Exercise of force during duty causing injuries. Is there lawful trespass of the person?

Speaker: Tze-Yan Lam
Trespass to Person

• Assault

• Battery

• Intentional infliction of injury

• False imprisonment

➔ If indeed founded, harm therein could underpin a PI claim
Some Defences

- D was using *reasonable force* in the prevention of crime
- D was *preventing or stopping* a breach of the peace
- D was effecting or assisting in the *lawful arrest of offenders* or suspected offenders or persons unlawfully at large
- D was exercising a *statutory power* to stop and search

→ All concern trespass to the person under lawful authority
Sources of lawful authority

• Statutes
  
  • Different powers given to different law enforcement authorities under different statutes
  
  • E.g. Police, ICAC, C&E, Immigration, Correctional Service Officers
  
• Common Law
  
  • E.g. Using force to prevent an imminent breach of the peace (as illustrated by the cases below)
Statutes giving lawful authority

- Police Force Ordinance (Cap 232) s. 50

  1. It shall be lawful for any police officer to apprehend any person who he reasonably believes will be charged with or whom he reasonably suspects of being guilty of (a) any offence for which the sentence is fixed by law or for which a person may (on a first conviction for that offence) be sentenced to imprisonment.

  2. If any person who may lawfully be apprehended under subsection (1) or (1B) forcibly resists the endeavour to arrest him or attempts to evade the arrest, a police officer or other person may use all means necessary to effect the arrest.
Statutes giving lawful authority

• Independent Commission Against Corruption Ordinance (Cap 204) s. 10
  
  (3) Any such officer-

  (a) may use such force as is reasonable in the circumstances in effecting an arrest under subsection (1) or (2) (i.e. offences under the ICAC Ordinance, Prevention of Bribery Ordinance, Elections (Corrupt and Illegal Conduct) Ordinance, etc.)

• Customs and Excise Service Ordinance (Cap 342) s. 17A
  
  (2) If any person resists, or attempts to evade, search or arrest by a member, whether effected under this Ordinance or any other power, the member may use such force as is reasonably necessary to effect the search or arrest.
Statutes giving lawful authority

- Immigration Ordinance (Cap 115) s. 56(2)
  - For the purposes of this Ordinance, any public officer may-
    - (d) remove by force any person or thing obstructing any arrest, boarding, entry, search, seizure, removal or detention which he is empowered to make

- Prison Rules (Cap 234A) r. 237
  - (1) No officer of the Correctional Services Department in dealing with prisoners shall use force unnecessarily and, when the application of force to a prisoner is necessary, no more force than is necessary shall be used.
Statutes giving lawful authority

- Statutes giving power by nature of the issue
  - E.g. Public Order Ordinance (Cap 245)
    - S. 17(2): Power to disperse any public gathering if reasonably believes it is likely to cause or lead to a breach of the peace (by officer of or above inspector rank)
    - S. 45(b): …any police officer may use such force as may be necessary-
      - (a) to prevent the commission or continuance of any offence under this Ordinance;
      - (b) to arrest any person committing or reasonably suspected of being about to commit or of having committed any offence under this Ordinance; or
      - (c) to overcome any resistance to the exercise of any of the powers conferred by this Ordinance.
    - S. 46(3): Any person who uses such force as may be necessary for any purpose, in accordance with the provisions of this Ordinance, shall not be liable in any criminal or civil proceeding for having, by the use of such force, caused injury or death to any person or damage to or loss of any property
Statutes giving lawful authority

- Power of any person to arrest: Criminal Procedure Ordinance (Cap 221) (Civil Arrest)
  - S. 101(2): Any person may arrest without warrant any person whom he may reasonably suspect of being guilty of an arrestable offence
  - S. 101A(1): A person may use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large
  - E.g. Security guards’ power to use reasonable force in effecting an arrest of an arrestable crime or for breach of the peace comes from this section (which is the same as any other person)
Summary on the statutes / common law rules

- Circumstances under which use of force is allowed
  - Effecting an arrest / preventing a breach of the peace
  - Resistance of an arrest
  - Reasonable belief or reasonable suspicion (slide 12)
- Degree of force (slide 14)
  - Reasonable
  - Necessary
Reasonable belief / Reasonable suspicion (Objective test)

- HKSAR v Yeung May Wan (2005) 8 HKCFAR 137

- “An examination of the legal principles relevant to the two foregoing arguments may begin with the proposition, well-established in relation to powers of arrest which are exercisable on reasonable suspicion of guilt, that the arresting officer must have both a genuine suspicion that the offence in question has been committed and reasonable grounds for that suspicion”

(Subjective and objective)
Reasonable belief / Reasonable suspicion


- “But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised.

- This means that the point does not depend on whether the arresting officer himself thought at that time that they were reasonable. The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the arresting officer. It is the arresting officer's own account of the information which he had which matters, not what was observed by or known to anyone else.”
Reasonable and necessary degree of force

- Chan Hau Man Christina v Commissioner of Police [2009] 4 HKLRD 797 (CFI)
  
  *Holding down outnumbered peaceful demonstrators by force*

- Austin and another v Commissioner of Police of the Metropolis [2007] EWCA Civ 989 (CA); [2009] 1 UKHL 5 (House of Lords)
  
  *Holding down and preventing peaceful demonstrators from leaving a cordoned area by force (for several hours)*
Chan Hau Man Christina v Commissioner of Police

- Chan, with 8 other people, demonstrated in the Olympic torch relay in HK on 2 May 2008
- Purpose was “to raise public awareness of human rights and civil liberties issues in Mainland China, the Tibetan region, and particularly the Tibetan people’s right to self-determination”
Chan Hau Man Christina v Commissioner of Police

- The demonstrators (including Chan) arrived at 6:30 am on 2 May 2008 and protested at a location near Park Lane, Nathan Road
- The location was along the relay route
- The torch relay was scheduled to start at 10:30 am
- The demonstrators met with an increasing number of counter-demonstrators
- The counter-demonstrators were waving Chinese national flags, singing the National Anthem and shouting slogans to drown out the demonstrators
- The counter-demonstrators shouted abuses at the demonstrators and called them “traitors” and “running dogs”. Some used their flags to hit the Snow Mountain Lion flag carried by the demonstrators
Chan Hau Man Christina v Commissioner of Police

- The police had to form a “protective bubble” to separate the demonstrators and counter-demonstrators
- As the start of the torch relay got nearer, more and more counter-demonstrators were gathering around the demonstrators
- Very crowded scene:
  - Very few pro Tibet demonstrators
  - Several hundreds of counter-demonstrators
  - Police were outnumbered by counter-demonstrators
  - Pavements fully filled with on-lookers
  - Tens of reporters
- Confrontation escalated despite police attempted to separate the demonstrators and counter-demonstrators
Chan Hau Man Christina v Commissioner of Police

- At 9:50 am, a Senior Superintendent made a decision to remove the demonstrators (including Chan) from the scene of protest to a buffer spot
- Reasons:
  - There was an imminent danger of a breach of the peace
  - Done for the safety of the demonstrators and the safety of others present, including police officers protecting them
- The demonstrators were led to a buffer zone surrounded by metal barriers, with a view to driving them away in a police van to a point of safety
- The demonstrators continued demonstration in the buffer zone, which further irritated the counter-demonstrators
- The counter-demonstrators tried to overturn the metal barriers
Chan’s Allegations

• Chan’s allegations:
  • The police forcibly took away her flag and placard for demonstration
  • Police pressed her to the ground when she tried to demonstrate at the buffer zone
  • Against the demonstrators’ wishes, the demonstrators (including Chan) were taken inside a police van and driven away to Yau Ma Tei Police Station at 10:20 am
  • They left the Police Station at 11:45 am
  • She alleged having been subjected to unlawful arrest or detention and her freedom of movement had been unlawfully curtailed
    (→ False imprisonment)

• Judicial review before Andrew Cheung J
Court’s Judgment

• Common law: every constable has the power and duty to seek to prevent, by arrest or other action short of arrest, any breach of the peace occurring in his presence.

• “Breach of the peace” whenever harm is actually done or is likely to be done to a person or in his presence to his property, or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance. (R v Howell [1982]QB 416 followed.)

• If a police officer (or indeed any citizen) reasonably apprehends that a breach of the peace is “imminent” (or “about to occur”), his duty is to take reasonable steps to prevent it.
Court’s Judgment

- Police officers may take steps, **not** against those who are about to breach the peace, but against others **who are not**, in **exceptional circumstances** (para 53)

- The 3 exceptional circumstances:
  
  1. Where the imminent breach of the peace by others is provoked or otherwise caused by a person’s **deliberate action** which **interferes** with the rights or liberties of others as is likely to provoke violence (Chan did not fall in this category, para 55)

  2. Where the action by others is provoked or caused by a person whose conduct, though technically lawful or **not involving any interference** with the rights or liberties of others as such, **is nonetheless “outrageous”, “unreasonable” or “provocative”** (Chan fell w/n this category para 58)
Court’s Judgment

• 3. In the circumstances, there is no other way available to maintain the peace

“The law allows and indeed requires, as a matter of necessity, a police officer to take steps that are reasonably necessary to prevent a breach of peace that is imminent against a citizen who is not about to breach the peace..., if the police officer reasonably believes that there are no other means whatsoever to prevent the imminent breach of the peace, even though to do so would entail curtailment of the lawful exercise by the citizen of his fundamental rights, such as the right to demonstration or the right to liberty”
Court’s Judgment

- However, such action taken must be reasonably necessary and proportionate. Otherwise, the actions taken could infringe an individual’s constitutional right and amount to false imprisonment.

- As there is interference with an individual’s right to liberty here, the proportionality test applies: Leung Kwok Hung v HKSAR (2005) 8 HKCFAR 229
  - Is there a legitimate aim for the act of interference?
  - Is it no more than is necessary?
  - Is it proportionate?
  - Clearly a legitimate aim to prevent an imminent breach of the peace
Court’s Judgment

Reasonably necessary and proportionate?

• Police reasonably believed that there was an imminent breach of the peace when they removed Chan
  • Extremely crowded with people
  • Police officers and the demonstrators were greatly outnumbered by the counter-demonstrators
  • Reinforcements from police were insufficient to match the ever growing number of counter-demonstrators
  • Emotions were running high with increasing hostility
  • Chan’s cause was perceived by many as “anti-China” and disruptive
  • Abuses and insults were shouted
  • The counter-demonstrators used flags and flag poles to interfere with the demonstrators’ protest
  • The counter-demonstrators were pushing against the human cordon line formed by the police officers
Court’s Judgment

Reasonably necessary and proportionate?

• The imminence of a breach of the peace persisted even after the protestors were being herded slowly into the buffer zone and when they were in the buffer zone.

• It was never intended that the demonstrators be within the buffer zone for any moment longer than was necessary. The aim of taking them to the buffer zone was to remove them from the scene altogether by employing a police van which was nearby, as the crowd was meaning to overturn the cordons of the buffer zone.

• They continued to protest inside the buffer zone and emotion of counter protesters escalated. Chan’s case: her flags placards were forcibly removed, held down onto the ground and removed to police van.
Court’s Judgment

Reasonably necessary and proportionate?
• The police had **no option** but to take action against the demonstrators
  • No way to **separate** the two sides so as to enable both to carry on with their own causes
  • **Mass arrest** of the counter-demonstrators was a most undesirable option
  • Had to be done for the demonstrators’ and police’s own safety
• Therefore, in the circumstances, the police was **justified** in taking action against the demonstrators (including Chan)
• It follows that the police was justified in removing the demonstrators (including Chan) from the scene to prevent a breach of the peace
• It was no more than was **necessary** and was a **proportionate** action to take in the circumstances of the case
Court’s Judgment

Outcome

• The court concluded that the police were justified in removing the applicant from the scene of demonstration (by force)

• Chan’s challenge against the decision to do so was dismissed.
Austin and another v Commissioner of Police of the Metropolis [2009] UKHL 5 (decided on 28 Jan 2009)

• Appellant was part of a demonstrating crowd (against capitalism and globalization) on Oxford Circus, London (busy shoppers and traffic) on 1 May 2001

• Organizers did not notify the police of their plans and refused to cooperate with the police

• Police expected a protest at 4 pm but a large crowd had unexpectedly gathered at 2 pm (500-1000)

• Police decided to impose an absolute cordon
Austin and another v Commissioner of Police of the Metropolis

- 2:05 - 2:10 pm: loose cordon in place
- 2:20 pm: full cordon in place
- 2:25 pm: Police planned to start a controlled dispersal, but could not take place because, while 60% of the demonstrating crowd within the cordon remained calm, the other 40% were violent and disorderly (paragraph 6)
  - Pushing and throwing missiles
  - Breaking paving slabs and throwing the debris at the police
Austin and another v Commissioner of Police of the Metropolis

- 4 pm: the crowd were told they were being contained to prevent a breach of the peace and they would be released in due course

- The dispersal was not completed until 9:30 pm

- Appellant who had her baby (11 months) in a crèche was forced to remain in the cordon sued the police for false imprisonment and for breach of her right to liberty under article 5(1) of the European Convention on Human Rights
Court’s Judgment

Lord Hope:

• Appellant’s fundamental right of movement has been restricted

• Legitimate aim? → There is clearly public interest in adopting measures of crowd control

• Competing interests between appellant’s right to liberty and public interest (safety) → Need to search for a fair balance

• Here, steps taken by the police were in good faith (in the words of Lord Neuberger, “not beyond the time necessary for crowd control, in order to punish, or ‘to teach a lesson’ to, the demonstrators within the cordon) and proportionate to the situation which has made the measures necessary

• Held not arbitrary deprivation of liberty and was lawful
Use of Force: The Police Standard

- Sony Rai v William Ng, Esq, The Coroner of Hong Kong [2011] 2 HKLRD 245 discussed:
  - Police General Order (PGO) 29-01 on “Use of Force”
  - PGO 29-03 on “Use of Police Firearms”
  - PGO 29-04 on “Drawing or Presenting Police Firearms”
  - PGO 29-09 on “Use of OC Foam (Oleoresin Capsicum)”
  - Force Procedures Manual (FPM) 29-02 on “Use of Force Continuum”
Binding effect of Police General Orders / Force Procedures Manual ("Standard of Care")

• Made by the Commissioner of Police under s. 46 of the Police Force Ordinance

• PGO 1-02 paragraph 4: PGOs are mandatory and non-compliance will make an officer liable to disciplinary action (negligence claim?)

• PGO 1-03: FPM contains information, advice and guidelines on procedures. An officer not complying with FPM should be given suitable advice or guidance. Recurrent or blatant disregard for FPM renders an officer liable to disciplinary action (negligence claim?)
Police General Orders

- PGO 29-01 on “Use of Force”
  
  - An officer should “exercise a high degree of restraint when dealing with the public”
  
  - An officer “shall not resort to the use of force unless such action is strictly necessary and he is otherwise unable to effect his lawful purpose”
  
  - “Only the minimum force necessary to achieve the purpose may be used and once that purpose has been achieved, the use of force shall cease”
  
  - “The force used must be reasonable in the circumstances”
Police General Orders

• PGO 29-03 on “Use of Police Firearms”

  • An officer may discharge a firearm where the officer’s object was “to protect any person, including himself, from death or serious bodily injury” or “to effect the arrest of any person who he has reason to believe has just committed a serious and violent crime, and who attempts to evade such arrest”

  • May be used for a listed purpose “provided that no lesser degree of force can achieve this purpose”

• PGO 29-04 on “Drawing or Presenting Police Firearms”

  • When an officer may draw a revolver from his holster or point or aim it as a precautionary measure
Police General Orders

- PGO 29-09 on “Use of OC Foam (Oleoresin Capsicum)”
  - Use of OC Foam (aka pepper spray) “can be considered to obtain compliance when a person is involved or likely to become involved in violent or other behaviour likely to injure himself/herself or others”

- Force Procedures Manual (FPM) 29-02 on “Use of Force Continuum”
  - A table of a continuum of measures which an officer might use to deal with increasing levels of resistance from a person
  - E.g. OC foam in response to “defensive resistance”; OC foam or baton in response to “active aggression”; use of a firearm (“deadly force”) in response to “deadly force assault”
Points to Note in PI Cases against the Police

• Whether there was reasonable suspicion / imminent breach of the peace: “The court must guard against the danger of hindsight, and the judgment of the officer on the spot, in the exigency of the moment, deserves respect” → Shows court may have tendency to favour judgement of the police officer at the time of trespass to the person

• Whether the degree of force was “necessary” or “reasonable” could be unpredictable

• Breach of PGOs may point towards that unlawful force had being used → harm

• Complaint to the Independent Police Complaints Council (some evidential value)
### Nature of Allegations Endorsed by the Independent Police Complaints Council

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<th>2012/13</th>
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<td>B. Misconduct / Improper Manner / Offensive Language</td>
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<td>D. Unnecessary Use of Authority</td>
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<td>E. Fabrication of Evidence</td>
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Source: Website of the IPCC
Vicarious Liability of the Government

- In common law, an employer is liable for a tort committed by an employee against a third party, provided that tort was committed by the employee in the course of his employment, or while he was engaged on his employer’s business.

- If a law enforcement officer is found to have committed a trespass to the person against the complainant, the complainant can seek remedies against the law enforcement department concerned.
Remedies

• Heads of damages:
  • Loss of income (past and future)
  • Cost of medical treatment
  • PSLA
  • All heads of damages require proof
Conclusion

- Circumstances under which force can be used and degree of force permitted to be used are regulated by statute and common law.
- Require objective reasonableness.
- If the persons do not act in accordance with such principles when using force, they could be liable in tort.
solutions • not complications