

Tort Law in Hong Kong

An Introductory Guide

Second Edition

Stephen D. Mau

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Foreword

Established in 1984, the Hong Kong Institute of Surveyors (HKIS) strives to serve the surveying profession. In 2010, the HKIS began sponsoring publication of reference books that are relevant to the needs and requirements of the local surveying practice. The HKIS is pleased to have funded another in a series of books authored by Stephen D. Mau. Like its sister publication, *Property Law in Hong Kong: An Introductory Guide* (second edition) by Mr. Mau, this second edition of his book on tort law in Hong Kong is not only intended for the surveying industry and its students, but also for the non-legal professional and the general public.

The real estate and construction-related industry has experienced substantial growth over the past few years. In response to this growth, there are a large number of individuals interested in entering this industry and others in the industry who are interested in further advancing their careers by expanding their knowledge of law. This book serves both groups as this edition of *Tort Law in Hong Kong: An Introductory Guide* has been revised, updated, and re-organized to enhance the reader's experience and understanding. The second edition continues to be written in non-legal English with a comprehensive endnotes section which provides further and more detailed explanations of the main text along with references for those who are interested.

This book comprises several chapters which discuss torts that are more frequently encountered in daily activities. Hence, this book is relevant to both professionals and lay readers. It is also an excellent reference for undergraduate and postgraduate student studying courses related to the industry.

Sr Vincent Ho
President

The Hong Kong Institute of Surveyors

Preface

With the success of the first edition of this book, I have prepared an updated second edition which includes revisions to its organization to improve the reading. The purpose of this new edition has not changed: it is to provide general coverage of matters in the area of tort law. Thus, this title is intended for use by the general public rather than for use by legal professionals or those studying to become legal professionals. Accordingly, this book is suitable for both professionals and students who wish to acquire some legal knowledge but not to the extent of a legal practitioner. Other existing titles offer more extensive and detailed examination of this subject for those who wish to pursue further studies.

At times, the study of law is difficult—due to concepts, application and/or technical terms—with language being an obstacle to many. With this in mind, I have attempted to use “simple English” where possible, rather than using academic prose, formal English, or technical language. Where technical terms are used, I have attempted to define these terms in simple English rather than using “legalese”. Additionally, I have provided a Chinese translation—in traditional characters—of most legal terms, either in the main text or in the endnotes.

At the back of this book, there are notes for each of the chapters. In these notes, the reader can find additional information. This information consists of more detailed explanations and/or discussions of the corresponding topic in the main text. It also includes references to other sources where additional information on the particular topic may be found.

Finally, I wish to acknowledge the invaluable assistance provided by the following individuals in the preparation of the second edition: Chow Man Ho, Rocky (周文浩); Fong Man Hin (方文軒); Krystal Lee Yeuk-ying (李若瑩); and Lit Ka Ki, Andy (列家麒).

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1

Introduction

A. Overview

This book is about tort and the general legal principles which apply to this area of law. Rather than a specialized textbook for law students, this book aims to introduce tort law to readers from different fields such as construction, accountancy, social work, and, foreign-based individuals from countries whose legal systems are based upon the civil law legal system.

This publication will not cover all kinds of tort. Instead, this book will cover the types of tort that are, in general, governed by the common law. However, for certain types of tort that are statute-based, such tort will be reviewed briefly but not in any substantive detail. Such sorts of tort are mainly governed by legislation instead of the common law tort principles on which this book concentrates. For example, issues related to employment are categorized as *employment law*.¹

However, before continuing on this subject of tort law, we should discuss a related matter—the common law legal system. Hong Kong, the United Kingdom, the United States, along with most Commonwealth nations, follow the common law legal system. Continental Europe and China are examples of jurisdictions which follow the civil law legal system. The major difference between the two legal systems is that the common law legal system relies upon precedent.² *Common law* originally refers to the law common to all of England. *Precedent* refers to prior examples found in preceding court decisions which would be followed in subsequent cases concerning the same facts and issues. Consequently, this is the reason for referring to cases and for discussing cases in this book.

B. Organization

We begin first with a definition of tort and tort law. We then continue with a discussion of some purposes of tort law. The second chapter reviews the more commonly encountered categories of tort. The next two chapters will analyse the most common type of tort: negligence. In Chapter 5, we will review the other frequently encountered types of tort. Finally, in the last chapter, there will be a brief review of the varieties of compensation available to an individual injured by a tortious act.

C. Definition

We begin with the definition of *tort*. Generally, a tort is a type of wrong that has caused harm to a person or to someone's property.³ The Hong Kong government's *English-Chinese Glossary of Legal Terms* translates *tort* as “侵權” and “侵權行為”.⁴ *Tort law* can be translated as “侵權法”.

Tort is generally fault-based liability. A tort is a loss, not caused by a breach of contract, for which the law will compensate the injured party by awarding damages.⁵ Unlike criminal law, which involves enforcement of laws by the government, torts generally involve court actions between private parties.⁶ Although a tort case is different from a contract or criminal case, these different legal fields might overlap, and this overlap might arise from the same act by the wrongdoer.⁷ Frequently, this wrongdoer is referred to as the *tortfeasor*.⁸

The following are some of the differences between tort law and contract law:

- Tort liability is not based on agreements between the parties. Contractual liability is based on legally binding agreements.⁹
- Tort obligations (i.e., rights and duties) are owed to everyone whom the courts consider to be a *neighbour*. Contractual obligations or promises are owed only to those who are parties to the contract.
- Tort obligations are imposed by law rather than by the parties themselves. Contractual obligations are created and accepted by the parties to those agreements.
- The basis of tort is to compensate the injured victim for loss or harm, i.e., to return the injured party to the situation prior to the tortious act. The basis of a contract is to enforce the promises, rights, or obligations of the parties. In a contract case, the court attempts to place the parties in the position as if the contractual obligations were fulfilled.
- Damages in tort are an unliquidated sum, i.e., the tortfeasor pays an amount which the court considers appropriate. Damages in contract

may be either liquidated, i.e., a predetermined sum of money, or unliquidated, depending on the facts of each case.¹⁰

Some of the differences between tort law and criminal law are:

- In a court action based upon a tortious act, the legal proceeding is between private individuals, an injured party (who may also be referred to as a *plaintiff* or a *claimant*) suing a tortfeasor (who may also be referred to as a *defendant* or a *respondent*). In a legal proceeding based upon a criminal act, the action is prosecuted by the government.¹¹
- The purpose of tort law is to compensate the injured party for the wrong or injury suffered. Criminal law aims, among other things, to punish the offender and deter future wrongful behaviour.¹²
- Where an injured party sues the wrongdoer in a civil case, the standard of proof is lower. This obligation to produce evidence is commonly known as the *burden of proof*¹³ which is defined as: “the duty of one party (usually the party bringing the proceedings against another) to make out the case against the other party and to prove to the court that the case has been established.”¹⁴ The standard of proof in tort actions generally is *on the balance of probabilities*¹⁵ or a *more likely than not* standard. This standard for civil lawsuits requires the injured party proving its case more convincingly than not, say, more than one-half.¹⁶ On the other hand, the standard of proof in criminal actions is generally higher: the standard of *beyond reasonable doubt*.¹⁷ This standard for criminal cases requires the prosecution to prove its case to a more convincing standard.¹⁸ Thus, where someone accused of committing a tort is acquitted in the criminal proceedings, this is not conclusive in the civil action because the standard of proof in the criminal action is higher.
- If a plaintiff proves its case in tort, civil remedies will be available to the injured party. If the government proves its case beyond reasonable doubt in a criminal proceeding, the defendant will be convicted and shall incur a penalty, such as a fine and/or imprisonment. Sometimes compensation (known as *restitution*) to the injured party may also be imposed against the defendant.

Note, thus, that these distinctions can overlap, and a tortious act may also be a criminal offence. For example, the tort liability of a person convicted of battery is not settled by serving a prison sentence. If the victim successfully brings a tort action against this person, the accused will pay damages for the victim’s injuries.¹⁹ Another example of this overlap may

arise where the liability of a manufacturer of a defective product, which causes harm to person or property, is based both on the fault-based principles of tort law and the breach of warranty principles of contract law.

Whilst it is difficult to determine precisely the exact purpose behind tort law principles, two principal functions may be discerned: to compensate the victims of civil wrongs;²⁰ and, to deter people from committing wrongs which cause injury to others or damage to their property.

Therefore, the intent of tort law appears to include the following:

- to protect the physical integrity of people and property;
- to protect the enjoyment or use of property;
- to protect the reputation of a person or of things; or
- to protect against economic or financial loss.

In summary, the purpose of tort law is to compensate the injured party for the unreasonable harm caused by the tortious acts of the tortfeasor. The law of tort thus provides a cause of action—a reason to sue—for the injured party seeking to protect or to compensate for a civil wrong suffered.

The law of tort in Hong Kong generally follows case law in the United Kingdom with variations in interpretation necessitated by cultural differences.²¹ Certain statutory provisions, such as the *Occupiers Liability Ordinance* (Cap 314), *Fatal Accidents Ordinance* (Cap 22) and the *Civil Liability (Contribution) Ordinance* (Cap 377), also play a role in tort law in the territory. In Hong Kong, a person injured through an accident is more likely to seek compensation not through the tort system, but through one of the government-administered no-fault schemes, such as those established under the *Employees' Compensation Ordinance* (Cap 282), the *Pneumoconiosis and Mesothelioma (Compensation) Ordinance* (Cap 360), the *Occupational Deafness (Compensation) Ordinance* (Cap 469), the non-statutory Traffic Accident Victims Compensation Scheme (funded by the *Traffic Accident Victims (Assistance Fund) Ordinance* (Cap 229)), and Criminal and Law Enforcement Injuries Compensation Scheme. The compensation paid under these no-fault schemes are usually lower than the compensation typically awarded in tort cases, but the claimant is entitled to at least some compensation, does not have to commence a court action, and has no need to prove any fault on the part of the wrongdoer.²²

2

Types

Tortious acts may be classified in several ways. For the purposes of this book, tort will be classified into the following categories:

- Intentional tort: where a person intended the results or consequences of the act. Examples of intentional torts would include assault, battery or false imprisonment.¹
- Strict liability: where a person's conduct was neither intentional nor negligent, but is held liable without the plaintiff needing to prove fault. An example is the rule in the case of *Rylands v Fletcher*.²
- Negligence: where a person is careless. For instance, if a defendant deliberately throws a stone at the plaintiff and hits the plaintiff, the defendant has committed an intentional tort. If the defendant intentionally throws a stone at a tree, but misses and hits the plaintiff, the defendant may be negligent.³
- Other torts: included in this category are other torts frequently encountered by the general public and include such acts as nuisance, occupier's liability, trespass and defamation.

The first and the second categories are self-explanatory and conceptually easy to understand. These categories will be discussed in this chapter and the tort of negligence will be presented in the two following chapters while the last category of torts will be reviewed in Chapter 5.

Due to the introductory nature of this book, the reader should note that there are still other types of torts which exist but which will not be reviewed in this publication. Some of examples of these types of torts include: product liability;⁴ deceit;⁵ passing off;⁶ wrongful interference with goods;⁷ and discrimination.⁸

4

Defences to the Tort of Negligence

Recall that tort law may involve both a civil case and a criminal case resulting from the same act. In a civil case, the burden of proving liability is lower than in a criminal case. The injured party in a civil case must prove all the elements of the tort of negligence on the *balance of probabilities* standard; otherwise, the injured victim has failed to prove its case and the defendant is free of liability. A tortfeasor may raise a defence which would relieve the tortfeasor from full or partial liability for the injury caused to the victim. Defences available to a tortfeasor against a claim of negligence are mainly contributory negligence and *volenti non fit injuria*.

A. Contributory Negligence

At common law, the defence of contributory negligence could completely prevent an injured victim's court action, provided that the victim was unreasonable in avoiding risks, and if this unreasonableness was a substantial factor in producing the injury. This would be the result even if the defendant was also negligent.¹ In other words, if some contributory negligence could be shown on the injured victim's part, the victim would not be able to claim any damages in a negligence action.²

In Hong Kong, the potentially harsh application of this common law rule has been made less severe by the *Law Amendment and Reform (Consolidation) Ordinance* (Cap 23) which provides for an apportionment of damages. This is because the negligence of both parties is taken into consideration, i.e., the injured party's negligence is compared with that of the tortfeasor.³ (In some countries, this comparison of the parties' negligence and resulting apportionment of damages is known as *comparative negligence*.) Section 21(1) of the Ordinance states:

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons . . . the damages recoverable . . . shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.⁴

The *Law Amendment and Reform (Consolidation) Ordinance* only changes the consequences of negligence.⁵ The question of whether there has been contributory negligence is still determined by the common law. In *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601, the court said that:

when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary . . . is to prove . . . that the injured party did not in his own interest take reasonable care of himself and contributed . . . to his own injury.⁶

Should an injured party's conduct fall below a reasonable standard of care and thus contribute to the injuries, an apportionment of the damages will be made. As mentioned earlier, Section 21(1) of the *Law Amendment and Reform (Consolidation) Ordinance* provides that the recoverable damages may be reduced as a court thinks is fair considering the victim's share in the responsibility for the damage. One Hong Kong authority concludes that this determination has two factors: causation and blameworthiness. The court compares the injured party's conduct with the tortfeasor's conduct, measuring their respective blame, and the degree to which their conduct caused the damage.⁷

B. *Volenti Non Fit Injuria* (Assumption of Risk)

Volenti non fit injuria is translated to mean no injury is done to a person who consents to the risk of injury.⁸ *Volenti* is a complete defence to an injured party's lawsuit.⁹ If a victim knowingly and voluntarily accepts the risks of injury by the defendant's negligence, the injured party cannot recover for any loss, damage or injury.¹⁰ Courts generally interpret this defence narrowly as courts are reluctant on policy grounds to deny a victim of any compensation.¹¹

The tortfeasor must prove that the injured party voluntarily submitted to the risk of injury. In other words, the injured victim must actually know of the risk, along with the nature of the risk, and the extent of the risk.

A court will need to determine the injured party's subjective state of mind, "as opposed to the objective, reasonable standard required in (contributory) negligence."¹² In *Bowater v Rowley Regis Corporation* [1944] KB 476, the court stated that:

a man cannot be said to be truly "willing" unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will.¹³

In *Dann v Hamilton* [1939] 1 KB 509, the court decided that mere knowledge of the danger is not sufficient to establish the defence of *volenti*. The defendant in the court case must prove that the injured party agreed to the risk, not simply that the victim had knowledge of the risk.¹⁴

One authoritative source has explained the difference between assumption of risk and contributory negligence:

it is a good defence that the plaintiff consented to that breach of duty, or, knowing of it, voluntarily incurred the whole risk entailed by it. In such a case the maxim *volenti non fit injuria* applies. This literally means that no wrong is done to one who consents. This defence is to be distinguished from the plea of contributory negligence, for a plaintiff may have voluntarily exposed himself to the risk of being injured while himself exercising the utmost care for his own safety; and, conversely, while knowledge of the risk may show contributory negligence, it does not prove voluntary assumption of risk.¹⁵

Note that the *Control of Exemption Clauses Ordinance* (Cap 71) is a legislative attempt to restrict the use of exemption clauses by commercial enterprises in order to avoid business liability.¹⁶ Section 7(3) of this ordinance specifies that a person's agreement to or awareness of a contract provision limiting liability for negligence does not necessarily indicate that person's acceptance of a risk.¹⁷ Section 7(1)¹⁸ of this ordinance provides that liability for death or personal injury resulting from negligence is not excludable. In respect of other property loss or property damage, Section 7(2)¹⁹ requires that the terms in the exemption clause limiting liability must meet the reasonableness requirement in Section 3.²⁰ Section 5 of the ordinance sets out the varieties of exemption clauses.²¹ (This ordinance will be discussed again in Chapter 5 Section D.)

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