HK Physical Education Teachers Conference 2020: 香港體育教師會議2020:

(Primary & secondary Schools) 專題講座 (中小學)

Legal Liability & Risk Management in Outdoor activities 戶外活動的法律責任與風險管理

Chong Yiu Kwong, Solicitor, EdUHK Senior Lecturer (EPL Dept.), LLM(human rights), Mediator

23 July 2020

### Rundown

- 1. Legal liability of negligence in outdoor activity
- 2. Risk management in outdoor activity
- Risk management of harassment by intern and volunteer
- 4. Annex & References

### PART I

3

### LEGAL LIABILITY OF NEGLIGENCE AND OUTDOOR ACTIVITY

# UK cases

- Porter v City of Bradford Metropolitan Council unreported, but available through Lexis), 14 Jan 1985 (CA)
- UK CA 1985: a teacher leading 12 students (aged 15-16) field trip, a boy threw stone 15 minutes and his classmatewas seriously injured.
- Woodbridge School v Chittock [2002] EWCA Civ 915, [2002]ELR 735
   School trip (skiing) in Austria, permanently paralysed from waist down as going too quickly.
- Kearn-Price v Kent County Council [2002] EWCA Civ 1539, [2003] ELR 17
- 15 minutes before start of school day, a football hit a boy's eye (aged 14). Football ban not enforced.

# HK cases

 Wong Wing Ho v Housing Authority [2008]1 HKLRD 352 (CACV 28/2007, 28/12/2007)

Climbed over the fence into an adjoining closed court to retrieve the ball but fell.

Amrol v Rivera [2008]4 HKLRD 110 (DCPI 267/2007, 19/3/2008)

A boy aged 4 knocked down by a golden retriever (25 kg) in an open plaza.

- HK Red Cross v HK Federation of Youth Groups (DCCJ 2233/2007, 12 Feb 2010)
- Lilley v HK & Kowloon Ferry Ltd. (HCPI 811/2005, 20/1/2012)
   Lamma Island fell from a ferry into sea

Case 1: Man Hin Fung case, 23 March 2018 DCPI 2725/2015, [2018] HKDC 323

6 December 2014, plaintiff sustained **serious injury** to his left **eye** resulting in loss of a **larger portion** of **iris** ("the Accident"). The quantum of damages has been agreed at HK\$800,000 and the trial is only concerned with the issue of liability. (Paragraph 1 "P1")

prepare Inter-School Athletics Championships, 2 teachers & 1 coach, 27 students (P3, 4)

Coach overseeing high jump practice, not witness Accident, suddenly heard the plaintiff screamed (P7) Accident: Cheng and Lee started to horseplay. Lee mocking the act of an Olympic player and clapping his hands over his head. Cheng then threw a tennis ball at Lee, with Lee threw back a red round-shape plastic mat ("the Mat") in return. Cheng managed to dodge (P9)

Man squatted down to tie his shoelaces, when he stood up, suddenly the **Mat** hit his face, breaking the glasses and **seriously injuring** his left **eye** (P8)

Mat involved in the Accident was only used as a spot marker for long jump practice (P28 (vi))





"(a) The **reasonableness** of the schoolteacher's duty to take care of the students shall be determined in light of, inter alia, (i) the **conditions** of the **school life** as distinct from the home life, (ii) the **number** of children in the class, and (iii) **nature** of those **students**.

(b) It is also established that teachers **cannot** be **expected to insure** children **against injury** from **ordinary play** in the playground, as it would be impossible to supervise all the school students that they never fall down and hurt themselves (Clerk and Lindsell on Torts 21st ed,  $\S$ 8-209). (P24)

"

"(i) The School was and is a **Band 1 school** where most of the students were hardworking, focused in their learning, **well behaved** and **disciplined**.

(ii) That occasionally students would be playing amongst themselves at times, but there were **no serious disciplinary issues** at the School and there had **never** been any **accident** of a **similar nature** at the School before." (P34) I " agree with, the group of **pupils** involved in the present case (including Cheng and Lee) are generally well-behaved and harmless who did not present themselves as a high safety risk. There were no serious disciplinary issues, no occurrence of accidents resulting in serious injuries during track and field practice or dangerous horseplay. The teachers or coaches of the defendant were simply not alerted nor put on inquiry to provide extraordinary supervision over Cheng and Lee". (P39)

"it is against public policy and damaging teacher-pupil relationship by removing the slightest element of trust to impose a duty on the teacher to constantly supervise students like Cheng and Lee who are just being playful at times, without being violence or having a history of causing injuries while they were playing around (*Trustee* of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Hadba (2005) 216 ALR 415 ("Hadba") at [25])." (P43)

"I find that...the staff to **student ratio** in the present case is **appropriate**." (P44)

I "find the supervision provided was adequate". (P44)

"Bearing in mind that the **obligation** on the **School** and teachers does **not extend to constant supervision**, the evidence does not establish that had a teacher been on patrol in the playground, the incident would necessarily not have occurred." (P50)

"even if there was one or more teachers on duty at the playground, he/they would most likely be unable to stop the Mat from hitting the plaintiff, given the time frame within which the incident occurred and the sudden and impulsive nature of the actions of Cheng and Lee." (P51)

#### "Accident was a sudden, unfortunate but totally unexpected occurrence and there was little that the defendant could have done to prevent it." (P60)

"Alternatively, even if there is a breach of such a duty, I am of the view that it was not causative of the Accident and/or the injuries suffered by the plaintiff." (P61)

"I order that the plaintiff's claim herein be dismissed with a costs order in favour of the defendant with certificate for counsel. The plaintiff's own costs to be taxed in accordance with the legal aid regulations." (P62)

### Case 2: Fong Chong Chuen v BGCA DCPI 548/2018, 15 October 2019

#### Background

Plaintiff ("P") was **17 years** old in Dec 2014. (Paragraph 3, "p3")

Defendant ("D") is a non-profit organization founded in 1936 and experienced in providing social service and activities to the public, with a focus on children and youngsters. (p4)

(a) The goals of the activity "**Team Challenge 36**" included challenging, testing and training the physical / mental endurance, honing team organisation skills of the participants and help building confidence; (p5) (b) Part of the activity was an **orienteering competition** (the "Activity") in the **Sha Lo Tung** area in **Tai Po** (the "Area");

(c) The Premises is owned by the Hong Kong Government.
D obtained a permit (No. ORE0242/14) (the "Permit") from the Agricultural, Fisheries and Conservation Department ("AFCD") to hold the Activity in the Area;

(d) Participants were required to participate in the Activity in teams. Each team consisted of **5 persons**. Each team was required to find and visit **5 checkpoints** marked on a map provided by D in order;

(e) The participants could visit the 5 checkpoints using their **own choice of route**; (p5)

(f) The Activity was in the form of a competition. The participating teams were ranked according to the **time** that they took to **finish** the **checkpoints**;

(g) The Activity involved walking and **hiking** in the **country areas**;

(h) D has been organising the **Activity once a year since 1998**. It was the **third time** that the Activity was held in the **Sha Lo Tung** area; and

(i) The Activity was a **charitabl**e event with a **fundraising** element. (p5)

#### Accident

(a) P belonged to **Team 528** which participated in the orienteering Activity on **20 December 2014**;

(e) At about **noon** 

(g) At the time of the Accident, the first 2 members of Team 528, namely, Wong Kin Yat ("Wong") and Tong Chi Fung ("Tong"), had completed Checkpoint 2 and walked onto the Bridge...

(h) P also walked onto the Bridge

 (i) After about 30 seconds of waiting, one of the concrete slabs of the Bridge suddenly broke. As a result, Wong, Tong and P lost their balance and fell into the stream below the Bridge; and

(j) P suffered injuries as a result of the fall. (p6)

**combined weight** of the **3 young men exceeded** the **weight-bearing capacity** of the **Bridge**...the Bridge appeared to consist of an **old** piece of **concrete** and suffered **weathering** and **material fatigue**... (p10)

#### **D's Defences**

- (a) not reasonably foreseeable
- (b) defect of the Bridge was a **latent defect** and **not discoverable** by reasonable inspection
- (c) **D took all reasonable care** in the circumstances to ensure P's safety (p12)

D was obliged to ensure that the Area was reasonably safe for the Activity to be carried out in the circumstances that it was carried out, and in the manner as directed by D. In other words, D was obliged to ensure that the Area was reasonably safe for carrying out the orienteering competition according to the manner and rules as designed and directed by it. (p18)

the **risk** of participants **falling from** the **Bridge** while using it **resulting in bodily harm** was **clearly reasonably foreseeable**. As the **Bridge** from its **outward appearance clearly could not hold a lot of people**...(p23) the scope of the duty of care is clearly **fact sensitive**. My analysis above may be different if, for example, the **size** of each **team** is smaller, or the **Bridge** was not **close to** any **checkpoints** or any **popular routes**. (p24)

**D** has carried out a **safety assessment** of the Bridge (p29)

D has not tried to test-walk the Bridge with 3 persons at the same time, or otherwise attempted to find out (e.g. from the AFCD) whether the Bridge could hold at least 3 persons at the same time. (p31) The **Government** was **not** the organiser of the Activity and was not faced with the aforesaid factual circumstances. It was D's obligation, after being permitted to organise the Activity in the Area, to ensure that the Bridge was safe for use for the purpose of the Activity. (p36)

In *Tomlinson*, Lord Hoffman said "...what amounts to "such care as in all the circumstances of the case is reasonable" depends upon assessing, as in the case of common law negligence, not only the likelihood that someone may be injured and the **seriousness** of the **injury** which may occur, but also the **social value** of the **activity** which gives rise to the risk and the cost of preventative measures. These factors have to be balanced against each other." (p39)

"Whether the social benefit of an activity is such that the **degree** of **risk** it entails is **acceptable** is a **question** of **fact, degree** and **judgment**, which must be **decided on** an **individual basis** and not by a broad brush approach." (p40)

the **Bridge** was **located** at a rather **important place** in the context of the Activity. This, in my view, **justify imposing** a **duty of care** on D in relation to the safety of the Bridge (p43)

**D could have asked** the **AFCD** for **more information** about the **Bridge**, in particular, its **load bearing capacity** (p44)

# it is **fair, just** and **reasonable** that a **duty of care** be **imposed** on D (p45)

D has **breached** its **duty of care** owed to P. P's case of **negligence** is **established**. (p51)

K C Hui, Deputy District Judge

Mr Patrick D. Lim, instructed by Li & Lai, assigned by the Director of Legal Aid, for the plaintiff

Mr Anthony Ismail, instructed by Clyde & Co, for the defendant.

BGCA applied for leave to appeal but was dismissed by Judge KC Hui on **16 June 2020** 

# PART II

29

# RISK MANAGEMENT IN OUTDOOR ACTIVITY





# 96年八仙嶺大火

#### 96年八仙嶺大火奪五名師生生命 政府建春風 亭紀念亡者 2020/02/10 13:09

- 【有線新聞】秋冬季節,風高物燥,容易引起山火。回想1996年,八仙嶺一場大火奪去五名師生的生命。事後政府在八仙嶺興建了一座春風亭,並在亭前種植兩棵羅漢松,紀念在山火中捨身救人的兩位教師。
- http://cablenews.i-cable.com/ci/videopage/news/17546

- Purpose: ensure satisfactory precautions are made so that the risk is small.
- Otherwise: examples of tragedy:
   2003 (late June) Sai Kung incident,
   1996 Pat Sin Leng incident,
   1955 Tsung Tsai Yuen incident

# Elements of negligence <u>疏忽</u>元素

a. Duty of care 照顧責任 b. Breach of duty 失責 c. Causation 失責導致損失 d. Reasonably foreseeable 可合理預見

### 5 Steps to Risk Assessment 風險評估五步曲

- a. Look for hazards 找出危險
- b. Who may be harmed and how 誰會受損
- c. Evaluate the risks and decide if the existing precautions are adequate 評估風險
- d. Record your findings 記錄評估
- e. Review assessment and revise if necessary 覆核評估

https://www.labour.gov.hk/tc/public/pdf/os/D/FiveSteps.pdf

# PART III

36

### RISK MANAGEMENT OF HARASSMENT BY INTERN AND VOLUNTEER



**Applicable areas of Sex Discrimination Ordinance** 

- 1. Employment 僱傭
- 2. Education 教育
- Goods, facilities, services and premises 貨品、設施、服務及處所
- 4. Advisory bodies 諮詢團體
- 5. Barristers 大律師
- 6. Clubs 會社
- 7. Government 政府

(all relations under legal protection: ss23, 23A 24, 39, 40)



#### Applicable Areas of Sexual Harassment on Section 23A(1): Sexual harassment at workplace

It is unlawful for a person who is a **workplace participant** to sexually harass a woman who is also a workplace participant at a **workplace** of them both.

#### 第23A(1)條: 在工作場所的性騷擾

凡某屬場所使用者的人,在其工作場所,對亦屬場所 使用者並同樣以該處為工作場所的某女性,作出性騷 擾,該人即屬違法。 Section 23A(2): Sexual harassment at workplace 第23A(2)條: 在工作場所的性騷擾

Workplace (工作場所), in relation to a person, means a place—

(a) at which the person works as a workplace participant; or

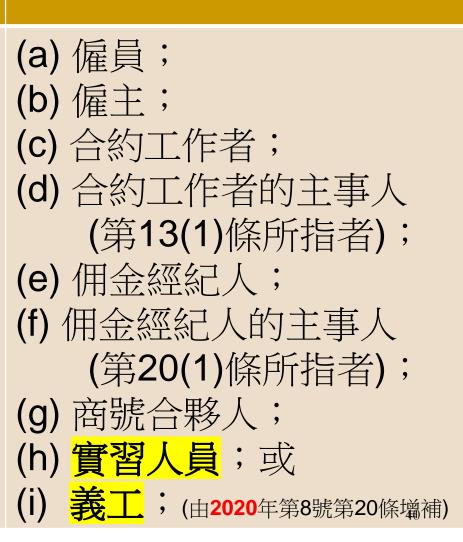
(b) that the person attends as a workplace participant;

工作場所(workplace)就某人而言,指—— (a)該人作為場所使用者而工作的所在地方;或 (b)該人作為場所使用者而置身的地方; Section 23A(2): Sexual harassment at workplace 第23A(2)條: 在工作場所的性騷擾

場所使用者指

workplace participant means—

- (a) an employee;
- (b) an employer;
- (c) a contract worker;
- (d) the principal, within the meaning of section 13(1), of a contract worker;
- (e) a commission agent;(f) the principal, within the meaning of section 20(1), of a commission agent;
- (g) a partner in a firm;
- (h) an <mark>intern</mark>; or
- (i) a volunteer. (Added 8 of 2020 s. 20)



Intern (實習人員) means a person who is engaged by another person for an internship but is not an employee of that other person;

Internship (實習) means—

(a) a period of work the completion of which is required for attaining a professional or academic qualification and includes a pupillage; or

(b) any other work that is usually described as an internship;

volunteer(義工) means a person who performs volunteer work other than in the capacity of an employer or employee; 第23A(2)條: 在工作場所的性騷擾

<mark>義工 (volunteer)</mark> 指並非以僱主或僱員身分**進 行義工工作**的人;

# <mark>實習 (internship)</mark>指 ——

(a) 在一段期間從事的工作,而在該期間完成 該等工作,是取得某專業或學術資格所必需 的,並包括見習職位;或

(b) 通常稱為實習的任何其他工作;

實習人員 (intern)指符合以下說明的人:該人 獲另一人任用從事實習,但該人並非該另一 人的僱員。



### Minutes of the Bills Committee on Discrimination Legislation (Miscellaneous Amendments) Bill 2018, 9<sup>th</sup> December 2019, pp4,5

https://www.legco.gov.hk/yr18-19/english/bc/bc52/minutes/bc5220191209.pdf

《2018年歧視法例(雜項修訂)條例草案》委員會會 議紀要

## 2019年12月9日(星期一) , 頁4-5

https://www.legco.gov.hk/yr18-19/chinese/bc/bc52/minutes/bc5220191209.pdf

(More reference on the background of including volunteer and intern into common workplace harassment (共同工作間騷擾), please see "Submission to LegCo Bills Committee on Discrimination Legislation (Miscellaneous Amendments) Bill 2018", Chong Yiu Kwong, Solicitor, Senior Lecturer, The Education University of Hong Kong 莊耀洸律 師, 香港教育大學高級講師「向《2018年歧視法例(雜項修訂)條例草案》委員會呈交意見 書」For the Public Hearing on 25th February 2019:

https://www.legco.gov.hk/yr18-19/chinese/bc/bc52/papers/bc5220190225cb2-824-1-ec.pdf)

(6) An act done by a volunteer in the course of performing volunteer work is to be treated as an act done—

(a) by the volunteer; and

(b) by the person who engaged the volunteer to perform the work, whether or not the act was done with the knowledge or approval of that person.

(6) 義工在進行義工工作的過程中作出的作為,須視為由以下的 人作出 ——

(a) 該義工; 及

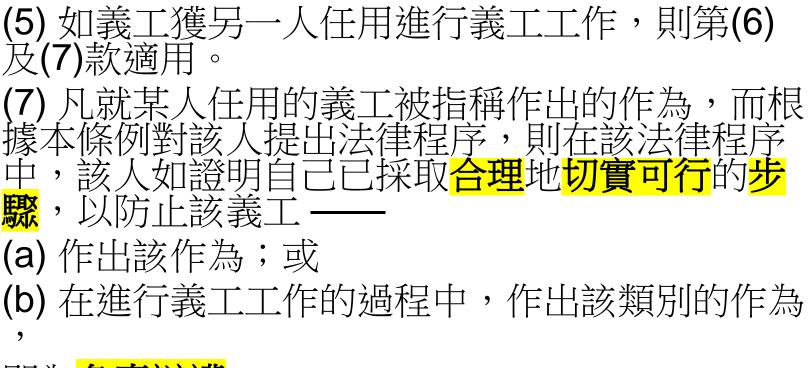
(b) 任用該義工進行該項工作的人(不論該人是否知悉或批准作出 該作為)。

(5) Subsections (6) and (7) apply if a volunteer is engaged by another person to perform volunteer work.

(7) In proceedings brought under this Ordinance against a person in respect of an act alleged to have been done by a volunteer engaged by the person, it is a **defence** for the person to prove that the person took **reasonably practicable steps** to prevent the volunteer—

(a) from doing that act; or

(b) from doing acts of that description in the course of performing volunteer work. (Added 8 of 2020 s. 21)





(3) An **act** done by an **intern** in the course of an internship is to be **treated as** an act **done**—

(a) by the intern; and

(b) by the person who engaged the intern for the internship, whether or not the act was done with the knowledge or approval of that person.

(3) <mark>實習人員</mark>在實習的過程中作出的<mark>作為</mark>,<mark>須視為</mark>由 以下的人作出——

(a) 該實習人員; 及

(b) 任用該實習人員從事該項實習的人(不論該人是 否知悉或批准作出該作為)。

## 轉承責任:任用實習人員及義工的人的法律責任

Vicarious Liability: Liability of persons engaging interns and volunteers

### Section 46A

(4) In proceedings brought under this Ordinance against a person in respect of an act alleged to have been done by an intern engaged by the person, it is a **defence** for the person to prove that the person took **reasonably practicable steps** to prevent the intern—

(a) from doing that act; or

(b) from doing acts of that description in the course of the internship.

(4) 凡就某人任用的實習人員被指稱作出的作為,而根據本條例對該人提出法律程序,則在該法律程序中,該人如證明自己已採取合理地切實可行的步驟,以防止該實習人員——

(a) 作出該作為; 或

(b) 在有關實習的過程中,作出該類別的作為,

即為<mark>免責辯護</mark>。

N.B.: similar provisions were newly added to DDO and RDO.

### Vicarious Liability 轉承責任

"Introducing the concept of "volunteers" to the anti-discrimination legislation may lead to problems such as whether an organization/organizer that recruits volunteers to participate in various services would be considered as the volunteers' "employer" or "principal" and whether the organization/organizer would have to bear vicarious liability for the volunteers' acts." (Report of the Bills Committee on Discrimination Legislation (Miscellaneous Amendments) Bill 2018) dated 19<sup>th</sup> May 2020, paragraph 20(d): https://www.legco.gov.hk/yr18-

19/english/bc/bc52/reports/bc5220200527cb2-1018-e.pdf

「在反歧視條例引入"義工"概念, 或會導致某些問題,例如招募義工從事各種服務的機構/籌辦人, 會否被視為義工的"僱主"或"主事人", 以及該機構/籌辦人會否須 為義工的作為承擔轉承責任。」(《2018年歧視法例(雜項修訂)條例草案)》委員會報告, 2020年5月19日, 段20(d):

https://www.legco.gov.hk/yr18-19/chinese/bc/bc52/reports/bc5220200527cb2-1018-c.pdf )

# **PART IV**

50

# **ANNEX & REFERENCES**

Annex I

Chapter:	71	Title:	CONTROL OF	Gazette	
			EXEMPTION CLAUSES	Number:	
			ORDINANCE		
Section:	7	Heading:	Negligence liability	Version Date:	30/06/1997

PART II

#### CONTROL OF EXEMPTION CLAUSES Avoidance of liability for negligence, breach of contract, etc.

(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

(3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk. (Enacted 1989) [cf. 1977 c. 50 s. 2 U.K.]

### Annex I (Chinese)

章: 71 標題: 管制免責條款條例 憲報編號:條: 7 條文標題: 疏忽的法律責任 版本日期: 30/06/1997

#### 第II部

管制免責條款

逃避因疏忽、違約等而引致的法律責任

(1)任何人不得藉合約條款、一般告示或特別向某些人發出的告示,而卸除或局限自己因疏忽引致他人死亡或人身傷害的法律責任。

(2) 至於其他損失或損害方面,任何人亦不得藉上述各項而卸除或局限自己因 疏忽而引致的法律責任,但在該條款或告示符合合理標準的範圍內,則不在 此限。

(3) 如合約條款或告示看來是用以卸除或局限因疏忽而引致的法律責任,則雖 然某人同意或知道該條款或告示的存在,亦不得單憑這點認為該人表示自願 承擔任何風險。 (1989年制定) [比照1977 c. 50 s. 2 U.K.]

## Annex II 教育局課外活動指引 (1997年)

第五章 舉辦課外活動應該注意的事項

5.6 責任與法律問題 校方於學校舉辦的課外活動中負有監督的責任。活動 中教師有責任照顧學生,如同一個父親或母親照顧其 子女般。教署已於1988 年起代各**資助**及**按位津貼學校** 向保險公司投保綜合保險,綜合保險包括以下三部份:

公眾責任保險(保額上限為每所學校每宗事故港幣1億元)
 僱員補償保險(保額上限為每間受保學校每宗事故港幣1億元)
 團體人身意外保險(保額上限為每名學生港幣10萬元)

As at 20 July 2020

EdUHK HPE outdoor activities July2020

## Annex III 綜合保險摘要說明

- 1.2 這保險的主要目的在於保障學校,以免學校因其行動 使他人身體受到傷害而招致金錢上的損失。
- 1.3 在這些學校行動中受到傷害的人士,可向有關學校索 償。受害人可以是:
  - 按政府補助薪金表支薪的學校僱員;
  - 任何並非受僱於學校的人士(例如學生、家長、訪客、或與學校接觸的市民)。

1.4 如法庭裁定學校疏忽, 可下令學校支付賠償給受害人

## Annex IV 教育局《戶外活動指引》(2008年)

引言

「重視學生安全是推展戶外活動的重要課題。因此,不同的戶外活動組織/團體都會清晰具列 有關活動守則,如學生參加活動前的測試標準、 又或因應天氣變化所作的應變計劃等資料,惟 取捨之間,各組織團體可能稍有出入。假如學 校本身是戶外活動的主辨者,則應依循《指引》 的準則行事,並根據活動的性質及學生的體力 和技能,制訂合適而周全的計劃。」

聲明

講義只作輔助講解及參考之用。倘同時參閱法例 條文及判案書原文,更能了解講議和講解內容。 此講義、講解內容、問答環節,以至討論,均非 作出法律意見,而是旨在提高對有關問題的認識 ,如有需要,請另行尋求律師意見 此講義並不是對法律全面而準確的描述,不可視 為法律的詳細或具權威性的說用 @版權為作者所有,翻印須得作者同意

As at 2020.7.23. EdUHK HPE outdoor activities July2020