CONNECTING THE INJURY WITH THE EMPLOYMENT IN THE PROOF OF EMPLOYEES’ COMPENSATION CLAIMS

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The Employees’ Compensation Ordinance holds out the promise of no-fault compensation, but a claimant must establish certain qualifying conditions connecting the injury with the employment in order to succeed. He is assisted along the way by statutory presumptions in the form of deeming provisions, which help in establishing the qualifying conditions. At the same time, the court is called on to draw factual inferences from the evidence, often sketchy, to fill the gaps, as in the case where there are no witnesses to the accident, or where the worker was killed in ambiguous circumstances. This article will explore recent case law, which demonstrates the difficulties inherent in the process of connecting the injury with the employment. Although the court is prepared to be flexible, given the social reform objectives of the Employees’ Compensation Ordinance, and the court’s sensitivity to Hong Kong’s changing social environment and the recognition that English precedents may no longer offer the best guide, careful argument is required in order to ensure the application of the presumptions and the drawing of the necessary inferences connecting the injury with the employment.

“The backdrop of a new social environment is how one should consider the case when applying the words of a statute first introduced in Hong Kong in 1953 ... the cases decided in the past are to be used as guidance to the approach to be adopted, rather than as providing an answer in a particular case.”

1 Cheung JA in Hau Shu Chau v Lung Cheung Toys Ltd (2002) CACV 754 of 2001, para 26. This cautionary statement was made in the context of a case concerning employment of Hong Kong persons in China, in which recently enacted Employees’ Compensation Ordinance provisions extending the course of employment to cross-border and overseas travel required consideration.

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“Case law on the [UK Workers’ Compensation Acts] can at best be indicative of the correct approach in Hong Kong. Ultimately, the Employees’ Compensation Ordinance must be read in light of local circumstances and needs, not those of the UK.”

Introduction

Enacted in 1953 and modelled on the UK Workmen’s Compensation Acts dating back to 1897, the Employees’ Compensation Ordinance is an insurance-supported scheme requiring employers to pay compensation for work-related injuries, in the case of temporary incapacity calculated according to the extent and duration of the disability, and in the case of permanent incapacity or death, a lump sum calculated according to the age of the worker and his monthly salary at the time of injury or death, and subject to ceilings provided in the Ordinance.

The Employees’ Compensation Ordinance is an instrument of social reform. It is intended to provide a quick and sure mechanism of compensation for injured workers without the need to show employer’s fault. It exists, alongside the usual tort law remedies, because of a societal belief that workers perform vital functions that are to be encouraged, however much they may involve personal risks, and that compensation for work-related injuries must be guaranteed, to avoid the injured worker having to rely directly on the State for social welfare assistance.

As such, a successful application for compensation under the Employees’ Compensation Ordinance does not require the injured worker to show that he was injured by his employer’s fault. Rather, he need only

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3 Cap 282 Laws of Hong Kong.
4 Ironically, at the time of the introduction of the Ordinance in 1953, the English Acts on which it is based were already deemed outdated there and had been replaced (in 1946) by a system of national insurance. As a result, Hong Kong judges applying the Employees’ Compensation Ordinance look to current UK model for guidance, and routinely resort to century-old cases for interpreting the relevant UK legal landscape. For a general critique of the Hong Kong legal landscape, see, for example, Writing the History of Compensation System in Hong Kong (Hong Kong: Centre of Asian Studies, 1967).
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show that he was working under a contract of service, and that he was
"injured by accident arising out of and in the course of employment". In other words he must connect the injury with the employment. He
can do so by direct proof, or, more likely, he will rely on any of a number
of deeming provisions contained in the Ordinance. He is also likely to
prove the necessary connection by inviting the court to draw inferences
from the evidence. The flexibility that the court brings to this process
will be determinative in individual claims, and will set the tone for the
interpretation and application of the Ordinance generally. In other words,
the effectiveness of the Ordinance in achieving its aim of providing no-
fault workers' compensation is very much a function of this process, and
the spirit of interpretation and application brought to this process by
judges.

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The operative provision is to be found in section 5(1) of the Ordinance:

"... if in any employment, personal injury by accident arising out of
and in the course of the employment is caused to an employee, his
employer shall be liable to pay compensation in accordance with
this Ordinance."

This requirement can be broken down into four qualifying conditions:
employment (contract of service); injury by accident; accident arising
in the course of the employment; and accident arising out of the
employment. The latter three, concerned with connecting the injury
with the employment, will be considered in turn, where appropriate, in
the context of the statutory deeming provisions.

5 See n 3 above, s 5(1).
6 The issue of contract of service is not taken up in this article; for the purposes of the present
analysis, a contract of service will be assumed. For a consideration of the contract of service
issue and some of the case law, see R Glatcheski, Tort Law in Hong Kong (Hong Kong: Sweet
& Maxwell Asia, 2002), pp 400-405.
7 By virtue of s 32(1), an occupational disease (listed in the Second Schedule) will be treated as
an injury by accident for the purposes of an award of compensation.
It is important to note that it is the accident, not the injury, that must be shown to arise out of and in the course of the employment. It is also important to note that it is the applicant who has the burden of proving the necessary conditions, on a balance of probabilities. However, regarding the requirement that the accident arise out of and in the course of the employment, the applicant can do so by reference to the deeming provisions in section 5(4).

Deeming provisions

Section 5(4) contains a number of deeming provisions relevant to the worker’s proof of the section 5(1) requirements that the accident arise out of and in the course of the employment. Section 5(4) is a crucial section. It is there for policy reasons, to facilitate and simplify the worker’s proof. Most of the provisions have the effect of expanding the scope of the employment, so that injuries incurred in circumstances that may not at first glance appear to have been incurred in the course of the employment will nonetheless be included.

The general deeming provision is to be found in section 5(4)(a) of the Ordinance. According to this provision, “an accident arising in the course of an employee’s employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment”. Introduced in 1969, this is a useful and necessary provision because of the continued use of the conjunctive in section 5(1), requiring the employee to show both that the accident arose in the course of and out of the employment. Its effect is to relieve the worker of what is sometimes a difficult burden of proof of causation, by shifting the burden to the employer. This provision operates in all cases where the accident has been shown to arise in the course of employment, and is applied by judges as a matter of course.

8 This much becomes apparent in the s 5(4)(a) deeming provision, which uses the phrase “accident arising in the course of employment”.
10 To be contrasted with some Australian legislation which uses the disjunctive “or”, as in the States of Victoria and Western Australia.
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The deeming provisions in section 5(4)(b)-(g) are more far-reaching than the general deeming provision in section 5(4)(a), in that they relate to two qualifying conditions. In the relevant circumstances, they deem the accident to arise both out of and in the course of the employment. These provisions concern accidents occurring during work-related travel, rescue operations, rescue training, activities otherwise connected with the employer's business, and during gale warnings. Some of them are of relatively recent origin. The effect of these provisions is to extend the course of employment to include accidents that take place outside of working hours, and away from the work premises. As these provisions represent artificial extensions to the course of employment, they are to be strictly construed.

Those deeming provisions that have been recently considered by the Hong Kong courts will be examined in the analysis that follows. However, it is first necessary to consider another of the section 5(1) requirements, that there be "injury by accident".

Injury by Accident

Meaning of Accident
There are no deeming provisions relevant to the determination of "injury by accident". However, this is an area where the court will be called on to draw inferences from the facts to determine whether there was an accident, and whether the injury was caused by the accident.

The question of whether or not the injury has occurred "by accident" in the context of the Ordinance is a question of mixed law and fact. The question of the existence of an accident causing injury is one of fact.

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11 Subsections 5(4)(a), (f) and (g) were introduced in 1994-95.
13 For a useful discussion of this issue prior to the introduction of the 1994–95 amendments, see R Martin, "Employees' Compensation: Arising out of and in the Course of Employment" (1986) 16 HKLR 71.
14 Langley v. Reeve (1910) 3 BWCC 175.
while the question of whether the event constitutes an accident within the meaning of the Ordinance is one of law.\textsuperscript{15}

The requirement of accident contemplates an unlooked for or unexpected event, unexpected from the perspective of the worker.\textsuperscript{16} It is a broad term, and covers a wide range of events, fortuitous and otherwise. It is flexibly interpreted, but occasionally causes difficulties for workers in the proof of their claims.

Accident appears to require an identifiable event or events that triggered the injury. Therefore, a continuous process, such as prolonged noise over the course of time causing deafness, will not qualify.\textsuperscript{17} This "doctrine of process" has understandably been criticised as unnecessarily harsh, denying compensation to workers who suffer from gradual injury in circumstances where the connection with the employment is clear.\textsuperscript{18} It is often the failings of medical science that prevent the disease from being listed as one of the prescribed diseases under the Ordinance. Only a scheduled occupational disease, pre-determined to be a risk of the employment, can overcome the doctrine of process.\textsuperscript{19} For this reason, death at work from a long standing disease (a heart condition) was held to be not an accident, in the absence of a triggering event, despite the likelihood that the employment contributed to the disease over the course of time.\textsuperscript{20}

Similarly, it is not sufficient to show that the injury has arisen by accident in the sense of "accidentally". The claimant must identify an accident or accidents that happened to him. Therefore, a fire officer who suffered post traumatic stress disorder as a result of attending at various aircraft and motor vehicle accidents over a period of years in the normal course of his duties was not injured by accident within the meaning of section 94 of the Social Security Contributions and Benefits Act 1992.\textsuperscript{21}

\textsuperscript{15} Fenton v Thorley [1903] AC 433.
\textsuperscript{16} Ibid., p 451.
\textsuperscript{17} Wong Chuck v Swine Pacific Ltd (1992) ECC 165 of 1990. Now see Occupational Deafness (Compensation) Ordinance (Cap 469).
\textsuperscript{18} Lewis, Compensation for Industrial Injury (Abingdon, Oxon: Professional Books Ltd., 1987), pp 42-43.
\textsuperscript{19} Cap 282, s 32.
Act 1992, a provision worded identically to section 5(1) of the Employees' Compensation Ordinance.  

The term "accident" has been held to include, in addition to the usual kinds of inadvertence that occur at the workplace, the not so obvious cases of collapse from fatigue, 22 and death by stroke or heart attack triggered by work activities. 23 Recent case law also confirms that assaults are included within the statutory meaning of the term, however much they are intended and cannot be said to be "accidental" in the ordinary sense of the term. In Law Yim Ming v Cheung Hang Fook & Anr an attack by unknown assailants on a brothel cleaner was held to be an accident. 24 And in Chan Ho on behalf of Estate of Deceased v 999 HK Petroleum Company Limited, 25 an attack by a visitor on a sleeping barge worker was held to be an accident within the meaning of the Ordinance. 26

Deliberate self-injury, such as suicide, is excluded, as this is self-designed, in no sense an accident. 27

Problems in causation: was the injury caused by the accident in question?  
The phrase "injury by accident" connotes a causation requirement. It is not enough to show that there was an accident, and an injury. It must also be shown that the injury was caused by the accident. 28 This

21 Chief Adjudication Officer v Fauidia [2000] 1 WLR 1235.  
23 Ho Woon-King v The Hong Kong & Knobson Wharf & Cemetery Co Ltd [1965] HKDCLR 265; Wong Yuk-hei v Hai Hong Tea House [1966] HKDCLR 124; Yip Ho v The Hong Kong & Knobson Wharf & Cemetery Co Ltd [1969] HKDCLR 1; unless the heart attack was totally unrelated to the work; see Ch-Aman Chaphat & Others v National Lacer and Pain Products Co Ltd (2001) DCEC 103 of 1998; or there is absent a triggering event; see Tang Sai Chun v Yan Chung Yee & Others (2002) DCEC 722 of 1999.  
26 As will be seen, a ruling that an assault is an "accident" within the meaning of the term is not the end of the inquiry for the purposes of satisfying s 5(1). The court must independently consider whether the accident (ie the assault) arises out of the employment. See discussion below under "Arising out of the employment".  
27 Leaving aside the possibility, as contemplated by Warrington LJ, that the dependents can succeed if they can prove that at the time the deceased committed suicide he was insane, that the suicide was the result of the insanity, and that the insanity was the result of an accident: Marriott v Malby Main Colliery (1920) 13 BwCC 353 at 359. On this analysis, it is the event triggering the mental illness, not the suicide, that is the accident, and so a compensation claim could succeed whether or not a suicide was attempted or occurred. It is to be noted that claims for deliberate self-injury are expressly prohibited by s 5(2)(b).  
28 Chow Mui v Chow Cheuk-chung & Ors (in 20 above).
requirement can pose problems not dissimilar to those encountered by the courts in the common law of negligence.

In those cases where there are no eye witnesses to the accident, the court will be required to draw the necessary inferences, and will generally adopt a robust and common sense approach to the facts. Where a worker, working near a crawler crane, was found crushed to death, with no witnesses present, and even in circumstances where the police felt compelled to investigate the crane operator for homicide, the court inferred an accident and, not surprisingly, that death was caused by the accident.29

In some cases, difficulties in causation arise due to competing theories of the medical aetiology. Although the court will have close regard to the medical evidence, once again a commonsense approach is taken by the judge in the drawing of inferences to fill the gaps in proof, proof that may not always conform to the standards of medical science.30

Where a worker suffered gangrene, allegedly due to pebbles and water trapped in his boots while working on a flooded worksite, in circumstances where there was no immediate report of any accident, and no identifiable date of occurrence, in the absence of any other explanation, the court inferred that the injury must have occurred by accident as alleged.31 To rebut such inferential reasoning it would be incumbent on the employer to identify some other means by which the gangrene could have been contracted, a normally difficult burden to discharge.

However, it is to be noted that in the same case, the worker's subsequent death by liver disease could not be inferred to be caused by accident. Other medical conditions concurrently operating on the worker could not be shown to be connected in any way with the accident that occurred on the flooded worksite.

Multiple causes arising from pre-existing vulnerabilities and accident: relevance of common law principles on causation

The causation issue presents itself in many different ways. As sometimes encountered in the common law of negligence, an injury by accident may appear to be overtaken by an independent concurrent event, whether tortious, or occurring as a result of other medical conditions affecting the worker. 2

In *Wong Hoi Chung v LKK Trans Ltd* 3 a delivery worker slipped and fell from a lorry inside a supermarket warehouse, and injured his left hip, resulting in a permanent partial incapacity in the form of pain, weakness, and the shortening of his leg. However, the evidence revealed a pre-existing bilateral avascular necrosis of both hips. The employer argued that the injury caused by the accident had been superseded by the avascular necrosis, and as such, there was no permanent incapacity arising from the accident. The incapacity would have resulted anyway. This, the employer argued, could be demonstrated by reference to the right hip, not injured in the fall, but by the time of trial affected by an advanced stage of avascular necrosis. Making this comparison, the employer argued that an inference could be drawn that avascular necrosis in the left hip would have proceeded at the same pace even if the accident had not occurred. Therefore, any permanent incapacity was inevitable and unrelated to the accident, and any award for compensation should be made only for the temporary incapacity caused, and should not give rise to an award of compensation for permanent incapacity under section 9 of the Ordinance.

Such a case could be viewed as a classic conflict between two competing causation principles. On the one hand, the wrongdoer must take the victim as he finds him, and if so, the employer should take the worker as one suffering a pre-existing condition, a condition that was exacerbated and accelerated by the accident. On this basis, the employer would be liable for the full amount of the incapacity. On the other hand, if the avascular necrosis would have occurred anyway, and would have resulted

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2 This issue has been encountered by the courts in the common law of negligence, most notably in the leading cases of *Baker v Willoughby* [1978] AC 467, and *Johling v Associated Dairies Ltd* [1982] AC 794.

in the same incapacity independently of the accident, fairness would seem to require that the employer not be liable for the full extent of the incapacity. 64

The trial judge reasoned that, as there can be more than one cause of an injury, and as the fall was a substantially contributing cause of the injury, the injury can be inferred to be caused by accident within the meaning of the Ordinance. The argument that the necrosis would eventually have led to a serious disability and therefore should be taken into account in assessment was rejected. That is because there is no provision for the reduction of compensation under the Ordinance. Compensation is to be calculated in the usual way, within the four corners of the Ordinance, according to the full amount of the incapacity. On this basis, compensation for permanent partial incapacity was awarded under section 9 for an assessed 90 per cent loss of earning capacity. In reaching this decision the court expressed doubts about the importing of common law principles for causation in the assessment of causation under the Ordinance, and sounded a cautionary note regarding the application of UK authorities to Hong Kong, where the statutory scheme contains material differences with that applicable in the UK.

This conclusion was supported by the deeming provision in section 10(5) of the Ordinance, which provides that where an employee has received periodical payments for temporary incapacity for 36 months, the employee is no longer entitled to periodical payments, and shall be deemed to have suffered permanent incapacity, in which case the provisions of section 7 (permanent total incapacity) or section 9 (permanent partial incapacity) shall apply. 65

On appeal, the Court of Appeal unanimously agreed with the trial judge, that the employer had not proven that the employee's incapacity would inevitably have resulted from the avascular necrosis, regardless of the accident. 66 There was too much of "assumption, conjecture and assertion" in the medical evidence relied on by the employer in support

64 As occurred in the negligence case of Jobling v Associated Dairies Ltd (n 32 above).
65 The court noted that this is not a rebuttable presumption, by reference to Butterworths Hong Kong Personal Injury Service, para 1552.
of this argument. The Court agreed that the Ordinance took no account of the fact that an injury might be more severe due to a pre-existing condition or disease or congenital defect, as was done under the current UK regulations, and found no legal basis for a downward adjustment of the award. The Ordinance simply did not allow for it. Moreover, section 10(5) was clear, where periodical payments for temporary incapacity were received for 36 months, the injury is deemed to be permanent, and section 7 or 9 "shall apply" to the assessment. The argument that the employee should have undertaken a hip replacement operation which might have reduced his incapacity was also of no merit, because the Ordinance did not provide an allowance in respect of any mitigation which the applicant might but did not undertake. At any rate, the results of such an operation were speculative, and there was no provision in the Ordinance for the making of payments in respect of the costs of such an operation. Finally, the argument that the assessment should have been made on the basis that the right hip, also now seriously affected by necrosis, was healthy, since that injury was not caused by the accident, was also rejected because there was no evidence to suggest that the injury to the left hip did not exacerbate the condition of the right hip.

The employer has recently been given leave to appeal to the Court of Final Appeal, that court having determined the causation issues to be points of great general or public interest meriting reference to the Court of Final Appeal. This will be a decision of some moment, as it will determine some of the important issues of causation that "injury by accident" gives rise to, in particular, whether the Ordinance can sustain an interpretation whereby a superseding event or condition should be ignored for the purposes of determining the appropriate compensation. On the one hand, section 10(5) supports this conclusion, and there is no provision in the Ordinance for a reduction of compensation on the basis of such superseding events. An ordinance should be interpreted within its four corners and applied as such. On the other hand, it is also probably fair to say that the drafters of section 10(5) did not have in

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37 Per Reves JA, para 31.  
mind cases where the incapacity may have been superseded by an independent and overpowering event that could be argued to be the cause of the permanent incapacity.

With all respect to the employer's arguments, it would seem that the interpretations of the trial judge and Court of Appeal are correct. Firstly, there was a distinct and identifiable event that triggered the injury and incapacity. Secondly, although there is a line of English authority demonstrating a judicial reluctance to find that an injury or death by disease can constitute an injury by accident, there is an equally persuasive line of authority that where the accident is a contributing factor, together with the disease, or where it accelerates the disease, there is injury by accident for the purpose of the Ordinance. This would be so even if one pursues the analogy with common law principles, the argument promoted by the employer. It is true of the common law, as demonstrated in cases like Jobling v Associated Dairies, that if the court finds that the incapacity would have happened anyway because of the inevitability of the superseding event, the damages should be adjusted accordingly. However, it has to be remembered that in Jobling, the injury caused by the defendant was unrelated to the superseding event. The two events were truly independent of one another, the 100 per cent incapacitating disease not in any way triggered by the defendant's tortious conduct. This is an important distinction because there is another common law principle of causation, one that requires the defendant to "take his victim as he finds him". Here, the fact that the defendant's tort triggered more damage than expected because of the plaintiff's special and unforeseeable vulnerability is no justification for reducing damages. If that is the result in the common law, there is no justification for imposing a more onerous rule in a no-fault statutory compensation regime, a regime that contains no provisions expressly permitting a reduction of compensation. At any rate, one might well question, as did the trial

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19 Reviewed by Judge Fickering in Ho Woon-Long v The Hong Kong & Kowloon Wharf & Godown Co Ltd (n 2) above.
40 Also reviewed in Ho Woon-Long v The Hong Kong & Kowloon Wharf & Godown Co Ltd (ibid).
41 See n 32 above.
42 The so-called "thin-skull" rule; see eg Smith v Loach Brain & Co [1962] 2 QB 405.
judge, whether common law principles of causation in negligence should be imported into a social welfare document like that of the Employees' Compensation Ordinance.

Arising in the Course of the Employment

Meaning of

This requirement, like accident, is less likely to pose difficulties of proof for the applicant than its counterpart, "arising out of the employment", although it occasionally requires the court to draw inferences in ambiguous circumstances.\(^{43}\)

It is also flexibly interpreted, and according to Judge Bokhary in Lam Sik v Sen International,\(^{44}\) is concerned largely with spatial and temporal considerations. According to Judge Bokhary, it encompasses "anything that happens to a person while he or she is at work".\(^{45}\)

That is perhaps an oversimplification, as can be seen from most of the cases. The more conventional and oft-cited test is that of Lord Dunedin in Davidson v M'Robb.\(^{46}\) According to Lord Dunedin, this provision imposes the requirement that the accident must have occurred "in the course of the work which the workman is employed to do and what is incident to it" and connotes "the idea that the workman or servant is doing something which is part of his service to his employer or master".\(^{47}\)

That the phrase includes activities incidental to the employment has been accepted and reinforced in the courts of Hong Kong. Judge

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\(^{43}\) For instance, in Yan Tong-kam v Gammon (HK) Ltd [1981] 1 HKR CLR 1, where the employee was knocked down by a motor vehicle when crossing the road in the direction of an off-ster public toilet, the court drew the inference that the worker was not departing for home, but to the toilet, after which he would return to work. He was held to have been injured in the course of employment.

\(^{44}\) [1994] 3 HKC 455.


\(^{46}\) [1918] AC 304.

\(^{47}\) Ibid, at 321.
Caird in *Yan Tong-kan v Gammon (HK) Ltd* amplified the meaning of “incidental to the employment” as follows:

“I have no doubt whatsoever that a worker remains in the course of his employment despite his ministering to himself in such ways as quenching his thirst, relieving his hunger, obeying the calls of nature, changing his clothes (eg judge's robing). Any acts which are reasonably necessary to protect an employee's health and comfort are incidental to the employment and acts of service therein within the meaning of the Ordinance albeit they are personal to the employee and only indirectly connected to the object of his employment.”

Adopting this approach, toilet breaks will be included as incidental to the employment, as will rest breaks where the worker is encouraged or required to remain on-site.

The phrase normally excludes toilet breaks before reaching the work site, travelling to and from work, and the taking of off-site rest breaks unless, as in *Lam Min & Others v Yan On Construction Company*, the only available means of travelling for a rest break is provided by the employer, and the worker is injured or killed while so travelling.

When does the employment begin and end?

It is a general rule that the employment does not begin until the worker has reached the place of work and does not continue after he has left it, and the period in which he is travelling to and from work is generally excluded. However, the time frame encompassed in the phrase “arising in the course of employment” is interpreted to include activities incidental to the employment, and so is not necessarily confined to the period of actual work. It includes a reasonable interval of time and space.
in reaching or departing from the scene of work, even though the worker is not being paid during this period. It does not require that the worker have “clocked on”. This interpretation is necessary as a matter of policy and common sense. The employment will often require certain preparatory activities on the part of the employee upon reaching the worksite, activities which the employer would want to encourage and which could be said to be incidental to the employment. And so an early precedent held that the course of employment included a worker who, while returning to work after taking her lunch in a canteen provided by the employer, slipped and fell down the steps in her employer’s premises.

More recently, a restaurant worker on an on-site rest break between same day shifts who was injured falling down steps while on his way to take the meal provided by his employer in advance of the next shift was included within the meaning of the phrase. The activity was determined to be incidental to the work because the employer encouraged the taking of on-site rest breaks and sustenance. This is a potentially far-reaching decision for workers and employers in Hong Kong, because the worker in question was not required to remain on site. He was free to depart and remain absent pursuing his private business until the commencement of the next shift. Any accident incurred while pursuing those activities off-site would most certainly not entitle the worker to compensation. The court appears to have been determined to interpret this work relationship and the circumstances of employment realistically, recognising the nature of the restaurant and catering industry in Hong Kong, in which workers are often required to work two same day shifts with a midday break, standing workers in a distant part of the city, far from home, with little to do but wait around for the next shift to begin. In such circumstances the court was prepared to ignore the fact that the worker was free to come and go. The fact remains that he did avail himself of the rest area and the on-site meal provided by the employer, albeit it was optional.

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It is not surprising then that a worker actually required to remain on-site during rest breaks or between shifts and who is injured will be included as having been injured in the course of employment. A worker on board a barge on a 48 hour shift, who was attacked while sleeping, was determined to have been injured in the course of employment, his sleeping on board treated as being incidental to his work, because his employment required him to remain on board for the duration of his shift.\textsuperscript{60}

Deeming provisions

A number of the provisions in section 5(4) deem certain activities to be in the course of employment, although work, in the usual sense of the term, has not yet commenced, or has been concluded. Of these, section 5(4)(b) is perhaps the most far-reaching, with its full potential not yet realised. Under this provision, any act done by the employee "for the purposes of and in connection with the employer's trade or business" is deemed to arise out of and in the course of the employment, notwithstanding that it was done in contravention of any regulation or of any orders given or in the absence of instructions.

A recent example of its application took place in \textit{Ng Mung Khian v Wing Kwong Painting Co},\textsuperscript{61} where a paint worker on lunch break who died in a fire while preparing materials for the resumption of work, was determined to have died in the course of employment, although work had not formally commenced. Since the work could easily be interpreted to be for the purposes of and in connection with the employer's business, it was deemed to be in the course of the employment by section 5(4)(b), which by its terms applies even though the work was not done pursuant to the employer's instructions.

The provision also operates where work has formally commenced. In \textit{Chan Ka Leung Bee v Golden Island Metal Manufactory}, a worker unloading goods using a lorry tailgate that he knew to be defective could rely on the presumption in section 5(4)(b) because the work was done "for the purpose of and in connection with his employment".\textsuperscript{62}

\textsuperscript{60} Chan Ho on behalf of Estate of Deceased v 999 HK Petroleum Company Limited (2004) DCEC 481 of 2002.
A reasonable and plain meaning reading of this provision suggests that it could cover a wide range of activities, going far beyond the kind of activities undertaken in Ng Mung Khiian, to include activities that take place well outside of work hours. There is nothing in section 5(4)(b) limiting its application to the work site or work hours. Therefore, a unilateral decision to make a purchase of work-related equipment outside of work hours would arguably be included as within the course of the employment, particularly in view of the fact that the provision operates even in the absence of instructions from the employer.

**Travelling to and from work**

The travelling provisions in section 5(4)(d), (e) and (g) have the effect of expanding the course of employment to include specified instances of work-related travel. Section 5(4)(d) provides that an accident shall be deemed to arise out of and in the course of the employment if it happens while the employee, with the employer’s permission, is travelling as a passenger to or from work, and the transport is operated by or on behalf of the employer or by some other person pursuant to arrangements made with the employer and other than as part of public transport. Section 5(4)(e) deems an accident to arise out of and in the course of the employment if it happens to the employee while he is driving any means of transport arranged or provided by his employer between his place of residence and his place of work, by a direct route, to his place of work for the purposes of and in connection with his employment, or to his place of residence after attending to those purposes. Finally, section 5(4)(g) deems an accident to arise out of and in the course of the employment if it happens while the employee with the employer’s permission, is travelling by any means of transport for the purposes of and in connection with his employment between Hong Kong and any place outside Hong Kong, or between any place outside Hong Kong and any other such place. This last mentioned provision addresses the modern and increasingly common social phenomenon of a mobile workforce, in particular those workers employed in Hong Kong but required to travel to China in fulfilment of their work duties.
In Hsu Shu Chian v Lung Cheong Toys Ltd, the worker was required to work in southern China. His employer provided transportation from his workplace in Dongguan to Shenzhen, where he would get onward transportation to Hong Kong. On the day in question, he was required to work late and missed the transportation. Pursuant to a standing agreement with his employer he took a taxi. The taxi was involved in a collision in which the worker was killed. The trial judge held that section 5(4)(d) did not apply to deem the accident to arise in the course of employment. The taxi was not being operated “on or behalf of his employer ... other than as part of a public transport service”. Moreover, according to the trial judge, the travel was not otherwise in the course of the employment, because it was unconnected to work, and was for the purpose of getting to his home in Hong Kong and meeting his girlfriend in Shenzhen.

However, on appeal, the Court of Appeal decided in favour of the applicant on a consideration of another of the section 5(4) deeming provisions. Since the worker was working outside Hong Kong, section 5(4)(g) applied to deem the accident to arise in the course of the employment, because he was “with the express or implied permission of his employer ... traveling by any means of transport for the purpose of and in connection with his employment between ... any place outside Hong Kong and any other such place”.

This ruling demonstrates the reach of section 5(4)(g), and its purpose, to include workers required to travel to and from China in fulfilment of their work-related duties. Although not paid for the travel time, such travel was authorized by the employer and was in “connection with his employment”, at least in the sense that it was required by his employment. It is difficult to see what purpose this provision serves, which after all applies to “any means of transport”, if it does not apply in such a case. As Cheung JA observed:

“... many of the traveling cases decided in the past were in the context of a local environment of an employee traveling to and from his

work. The courts were not concerned with cross-border traveling ... such as many Hong Kong residents are doing these days. In deciding this case, there is no escape from this new social dimension, which takes into account of a modern employment relationship and the practical consideration that, while a person injured on a road in Hong Kong may be covered by compulsory third party insurance, there is no certainty that the same protection is afforded him in another jurisdiction.64

As for the possible application of section 5(4)(d), an argument rejected by the trial judge, that the taxi might qualify as "transport operated pursuant to arrangements with the employer ... other than as part of a public transport service", the question was left open.65

Arising out of the Employment

Meaning of

This issue poses a question of causation in addition to that implied in the phrase "injury by accident", discussed above. The question here is: did the accident arise from a risk inherent in or incidental to the performance of the work? Was the risk one which the work normally subjected the worker to?66

From this interpretation, obvious examples would include a scaffolding worker who falls from a height, a fisherman who drowns in a storm, and a cook who suffers kitchen burns. Attacks by third parties (unless the attack is a risk of that work), deliberate self-injury, injuries caused by a pre-existing condition, and activities for the worker's personal benefit, would naturally be excluded.

However, the phrase requires a flexible interpretation, as most employment involves many different kinds of risks that do not lend

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64 Ibid., para 26.
65 The application of s 5(4)(e) was not considered by the court, although on its face, it might also apply.
themselves easily to this distinction. In particular, reference must be made to section 5(4)(a), a general deeming provision that is applicable in all cases:

"an accident arising in the course of an employee's employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment".

By virtue of this provision, all accidents (arising in the course of employment) are deemed to arise out of the employment, unless there is evidence to the contrary. The inquiry is transformed from "did the accident arise from a work-related risk?" to "the accident did arise from a work-related risk; can the employer adduce any evidence that it did not so arise?" The burden is on the employer to adduce evidence to the contrary, or, where appropriate, the court may draw the necessary inference that there is evidence to the contrary from the facts. It is important to note that the section does not require proof to the contrary to rebut the presumption, but merely the existence of evidence to the contrary. As noted by Judge Hooper in Wong Gun Fook & Others v McLean "the words of the section are not 'in the absence of proof to the contrary' or 'unless the contrary is proved'; the words of the section are 'in the absence of evidence to the contrary'".65

If there is evidence to the contrary, the applicant must prove on the available evidence that the accident (eg assault, heart attack, etc) arose out of the employment. This may be difficult in the case of workers who are killed in the accident, as the applicant may not have access to any evidence to prove that the accident did indeed arise out of the employment.

**What constitutes "evidence to the contrary"?**

In Wong Gun Fook v McLean Judge Hooper held that the evidence required was "evidence fit to be left to a jury".66 In that case the murder of

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65 [1973] HKDCLR 75.
66 Quoting Lord Devlin in *R v National Insurance (Industrial Injuries) Commissioner, Ex parte Richardson* [1958] 2 All ER 689. It has elsewhere been described as "something more than speculative inference although ... something less than proof" *(R (1) 1/64, cited in Lewis (n 18 above), p 89).*
a domestic helper in circumstances where nothing was stolen from the flat was held to satisfy this standard, and in the event, the applicant's claim was dismissed.

From this it can be inferred, as has been confirmed in the case law, that assaults, blackouts, epileptic fits and heart attacks, could all constitute evidence to the contrary.69 Blackouts, heart attacks and the like, may be treated as constituting evidence to the contrary because there is a natural inference to be drawn that such occurrences may arise from a pre-existing vulnerability or condition. However, in such cases, the accident can be shown to arise out of the employment if the applicant can prove that the injury arose both from a pre-existing condition and from a separate accident, unless,70 as occurred in Leung Koon-chun v City Act Trading Limited the court finds that the worker's condition was the "overwhelming medical feature", in that case heavy smoking and high cholesterol.71 There is some overlap with the "injury by accident" requirement, in that both can be satisfied on proof that, although there was a pre-existing condition or disease, the accident contributed to or accelerated the injury.72

Since the decision in Wong Gin Fook v McLean, the courts have taken a more flexible approach to the interpretation of assaults on workers in the course of employment. Courts are more prepared to assume that workers, like all citizens, are vulnerable to criminal attacks, even random criminal attacks, and are less prone to find that there is "evidence to the contrary". And so for instance, in Law Yin Ming v Cheung Hang Fook & Anr, an attack on a brothel cleaner by unknown assailants did not constitute evidence to the contrary, despite the employer's invitation to the court to draw the inference that the worker's habits of taking prostitutes to the villa and placing horse racing bets were connected to the attack.73

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69 See Martin (n 13 above), pp 74, 77.
70 As in Wong Hoi Chung v LKK Trans Ltd (n 33 above).
72 See n 40 above and accompanying text.
73 See n 24 above.
Similarly, in Lam Chi-hiu v Mak Kee Limited & Anr, where a warehouse worker was attacked by unknown assailants, the court refused to infer evidence to the contrary, despite the employer's argument that the attack may have been related to the worker's recent appearance on a local television programme.\(^{24}\)

Of course, where there is some evidence available to the court regarding the background and motive for the attack, the question of the existence of evidence to the contrary will be easier to resolve. In Chan Ho on behalf of Estate of Deceased v 999 HK Petroleum Company Limited,\(^ {25}\) the worker was asleep on board during a 48 hour shift when he was attacked and murdered by an intruder. There was evidence to the effect that the attack was prompted by a dispute between the intruder and the worker regarding the intruder's right to stay on board overnight. There was nothing to suggest a purely personal dispute or grudge, and so the section 5(4)(a) deeming provision applied in the usual way, the court refusing to draw the inference that the murder constituted "evidence to the contrary".

And in yet other cases, where the exact circumstances of the accident causing death are unknown, the court will draw natural inferences from what evidence is available. And so in Cheung Kai Chi on behalf of Estate of Deceased v Chin Wo Contractors Limited & Anr, where a construction worker was crushed by crawler crane, with no eye-witnesses, in circumstances where the crane operator was subsequently investigated for manslaughter, the section 5(4)(a) deeming provision was applied in the usual way.\(^ {26}\)

In Ng Mung Khian v Wing Kwong Painting Co,\(^ {27}\) the court considered a technical argument regarding the effect of the section 5(4)(a) deeming provision. The employer argued that the provision operated in the same way as the common law principle of \textit{res ipsa loquitur}, in which case the burden remains on the applicant despite the existence of the deeming provision. In this case a paint worker was killed in a fire in a storeroom


\(^{25}\) See n 25 above.

\(^{26}\) See n 29 above.

\(^{27}\) See n 61 above.
during the lunch break, with no eye-witnesses, and no direct evidence as to whether the fire thought to have been caused by the mishandling of paints, was deliberate or accidental. The court held that, unlike res ipsa loquitur, the burden of proof under section 5(4)(a) does not remain on the applicant, but shifts to the respondent. The respondent has an affirmative burden to adduce evidence to the contrary, failing which the applicant’s burden is discharged. In the result, the fact of the worker’s small unpaid debts, and the fact that he was suffering from a lung ailment, was considered insufficient to discharge the employer’s burden to show evidence to the contrary, i.e. that the death may have occurred by suicide.

It is now the law that, even where the court considers that the attack by unknown assailants constitutes evidence to the contrary, the accident can be proved to arise out of the employment if the employment “brought [the worker] to the particular spot where the accident occurred, and the spot in fact turned out to be a dangerous spot”. In United Ford Development v Fung Yin-see, kitchen workers who complied with their employer’s request to stay on after hours to provide mahjong playing partners for a regular customer, and who were then killed in an arson attack by unknown assailants, were held to have been killed by accident arising out of the employment. However much it may be difficult to connect an arson attack with their employment as kitchen workers, the fact that their employment required them to be on the spot which proved to be dangerous was enough to establish that their deaths arose by accident arising out of the employment. This is a decision of some import in that it eases the burden of workers injured in circumstances where there is “evidence to the contrary” within the meaning of section 5(4)(a).

Indeed, by virtue of this ruling, cases like Wong Gin Fook v McLean would now be decided differently, in favour of the applicant.79

Of course, the circumstances that form the basis of the ruling in United Ford Development v Fung Yin-see are to be distinguished from those where


79 As would Lai Fong v Shun Fung Ironworks Ltd (1977) WCC Nos 10C and 101 of 1976, in which sleeping workers who were required to remain on-site and who were inexplicably attacked by a co-worker were held injured by accident not arising out of the employment (discussed in Martin (n 13 above), p 75).
the worker is attacked for reasons personal to him. In such a case the principle in *United Ford Development v Fung Yin-yee* would not apply because it is not a work-related spot that endangered the worker, but his own personal dealings. In such a case, the spot is the worker himself: wherever he may go, he is on a dangerous spot.

**Conclusion**

It can be observed from the recent case law concerned with the most contentious issues in the Employees' Compensation Ordinance, those in section 5 concerning qualifying conditions connecting the injury with the employment, and the deeming provisions to help prove those conditions, that the courts of Hong Kong are prepared to make some effort to read the provisions expansively and purposively, to realise the aim of the Ordinance to provide a comprehensive, no-fault compensation scheme for work-related injuries. Harsh precedents such as *Wong Gun Fook v McLean*, in which the court inferred evidence to the contrary where there was no evidence for the motive of the attack, are no longer being followed. The court is now unlikely to draw the inference that there is evidence to the contrary where there is no evidence regarding the motive for the attack. And from recent decisions it is clear that the courts will not be impeded by the weight of English precedent if that precedent stands in the way of the court's vision of the social purposes of the Ordinance. This much is evident from the recent rulings on the interpretation of "injury by accident", with its potential for causation problems, and the section 5(4) deeming provisions. The court appears to be taking to heart the admonition in section 19 of the Interpretation and General Clauses Ordinance that "every Ordinance shall be deemed to be remedial" and shall receive such "fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance ...".

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80 See n 67 above.
81 Cap I. Laws of Hong Kong.
However, the reality is that in the absence of wholesale reform, and there is none on the immediate horizon, the section 5 provisions concerning the qualifying conditions and presumptions connecting the injury with the employment are likely to continue to generate large volumes of litigation that will challenge lawyers in devising creative arguments to fill the gaps in the evidentiary proof, whether arising from the absence of witnesses or ambiguities in the facts or from the interpretation of the statutory deeming provisions. Even more so will judges be challenged in their attempts to achieve justice out of an increasingly outdated instrument the model for which was long ago repealed.