TOWARDS A HONG KONG LAW OF TORT?

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Review of Tort Law and Practice in Hong Kong*, Hon Mr Justice Bokhary PJ, Hong Kong Court of Final Appeal (Editor-in-Chief) Sarony N and Srivastava DK (General Editors) ISBN 962 661 259 2 Sweet & Maxwell Asia, 2005, 224 + 1184 pp, HK$ 3,595/US$ 461 (hardback).*

I THE LEGAL SYSTEM OF HONG KONG

On 1 July 1997 Hong Kong ceased to be a Crown colony and sovereignty was formally handed over by the United Kingdom to the People's Republic of China. Now a Special Administrative Region of China, Hong Kong enjoys a fairly high degree of autonomy. Its legal system continues to be based on the Common Law, even though China itself belongs to the legal family of the civil law. The constitution of Hong Kong, known as the Basic Law, empowers the courts to refer to precedents in other common law countries. As Hong Kong is a relatively small jurisdiction, this contact with other common law systems allows legal insularity and stagnation to be avoided. In the same vein, the Hong Kong Court of Final Appeal, which exercises powers previously held by the Privy Council in London, has an international make-up. Two of its (non-permanent) members are former Chief Justices of the High Court of Australia. They are the Hon Sir Gerard Brennan and the Hon Sir Anthony Mason. Other non-permanent members come from Bermuda, Brunei, New Zealand and, tellingly, the United Kingdom.

In the legal system of contemporary Hong Kong continuity and change go hand in hand. The impetus for the production of the book under review came from a desire to approach the law from a distinctly Hong Kong perspective. Specifically, the objective was to create a textbook that reflects the growing body of home-grown tort law. However, what makes this book of interest to a wider audience is that the discussion of Hong Kong tort law consciously occurs within the broader context of the rest of the Common Law world. The Australian reader, in particular, may wish to draw parallels between the authors' attempts at drawing out the uniquely Hong Kong dimension of tort law and efforts at legal emancipation from English law in Australia. A detailed account of the latter can be found in Ellinghaus MP, Bradbrook AJ and Duggan AJ (eds), *The Emergence of Australian*

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Law (Butterworths, 1989). In addition to separate tables for indigenous and United Kingdom case law and legislation, *Tort law in Hong Kong* provides extensive lists of 'international' law from other jurisdictions as well. While the emphasis understandably is on foreign law from other common law jurisdictions, occasional references to US law are also made where deemed appropriate.

II TORT LAW IN HONG KONG

In terms of its coverage, *Tort Law in Hong Kong* is genuinely comprehensive. Intriguingly, the General Editors indicate in the Preface that 'the version that went to print is not as comprehensive as we had first wished' (p viii). Be this as it may, weighing in at some 4 kg, the book under review comprises 30 chapters on all the traditional topics such as negligence (chapter 3), trespass (to the person: chapter 5; to land: chapter 9), occupier's liability (chapter 10), nuisance (chapter 11), breach of statutory duty (chapter 14) and defamation (chapter 20). Torts committed in the context of business affairs receive extensive coverage and include not only product liability (chapter 7) and professional liability (chapter 24) but also economic torts (chapter 15), statutory intellectual property rights (chapter 16), passing off (chapter 17), and breach of confidence (chapter 18). In addition, there are several chapters on what may be referred to as the 'new' torts, including anti-discrimination torts (chapter 4), environmental torts (chapter 13), and – most timely - internet torts (chapter 19). As this is meant to be a practitioner text first and foremost, separate treatment is provided for the discussion of defences (chapter 25), remedies (damages: chapter 26; injunctions: chapter 30), limitation of action (chapter 28) and discharge of torts (chapter 29). There is even a chapter on conflicts of tort law (chapter 27 entitled foreign torts).

Given this breath of coverage, the depth of treatment of the various torts is truly remarkable. To this effect every chapter has been written by someone (practitioner or academic) with special expertise in the relevant subject area. It is not possible to do justice to each individual chapter within the constraints of this book review. Instead it may be useful to focus on certain aspects of tort law that are of contemporary relevance in Australia and have proved difficult or controversial in Australia. A first item of interest in this regard is the Hong Kong approach to duty of care in negligence. A second point of comparison with Australian law is liability of legal professionals. And, finally, the liability of medical and allied professions warrants closer scrutiny as well.

III DUTY OF CARE IN NEGLIGENCE

Hong Kong has – wisely, perhaps – stayed clear of the 'salient features' approach to duty in the High Court of Australia. Rather Hong Kong continues to use the familiar, three-stage *Caparo*[1] approach. Thus a duty of care exists where the risk of harm is reasonably foreseeable, the relationship between the parties can be said to be sufficiently close (proximity), and the imposition of a legal obligation to take care is deemed 'fair, just and reasonable' in the circumstances.

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1 *Caparo Industries plc v Dickman* [1990] 2 AC 605.

The authors of the chapter on negligence, Professor D K Srivastava, Charu Sharma (both from the City University of Hong Kong) and Nancy Leung, acknowledge that foreseeability is 'a rough and ready guide' [3.19] and that proximity is a similarly 'abstract term and no precise meaning can be attributed to it' [3.29]. Not unlike the legal situation in Australia, much depends on the specific circumstances of each individual case. Decisions on 'fairness, justice and reasonableness', in particular, tend to be policy based [3.38]. The authors distinguish between legal and public policy considerations. Whereas legal policy is practical in its focus and, in essence, seeks to avoid floodgates of claims, public policy is more delicate in that it looks at the 'public good' as the trigger for determining duty [3.39]. In *Richardson Greenshields of Canada (Pacific) Ltd v Keung Chak-kiu and Others* [1989] 2 HKLR 103 the plaintiff allegedly lost money on trading because of the closure of the market on so-called Black Monday in October 1987. The authors quote from Sears J who held that the Futures Exchange did not owe a duty of care on the following grounds of public policy [3.41]:

> There would be compelling policy reasons against the existence of such a duty of care. For example, the regulation of a financial market at a time of economic pressure is difficult; a decision to suspend trading might have to be taken quickly and a fine judgment drawn between divergent interests. It would be quite wrong to inhibit the decision makers with the threat of legal suits. Some investors will say, as in this action, that the market should have stayed open; others might say, if a decision to remain open had been made, that the market should have closed.

Black Monday is the name given to Monday, 19 October 1987. On that day the Dow Jones Industrial Average fell dramatically. Similar enormous drops occurred across the world. By the end of October, stock markets in Hong Kong had fallen 45.8% and in Australia by 41.8% (source: Wikipedia).

IV LEGAL PROFESSIONALS

In the past, a clear division of responsibilities existed between barristers and solicitors. The issue of liability in tort then used to be determined in line with this division of labour between both branches of the legal profession. However, the move towards a greater role for solicitors acting as advocates in the higher courts has meant that much of that clarity has now been lost [24.19]. The traditional function of barristers to draft pleadings certainly has undergone significant erosion in Hong Kong. In particular, it has become 'quite normal' for pleadings in the District Court or Court of First Instance to appear under the signature of the instructing firm of solicitors. The authors of chapter 24, Professor Sarony from the City University of Hong Kong, together with Martin Rogers and Gary Soo, refer to a related Hong Kong practice whereby firms of solicitors instruct counsel in England to draft their pleadings. Because English counsel may not be admitted to practice in Hong Kong, the pleadings typically are not signed by their actual author. The question is asked as to what would happen if a client were to be able to attack such 'blind' pleading successfully. Would the Hong Kong solicitors be entitled to join the English barrister as a third party to its defence of the claim? [24.21, n 66].

As for the vexed issue of advocates' immunity, the authors appear to disapprove of the House of Lords decision in *Hall (Arthur JS) & Co v Simons* [1993] 3 WLR 873. In *Hall* a majority in the House of Lords decided in favour of lifting the immunity of advocates in negligence claims. It is argued that, 'on the face of it', there is no reason why the Hong Kong courts should not follow the reasoning to the contrary by the High Court of Australia in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12. Of course, to the extent that advocates' immunity may run counter to the European Convention of Human Rights, this is not a straightforward proposition by virtue of analogous provisions in the Hong Kong Bill of Rights Ordinance. In any event, the principle of no collateral attack on the integrity of a decision of a competent court is said to embrace necessarily the immunity of counsel in the conduct of litigation [24.24]. A recent decision on that very issue is *Tsang Chin Keung v Employees Compensation Assistance Fund* [2003] 2 HKLRD 627. Following *Hunter v Chief Constable of West Midlands* [1982] AC 529 and *Smith v Linskills* [1996] 1 WLR 763 the Hong Kong Court of Appeal there drew particular attention to the need for finality and certainty in the outcome of litigation. Considerations of fairness as well were a factor that influenced the court [24.25].

V MEDICAL PROFESSIONALS

The doctor-patient relationship is an established category for the existence of a duty of care in Australia. A duty may even extend to non-patients: *Lowns v Woods* (1996) Aust Torts Reps 81-376; *BT v Oei* [1999] NSWSC 1082; *Alexander v Heise* [2001] NSWSC 69. It would appear that the situation in Hong Kong is somewhat more complex. Clearly, 'a duty of care is owed to anyone placing themselves in the hands of a medical practitioner *who accepts that person as a patient'* [24.64] (emphasis added). However, most doctors in Hong Kong are sole practitioners in private practice. This is said to reduce the likelihood of GPs in Hong Kong being held liable for failing to follow up on a request to go to the assistance of a person in need – as the plaintiff must convince the court that an established doctor-patient relationship exists sufficient for it to be regarded as on-going [24.66]. Absent a contractual obligation, there is no legal duty to respond to being 'called out' [24.66].

In Australia the *Bolam*[2] principle has come in for some critical attention by both the judiciary and the (state) legislature in recent years. In the legal system of Hong Kong, by contrast, the standard of care of medical professionals continues to be governed by reference to a reputable body of professionals in the same field as the defendant. Even so, courts called upon to make value judgments on the merits of one set of doctors over another are not required to classify the rejected expert evidence as 'irrational' [24.68]. The authors of the book under review thus distance themselves from statements to the contrary by Lord Browne-Wilkinson in *Bolitho v Hackney Health Authority* [1998] AC 232. By the same token, though, the authors also acknowledge that the *Bolam*

2 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

test is not without its limitations and that 'given the reprehensible facility with which "experts" can be conjured up to support one or the other view, the task facing both legal advisors and judges is substantial' [24.89].

VI CONCLUSION

Tort Law in Hong Kong is a formidable publication in more ways than one. It covers a vast and expanding area of the law in admirable detail. It has a most user-friendly lay-out. While obviously geared to the legal professional market of Hong Kong in the first instance, the book contains ample material for comparative study and reflection. From an antipodean perspective *Tort Law in Hong Kong* provides intriguing insights as to the extent and the manner in which legal emancipation from the English law occurs in another former colony.