if established,[7] constitute a good cause of action thus seems rather surprising. One possible reason why no application was made to have the statement of claim struck out might be that the society hoped to have the confidentiality it offered to informants legally recognised.

**THE DEFENCE**

Invoking Rule of Supreme Court Order 24 rule 15,[8] the society claimed public interest required that the document containing the informant's identity should not be produced. The claim was based on two grounds:

i) *The broad ground* [9] Wherever and whenever there is a public interest to be served by withholding documents or information from disclosure in legal proceedings, the court has a duty to weigh that interest against the public interest in the administration of justice, and to refuse disclosure if the balance tilts that way.

ii) *The narrow ground* The society is authorized by the Secretary of State to bring care proceedings under the Children and Young Persons Act 1969. Thus it functions in the sphere of the public

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2 At p 998g.
3 (1876) 4 Ch D 92.
4 [1974] AC 133.
5 ibid at p 175.
6 At p 998.
7 D alleged she suffered ' a severe degree of clinical depression' following Mr Jenkins' visit. Assuming she could convince the court of this, four points fall to be considered in deciding whether an actionable wrong occurred: (a) bad faith, (b) duty, (c) forseeability and (d) policy.
8 RSC Order 24 r 15 states:
'The foregoing provisions of this order shall be without prejudice to any rule of law which authorises or requires the withholding of any document on the ground that disclosure of it would be injurious to the public interest.'
This rule was new in 1965, following the Court of Appeal's decision in *Re Grosvenor Hotel* [1965] Ch 1210 that the former rule was ultra vires insofar as it purported to alter (and not merely to state) the law (cf p8).
9 As paraphrased by Lord Scarman at p 1002.

service of the state and can claim what Scarman LJ termed 'Crown privilege or a modern extension of Crown privilege'[10] to protect the confidentiality offered in that service.[11]

## CROWN PRIVILEGE AND PUBLIC INTEREST

### (a) The position prior to *Duncan* v *Cammell Laird*

The nature of Crown privilege in civil cases prior to *Duncan v Cammell Laird* is set out in the judgment of Lord Simon[12] in that case. Two points of interest emerge:

1 *Where the Crown was a party to the action*

The common law position was that it could not be compelled to produce any document whatsoever. This was clearly a privilege in the full sense of that word, and still existed at the time of *Duncan,* though Lord Simon was at pains to explain that 'in practise, for reasons of fairness and in the interests of justice, all proper disclosure and production would be made.'[13] Lord Simon does not indicate who, in such circumstances, would decide what constituted 'proper production'.

2 *Where the Crown was not a party to the action*

Documents might still be withheld if the Crown either resisted a subpoena to produce them or intervened between parties to the action, to prevent production by one of them. In either case, the ground of objection strictly speaking would be injury to the public interest, not Crown privilege in the sense of prerogative as applied where the Crown itself was a party. However, in the Court of Appeal, counsel for Duncan argued that the procedure laid down in Rules of Supreme Court Order 31 rule 19(A) sub-rule 2[14] was applicable.

The rule is discussed in the Court of Appeal judgments, notably by du Parcq LJ.[15] Firstly, the learned judge doubted whether, on the facts of *Duncan,* the refusal to produce the documents was a claim of privilege within the meaning of rule 19(A). Secondly, he stated that, assuming the rule did cover the situation in *Duncan,*

> '[W]here a responsible Minister of the Crown or head of department states on oath that the production by one of the litigants of a document would be injurious to the public interest, there can be very few cases in which it would be a proper exercise of the judge's discretion to look at the document to try to make up his own mind whether ... the Minister was right ...'

Interestingly, and perhaps with some prescience, du Parcq LJ went on to add:

'If any attempt is made to use rule 19(A) sub-rule 2 as laying down a general rule that in all cases of this kind the judge may look at the documents, one might just as well argue that under Order 31 rule 14,[16] which is the general rule enabling the court to order production of documents, the judge might in his discretion order any document to be produced without regard to the very well settled rules which are to be found, not in the Rules of the Supreme Court, but in the decisions of the courts subject to which those Rules have been made.'

So after reviewing those decisions, the Court of Appeal held that the normal practice of the court was to accept the affidavit of a minister not party to the action that production of certain documents would be against the public interest,

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10 ibid.
11 Both defences failed. The NSPCC was given leave to appeal.
12 [1942] AC 624 at 633.
13 ibid.
14 The rule state:
'Where on an application for an order of inspection, privilege is claimed for any document, it shall be lawful for any court or judge to inspect the document for the purpose of deciding as to the claim of privilege.'
15 [1941] All ER 587, 647.
16 Order 31 r 14 of 1941 states:
'It shall be lawful for the court or a judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter as the court or judge shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just.'

and neither to order their production in the action nor to have them produced to the court for it to form an opinion on whether the view expressed by the minister was correct. This practice, the court held, had been established at least since 1860[17] and upheld most recently in *Ankin v London & North Eastern Ry Co.*[18]

However, both MacKinnon and du Parcq LJJ thought the courts had at least a theoretical right to look at such documents, though such a right, if it existed, should be exercised only very rarely and when justified by unusual facts (such as those in *Robinson* v *State of South Australia).*[19]

### (b) The Effect Of Duncan v Cammell Laird

In a nutshell, the House of Lords' decision affirming the Court of Appeal decision in *Duncan* granted the Crown a privilege where it was *not* a party to an action approaching that recognised where it *was* a party.

The decision relied heavily on the early House of Lords case of *Earl v Vass,*[20] where the Commissioners of Customs intervened in an action between third parties to object to production of correspondence between themselves and the Earl of Home (defendant). The question, according to Lord Eldon LC[21] was whether the Commissioners were under a duty to protect the relevant documents 'upon the grounds stated', namely public policy. After giving details of those grounds, Lord Eldon concluded that:'Upon the whole, it does appear to me that it would be a dangerous thing indeed if this (ie production) were permitted.'

It seems clear that Lord Eldon based his decision specifically on the facts of this case, and did not assume any wide principle to the effect that *any* objection by the Crown on grounds of public policy was automatically conclusive.

However, purporting to follow *Earl v Vass,* Lord Simon, speaking for the House in *Duncan,* decided that an objection validly taken to production on the ground that it would be injurious to the public interest was conclusive.

This, as the word 'validly' indicates, is not so absolute a privilege as that allowed the Crown where it was itself a party to the action (where no grounds for refusing production had to be given). Lord Simon held that the mere fact that the minister did not wish to produce the document would not be adequate. Production should only be withheld (to quote the headnote):

> 'when the public interest would otherwise be damnified, as where disclosure would be injurious to national defence or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.'

Where the objection was thus validly taken, even the court should not require to see the document.

The decision thus created a new Crown privilege, effectively placing ministers beyond the reach of the courts where the Crown was not a party.

### (c) Historical Note

The Lords' rather startling unanimity in granting such a privilege to the executive should be seen in the context of 1942. The understandable national sentiment was to give every assistance to the government in the war effort. The bona fides and specially qualified position of ministers to judge what was in the public's best interest in terms of national security was not to be questioned[22] – particularly when the issue concerned design plans for a submarine.

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17 *Beatson v Skene* S H & N 838.
18 [1930] 1 KB 527.
19 [1931] AC 704.
20 (1822) 1 Shaws App 229.
21 ibid at p 237.
22 *Duncan v Cammell Laird*1 appears in the same volume of the Law Reports as that monument to illiberal thinking, *Liversidge v Anderson* [1942] AC 206.

> 'After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation.' [23]

While not perhaps justifying Lord Simon's dictum on the conclusiveness of a ministerial objection where the Crown was not a party, such considerations at least make it understandable. But its standing became even more questionable in 1947 with the passing of the Crown Proceedings Act. By section 13 of this Act, the Crown became subject to the same rules of procedure regarding discovery as any other party litigant.

This meant that as a litigant the Crown was liable to discovery orders made by the court, whilst in the *Duncan v Cammell Laird* type situation it was able to invoke privilege to resist any such order – in other words, the anomalous situation then existed where, theoretically at least, the Crown enjoyed a more privileged position when it was not a party to proceedings than when it was a party.[24]

After the war ended, the bureaucracy of government extended apace, and with it the claims of Crown privilege.[25] Predictably, with the great national danger over, the courts began to reassert themselves in controlling the executive. This led to the Lord Chancellor making a statement[26] in the House of Lords in 1956 setting out guidelines to be followed by ministers in claiming Crown privilege. However, dissatisfaction remained.

(d) *Re Grosvernor Hotel*[27] and *Conway* v *Rimmer*[28]

On January 1, 1964, the short-lived Rule of Supreme Court Order 24 rule 15 (predecessor to the current rule)[29] came into force. This stated:

> 'The court shall not – (a) make an order under rr 12 or 13[30] in relation to a document or (b) inspect a document under r 14(2)[31] if a statement is duly made on behalf of the Crown that the production of that document to the court or, as the case may be, for inspection, would be injurious to the public interest.'

The rule thus seems to bestow a cloak of utmost respectablity on Lord Simon's dictum in *Duncan's* case. Predictably, it provoked a howl of outrage from the Court of Appeal presided over by Lord Denning MR, and in *Re Grosvenor Hotel,*[27] which opportunely came before the court just seven months later in July 1964, it was held that the rule 'insofar as it purports to alter (and not merely state) the existing rule is ultra vires.'

This round of the battle clearly went to Lord Denning, as the rule was swiftly replaced by the current Order 24 rule 15. However, its brief appearance provided a golden opportunity for once more reviewing the ambit of Crown privilege and stating the court's stance towards it.

In general terms, the latter was made crystal clear in some forceful statements by Lord Denning and Lord Salmon: 'It is the judges who are the guardians of justice in this land.'[32] 'There is no droit administratif in this country.'[33]

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23 [1942] AC 624 at 643.

24 This situation arose through the courts for some time accepting Lord Simon's dictum on the conclusiveness of a ministerial affidavit as part of the ratio decidendi of *Duncan's* case. In fact, as has been frequently pointed out, it was obiter, and also
- i) not supported by authority (Lord Simon quotes only Pollock CB in *Beatson v Skene*, without mentioning the qualifications also laid down in that case or other contrary authorities);
- ii) incorrect in relation to Scottish law – see *Glasgow Corp v Central Land Board* [1956] SC (HL) 1 HL; and
- iii) at complete variance with the Privy Council decision in *Robinson* which Commonwealth countries have consistently followed in preference to *Duncan.*

25 For example in 1964, Lord Harman was to remark, in *Re Grosevenor Hotel* [1965] Ch 1210 at 1248: 'I seem to detect a desire in the official mind to push ever forward the frontiers of secrecy. This is a process I regard with distaste.'

26 The statement is set out and stringently criticised by Lord Reid in *Conway v Rimmer* [1968] 1 A11 ER 874 at 1006.

27 [1965] Ch 1210.

28 [1968] 2 WLR 998.

29 cf fn 8.

30 rr 12 and 13 related to orders for production for inspection or to the court.

31 r 14(2) provides for inspection of documents by the court where privilege was claimed.

32 ibid at p 1245.

33 ibid at p 1261.

More specifically, the court drew a sharp distinction between privilege claimed for the contents of a particular document, and that claimed for a class of documents. In the former case, they were prepared to accept the minister as best judge. But where a whole class of documents was alleged to be privileged in order, as Lord Harmon put it,[34] 'to shroud the authors in anonymity on the vague pretext that candour will be impaired if secrecy is not observed' they held that the minister must both describe the nature of the class and give reasons why it should not be produced.

After which, the court could, if it chose, exercise its power to override him. In an obvious effort to be tactful and not antagonise the executive unduly, the judges delicately termed this a 'residual power' which would be used 'very sparingly'.[35]

*Re Grosvenor Hotel*[27] thus cleared the way for *Conway v Rimmer*[28] three years later, where the House of Lords put its authoritative stamp of approval on the Court of Appeal's assessment of Crown Privilege in relation to classes of documents.

The effect of these two cases was to do away finally with Crown *privilege* as such, leaving simply a *duty* on the Crown to protect the national interest by making an objection to discovery of documents for the court's consideration where it felt this necessary. This duty, the court held, was equally owed by the court and the litigants even if the Crown made no objection.[36]

## CHANGING CONCEPTS

Until the 1960s, it seems to have been fairly happily accepted that 'the public interest' meant matters relating strictly to the central government and affecting the nation as a whole, either in affairs of state or in the proper functioning of the public service. The only problems concerned *who* should decide when the public interest needed protecting in litigation, and *what classes* of documents the public interest could be said to include.

In *Re Grosvenor Hotel,*[27] however, two more problems were foreshadowed:

i) What is the public service? and
ii) Which public interest?

i) *The Public Service* – Previously, with a comparatively compact central government operating in well-defined areas, the parameters of the public service were not hard to draw (even if they were taken to include an incorporated trading company!).[37] But with the rapid post-war growth of the welfare state and its nationalization of industries. there was a mushrooming not only of Government activity, but also of bodies with statutory powers which could claim to be functioning as organs of government.

ii) *The Public Interest* – From treating this term as capable of only the one meaning suggested above, the courts gradually came to use it in another context, namely 'the public interest in the administration of justice.'[38] From there it was but a short step to making the term a positive Hydra. For if there is a recognised public interest in disclosure there may equally be a *recognisable* interest in maintaining confidentiality generally – as Lord Denning has argued on a number of occasions.[39]

The emerging problems with these two phrases can be seen in a passage from Lord Salmon's judgment in *Re Grosvenor Hotel:*[40]

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34 ibid at p 1245.
35 ibid at p 1124.
36 ibid per Lord Reid at p 1013.
37 *Smith v East India Co* 1 Ph 50.
38 Per Lord Reid, *Conway v Rimmer* [1968] 2 WLR 998 at 1014:
'The House ought now to decide that the courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice.'
39 See section on 'Fingers in the dyke?' p 66 et seq.
40 [1965] Ch 1210 at 9259.

> 'I appreciate that it is of the utmost importance in the public interest that the public service should function properly .... It is also very much in the public interest that the great nationalized industries and commercial undertakings generally should function properly. Indeed, the whole national economy and public weal depends upon their doing so.'

Lord Salmon is clearly using 'public interest' to denote two totally different concepts. The 'public interest that the public service shall function properly' is that aristocratic creature defined in *Duncan v Cammell Laird*[12] for which Crown privilege could be claimed. The public interest that 'the great nationalised industries and commercial undertakings generally should function properly' is a far more commonplace animal, more akin to 'community concern', attracting no special protection.

Where the sense in which the term is being used is fairly clearly set out as here, there is not too much difficulty. But since *Conway v Rimmer*[28] 'public interest' standing alone has become the accepted shorthand to denote what used to be Crown privilege, and confusion can easily arise.

Recent cases has shown the courts, ostrich-like, pretending either that these problems need not be considered *(Re D Infants)*[41] or that they will go away if not inspected too closely *(Rogers v Home Secretary)*.[42]

*Re D Infants,*[41] was an interlocutory appeal concerning two children in care of foster parents under the auspices of a county council. In a suit between the parents for custody, the mother sought disclosure of the council's case-notes to assist in cross-examining their child care officers and the foster parents. The council appealed against disclosure on the ground that it was of great importance for child care officers to be completely free and frank in making their reports, and such freedom and frankness would be imperilled if they were liable to be disclosed.

The court allowed the appeal on the grounds that disclosure would be i) contrary to practice in custody cases and ii) 'contrary to public policy, because these records must not be kept by people looking over their shoulders in case they should be attacked for some opinion which they may feel it is their duty to express.'[43]

This might be summarised by saying disclosure would be injurious to the proper functioning of the county council. Such a council is not, of course, part of the public service in the *Duncan v Cammell Laird* sense – a fact which none of the three appeal judges chose to consider, though some importance was attached to the fact that the making and keeping of records in child care cases is part of a local authority's statutory obligation under the Children Act 1948.

*Rogers v Home Secratary*[42] involved two appeals concerning the Gaming Board. Part of the board's statutory function was to screen applicants for gaming licences under that Act, to eliminate the criminal elements that had been gaining control of gaming in Britain. The police were required to help by providing the board with information about applicants. A letter from the police to the board about one such applicant, Rogers, somehow came into Mr Rogers' hands. He started criminal libel proceedings and issued witness summonses to the chief constable and the secretary of the Board to give evidence and produce certain documents, including the letter. The Home Secretary applied for an order of certiorari to set both these aside, and the board made a similar application on behalf of its secretary.

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41 [1970] 1 All ER 1088.
42 [1973] AC 388.
43 [1970] 1 All ER 1088 at 1090 per Harman LJ.

The Home Secretary's application of course invoked and was granted on the ground of Crown privilege. Three[44] of the judges who heard the ensuing appeals also sat on the bench which five years ealier had decided *Conway v Rimmer*[28] Lord Reid's judgments in the two cases exemplify an interesting change of judicial stance.

In *Conway v Rimmer,* Lord Reid broadly accepted the definition in *Duncan's case* of the two grounds on which Crown privilege could be claimed, the second being, of course, injury to the functioning of the public service. But he was at some pains to establish that the court was not thus handing the executive a wide licence for secrecy:

> 'There are now many large public bodies such as British Railways and the National Coal Board, the proper functioning of which is very necessary for many reasons including the safety of the public. The Attorney-General made it clear that Crown privilege is not and cannot be invoke to prevent disclosure of similar documents made by them or their servants, even if it were said that this is required for the proper and efficient functioning of that public service.'[45]

Five years later in *Rogers,* Lord Reid stated summarily:

> 'I do not think that "the public service" should be construed narrowly. Here the question is whether the withholding of this class of documents is really necessary to enable the board adequately to perform its statutory duties. If it is, then we are enabling the will of Parliament to be carried out.'[46]

This seems a startling extension of the categories able to claim Crown privilege. If this statutory body, why not every statutory body? And why the apparent inconsistency? The answer is that it is no inconsistency at all, or at least so the noble lord sought to demonstrate in the last paragraph of his judgment in *Rogers:*[47]

> 'I do not think the right to withhold these documents depends on or flows from any privilege. It arises from the public interest, and the board are entitled to assert that public interest.'

Shades of Catch 22. It has already been shown that since *Conway's case,* 'privilege' as such ceased to exist and was replaced by 'public interest.' Nevertheless, *Conway* did lay down that where an objection to disclosure of a class of documents was taken on the grounds of public interest, it had to be taken by a minister to protect the functioning of *the public service.*

It is a large step to hold that a quasi-government body can claim such a protection of its own accord.[48]

There has of course always been one major exception to the strict definition of 'the public service' in terms of protection from discovery, and that is the police.

The police are paid from the rates and controlled by their local authorities, but their role in serving the national interest and consequent right to protection similar to that allowed the public service has never been questioned. Their role is unique and unlikely to form the base of any argument for extending the 'public service' concept.[49]

Such is not the case with a body like the Gaming Board. It is instructive to compare the establishment and function of this Board with, for example, the National Coal Board.

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44 Lord Reid, Lord Pearce and Lord Morris of Borth-y-Gest.
45 ibid at p 1005.
46 [1973] AC 388 at 401.
47 [1973] AC 388 at 402.
48 Lord Reid need not have gone so far. The Board's secretary was already protected by the order granted to the Home Secretary. The Board's claim to protection, as shown in the summary of counsel's argument at p 397, was on an alleged independent right to confidentiality, which none of the learned judges choose to discuss..
49 This is perhaps debatable with the possible development of fast breeder nuclear reactors in England and the consequent need that would arise (or so it was alleged recently in the Sunday Times) for privately maintained, highly trained, armed squads to protect the nuclear plants and the shipments of plutonium from terrorist attack.

The Gaming Board was set up by section 10(1) of the Gaming Act 1968. Its members are appointed by the Secretary of State for the Home Department. Its function, as Lord Salmon[50] put it, is 'to keep gaming clean in this country by ensuring that it does not get into the hands ... of any undesirable person.'

The National Coal Board was set up by the Coal Industry Nationalisation Act 1946. Its members are appointed by the Minister of Power. Its functions are firstly, to ensure that coal is brought to the surface and secondly, by section 1 (1)(c), to 'make supplies of coal available of such quality and sizes, in such quantities and at such prices as may seem to the Board best calculated to further the public interest in every respect.'

Comparing the two bodies, it would seem that the rule of the National Coal Board is by far the more important in terms of the national interest (certainly, industry would not grind to a halt and the government fall if the Gaming Board ceased functioning tomorrow – but that was the effect of the miners' strike in 1973).

It is difficult to see, therefore, how Lord Reid and his brother judges can fail to accept that, whether or not they intended it, *Rogers*[51] case made a major breach in the dyke containing 'the public service.'

It is equally difficult to see how such a breach will not be utilised, when the appropriate factual situation occurs, by other quasi-government bodies.

**FINGERS IN THE DYKE?**

The attempt was of course made in *D v NSPCC*, in what the judges termed the 'narrow submission' in the society's defence. Briefly, counsel argued that the NSPCC is authorised by the Secretary of State to bring care proceedings under section 1 of the Children and Young Persons Act 1969; such proceedings are brought in the public interest; confidentiality is required to gain information for proceedings; therefore non-disclosure of confidential material is necessary for the proper functioning of the society in its exercise of statutory powers.

The Society's 'broad submission' seized on the new 'Hydra' concept of public interest: wherever there is a public interest in withholding documents, it should be weighed against the public interest in the proper administration of justice through production.

Eight years after *Conway v Rimmer* and a mere two since Rogers' case, the variety (not to say confusion) of approaches displayed by the three judges is interesting:

Scarman LJ resurrected the unfashionable and inaccurate phrase 'Crown privilege', and applied it strictly along *Duncan v Cammell Laird* lines. With regard to the narrow submission:

> 'The work of the society is assuredly of public importance, but it is unrealistic to suggest that their work, even including their not very frequent initiation of care proceedings, is an essential function of government.'

*Re D* offered no support because it turned on its 'special facts' – a most convenient argument.

With regard to the broad submission, Scarman LJ stated that he could find no break in the 'historic link between the interest of the public service of the state and Crown privilege.'[52] *Rogers* offered the society no support either: 'On the contrary, it is an illustration, in the modern setting of a governmental agency created by statute, of the classic link between Crown privilege and the central organs of Government.'[53]

Sir John Pennycuick felt on the other hand, that with regard to the narrow submission, the society might well be entitled to protection if the documents at issue actually concerned care

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50 [1973] AC 388 at 409-410.
51 ibid.
52 [1976] 2 A11 ER 993 at 1003.
53 ibid p 1004.

proceedings, that is, the exercise of the society's statutory powers. He cited no authorities for or against this opinion, but clearly must have been placing more weight on *Re D* than did Scarman LJ.

With regard to the broad submission, he alone of the three judges seemed to be clear about the distinctions which nowadays need to be made between Crown privilege, ordinary privilege, public interest and duty. It is worth quoting at some length from his judgment:

> 'The main head of privilege properly so called is legal professional privilege ... There are a number of other specific heads of privilege ... The most important for the present purpose is the well-established right of the police to withhold the names of informers. Experience may require the addition of other specific heads ... There remains what used to be known as Crown privilege, but since the decision of the House of Lords in *Conway v Rimmer*, this is now described as public interest ... It could not be maintained that the public interest in the relevant sense, ie the interest of the nation or the public service, requires that the names of the Society's informants should not be disclosed.
>
> Counsel for the society, however, contended that one should in this context have regard to the public interest in an altogether wider sense, in effect although perhaps subject to some limitations, that which is beneficial to the community ....
>
> 'It is important to remember ... that a claim to withhold a document on the ground of public interest (in the narrow sense) rests on duty, not on privilege.'[54]

Pennycuick LJ then rejected the society's broad submission on two grounds. The first is the same as Scarman LJ's, namely that the NSPCC cannot, unlike the Gaming Board, be regarded as an organ of state. The second is that accepting the society's contention would

> 'lay on the court the duty of deciding in any given case where the public interest lies. This is a function inappropriate to the court and indeed incapable of being performed with the precision required in the administration of justice.'[55]

It is submitted with respect that both Scarman and Pennycuick LJJ are in the position of the little boy at the dyke with his finger in the breach. The clock cannot be turned back to the days of strict Crown privilege. In practice, when a minister gives reasons on affidavit why a particular body should not be ordered to produce a document, the court already has to examine the public interest served by that body and weigh it against the public interest in the administration of justice, in order to carry out its judicial function.

There are two possible solutions for the courts. Either rigid definitions must be formulated and adhered to, so that the parameters of the public service are once more well defined. Or the courts must be prepared to weigh the public interest and the body claiming to protect it in the judicial balance as and when necessary.

## CONFIDENTIALITY: OPENING THE FLOOD-GATES?

As might be expected, Lord Denning's approach was rather different:

> "The question raised in this case is: when a man gives a pledge that he will treat information as confidential, how far will the law compel him to break his pledge and disclose the information to others?'[56]

54 ibid at p 1008.
55 ibid.
56 [1976] 2 A11 ER 996.

The Master of the Rolls' interest in the role of confidentiality can be seen emerging four years earlier when *Alfred Cromption v Commissioners of Customs*[57] reached the Court of Appeal. There he held (the other two judges concurring) that while certain of the documents in issue were not covered by Crown privilege, there was a general ground of privilege (not peculiar to the Crown) applicable to documents entrusted in confidence by a third party to the person from whom discovery of them is sought.

When the case reached the House of Lords, Lord Cross (Lord Reid and Lord Morris of Borth-y-Gest with him) noted that the Commissioners had not based themselves on any such argument and they refused to accept it.

> 'Confidentiality is not a separate head of privilege, but it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest.'[58]

And since the Commissioners did invoke public interest, their claim was allowed. It is interesting to note that the Commissioners claimed public interest 'in the interests of the third parties concerned *as much as*[59] in the interests of the Commissioners',[60] and that the House appeared to accept both grounds.

But surely recognising the sensibilities of third parties in this context is getting very close to recognising confidentiality per se as a ground of privilege.

Just two months after the Court of Appeal's decision in *Alfred Cromption*[61] the same argument came before the House of Lords in *Rogers*.[62] The synopsis of counsel for the Gaming Board's argument stated:[63]

> 'The order made below seems to assume that the board had no right to claim. It is desired to show that it has a right of its own to claim on the ground of confidentiality .... Taking confidentiality as a separate head of privilege, a confidential communication is prima facie protected unless the court considers that disclosure is in the public interest. In the present case, confidentiality is the decisive factor, even standing alone without other indicia.'

Only Lord Simon of Glaisdale cited *Alfred Crompton*. He doubted whether there was 'any general privilege protecting communications given in confidence'[64] and held that the argument needed no further consideration since public interest in any case made the documents in issue inadmissible. The other judges, finding for the Board on the same ground, did not consider it worth even mentioning counsel's specific ground of claim.

One month after *Rogers* was decided by the House of Lords, *Norwich Pharmacal v Customs Commissioners*[4] came before the Court of Appeal.

Predictably, Lord Denning continued the line of argument he had adopted three months earlier in *Alfred Crompton* (and which had not yet, of course, been criticised by the House of Lords). Citing inter alia *Rogers* (which, as has been seen, is not an authority for this proposition) Lord Denning stated:[65]

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57 The chronological order of *hearing* of the three cases discussed here is:
i) *Alfred Crompton*, Court of Appeal, February 1972.
ii) *Rogers*, House of Lords, April 1972.
iii) *Pharmacal*, Court of Appeal, May 1972.
iv) *Pharmacal*, House of Lords, February 1973.
v) *Alfred Crompton*, House of Lords, June 1973.

58 [1973] 2 A11 ER 1169 at 1184.
59 My emphasis.
60 ibid p 1185.
61 [1973] 2 A11 ER 1169.
62 [1973] AC 380.
63 ibid p 397.
64 ibid p 408.
65 ibid p 140.

> The public interest has two sides to it. On the one hand it is usually in the public interest that when information is received in confidence ... it should not be used for other purposes. In such cases, confidences will be held sacrosanct ... On the other hand, confidences will sometimes be overcome by a higher public interest, such as the interest of justice itself, the prevention of wrongdoing, or the security of the state ... So in every case it is a question of weighing the public interest.'

Public interest is clearly being used in its widest sense, with confidence per se as a ground for claiming it, and on this ground Lord Denning allowed the Commissioners' claim. (The other two judges also allowed the claim, but on different grounds).

When *Pharmacal* reached the House of Lords the following year, Lord Cross alone considered Lord Denning's line of argument, and he dismissed it in half a sentence:[66]

> '[O]utside the field of legal professional privilege the fact that information has been imparted confidentially is not, in the absence of express statutory prohibition, any bar to the court ordering its disclosure.'

As has been seen, Lord Cross gave the argument further consideration four months later when *Alfred Crompton* came before the House, and again dismissed it.

It is not, of course, in Lord Denning's nature to be deterred by such trifles as three setbacks at the House of Lords, and so to find him advancing the same argument in*D v NSPCC* should come as little surprise. Broadly, he argued that there are many situations where the courts will prevent a breach of confidence, therefore they should not, *and will not,* order any breach of confidence except in situations of the most compelling public interest in disclosure.

Many of the cases he cited to support the first branch of this contention arise either from commercial or contractual situations[67] where no question of public interest is involved, or come under recognised heads of privilege such as the legal profession or the police.

Neither of these supports the argument that confidentiality per se can be a ground of privilege. As for the second branch of Lord Denning's contention, this was deftly dealt with by Sir John Pennycuick who, describing it as ' an attractive view but not ... a permissible one' stated:[68]

> 'The law as I understand it is not that a confidential document is immune from discovery unless the public interest requires its disclosure; but that all relevant documents, whether or not confidential, are subject to disclosure unless on some recognised ground, including the public interest, they are withdrawn from disclosure.'

This seems effectively to cover the remaining cases[69] cited by Lord Denning, leaving nothing of his argument standing.

## IN HONGKONG

The claim of Crown privilege seems to have been raised remarkably rarely in Hong Kong. An early case was *Yeung Chik Fook v Lim Ho U.*[70] This was a landlord-tenant dispute in which the parties had originally tried to settle their differences with the help of an officer from the Secretariate for Chinese Affairs, Mr Nihill. Mr Nihill was subsequently subpoenaed to give evidence, and the head of his department objected on the ground that disclosure would be prejudicial to the public interest and the efficient functioning of the department. After looking briefly at three authorities, Gompertz J allowed the claim in one sentence on the ground that:

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66 [1974] AC 133 at 198.
67 eg *Seager v Copydex* 1967 2 All ER 415 and *Initial Services V Putterill* [1967] 3 All ER 145.
68 at p 1009.
69 eg *Attorney General v Mulholland* [1963] 1 All ER 767.
70 (1924) 19 HKLR 58.

> 'It is to the public interest that officers of a department, when reporting to their official chief, should be able to express their opinions freely, unhampered by the knowledge that what they write may afterwards be given to the world.'[71]

More recently, the question arose again in *Edwards v. Almao* (No 2).[72] The plaintiff, a former employee of the Inland Revenue Department, claimed damages against his former superior for injurious falsehoods contained in a report on him written to the head of the department. The Colonial Secretary objected to discovery of the report on the ground of public interest. Scholes J's consideration of the Crown's right to claim the privilege amounts to little more than a string of quotations from English decisions, listed without comment or analysis, and concluding with the simple statement that 'I therefore consider the objection raised by the Honourable Colonial Secretary is conclusive.'[73]

The conclusion to be drawn from these two cases is that, formerly at any rate, Hong Kong judges regarded Crown privilege as a fairly simple matter: the English authorities said it could be claimed with the appropriate affidavit, therefore if it was thus claimed, it should and would be granted.[74]

The task of Gompertz and Scholes JJ would of course have been a little more demanding had the cases arisen after *Conway v Rimmer.*[28]

The fact that there are so few Hong Kong cases involving Crown privilege suggests that *D v NSPCC* is unlikely to be of great importance here, particularly if, as seems probable, the House of Lords agrees with Scarman LJ that the historic link between privilege and the central government remains unbroken.

On the other hand, if Lord Denning's argument that confidentiality per se is a ground of privilege were approved, the law would clearly have changed and more cases turning on claims of privilege might be expected.[75]

The third possibility is that the Lords will adopt the suggestion briefly put forward by Sir John Pennycuick, that 'experience may require the addition of other specific heads (of privilege).'[76] Pennycuick LJ was here picking up a lead hinted at by Lord Salmon in *Rogers* case when he stated that: 'This immunity should not lightly be extended to any other class of document or information, but the boundaries are not to be regarded as immutably fixed.'[77]

Should the House of Lords choose to state that statutorily constituted bodies could, as government agencies, claim either Crown privilege in their own right or a special independent privilege, the implications for Hong Kong could be interesting.

For where Britain now has many nationalised industries, Hong Kong has a number of vitally important companies and organisations operating under statutory authority and performing what might loosely be called 'public duties'.

For example, section 24 of the Telephone Ordinance[78] states:

> 'The company shall, within a reasonable time after the receipt of a request in writing ... install a telephone in such building within the Colony as the requesting party may require, and shall connect the same with the nearest exchange and accord to the requesting person a good and continuous telephone service for so long as that person continues to pay the company's usual charges on the due date.'

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71 ibid at p 63.
72 [1957] HKLR 7.
73 ibid at p 24.
74 Scholes J seems to go even further at p 24 and regard Crown privilege as something which need not be claimed at all, but which attaches by definition to any civil service internal communication: 'Quite apart from the Colonial secretary's affidavit, I consider the report in question absolutely privileged ....'
75 More probably this attempt to blaze a new trail will meet a fate similar to Lord Denning's attempt to create a deserted wives' equity, which was briskly disapproved by the House of Lords in *NPB* v Ainsworth [1965] AC 1175.
76 At p 1008.
77 [1972] 1 All ER 1071.
78 Cap 269.

The duties which the company is required to carry out clearly involve a public service of a vital nature in the modern world.

If the House of Lords were to opt for the third alternative, such local bodies exercising statutory powers might arguably find themselves presented with the gift of a new shield in litigation, namely, privilege from disclosure in the public interest.

**CONCLUSION**

The risk that all and sundry might attempt to leap on the bandwaggon of 'privilege in the public interest' if its ambit were extended is virtually certain, it is submitted, to persuade the House of Lords to accept Scarman LJ's opinion and dismiss the NSPCC's appeal.

It was earlier argued that, in the face of the difficulties now arising in Britain through the spread of Government control, the courts were faced with two possible solutions in considering claims of 'privilege in the public interest': either the parameters of 'the public service' must be strictly re-defined, or the courts must be prepared to weigh 'the public interest' and the body claiming it in the judicial balance as and when necessary.

The first seems impossible, the second inevitable. However, the Lords seem unlikely to adopt the second course overtly, since this would tend to encourage a steady stream of litigation on claims such as the NSPCC's.

The likely posture would be similar to that adopted in *Rogers' case* and approved by Scarman LJ in *D v NSPCC,* when he commented:

> The board is an agency established under the authority of the Gaming Act 1968 to perform a state function, and its relationship with the executive and legislative arms of government is clear ... The board is truly part of the public service ...'[79]

Interestingly, this approach was adopted recently in Hong Kong by Cons J in the case of *Lai Hing,*[80] where Mr Jack Cater, head of the Independent Commission Against Corruption, was sued personally as first defendant, and the Attorney General as second defendant. The proceeding before Cons J was an application by Mr Cater that he ceased to be a party to the action, and the question to be decided was whether he was or was not a Crown servant.[81]

Con J looked in some detail at the question of Mr Cater's independence of the government, stressed in the title of his Commission and throughout the Independent Commission Against Corruption Ordinance:[82] for example, his complete discretion in hiring and firing, and his freedom from control of any person other than the Governor himself. He then commented:

> 'In England and elsewhere there are statutory corporations in very much the same position as the Commissioner when it comes to independence. These are not usually treated as Crown servants. ... But the matter does not rest there. When it is a matter that concerns the interests of the Crown it is necessary also to look at the nature of the action tnat is to be performed. Most of the functions exercised by the big statutory corporations in the United Kingdom were previously undertaken by commercial enterprises. The assumption of responsibility by the Government did not stem from long established prerogative rights. It was a culmination of comparatively recent social tendencies. There are, however, certain functions which Crowns and Governments have exercised as a matter of right from time immemorial ... These functions inherently assume the mantle of the Crown and to my mind any person who exercises them on a regular or routine basis ipso facto does so in the service of the Crown.'

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79 At p 1004.
80 Action No 512 of 1976.
81 If it were found he was *not* a crown servant, he could be sued as an employer with pesonal responsibility for the actions of his subordinates. As a crown servant he would not bear personal responsitility.
82 Cap 204.

Citing Lord Watson in *Coomber v The Justices of the County of Berks* as his authority[83] Cons J then declared the repression of crime to be such a function, corruption to be an aspect of crime, and sequitur Mr Cater, as the person charged with repressing it, a Crown servant.

With respect, Cons J's test for identifying Crown servants is neither very accurate nor reliable. Today's 'comparatively recent social tendencies' are tomorrow's 'functions ... exercised as a matter of right from time immemorial' – as his inclusion of the repression of crime would tend of show (the development of a national police force in England being a 19th century innovation). Likewise the 'primary and inalienable functions of a constitutional Government'[84] can and do change – to give a modern example, should there be a world fuel crisis by the end of this century, as has been predicted, it will certainly become a primary function of the British government to secure enough fuel for the population. A special agency might well be set up to deal with this, its negotiations would certainly be top secret, and its members would then arguably be Crown servants.

Dealing with claims of 'privilege in the public interest' in this changing context will doubtless be difficult. But neither opening the floodgates to confidentiality per se as a ground of privilege nor keeping a finger optimistically in the dyke in the hope that pre-*Duncan v Cammell Laird* simplicity might return is the answer. There must now be a certain judicial flexibility in assessing and protecting the public interest.

Perhaps the ultimate question the courts will have to ask themselves is the one posed by Scarman LJ in *D v NSPCC:*

> 'It has to be accepted that some may be deterred from giving information to the society if Crown privilege cannot be claimed. This is a loss which could be damaging to the public interest. But the damage has to be considered in a wider context even than the welfare of children. What sort of society is the law to reflect?'

His answer:

> 'If it be an open society, then men must be prepared to face the consequences of giving information to bodies such as the NSPCC ... If it be a society in which as a general rule informers may invoke the public interest to protect their anonymity, the law may be found to encourage a Star Chamber world wholly alien to the English tradition.'

**POSTCRIPT TO D v NSPCC**

The House of Lords reversed[1] the Court of Appeal decision and allowed the NSPCC'S appeal against disclosure.

To resume briefly: the NSPCC had based its defence on two grounds. In what was termed the 'broad' ground, the society submitted that whenever there is a public interest to be served by withholding information from disclosure in legal proceedings, the court must weigh that interest against the public interest in having 'the truth the whole truth and nothing but the truth' in the administration of justice.

In the 'narrow' ground it was argued that since the society was authorised to bring care proceedings under the Children and Young Persons Act 1969, it should be regarded as carrying out a public service of the state and entitled to what Scarman LJ termed 'Crown Privilege or a modern extension of Crown Privilege.'

Lord Denning MR, dissenting, would have allowed the society's claim on the ground that confidentiality per se is a ground for allowing non-disclosure.

Although the House of Lords agreed with Lord Denning that the NSPCC's promise of confidentiality should be protected, they were unanimous in disapproving his reason. Confidentiality per se is *not* a ground for allowing non-disclosure.

The Lords also rejected the society's 'broad' submission.

Thus the decision to allow the NSPCC to withhold the information sought by Mrs D was based expressly and with some emphasis on the 'narrow' ground.

However, it is submitted that this was achieved by something of a sleight of hand, and that in reality the ratio is that of the 'broad' ground.



83 (1883) 9 AC 61.
84 ibid at p 74.
1 [1977] 2 WLR 201

The Lords were faced with a dilemma. Rightly or wrongly they felt public policy required that the NSPCC's informants should be protected. But on the one hand, it would clearly be preposterous to accept the 'narrow' submission that mere conferral of a statutory power also conferred the right to Crown privilege. While on the other hand, there were policy reasons against an overt acceptance of the 'broad' submission[2] (namely, as predicted previously, a fear that this would permit all and sundry to leap on the bandwagon of 'public interest').

Having reached their policy decision, it seems the Lords then found their ratio (and the way out of their dilemma) by formulating the problem as one of evidence rather than discovery and claiming to have merely extended an established category of inadmissible evidence.

The reasoning appears to be as follows:

1 The identity of people giving information to the police is protected from discovery in legal proceedings.

2 The identity of the informant in this case would thus have been protected had she given her information to the police instead of the NSPCC.

3 Parliament could not have intended such an absurd anomaly as protection for people giving information of child abuse to the police and no protection for people giving similar information to the NSPCC and local authorities.

4 Therefore the NSPCC's (and presumably the local authorities') informants were in a position analogous to police informants, and should be afforded similar protection.

5 It would be another absurd anomaly to suggest that such protection should be given only where care proceedings ensued, and not where the society chose to take some alternative action on the information. Therefore all information given to the NSPCC would be protected.

This dubious analogy with the police may be ingenious packaging, but it only thinly hides the fact that in the end, competing public interests must be – and have been – recognised and weighed.

Thus Lord Diplock states:[3]

> 'I see no reason and I know of no authority for confining public interest as a ground of non-disclosure of documents or information to the effective functioning of departments or organs of central govemment. In *Conway v Rimmer* the public interest to be protected was the effective functioning of a county police force; in *In re D* the interest to be protected was the effective functioning of a local authority in relation to the welfare of boarded-out children. In the instant case the public interest to be protected is the effective functioning of an organisation authorised under an Act of Parliament to bring legal proceedings for the welfare of children. I agree with Croom-Johnson J that this is a public interest which the court is entitled to take into consideration in deciding when the identity of the NSPCC's informants ought to be disclosed. I also agree that the balance of public interest falls on the side of non-disclosure.'

Similarly, Lord Hailsham:[4]

> 'Confidentiality is not a separate head of immunity. There are, however, cases when confidentiality is itself a public interest, and one of these is where information is given to an authority charged with the enforcement and administration of the law by the initiation of court proceedings .... The categories of public interest are not closed, and must alter from time to time whether by restriction or extension as social conditions and social legislation develop.'[5]

It is submitted with respect that their Lordships have joined Scarman and Pennycuick LJJ with their fingers in the breach.

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2 eg Lord Hailsham at p 214.
3 p 209.
4 pp 218-219.
5 See also Lord Simon at Glaisdale at p 228, and Lord Edmund-Davies at 233. Lord Kilbrandon concurred with Lord Hailsham.

*Photograph by courtesy of*
*South China Morning Post, Limited.*

# BAIL – THE LAW AND PRACTICE

*Wendy Chow*

## INTRODUCTION

With the remarkable growth of reported crime rate in recent years[1] there is a corresponding growth in the number of persons being brought before the courts.[2] The intervals between arrest and trial, between trial and appeal are for the accused merely times of waiting. Applications for bail are therefore most important to them.

Regrettably when looking for judicial statements and reported cases on bail by local courts, there is a scarcity of material.[3] It is the object of this article to review the rationale behind the granting of bail, the types of bail which are available and several connected problems.

## RATIONALE BEHIND THE GRANTING OF BAIL

### Nature of Bail

Bail has been defined as 'sureties taken by a person duly authorised, for the appearance of an accused person at a certain day and place, to answer and be justified by law.'[4]

Strictly speaking, bail is the security given by another person that the accused will attend the court on the day appointed, but it now generally covers the situation where the accused enters into recognizance, not necessarily with sureties, conditioned for his appearance before the court.[5]

### The Rationale for Granting Bail

The reasons why bail should be granted have been suggested as follows:-[6]

1 *Presumption of innocence*

The defendant is presumed innocent until he is proved guilty. This presumption is more than a mere rule of evidence because, for persons who are innocent, the risk of retaining them should be reduced to a minimum, and even for those who are guilty, their liberty should not be restrained before they have been tried and convicted.[7]

2 *Effect of detention on prisoner's private life*

If the defendant is the only bread-winner of his family, pre-trial detention would not only affect him but also his dependants, the economic consequences which follow upon them may be serious. Imprisonment of any length may also result in the accused losing his job.[8]

3 *Impact on prospects of acquittal*

Detention before trial may adversely affect the accused's chance of acquittal for the following reasons:–

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1 Appendix: table 1.
2 Appendix: table 2.
3 Attempts have been made at a Magistrates' Court to find out the reasons for granting or refusing bail, regrettably the court files do not normally contain such reasons.
4 Archbold, *Criminal Pleadings Evidence and Practice* (38th ed 1973) para 290.
5 Arguile, *Criminal Procedure* (1969 ed).
6 Zander, 'Bail: A Reapprisal' [1967] Crim LR 25.
7 Zander, 'Bail: A Reapprisal' [1967] Crim LR 25 at 26: 'those who are *guilty* should not be punished before they have been convicted. It is impossible to deny that imprisonment before conviction has stong punitive effect.' But in *I Rose* [1898] LJQB 289, it was held that refusal to grant bail should not be regarded as a form of punishment.
8 Parliamentary Debate (1976) no 976 at 649, Lord Gardiner in discussing compensation for pre-trial detention if the accused turns out to be innocent recognizes that detention even for three months may result in the accused losing his job.

a) A person in custody has greater difficulties in getting legal advice.[9]
b) Even though the person remanded is lucky and obtains the necessary legal advice, the process of consulting a solicitor is more difficult and less convenient than that achieved if he is at liberty.
c) Even a good lawyer may not be as able as the client to gather evidence, contact witnesses which would present a stronger case for his acquittal.

4 *Custody and Pleas of Guilty*

Pre-trial detention may produce a higher rate of pleas of guilty than liberty whilst awaiting trial. It has been suggested that there may be a possibility that while a defendant is in custody other prisoners and prison officials might suggest that he would get off more quickly and perhaps more lightly if he is prepared to plead guilty.[10]

5 *Pre-trial detention and disposition of the case*

Pre-trial detention may affect the accused's sentence on conviction[11] (for example getting a shorter sentence), but in some cases, pre-trial custody may lead to a less favourable disposition of the case, one of the reasons may be the psychological effect on the sentencing court of knowing (as it normally would) that the offence had been thought too serious or the accused is not sufficiently trustworthy for release on bail.

6 *Detaining offenders who on conviction are not considered suitable for detention*

It is practically objectionable that a person should be retained before hearing where imprisonment is not imposed at the trial, for example where the accused is given a non-custodial sentence or in cases where the maximum penalty is only for a short period.

7 *Effect on Prison Population*

On policy ground it is clearly undesirable to increase the burden on the government's budget by clogging the prisons with untried persons,[12] and creating more duty for the staff of prisons, since at the reception stage, a complex process of checking-in, searching, removing and cataloguing personal property, medical examinations, issuing of instructions and information, and generally they are guarded and supervised like the other prisoners.

For the above reasons, it is submitted that an accused person should be given bail if on the facts of the case, there is reasonable ground for doing so.[13]

## TYPES OF BAIL

### Police Bail

1 *Police Power to grant bail*

The power of the police to grant bail is governed by section 52 of the Police Force Ordinance.[14] This section provides that a police officer who is in charge of any police station can grant bail to a person who is arrested without a warrant. The arrested person may be released on his entering into recognizance with or without sureties conditioned upon his appearance before a magistrate, or at any time and place specified.

The recent amendment of section 52(3) of the ordinance enables a police officer to grant cash bail to an arrested person without having him entering into recognizance, although on a breach of the conditions specified, the sum of money deposited would be forfeited on an order of the magistrate.[15]

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9 *'Legal Aid in Criminal Proceedings'* (1966; Cmnd 2934) para 219. The Widgery Committee also recognized that 'in practice his (a person remanded) chance of obtaining advice would be *remote*.'
10 Zander, 'Bail: A Reapprisal' [1967] Crim LR 25 at 30.
11 Criminal Justices Administration Act 1962, s17(2) provides that 'the length of any term of imprisonment, corrective training or preventive detention imposed by the sentence of any court shall be treated as reduced by any period during which the offender was in custody before sentence ....' A similar provision can be found in the Criminal Procedure Ord (cap 221, LHK 1972 ed)s 67a.
12 Appendix: table 3.
13 What constitutes a reasonable ground for bail would be discussed later in the context of 'judicial attitudes towards granting bail'.
14 (cap 232, LHK 1964 ed). In England it is governed by the Magistrates Courts Act 1952, s 38.
15 Police Force(Amendment) Bill1976, clause 2 Hong Kong Government Gazette (Legal Supplement no 3, Bills 1976)C77.

In deportation cases, the Commissioner of Police or any police officer authorized in writing by the Commissioner of Police, to act on his behalf for the purposes of the Emergency (Deportation & Detention) Regulations Ordinance[16] can grant bail to a person who is held under a warrant of arrest and detention, upon his entering into recognizance to appear and surrender himself at such place and time specified in the recognizance.[17]

If the accused's arrest was effected by a warrant, the warrant may be backed for bail, that is, a magistrate may endorse on the warrant a direction that the accused shall be released after his arrest on his entering into recognizance and obtaining sureties if they are required.[18] But if an accused is found to have committed other offences and is also charged with them, he may still be detained notwithstanding that the warrant has been backed for bail by the magistrate.[19]

2 *Limitations on police power to grant bail*

Although a general power to grant bail is given to the police by statute, in practice there is a list of the different types of offenders who will not be admitted to bail, they are:–

a) a person other than a juvenile who has been arrested on a warrant which contains no directions regarding bail, or if the duty officer regards the offence charged as serious, or if it appears to the police officer that the accused is likely to impede the investigation of the case, or perhaps he should be detained for his own safety.

b) A juvenile who is charged with homicide or some other grave crime, whose interest requires that he be removed from association with any undesirable person or whose release would defeat the end of justice.[20]

In addition a person who is delivered into police custody by a member of The Immigration Department, Preventive Service or Independent Commission Against Corruption should not be released on bail unless the memorandum accompanying the prisoner states that this may be done.[21]

The factors which a police officer may take into consideration when granting bail are generally governed by their General Orders and General Duties Manual. A police officer will not grant bail in murder and treason cases. In granting bail, he must consider the nature and gravity of the charge, the weight of evidence and probability of the accused's appearance at the trial, the probable disposition of the case, the possibilities of interfering with witnesses, destruction and concealment of evidence and any possibility of suicide or attempted suicide by the accused.[22]

3 *Comment on Police Bail*

From the above discussion, it can be seen that a highly discretionary power of granting bail is vested in the police. Yet the limitations discussed above are so vague, that granting bail is in essence subject to the personal opinion of the police officer, for example paragraph 400 of the General Duties Manual provides that if the police officer regards the offence charged as serious, bail will not be granted. What is a serious charge, is a matter of dispute.

**Bail by Magistrates**

1 *Power of magistrates to grant bail*

Magistrates have the power to grant bail in whatever capacity they sit except in cases of treason or murder, when bail can only be granted by an order of a judge.[23]

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16 (cap 241, LHK 1967 ed).
17 ibid, reg 8.
18 Magistrates Ord, s 102(3).
19 General Duties Manual, para 403.
20 General Duties Manual, para 401.
21 Police General Order, para 470 to 3.
22 General Duties Manual, para 400.
23 Magistrates Ord, s 102(1).

A magistrate sitting in a summary trial may adjourn the case before or after hearing, and in doing so may remand the accused either in custody or on bail, and if the offence is triable only summarily, the accused may be simply released.[24]

A magistrate also has the power to grant bail on appeal or by way of case stated, the person who has given notice to appeal may apply to the magistrate for bail.[25]

Formerly in England restrictions were imposed on the magistrates' discretion to grant bail,[26] but the Bail Bill[27] which is now awaiting the Royal Assent, if passed, will repeal this section altogether.[28] It has been suggested that the effect of repealing this section will give rise to the undesirable result of taking away the safeguards against post-conviction remand.[29]

There seem to be no equivalent restrictions on the magistrates in Hong Kong[30] except in cases of treason and murder as aforesaid. Magistrates in Hong Kong are empowered to grant bail to person who is charged with any bailable, indictable offences and committed to prison to take his trial for the same before the court.[31]

2 *Should a magistrate who has sat in a bail application try the same case?*

When an application for bail is made to a magistrate, the police are usually asked if they have any objections to bail. In doing so, the police may have made known to the magistrate the accused's previous conviction.[32] Thus in England, by section 19 of the Criminal Justice Act 1967, a magistrate who has been informed of the accused's previous convictions in the course of a bail application cannot take part in his trial.

Apparently there is no such provision as section 19 of the Criminal Justice Act in Hong Kong and in *Yu Hung*[33] there was on appeal by the appellant against conviction of attempted larceny on the ground that it was made known to the magistrate the appellant's bad record when he sat on bail application, therefore it was unjust for him to sit at the trial and proceeded with the hearing. But it was held on appeal that there was no injustice done since the magistrate had stated in his decision that he had banished from his mind the appellant's bad record and had not allowed it to influence his decision.

In *Alexander Urechenko*[34] there was an appeal against conviction on the ground that the magistrate could not have conducted the trial with an unbiased mind since he had seen the appellant's criminal record during a bail application. But this was rejected by Blair-Kerr J who further held that 'justice has not only been done', but 'has been seen to be done' by the fact that the magistrate had offered to transfer the case to another magistrate for trial, but it was refused by the appellant.

It is submitted that the above decisions are no doubt correct on their particular facts. But what if in a case where the same situation arises and there is a failure to transfer the case or where the magistrate has not in fact made the offer nor does

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24 Magistrates Courts Act 1952, s 14(1); Magistrates Ord, s 20(1).
25 Magistrates Courts Act 1952, s 89(1); Magistrates Ord, s 119.
26 Criminal Justice Act 1967, s 18 provides that it is mandatory for remand of defendants under 17 who are charged with a summary offence to be on bail unless s 18(5) was satisfied, eg where it is for the accused's own protection that he should be remanded in custody.
27 Bail Bill, May 6, 1976.
28 ibid, schedule 2 para 34.
29 Susanne Dell, 'The Bail Bill and Medical Remands' (Apr 1, 1976) NLJ 348.
30 A search has been made in the Magistrates Ord, the Criminal Procedure Ord, the Application of English Law Ord, no such section applies in Hong Kong.
31 Magistrates Ord, s 102(4).
32 Although it is not of strict legal rule, it is desirable that such evidence should be admitted in writing rather than given orally in open court *Dyson* (1944) 29 Cr App 104. The fact that convictions have been made known in this way will not afford grounds for appeal (*Fletcher* (1949) 113 JP 365).
33 [1962] HKLR 165.
34 [1966] HKLR 735.

he say in his decision that he has banished from his mind the knowledge of the accused's criminal records, can it be said that justice has been seen to be done? Should it afford a valid ground for appeal? It is submitted that the answer is still arguable.

3 *Accused's right to appeal against conditions set down by Magistrate*

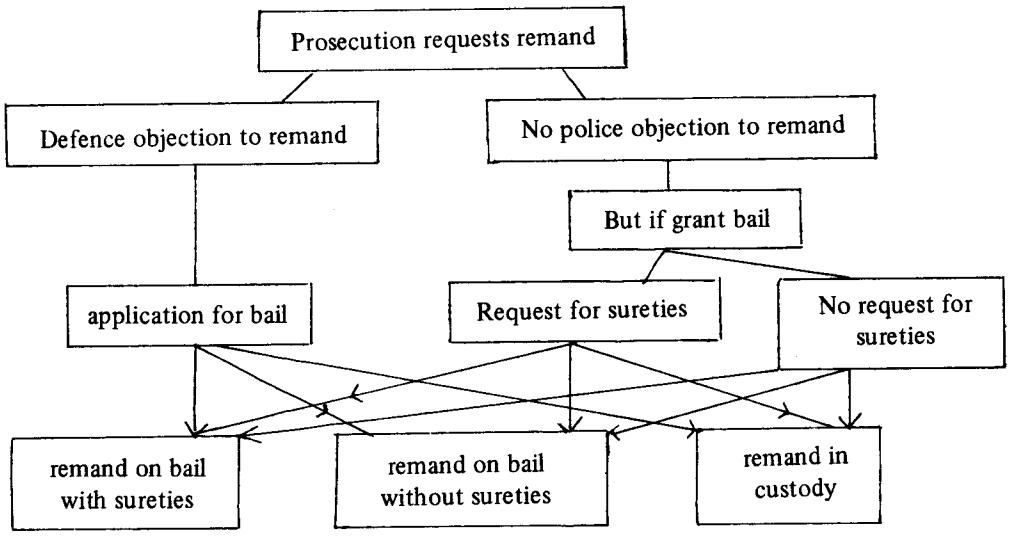
In England if a magistrate refuses bail, he must inform the accused that he has a further right to apply for bail to the High Court.[35] The accused in England has also the right to appeal against the amount of bail set down, this right is given by statute[36] and it is also available at common law. In *Ex parte Thomas*[37] the appellant was charged with robbery of three shillings. Bail was granted in T's recognisance of £100 and one other surety of £ 500. Application was made to the Divisional Court for a writ of habeas corpus on the ground that the imposition of such high bail in relation to the charge was unreasonable. The Divisional Court upheld the appellant's contention, and the magistrate was requested to reduce the amount or to acquaint the High Court with reasons for such high bail.[38]

In Hong Kong, there is no statutory provision equivalent to that of section 22 of the Criminal Justice Act 1967 which provides the accused with a right to appeal against high bail. But it is submitted that the common law as laid down in *Ex parte Thomas*[39] should be applied in Hong Kong, to protect the accused against unreasonably high bail.[40]

4 *Normal Procedure in a Magistrates' Court*

The normal procedure which takes place in a Magistrates' Court may be illustrated as follows:–

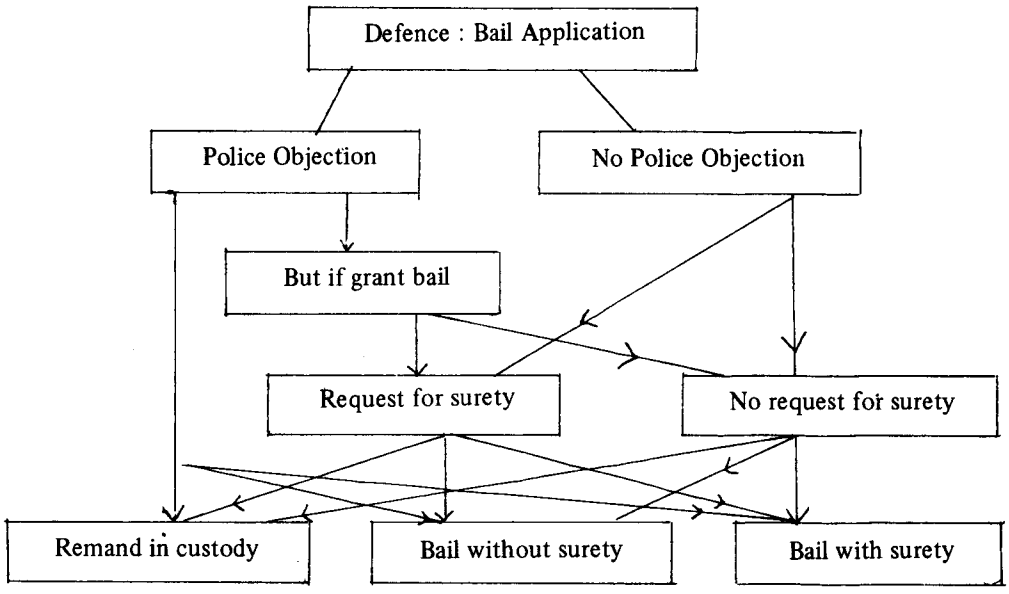
a)




35 Magistrates Courts Rule 1952, r 9.
36 Criminal Justice Act 1967, s 22(1). Amendment in the Bail Bill 1976 reads: 'Now the accused can appeal to the High Court where bail offered are unacceptable to him.'
37 [1956] Crim LR 119.
38 In *Ex parte Speculand* [1946] KB 48 it was held that the court has no inherent jurisdiction to reduce the amount of bail which the justices have fixed in pursuance of their statutory power. But this decision seems to have been overruled by *Ex parte Thomas* [1956] Crim LR 119 and the Criminal Justice Act 1969, s 22.
39 [1956] Crim LR 119.
40 See Application of English Law Ord, s 3(1).

In a committal proceedings or at a trial before a magistrate, procedure (a) may take place The prosecution may request the accused to be remanded in custody or if bail is granted, to release the accused with sureties. The defence counsel may object to it, and the magistrate in exercising his discretion may remand the accused in custody, or he may release the accused on bail with or without sureties.

b)




If the defence counsel applies for bail, there may or may not be police objections to it, and if these objections are overruled, the police may request the accused to be released on bail with sureties. In this situation, the magistrate may remand the accused in custody, or he may simply release the accused with or without sureties as the case may be.

The above diagrams only illustrate the situation where the accused is represented by a lawyer, who knows that his client can apply for bail. But what if in a situation where the accused is not represented, and he is not informed of his right to apply for bail? There may be a danger that a person who would have been released on bail is remanded in custody simply because owing to his ignorance, he has not applied for it.

It is submitted that in order to ensure that the accused is not deprived of his rights, there should be a mandatory provision requesting the magistrates to inform an accused person who is not represented, of his rights to apply for bail.

It will also be useful if a detailed court procedure sheet is given to the accused before his first appearance informing him of his rights and the way to prepare his case for bail if he is unrepresented.

**Bail by High Court**

In England where a magistrate has refused to release the accused on bail, he can apply to the High Court for it.[41] Such application must be made to the High Court by summons before a judge in chambers to show cause why the defendant should not be admitted to bail.[42]

A summons has then to be served to the prosecutor at least 24 hours before the day named for hearing.[43] If the application is granted the High Court has the same power to impose conditions as the inferior court.[44]

1 *Order 79*

In England, the procedure for applying bail to the High Court is governed by Order 79 of the Supreme Court Practice.

In Hong Kong the Supreme Court has power to grant bail both at common law[45] and by section 13 of the Criminal Procedure Ordinance.[46] But the procedure which has to be followed is not laid down in the Ordinance itself, nor in the Rules of Supreme Court Hong Kong.[47] It is therefore questionable whether Order 79 of Rules of Supreme Court should be applied to the local High Court.

In a recent case *Fong Shing Cotton Mill (HK Ltd) v Chan Hing*[48] which concerned the application of a new English Order in Hong Kong, Cons J held that the current English practice should be applied in Hong Kong by virtue of section 17 of the Supreme Court Ordinance,[49] subject only to the Rules of Supreme Court which may be made here.

Following the above decision, Order 79 should apply since it is the *current* practice in England. But it is submitted that if Order 79 is to be applied, the situation would be anomalous, since Order 79 has been amended in 1967 and 1971 respectively to fit into special circumstances created by section 22 of the Criminal Justice Act 1967 and the Courts Act 1971.[50] It should be noted that although most of the sections which concern bail are incorporated into the local ordinance, section 22 is deliberately left out.[51] It affronts common sense that the order is to be adopted when a substantial provision upon which the order is made, is deliberately left out of our Ordinance.[52]

2 *The Procedure in the High Court*

Despite doubt concerning the application of Order 79, the normal practice in applying for bail to the High Court has been laid down in *Re Wong Tai*.[53] When a charge is brought against the accused and although no evidence in support of it is given, nevertheless the magistrate refuses bail. Then there are two modes of procedure open to the accused. It can be by way of habeus corpus or he can apply to a judge in chambers for a summons calling on the magistrate to show cause why the accused should not be admitted to bail.

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41 Criminal Justice Act 1967, s 22 (1).
42 Rules of the Supreme Court, O 79 r 9(1).
43 ibid, r 9(2).
44 Criminal Justice Act 1967, s22(2); Rules of the Supreme Court O 79 r 9(6).
45 In *Re Wong Tai* [1911] HKLR 67, it was held that the Supreme Court then has inherent jurisdiction to grant bail.
46 (cap 221, LHK 1973 ed).
47 (cap 4, LHK 1975 ed).
48 MP/No 566 of 1976.
49 Cap 4, s 17: 'Subject to the rules of court the practice of the Supreme Court of Judicature in England for the time being in force therein shall be in force in the Supreme Court.'
50 See Order 19/9/2 RSC and 1971 SI 1955.
51 ss 21, 22, 23 of the Criminal Justice Act 1967 are the major provisions for bail. Ss 21,23 are incorporated into the Criminal Procedure Ordinance as s 13A and s 13B respectively. But s 22 is not incorporated into any of the local Ordinance.
52 In a recent case *Viroj Broosrawong alias Wong Kam Ching* (H Ct, MP No 699 of 1976) crown counsel argues that the judge has no jurisdiction to hear the bail application once it is refused by another high court judge because of O 79 r 9 (12). Regrettably decision is reached irrespective of O 79.
53 (1911) 6 HKLR 67.

But there is a substantial difference between the two procedure. If it is by way of habeus corpus it can only be applicable when the detention was unlawful, for example when the magistrate has exceeded his jurisdiction or where the magistrate has exercised his discretion wrongly.[54]

But if the procedure is by way of summons, the issue at stake is not whether the detention is wrongful but whether the magistrate has exercised his discretion reasonably. In *Re Wong Tai*[55] it was held that the usual procedure should be by way of summons. It is submitted that the following may be the reasons why procedure by way of summons is to be preferred:–

First, it is more expensive if it is by way of habeus corpus.

Secondly, it would be hostile to the magistrate who has refused bail without informing him of the application.[56]

Thirdly, an application by way of habeus corpus is limited to situations where the magistrate has exercised his discretion on wrong principles, thus its scope is much narrower than that of summons.

It is submitted that despite the above procedure there may be a third procedure open to the accused. On refusal by a magistrate to grant bail, the accused may apply to the District Court for bail by virtue of section 13 of the Criminal Procedure Ordinance.[57] On further refusal the accused may apply to the High Court. This procedure was in fact adopted in *Tang Hon Chai*[58] where the application was first made to the District Court and on refusal to the High Court. It was further held in the case, that if application was made to the District Court and then to the High Court, it was in essence an appeal against the district judge's decision, the High Court must then considered the application in the light of the district judge's refusal and whether he has exercised his discretion on wrong principles.[59]

Usually procedure by way of summons is adopted because it is less expensive and its scope of operation is much wider than the others.

3 *Revocation of Bail by High Court and Premature application:–*

a) Effect of revocation of bail by High Court: In a recent case *Wong Kam Ching*[60] doubt was cast on the precise effect of the revocation of bail by a commissioner in court. It was held by Li J that following the principles laid down in *Re Kray*[61] and *Re Hastings*[62] he has no jurisdiction to entertain the application.[63] It was also held that the revocation of bail by the commissioner in court amounted to a decision on the earlier application, and it would be improper for another high court judge to review the commissioner's decision as if he was sitting in the Court of Appeal.

Thus the postion now is this: once bail is refused by a high court judge or by a commissioner there is no further right to apply to another high court judge for bail.

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54 ibid, an example given by Piggott CJ would be where the magistrate has made a mistake in law and accordingly exercised his discretion on wrong principles.
55 ibid.
56 ibid, at 68.
57 Cap 221, s 13A (3) reads: 'In this section 'Court' included a district court and a magistrate.'
58 [1966] HKLR 730.
59 ibid, at 733.
60 MP No 699 of 1976.
61 [1965] 1 Ch 736.
62 [1959] 1 Ch 368.
63 It was held in *Re Kray* and *Re Hastings* that one division of the High Court in England will not entertain a subject matter which has been determined by another division of the High Court in England. Analogy was drawn by Li J that a decision by a commissioner was similar to that of a Divisional Court in England.

b) Premature application for bail: In *Re Wong Tai*[64] the prisoner was charged with kidnapping and assault, he applied to the magistrate for bail. No evidence in support of the charges was placed before the magistrate to enable him to form an opinion in one way or the other. The magistrate declined bail. An application by way of summons was then made to a judge of the Supreme Court who considered that the application was in the nature of an appeal against the exercise by the magistrate of his discretion. It was held that there being no facts put in evidence before the magistrate, it could not be said that he has exercised his discretion unreasonably, the time for considering whether he was right or wrong, reasonable or unreasonable has not arrived, consequently the application to the Supreme Court was premature.

It is submitted that from the facts of *Re Wong Tai* there is a possible inference that the magistrate refused bail because of the charge. And it is further submitted that the fact that a serious charge is alleged against the accused at a preliminary hearing should not form the sole basis for refusing bail in the absence of evidence by the prosecution, because in practice, there are far too many cases where a serious charge is in fact dropped at the trial, but the accused by that time has already been remanded in custody for several months, simply because a serious charge is alleged against him at the beginning.

Secondly it is submitted that the decision of *Re Wong Tai*[65] concerning premature application for bail is not a satisfactory decision, because where no facts are placed before a magistrate to help him to form a decision in one way or another, it is submitted that the presumption should be always in favour of the accused, because at stake is the liberty of a man; moreover if the prosecution wants to object to bail, it is always their duty to show reasons for such an objection. And application cannot be said to be premature simply because the prosecution have not done their part of the job.

**Bail On Appeal**

There is great reluctance to release the accused on bail pending appeal. In a recent case *Tam Chun Wah,*[66] Cons J discusses in his judgement the condition and procedure to be taken if bail is applied in a case pending appeal.

First, the application should be made in the first instance to the trial magistrate.[67] The application may be made informally and no supporting affidavit is necessary, for the magistrate will already be aware of the relevant matters.

Secondly, where the appeal is against conviction no application should be made at all until the grounds of appeal have been properly considered and formulated in detail. Where the application is made to the High Court the affidavit in support should recite the detailed grounds of appeal or have exhibited to it a copy of the notice of appeal. The affidavit should also set out such facts found by the magistrate or otherwise as are necessary to support the appeal.

Thirdly, where the appeal is against sentence the affidavit in support should set out, in addition to other relevant matters, sufficient of the facts found by the magistrate as will enable the court to form a fair opinion of the gravity of the offence.

Fourthly, where a person is convicted there is no implied right to bail, the applicant is no longer presumed to be innocent because he has been found guilty. It is therefore necessary to show that the chances of a successful appeal are high and that substantial injustice could be done by retaining the applicant in custody.

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64 (1911) 6 HKLR 67.
65 ibid.
66 MP No 539 of 1976.
67 Magistrates Ord s 119.

It can be seen that it is very difficult to obtain bail in a case pending appeal. It would only be granted in *exceptional* circumstances;[68] as when there is a lapse of a considerable period of time before an appeal can be heard.[69] Or if it is a case where release on bail would be of assistance for the preparing of a real case for appeal,[70] or if the case is one of great length and complexity and there is the interval of long vocation then bail should also be granted,[71] or if the case is one of short sentence and the case cannot be speedily heard, then bail should also be granted.[72]

But in *Lee Po On*[73] there was an application for bail pending appeal on the ground that there was likely to be a considerable interval of time before an appeal could be heard. Bail was refused, the reason being that a sentence of three years imprisonment, was not a case of short sentence to bring it within the rules of 'special circumstances' where bail would be granted.[74]

And in *Yeung Kam Yuen*[75] the accused was sentenced to thirty months imprisonment. Bail was applied pending appeal on the ground that the preparation of the record would take up a substantial part of the sentence. Bail was again refused.

In addition to the common law power to grant bail pending on appeal, the appeal court in Hong Kong has power to grant bail or vary such order when the case is heard before it, by virtue of rule 25(9) of the Criminal Appeal Rules.[76]

## RELATIONS BETWEEN THE ACCUSED AND SURETY

### The Selection of Sureties

English courts do not accept professional bailsman as sureties.[77] Therefore bail must be given by someone who can satisfy the court as to his financial competence;[78] householders are generally preferred; infants, convicted persons[79] and the accused's solicitor[80] are not acceptable as sureties. It seems that the wife of the accused can be accepted as surety provided that she has sufficient means of her own separate money and not from the joint property or the matrimonial home.[81] But the accused should not indemnify his bail against the consequences of his own non-appearance, to do this would amount to an offence of conspiracy,[82] and it is also contrary to public policy because in effect it gives the public the security of one person only instead of two.[83] Moveover, the surety would then has no interest in seeing to it that the condition of the recognizance is performed.[84]

A magistrate has a right to inquire into the sufficiency and qualifications of a surety, but he is not justified in seeking to persuade or otherwise prevent a person from being a surety.[85] Furthermore, bail should not be refused on account of the personal character or opinion of the proposed surety, if otherwise the requirements are satisfied.[86]

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68 *Golt* (1921) 16 Cr App R 86.
69 *King* (1931) 23 Cr App R 143.
70 *Wise* (1922) 17 Cr App R 7.
71 *Newsbury & Elman* (1931) 23 Cr App R 66.
72 *Selbrik* (1925) 18 Cr App R 172.
73 [1959] HKLR 156.
74 Cf *King* (1931) 23 Cr App R 143 (bail was granted because of interval of Christmas vacation).
75 [1965] HKLR 560.
76 Cap 221, r 25(9) provides that the full Court (now renamed as the Court of Appeal) has the power to grant bail whether or not the accused has applied for it, it has also the power to vary such order if made previously.
77 Albert Lieck, 'Bail Bonds of Surety Companies' 72 Sol J 589.
78 *Saunders* (1791) 2 Cox CC 149.
79 *Edwards* (1719) 4 TR 440.
80 *Scott – Jervis* (1876) Times, Nov 20.
81 *Southampton Justices Ex parte Green* [1975] 2 All ER 1073 at 1078.
82 *Porter* [1910] 1 KB 369; Bail Bill 1976 clause 9.
83 *Jones* v *Orchard* (1855) 16 QB 614; *Wilson* v *Strugnell* (1881) 7 QBD 548; *Porter* [1910] 1 KB 369.
84 *Consolidated Exploration and Finance Co. v Musgrave* [1900] 1 Ch 37.
85 *Saunders* (1847) 2 Cox CC 249.
86 *Badger* (1843) 4 QB 468.

**The Surety's Power Over The Accused**

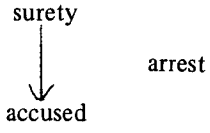
The surety's power over the accused exists both at common law and by statute.[87] At common law the surety always has the right to arrest the accused if he thinks that he is about to flee,[88] for the accused is committed into his custody. The accused is then brought before a magistrate who will discharge the bail and unless new sureties can be found the accused will be remanded in custody.

The surety is also given a power to arrest the accused under the statute. By rule 25(10) of the Criminal Appeal Rules,[89] the surety may apply to the magistrate for a warrant of arrest, if he suspects that the accused is about to leave the jurisdiction or in any manner fail to observe the conditions of his recognizance.

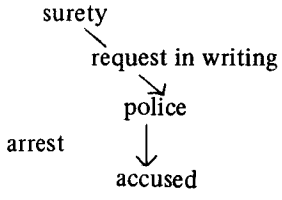
Although the right to arrest the accused acts as a protection to the surety, in practice the assistance of the police is often necessary. By virtue of section 13B of the Criminal Procedure Ordinance,[90] the police have a power to arrest the accused without warrant if requested by the surety in writing, or of their own volition if they are of the opinion that he is about to break any condition of his bail.[91]

The right of the surety over the accused may be illustrated as follows:–

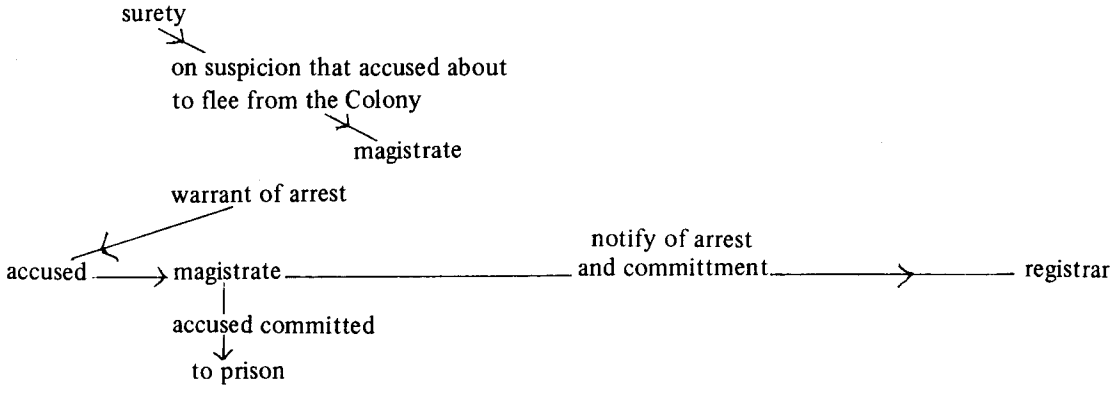
1) *At Common Law:–*




2) *By Statute:* section 13B Criminal Procedure Ordinance




3) *By Statute:* bail on appeal. Criminal Appeal Rules rule 25(10) – rule 25(12)




87 Criminal Appeal Rules, r 25(15) preserves the surety's common law rights.
88 *Butcher* (1792) Peake 226
89 Cap 221.
90 ibid.
91 Criminal Justice Act 1967, s 23 (1); Criminal Procedure Ord s 13B.

## JUDICIAL ATTITUDES TOWARDS GRANTING BAIL

There are generally five factors which judges normally observe when granting bail:–

### Non-appearance at The Trial

The possibility of the accused absconding is the most important factor to be taken into consideration, since the principle on which persons are committed to prison by magistrate previous to the trial is for the purpose of ensuring the certainty of their appearing to take the trial, the same principle is to be acted on in an application for bailing a person committed to take his trial and it is not a question as to guilt of innocence of the prisoner.[92]

### Seriousness of The Charge

The seriousness of the charge, the nature of the offence may also be a factor affecting bail.[93] In homicide cases, bail is scarcely granted. In *Ex parte Barronet & Allain*[94] a Frenchman was charged with aiding and abetting wilful murder, bail was refused on the ground that 'the crime is of the highest magnitude the punishment of it assigned by the law is of the extreme severity, and the evidence of guilt and confession, under such circumstances the court is bound to presume that no amount of bail would secure the presence of the accused at the trial should they be liberated'.[95] The likelihood of acquittal in relation to the charge is also relevant in granting bail.[96]

### Prior Conviction And Possibility Of Further Offences

It seems to be the general rule that prisoner with previons criminal records should only be released on bail with care. In *Gentry*[97] the person applying for bail had eight previous criminal records, bail was refused because it was inadvisable to grant bail to such prisoner.[98] Bail will also not be granted to an accused who is likely to commit the offence again when he is free.[99]

### Unreasonable Delay Of The Trial

Unreasonable delay of the trial by the prosecution is often a relevant factor in granting bail pending appeal. But the fact that detention would cause inconvenience to the preparation of the defendant's case is not a valid ground[1] nor is ill health unless it can be shown that it was due to the long period of detention.[2]

### Police Objection To Bail

In general police objection to bail largely influence the court's discretion to grant bail both in Hong Kong and in England.[3] The shortage of court's time, the large number of bail cases to be dealt with in a Magistrates' Court makes it invariably the case that in exercising his discretion, a magistrate has to rely heavily on the recommendations of the prosecution.[4]

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92 *Scaife* (1841) 10 LJMC 144 per Coleridge J.
93 *Robinson* (1854) 23 LJQB per Coleridge J.
94 (1852) 1 E & Bl.
95 ibid, per Erle J.
96 *Tam Chun Wah* Miscellaneous Proceedings No. 539 of 1976. But in homicide cases bail was refused even though there is a high likelihood of acquittal: *Andrews* (1844) 2 Dow & L 10.
97 [1956] Crim. LR 120, cf *Armstrong* [1952] 2 A11 ER 219.
98 Disclosure of conviction on bail application in a newspaper, was held not to be a good ground for quashing the conviction: *Armstrong* [1951] 2 All ER 219.
99 Phillips (1947) 32 Cr App R 47; *Wharton* [1955] Crim LR 565.
1 cf *Yeung Kam Yuen* [1965] HKLR which was held that an application for bail on the gound that the preparation of the record for the appeal would take up a substantial portion of the accused's sentence was not a valid ground for granting bail.
2 *Kirby* (1714) Gilb 310, Wyndham (1716) 1 Stra 2; *Ex partes Elliot* [1949] 1 A11 ER 313.
3 Appendix: table 4.
4 In a visit to a Magistrates' Court, the writer was informed that in a Monday morning usually there are about thirty to forty bail cases that have to be dealt with by a magistrate.

## TAMPERING WITH WITNESSES – SPECIAL CIRCUMSTANCES OF HONG KONG

The possibility of tampering with witness has been regarded as a special condition in Hong Kong and so constitutes an important factor in not granting bail. In *Man Kam Fat*,[5] Gould J took the view that: 'a magistrate is fully entitled in exercising his discretion to bail to have regard to obvious *differences* in conditions between Great Britain and Hong Kong. The possibility of interference with witness is greatly heightened in a colony where the average Chinese witness is notoriously reluctant to come forward even in ordinary circumstances, and is thereby the more easily induced by threats or rewards to remain silent or falsify his evidence.'

In the same case it was further held that if a magistrate is satisfied on the assurance of a responsible police officer that the allegations are *likely* to be correct,[6] there is no need for the police objection to be in sworn evidence.

In *Tang Hon Chai*[7] where bail was refused on the ground of likelihood to tamper with witness, it was held that no evidence of actual interference was required.

The writer submits that the above decisions are unduly favourable to the prosecution for a magistrate to satisfy himself solely on the ground that the allegations of the prosecution are *likely* to be correct and by not requiring them to adduce evidence in support of their objections.

It is submitted that the police should be ready to give full reasons, and if possible with evidence, for opposing bail. And the court should always give its reasons for refusing bail, because there may be occassions that the police over estimated the case of the accused and repeat in the almost parrot fashion: 'Because of the seriousness of the case I oppose bail ....'

## RECOMMENDATIONS FOR REFORM

### Inadequacies Of The Present Bail System

From the above discussion, it can be seen that the bail system in Hong Kong is not at all free from deficiences. The statutory provisions are mainly governed by the Police Force Ordinance,[8] the Criminal Procedure Ordinance,[9] the Magistrates Ordinance[10] and the Supreme Court Rules,[11] but they offer no real guidance as to what weight should be given to the different factors that are allowed to influence the decision to grant bail, considerable differences in the practice and approach of the courts are bound to exist. The large number of bail cases that have to be dealt with by a magistrate makes it invariably the case that he has to rely heavily on the prosecution's recommendations and to a large extent guess work, since the police are not required to give actual evidence for their objections.[12] But the period before trial is too important to be in a state of muddles because at stake is the liberty of an individual, and unless this right to bail is preserved 'the presumption of innocence secured only after centuries of struggle would lose its meaning'[13]

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5 (1947) 31 HKLR 113.
6 ibid, at 118.
7 [1966] HKLR R730.
8 Cap 232.
9 Cap 221.
10 Cap 227.
11 Cap 4.
12 Reasons for this criticism: see above the section on 'Police objections to bail.' Similar opinion is also expressed by Bottomly AK. Concerning the situation in England, see Bottomly, AK., 'The granting of Bail: the law and practice' 31 MLR 40.
13 *Stack* v *Boyle* (1951) 342 US 1 at 4 per Vinsor CJ.

It is also an undeniable fact that being remanded in custody before trial causes considerable hardship and distress not only to the person immediately concerned, but also his family.[14] Considerable inconvenience (possibly resulting in inefficiency and injustice) would occur in the preparation of the case.[15] The administrative problems of the Prison Department in dealing with the rapid turnover of the 'remand and trial' prisoners cannot be ignored.[16] It is time that the legislature should be invited to investigate the problems posed and make relative improvements to it.

**RECOMMENDATIONS**

A consolidation of the present statutory provisions in the manner of the Bail Bill 1976 of Great Britain is recommendable.

Clarification is required as regards the types of offences which bail should not be refused, the amount of money required in relation to the charge should also be laid down.

The writer submits that the following factors should also be taken into account when reconsidering the present situation:–

a) The police should be required to present compelling evidence to support objections to bail and the court should be obliged to investigate the objections.

b) A standardized procedure for bail applications is desirable.[17]

c) Where the accused is not represented by a lawyer, it is desirable that the magistrate should tell him of his right to apply for bail or to supply him with a detailed court procedure sheet informing him of his rights and the way to prepare his case for bail.

d) It should be laid down that a magistrate who has sat on bail application, should not sit at the trial to prevent unnecessary bias.[18]

e) It is desirable that the magistrates should be obliged to hear bail cases in camera on the application of the prosecutor or the defence counsel in appropriate circumstances, for example when the police are reluctant to disclose details in open court on a preliminary hearing, or if such information is disclosed, it would unduly prejudice the defence case.[19]

f) There should be a presumption for bail where a person is brought before a magistrate on a preliminary hearing and the question arises is what is to be done with him on an adjournment.[20]

g) The time spent in custody prior to the trial should also be taken into account when sentencing.

h) Legal aid should also be extended to proceedings in Magistrates' Court and if any person was at the risk of being remanded in custody came within the financial criteria, he ought to be given the benefit of legal aid to enable him to make his representations on bail.

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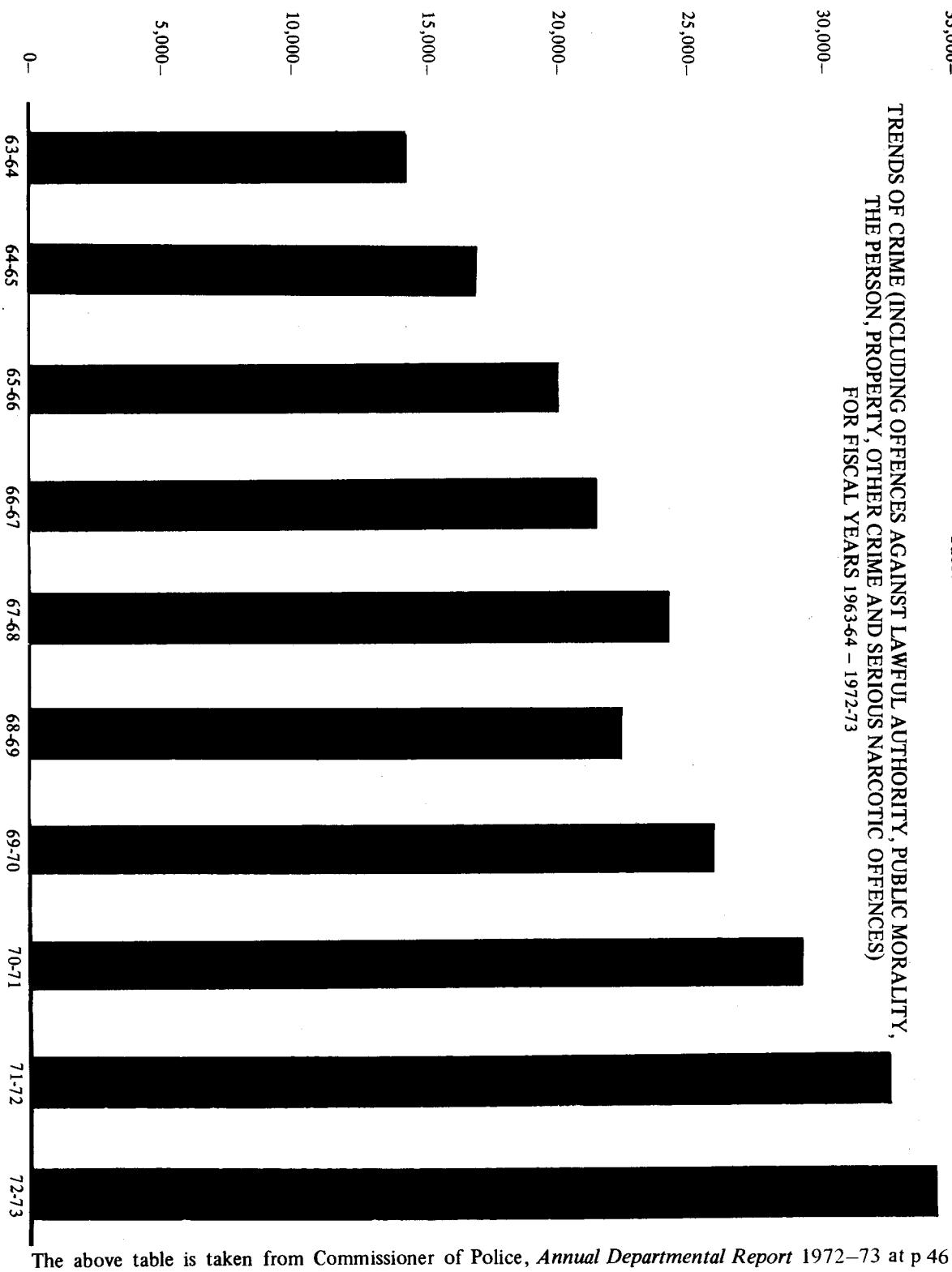
14 see above 'Effect of detention on prisoner's private life' and also footnote of the same page.
15 see above 'Impact on prospects of acquittal'.
16 see appendix table 3.
17 One of the reasons for this suggestion is because of the numerous procedure which are open to the accused in applying bail to the High Court. See above 'The procedure in the High Court'.
18 In Hong Kong a magistrate who has sat in bail application can also sit at the trial. See above 'Should a magistrate who has sat on a bail application try the same case?'
19 Although s 123 of the Criminal Procedure Ordinance confers a general power on the court (including a Magistrates' Court) a discretion to conduct criminal proceedings in camera. The section should be made mandatory in a bail case on the application of the defence counsel or the prosecutor.
20 In some states in America eg Michigan where an accused person is brought before a magistrate and before he is convicted, the granting of bail is compulsory, for until his guilt is proved beyond reasonable doubt by the prosecution, he is still presumed to be innocent. See, Lee and Lee, *Criminal Law and its* Enforcement (Tai Pei: 5th ed 1963) at 125.

**APPENDIX : TABLE 1**




The above table is taken from Commissioner of Police, *Annual Departmental Report* 1972–73 at p 46 (Appendix 13)

Table 2

*Number of persons prosecuted*

| Offences | 69-70 | 70-71 | 71-72 | 72-73 |
|---|---|---|---|---|
| Against lawful–authority (class 1) | 953 | 1,313 | 1,467 | 1,881 |
| Against public morality (class 2) | 336 | 376 | 401 | 527 |
| Against person (class 3) | 1,247 | 1,303 | 1,463 | 1,465 |
| Against Property (class 4) | 9,830 | 11,170 | 12,180 | 8,892 |
| Other Crimes (class 5) | 322 | 460 | 301 | 315 |
| Narcotics Offences (class 6) | 1,114 | 1,298 | 1,341 | 1,697 |

The statistics in Table 2 are extracted and condensed from Commissioner of Police, *Annual Departmental Report*, 1969-70, 1970-71, 1971-72, 1972-73 at pp 58, 48, 52, 50 respectively.

Table 3

Number of Male Persons Remanded for Hearing

| Court | 70-71 | 71-72 | 72-73 | 73-74 |
|---|---|---|---|---|
| Magistrate Court | 9,732 | 9,292 | 9,918 | 12,262 |
| District Court | 207 | 321 | 662 | 802 |
| Supreme Court | 119 | 163 | 282 | 223 |

These statistics are extracted and condensed from Commissioner of Prisons, *Annual Departmental Report*, 1970-71, 1971-72, 1972-73, 1973-74 at pp 18, 15, 33, 17 respectively.

Table 4

Frequency of certain Police Objection to Bail and results:

| | Grants | Refusals |
|---|---|---|
| (a) Objection based at least in part on likelihood of abscondence: | 3 | 82 |
| Objection based in part on likelihood of abscondence and in part on other grounds: | 1 | 69 |
| Previous abscondence noted: | – | 15 |
| Objections based solely in likelihood of further offences: | 1 | 12 |
| (b) Objections based at least in part on likelihood of further offences: | 3 | 72 |
| Objections based in part on likelihood of further offences and in part on other grounds: | 2 | 60 |
| Previous offences while on bail noted: | – | 27 |
| Objections based solely on likelihood of further offences: | 1 | 12 |
| Previous offences whilst on bail noted: | 1 | 6 |
| (c) Objections based at least in part on likelihood of interference with witnesses: | | |
| Objections based in part on likelihood of interference with witnesses: | – | – |
| (d) Objections based at least in part on need for further police enquries: | – | 6 |
| Objections based in part on further enquries and in part on other grounds: | – | 6 |
| Objections based solely on further enquries: | – | – |

(This table is extracted from 'A study of Bail Application through the Official Solicitor to the Judge in Chambers by Brixton Prisoners in 1974' [1976] Crim L R 541).

Regrettably statistics on similar nature could not be obtained from the Police Force.

*Photograph by courtesy of*
*South China Morning Post, Limited.*

# STATUTORY PROTECTION OF MANUAL WORKERS ENGAGED IN OVERSEAS EMPLOYMENT

*Anthony To Kwai Fung*

## INTRODUCTION

### Hongkong And The International Labour Organization

1 Because of her status as a dependent non-metropolitan territory, Hong Kong cannot be a member of the International Labour Organization (ILO). But this in no way impedes her association with the ILO, the only incovenience is that all official contacts are to be made through the United Kingdom government. In the field of technical assistance, Hong Kong has benefitted from visits of ILO experts and their advice. On the other hand, not being a member, Hong Kong is not called upon to ratify any conventions. But declarations in respect of Hong Kong of the application of conventions ratified by the United Kingdom are made on her behalf by the United Kingdom in one of the following manners:

(a) applied without modification, that is, full acceptance of all provisions of a convention;
(b) applied with modification, that is, acceptance of some specified provisions of a convention;
(c) decision reserved, that is, the convention cannot be accepted for the time being; and
(d) inapplicable as being irrelevant.

Hong Kong is obliged to give legislative and or administrative effect to the conventions which are declared as applicable with modification or applicable as modified.

2 As at June 1, 1976, ILO has adopted 143 conventions with a total ratification of 4,196 from its 135 member states. Of these 143 conventions, United Kingdom has ratified 69. As regards Hong Kong 21 conventions are applied without modification and 12 with modification, while decisions are reserved for 33 bringing a total of 66 conventions of concern to Hong Kong. This has placed Hong Kong in the upper half of the world league and compares favourably with Singapore with 21 conventions ratified, Philippines with 19, Thailand with 11 and Malaysia with 11.

### Contracts For Overseas Employment Ordinance

3 ILO conventions dealing with protection of workers employed overseas are conventions numbers 50, 64 and 86. Of these the first two are applied to Hong Kong without modification while convention number 86 was applied with modification. Covention number 50, Recruiting of Indigenous Workers Convention was adopted at the 20th session of 1936. Its main provisions are that the authority should enact regulations to control the recruiting of indigenous workers, having regard to the possible effect on the social life of the population and the protection required by the workers and their dependents. Convention number 64, Contracts of Employment (Indigenous Workers) Convention, the major convention in this area, was adopted at the 25th session of 1939. It provides that any contract of service by a manual worker in excess of six months for employment in a different territory, unless it is an apprenticeship contract or other contract specifically exempted by the authority, is required to be made in writing with all particulars stipulated and that such a contract is required to be attested by the authority who may prior to attestation impose conditions.

Convention number 86, Contract of Employment (Indigenous Worker) Convention, adopted at the 30th session of 1947 provides that the authority should prescribe different maxima in the length of contracts performed in the territories involving a short and inexpensive journey and those involving a long and expensive journey. The latter should logically be of longer duration. This convention was applied with modification that it is limited to manual workers.

4 To give legislative effect to these three conventions, so as to discharge its obligation under ILO the Contracts of Overseas Employment Ordinance[1] was enacted in February 1965 . The purpose of the ordinance as stated in the preamble is 'to control contracts of employment entered into in the colony by manual workers proceeding overseas for employment and the obtaining and supply of such workers and to provide for matters ancillary thereto'.

## ENFORCEMENT OF THE ORDINANCE

### Protection Under The Ordinance

*Persons to whom the Ordinance applies*

5 Section 4 of the ordinance provides that the Ordinance applies to 'contracts of employment entered into in to Colony by which a person in the Colony enters or agrees to enter into the service of another as a manual worker, where the contract is to be performed, whether wholly or partially,



1 Ordinance No 8 of 1965, now contained in cap 78 LHK, 1971 ed.

outside the colony. The proviso to the section exempts from the Ordinance the following categories of workers:

(a) persons employed for service as members of the crew of ships or aircraft;
(b) those proceeding to the United Kingdom for employment; and
(c) certain class of persons migrating for employment.

Thus other than the three categories of workers, the Ordinance applies to all manual workers contracting in Hong Kong for employment overseas. The Ordinance apparantly covers manual workers originally employed to work in Hong Kong but has been posted to go overseas temporarily for his employer's business. But since convention number 64 refers to a period of overseas employment of more than six months, the Commissioner for Labour only requires a written contract to be furnished for attestation only where the period of overseas service exceeds six months. In addition, for policy reasons workers proceeding for employment in Macau, Taiwan and China are not required to have their contracts attested.

6 The term 'manual worker' is not defined in the Ordinance. Resort has to be made to the case law. Lord Esher MR, in *Bound v Lawrence*[2] held that one is a manual labour under the Employers and Workmen Act 1875 if the substantial part of his employment is working with his hands and that the court should look to the nature of substantive employment and not to matters which are incidental and accessory. In *Haygarth v J & F Stone Lighting & Radio Ltd*[3] the House of Lords in considering the meaning of 'manual labour' under section 175 (1) of the Factories Act seemingly approved Lord Esher MR's dictum and held that to decide whether one is a manual labour, it was necessary to consider the nature of the substantial employment. Accordingly in that case an engineer employed to repair or adjust or replace radio or television sets with his hands was held to be a manual worker though the work involved one variety of skill.

7 Apart from the exceptions above mentioned, the application of the Ordinance is limited to manual workers contracting in Hong Kong for employment overseas while non-manual workers are not protected under the Ordinance. According to an official of the Labour Department, the limitation arose out of article 2 of the ILO Convention number 64 which reads: 1. This Convention applies to contracts of employment by which a worker enters the service of an employer as a manual worker for remuneration in cash or in any other form whatsoever.' But it is respectfully submitted that such limitation is groundless. What ILO sets up is a minimum standard for its members. There is no reason why an enlightened legislature of a member state or a dependent member like Hong Kong should not enact beyond minimum and protect manual as well as non manual workers going abroad for employment. Presumably when the bill was first drafted, attention was focused on the requirement of the convention instead of on the 'safety, health and welfare' aspects of the workers as is the basic theme in the later employment legislations.

8 Other practical reasons for the limitation, according to that officer, were as follows. Firstly, there was little demand from Hong Kong for non-manual workers overseas. Secondly, at the time the Ordinance was enacted, non-manual workers had little difficulties in finding local employment. Thus in the absence of attractive terms, written contracts and various contractual safeguards better than those statutorily provided for manual workers, it is unlikely that a non-manual worker would accept employment overseas. Thus statutory provisions for non-manual workers was thought unnecessary. If this is the true rationale for the limitation, it is regrettable as having little in principle to commend it. Conditions of employment is often a matter of bargain between employers and employees which depend on supply and demand of labour in both local and overseas employment markets as well as economic factors both locally and overseas. With changes in employment and economic situations, it is possible that there are exceptional isolated instances where a non-manual worker does not enjoy as good protections under his contract as does a manual worker under the ordinance. For these reasons, it is submitted that this limitation is not well founded. Similar criticisms were advanced by John Rear and Joe England when commenting on the wage limitation of two thousand dollars per month in respect of non-manual workers under the Employment Ordinance.[4] It is worth noting in



2 [1892] 1 QB 226.
3 [1966] 3 WLR 879.
4 England and Rear, *Chinese Labour under British Rule* (Hong Kong: Oxford UP, 1975).

passing that following the rapid wage increases and inflation as a result of the energy crisis and Middle East War, the Commissioner for Labour is now actively considering to increase this limitation under the Employment Ordinance to five thousand dollars while no limit is maintained in respect of manual workers.

9 Another reason for the limitation is probably historical. The first piece of employment legislation, Employers and Servants Ordinance[5] was applicable to employers and servants only. The category of servants described under that Ordinance were basically manual workers such as mechanics, artificers, handicraftsman, bearers of private chairs, water carriers, domestic servants etc.[6] This Ordinance was subsequently repealed and replaced in 1961 by the Employers and Servants Ordinance[7] which applied to all contracts of service in respect of which the remuneration in cash did not exceed seven hundred dollars. There was no distinction between manual or non-manual workers. Wage rate was the basic criterion for employment protection which hardly covered the entire field of manual labourers. This is illustrative of the type of legislative thinking of early sixties when the social welfare development of Hong Kong was still at its infancy. Probably this background setting together with the practical reasons suggested in paragraph 8 and article 2 of ILO convention number 64 influenced our legislators in 1965 to the extent of limiting the legislation to manual workers only.

*Protection under the Ordinance*

10 The protections given by the Ordinance are two folds – positive and negative. The positive protections are as follows:

11 Section 5 (1) requires every overseas contract to be in writing and signed by the parties concerned. The advantage of this is obvious. It enables terms of the contract to be clearly spelt out for both parties and in case of dispute, it reduces the court of the burden of finding evidence and intention etc.

12 Section 5 (2) requires that the written contract should contain the following particulars: names of parties, place of performance, wage rates, periodicity of payment, period of employment, rest days, paid holidays, duration of the contract, measures to be taken for the welfare of the workers and his dependents who accompany him, provision of passage for the workers and his dependents, free facilities for remittance to the dependents, transfer of contract, undertaking of repatriation, and undertaking not to require re-engagement in certain circumstances. These particulars adequately cover the essentials of a contract of employment to enable a worker to be reasonably protected against exploitation and abuse and adequately safeguard his interest and that of his dependents. The comprehensiveness of these particulars can be appreciated by a reference to a copy of the model contract recommended for use by the commissioner.

13 Section 6 requires every such contract to be presented to the commissioner for attestation before the departure of the worker from the colony. This ensures that the written contract is scrutinised by an Assistant Labour Officer who shall see that it is reasonable and fair as to the parties and that it contains the particulars required in section 5 and is adequate for the protection of the worker.

14 Section 8 empowers the commissioner to require a bond or a guarantee to be furnished for the performance of the contract by the employer. Should the employer default, the bond ensures funds available to meet the worker's claim, while the guarantee by a permanent resident in Hong Kong gives the worker an alternative party to sue.

15 As for negative protection, section 7 provides that where an overseas contract is not in writing or has not been attested by the commissioner, it shall be unenforceable against the worker. The section further provides that where the failure to make a written contract or to present it for attestation is due to wilful neglect on the part of the employer, the worker may sue for breach of contract and repatriation cost. This does not mean that the worker has no other right against the employer under the contract and that it is void. The provision ensures the worker of the right to recover repatriation cost if it is not provided for in the contract. Thus where a contract is not writing or is not attested, it is unenforceable against the worker, but it remains enforceable against the employer and the worker has the

5 No 49 of 1902.

6 Under the Employers and Servants Ordinance (No 45 of 1902), 'servant' was defined as 'every person above the age of sixteen years being a mechanic, artificer or other handicraftsman, engine driver or fireman; boatman, any person engaged for service on board any launch, cargo-boat, fishing-junk or trading junk; messenger, lift attendant, godown keeper, tallyman, watchman, labourer, servant in husbandry or manufacture; coachman, groom or other stable servant, bearer of private chair, puller or propeller of private jinricksha, water carrier; domestic menial or other house servant whether ordinarily employed in or out of door; who enters into a contract of service with an employer'.

7 cap 57, No 46 of 1961.

guarded right to repatriation. In this respect, it seems paradoxical that where the terms are fair and reasonable and a guarantee or bond is furnished, the worker may be better off if his contract is in writing but not attested.

*Jurisdiction of the local courts and tribunal*

16 Where a claim is made within six months the Labour Tribunal has exclusive jurisdiction under section 7 (1) of the Labour Tribunal Ordinance,[8] to inquire into and determine claims for money which arise from the breach of an overseas contract of employment. But the tribunal has no jurisdiction to hear claims arising from breach of contract or duty imposed by the common law or by an enactment. Thus while the parties to the employment contract may be sued in the tribunal, the tribunal cannot hear a worker's claim against the guarantor which is within the jurisdiction of the District Court or Supreme Court.

17 In all other cases, subject to provisions of the Limitation Ordinance,[9] claims involving less than twenty thousand dollars are to be lodged with the District Court and those in excess of twenty thousand dollars with the Supreme Court.

18 So far since the Ordinance came into effect, there was only one case involving a 'first contract' that was tried in the Labour Tribunal. Up till 1976, no proceedings, whether arising out of the overseas contracts or contracts of guarantee, have ever been brought before the District Court or Supreme Court.

**Enforcement Of The Ordinance**

19 There are two types of overseas contracts recognised by the commissioner: 'first contract' and 're-engagement contract'. A 'first contract' technically means one which is entered into in Hong Kong by a worker for performance overseas; it includes also a re-engagement contract (in the non-technical sense of the word) entered into in Hong Kong after a worker's repatriation on expiration of his first contract. Thus it refers to all locally entered contracts.'Re-engagement contract' refers to contracts of re-engagement entered into overseas.[10]

*Attestation of First Contracts*

20 Before a worker proceeds overseas for employment, he applies to the Director of Immigration for a travel document. The director will not issue travel document to any worker covered by this Ordinance unless he is satisfied that he has entered into a contract attested by the commissioner. If no such contract has been attested, the worker is referred to the commissioner.

21 Some workers and employers or their local representatives who are aware of the existence of this Ordinance approach the Overseas Employment Service of the Labour Department direct. This is especially the case with the larger overseas employers or where the formalities are processed through an employment agency or travel agent.

22. The requirement of the Ordinance is explained to both the worker and the employer, by letter if necessary. The written contract duly signed together with a letter of guarantee from a permanent local resident which includes a registered company, a form showing the particulars of the worker's dependents supported either by documentary proof or statutory declaration, and a medical certificate as to the fitness of the worker to proceed overseas for employment are then for warded to the Overseas Employment Service. When satisfied that the documents are in order, and the contract contains all the terms required under section 5(2) and are fair and reasonable, the worker is notified to present himself at the office of an Assistant Labour Officer for contract reading. On contract reading date, the terms of the contract are explained to the worker. Having satisfied that he understands and consents to the terms of the contract, the worker is required in accordance with section 11(1) to sign an under taking to show that he has freely consented to the contract, full understood its terms, spontaneously offered his service and that he is not bound by any previous contract. The officer then attests the necessary copies of the employment contract. One copy is handed to the worker, one is sent to the employer and one is retained in the department for six years in accordance with section 11(3), while other copies are to be sent to overseas authorities where required. The Assistant Labour Officer then recommends to the Direc-



8 cap 25, LHK 1974 ed.
9 cap 347, LHK 1976 ed.
10 para 43-5, post.

tor of Immigration for the issue of travel document. Where the terms of the contract are unfair he recommends to the commissioner for refusal to attest under section 11(2). Where the commissioner refuses attestation, such a contract has no further validity.

23 Three months prior to expiry of a contract, the Assistant Labour Officer writes to the employer to remind him of his obligation to repatriate the worker. If this and subsequent reminders are ignored, the Director of Immigration is informed that no extension of travel document is recommended (But see paragraph 33). If the employer informs the Labour Department of arrangements made for repatriation, a letter will be sent to the worker, when he is due to have returned, to confirm repatriation and whether the employer has fulfilled his obligation under the contract. If the employer indicates his willingness to re-engage the worker, a re-engagement contract will be processed.

*Attestation of Re-engagement Contests*

24 Having received the required number of copies of re-engagement contracts satisfactorily completed, a statement signed by the worker stating that he is willing to be re-engaged and to waive his right to repatriation under the first contract, a statement signed by the worker's dependents, if any, confirming that they have no objection to the worker's re-engagement, the necessary copies of contract are attested and sent to the worker, the employer and the overseas authorities if required, while a copy is retained for record for six years. The Director of Immigration is notified of recommendation to extend the validity of the worker's travel decument.

*Statistics*

25 The number of first and re-engagement contracts attested in the last six years are as follows:

| Year | First Contract | Re-engagement Contract |
|---|---|---|
| 69/70 | 2,513 | 1,239 |
| 70/71 | 2,134 | 1,306 |
| 71/72 | 1,057 | 887 |
| 72/73 | 706 | 709 |
| 73/74 | 798 | 346 |
| 74/75 | 645 | 600 |

26 According to the commissioner's report, the decrease in the total number of workers going abroad on attested contracts or being re-engaged overseas is due to the exclusion from the ordinance of workers going to Britain for employment which accounted for a decrease of about six hundred per year, and to more stringent immigration control adopted by certain countries. There was a slight increase in 73/74 in the number of first contracts attested and in 74/75 in the number of re-engagement contracts attested. The increase is due to a comparatively larger intake of fresh labour and re-engagement by the Republic of Nauru.

27 The major territories of employment and the number of workers proceeding there under a first contract attested by the Commissioner in the past six years are as shown in Table 1.

Table 1

Number of Workers employed in major territories of employment

| Territories | 69/70 | 70/71 | 71/72 | 72/73 | 73/74 | 74/75 |
|---|---|---|---|---|---|---|
| Brunei | 774 | 375 | 182 | 137 | 885 | 126 |
| Malaysia | 144 | 59 | 88 | 26 | 78 | 29 |
| Singapore | 75 | 67 | 54 | 30 | 41 | 33 |
| S Vietnam | 216 | 2 | — | — | — | — |
| UK | 586 | 688 | 179 | Ordinance inapplicable | | |
| W Germany | 13 | 41 | 65 | 66 | 73 | 77 |
| Holland | 31 | 56 | 14 | 13 | 10 | 8 |
| Nigeria | 182 | 208 | 136 | 148 | 132 | 90 |
| Nauru & Ocean Is | 169 | 271 | 122 | 48 | 184 | 70 |
| HM Ships | 09 | 112 | 96 | 167 | 143 | 118 |

28 Local workers are mostly recruited for employment in Brunei as masons, West Germany as cooks (hotel and restaurant workers), Nigeria as enamel or textile technicians, Singapore as fishermen, and on board Her Majesty's ships as coblers, tailors, etc. On the other hand Nauru recruits a large number of various kinds of workers for its phosphate works in the small but overwhelmingly

rich island Republic of Nauru.

*Complaints and Disputes*

29 Occasionally, complaints or disputes over the contracts are lodged by the worker, or his dependents or the employers. The handling of complaints and disputes is a matter of great concern to the Overseas Employment Service. Detailed procedures are laid down in the Manual of Instruction for Staff of the Overseas Employment Service of which the following is a brief description. Complaints are primarily handled by an Assistant Labour Officer while the Labour Officer in charge keeps regular review of the progress in the settling of disputes.

30 On receiving the complaint, the Assistant Labour Officer writes to the other party conveying to him the complainant's claims. On receiving an account from that other party, he carries out a process of conciliation by letters. Each case is treated according to its own circumstances and based on terms of the contract and laws of the country of employment. Where conciliation fails or is likely to prejudice the interest or either party, the assistance of overseas employment or labour authorities is sought. Co-operations are usually received. Where necessary, the guarantor is also contacted. Being secondarily liable to the worker for the employer's breach of contract, the guarantor sometimes helps in pressurizing the employer for an early and reasonable settlement.

31 According to the Overseas Employment Service, the majority of complaints are in respect of first contracts. The number of complaints is expected to show an increasing trend probably due to the ease of communication in the recent years and to the more thorough understanding of and exercise by the worker of his contractual and statutory rights.

32 Complaints are usually of the nature of wrongful dismissal, repatriation and arrears of wages. Settlement rate is usually high. Some complaints are not genuine labour disputes, but are complaints from dependents for not receiving remittances or objecting to the worker's re-engagement. In one case, the unyielding personality of an Assistant Labour Officer brought about the 'repatriation' of the remains of a deceased worker from Solomon Island three years after his death and an ex-gratia gratuity was given to the dependents. There was also one case involving an unattested contract where the employer's local agent threatened to sue an employee for non performance. The contract was unfair and unreasonable. The case was referred to the Director of Legal Aid. Presumably the action was dropped because of the negative protection given to the worker under section 7 of the Ordinance.

## ENFORCEMENT PROBLEMS

### General Enforcement Problems

33 Despite the conscious efforts by the commissioner to enforce the Contracts for Overseas Employment Ordinance, it is suspected, that a significant number of workers have been leaving Hong Kong without attested contracts. The commissioner also recognised the difficulty of requiring attestation of re-engagement contracts in particular. These problems are attributtable to the following reasons:

(a) the attitude of workers and employers;
(b) the complicated procedural requirements in connection with the attestation of the contract;
(c) problems raised by travel documents; and
(d) requirement for guarantees or bonds.

*Attitude of workers and employers*

34 Many workers take up overseas employment with their friends or relatives. Between them they have their mutual agreements and are eager to avoid entering into any formal contract. If they should enter into a first contract to meet local or overseas immigration requirement, the contract loses its value as soon as the worker lands overseas. There and then they honour their mutual agreement. Needless to say to enter into a re-engagement contract is of no appeal to them whatsoever especially when the worker is in possession of a travel document valid for ten years and he has no immediate need of the commissioner's assistance for extension of the travel document. And by the end of the ten years some of these workers may have gained permanent residence in the place of employment. Thus many workers do not care to forward their re-engagement contracts to the commissioner for attestation.

*Procedural problems*

35 According to the Overseas Employment Service, the time taken to complete the necessary procedures leading to the attestation of a first contract and a re-engagement contract is about one month and three months respectively. The delay is understandable because of the need to communicate with overseas employers and for them to furnish the necessary documents, medical certificates, and guarantees, etc The delay induces workers who are urgently required overseas to try to leave without an attested contract if somehow or other they can obtain the necessary travel documents.

*Travel documents*

36 As discussed in paragraph 16, workers proceeding for overseas employment are brought to the attention of the commissioner by the Director of Immigration when they apply for travel documents. There is no co-operation with overseas immigration authorities to check the entrance of Hong Kong citizens into their territories for employment. This being the case, a worker can escape the attention of the commissioner and proceed overseas for employment without complying with the requirement of the Ordinance in the following circumstances:

(a) When a worker is already in possession of a valid travel dicument, whether obtained for the purpose of employment or otherwise because in such circumstances, he need not approach the Immigration Department.
(b) When a worker fraudulently represents to the Director of Immigration that he applies for a travel document for purposes other than overseas employment, for example, visiting relatives, or sight-seeing etc.
(c) When a worker claims to be a non-manual worker outside the application of the Ordinance.

37 Some workers and certain travel agencies specialized in overseas recruitment are aware of these time and trouble saving alternatives. Not infrequently some workers prefer to go without an attested contract to save time and inconvenience. Employers are all the more willing to do so for the added advantage of saving inconvenience of finding a local guarantor or the unwarranted cost of furnishing a bond under section 8.

38 Furthermore, the long validity of travel documents raises problem with enforcement in respect of re-engagement contracts. With effect from April, 1972, certificates of identity are issued valid for ten years. Whether the parties enter into a re-engagement contract poses no immediate threat to the worker by way of the commissioner's influence in extension of validity of his travel document (Please also see paragraph 29).

*Guarantee and bond*

39 Despite the discretionary nature of the power granted under the Ordinance to require guarantee or bond, invariably in almost all circumstances, a guarantee or bond is required. The only exceptions are in respect of employment on board Her Majesty's ships and in one case of employment with a South African ambassador. It is understandable that overseas employers have great difficulties in finding a local guarantor unless they have friends or relatives, or business connections here.

40 The alternative is to seek a bond. The amount required by the commissioner is an amount equivalent to repatriation cost, six months wages and workman's compensation in case of one hundred per cent permanent disability if he is not covered by workman's insurance. Thus for a worker earning $1,500.– per month, the amount of bond is $73,000.– if he is not covered by insurance or $13,000.– if he is so covered:

| | Worker covered by insurance | Worker not covered by insurance |
|---|---|---|
| Repatriation Expenses : | $ 4,000 | $ 4,000 |
| Six months wages : | $ 9,000 | $ 9,000 |
| Workmen's compensation : | – | $ 60,000 |
| (48 months wages subject to a maximum of $60,000) : | | |
| | $ 13,000 | $ 73,000 |

41 To secure a bond, an employer has either to freeze this sum of money in a local bank or to pay a high rate of interest if he can offer property

to be held by the bank on mortgage term. The current mortgage interest rate is ten to eleven per cent per annum depending on strength of the security and duration of the mortgage.[11] Thus a bond is not a practicable alternative for a business minded employer especially when he has to recruit two or more workers.

42 To overcome these difficulties, it is possible that the parties will resort to malpractices over the guarantee. In order that an employer can provide a guarantee, the workers would request their personal friends or relatives to act as guarantors and agree not to claim against them in all events. Alternatively, an employer would recruit through travel agencies which act as guarantors regardless of consequence so as to secure business. The trustworthiness of these professional guarantors are doubtful. Assuming that a travel agency guarantees more than seventy contracts a year and assuming a complaint rate of say 1.5 per cent the importance of the situation can be expressed mathematically. Thus these agencies may be involved in a complaint case each year in which the proprietors may be required to discharge the employer's obligation under the contract. As calculated in paragraph 32, the liability may be as high as $73,000 in a single case. But the financial ability of these proprietors are not known. Thus these malpractices over the guarantee may defeat the purpose of the Ordinance. They arise because the Ordinance imposes no qualification for guarantors.

**Legal Problems With Re-engagement Contracts**

*Ultra vires*

43 There are three types of overseas employment contracts:

(a) an original or first contract in its literal sense entered into in Hong Kong for performance overseas;
(b) a re-engagement contract entered into in Hong Kong on the worker's repatriation after completion of his original contract; and
(c) a re-engagement contract entered into overseas after expiry of the first contract.

44 According to the commissioner, a 'first contract' in its technical sense refers to (a) and (b) above, while a 're-engagement contract' refers to (c) alone.

45 It is respectfully submitted that this interpretation is wrong. Section 4 provides that the Ordinance applies only to contracts of employment entered into in the colony. Thus type (c) contracts, that is, re-engagement contracts entered into overseas, are necessarily new contracts entered into overseas and are therefore excluded from the application of the Ordinance. Though section 14 provides that for avoidance of doubt all provisions of this Ordinance save where the context otherwise requires shall apply to overseas contracts of re-engagement, it is submitted that because of the words 'for avoidance of doubt' and because of section 4, section 14 should be restrictively construed to cover type (b) re-engagement contracts entered into locally. The word 'overseas' in section 14 merely refers to performance being overseas and not the contract being entered into overseas. If so, the commissioner in attesting type (c) contracts is acting ultra vires the Ordinance. Also, any other interpretation of section 11 which purports to extend application of the Ordinance to class (c) type of contract is necessarily ultra vires as being extra-territorial and therefore void.

46 Under the doctrine of supremacy of Parliament, Acts of United Kingdom Parliament can have extra-territorial effect.[12] However, enactments of a dependent territory cannot. In *MacLeod v Attorney General for New South Wales,*[13] the Privy Council quashed a conviction of bigamy on the ground that it was not possible for New South Wales Parliament to legislate extra-territorially. However, this rule had been criticized as too restrictive and was relaxed in the later case of *Croft v Dunphy.*[14] In that case, the Privy Council held that enactments of a self-governing Dominion which purports to have extra-territorial effect is valid if it bears a substantial relationship to the peace, order and good government of the dependent territory. However, it is inconceivable that the operation of the Contracts for Overseas Employment Ordinance extra-territorially has anything to do with peace, order and good government of Hong Kong as to bring the Ordinance within the rule in *Croft v Dunphy.* Furthermore, the principle in *Croft v Dunphy* deals with the legislative power of a self governing Dominion and not a dependent colony like Hong Kong and accordingly the principle in *Croft v Dunphy* has no application here.



11 According to interviews with Hang Seng Bank Ltd and The Chase Manhattan Bank, NA.
12 Dicey, *Introduction to the Study of the Law of the Constrtution* (10th ed 1959) 70.
13 [1891] AC 455.
14 [1933] AC 156.

47 However the Full Court in *Re Iu Kishing,*[15] developed a new notion. It drew the crucial distinction that Hong Kong is governed by Royal Instruction and Letters Patent and the Hong Kong legislature is delegated by the King. The King has power to legislate extra-territorially and when the King signifies non-disallowance of a dependent legislation, he has in effect converted it to his own prerogative legislation which can have extra-territorial effect. *Re Iu Kishing* was followed in *Re Chan Yue Shan*[16] but not in *Re Sun Ah Wan.*[17] *Re Iu Kishing* seems to have been followed again without argument in *Re Hung Siu Lun.*[18] If so, by the Queen's signification of non-disallowance, the Ordinance is given extra-territorial effect. But it is submitted that the argument in *Re Iu Kishing* is illogical and dubious. Furthermore, the above cases cited involve Chinese Extradition Ordinance which can be considered as one enacted for the peace, order and government of Hong Kong. The Overseas Employment Ordinance is not one of this category. For the above reasons it would be unwise to rely on the Ordinance as having extra territorial effect. No remedy is possible unless constitutional changes are also involved.

48 Whatever interpretation is to be taken, a contract entered into overseas in accordance with the law there is a valid contract which will be given effect by the courts there. Attestation or non-attestation by the commissioner will not affect its validity or enforceability overseas. It makes no difference whether it is the Ordinance which is ultra vires as being extra-territorial or that the Ordinance is not intended to be extra-territorial but only that the commissioner is acting ultra vires in attesting the contract. And whether the Ordinance can have extra-territorial effect, it is inconceivable that the foreign courts will hold that contracts validly entered into in the territories within their jurisdiction should be void merely because they do not comply with an enactment in the workers' place of origin.

49 Presumably the commissioner appreciates some of the legal problems raised by the interpretation of the words 're-engagement contract' under the Ordinance. However, paragraph 3 of article 16 of International Labour Organization Convention number 64 expressly applied to re-engagement contracts and the context in which these words are used in the convention makes it absolutely plain beyond all doubts that they refer to overseas contracts of re-engagement, that is, type (c) contracts. Paragraph 2 of Article 16 provides that

> 'where the period of service to be stipulated in any re-engagement contract, together with the period already served under the expired contract involves the separation of any worker from his family for more than eighteen months the worker shall not begin the service stipulated in the re-engagement contract until he has had the opportunity to return home at the employer's expense.'

If 're-engagement contracts' under the convention refers to re-engagement contracts entered into locally on the workers' repatriation after completion of his original contract, that is, type (b) contracts, the entire paragraph 2 is a waste of words and is meaningless. That it refers to type (c) contracts is the only consistent interpretation. Because of this obligation under the International Labour Organization Convention the commissioner continues to attest type (c) contracts.

*Jurisdictional problem of the local courts*

50 The above apart, the enforceability by the local courts of a re-engagement contract entered into overseas also raises complicated problems which equally apply to first contracts. In brief the situation is governed by Orders 10, 11 and 14 of the Supreme Court Ordinance.[19] Thus where the employer is outside Hong Kong with no local agent here or where the contract does not contain a term to the effect that the court shall have jurisdication to hear any action in respect of the contract, it is unlikely that the contract can be enforced locally. This is principally because of difficulties in effecting service of writ and further difficulties are raised in enforcement of judgement against an overseas employer.

51 So far since the Ordinance came to effect, there is only one case involving a first contract that was tried in the Labour Tribunal: *Chan Pak-to v Dai Dai Knitting Co Ltd.*[20] But that case was uninstructive because of non-existence of the employer.

15 [1908] 3 HKLR 20.
16 [1909] 4 HKLR 128.
17 [1910] 5 HKLR 72.
18 [1915] 10 HKLR 144 at 139, per Compertz J.
19 cap 4, LHK 1976 eal.
20 Lab Trib Claim No 1458 of 1976.

## EXAMINATION OF COMPARABLE STATUTES

### Countries Which Ratified International Labour Organization Numbers 50, 64 And 86

52 The major convention is Convention Number 64 which has been ratified by 26 countries as at June 1, 1976. Of these only thirteen have ratified also Conventions Number 50 and 86. The countries ratifying these conventions are as shown in Table 2.

Table 2 – Countries ratifying Conventions 50, 64 & 86

| Countries | No 50 | No 64 | No 86 |
|---|---|---|---|
| Argentina | X | | |
| Barbados | X | | X |
| Belgium | X | X | |
| Burundi | X | X | |
| Cameroon | X | X | |
| Fiji | X | X | X |
| Ghana | X | X | |
| Guyana | X | X | X |
| Jamaica | X | X | X |
| Japan | X | | |
| Kenya | X | X | X |
| Malawi | X | X | X |
| Malaysia | X | X | |
| Yemen | | X | X |
| Lesotho | | X | |
| Australia | | | X |
| Equador | | | X |
| Guatemala | | | X |
| Mauritius | X | X | X |
| New Zealand | X | X | |
| Nigeria | X | X | |
| Norway | X | | |
| Panama | | X | X |
| Romania | | X | |
| Rwanda | X | | |
| Sierra Leone | X | X | X |
| Singapore | X | X | X |
| Tanzania | X | X | X |
| Br. Somaliland | X | X | |
| Trinidad & Tobago | X | | |
| Uganda | X | X | X |
| United Kingdom | X | X | X |
| Zaire | X | X | |
| Zambia | X | X | X |
| Bahamas | X | X | X |

*United Kingdom*

53 United Kingdom has ratified all the three conventions, but despite extensive search over Halsbury's Statute and the Index to Statute prepared by Her Majesty's Stationery Office, no equivalent Act seems to have been made to give legislative effect to those conventions. The only United Kingdom provision of some relevance is section 9 of the Contracts of Employment Act 1963, which provides:

Section 9(1) : Section 1 - Section 4 of this Act shall not apply in relation to employment during any period when the employee is engaged in work wholly or mainly outside Great Britain unless the employee ordinarily works in Great Britain and the work outside Great Britain is for the same employer.

Section 9(2) : Subject to the foregoing subsection this Act shall apply whatever the law governing the contract between the employer and the employee.

Section 1 deals with rights of employer and employee to a minimum period of notice. Section 2 deals with rights of employee in period of notice. Section 3 provides for measure of damages in proceedings against the employer. Section 4 is concerned with written particulars of terms of employment. The Act does not provide for attestation, guarantees or bonds and repatriation etc. It serves little for the purpose of comparison.

*Fiji, Kenya, Malawi and Kenya*

54 Statutes in many of these countries ratifying these conventions are not available locally. The statutes of Fiji, Kenya, Malawi and Uganda have been examined.[21]

55 Unlike Hong Kong which embodies all the provisions in respect of overseas employment in one Ordinance, the provisions in this subject are embodied in the main employment statutes of these countries. As these provisions are to give effect to the same three International Labour Organization Conventions, they are in essence similar to the Hong Kong provisions in the Ordinance which is enacted for the same purpose.

56 In all these countries, a 'foreign contract of service' is statutorily defined as a contract made within that country to be performed in whole of in part outside that country. But the definition in the Malawi Act expressly excludes those contracts under which the employees are required to perform a journey from Malawi and to return within two months.

57 All foreign contracts in these countries are required to be in writing and to contain certain particulars and to be attested. In this respect they are similar to the provisions contained in section 5 and section 6 of the Hong Kong Ordinance. But



21 These are –
Fiji : The Employment Ordinance (cap 75, Laws of Fiji 1967 ed)
Kenya : The Employment Ordinance (cap 226, Laws of Kenya 1962 ed)
Malawi : The Employment Act (cap 55:02, Laws of Malawi 1968 ed)
Uganda : The Uganda Employment Act (cap 192, Laws of Uganda 1964 ed).

section 34 of the Fiji Ordinance and section 9(2) of the Kenya Ordinance require these contracts to be made in prescribed form or to the like effect. On the other hand, section 13(3) of the Uganda Act section 13(9) of the Malawi Act provide that the attested copy of the contract shall be admissible as evidence of the contract without further proof.

58 Section 8(1) of the Uganda Act provides that a foreign contract is void if not in writing, while section 11 of the act and section 8(1) of the Kenya Ordinance provide that an unattested contract is unenforceable against an illiterate worker only, and no mention is made where the worker is able to read. Section 35(4) of the Fiji Ordinance and section 12(3) of the Malawi Ordinance provide that an unattested contract is unenforceable against the worker except during the first month it is made, but it can be attested any time before the expiry of the contract. It is doubtful if these provisions refer to local contracts or to written contracts generally include foreign contracts. If they refer also to foreign contracts, the result may be absurd; because if it is enforceable during the first month, an employer can send his worker overseas during the first month but without legally completing the attestation requirement; or having so sent his worker abroad can remedy the defect by attestation anytime before expiry of the contract. The inadequacies in these statutes are probably due to drafting defects and failure to anticipate their application to foreign contracts. In this regard, section 6 and section 7 of the Hong Kong Ordinance are preferred. But it is doubtful whether such provisions are suitable to the social conditions of those countries. In addition, section 12(6) of the Malawi Act imposes a fine of £ 2 for everyday on the employer's wilful default in not presenting the contract for attestation one month after it is made.

59 Section 48 of the Fiji Ordinance, section 12 of the Kenya Ordinance and section 12(1) of the Uganda Act require from the overseas employer a bond with one or more surety from a local resident to secure the performance by the employers of the contract. This is similar to the requirement under section 8 of the Hong Kong Ordinance. No guarantee or bond of any kind is required under the Malawi Act.

60 Provision by the employer of journey to the place of employment and repatriation are all provided for in these statutes as is provided by the Hong Kong Ordinance in section 5(2) (j) and section 5(2)(k). In addition, section 42 of the Fiji Ordinance provides that failure to repatriate is an offence for which a fine of £ 50 on first conviction or £100 or six months imprisonment on subsequent conviction is imposed on the employer. But it is doubtful how this penal punishment can be imposed on an overseas employer.

61 Furthermore, in Fiji, Kenya and Uganda, it is an offence to induce, or attempt to induce a person to proceed abroad under an informal contract, that is unattested or oral contract, or knowingly aid in the engagement of such persons. The Kenya statute extends the offence to employers who engage such persons. It is worth noting that the word 'knowingly' is used in connection with the offence of aiding in the engagement of such persons but not used in describing the other offences under the same sections. Thus it appears that the offence of induction and engagement are offences of strict libility for which proof of mens rea as an element of the offence is not required. But no penalty of any kind is imposed under the Hong Kong Ordinance for contravention; the only sanction is that the contract is unenforceable against the worker under section 7.

62 It seems that the law in these places takes a very serious attitude against contravention of the statute and imposes penalty for the contravention. This can probably be explained on the ground that these are under developed countries with little social and economic development. The countries are poor and opportunities of local employment are low. Thus more people have to seek overseas employment. To guard these workers from exploitation and unfair terms, stronger laws are enacted. That penal punishment is not imposed under the Hong Kong Ordinance probably reflects on the unimportance of the Ordinance to Hong Kong because of the small number of workers proceeding overseas, the relatively high educational standard of Hong Kong workers and the more advanced economic and social development in Hong Kong.

## COMMENTS AND RECOMMENDATIONS

### Comments

63 The Ordinance is of little importance for Hong Kong. Its position as a financial centre in South East Asia, as well as its rapid economic and industrial development have created a great demand for labour. Wage rate in Hong Kong is among the highest in Asia. Hence the need for local workers to seek overseas employment is low. On the other hand, employment and immigration control overseas have also deterred workers going abroad.

### Recommendations

64 Earlier discussions have isolated a number of problem areas. To correct the workers' attitude towards complying with the Ordinance, the commissioner has arranged for periodic press releases and radio interviews to publicize the benefit of entering into a written and attested contract. The time taken for attesting a contract is reasonable having regard to the delay in communication. The time taken also depends on the promptness of the employer to respond to the commissioner's communication. Thus this area is not entirely within the commissioner's possible control and influence. No recommendation in these two areas will be made.

*Re-engagement contract*

65 This problem has been thoroughly discussed in paragraphs 43-50. The legal problem of extra-territoriality is an inherent one of the legislative ability of a dependent colony. It may perhaps be solved by passing a requisite act by the United Kingdom Parliament or by the colony undergoing constitutional changes. However this problem is totally academic. The real practical problems are jurisdictional problems, problems of emforcement of judgment given by the local courts and whether effect will be given to the local statute by a foreign court. Hence no recommendation in this area seems practical.

66 However, as discussed in paragraph 49, effect has to be given to paragraph 3 of Article 16 of Convention Number 64 despite the fact that ILO has made no consideration for all the legal or jurisprudential niceties facing a dependent legisiature like Hong Kong. Probably it is because of the obligation under this Convention that the commissioner continues to attest overseas re-engagement contracts. To remove the difficulties raised in attesting these contracts, the commissioner should liaise with the Director of Immigration so that travel documents of shorter validity, say five years, will be issued to workers. This makes the extension of their travel documents more dependent on the commissioner's recommentation and hence induce them to enter into re-engagement contracts and to present them for attestation.

*Guarantee*

67 This is the real problem of concern. If the benefit of the worker is of paramount importance, the malpractices should be stopped. Suitability of guarantors should be examined and certain minimal requirements should be laid down if not generally at least for those guaranteeing more than say twenty contracts. They should give proof of financial ability to meet repatriation cost and workmen's compensation in the case of total permanent disability of a certain number of workers to be decided on an individual basis according to the number of contracts guaranteed and on the basis of current complaint rate or risk to be reviewed from time to time. Where the number of contracts guaranteed is exceptionally large, a bond for a certain amount should also be required.

*Bond Scope of the Ordinance*

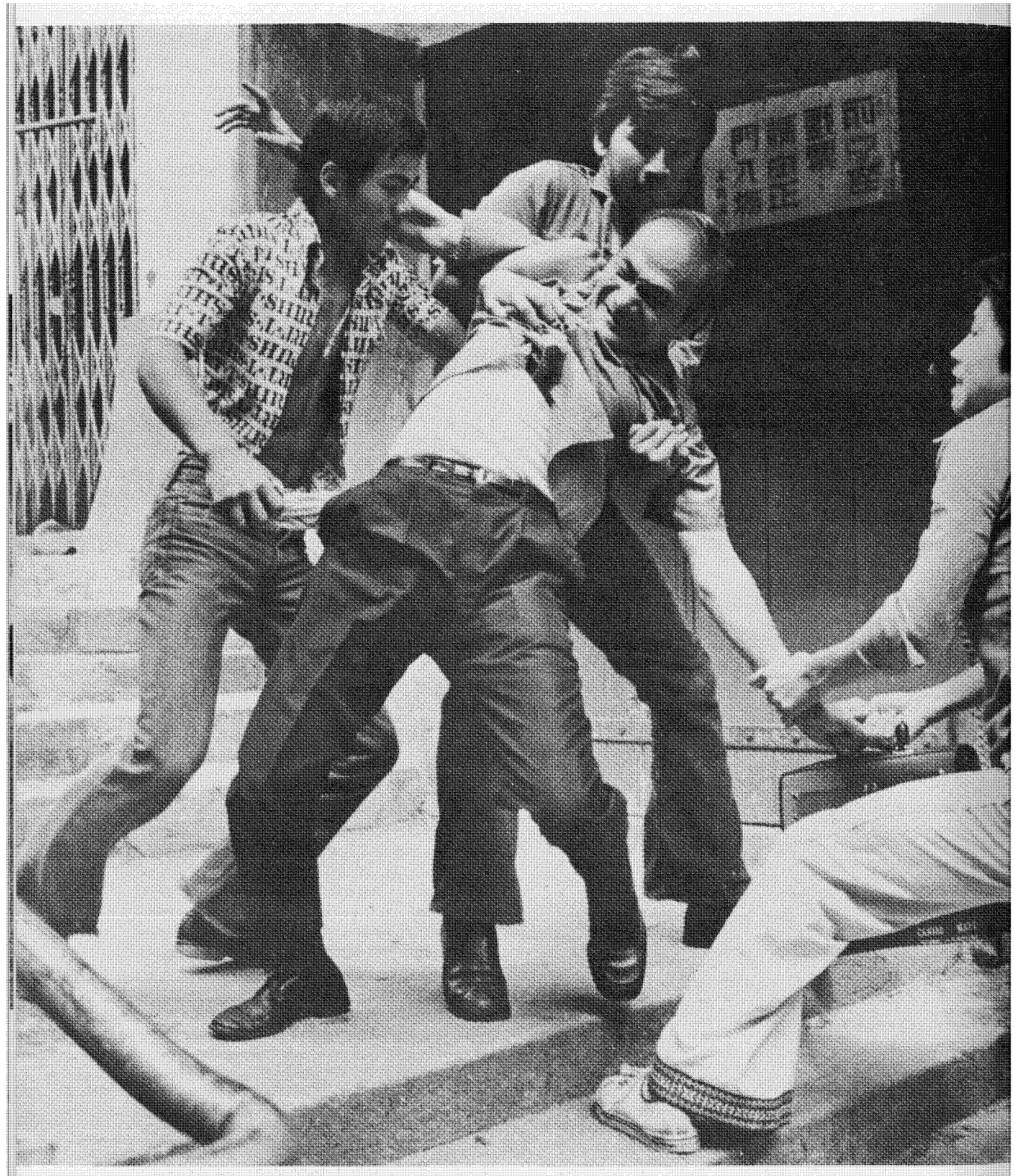
68 The amount of bond required should be adjusted more realistically as to make it practicable. Where immigration authorities have required the employer to furnish security for the worker's repatriation, the amount should be reduced accordingly. It is also unlikely that a worker will be owed six months wages and suffer total permanent disability after six months no pay service. It is suggested that the amount should be reduced to cover repatriation cost plus workmen's compensation for total permanent disability only. Further reduction of the amount of the bond should be made where the country of employment provides good social security schemes and good and fair treatment to workers and their claims. In France, for example, workmen's compensation is part of the general social security scheme, while in Union of Soviet Socialist Republics as well as

many communist countries, workmen's compensation is paid by the state.

69 It is hoped that such reduction will encourage employers to resort to bond thereby reducing the possible and undesirable use of travel agencies or workers' friends or relatives as guarantors.

*Scope of the Ordinance*

70 As discussed in paragraphs 7-9 the limitation of the Ordinance to manual workers is not based on sound principle or policy. It is therefore recommended that similar to the Contract of Employment Act 1963, the Ordinance should be extended to cover all employees, manual or otherwise, contracting in Hong Kong for employment overseas.





*Photograph by courtesy of Royal Hong Kong Police Force, Public Relations Bureau.*

# AN ASPECT OF CRIME PREVENTION — POSSESSION OF OFFENSIVE WEAPON IN A PUBLIC PLACE

*Billy Kong Churk-hoi*

## INTRODUCTION

### Scope of Subject

The people in Hong Kong are much corncerned about the rise in crime over the past ten years or so and the Governor has said that the community will not accept such a rise as 'an inevitable complement to prosperity in the latter half of the twentieth century.'[1]

Section 33 of the Public Order Ordinance[2] is an attempt to grapple with the serious rise in crimes of personal violence. Some idea of the gravity of the position may be obtained by examining the figures of violent crimes, known to the police, to have been committed over the ten years period to the passing of the Ordinance in 1967. Taking firstly cases of murder and manslaughter, in 1957, the figure was 19 which contrasts sharply with a total of 43 in 1966 and 80 in 1967. Cases of serious assaults continued to rise abruptly from 363 in 1957 to 1092 in 1967. A similar picture is portrayed in cases of robberies where 117 cases were committed in 1957 but the figure reached 1695 in 1967. (Please also see Appendix A for detail illustration.)

Whilst it is true that many of these cases did not necessarily involve the use of offensive weapons, there is abundant evidence that in an increasingly large number of crimes of personal violence the present-day criminal has no compunction in using a variety of weapons to achieve his purpose.

Section 33 of the Public Order Ordinance provides an effective measure of crime prevention. In the first place it discourages the carrying of weapons which would be dangerous if used when those carrying them engage, as a result of temperament, drink, or the need for diversions, in fighting among themselves or assaults on policemen or other citizens. Secondly, it tends to protect those who are wont to carry weapons or razors as a badge of manhood, one equivalent of a sword for our latter-day young bloods, from the consequences of their own folly by making less likely the facile stab with a sharp weapon which can result in a charge of homicide[3].

It is true that prevention is always better than cure. Preventive measures are needed to curb potential criminals from furthering their unlawful intentions. However, it is also important that a correct balance be maintained between the opposing values of liberty and public order.[4] It is therefore axiomatic that the law governing preventive crimes should be concisely and clearly drafted so as to avoid misinterpretation and to close loopholes for abuse of power by the law enforcement agencies.

Section 33 has been in operation for a period of time sufficient for difficulties of interpretation to emerge and the object of the present article is to examine the problems of interpretation and the functions of this section in crime prevention.

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1 Rear, *Fight Crime* (Hong Kong: Hong Kong Bar Association, 1973).
2 Cap 245 LHK 1970 ed.
3 See Browlie, 'The Prevention of Crime Act 1953' [1961] Crim LR 20 for a detail discussion on this topic.
4 See Sargant, 'Police Powers – A General View' [1966] Crim LR 583.

**The Concept of Preventive Offences**

The courts seem at one time to have inclined to the view that any act done with intent to commit a felony or misdemeanour was an offence. It was held to be an offence at common law to procure counterfeit coin with intent to utter it in payment[5] and to procure indecent prints with intent to publish them[6]. It was enough that the procuring was an act done in the commencement of a misdemeanour to render it indictable as a misdemeanor in itself. The position is now governed by the principle of common law attempt. Parke B when considering the liability of common law attempt in *Eagleton*[7] said,

> 'The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are ....'

It is an indictable offence at common law to attempt to commit an offence whether common law or statutory. An attempt to commit a crime is an act done with intent to commit that crime and it must be an overt act of such a kind that it is intended to form and does form part of a series of acts which would constitute the actual commission of the offence if it were not interrupted. The act relied on as constituting the attempt must not be an act merely preparatory to commit the completed offences, but must bear a relationship to the completion of the offence.[8] Accordingly, buying matches with intent to commit arson would not be a sufficiently proximate act to amount to an attempt to commit arson.[9]

In punishing persons for attempting to commit crimes the law is punishing them for the offence they fail to complete. The justification for this is that it is only common sense to lock the stable door once the horse has shown signs of intending to get out, and foolish to wait until it has gone. Once there is an attempt, 'the offender appears to the legal system, on the strength of the act done, already so dangerous that the law dare not wait for further proof of his dangerous character; the incompleted act furnishes a sufficient proof.'[10]

Attempts are sometimes difficult to prove and in some cases, it would be difficult to ascertain at what stage the act of the criminal can safely be regarded as 'sufficiently proximate.' The creation of preventive offences by the legislature is desirable in this connection. If the legislature considers that the acts of the offender preparatory to the commission of an offence has already imposed undue threat to the safety of society or person, the legislature is justified in making such a preparatory act an offence itself. If, for example, the law wants to prevent people injuring others with offensive weapons, it can do so, not by trying to show that anyone who carries an offensive weapon with the intention of using it is ipso facto guilty of attempted assault, but by making it a crime to carry an offensive weapon without lawful excuse. This is exactly what Section 33 of the Public Order Ordinance seeks to enforce.

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5 *Fuller and Robinson* (1816) R & R 308.
6 *Dugdale* (1853) 1 E & B 435.
7 (1855) Dears CC 515.
8 This principle is now firmly established, see *Haughton v Smith* [1973] 3 All ER 1109.
9 Per Pollock CB in *Taylor* (1859) 1 F & F 511. The proximity test was also applied in *Davey v Lee* [1967] 2 All ER 423 and *Comer v Bloomfield* (1970) 55 Cr App R 305.
10 Ullmann, 'The Reason for Punishing Attempted Crimes' (1939) 51 JR 353 at 363. See also G H Gordon, *Criminal Law* 152-3.

**Section 33 of the Public Order Ordinance**

The Public Order Ordinance[11] was brought into being on November 17, 1967.[12] Under section 33(1) of the Ordinance, an offence is committed by 'any person who without lawful authority or reasonable excuse, has with him in any public place any offensive weapon.'

The Ordinance was passed in 1967 which was a period of considerable public disorder. The long title of the Ordinance reads:–

> 'To consolidate and amend the law relating to the maintenance of public order, the control of organisations, meetings, places, vessels and aircrafts, unlawful assemblies and riots and matters incidental thereto or connected therewith.'

The first question therefore arises as to whether the long title governs or places a gloss on the wording of section 33(1) of the Ordinance, leading to the conclusion that section is only applicable where there is some element of public disorder, or of association with orther persons, at the time the offence is committed. This question was considered in *Liu Kam-man*[13] where the Full Court followed the House of Lords decision in *Ward v Holman*[14] in which Lord Parker said, 'It is impossible to look at the long title of the Act as controlling the operative words of the Act itself unless those words are ambiguous.' Applying this reasoning the Full Court held that the words of section 33(1) are plain and unambiguous and therefore the wordings of the long title are irrelevant. Thus, the Public Order Ordinance applies to individual persons committing an offence on their own as well as to two or more persons committing an offence in concert.

This decision makes it plain that the aforesaid section is wide enough to make it an offence for any person to be found in a public place carrying an offensive weapon without lawful authority or reasonable excuse. This brings section 33(1) Public Order Ordinance in line with the Prevention of Crime Act 1953 which deals with the same offence.

## PROBLEMS ARISING FROM THE INTERPRETATIONS OF SECTION 33

**Offensive Weapons**

Under section 1(1) of the Prevention of Crime Act 1953 an offence is committed by 'any person who, without lawful authority or reasonable excuse, the proof thereof shall lie on him, has with him in any public place any offensive weapon':–

(i) 'Any article made ... for causing injury to the person', comprising such things as revolvers, daggers, coshes and knuckle-dusters.[15]
(ii) 'Any article ... adapted for use for causing injury to the person', which would include a chair leg studded with nails, a sock filled with sand or a razor blade inserted in a potato.
(iii) 'Any article not coming within (i) or (ii) above but which is intended by the person having it with him for use for causing injury to the person.'

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11 Cap 245 LHK 1970 ed.
12 Prior to the passing of this ordinance, s 17 of the Summary Offences Ordinance (cap 228 LHK 1972 ed) had been in operation which makes it an offence for any person to have in his possession any spear, bludgeon or other instrument fit for unlawful purposes with the intent to use the same for any such unlawful purpose, or is unable to give a satisfactory account his possession thereof. This section is obscure in meaning and has caused difficulties in determining its precise effect. It appears that the main purpose of the section is to deal with theft offences like pick-pockets (*Tang Chi-ming* [1968] HKLR 716 FCt) or housebreaking (*A-G v Li Chu* [1968] HKLR 242). Since this section does not specify the location in which the offence could be committed, it is submitted that it is wide enough to extend to private places. Above all, the penalty for such an offence is a fine of $1,000 or imprisonment for three months, which is considered less effective than s 33 of the Public Order Ordinance, which is drafted in greater clarity and provides for a more severe penalty. The maximum punishment of which, prior to the amendment in 1972, was two years imprisonment.
13 Crim App No 100 of 1972.
14 [1964] 2 A11 ER 729.
15 '[B]ludgeons, properly so-called, clubs and anything that is not in common use for any other purpose but a weapon are clearly offensive weapons within the meaning of the legislature': (1784) 1 Leach 342n(a).

The distinction between these three types is of great importance, for in the first two the prosecution has only to prove possession in the public place.[16] The accused will then be convicted unless he can prove that he had lawful authority or reasonable excuse. In type (iii), however, the onus is on the prosecution to prove it was carried with intent to injure.[17] Examples of this type would include articles with domestic or trade use, sheath-knives[18], a shot-gun[19], a razor[20] and indeed almost anything that is solid and heavy or is otherwise injurious if brought into contact with the person.

It will be noted that section 33(1) Public Order Ordinance provides nothing concerning the accused's burden of proving lawful authority, or reasonable excuse. The apparent omission in the Hong Kong Ordinance is, however, academic[21] since by virture of section 94A(1) of the Criminal Procedure Ordinance[22] the onus of showing lawful excuse is upon a defendant.

A more real distinction between the statutory law of England and that in Hong Kong lies in the respective definitions of 'an offensive weapon' in the two jurisdictions. In the Public Order Ordinance[23] 'an offensive weapon' is defined in section 2 as meaning:–

> 'any article made or adapted for use, or suitable, for causing injury to the person, or intended by the person having it in his possession or under his control for such use by him or by some other person.'

Huggins J in *Lok Chi-wai*[24] said, 'This definition (section 2 cap 245) is considerably wider than the comparable provision applicable in England by reason of the addition in Hong Kong of the words "suitable for use".' Hong Kong courts are faced with great difficulties in deciding what the true definition of the phrase 'articles suitable for causing injury' is. This question was raised in *Lok Chi-wai*[25] in which the appellant was found guilty by the magistrate under section 33 of the Public Order Ordinance. The facts in this case were that the appellant, who had been loitering in a public lavatory was found in possession of an ordinary fruit or vegetable knife with a blade of three and half inches. The appellant's story was that he had just bought it and that it was still wrapped. The magistrate found as a fact that it was not wrapped. It was conceded by the crown that the knife was neither made nor adapted for causing injury and that there was no evidence that the appellant had any intent to use the knife as a weapon although there were strong grounds for suspicion.

Huggins J dismissed the appeal on the ground that 'a knife of the kind found in possession of the appellant was clearly within the definition "offensive weapon" in section 2 of the Ordinance.' He agreed with the suggestion by crown counsel that the intention of the phrase 'suitable for causing injury' was to include anything that can readily and effectively be used to cause injury, to be 'as good an explanation as one could find.' However, he made no attempt to make any firm decision on this point as he considered that it was not necessary for him to do so since he held that the magistrate, as a matter of law, is entitled to choose and decide, between the conflicting evidence given on either side, as to which is more reliable. In this case, the magistrate accepted the evidence of the prosecution.

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16 *Davis v Alexander* (1970) 54 Cr App R 398.
17 *Petrie* [1961] 1 A11 ER 466.
18 *Woodward v Koessler* [1958] 2 A11 ER 557.
19 *Gipson* [1963] Crim LR 281; *Hodgson* [1954] Crim L R 379.
20 *Petrie* [1961] 1 A11 ER 466.
21 per Pickering J in *A-G v Hui Kwok-keung* Crim App No 863 of 1973.
22 Cap 221 LHK 1972 ed.
23 Cap 245 LHK 1970 ed.
24 [1973] HKLR 577 at 579.
25 ibid.

This decision is not helpful in deciding to any certainty the definition of the phrase 'suitable for causing injury'. However, inference could be drawn from this decision that under section 2 of the Public Order Ordinance, once it is established that an 'article suitable for causing injury' is found in possession of an accused, the accused will be convicted unless he is able to prove that he had lawful authority or reasonable excuse.

A detailed discussion was made by Pickering J in *Att-Gen v Hui Kwok-keung.*[26] In this appeal the exhibit had unfortunately been destroyed and the court had to rely on a drawing and description of a knife allegedly found in the possession of the appellant.

The knife in question appeared to have a blade of approximately six inches. Crown counsel argued that any knife which could be held by the handle and which had a blade two or three inches long must be suitable for causing injury. However, in the present case the trial magistrate considered that the knife, which he described as a stainless steel vegetable knife was unsuitable for causing injury since it was blunt and no attempt has been made to sharpen it. Pickering J whilst expressing his doubts on the decision of the magistrate, could not formulate a firm decision in the absence of the exhibit.

Nevertheless he said, 'It is perhaps not inappropriate to remark that the distinction obtaining in England between weapons which are offensive per se for example, a knuckle-duster or a dagger, and offensive weapons not made or adapted for the specific purpose of offence, for example, a knife or a spanner, does not obtain in Hong Kong by virture of the inclusion in the definition of the offensive weapon as an article "suitable for causing injury to the person".'

In the appeal, argument arose as to whether the meaning of 'suitable for' could be equated with 'capable of'. Pickering J considered this point and said, 'In the court below, it was argued that "suitable for" could be equated with "capable of" but, as it seems to me, this equation is too facile. [A volume of the Ordinance of Hong Kong][27] is capable of causing injury to the person but is not basically suitable for that purpose and anybody such a volume in a public place could not presumably be found guilty of this offence unless and until, in the words of the definition, he intended to use it for the purpose of causing injury to the person. Too many illustrations could befog the issue but a heavy ashtray or paperweight may both be said to be capable of causing injury to the person and in one sense suitable for that purpose but as I see it this is not the form of suitability contemplated by the Ordinance and possession of such objects in a public place would not constitute an offence unless and until the intention was formed to use them for the purpose of causing injury. Each case must depend upon its facts and in the case of otherwise innocuous objects "capable of" and in the limited sense "suitable for" causing injury the courts will no doubt usually be driven back upon proof of intent.'[28]

This obiter dictum is important in that it helps to narrow down the wide definition of offensive weapon to some extent. Pickering J seemed to hold the view that to establish whether an article is suitable to cause injury, intention of the accused to use it for the purpose of causing injury must be proved. This appears to be in conflict with the decision in *Lok Chi-Wai*[29] in which case the crown clearly conceded that there was no evidence that the appellant had any intent to use the knife as a weapon although there were strong grounds for suspicion, and the accused was convicted purely on the ground that the weapon he had in possession was an offensive weapon under the definition of 'article suitable for causing injury'. It is submitted that although the dictum of Pickering J is a more reasonable one, the decision of *Lok Chi-wai* is correct if the Ordinance is to be interpreted strictly.

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26 Crim App No 863 of 1973.
27 My brackets.
28 *A-G* v *Hui Kwok-keung* Crim App No 863 of 1973.
29 [1973] HKLR 577.

According to *Davis v Alexander*[30] the word 'or' in the section is to be read disjunctively and therefore in the case of 'articles made or adapted for causing injury', the prosecution has to prove no more than possession in a public place. The accused will be convicted unless he can prove, on a balance of probability, that he had lawful authority or reasonable excuse. But if the article falls within the other category, that is, 'intended by the person having it with him for such use by him', the onus is on the prosecution to show that it was carried with intent to injure.[31] If this is the case, the additional provision of the phrase 'suitable for causing injury' under the Ordinance should accordingly be classified under the former category whereby the onus of proof is shifted to the accused. This appears to be what was suggested by Huggins J in *Lok Chi-wai* where he said, 'all I need to say is that in my view a knife of the kind which was produced in this case was clearly within the definition and there was ample evidence to support the learned magistrate's finding that it was an offensive weapon. That being so it is not necessary for me to consider whether or not it would have been within the English definition and I find no assistance from the case of *Petrie*.'[32]

The view of Huggins J In *Lok Chi-wai* has no doubt widened the definition of offensive weapon to an unreasonable extent. Under this rule any person found in a public place to be in possession of an ordinary fruit knife or any article in the view of the court to be suitable to cause injury can be charged with the offence under this section. The onus of proof is placed on the accused. Whilst this problem is still unsettled in the absence of any direct authority, it is to be hoped that the Hong Kong courts would in future formulate a more definite view on the interpretation of this important phrase and its scope of application.

**'has with him' an offensive weapon in any public place**[33]

According to its long title the Prevention of Crime Act 1953 is 'an Act to prohibit the *carrying* of offensive weapons in public places without lawful authority or reasonable excuse.'[34] Section 1(1) refers to any person who 'has with him' in any public place any offensive weapon. The preamble is more explicit in expression since it implies a physical act of carrying on the person. The text of section 1 – 'has with him' – still seems to connote a carrying but is not necessarily so confined. The courts will, no doubt, simply ask if the accused had a weapon in his 'possession' and certainly the Act will be strengthened in its effect if the concept of effective control of and access to such a weapon in a public place is imported. It is submitted that there is probably a possession within the meaning of the Act if the accused has a weapon in a car on the highway a short distance from the place where he incurrs the suspicion of the police.[35] Also there will probably be a

30 (1970) 54 Cr App R 398.

31 *Petrie* [1961] 1 A11 ER 466.

32 ibid. In that case it was held that if an article falls within the third category, the onus is on the prosecution to show that it was carried with intent to injure.

33 Public place is defined in s 33 of the Public Order Ordinance. Subsection 8 provides that in this section 'public place' includes a common part of any premises notwithstanding that the public or a section of the public are not entiltled or permitted to have access to such common part or such premises. It would appear that this definition is sufficiently wide to include places such as billiard halls, dance halls, discotheques, mahjong schools and other similar places to which anyone can go with or without payment of entrance fee or charge or with or without payment for the use of any facility provided in such place. However, it is not certain whether this also applies to private clubs or associations. See *Lai Chun-wa* Crim App No 687 of 1973 and *Chan Man* Crim App No 26 of 1976.

34 My italics. As already pointed out in former paragraphs, the long title in the Public Order Ordinance is entirely different from that in the Prevention of Crimes Act 1953, However, in view of the decision in *Liu Kam Man* s 33(1) of cap 245 should be interpreted as it apparently stands and the long title is irrelevant. Since the construction of s 33(1) is identical with that of s 1(1) of the 1953 Act (only with the omission of the burden of prood whereof shall lie on the accused), it seems logical that the long title of the Prevention of Crime Act 1953 is analogous to the Ordinance, though it should not be taken to be conclusive. It should be noted that s 18(3) of the Interpretation and General Clauses Ordinance, cap 1 provides that 'A marginal note to any provision of any Ordinance shall not have any legislative effect and shall not in anyway limit or extend the interpretation of any Ordinance.' It is not known whether this equally applies to the long title of an Ordinance.

35 Cf 20 JP 236.

possession if the weapon is carried by an innocent agent,[36] a friend of the accused for example, who accompanies him in the public place concerned in a case in which the weapon comes within the Act by reason only of the intent with which the accused 'has it with him'. Nor should a different view be taken if the weapon, whether in the hands of any agent or not, is not itself 'in a public place' when for example, the accused has left it in a vehicle on private premises or just inside an open window in nearby premises. The test would seem to be the ease and immediacy of access to the weapon, that is, physical control.[37]

**What does the section prohibit – the 'carrying' or the 'using' of the offensive weapon?**

The courts have been confronted with the problem of deciding what the true intention of the section is – the 'carrying' or the actual 'using' of the weapon. Lord Goddard CJ in the early case of *Jura*[38] said that 'The Act ... is meant to deal with a person who, with no excuse whatever, goes out with an offensive weapon.' However, it seems clear that the Act goes further than this. If, for instance, two persons in a public place enter into a dispute and each were to express his intention to set upon the other later the same day, then articles not originally offensive may become so by virture of the formulation of the intention to cause injury.[39] But what of the situation where during a heated argument in a public place, a man picks up an article to strike another?

*Ohlson v Hylton*[40] clearly illustrates this point. In this case the defendant entered into a dispute with the victim when trying to board a crowded underground train. The defendant was a carpenter and in his brief case he had some of the tools of his trade, including a claw hammer. In the heat of the dispute the defendant seized the hammer and struck the victim on the head. The defendant was charged, inter alia, with possessing an offensive weapon.

The Court of Appeal was faced with two conflicting lines of authorities on this point. One argument is that on a literal reading of section 1, the offence was proved in that when the accused seized the hammer he had the intention of using it on the victim and therefore there was at least a short period of time in which the hammer became a weapon which he had with him with the intention of causing injury to the person. This appears to be the approach to the section taken by Donovan J in *Woodward v Koessler:*[41] 'All that one has to do for the purpose of ascertaining what the intention is to look and see what use is in fact made of it. If it is found that the accused did in fact make use of it for the purpose of causing injury, he had it with him for that purpose.' It was obiter on the facts, but was relied upon by the Court of Criminal Appeal in *Powell*[42] where the defendant was alleged to have taken a toy pistol from his pocket, pointed it at another and then hit him with it. Winn J said, 'It is clear that use producing injury establishes an intent when carrying it to use the article in order to cause injury with it.' The same approach is also reflected in *Harrison v Thornton*[43] where the defendant picked up a stone and threw it at another, and this momentary possession was regarded as sufficient to constitute the offence.

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36 Cf the rule in receiving: *Miller* (1853) 6 Cox CC 353; *Rogers* (1868) LR 1 CCR 136. Also note that there is no direct authority on this point. The two cases cited concern the handling of stolen propety. It is not known whether this is equally applicable to the possession of offensive weapons.

37 *Gleed* (1916) 12 Cr App R 32; *Hobson v Impett* [1957] Crim LR 476.

38 [1954] 1 QB 503 at 506.

39 This is recognised by Lord Widgery CJ in *Ohlson v Hylton* [1975] 2 A11 ER at 495. In this situation one can at least see a 'state of affairs', which the long title would suggest that the Act covers.

40 [1975] 2 A11 ER 490.

41 [1958] 3 A11 ER 557 at 558.

42 [1963] Crim LR 511, also see (1976) 127 NLJ 881.

43 [1966] Crim LR 388.

The other line of authorities supports the view that the section did not extend to the seizing and use of a weapon for the purpose of causing injury to the person if the weapon was seized only at the moment when the intention to injury arose, and that the type of activity contemplated by the section is not the use of a weapon for offensive purposes but the premeditated *carrying* of a weapon for those purposes. The fact that the intent must have been formed at a brief moment before the blow was struck was not enough to come within the section. In *Jura*[44] Lord Goddard considered that 'having it with him' involves a state of affairs in which the accused 'goes out with an offensive weapon' without lawful excuse. If a person carrying an 'offensive weapon' with a lawful excuse should suddenly decide to use the weapon to injure a person and attempt or actually succeed in carrying out an attack, the correct charge will be one under the Offences Against the Persons Act. This approach was preferred by the Court of Appeal in the recent case, *Dayle.*[45] There, the accused, in the course of a fight, had taken a car jack from the boot of his car and thrown it at his adversary. The court felt it should comment on *Powell*[46] which was decided on its particular facts and open to misinterpretation. The words used in it 'use producing injury establishes an intent when carrying the weapon' were obiter and not applicable to all circumstances. Moreover, the words in *Woodward v Koessler*[47] 'all that one has to do for the purpose of ascertaining what the intention is, is to look and see what use is in fact made of it' were too widely expressed to be applicable in every case. Both cases must be read in the light of section 8 of the Criminal Justice Act 1967. The jury must decide the issue of intent by reference to all the evidence, drawing such inferences from the evidence as appear proper in all the circumstances. It was said that each case must depend on its own facts.

In *Ohlson v Hylton,*[48] Lord Widgery put the whole issue in perspective. He said, 'No offence is committed under the Act of 1953 where an assailant seizes a weapon for instant use on his victim. Here the seizure and use of the weapon are all part and parcel of the assault of attempted assault. To support a conviction under the Act the prosecution must show that the defendant was carrying or otherwise equipped with the weapon and had the intent to use it offensively before any occasion for its actual use had arisen.'[49]

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44 [1954] 1 QB 503; [1954] Crim LR 578.
45 [1973] 3 All ER 1151.
46 [1963] Crim LR 511.
47 [1958] 3 All ER 557.
48 [1975] 2 All ER 490.
49 Lord Widgery's rule may still creat problems. In *Giles* [1976] Crim LR 253, Giles went to the assistance of his brother-in-law who was involved in a fight in a club. One of the combatants turned round and hit him on the head with a bottle. Giles picked up a glass in order to protect himself. After the participants in the fight and by-standers had been dispersed, Giles refused to put his glass down maintaining that he intended to use it in his own defence against the man who has hit him.
In that case, Giles' picking up the weapon to protect himself clearly fell outside the section under this ruling. If he had been charged with committing an assault with the glass, the onus of proof would have been on the prosecution to prove beyond reasonable doubt that he was not acting in self-defence. It would be unfortunate if the prosecution were able to reverse the onus of proof by charging him with carrying an offensive weapon, where the Act places the onus of proof of reasonable execuse on the accused. If both charges were made, the judge might then have the unenviable task of instructing the jury that, for the purpose of the assault charge, the onus of proof was on the crown, whereas on the offensive weapon charge, the onus of proving the same fact was on the accused. The difficulty arose in this case because Giles refused to put his glass down after the dispersal of the other participants in the fight. If Giles had set off to walk home, perhaps for two miles through the streets, carrying the glass in his hand, it would seem that it might then fairly be alleged that he had the glass with him for the purpose of causing injury to the person. The onus of proof would, therefore, have been upon him to show that he had a reasonable excuse. Thus, there is a question of degree. An 'occasion' has a beginning and it must also have an end. In the present case, if the accused's story were true, the occasion had not come to an end. Please also see *Considine v Kirkpatrick* [1971] SASR 73 and *Police v Smith* [1974] 2 NZLR 32.

Nevertheless, this rule does not appear to be conclusive and may arise in marginal situations. As suggested by John Beaumont, would it, for instance, have made a significant difference if, after grasping the hammer and before using it, Hylton had waited until a passing policeman had walked down the platform and moved out of sight? [50]

**Lawful Authority or Reasonable Excuse**

The effect of these phrases is to provide one of the surrounding circumstances constituting the actus reus of the offence in question. The offence is not committed merely by being in possession of an offensive weapon in a public place without lawful authority or reasonable excuse. The requirement of possession without lawful authority or reasonable excuse is just as essential to render possession of an offensive weapon criminal as is the requirement that the possession must be in a public place. Both 'without lawful authority or reasonable excuse' and 'in any public place' are essential actus reus of the offence in question.

There is very little case law on what constitutes 'lawful authority or reasonable excuse'. The courts have declined to lay down positive and general definition and their approach is exemplified by the opinion of the Privy Council in *Wong Poon Yin v Public Prosecutor*[51] where Lord MacDermott said:

> 'Their Lordships doubt if it is possible to define the expression "lawful excuse" in a comprehensive and satisfactory manner and they do not propose to make the attempt. They agree with the Court of Appeal [of the Federation of Malaya] that it would be undesirable to do so and that each must be examined on its individual facts.'[52]

(i) *Lawful authority*

An interesting question regarding the definition of lawful authority was raised in the recent case of *Bryan v Mott.*[53] In that case, the accused, who was in a road, picked up a broken milk bottle neck, intending to commit suicide by slashing his wrists. He was convicted by justices under section 1 of the Prevention of Crime Act, but that conviction was quashed by the Crown Court which held that the bottle neck was an offensive weapon per se as being adapted for use for causing injury to the person, but that, since committing suicide was no longer an offence, the accused has the bottle with him for a lawful purpose. The Divisional Court nevertheless allowed the prosecutor's appeal and held that 'lawful authority' referred to people carrying such weapons as a matter of duty, such as soldier with his rifle and a police officer with his truncheon.

Since neither the Prevention of Crime Act 1953 nor the Public Order Ordinance defines 'lawful authority' in its context, there does not appear to be any statutory provision giving authority to possess offensive weapons in a public place and the law in this area is left in an uncertain state. The rule by the Divisional Court in *Bryan v Mott*[54] deals only partially with the problem. What is the situation, for instance, in cases of security guards employed by a private firm?

This problem arose in *Spanner, Poulter and Ward.*[55] It was held that men employed as security guards at dance halls and each carrying a truncheon 'as a deterrent and as part of the uniform' had neither lawful authority nor reasonable excuse for carrying them. The Court of Appeal stated that 'weapons must not be carried as a matter of routine or as part of uniform.' Yet if this is so, what is the position of those said to be

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50 (1976) 127 NLJ 882.
51 [1955] AC 93, also see Card, 'Authority and Excuse as Defence to Crime' [1969] Crim L 359 at 360.
52 ibid at 100. Also see the similar views expressed in *Grieve v Macleod* [1967] Crim LR 424 and *Leck v Epsom RDC* [1922] 1 KB 383. The latter case concerns an action for a penalty against a local authority for failing, without reasonable excuse, to empty a cesspool, after notice from an occupier.
53 [1976] Crim LR 64.
54 ibid.
55 [1973] Crim LR 704.

employed by private security forces and to be armed with batons or sticks? Are they all committing offences daily?

As regards possession of arms and ammunition by such persons in Hong Kong it is submitted that the possession of a valid licence under the Arms and Ammunition Ordinance,[56] to possess and carry the arms and ammunition in question would constitute 'lawful authority' for the purpose of Section 33 of the Public Order Ordinance. The carrying by such persons of truncheons etc is, however, less easy to justify in law. It seems that security guards and persons employed in a similar capacity are watchmen within the meaning of the Watchman Ordinance.[57] If security guards and such other similar persons are, in fact, registered under the Watchman Ordinance, this fact alone may constitute 'lawful authority' or 'reasonable excuse' for the possession of truncheons whilst on duty. It is noted that regulation 4(1)(c) of the Watchman Regulations[58] actually contemplates the carrying of arms and ammunition by watchmen who are registered under this Ordinance. Although neither the Ordinance nor the Regulations referred to truncheons or similar offensive weapons, it is submitted that, if registered watchmen can carry arms and ammunition, (as contemplated by the reguations), then, a fortiori, they can carry the less lethal truncheons and similar offensive weapons. But without a court decision one way or the other on this point their situation must remain somewhat uncertain under the law.

(ii) *Reasonable excuse*

The definite meaning of 'reasonable excuse' is also obscure and requires clarification. In *Evans v Wright*[59] the defence was that the defendant carried a knuckle-duster and a truncheon to guard against possible attempts to rob him of the wages he collected for his employees. The court held that the justices had rightly found that his explantion was an unreasonable one, because he had last collected wages a few days before and had left the truncheon in his car and the knuckle-duster in his pocket. It might have been otherwise if he had been in the course of, or just returning from, collecting wages. If the question is then simply one of reasonableness, this leaves a large measure of discretion to the courts.

This appears to be the case in *Evans v Hughes*[60] where the defendant was found with a metal bar and said that he carried it for self-protection, as he had been attacked by three men about seven days before and wanted to be prepared, if he was attacked again. The justice accepted this defence and held that the bar was not an offensive but a defensive weapon, and irrespective of this, that there was a reasonable excuse. The Divisional Court held that the bar was not offensive per se, but it was intended for use for causing injury to the person. The fact that the carrier of a weapon only intended to use it defensively did not prevent it from being an offensive weapon; also that the Act was never intended to sanction the permanent or constant carriage of an offensive weapon merely because of some enduring threat or danger to the carrier. In order that it may be a reasonable excuse the threat must be an imminent, particular threat affecting the particular circumstances in which the weapon was carried. Whilst one or two days perhaps would suffice, seven days was very close to the borderline. This rule would seem to be consistent with the decision in *Evans v Wright* and was also applied in *Peacock.*[61]

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56 Cap 238 LHK 1964 ed, s 3(1)(a).
57 Cap 299 LHK 1964 ed.
58 It provides that 'every employer shall ensure that any arms and ammunitions carried by watchman in his employment are maintained in good order and working condition.'
59 [1964] Crim LR 466.
60 [1972] 3 All ER 412.
61 [1973] Crim LR 639.

However, potential difficulties may arise and this is illustrated in *Bradley v Moss.*[62] The accused was a juvenile who was found in the possession of several implements. The justices found that for several times he had been chased or threatened by older youths and that he genuinely believed there was an imminent threat of attack upon himself. This finding was founded upon the fact that subsequent to being charged he was beaten by a gang of youths. The Divisional Court purported to apply the principles in *Evans v Hughes* and held that there was no lawful authority or reasonable excuse. It was considered that the defendant did not need to carry all the implements for protection.

It is difficult to see why a threat is not particular and imminent, when each time a person goes out he is in fear of attack from a gang of youths. It appears that the courts have adopted a strict interpretation in construing 'reasonable excuse'. This attitude is probably based on the policy of discouraging people from equipping themselves for general self-defence. In the words of Lord Widgery CJ in *Evans v Hughes,*[63] 'people who are under that kind of continuing threat must protect themselves by other means, notably by enlisting the protection of the police.'*

## THE PUBLIC ORDER (AMENDMENT) (NO 2) ORDINANCE 1972

During the period between 1968 and 1972, there was such an alarming upsurge of violent crimes in the colony that it was necessary for the Legislative Council to strengthen measures in an effort to combat the growing menace of violent crimes.[64] Prior to the introduction of the Public Order (Amendment) (No2) Ordinance, in 1971, offensive weapons were used in 26.1% of the cases of robbery which came to the attention of police.[65] Offensive weapons were used in 57.7% of the increased number of robbery cases coming to attention in 1972. During the last three months of 1972, they appeared in over 70% of the cases (October 75.9%, November 71.1% and December 73.1%).

The principle objects of the amendment, which came into force on December 15, 1972 was to impose a mandatory sentence of six months against a person convicted of the offence under section 33, to raise the maximum penalty from two years to three years and to confer on the police force a general power to search any member of the public in a public place in order to ascertain whether or not this offence has been committed. These amendments, however, call for comments and criticisms.

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62 [1974] Crim LR 430.

63 [1972] 3 A11 ER 412 at 415.

* One point worthy of note is the aspect of mens rea required in this section. Must the accused know that he has an offensive weapon in his control to be found guilty under the statute: can he prove that the weapon was placed on his person without his knowledge? The preamble in its reference to 'carrying' would suggest an affirmative answer. The Court of Criminal Appeal has held that the words 'has with him in any public place' mean 'knowingly' has with him in any public place. Cf Smith & Hogan, *Criminal Law* (3rd ed 1973) and *Cugullere* [1961] 2 All ER 343 at 344, *Warner v Metropolitan Police Commissioner.* [1968] 2 A11 ER 356. 'If some innocent person has a cosh slipped into his pocket by an escaping rogue, he would not be guilty of having it with him within the meaining of the section, because he would be quite innocent of any knowledge that it has been put into his pocket.' Cf *Roper v Taylor's Garage Ltd.* [1951] 2 TLR 284 at 288; *Carpenter* [1960] Crim LR 633.

64 *LegCo Proc 1972-73* 198 (Nov 29 1972; Attorney General).

65 These statistics are supplied by the Royal Hong Kong Police Statistics Office. It may be noted that the percentage of offensive weapons known to be used in cases of robbery in 1971 was surprisingly low – only amount to 26.1%. The true reason for this can hardly be ascertained. However it is worthy of note that during the recent years, the modus operandi of criminals engaged in robbery has drastically changed. During the period of 1969-71 the common modus operandi by the robbers was 'neck-gagging'. To avoid direct confrontation with the victim, they usually approached from behind and put their arms round the neck of the victim forcibly causing the victim to suffer a 'black-out', during which time the victim was robbed. In most of these cases, the victim were unable to identify the criminals and were unable to tell whether or not weapons were used. This may attribute to the inaccuracy of the statistics. In recent years, the robbers are more open in their modus operandi and weapons are brandished so as to impose a threat on the victim before the robbery actually takes place.

**Mandatory Sentence**

The Public Order (Amendment) (No2) Ordinance 1972 provides that a person convicted of the offence of possession of offensive weapons in a public place (contrary to section 33) shall be sentenced to imprisonment for not less than six months or to a detention order. However, the object of this provision is defeated by attempts made by magistrates to avoid imposing such sentences by means of the authority under section 36 of the Magistrates Ordinance[66] or section 3(1) of the Probation of Offenders Ordinance.[67] These sections empower a court to make an order for an absolute or conditional discharge, or a probation order, 'with or without recording or proceeding to a conviction.' If a magistrate exercises the discretion not to record a conviction, he thus evades section 33(1), which provides a mandatory sentence only 'on summary conviction'. This problem arose in *Attorney General v Wong Yiu Chung*[68] where the magistrate used his power, under section 36 of the Magistrates Ordinance, of not recording a conviction on the ground that the 'offence was of a trivial nature' and that no place was available in the detention centre. This decision was, however, rejected by the Full Court in which Pickering J held that the requirements of section 36, as to the 'trivial nature of the offence' or the 'character' and 'antecedents' of the respondent, did not justify the magistrate in discharging the respondent without recording a conviction in respect of the offence.

This problem is now settled by the subsequent amendment of the Public Order Ordinance in 1973, section 33(3) of which provides that 'where any person, other than a person under the age of fourteen years is charged with an offence under this section, it shall not be open to the court to exercise either the powers conferred by section 36 of the Magistrates Ordinance or the powers conferred by section 3 of the Probation of Offenders Ordinance.'

A similar problem arose in *Attorney General v Chong Hon Ying*[69] as to whether section 11(2) of the Juvenile Offenders Ordinance[70] overrides section 33 of the Public Order Ordinance. Section 11(2) provides that no young person aged between fourteen and sixteen shall be sentenced to imprisonment 'if he can be suitably dealt with in any other way.' The Full Court took the view that 'the provision of section 33(1) are, in fact, mandatory and overrides the general provisions contained in Section 11(2) of the Juvenile Offenders Ordinance and that once a conviction had been recorded, the court has no alternative other than to sentence the offender to prison for a minimum period of six months, or alternatively, direct that he be sent to a detention centre.'[71] This decision is given effect by section 33(4) of the Public Order Ordinance (Amendment) Ordinance in 1973.

It becomes clear that the provision of a mandatory sentence under this Ordinance means *mandatory* and the court is given no alternative but to impose on the defendant the minimum sentence of six months once conviction is recorded or to send him to a detention centre or to impose corporal punishment.

**Police Power of Stop and Search**

Before the amendment, a police officer, in the exercise of his pwer of stop and search, could only rely upon section 54 of the Police Force Ordinance.[72] By virtue of this section, a police officer may properly stop and search a person in a public place if that person is acting in a suspicious manner or if the police officer suspects that person of having committed, or being about to commit, any offence. At present, section 33(6) of Public Order Ordinance provides that 'any police officer may stop and search any person in a public place in order to ascertain whether or not that person has been guilty of an offence against this section.' The amendment, therefore, relieves the

66 Cap 227 LHK 1971 ed.
67 Cap 298 LHK 1964 ed.
68 [1973] HKLR 131.
69 [1973] HKLR 145.
70 Cap 226 LHK 1974 ed.
71 *A-G v Chong Hon Ying* [1973] HKLR 145 at 147, per Rigby CJ.
72 Cap 232 LHK 1964 ed.

police officer of having to form a *reasonable suspicion* in each individual case before he carries out a search of a member of the public and enables areas to be cordoned off and anybody in the area searched for offensive weapons.[73]

This provision has indeed conferred on the police extremely wide powers of stop and search. The Attorney General explains that,

> 'while the public has generally supported what have been called "stop and search" operations in the past, I am aware that some misgivings have been expressed about this new wider power, which may cause some inconvenience to innocent members of the public going about in their ordinary business. I accept the view that this power must be used with discretion and I can assure [Honourable members] that the Commissioner of Police fully agrees that it must not be employed indiscriminately and he will do his best to ensure that this will not occur.'[74]

It is true that police internal orders are issued from time to time and instructions given to ensure that these powers are not to be abused.[75] It is submitted that the Attorney General's statement is open to criticism. Misuse of a stop and search power will generally constitute a false imprisonment. In the words of John Rear, 'As Hong Kong becomes more sophisticated, and people become increasingly aware of legal rights, the police can expect to have their actions questioned more often.'[76] If the police are to expect greater criticism of their actions under this power, would it not be in the police and public interest to redefine these powers, rather than leaving them so wide and open to abuse?

**Prevention of Crime – Law Enforcement**

The main aim of the Ordinance is to control the serious rise in crimes of personal violence. It is obvious that the legislature is determined to exercise all means to curb the upsurge of crime. They are prepared to depart from tradition to forfeit the discretionary power of the judiciary in imposing sentences. The legislature considers itself fully justified in imposing mandatory sentences in the Hong Kong situation where we are faced with a growing menace from gangs of young men carrying offensive weapons for use in gang attacks and with a serious increase in the number of robberies in which weapons are used to threat or attack.[77] They have given the police extremely wide powers of stop and search and are willing to off-set the balance between the opposing values of liberty and public order.

Much has been done by the Police Force, since the passage of the Public Order Amendment in 1972, to fulfil their role of crime prevention. Numerous operations of stop and search, and spot checks in cordoned areas are mounted from time to time. In the recent months, an average of 42,930 persons were questioned or stopped and searched each month in Kowloon District, out of which an average of 298 persons were arrested and charged mostly in connection with possession of offensive weapons in public place.[78] The police action has not only led to the arrest of criminals but must also have a strong deterrent effect on those who may wish to commit crime. But on the other hand, looking at the small percentage (average of 0.7%) of arrests out of the enormous

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73 In July 1970 the Hong Kong Police undertook a massive stop and search campaign in which some 135,000 persons, mostly young persons, were stopped and searched and an indeterminate number (but certainly over 220) were arrested and detained and (all except some 60) later released. Conflicting statements did not make clear exactly under what powers the police were acting. John Rear criticised the police action on the ground that they had apparently exceeded their powers (as s 54 of Police Force Ordinance requires 'reasonable suspicion' in the exercise of stop and search power): 'The Power of Arrest' (1971) 1 HKLJ 168. It becomes clear that in the operation of this amendment, the police would be equipped with full ammunitions in answer to these queries next time when they carry out massive stop and search operations.

74 *LegCo Proc 1972-73* 198 (Nov 29 1972; Attorney General).

75 The recent one being the Director of Criminal Investigations Circular No 1 of 1973.

76 (1971) 1 HKLJ 176.

77 *LegCo Proc 1972-73* 198 (Nov 29 1972; Dec 13 1972; Attorney General).

78 Statistics supplied by the Criminal Investigation Department/Headquarters and the Triad Society Bureau, RHKP.

number of innocent citizens being stopped and searched, one may begin to doubt the justification of the Ordinance. The following table serves as an illustration on this point:

| Month in 1976 | No. of persons stopped/searched | No. of persons arrested & charged | Percentage of No. of persons arrested and charged |
|---|---|---|---|
| April | 32,779 | 243 | 0.74% |
| May | 41,136 | 227 | 0.55% |
| June | 48,673 | 300 | 0.61% |
| July | 46,089 | 333 | 0.72% |
| August | 45,976 | 356 | 0.77% |
| Average: | 42,930.6 | 297.8 | 0.69% |

Under the pressure of constant police action, it appears that the increase rate of robbery cases with weapons has levelled off since 1972 (see Appendix B) and the associated figures for gang fights and gang incidents at Appendix C shows that these have remained at approximately the same level. However, serious assaults increased generally during 1973 and 1974 but in both 1975 and 1976 the rate of increase has been considerably reduced (see Appendix A).

## CONCLUSION

Whilst it is obviously desirable that drastic legislative measures should be taken to restore law and order, it is equally important that civil rights and personal liberties could be sufficiently safeguarded. As we have seen earlier that preventive offences are intended to punish potential criminals for the offence they fail to complete, for an unfulfilled intention. The intention of the Ordinance is not to penalise those who *use* offensive weapons but only those who *carry* them. To ensure that the interest of innocent citizens are sufficiently protected, the law must necessarily be just and certain.

Lengthy discussions have been conducted regarding the difficulties arising from the interpretation of the statue. It is noted that the definition of offensive weapon is extremely wide. The phrase 'suitable for causing injury' in particular, is ambiguous and vague and until an authoritative view is expressed by the courts the law is still in an uncertain state. We have also seen the problems arising from the meaning of 'lawful authority' and 'reasonable excuse' which are, regrettably, not defined in the statute. It is regrettable because it appears that these are the only avenues open to the accused in raising a defence, and in many cases, the onus of proof is placed on him. It would be utterly unjust to place such an onerous burden on a person who is not made certain of what precisely his legal rights are.

The mandatory sentence system is against tradition and is the one which compels the law to turn a blind eye to the mitigating circumstances in which the accused committed the offence. On the other hand, the executive is given extremely wide powers in the enforcement of law and order under this provision and the legislature is prepared to forfeit part of the civil rights of some innocent members of the public to fulfil their aim.

It may be true, in the words of an honourable member of the Legislative Council that, 'In normal times reasonable penalties should be imposed; but in times of disorder severe sentences must be passed to correct the situation (治亂國用重刑)'[79] but it is also important that the law should be reasonably clear, so as to prevent undue infringement of personal liberty and to maintain the integrity of our system of criminal justice.

79 *LegCo Proc 1972-73* 264 (Dec 13 1972; Mr Woo Pak Chuen). This is a well-known Chinese saying and Mr Woo suggested that this view is consistent with the virtues of the British penological and legal systems.

## APPENDIX A

**Comparative Table Showing Violent Crimes for 1958/59 – 1975/76**

| Crime | 1958/ 59 | 1959/ 60 | 1960/ 61 | 1961/ 62 | 1962/ 63 | 1963/ 64 | 1964/ 65 | 1965/ 66 | 1966/ 67 | 1967/ 68 | 1968/ 69 | 1969/ 70 | 1970/ 71 | 1971/ 72 | 1972/ 73 | 1973/ 74 | 1974/ 75 | 1975/ 76 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Murder/ Manslaughter | 28 | 25 | 30 | 22 | 23 | 25 | 49 | 27 | 43 | 80 | 44 | 55 | 85 | 93 | 118 | 103 | 122 | 97 |
| Serious Assaults | 435 | 439 | 551 | 661 | 661 | 665 | 946 | 934 | 1,059 | 1,092 | 1,045 | 1,312 | 1,387 | 1,583 | 1,804 | 2,503 | 4,256 | 4,740 |
| Robberies | 85 | 64 | 92 | 105 | 148 | 148 | 316 | 384 | 565 | 1,695 | 1,599 | 2,484 | 3,473 | 5,374 | 8,176 | 9,636 | 13,000 | 10,244 |
| Personal damage to property | 114 | 107 | 166 | 211 | 152 | 178 | 243 | 206 | 276 | 364 | 218 | 201 | 274 | 261 | 329 | 666 | 935 | 1,139 |

* Statistics extracted from the 'Crime Report for Fiscal Year 1975/76' of the Royal Hong Kong Police Force.

## APPENDIX B

### Comparative Table of Robberies with Breakdown of Number of Cases with Weapons

| Year | Total No of Robberies | Total No of Robberies with Weapons | Percentage with Weapons |
|---|---|---|---|
| 1971 | 5,146 | 1,343 | 26.1% |
| 1972 | 7,404 | 4,270 | 57.7% |
| 1973 | 8,717 | 4,339 | 49.8% |
| 1974 | 12,787 | 5,852 | 45.8% |
| 1975 | 11,120 | 6,078 | 54.7% |

* Statistics supplied by the Statistics Officer/CID/HQ, RHKP.

## APPENDIX C

* **Gang Fights and Gang Incidents**

| | Gang Fights | Gang Incidents | Total |
|---|---|---|---|
| 1973 | 114(35) | 363(29) | 477(64 or 13%) |
| 1974 | 86(29) | 360(46) | 446(75 or 17%) |
| 1975 | 100(41) | 382(86) | 482(127 or 26%) |
| 1976 (Jan-Oct) | 68(33) | 302(77) | 370(110 or 30%) |

| | Gang Fights No. of Persons Arrested | Gang Incidents No. of Persons Arrested | Total |
|---|---|---|---|
| 1973 | 233(100) | 259(33) | 492 (133 or 27%) |
| 1974 | 186(79) | 252(54) | 438 (133 or 30%) |
| 1975 | 189(104) | 184(81) | 473 (185 or 39) |
| 1976 (Jan-Oct) | 148(49) | 215(34) | 363 (83 or 23%) |

Figures in ( ) indicate the number of cases which were said to have triad involvement.

* Statistics supplied by Triad Society Bureau/CID/HO, RHKP.

# THE EXAMINATION OF VOIR DIRE WITH REFERENCE TO CONFESSIONS

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## INTRODUCTION

The courts in Hong Kong, as in other jurisdictions, regard the protection of the innocent as their primary duty. To achieve this end, they risk the possibility that some guilty persons may go unconvicted. With this aim in mind, they exercise with particular care in relation to the reception of confessions, which are admissions made by a person charged with a crime stating or suggesting the inference that the accused has committed the crime charged.[1] 'It is the purpose of this article to examine the procedure in which incriminating statement is admitted and its efficacy in safeguarding justice.

## WHEN SHOULD A VOIR DIRE BE HELD

An extra-judicial statement made by an accused is either admissible or not. If not, it is to be treated as non-existent and nothing more ought to be heard about it.[2] A consequence which flows from this is that the issue of admissiblity must be decided before any mention of a statement is made before the jury. Accordingly, when a confession is disputed, the judge will invariably hold a trial within a trial which is also referred to as a 'voir dire' for the determination of the admissibility of a confession.[3]

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1 Stephen I, History of Criminal Law, pp 446-7.
2 *Treacy* (1949) 30 Cr App R 93.
3 Voir dire will also be held in cases for ascertaining witness' qualifications and religions belief.

There are many other reasons that the jury should retire[4] when deciding matters of admissibility of confessions. Such matters are questions of law and thus, it should be determined by the judge. Moreover, the jury are sworn to try the issue and it is not their scope of duty to decide on the question of admissibility which, as a norm, depends on the proof of some preliminary but disputed facts.[5] But the vital reason seems to be the fact that the accused may be prejudiced. Despite the judge's admonition to disregard such 'evidence' if it is found to be involuntary, there can never be any guarantee that it has not been considered by the jury.[6] They cannot be compelled to give reasons for their verdict and an appellate court will turn a deaf ear to what takes place in the jury room unless it is clearly revealed in an open court when the verdict is given.[7] Undoubtedly, the procedure of holding a voir dire suffers from great inconvenience, especially when the preliminary facts are identical to the facts in issue.[8] But for reason that an accused should never be prejudiced, it is desirable that they should be dismissed temporarily.

In the light of these reasons, it is clear that crown counsel[9] should refrain from making any reference to the existence of a confession in his opening speech. Even when it is admitted, it is equally unsuitable for a judge or counsel to mention to the jury that there has been a trial within a trial. This point was stressed in particular by the court in *Chan Kam-Kei*[10] where Huggins J said:

> 'It is undesirable that either judge or counsel should, when addressing the jury, remind the jury that there had been a trial within a trial. The fact is entirely irrelevant to any issue which the jury has to decide. The jury is not concerned with the reason why the confessional statement is admitted in evidence, nor, unless there has been cross-examination upon the inconsistencies between the evidence given upon the issue of admissibilty and the evidence given in the trial within the trial.'[11]

The probable effect on the jury is that they may obviously jump to the conclusion that some conflicting evidence had been in fact given during the trial within a trial when they are excluded from the court. It is natural that they may be puzzled as to the effect of the undisclosed evidence on their deliberations and accordingly, the weight to be attached to such confessions. Therefore, whenever the jury inquired about what had been said during their absence, it would be better for the judge to confine his answer to telling the jury that what transpired during their absence does not concern them in any way and that all they have to know was the statements have been admitted in evidence.[12]

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4 There is no doubt that the judge has power to dismiss the jury while hearing arguments on the admissibility of evidence or while holding a voir dire. But there is authority to the effect that the judge has power to ask them to retire only if it is requested or consented to by the defence. See *Anderson* (1929) 21 Cr App R 178.

5 Phipson, *Evidence* (London, Sweet & Maxwell, 1970) 11th ed para 19, cf Stephen, art 7 which denies the judge's right in this case.

6 Bernard Downey, 'Confession to Police Officers' (1971) 1 HKLJ 131, 138.

7 *Ellis v Deheer* [1922] 2 KB 113 at 121.
'That the court does not admit evidence of a juryman as to what took place in the ;ury room, either by way of explanation of the grounds upon which the verdict was given, or by way of statement as to what he beleives its effect would be.' per Atkins LJ.
See also *Boston v Bagshow* [1966] 1 WLR 1135.
and *Roads* [1967] 2 QB 108.

8 In the first place, it means that the judge has to sum up to the jury on an issue which he has already decided. Secondly, it may mean that all the evidence given on the voir dire will have to be given all over again when it is held in their absence.

9 Usually, the confession is adduced as part of the prosecution's evidence.

10 [1973] HKLR 153.

11 ibid, 155. Both the court and the counsel for the Crown in speeches to the jury mentioned the trial within a trial. The court adressed the jury in the following words:
'Yes , members of the jury, you were absent for a day during the time evidence was heard with a view to determining whether the statements made by the accused to the police were admissible or not ... you did not hear this evidence, but it is open to the counsel to refer this and to show that the evidence that he gave at the time and the evidence he is giving now are not consistent.'

12 ibid, 155.

It is doubtful whether a judge sitting alone is under any obligation to do so. Even if the magistrate had done so, its efficacy had often been called in question when he is performing the dual functions of both a judge and a jury.[13] In *Li Kam-hung*[14] Huggins J pointed out the artificiality of a judge sitting alone in holding a voir dire. It is true that having heard the evidence on the voir dire, it must be extremely difficult for him to dismiss that evidence from his mind when he turns to subsequent issue.[15]

There is some authority to the effect that a magistrate is obliged to follow the 'well established practice in relation to extra-judicial confessions tendered in evidence'[16] as suggested by Huggins J in *Lam Yuet-ching,*[17] However, on the other hand, there are relatively recent cases which suggested that it is at the discretion of the judge. Hogan CJ in *Wong Kam-cheung*[18] explained:

> 'The practice of holding a voir dire in order to determine whether an alleged confession should or should not be admitted, finds its origin in the desire to keep the document or statement from the jury until such time as its voluntariness has been ruled on by the judge as a matter of law. The reason which prompted the introduction of the somewhat cumbersome procedure of a trial within a trial in such circumstances have little relevance to the situation which exists when a judge is sitting alone, and it may well be that the better practice in such circuimstances would be to leave the question to be determined as part of the general issue.'[19]

The Full Court in *Ho Yiu-fai*[20] clarified the issue and expressly stated that 'though to hold a voir dire in the District Court is a common practice in Hong Kong, there is no authority stating that it is mandatory to do so.[21] At the latter part of his judgment, he again referred to the same line of reasoning as Hogan CJ and concluded that 'it makes no difference whether the judge in such a case holds a voir dire or deals with the question of admissibilty in the manner adopted in the present case'[22] where no voir dire was held. Perhaps the correct position is that 'although it might have been preferrable if he had determined on the voir dire, once he had entered on that procedure, the question whether the circumstances prevailing immediately prior to the alleged statement were such as to render the alleged statement inadmissible, it is apparent that he had clearly addressed his mind to this point before finding his verdict and consequently we see no reason, on this account, to differ form the conclusion reached by the trial judge or to interfere with the verdict.'[23]

## OBJECTION TO SUCH DISCRETION

The main objection to the rule is that if the judge decides not to hold a voir dire, the accused is virtually compelled to give evidence on the general issue. To have any chance of having the confession rejected he must give evidence thereon. Although he can confine his examination-in-chief to the issue of admissiblity he can still be cross-examined on matter relating to the general issue.[24] Its implication is fully illustrated in the case of *Ho Yiu-fai*[25] The accused appealed against conviction

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13 *Ng Chun-kwan* [1974] HKLR 319 at 324.
14 [1969] HKLR 84.
15 ibid, 87.
16 *Lam Yuet-ching,* [1968] HKLR 579 at 582. Huggins J was of the opinion that 'prima facie there was ... a failure to follow the well established practice in relation to extra-judicial confessions tendered in evidence' by the magistrate. From this opinion, it seems that there is a duty on the part of the magistrate to follow the procedure.
17 ibid.
18 [1967] HKLR 610.
19 ibid, 615.
20 [1970] HKLR 415.
21 ibid, 420. In the case of *Ng Chun-kwan,* supra fn 13, voir dire was held by magistrate sitting alone and this is another example of the artificiality of magistrate holding a voir dire.
22 The court qualified its statement by holding that 'what a judge must do to ensure that the accused or his legal representative is not left with the "impression" that his right of cross-examination is limited to the issue of admissibility.'
23 *Kang & Lui Dip* [1959] HKLR 19 at 27.
24 See Bernard Downey, supra, fa 6 at p 138.
25 supra, fn 20.

mainly on the ground that the trial judge was alleged to have held a voir dire during the course of the trial, and that he wrongfully took into account evidence given during the voir dire when convicting the accused.[26] The defence counsel claimed that without the evidence, the conviction could not stand. However, the court rejected the contention and pointed out that the voir dire procedure was not followed.[27] Therefore, his conviction was correct.

The accused is manifestly prejudiced when voir dire procedure is not followed. This is especially the case when his conviction depends on evidence that would normally be given on a voir dire. In other words, it seems that conviction of an accused may depend solely on whether the procedure is held or not. Therefore, the suggestion by the Full Court[28] that, where the judge is sitting without a jury, it makes no difference how he deals with the issue of admissiblity is quite wrong. It may make no difference to the judge, but it is of considerable importance to the accused. Furthermore, there is no separate set of rules of evidence for judges sitting alone. Rules of evidence apply to all trials and therefore judges even sitting alone, must observe them in the same way as if the jury is present.[29]

## WAIVER OF VOIR DIRE

It is the usual practice that only where objection is taken to the admissibility of an alleged confession, must the judge hold a voir dire.[30] Objection should normally be taken when the prosecution starts to lead the evidence sought to be exclude.[31] If counsel for the defence intends to object to the admissibility of the confession, the normal and desirable practice is for him to inform the prosecution of that fact before the hearing, and counsel for the prosecution ought not to open that evidence.[32]

The Full Court in *Wong Kam-cheung*[33] approved the practice and said that:

> 'We would merely content ourselves with saying that where ... the accused ... did not seek to raise any matter which brought into the question its voluntary nature, the judge was justified in dispensing with a voir dire.[34]

The judge after his dispensation will then proceed on the determinating both of the questions, namely, whether the accused has in fact made such a statement and whether the statement is voluntary, in the course of his final judgment. One obvious effect of not challenging its voluntariness, as pointed out in *Kwok Wing-hung*[35] by Blair-kerr J is that:

> 'Where the voluntariness of the statement is not challenged, the court will usually be satisfied by general evidence from the person to whom the statement is made to the effect that he is not aware of any circumstances which might lead the court to think that the statement was not made freely and voluntarily.'[36]

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26 A trial judge is not allowed to rely on evidence given on voir dire to decide the general issue of guilt.

27 The court did not think that there was any duty imposed on the trial judge to hold a voir dire and they stressed that from the record as a whole, it was clear that no voir dire was ever held.

28 supra, fn 20 at p 43.

29 Kaufman, The Admissibility of Confessions in Criminal Matters (Toronto, Canada, The Carswell Company Ltd, 1974) 2nd ed at p 22.

30 *Francis* (1959) 43 Cr App R 174.
However, the proposition has to be qualified by some authority which suggests that the procedure may be dispensed in case where the trial is by a judge alone. For this part, refer to p 2 of this article

31 Phipson, supra fn 5, para 793.
The parctice in Canada is different as the weight of jurisprudence indicates that the defence may not waive the holding of a voir dire because the admission or rejection of a statement is a matter for the judge.

32 *Cole* (1914) 165 LT 125; *Hammond* [1941] 3 A11 ER 318; *Patel* [1951] 3 A11 ER 29.

33 supra, fn 18.

34 ibid, 615.

35 [1966] HKLR 590.

36 ibid, 600.

As this will be a probable consequence, it seems that the accused should request the holding of a voir dire whenever there is doubt on the voluntariness of the statement. In case where a defendant is not legally represented, it would be the duty of the judge to inquire whether he objects to the admission of the statement and a note of reply should be entered into the record accordingly.[37]

## BURDEN OF PROOF

It is now settled that the burden of proving the facts constituting the condition precedent to the admissibility of confessions is borne by the prosecution as the party seeking to tender them in evidence. The classic formulation is found in Lord Summer's speech in *Ibrahim*[38] which was again stated in *Thompson.*[39] Identical principle has also found its way in a number of Hong Kong decisions.[40] The position is made crystally clear by Pickering J, in *Wat Kwok-leung*[41] as follows:

> 'It must not be overlooked that the burden upon the prosecution is that of providing affirmatively that the statement was freely and voluntarily made.'[42]

As to the meaning of 'providing affirmatively', it was explained by McMullin J, in *Poon Chi-ming*[43] as all relevant matters connected with the taking of such statements.'

Although it is often mentioned that the burden lies on the prosecution, however, there is no clear indication as to how far the prosecution must go in order to satisfy the court that the confession is admissible. There is some authority which supports the view that it must be proved beyond reasonable doubt.[44] In fact, Shaw J in *Robson*[45] recognised that the rule of law with regard to confession is different from other cases where admissibility has to be established and in any event, has to be proved beyond reasonable doubt. This can be justified as it is well settled after *Chan Wei-keung,*[46] that it is the judge alone who has to determine the issue of voluntariness and therefore, utmost care should be taken prior to its placing before the jury. Furthermore, in *Wat Kwok-leung,*[47] the court has asserted that 'the prosecuting officer should have made sure that evidence is adequate to satisfy the court beyond reasonable doubt of the voluntary nature of the statement.' Hence, there is no good reason to deviate from the decision as it may safely be regarded as the true view.[48]

It is clear that in discharging the burden, it is not sufficient for the witness merely to assert that the confession is voluntary.[49] The desirable way to discharge was explained in full in *Wat Kwok-leung:*[50]

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37 *Lam Yuet-ching,* supra, fn 16.
38 [1914] AC 599 at 609.
'It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement ....'
39 [1883] 2 QB 12 at 16.
'The material question is whether the confession has been obtained by the influence of hope or fear and the evidence to this point being in its nature preliminary, is addressed to the judge, who will require the prosecution to show affirmatively, to the satisfaction that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head will reject the confession.' per Cave J.
40 *Wat Kwok-leung* Crim App no 880 of 1977; *Wong Kam-wing* [1970] HKLR 416 at 417; *Li Kar-wah* [1970] HKLR 572 at 579 where Rigby CJ stressed that it was the duty of the prosecution and not the accused to prove.
41 supra, fn 40.
42 ibid.
43 supra, fn 40. The proposition was approved in *Kwok Kwan-ho,* supra, fn 40
44 *Sartori* [1961] Crim LR 397.
45 [1972] 1 WLR 651.
46 [1965]HKLR 651.
47 supra, fn 40.
48 The court in *Li Ming-kwan,* supra, fn 40, also felt themselves bound to 'assume that the standard of proof required was beyond reasonable doubt.'
49 *Wat Kwok-leung,* supra, fn 40.
50 supra, fn 40.

> 'No doubt, in these cases, the burden thrown upon the prosecution is that of proving a negative but that can be done if the proper questions are asked and received credible appropriate answers. It is highly desirable, if not essential, that in preparing the ground for the admission of a confessional statement, questions as to whether any threats, inducements or violence were employed, be directed to the witness who took the statement or to any witness who was present at the time. Mere assertion by such witness or witnesses that the statement was free and voluntary is open to criticism that that is opinion and is indeed the very question which the court has to decide. What is required of the witness or witnesses is an account of the factual situation in which the statement came to given and not an expression of opinion.'

The explanation has adopted as a correct statement in *Kwok Kwan-ho.*[51] The explanation should not be taken to suggest that there are certain special questions which must be asked in every case, but what has to be done is to ensure that, whatever questions are asked, the evidence which is on the record is such that a judge can be fully satisfied that it has been proved affirmatively that the statement is voluntary. In case where the accused has been, or may have been in contact with the police or other persons in authority over an extended period of time before the statement is taken, it seems that 'it will be necessary for them to account, at least in a general way for every moment of that period otherwise the defence will be able to say that it has not been proved that it is not reasonably possible that some pressure was brought to bear upon the accused what was still operative when he made the statement.'[52] There is no hard and fast rule in relation to the discharge of the burden, as it has to depend on the facts of particular circumstances. Of course, if an accused person expressly states that he does not object to the admission of the confession, the court then will only require a scintilla of evidence to satisfy itself that the confession is voluntary.[53] But in any event, the burden is not a light one.

It has been suggested that the crown must prove its case during a voir dire to the satisfaction of the judge which is a more stringent standard than the traditional standard to prove beyond reasonable doubt.[54] The argument runs as follows:

> 'The jurisprudence dictates that all who were present when a statement was given must be called on the voir dire. One could easily foresee the case where five detectives were present, but where the Crown could establish the free and voluntary character of a confession by calling two or three or four of the five. Their evidence may not be impaired by cross-examination and the defence may call no witness to contradict them. A trial judge might therefore conclude that this was proof beyond reasonable doubt and if that were the true test, he would be obliged to admit the confession. But he should not do so unless he has 'adequate explanation as to why the remaining detectives were not called.'[55]

The requirement of adequate explanation[56] is regarded as a special rule which is in addition to what is necessary sufficient for discharging the burden to prove beyond reasonable doubt. The fallacy of the argument lies in the fact that a distinction is drawn between the standard of proving 'beyond reasonable doubt' and 'to the satisfaction of the judge'. In fact, it is submitted that they are merely different ways of describing the same standard and it can hardly be doubted that the judge will only be satisfied if the burden to prove beyond reasonable doubt is discharged. The so called special rule is merely a condition to be met, or else, there can be no proof beyond reasonable doubt. It is important to stress again

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51 supra, fn 40.
52 *Li Ming-kwan* supra, fn 40.
53 *Lee Fat* [1969] HKLR 353.
54 Kaufman, supra, fn 28.
55 ibid, at p 30.
56 *Thiffault* (1933) 60 CCC 97.

that 'to prove beyond reasonable doubt' is not an absolute standard, but it is subject to variations according to different circumstances.[57]

Another interesting question is whether particulars should be given by the defence for the grounds of objection to the admission of the confession. As observed by the court in *Li Ming-kwan,*[58] the prosecution's task may become well nigh impossible if there is no particulars from the defence. Therefore, the court resolved that when an accused objects to a confessional statement, he must give reasonable particulars, even though it may mean an encroachment on the accused's right of silence. It is not unreasonable for the court to reach such a decision, but it has the effect of turning something which is merely optional, though undoubtedly desirable, into an obligation. The court did not consider the latter part of the judgment of Blair-kerr J in *Kwok Wing-hung.*[59] He held that if the issue of admissibility was raised, he would:

> 'then ask him to disclose to the court precisely what grounds he has for saying that the statement is inadmissible so that these grounds can be properly inquired into bearing in mind that the onus always rests upon the prosecution. If he refuses to say what the ground are, I shall then ask the counsel for the Crown to proceed as best as he can, but if I get the impression that the object of the accused is to keep the Crown or the court as much dark as possible as to what his allegations are going to be, I shall give the Crown the fullest opportunity of calling evidence in rebuttal on all matters not specially raised by him at the commencement of the enquiry or in cross-examination of the crown witness.'

Prior to the decision of *Li Wing-kwan,* such duty to give particulars was entirely unnecessary and it would suffice as long as there were grounds for suspicion.[60] As conflicting opinion is found in *Li Ming-kwan,* it is uncertain whether the proposition by Blair-kerr J in *Kwok Wing-hung* can still be regarded as correct.

In practice, particulars should only be necessary when the accused alleges that his statement was not taken in the place where the prosecution alleges it was taken, or if there is some person other than the witness called to produce it, or if there is some allegation of relevant impropriety on the part of some person who would not normally be a witness for the prosecution. It should not be necessary to require the nature of the complaint to be particularised in detail, since this would emerge from the evidence.[61]

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57 It is suggested in *Lee Fat*, supra, fn 53 that 'If an objection is founded upon a story disbelieved by the court, it depends upon the facts of the particular case whether a like scintilla of evidence is sufficient to establish that the confession was voluntary. Where there is nothing on the record, other than the rejected story of the accused, to show that the confession was not voluntary, the judge is entitled to act upon the slightest evidence. Where there is other evidence that the statement was not voluntary, it is incumbent on the judge to consider it, whether expressly relied upon by the defence or not.'

58 supra, fn 40, at p 285.

59 supra, fn 35, at p 601.

60 See *Wat Kwok-leung*, supra, fn 40, Pickering J said:
'In the present case there was no actual evidence to the effect that the statement was not voluntarily made, because the defence offered none; but there were grounds for suspicion, because the defending solicitor made the allegation that the statement had been taken, not in the street as alleged by the police, but in the CID room where the appellant was threatened and received blows before copying a statement in words not in his own. At that junction the prosecution officer should have made sure that evidence adequate to satisfy the court beyond reasonable doubt of the voluntary nature of the statement was elicited if it existed to be elicited.'

61 (1974) 4 HKLJ 74 at 76.

Fortunately, the whole controversy is clarified by McMullin J in *Poon Chi-ming*[62] where he asserted:

> 'It is most important ... that such evidence *to prove affirmatively* if available should be tendered automatically by the Crown or its absence explained irrespective of whether or not it is anticipated that the prisoner will give evidence on the special issue.... It is not good enough to say that appellant's subsequent silence cured this deficiency for that would relieve the Crown of its duty by revoking the prisoner's right to remain silent.'[63]

Now, the accused's right of silence is once again re-inserted.

## JUSTIFICATIONS FOR EXCLUSION

Traditionally, statements by accused persons that are reported in court are accepted by the judges with delicacy, if not reluctance. Even if the statements are signed, it will be excluded anyhow on basis of involuntariness. The most important reason being that involuntary statements are unreliable.

Not all involuntary statements are false but, nevertheless, they are ruled out. It is hard to treat the danger of unreliability as the sole ground of exclusion at the present days. Allowance must also be made for the dislike shared by the lawyers and laymen alike of the spectacle of a man being put under what he might consider to be a pressure to incriminate himself.[64] It is not uncommon that there are complaints against the malpractice of the police. Clearly, it is the intention of the courts to discourage the police from exerting confessions by illegal means.

## CROSS-EXAMINATION ON INVOLUNTARY STATEMENT

Once a statement is excluded, it cannot be the subject of cross-examination. Accordingly, Humphreys J, in *Treacy*[65] rejected the contention of the crown counsel that when a man had made some statements in the witness box which did not agree with those which he had made in some previous inadmissible confessions, the prosecuting officer was entitled to put those confessions to him.

It is important to note that while the fact that an involuntary satement should not be revealed to the jury, the information derived from it may be used.[66] The issue was revealed by the Full Court in *Lam Tuk-yu*[67] where Blair-Kerr J ruled that:

> 'It is perfectly proper for the Crown to cross-examinate an accused person on information derived from an induced, or otherwise inadmissible, statement. But what he must not do is to reveal to the jury that the information is contained in such a statement.'

Not only the counsel is not allowed to mention the existence of the statement, but he must take care in framing the question in order that no jury could reasonably infer from the form of questions and their sequence that the accused has made an incriminating statement.

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62 supra, fn 40.
63 ibid, at p 427.
64 Cross, *Evidence* (London, Butterworth, 1974) 4th ed, at p 485.
65 supra, fn 2.
66 *Rice* [1963] 1 A11 ER 832 at 839.
67 Crim App No 111 of 1968.

The reason that the principle respecting confessions

> 'has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession or whether it arises from any other source; for a fact, if it exist at all, must exist invariably in the same manner, whether the confession from which it derives be in other respects true or false.[68]

The facts derived from it can thus be proved but they must be proved without any inference to the inadmissible confession. The rule which governs the admissibility of evidence obtained as a consequence of an inadmissible confession seems to be only a matter of relevancy. This was stated in *Kuruma*[69] by Lord Goddard in giving the advice of the Board said:

> 'When it is a question of admission of evidence, strictly it is not whether the method by which it is obtained is tortious but excusable but whether what was obtained is relevant to the issue being trial.'[70]

It may therefore be concluded that illegally obtained evidence is admissible, provided it does not involve a reference to an inadmissible confession of guilt, and subject to the overall exclusionary discretion enjoyed by the judge at a criminal trial.[71] In many cases, however, the mere proof of the facts, without any reference even to the part of the confession mentioning them, would be useless.[72]

## EVIDENCE TENDERED ON VOIR DIRE

It is controversial whether a judge can rely upon the evidence given during the voir dire in reaching a decision on the general issue of guilt or innocence of the accused. In *Li Kim-hung*[73] the Full Court decided that when deciding the general issue it is wrong for a trial judge to rely on evidence given on the issue of admissibility in the course of the voir dire.[74] This would be the same whether the evidence is for or against the defendant Similar decision was also found in the Federal Court of Appeal in Rhodesia and Nyassaland in *Chitambala*[75] But in *Ho Yiu-fai*[76] the Full Court declared that whilst the judge must not rely on the accused's evidence on the voir dire, he may rely on the evidence of the prosecution. It distinguished the case from *Li Kim-hung* and *Chitamabala* by saying that 'when the judge is sitting with a jury this must be so because the jury will not have heard the evidence on the voir dire. The position is different where the trial is by a judge alone.'[77] The Full Court went on to say that it is wrong 'to rely on such evidence which interferes with the right of an accused person to remain silent in the face of evidence called by the prosecution on the general issue ... These cases are not authority for saying that the trial judge sitting alone cannot make use of the evidence other than that of the accused when deciding the main issue.'[78] The rule was confirmed in *Ng Chun-kwan*[79] where McMullin J stated it as a settled law without any discussion. With respect, it is submitted that the distinction is quite arbitary and the Full Court has failed to appreciate that the evidence which is adduced in a trial within a trial is

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68 *Warickshall* (1783) 1 Leach 263 at 298.
69 [1955] AC 197.
70 ibid, 204.
71 It was recognised in *Kuruma* supra, fn 69, that the judge always has a discretion to disallow evidence in criminal case if the strict rule of admissibility would operate unfairly on the accused.
72 See *Gould* (1840) 9 C & P 364.
73 [1969] HKLR 84 at 87.
74 cf *Li Kam-ming* [1967] HKLR 513. The Full Court seems to suggest that voir dire evidence may be considered when determining verdict.
75 [1961] R & NLR 166.
76 supra. fn 20.
77 supra, fn 20, at p 421.
78 supra, fn 20, at p 422.
79 [1974] HKLR 319 at 328. 'The essence of the matter is that what the accused says on a voir dire may not be used as substantive evidence against him or his co-accused.'

relevant only to the admissibility of the alleged confession.

While doubt is cast upon the reliance on voir dire evidence by the prosecution to prove guilt, it is possible for the court to take into accout such evidence to determine the credibility of the accused. In *Ng Chun-kwan,*[80] McMullin J held that the 'only way in which evidence of an admission made by the accused on the voir dire may be adduced in evidence is by way of rebuttal if he gives evidence on the general issue and if that evidence is inconsistent with what he has said on the voir dire.'[81] There is nothing unfair to the accused as it only goes to his credibility.

## EXAMINATION OF THE ACCUSED

The trial within a trial follows the ordinary rules of criminal procedure and evidence. The Crown presents its case and its witnesses may be cross-examined. The defence may also call witnesses including the accused himself, and they too may be cross-examined. In section 54 of the Criminal Procedure Ordinance,[82] it is stupulated that 'every person charged with an offence ... shall be a competent witness for the defence at any stage of the proceedings.' But it was held in *Baldwin*[83] that where there is evidence of a prisoner having been properly cautioned, the accused is not entitled at that stage to give evidence that the statement was improperly obtained. The decision was doubted in *Cowell*[84] and the Full Court in *Wong Kam-cheung*[85] had impliedly accepted the opinion of *Cowell.* These cases, however, can be reconciled on the ground that the application of the proposition in *Baldwin* is limited to situations where a caution is properly administered in accordance with the judges' rules. Hence, the accused is still entitled to give evidence in other circumstances if the justice of the case makes it desirable.

The order of speeches by counsels is also governed by the general rules of criminal procedure. In *Tsui Sheung,*[86] the Full Court upheld the contention of the defence, namely, since the admissibility of a confession depends on mixed fact and law, the balance of convenience lies in adopting in voir dire proceedings the same order of speeches by counsel as applies upon the trial of the general issue in a criminal case.

As the general criminal procedure applies, the accused may be cross-examined if he is called as a witness. But is it desirable that he be asked whether his statement is true? The issue was first raised in *Hammond,*[87] a murder case. The facts of the case are simple. Three police officers were called to testify at a trial within a trial, and the accused then went into the witness box to give his version of the events which preceded his confession. The cross-examination then proceeded as follows:

Q: Your case is that this statement was not made voluntarily?

A: Yes.

Q: Is it true?

A: Yes.

Crown counsel was surprised by the answer given and in order to make sure that there was no mistake, he put the question again in unequivocal terms.

Q: What you are saying is that you are forced into saying what was true by something that was done. Is it right?

A: Yes, sir.[88]

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80 ibid.
81 ibid, 328.
82 Cap 221 LHK (1972 ed).
83 (1932) 23 Cr App R 62.
84 [1970] 2 KB 49.
85 [1967] HKLR 610.
86 [1968] HKLR 164.
87 supra, fn 31.
88 (1941) 28 Cr App R 84 at 87.

In the Court of Criminal Appeal, Humphreys J found the question clearly admissible, though the trial judge (Cassels J) was not quite as certain, and the court noted that he had had 'some doubt whether or not the question as to its truth was a desirable question to put.[89]

There is little doubt that a person charged and being a witness may be asked any question in cross-examination notwithstanding that it would tend to incriminate him as to the offence charged.[90] But the point is whether it is desirable to ask such a question. As there is little authority in England and Hong Kong, the discussion of its desirability has to be resorted to the decision in Canada. There are some authorities both for and against the view of Humphreys J. The matter was discussed in *La Plante,*[91] where the Ontario Court of Appeal agreed with *Hammond.*[92] Laidlaw J said:

> 'We can add nothing to the reasons given by Mr Justice Humphries (sic) in *Hammond.*[93] The evidence given by the accused in cross-examination on the voir dire that the statements made by him were true, touches the issue of admissibility ... and his answers in respect of both matters to the questions put by the counsel for the Crown were relevant to the issue as to whether or not the statements made by him were voluntary.'[94]

In a Hong Kong case, *Ng Chun-kwan*[95] McMullin J impliedly accepted that the question was admissible, but he also considered the possible use which might be made by the crown of such an admission. He held that: 'If the trial is by a judge alone, similarly the judge must not treat the admission as part of the prosecution case.' His view also coincided with the opinion of the court in *Declercq.*[96]

The main objection lies in the fact that the court under the guise of 'credibility' transmutes what is initially an inquiry as to the 'admissibility' of the confession into an inquisition of the accused. Strictly speaking, the *Hammond*[97] case does not preclude a trial judge from excluding a confession as involuntary even where the accused has admitted its truth. But this possibility seems to be a weak protection against the fact that the court may admit a confession only on the ground that it is found to be true.

The practice exposed in *Hammond's* case also attracts criticism for the reason that it is not directly relevant. At most, it can only be indirectly relevant as it throws light on the credibility of the accused testifying on the voir dire. In *Hnedish,*[98] Hall J even went further to say that he could not believe *Hammond* did in fact 'reflect the final judicial reasoning' of the English courts. 'I feel', he added, 'that when the point comes squarely to be decided, another court will take a hard look at the whole question.'[99]

In spite of the criticisms, the weight of the authority seems to tilt in favour of the view that as a matter of law, it is permissible for the question to be raised if it may assist the trial judge in determining the credibility of the evidence which the accused has given on the voir dire, but it is not desirable to put such a question. Cartwright CJ expressed similar opinion as follows:

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89 ibid, 88.
90 s 54(1) (e) of the Criminal Procedure Ordinance (cap 221, LHK 1972 ed).
91 [1958] OWN 80.
92 supra, fn 86.
93 ibid.
94 supra, fn 89, at 81.
95 supra, fn 13.
96 [1966] 2 CCC 190.
97 supra, fn 86.
98 (1959) 29 CR 347.
99 ibid, at p 349.

> 'However, while it cannot be said that the question was legally inadmissible, in my respectful opinion this was eminently a case in which the trial judge should, in the exercise of his discretion, have refrained from putting the question.'[1]

The Privy Council in *Noor Mahamed*[2] also expressed opinion to the effect that 'cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.[3] Therefore, the judges should exercise his discretion in favour of the accused under these circumstances.

## DUTY OF TRIAL JUDGE TO GIVE REASONS FOR THE RULING

Confession is usually adduced by the prosecution in evidence as proof of guilt against the accused.[4] This might even exonerate the police from their duty to investigate offence. Huggins J realised that the court too in the past had relied too heavily on such statement and in *Leung Tak-fuk,*[5] he expressed that:

> 'We cannot help suspecting the investigations were not pressed on because it was thought (wrongly as we hold) that the cautioned statement was conclusive of the appellant's guilt on these charges and we take the opportunity to say that in the experience of the judges of this court too great reliance is often placed upon statements by the accused persons where other and more satisfactory evidence could be adduced after further investigation.'[6]

Though the court held that it was wrong to take a confession as conclusive, there is a trend that such weight will be given to it whenever it is admitted. In the light of this situation, it is desirable for a trial judge or magistrate on a voir dire to state his ruling that he is satisfied beyond reasonable doubt on the evidence that a statement is voluntary or words to the effect, so as to exclude any possibility of doubt in the matter.[7] Huggins J in *Li Wai-leung*[8] suggested that it is the duty instead of a desirability of a judge to rule on the issue of voluntariness and in so far as the circumstances of the cases required, to indicate his reason for coming to the conclusion. This would mean that it is incumbent on a judge to make some reference to the arguments advanced on both sides when ruling upon the admissibility of an extra-judicial confession. He should then give reasons for his finding no matter they are in favour of the accused or not. The duty to give reasons is justifiable on the ground that difference between a judge and a jury is that the former is required to give reasons and the latter is not. Furthermore, in case where the trial judge wrongfully admits confession which is inadmissible as there is ponderous evidence or reasonable doubt to the contrary, it would be easier and more convenient for the defence counsel on appeal to point out where the trial judge has erred by reference to his reasons for his ruling. Of course, undoubtedly, it is still open to the accused to appeal on such ground even though no express reason are given.

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1 4 CRNS 204 at 209.
2 [1949] AC 182.
3 ibid, at p 192.
4 In *Ng Chun-kwan,* supra, fn 13, at p 322. The magistrate convicted the accused mainly on the weight of the confession. This could be shown by reference to his brief note of his reason concluded with the sentence, namely, 'being satisfied beyond reasonable doubt of the voluntary nature and the truth of the confession, I convict.'
5 Crim App No 389 of 1970.
6 This passage was re-iterated by Rigby J in *Wong Ho-ming Crim* App No 371 of 1970.
7 This is expressly stated in the decision of the Full Court in *Wong Kam-ming* supra, fn 40.
8 [1969] HKLR 642 at 671.

The desirability to give reasons seems to have been shaken by two subsequent cases decided by the Full Court. In *Kwok Kwan-ho,*[9] the question raised was whether or not there was evidence which justified the judge in coming to the conclusion that the statements were voluntary. The defence counsel also complained that the judge did not evaluate the evidence at all and he ought to have given a ruling setting out both for and against voluntariness for the making of clear findings of fact on the issue. The court in reply made reference to *Wong Kam-ming*[10] and held that it was not always necessary for a trial judge to give reasons. It is submitted that the court should indicate under what circumstances would a judge be deemed to owe a duty to give reasons if it is not necessary in every case for there to have a full ruling. Again in *Li Ming-Kwan*[11] Huggins J stated that there is 'no absolute necessity ... to give reasons for his ruling on the question of admissibility. He did so and his reasons are, of course, open to scrutiny.' It seems that Huggins J has changed his mind concerning the duty of a trial judge to give reasons and it is nó longer, in his view, under whatever circumstances for him to do so. It is much regretted that he came to such an opinion which will inevitably encourage the judges to refrain from giving any reasons which would afford ground for scrutiny and criticisms.

## EXCULPATORY STATEMENTS

A statement amounting to an admission or confession will be admitted as evidence of fact by way of exception to the hearsay rule. Such exception is inapplicable to exculpatory statements which do not fall into the catergory of admission. The rationale behind is pointed out by Professor Wigmore in his treatise on the Anglo-Americian System of Evidence in Trials at Common Law.[12] He stated that the tendency to reject evidence of a consciousness of innocence is due to the distrust of the inference from it which is often feigned and artificial as every man, if he is in a difficulty, or in the view to any difficulty, will make declarations for himself.[13]

Partial relaxation of the rule can be traced in situation where in a statement, the accused asserts certain facts which tend to show that he is guilty and others which tend to show that he is innocent. In *Poon Chi-kwong,*[14] Scholas J adopted a passage from the judgment of Parke J in *Huggins*[15] which was as the following:

> 'What a prisoner says is not evidence, unless the prosecution chooses to make it so, by using it as a part of his case against the prisoner; however, if the prosecution makes the prisoner's declarations evidence, it then becomes evidence for the prisoner, as well as against him.'

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9 supra, fn 40, at p 234. This case was again before Huggins J who held: 'We do not think that it was essential that he should make any express finding that the statement was voluntary and say that he was satisfied beyond reasonable doubt as to its voluntariness.'

10 supra, fn 40.

11 [1973] HKLR 275 at 280.

12 Vol 1, 384 of Treatise on the Anglo-American System of Evidence in Trials at Common Law.

13 See *Hardly* (1974) 24 State Tr 199 at 1093. Eyre CJ held that 'nothing is so clear that all declarations which apply to facts, and even apply to particular case that is charged, though the intent should make a part of the charge, are evidence against the prisoner and are not for him, because the presumption upon such declarations are evidence that every man, if he was in difficulty, or in view to difficulty, would make a declaration for himself.'

14 supra, fn 40, at p 362.

15 (1829) 3 Car & P 603.

It seems that it is now settled that self-serving statements may be rendered admissible by the fact that they form part of an inculpatory statement relied on by the crown.[16] The decision was again confirmed by the Full Court in *Yau Chung-Kee.*[17]

In the past, there was doubt on the value of such exculpatory portion. In *Girvin,*[18] Beck J took the favourable part as evidence for the accused as an aid to the interpretation of the unfavourable part which could not be given a meaning on its own but only a meaning as modified by the favourable part. What was in fact suggested is that weight must however be given to it in relation to the light it throws upon the part of the statement which amounts to an admission or confession and it stops short of having any force by itself. Such arguement was disagreed by McMullins J in *Yau Chung-Kei*[19] where he said:

> 'If it be argued that the only value which such explanatory matter can have resides in the tendency to destroy or to explain away the matter which stands against the accused in the statement then it must be remarked that the courts do not always seem to have dealt with such explanatory matter in this way.'[20]

McMullin J also relied on the academic authority of Professor Wigmore to explain away the fallacy of the argument. He stated:

> 'This, also, is simply a necessary deduction from the general principles. The remainder of the utterance, regarded as an assertion of the facts contained in it, is merely a hearsay statement, and as such has no standing. It is considered by the tribunal merely in order to piece out and interpret the first fragment and ascertain whether as a whole the sense of the first becomes modified ... all this is logically unquestionable. Nevertheless, it is not uncommon for courts to treat the remaining utterance, thus put in, as having a legitimate assertive and testimonial value of its own – as if, having once got in it could be used for any purpose whatsoever.'[21]

McMullin J is right in coming to the conclusion that the self-serving portion has testimonial value of its own. Perhaps, this is the first step towards the full recognition of the probative value of exculpatory statement. Indeed, Phipson in his texbook voiced that 'there is no useful distinction which may be drawn between statements containing both admissions and self-serving statement and statement amounting to a complete repudiation of the allegation.'[22]

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16 See Cross, supra, fn 64, at p 471; the same principle appears to have been accepted in *McGregor* [1968] 1 QB 371.
17 [1973] HKLR 257.
18 34 DLR 344.
19 supra, fn 15.
20 supra, fn 15, at p 267.
21 Professor Wigmore, supra, fn 10, Vol VII, 527.
22 Phipson, supra, fn 5, para 1539.

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