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Common Law (HK) vs Civil Law (China)

Common law	Civil Law
Judge made law (案例) Binding	Judge made law (案例) NOT Binding
Judge-Passive-referee	Judge-Active-Investigator
Adversarial 對抗性訴訟	Inquisitorial 審問制訴訟
Less prescriptive-- Everything is permitted that is not expressly prohibited by law	More prescriptive-- Codified system of law

Criminal Proceedings (HK)

Criminal Liability:

- The guilty act or omission known as “Actus Reus”
- The prohibited state of guilty mind known as “Mens Rea”

Penalties (conviction w criminal record)

- Imprisonment /Suspended Sentence/Discharge w/wo condition/Bind Over/ Community Service Order/Drug Addiction Treatment Centre Order/Probation Order/Fine/Compensation Order/Restitution Order/Forfeiture/Disqualification from driving/Hospital Order

Penalties (no conviction wo criminal record)

- ONE Bind Over (Offer No evidence, Bind Over)

Plea Bargain

ONE (Offering No Evidence) BO v BO (Binding Order)

- ONE BO -- No Criminal Record
- BO -- With Criminal Record

Lesser Charge

- Dangerous Driving to Carless Driving
- Offences against the Person & Common Law

Without Prejudice

- Correspondences between parties for negotiation
- Not admissible in court

Witness Statement vs Affirmation/Oath vs Cautioned Statement

Witness Statement--A witness statement is a signed document recording the evidence of a witness. A definition used in England and Wales is "a written statement signed by a person which contains the evidence which that person would be allowed to give orally".

Oath /Affirmation -- By swearing an oath or affidavit you will be confirming the truth of the document as if on oath in court. Swearing something on oath which is untrue could leave you open to a charge of perjury which could lead to a fine or imprisonment.

Cautioned Statement --In the course of an investigation into a criminal offence, an officer of an enforcement agency may take a cautioned statement with a suspect. Sometimes, the questioning may be conducted by way of a video recorded interview (often known as a "VRI") instead of a written cautioned statement which is admissible to court as evidence

Can Police Search Your Mobile Phone

Sham Wing Kan (岑永根) v Commissioner of Police, Court of Appeal, CACV 270/2017

A police could not under law compel an arrestee to provide the password of his mobile unless

- With a warrant from the magistrate
- With warrantless search, examination of the digital content should be limited to investigation of the suspected offences and the protection of the safety of the victim and relevant persons AND with written record at paragraph 187-188,199,218-220)

Traffic Offence - Careless Driving (1/2)

s.38(2) of the Road Traffic Ordinance (Cap 374)

- ❖ a person drive carelessly “If on a road he drives a vehicle
1) without due care and attention or 2) without reasonable consideration for other persons using the road
- ❖ whether the driver was exercising the degree of care and attention that a reasonable and prudent driver would exercise in the circumstances
- ❖ What is “reasonable” --Objective test

Traffic Offence - Careless Driving (2/2)

- ❖ Injury or damage is not an essential element in this offence
- ❖ Court ruled that there could be a failure to show reasonable consideration for other persons using the road when a driver drove at a slow speed e.g. substantially below the speed limit for that road and did not pull in passing bays to allow faster traffic to pass by
- ❖ Court must duly consider all factual circumstance related to the incident and find evidence of carelessness especially breach of the Road Uses Code such as unsafe overtaking, knocking down pedestrians, failing to check when reversing, failing to keep a safe distance and rear-end collision

Traffic Offence - Dangerous Driving

S.37(4) of the Road Traffic Ordinance (Cap 374)

- ❖ A person drives dangerously if “the way he drives falls far below what would be expected of a competent and careful driver” and “it would be obvious to a competent and careful driver that driving in that way would be **dangerous**”
- ❖ “**Dangerous**” was defined in s.37(6) , Cap 374 as “ danger either of injury to any person or of serious damage to property”
- ❖ Example of dangerous driving:
 - Racing
 - Jumping or running red lights deliberately
 - Excessive speeding
 - Driving an overloaded vehicle

Proof of Careless Driving / Dangerous Driving

- ❖ Court will adopt an objective test in deciding whether or the act of driving in question
- ❖ Court will take into of the factual circumstances related to the accident

Case Law Dangerous Driving vs Careless Driving

The legal principles in relation to dangerous driving was succinctly summarized by the Court of Appeal in the landmark case, *HKSAR v Lam Chi Fat* [2012] 1 HKLRD 961. The following principles from that case are particularly relevant:-

1. Whether a person's way of driving is dangerous is a matter to be decided objectively;
2. In deciding whether a person was guilty of dangerous driving, the court must base its **consideration on his way of driving rather than the consequences of the accident;**
3. Dangerous driving is a conclusion which must be drawn on the basis of the acts;
4. To support the charge of dangerous driving, the prosecution must point out what driving acts of the defendant constitute dangerous driving. They must also adduce sufficient evidence to establish that those driving acts fall far below what would be expected of a competent and careful driver and it would be obvious to a competent and careful driver that the defendant's driving in that way would be dangerous.

ICAC Vs Competition Tribunal

ICAC administrates 3 Ordinances

- ❖ Prevention of Bribery Ordinance (Cap 201)
- ❖ Election (Corrupt and Illegal Conduct) Ordinance (Cap 554)
- ❖ ICAC Ordinance (Cap 204)

Competition Tribunal

- ❖ Except for offences such as obstructing a Commission investigation or providing false information, violation of the Competition Ordinance attract no criminal sanction

Civil Proceedings Vs Criminal Proceedings Comparison

Criminal Proceedings	Civil Proceedings
Charge of Offence — Unilaterally	Claim vs Counterclaim bilaterally
Burden of Proof on prosecution	Burden of Proof — Who alleges Fault
Standard of Proof — Beyond Reasonable Doubt	Standard of Proof — Balance of Probability
Role of Investigation (Evidence) — Police	Role of Investigation (Evidence) – Alleged Party
Interlocutory Application — Less e.g. Witness Statement	Interlocutory Application — More e.g. Witness Statement, Expert Report, 3rd Party Discovery
Plea Bargaining — Lesser Offence, One BO....	Bargaining — Mediation, Sanctioned payment

Dispute Resolution -- Court

- OPEN -Judgment disclosed to the public

Alternative Dispute Resolution -- Mediation, Adjudication, Arbitration

- CONFIDENTIAL- Judgment NOT disclosure to the public
- Power based on consent of the parties, no order to non-parties

Mediation

- CONFIDENTIAL- Settlement NOT Disclosure to the public
- Settlement terms can go beyond the legal remedies of damages and injunctions to which the court limited (e.g. use the Rolex Watch to offset the alleged debt)

Judicial Review

- ❖ Government officials and other public authorities (such as the Housing Authority and the Hospital Authority) performing public functions are the most common bodies whose decisions are challenged by judicial review
- ❖ But any person exercising public power (including any statutory board or disciplinary panel of a professional body) may also be subject to judicial review
- ❖ Judicial review is different from an appeal. When hearing an appeal, the court is concerned with the **merits of a decision**. On judicial review, the court is only with whether the relevant act or decision is lawful or unlawful in the public law sense. If the decision is **unlawful, there will be a re-trial**.

Disciplinary

- ❖ Hearing is subject to the relevant rules of the disciplinary tribunal
- ❖ But the hearing is in accordance with the principle of natural justice including the rule against bias and the right of a fair hearing
- ❖ *The Court of Final Appeal in A Solicitor (24/07) v Law Society of Hong Kong* [2008] 2 HKLRD 567 held that the standard of proof for disciplinary proceedings in Hong Kong is the preponderance of probability. The more serious the act or omission alleged, the more inherently improbable must be regarded. The more inherently improbable it was regarded, the more compelling evidence was needed to prove it.

New development

- ❖ Outcome related fee structure --Part 10 B Arbitration Ordinance (包攬訴訟)
- ❖ Construction Industry Security for Payment Ordinance CAP 652
 - adjudicator deliver the adjudication decision to the parties and the Adjudicator Nominating Bodies (HKIE/HKIS/HKIA/HKIAC) 55 working days from the date of his appointment--expedited dispute resolution to reduce subcontractor's cash flow burden
 - No "pay when paid" Clause
 - Contractor can stop work if not paid

CCTV (excerpt from Guidance Note of Office of the Privacy Commissioner for Personal Data, Hong Kong)

- ❖ when a data user (e.g. Building Management Company) is asked to provide copies of CCTV records to a law enforcement agency (e.g. police) for criminal investigation purpose, the exemption provided under section 58(2) of the Ordinance
- ❖ The data user, however, is under NO general obligation to supply personal data as requested
- ❖ Before the exemption is invoked, the data user must be reasonably satisfied that failure to supply the data would likely prejudice the investigation

- ❖ 終審法院在 *Ming An Insurance Co (HK) Ltd v Ritz- Carlton* [2002] 2 HKLRD 644 訂下的「密切聯繫」測試，法院會審視僱員未經授權的侵權行為與其受僱工作之間是否有密切聯繫，以裁定僱主負上轉承責任(vicarious liability)是否公平公正。所有僱員未經授權而作出的侵權行為，「密切聯繫」都是判斷僱主是否須負上轉承責任的基本準則。
- ❖ 此案例審視僱主是否須就僱員受僱工作期間一名僱員襲擊另一名僱員而負上責任。

Case Analysis

Vicarious Liability of Employer 僱主轉承責任 (2/4)

Yeung Mei Hoi v Tam Cheuk Shing and Kai Shing Management Services Limited (CACV 136/2014, HCPI 901/2011)

- ❖ 原告及第一被告人譚卓成「譚」均受僱於第二被告人啟勝管理服務有限公司「啟勝」。一座位於新界的屋苑由啟勝管理「該屋苑」。原告及譚均被安排在該屋苑工作，原告人是顧客服務主管，譚則是保安員，是原告人的下屬。在原告人及譚受僱工作期間，原告人被譚襲擊。

詳細案情

- ❖ 於2006年8月27日，一輛的士載著一名懷疑醉酒的乘客，未有通過大閘的警衛便駛進該屋苑，當原告人向譚查問此事的時候，譚的反應粗魯並出言咒罵。同時原告人亦發現譚沒有按要求穿著制服。原告人認為譚失職，法定拍下他的照片向啟勝報告。譚激動起來，試圖搶去原告人的相機並揮拳打他。爭執期間，原告人被譚用對講機擊中頭部受傷。其後原告人提出訴訟，向譚及啟勝索償。

原訟法庭裁決

- ❖ 譚沒有提出爭辯，法院裁定他須負上責任。至於啟勝的法律責任，法院認為按公平的原則，譚不算是在執行保安員職責期間作出襲擊行為。譚突然對上司發怒及作出暴力行為，並非在他履行保安員及下屬職責期間可預期會發生的事，譚的行為亦不能被解釋為促進啟勝的利益或宗旨。因此法院裁定，要啟勝就譚對原告人的行為負上轉承責任，並不公平。

上訴法院的論證

- ❖ 關於是否有密切聯繫這一點，上訴法院認為，下級法院考慮僱傭範圍的方式太狹窄。英國上議院在 *Lister v Hesley Hall Ltd* 一案中裁定「僱員的職務不應被分割為其構成活動，必須廣泛地審視受僱工作的範圍」。上訴法院亦參考了多個例子，在適當情況下，僱主亦曾被裁定須就其僱員所作的襲擊行為負上轉承責任。在本案中，譚在當值時突然情緒失控襲擊原告人，在那一刻，譚的受僱範圍要求他接受原告人監督及訓示，因此上訴法院裁定，譚的未經授權襲擊行為與他受僱工作之間有充分聯繫，他發怒與其受僱工作有關，符合「密切聯繫」測試。
- ❖ 關於裁定僱主須負上轉承責任是否公平公正，上訴法院認為啟勝安排保安員以管理該屋苑及提供保安服務，它實施的監督制度存有風險，即下屬有可能在被上司訓示時可能以未經授權的方式回應。上訴法院裁定，要求僱主負上轉承責任是公平公正的，因為僱主可以就此風險購買保險。
- ❖ 在此情況下，法院裁定原告人上訴得直，啟勝須負責原訟法庭判給原告人的損害賠償。